CURBING *CONCEPCION*: HOW STATES CAN EASE THE STRAIN OF
PREDISPUTE ARBITRATION TO COUNTER CORPORATE ABUSERS

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Abstract. The ubiquitous use of predispute arbitration clauses in employee and consumer contracts has hidden a generation of wrongdoing behind confidential and unreviewable decision-making. With individuals lacking the bargaining power to refuse these provisions and Congress unable to pass meaningful reform to prevent them, it is time for the states to step in and restore the adjudicatory guarantees that have been eroded by increasingly severe arbitration procedures. This Article begins with a survey of the legal and policy background of mandatory arbitration in the United States and introduces an emerging interpretation of the Federal Arbitration Act that grants states the power to regulate arbitration without fear of federal preemption. The interpretation is then analyzed against nationwide precedent and is scrutinized for its viability outside of its current Ninth Circuit domain. If this understanding of federal law continues to proliferate, states can foster meaningful accountability within arbitration by providing consumers and employees with transparent dispute resolution practices and a revived ability to aggregate small-dollar claims.

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INTRODUCTION

Vanina Guerrero, a former partner at global law firm DLA Piper, is barred from facing her credibly accused abuser in court.¹ Due to a predispute arbitration clause in her employment agreement, Ms. Guerrero's claims of repeated sexual assault by a direct supervisor cannot proceed publicly through the court system.² Instead, any claim filed would be diverted into opaque and practically unreviewable arbitration proceedings against her will, shielding any facts uncovered or outcomes reached from public view.³ In response to these restrictive employment terms, Ms. Guerrero published an open letter demanding that DLA Piper "[r]elease [her] from forced arbitration and allow [her] to assert [her] civil claims for assault, battery, sexual harassment and retaliation in our transparent court system."⁴ The firm suspended her the following week.⁵

Vanina Guerrero's situation is far from unique: an estimated 60 million American workers are barred from accessing the court system in actions implicating their employer, including over half of the country's nonunion, private sector employees.⁶ Moreover, this figure does not begin to account for the number of American consumers bound by similar arbitration agreements when purchasing

¹ See *DLA Piper Hit by Law Student Protests over Arbitration*, BLOOMBERG LAW (Oct. 10, 2019, 2:15 P.M.), <https://news.bloomberglaw.com/business-and-practice/dla-piper-offices-hit-by-law-student-protests-over-arbitration> [<https://perma.cc/VH5F-EW8P>].

² See *id.* These sexual misconduct claims were echoed by the similar experiences of a human resources manager, an administrative assistant, and a professional responsibility counsel with the same managing partner. See Dan Packel, *Ex-DLA Piper Ethics Counsel Alleges Firm Tolerated 'Abuse of Power' by Ousted Partner*, AM. LAW. (Oct. 23, 2019, 1:32 PM), <https://www.law.com/americanlawyer/2019/10/23/ex-dla-piper-ethics-counsel-alleges-firm-tolerated-abuse-of-power-by-ousted-partner/> [<https://perma.cc/KGL7-XZM6>]; Dan Packel, *Third Accuser Files EEOC Claim About Former DLA Piper Partner*, AM. LAW. (Nov. 7, 2019, 5:05 PM), <https://www.law.com/americanlawyer/2019/11/07/third-accuser-files-eeoc-claim-about-former-dla-piper-partner/> [<https://perma.cc/A6B8-XA2Y>]; Ross Todd, *Second Woman Files EEOC Claim About Former DLA Piper Partner*, THE RECORDER (Oct. 21, 2019, 6:58 PM), <https://www.law.com/therecorder/2019/10/21/second-woman-files-eeoc-claim-about-former-dla-piper-partner/> [<https://perma.cc/RX5Q-6XR8>].

³ See Ramona L. Lampley, "Underdog" Arbitration: A Plan for Transparency, 90 WASH. L. REV. 1727, 1733 (2015) (acknowledging the "general criticism that arbitration is simply not transparent", and noting that "[m]ost arbitration disputes do not result in published opinion . . ."); Stephen Wills Murphy, Note, *Judicial Review of Arbitration Awards Under State Law*, 96 VA. L. REV. 887, 889 (2010) ("Generally, parties are bound by the decisions of arbitrators, and courts may not review arbitrators' findings of fact or conclusions of law.").

⁴ Open Letter from Vanina Guerrero to Roger Meltzer and Jay Rains, Co-Chairs, DLA Piper 2 (Oct. 2, 2019), <https://src.bna.com/LOo> [<https://perma.cc/M2V4-577Y>].

⁵ Braden Campbell, *DLA Piper, Ex-Practice Leader Face New Sex Bias Charge*, LAW360 (Oct. 21, 2019, 5:06 P.M.), <https://www.law360.com/articles/1211782/dla-piper-ex-practice-leader-face-new-sex-bias-charge> [<https://perma.cc/7M5C-JUK2>]; see also Lizzy McLellan & Dan Packel, *DLA Piper Removes Female Partner Who Alleged Sex Assault, Triggering 'Smear Campaign' Accusation*, AM. LAW. (Oct. 16, 2019, 11:58 AM), <https://www.law.com/americanlawyer/2019/10/16/dla-piper-removes-female-partner-who-alleged-sex-assault-triggering-smear-campaign-accusation/> ("The firm . . . in its statement, emphasized that the allegations against her are completely unrelated to her own allegations against Lehot.") [<https://perma.cc/G5WH-KQ9Y>].

⁶ See ALEXANDER J.S. COLVIN, ECONOMIC POLICY INSTITUTE, THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), <https://www.epi.org/files/pdf/144131.pdf> [<https://perma.cc/F6QG-7C9Q>] (extrapolating from data showing that 56.2% of American private-sector nonunion employees are bound by forced arbitration proceedings, with 53.9% of nonunion private-sector employers and 65.1% of companies with over 1,000 employees having such procedures).

goods or services.⁷

In the consumer context, companies implement arbitration provisions to guard against anything from disputes over credit installment plans to internet sweepstakes,⁸ and consumers can be bound by these agreements just by browsing a retailer's website.⁹ From credit card services to transportation companies, these agreements prevent consumers from using the court system to make themselves whole.¹⁰

When an Amtrak train careened off its track and killed eight passengers in 2015, the resulting lawsuit filed on behalf of those passengers and their survivors resulted in a \$265 million settlement paid out by the company.¹¹ Five years later, Amtrak added an arbitration clause to every purchased ticket preventing passengers killed or injured while traveling from suing in court.¹² If this 2015 crash were to happen today, passengers and their survivors could not use the public court system to seek relief for their injuries and damages, and Amtrak would remain free from the threat of damaging depositions or any public revelations of wrongdoing.¹³

This Article explores how states may hold the key to limiting the excesses of mandatory

⁷ See Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) ("At least a majority of the households in the United States (and possibly almost two-thirds) are covered by broad consumer arbitration agreements."); Press Release, Consumer Reports, Groups Launch Nationwide Effort to Stop Use of Binding Mandatory Arbitration Clauses (Feb. 24, 2005), https://advocacy.consumerreports.org/press_release/consumer-groups-call-for-end-to-use-of-binding-mandatory-arbitration-clauses/ [<https://perma.cc/BNK7-2T4Q>] ("There is probably not a single adult in the United States who is not subject to at least one binding mandatory arbitration clause – and most are subject to many."); see also Jeremy B. Merrill, *One-Third of Top Websites Restrict Customers' Right to Sue*, N.Y. TIMES: THE UPSHOT (Oct. 23, 2014), <https://www.nytimes.com/2014/10/23/upshot/one-third-of-top-websites-restrict-customers-right-to-sue.html> [<https://perma.cc/2J93-FXZE>] (discussing the use of arbitration agreements by "one-third of top websites").

⁸ See Szalai, *supra* note 7, at 239 (citing Amazon, Walmart, Home Depot, and Lowe's as companies mandating arbitration for consumer claims and noting the broad range of consumer transactions covered by arbitration clauses).

⁹ Reading the terms of service in software and user agreements is a practice that few, if any, consumers can or do take seriously, despite the massive consequences involved. See DELOITTE, 2017 GLOBAL MOBILE CONSUMER SURVEY: US EDITION 12 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf> [<https://perma.cc/7GUY-KWJA>]; Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2256, 2277–79 (2019) (using the Flesch Reading Ease test and the Flesch-Kincaid test to determine that the typical readability of online terms of service is equivalent to that of "articles found in academic journals" and therefore "unlikely to be understood by consumers"); see also Merrill, *supra* note 7 (examining the prevalence of "clickwrap" and "browsewrap" agreements in online terms of service).

¹⁰ See, e.g., *Apple Card Customer Agreement*, GOLDMAN SACHS 16, <https://www.goldmansachs.com/terms-and-conditions/Apple-Card-Customer-Agreement.pdf> [<https://perma.cc/MNH7-596D>] (including a confidentiality provision establishing that "[t]he parties agree that any arbitration proceedings initiated hereunder shall be kept confidential") (last visited Feb. 13, 2021); Sam Mintz, *Amtrak's New Ticket Rules Won't Let Passengers Sue in a Crash*, POLITICO (Nov. 8, 2019, 5:35 P.M.), <https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175> [<https://perma.cc/5LP8-8BH9>].

¹¹ See Mintz, *supra* note 10.

¹² See *Terms and Conditions*, AMTRAK (Jan. 31, 2021), <https://www.amtrak.com/terms-and-conditions.html#arbitrationAgreement-arbitrationAgreement> [<https://perma.cc/6VYH-KHYJ>]; see also Mintz, *supra* note 10 (explaining that this arbitration clause is "unusually broad and detailed" and describing the detail with which Amtrak waives civil liability).

¹³ See *Amtrak Cannot Force Passengers to Agree to Arbitration, Lawsuit Says*, PUB. CITIZEN (Jan. 7, 2020), <https://www.citizen.org/news/amtrak-cannot-force-passengers-to-agree-to-arbitration-lawsuit-says/> [<https://perma.cc/9KSN-XB2N>] ("Had its forced arbitration provision been in place at the time, the victims and their families would not have been able to use the courts to hold Amtrak accountable.").

predispute arbitration clauses and proposes solutions to a problem afflicting millions of Americans like Vanina Guerrero. Part I outlines the primary criticisms of mandatory arbitration and examines the current statutory and judicial framework regulating the practice. Part II analyzes how a Ninth Circuit interpretation of the Federal Arbitration Act (“FAA”) could expand the power of states to rein in aggressive arbitration provisions and assesses this interpretation’s viability against nationwide precedent. Part III proposes a guide for leveraging the Ninth Circuit interpretation to vindicate the rights of exploited workers and consumers. Finally, the Article concludes by advocating for legislation up to the hilt of state authority to combat the significant abuses left unchecked by current law.

I. ARBITRATION IN AMERICA AND THE LEGAL LIMITS TO STATE INTERVENTION

A. Arbitration’s Asymmetric Justice

Arbitration imperils legal protections in ways that are as subtle as they are serious. One of the primary critiques of the arbitration process is that its exemption from judicial review allows incidences of bias in the judgment and decision-making of arbitrators to go unchecked by higher courts.¹⁴ Absent the guaranteed right to appeal, parties end their dispute without an opportunity for a second opinion or any assurance of accuracy. Predispute arbitration agreements often restrict parties’ traditional protections even further, commonly prohibiting, for example, the right to proceed in solidarity as a class.¹⁵ These restrictions and opportunities for abuse are compounded when arbitration agreements include provisions ensuring the confidentiality of every proceeding. The guarantee of confidentiality shields the entire project from public scrutiny and leaves unanswered critical questions about prejudice, fairness, and principled judgment.¹⁶

¹⁴ See David B. Saxe, *Adding a Right of Appeal in Arbitration*, N.Y. L.J. (Aug. 16, 2019, 11:45 AM), <https://www.law.com/newyorklawjournal/2019/08/16/adding-a-right-of-appeal-in-arbitration/> [https://perma.cc/S9VH-Z88G] (noting “the frequency with which errors of law are made by arbitrators possibly because they are protected by the strict enforcement of finality”). See generally Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985) (discussing how arbitration and other informal dispute resolution mechanisms lack the formality and procedural protections of the court system that reduce bias and level the playing field for relatively disempowered disputants).

¹⁵ See, e.g., *Terms and Conditions*, *supra* note 12 (“The parties agree to bring any claim or dispute in arbitration on an individual basis only, and not as a class or representative action, and there will be no right or authority for any claim or dispute to be brought, heard or arbitrated as a class or representative action . . .”); see also Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://perma.cc/UBG7-BHWT] (“Some state judges have called the class-action bans a ‘get out of jail free’ card, because it is nearly impossible for one individual to take on a corporation with vast resources.”).

¹⁶ See Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L. J. 2804, 2816 (2015) (“Without public access, one cannot know whether fair treatment is accorded regardless of status. . . . And without public accountings of how legal norms are being applied, one cannot debate the need for revisions.”); see also Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 28–31 (2015) (arguing that confidentiality provisions within arbitration clauses, not the process itself may be responsible for hiding business wrongdoing); Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES: DEALBOOK (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/FM6G-TFQ5] (“Little is known about arbitration because the proceedings are confidential and the federal government does not require cases to be reported.”); Silver-Greenberg & Gebeloff, *supra* note 15

Over the past few decades, numerous empirical studies have lent weight to concerns about the potential for bias in arbitration.¹⁷ One notable investigation found that, in the employment arbitration context, complainants succeeded in only 21.4 percent of cases, compared with complainants' success in 57 percent of employment cases in state court and 36.4 percent of employment cases in federal court.¹⁸ These disparities reveal a marked decrease in success for employees pursuing their claims through arbitration as opposed to state or federal court.

The success gap may be attributed in part to a phenomenon commonly referred to as the “repeat player effect,”¹⁹ a theory that arbitrators reward reliable customers who return to the same arbitrator or arbitration company. Arbitration is a business, and as such, arbitrators have an economic incentive to provide returning companies with favorable results or risk losing them to someone else.²⁰ When large companies repeatedly hire the same arbitrators, the consumers and employees appearing before that arbitrator—for what is likely the first and only time—will be at a significant disadvantage because they fail to present the same lucrative incentives that contribute to structuring the decision-making process.

Although critics of the “repeat player effect” claim the phenomenon is overstated, empirical data suggest repeat player employers have markedly higher odds of success.²¹ A study conducted in

(“Part of the problem . . . is that arbitration keeps any discussion of discriminatory practices hidden from other workers ‘who might be experiencing the same thing.’”); Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html> [<https://perma.cc/QRL7-82AQ>] (“Because the claims are often kept under wraps in confidential arbitration hearings, critics say harassers often move easily to other jobs without warning to future victims.”).

¹⁷ See, e.g., CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY, § 5, at 13 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/YN5Y-C7WC>] (identifying that some form of relief was provided to consumers in 20.3% of studied arbitrations); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 5 (2011) (finding employee win rates of 21.4%, 36.4%, and 57% in arbitration, federal court, and state court respectively, and median awards of \$36,500, \$150,500, and \$68,737, respectively); cf. Silver-Greenberg & Gebeloff, *supra* note 15 (identifying that “the rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators”). But see David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563–78 (2005) (discussing the problems with some empirical studies of arbitration outcomes and concluding that comparisons of win/loss and damages rates are inconclusive).

¹⁸ See Colvin, *supra* note 17.

¹⁹ See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997) (“Unlike the labor case, in which both union and employer are regular participants in the arbitration process, only the employer is a repeat player in cases involving individual statutory claims. As a result, the employer gains some advantage in having superior knowledge with respect to selection of an arbitrator.”). See generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997) (noting the significance of *Cole v. Burns* and providing one of the earliest studies of the “repeat player effect”).

²⁰ See Silver-Greenberg & Corkery, *supra* note 16 (quoting Anthony Kline, a California appeals court judge as saying, “This is a business and arbitrators have an economic reason to decide in favor of the repeat players.”).

²¹ See Bingham, *supra* note 19, at 209–10; Colvin, *supra* note 17, at 18–19; see also CONSUMER FINANCIAL PROTECTION BUREAU, *supra* note 17, § 5, at 67–68 (finding some evidence of a “repeat player effect” on consumer arbitration but cautioning that there were too few cases involving a non-repeat company to draw firm conclusions). But see Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 8, 15 (identifying that only two cases out of 200 surveyed involved a second meeting between the same arbitrator and employer, and concluding that this was “not a statically significant incidence . . .”); Sherwyn et al., *supra* note 17, at 1570–71 (critiquing Bingham’s studies and concluding that

2011 found that employees win 31.6 percent of cases when placed on an even playing field with their employer, while only 16.9 percent of employees win cases when the repeat player effect applies.²² This disparity in employee success rates between repeat player employers and non-repeat player employers lends credence to the effect's existence and underscores its pernicious impact on workers' ability to recover damages.

Arbitration advocates argue that by avoiding the increased time, cost, and emotional turmoil of civil litigation, arbitration provides a fairer and more accessible option for all parties.²³ Supporters trivialize the more aspirational elements of the judicial system's promise, emphasizing that many of the advantages and protections promised by courts are rarely utilized except to gain leverage during settlement proceedings.²⁴ If arbitration is compared against a baseline of little to no judicial recourse, it appears to be a practical and swift avenue to restitution. This comparison between arbitration and litigation may be compelling in a discussion of the merits of elective arbitration itself, but the removal of self-determination in *mandatory* arbitration fundamentally changes the debate.²⁵

Despite this strong defense by practitioners and private enterprise, some advocates continue to claim that arbitration lacks a "natural defender" against its critics.²⁶ This assumption may yet be premature, as time and repeated cases have shown arbitration's most ardent protector to be the U.S. Supreme Court.

she found no support for arbitrator bias).

²² See Colvin, *supra* note 17, at 13.

²³ See Hill, *supra* note 21, at 16 (demonstrating that research showed arbitration "offers an affordable, fair, alternative adjudication forum"); Sherwyn et al., *supra* note 17, at 1578 ("[A]rbitration is faster. Because employment dispute resolution can be both heart wrenching and financially crippling, a quicker resolution is a positive."). But see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 408 (1997) ("To the extent that proponents . . . were attracted to it because of its promise of flexibility, adaptability, and creativity, we now see the need for ethics, standards of practice and rules as potentially limiting and containing the promise of alternatives to rigid adversarial modes of dispute resolution.").

²⁴ See Andrew J. Pincus, Remarks at the Federalist Society 2019 National Lawyers Convention, *Arbitration in the #MeToo Era*, at 40:38 (Nov. 14, 2019), <https://fedsoc.org/conferences/2019national-lawyers-convention#agenda-item-arbitration-in-the-metoo-era-1>; see also *Model Arbitration Statute Offered: American Arbitration Association, Powerfully Supported by Commercial Interests, Advances Voluntary Procedure – Lawyers Have New Opportunity*, 10 J. AM. JUDICATURE SOC'Y 122, 123 (1926) (arguing in 1926 that "[t]he lawyer can utilize arbitration as an instrument to afford his client real justice, as against mere theoretical justice."). But see Thomas E. Carbonneau, *At the Crossroads of Legitimacy and Arbitral Autonomy*, 16 AM. REV. INT'L ARB. 213, 258 (2005) (explaining how arbitration arose when "[t]he social need for access to workable dispute resolution trumped the value placed in the integrity of legal principles and in the fairness and legitimacy borne of rigorous due process. . . . [and when the] rhetoric of symbolic rights had become too costly in contemporary society").

²⁵ See Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 143 (articulating the need for a greater conception of justice in arbitration, particularly in instances where consent to the procedures is placed in doubt).

²⁶ See Pincus, *supra* note 24, at 25:14 (noting that "arbitration doesn't have a natural defender" or "an actual PR proponent").

B. Reimagining Federal Preemption in the Arbitration Arena

1. The history and legal development of the FAA

In 1925, Congress passed and President Coolidge signed the United States Arbitration Act (commonly referred to as the Federal Arbitration Act or FAA), securing the validity of predispute arbitration clauses within contracts.²⁷ Section 1 of the FAA lays out the statute's scope,²⁸ while section 2 establishes the default enforceability and irrevocability of predispute arbitration clauses.²⁹ The final clause of section 2 (the "savings clause"), however, establishes that enforceability depends on the agreement not being invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."³⁰ This caveat prompted state legislatures to pass laws and state courts to issue rulings that invalidated certain restrictive arbitration agreements on public policy grounds.

A notable example of such state action was California's response to arbitration agreements that forbade plaintiffs from joining together in class actions.³¹ In a series of cases over a five year period, the California Supreme Court used the FAA's savings clause to declare unenforceable any arbitration agreement that included a class action waiver, finding the waivers contrary to public policy.³² This use of the FAA's savings clause was short-lived, however, as California's rule protecting the right to class arbitration was struck down when the issue reached the Supreme Court in *AT&T Mobility LLC v. Concepcion*.³³

²⁷ Pub. L. No. 68-401, 43 Stat. 883 (codified as amended at 9 U.S.C. §§ 1–16).

²⁸ Section 1 contains an exception stating that "nothing herein contained shall apply to 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). This clause, along with the FAA's legislative history, led at least one court to view the exception as forbidding arbitration clauses in any employment agreement. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 110–11 (2001) ("[T]he Ninth Circuit's conclusion that all employment contracts are excluded from the FAA conflicts with every other Court of Appeals to have addressed the question."). This argument that the FAA did not apply to employment agreements broadly was put to rest by the Supreme Court, which held that the section 1 exception only encompassed workers employed in the transportation industry. *Circuit City*, 5 U.S. at 109; *see also* *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (applying the *Circuit City* holding to exempt a truck driver from an arbitration agreement). *But see Circuit City*, 5 U.S. at 128 (Stevens, J., dissenting) (arguing that the majority was "[p]laying ostrich to the substantial history behind the amendment").

²⁹ Section 2 ensures the enforceability of arbitration clauses and the Supreme Court has stipulated that they are just as valid as all other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.") (internal citations omitted); *see also infra* Section I.B.2 (elaborating on the modern interpretation of this section).

³⁰ 9 U.S.C. § 2.

³¹ *See generally* Merrill, *supra* note 7 (commenting that "legal provisions, known as forced arbitration clauses and class action ban clauses, have long been included in complex offline contracts like car leases"); Irma Reboso Solares, *Considerations for Use of Arbitration Agreements to Curtail Class Claims*, NAT'L L. REV. (July 21, 2019), <https://www.natlawreview.com/article/considerations-use-arbitration-agreements-to-curtail-class-claims> [<https://perma.cc/AJ9M-HRK2>].

³² *See e.g.* *Discover Bank v. Superior Court*, 113 P.3d 1100, 1116 (Cal. 2005) ("'Classwide arbitration, as Sir Winston Churchill said of democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives.' We continue to believe that the alternatives—[refusing to enforce the agreement entirely or inoculating parties against classwide liability]—are unacceptable.") (quoting Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982)).

³³ *See Concepcion*, 563 U.S. 333. At least one commentator viewed this decision as sounding a "death knell" to consumer class actions. *E.g.*, Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J.: L.

In *Concepcion*, the Court read the FAA’s saving clause narrowly, establishing that the savings clause does not “suggest[] an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”³⁴ The underlying objective, according to the Court, is the promotion of arbitration specifically because of its informal, streamlined proceedings.³⁵ As applied to California’s protection of class arbitration, the Court found that a state-mandated shift from traditional arbitration between two parties to arbitration between a party and a class “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”³⁶ Because class proceedings would make arbitration more formal and complex and frustrate the objectives of the FAA, the Court held that the statute preempted California’s rule.³⁷ While the decision in *Concepcion* may not have directly affected someone like Vanina Guerrero, who was not a member of a class, it set a precedent that the FAA preempts any state regulation that frustrates the statute’s purposes.³⁸

Justice Breyer’s dissent argued that prohibiting class arbitration will deprive some plaintiffs the ability to bring their statutory claim altogether, because no “rational lawyer” would represent individual claimants who are only owed small-dollar damages.³⁹ Breyer’s rationale resembles language from the Court’s earlier decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, which established that statutory claims could be properly arbitrated so long as the litigant could still effectively pursue their cause of action.⁴⁰ Like Breyer’s dissent in *Concepcion*, *Mitsubishi* seemed to contemplate situations where waivers within arbitration agreements could eventually render the agreements unenforceable.

Two years after *Concepcion*, a related class action decision addressed the question of *Mitsubishi*’s “effective vindication” language directly, holding that so long as plaintiffs retained the right to pursue a statutory claim, they were not entitled to any additional right to do so affordably.⁴¹ The Court found that plaintiffs bringing claims against a credit card merchant had no right to proceed as a class, even though the high cost of expert analysis necessary for each claim and the meager sums

BLOG (Apr. 27, 2011, 12:36 PM), <https://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/> (predicting that *Concepcion* could “spell the death-knell of consumer class actions”).

³⁴ *Concepcion*, 563 U.S. at 343.

³⁵ *Id.* at 344.

³⁶ *Id.* at 348.

³⁷ *See id.* at 352 (“Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ California’s *Discover Bank* rule is pre-empted by the FAA.”) (citation omitted) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

³⁸ *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L. J. 1217, 1242–44 (2013) (identifying how courts cite to *Concepcion* to compel arbitration over conflicting state law).

³⁹ *Concepcion*, 563 U.S. at 365 (Breyer, J., dissenting); *see also* *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“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.”).

⁴⁰ 473 U.S. 614, 637 (1985) (“And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”). The decision included a footnote stating that “in 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 statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.” *Id.* at 637 n.19.

⁴¹ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–37 (2013).

available for recovery made class arbitration the only economically viable option.⁴² The five to four majority relied on *Concepcion*, and once again allowed class action waivers within arbitration agreements to be enforced.⁴³

These cases show an unmistakable pattern of the Supreme Court ruling against class action protections and in support of expansive arbitration agreements. This trend led Justice Kagan to remark that the Court is subverting the goals of the FAA and allowing arbitration to “insulate wrongdoers from liability.”⁴⁴ Equating the Court to a hammer in search of a nail, Kagan emphasized the majority’s ceaseless attempts to stamp out procedural protections.⁴⁵ In contrast to the Supreme Court, however, the Ninth Circuit has offered a path forward, repeatedly refusing to enforce arbitration agreements that constrain the rights of employees and consumers.⁴⁶

2. The Ninth Circuit’s complexity distinction

In a pair of arbitration decisions decided after *Concepcion*, the Ninth Circuit upheld state rules regulating arbitration in a manner it held to accord with both the FAA and Supreme Court precedent. While acknowledging the fact that class protections within arbitration are no longer viable after *Concepcion*,⁴⁷ the Ninth Circuit now preserves plaintiffs’ right to bring Private Attorney General Act (“PAGA”) actions and public injunctions against corporations.⁴⁸ Under California law, a private attorney general action authorizes employees to recover civil penalties on behalf of themselves, other employees, and the state for violations of California’s labor code.⁴⁹ This type of action allows multiple employees to recover from the same defendant through a single action. Similarly, under California law, a claim for a public injunction permits a single plaintiff to enjoin defendants engaging in unlawful acts that threaten the public as a whole.⁵⁰ Both types of claims provide viable checks against

⁴² *Id.* at 231.

⁴³ *Id.* at 238–39. This case dismissed as dicta the footnote in *Mitsubishi* reading a guarantee of effective vindication of claims into the FAA. *Id.* at 235 n.2. After *Italian Colors*, the Court firmly established that, while plaintiffs have the right to pursue their claims through arbitration, they did not have the right to procedural elements like class arbitration that would allow them to do so in an economically feasible manner. *Id.* at 237 n.4.

⁴⁴ *Id.* at 253 (Kagan, J., dissenting).

⁴⁵ *Id.* at 252 (“To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”).

⁴⁶ See, e.g., *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670 (9th Cir. 2017), *rev’d*, 139 S. Ct. 1407 (2019); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *rev’d sub nom.* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom.* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *But see* *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019) (invoking *Italian Colors* to overturn Ninth Circuit precedent and rule in favor of enforcing arbitration).

⁴⁷ See *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 433 (9th Cir. 2015) (conceding that the Court in *Concepcion* held that the FAA preempted the California rule making class waivers unenforceable).

⁴⁸ See *id.* at 440 (“We have held that the waiver of Sakkab’s representative PAGA claims may not be enforced.”); *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 830–31 (9th Cir. 2019) (holding that the FAA does not preempt the California rule making waivers of the right to seek a public injunction unenforceable).

⁴⁹ Dep’t of Indus. Rels., State of California, *Private Attorney General Act (PAGA) – Filing* (Dec. 2020), <https://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html> [<https://perma.cc/Y3QL-Q4PC>].

⁵⁰ See *McGill v. Citibank, N.A.*, 393 P.3d 85, 89 (Cal. 2017) (distinguishing between private injunctive relief “that

corporate abuse and, in the view of the Ninth Circuit, are beyond the reach of restrictive arbitration agreements.

In *Sakkab v. Luxottica Retail North America, Inc.*, the plaintiff brought a PAGA claim in California state court against his employer, alleging the company unlawfully withheld wages from him and his fellow employees.⁵¹ Although the arbitration agreement signed by all employees waived the use of “representative actions,” the Ninth Circuit held that a California state court rule invalidating such waivers did not frustrate the purposes of the FAA, meaning the waiver would likely be unenforceable on remand.⁵²

Distinguishing this case from *Concepcion*, the Ninth Circuit explained that, while *procedural* complexity inherent in class action suits may frustrate the purposes of arbitration under the FAA, complexity flowing from the *substance* of a claim itself does not frustrate arbitration in the same way.⁵³ In *Sakkab*, the court contrasted PAGA claims and other substantively complex actions like antitrust claims with procedurally complex class actions.⁵⁴ The substantive complexity in PAGA actions, the court found, comes from the manner in which the defendant’s liability is measured, while the procedural complexity in class actions comes from the need to protect the due process rights of absent parties.⁵⁵ Accordingly, the court permitted the employee-protecting provision to survive the weight of *Concepcion* and set a precedent through which state arbitration rules can survive federal preemption.

Four years later, the Ninth Circuit decided a similar case pertaining to public injunctive relief in the consumer arbitration context. In *Blair v. Rent-A-Center, Inc.*, the plaintiff sought a public injunction to prevent Rent-A-Center from extorting consumers through rent-to-own contracts in violation of California state law.⁵⁶ Although the plaintiff was bound by an arbitration agreement forbidding her from seeking relief that would affect other Rent-A-Center account holders, the Ninth Circuit found a California Supreme Court rule declaring such waivers unenforceable to not be preempted by the FAA.⁵⁷

Citing *Sakkab*, the Ninth Circuit applied the same substantive versus procedural distinction

primarily ‘resolve[s] a private dispute’ between the parties and ‘rectif[ies] individual wrongs’, and that benefits the public, if at all, only incidentally” and public injunctive relief “that ‘by and large’ benefits the general public and that benefits the plaintiff, ‘if at all,’ only ‘incidentall[ly]’ and/or as ‘a member of the general public’” (citations omitted) (quoting *Broughton v. Cigna Healthplans*, 988 P.2d 67, 76 (Cal. 1999)).

⁵¹ 803 F.3d 425, 428 (9th Cir. 2015).

⁵² *Id.* at 431–33; *see* *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 149 (Cal. 2014).

⁵³ *Sakkab*, 803 F.3d at 438.

⁵⁴ *Id.* at 437–38; *see also id.* at 435 (“The class action is a procedural device for resolving the claims of absent parties on a representative basis. By contrast, a PAGA action is a statutory action in which the penalties available are measured by the number of Labor Code violations committed by the employer.”) (citations omitted).

⁵⁵ *Id.* at 438, 442 (“[T]he potential complexity of PAGA actions is a direct result of how an employer’s liability is measured under the statute. The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees. . . . ‘[C]lass arbitration *requires* procedural formality.’ For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”) (citation omitted) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 349 (2011)).

⁵⁶ *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 822–23 (9th Cir. 2019).

⁵⁷ *Blair*, 928 F.3d 822; *see also* *McGill v. Citibank, N.A.*, 393 P.3d 85, 93 (Cal. 2017).

to find that any complexity resulting from public injunctive relief flowed from the kind of substantive complexity characterizing PAGA claims and not the procedural complexity inherent in class actions.⁵⁸ Accordingly, the court extended *Sakkab's* holding and its carve-out from *Concepcion* to public injunctive relief and consumer arbitration.

Against the backdrop of Supreme Court precedent preserving the power of employers, companies, and their arbitration agreements, the Ninth Circuit's recent holdings may appear as momentary aberrations. But in spite of the odds, the carefully crafted legal arguments in *Sakkab* and *Blair* appear to conform with the language of the FAA and *Concepcion*, and could spark a revolution in employee and consumer arbitration jurisprudence if adopted by courts nationwide.

C. The Limitations of Alternate Solutions to Mandatory Arbitration

While courts and legislatures have attempted to reign in the excesses of mandatory arbitration at the state level, federal lawmakers and grassroots activists have also puzzled over ways to limit the prevalence of arbitration agreements. These groups have pursued legislative reforms at the federal level and engaged in direct action against companies that mandate arbitral proceedings. Although these approaches have seen some success, they also face significant obstacles.

In September 2019, the U.S. House of Representatives passed the Federal Arbitration Injustice Repeal ("FAIR") Act.⁵⁹ The Act would invalidate arbitration agreements in the consumer, employment, antitrust, and civil rights contexts.⁶⁰ Since these targeted categories contain the highest incidences of bias and harm,⁶¹ the Act could provide immense relief to those most negatively impacted by mandatory arbitration.⁶² Unfortunately, the Senate is unlikely to enact the bill due to partisan division in the bill's support.⁶³ Despite current Democratic control of the Senate, the bill would need to garner at least sixty votes to overcome a Senate filibuster, requiring significant bipartisan support.⁶⁴ These political obstacles limit the likelihood of an expeditious federal solution to

⁵⁸ *Blair*, 928 F.3d at 828.

⁵⁹ Andrew Kragie, *House Dems Pass Limits on Mandatory Arbitration Clauses*, LAW360 (Sept. 20, 2019, 6:56 PM), <https://www.law360.com/articles/1200881/house-dems-pass-limits-on-mandatory-arbitration-clauses> [<https://perma.cc/WJ/K2-8M5G>]. See generally H.R. 1423, 116th Cong. (2019).

⁶⁰ Kragie, *supra* note 59.

⁶¹ See *supra* Section I.A.

⁶² *Contra* Kragie, *supra* note 59 (quoting Republican Senator John Cornyn as saying the proposal would be "a gift to trial lawyers" and that "[w]hat citizens need is an inexpensive and quick way to resolve disputes. Arbitration is one way to do that.").

⁶³ See Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019, 11:30 A.M.), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act> [<https://perma.cc/7EZA-B76D>] (describing how the bill may face resistance from Senate Republicans); see 165 CONG. REC. H7852 (daily ed. Sept. 20, 2019) (reporting that only two out of 199 House Republicans, Congressman Matt Gaetz (R-FL) and Congressman Chris Smith (R-NJ), voted in favor of the bill).

⁶⁴ See Philip Bump, *Calls to End the Filibuster Have Bigger Problems Than Joe Manchin*, WASH. POST (Mar. 8, 2021, 11:30 PM), <https://www.washingtonpost.com/politics/2021/03/08/calls-end-filibuster-have-bigger-problems-than-joe-manchin/> [<https://perma.cc/GF6V-NQBL>]; Robert Lafolla & Louis C. LaBrecque, *Democratic Edge in Senate Opens Narrow Path for Workplace Bills*, BLOOMBERG LAW (Jan. 8, 2021, 1:49 PM), <https://news.bloomberglaw.com/daily-labor-report/draft-32> [<https://perma.cc/9U3H-LD9P>].

the discrimination perpetrated against workers and consumers through the arbitration process, suggesting the need for a more immediate alternative.

Over the past few years, organizations of workers and students engaging in direct action across the country have offered one such solution. The People's Parity Project, an organization of lawyers and law students committed to promoting fairness in the legal profession, champions issues ranging from ending forced arbitration to protecting law clerks from workplace harassment and abuse.⁶⁵ Among other achievements, the People's Parity Project was closely involved with a successful push to drive multiple law firms to strike mandatory arbitration provisions from their employment agreements.⁶⁶ The group has also successfully lobbied the National Association for Law Placement to include information about law firms' internal arbitration policies in its published legal career directory.⁶⁷ Organizations like the People's Parity Project are indispensable elements in the effort to end forced arbitration, and their continued advocacy will no doubt lead to lasting change for many employees and consumers.

Similar direct action has also led to concessions from employers in the tech world, where workers at Google, Riot Games, and others have demanded an end to forced arbitration agreements.⁶⁸ These protests originated as part of #MeToo walkouts denouncing the use of arbitration in sexual harassment and assault cases and have spread to these companies' use of arbitration agreements generally.⁶⁹ In response to this persistent activism, Google has ended its use of forced arbitration in employment agreements and now permits class action employment suits.⁷⁰

Yet, while this movement has led to undeniable improvements for some employees, recent successes fall short of broad reform. While Google's full-time employees were released from their

⁶⁵ See Karen Sloan, *Shaking Up Big Law, Harvard-Founded Student Group Goes National*, AM. LAW. (June 25, 2019, 2:29 PM), <https://www.law.com/2019/06/25/shaking-up-big-law-harvard-founded-student-group-goes-national/> [<https://perma.cc/R98F-6CVM>]. See generally PEOPLE'S PARITY PROJECT, <https://www.peoplesparity.org> [<https://www.peoplesparity.org>] (advocating for, *inter alia*, worker rights, consumer rights, and the rights of victims of sexual harassment, with a particular focus on ending forced arbitration) (last visited Feb. 19, 2021).

⁶⁶ See Samantha Stokes, *Another Law Firm Abandons Mandatory Arbitration as Pressure Continues*, AM. LAW. (Sept. 19, 2019, 5:08 PM), <https://www.law.com/americanlawyer/2019/09/19/another-firm-abandons-mandatory-arbitration-as-pressure-continues/> [<https://perma.cc/98BD-LJLA>].

⁶⁷ See Caroline Spiezio, *In Brief: NALP to List Law Firms' Arbitration Info in Directory*, REUTERS (Dec. 3, 2019, 5:40 PM), <https://www.reuters.com/article/usa-legal-nalp-arbitration/in-brief-nalp-to-list-law-firms-arbitration-info-in-directory-idUSL1N28D1U4> [<https://perma.cc/H9P3-5SAS>] (discussing the People's Parity Project's advocacy efforts for NALP to publicly list information about law firms' arbitration practices).

⁶⁸ See Sam Dean, *Riot Games Workers Walk Out to Protest Forced Arbitration of Sex Discrimination Suits*, L.A. TIMES (May 6, 2019, 1:37 P.M.), <https://www.latimes.com/business/technology/la-fi-tn-riot-games-walkout-protest-forced-arbitration-20190506-story.html> [<https://perma.cc/J43V-3DPS>] (describing collective action by Riot Games employees forced the company to end its practice of requiring mandatory arbitration for newly hired employees bringing sexual misconduct claims); Nitasha Tiku, *Tech Workers Unite to Fight Forced Arbitration*, WIRED (Jan. 14, 2019, 9:00 AM), <https://www.wired.com/story/tech-workers-unite-fight-forced-arbitration/> [<https://perma.cc/S4GG-CCZD>] (discussing collective action by Google employees to end forced arbitration).

⁶⁹ See Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/93RA-MECL>].

⁷⁰ See Nitasha Tiku, *Google Ends Forced Arbitration After Employee Protest*, WIRED (Feb. 21, 2019, 6:59 P.M.), <https://www.wired.com/story/google-ends-forced-arbitration-after-employee-protest/> [<https://perma.cc/QLE5-CSEJ>].

forced arbitration agreements, it took an additional stockholder derivative lawsuit for Alphabet, Google's parent company, to extend the change to its broader workforce.⁷¹ Further, Google has begun firing labor organizers throughout the company, a response that has drawn significant scrutiny from organizers and the National Labor Relations Board ("NLRB").⁷² Workplace-by-workplace action is a bold and necessary practice that should continue, but employer resistance and resource constraints will likely hold back a definitive end to forced arbitration.

In light of the substantial obstacles and limitations to federal and grassroots action impacting mandatory arbitration, this Article takes the position that dedicated state action is the broadest and most feasible solution. Aided by the Ninth Circuit's analytical distinction between substantive and procedural complexity in the *Sakkab* and *Blair* decisions, states are in the best position to enact laws that curtail the impact of arbitration agreements and ensure immediate and major protections for workers and consumers.⁷³

II. THE VIABILITY OF THE COMPLEXITY DISTINCTION

While the Ninth Circuit's interpretation of the FAA and *Concepcion* presents an attractive avenue for states looking to combat forced arbitration without risking federal preemption, success in other circuits will depend on bringing arguments in line with nationwide precedent. This Part begins in Section A by evaluating the complexity distinction's compatibility with two Supreme Court decisions relied on by the Ninth Circuit in *Sakkab* and *Blair*. Section B then incorporates related decisions issued after the Ninth Circuit's development of this interpretation, examining how these latter cases may further complicate the analysis. Finally, Section C expands to federal precedent nationwide and assesses the interpretation's likelihood of adoption in other circuits.

⁷¹ See *id.* (noting that the 2019 policy changes would not apply to "Google's army of temporary employees, contractors, and vendors"); Alaina Lancaster, *Google Ends Mandatory Arbitration in \$310M Sexual Harassment Settlement*, THE RECORDER (Sept. 25, 2020), <https://www.law.com/therecorder/2020/09/25/google-ends-mandatory-arbitration-in-310m-sexual-harassment-settlement/> [<https://perma.cc/DE5U-EFJB>]. This type of differentiated treatment is emblematic of a broader trend in the tech industry where companies avoid classifying workers as employees so that they may decrease their level of guaranteed benefits. See generally Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666–67 (2013) (identifying statutory protections afforded to employees but not independent contractors); Shannon Bond, *California Voters Give Uber, Lyft a Win But Some Drivers Aren't So Sure*, NPR (Nov. 5, 2020, 6:01 A.M.), <https://www.npr.org/2020/11/05/931561150/california-voters-give-uber-lyft-a-win-but-some-drivers-arent-so-sure> [<https://perma.cc/MHK3-7PH4>] (explaining how a recently enacted California measure codifies the distinction between employees and contractors in the gig economy).

⁷² See Greg Bensinger, *Another Fired Google Engineer Alleges Retaliation for Union Activity*, WASH. POST (Dec. 17, 2019, 9:00 A.M.), <https://www.washingtonpost.com/technology/2019/12/17/google-fires-fifth-engineer-who-alleges-retaliation-union-activity/> [<https://perma.cc/P9BJ-9N4U>]; Kate Conger & Daisuke Wakabayashi, *Google Fires 4 Workers Active in Labor Organizing*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/technology/google-fires-workers.html> [<https://perma.cc/L8QR-PYJ5>]; Tom Spiggle, *The NLRB Accuses Google of Retaliating Against Workers Trying to Improve Their Working Conditions*, FORBES (Dec. 9, 2020, 3:49 P.M.), <https://www.forbes.com/sites/tomspiggle/2020/12/09/the-nlrbs-accuses-google-of-retaliating-against-workers-trying-to-improve-their-working-conditions/> [<https://perma.cc/YDA9-9UDE>].

⁷³ See discussion *supra* Section I.B.2.

*A. The Complexity Distinction Is Consistent with Supreme Court Precedent*1. *Concepcion's* application of FAA preemption specifically targets procedural complexity

The Ninth Circuit's *Sakkab* and *Blair* decisions maintain that the FAA only preempts laws that increase the *procedural* complexity of arbitration, like the one mandating class action protections in *Concepcion*, and not those that may increase the *substantive* complexity of arbitration, like rules forbidding contractual waiver of PAGA claims in *Sakkab* or public injunctive relief in *Blair*. This assertion is both a reasonable interpretation of *Concepcion's* view of FAA preemption and was directly contemplated in *Concepcion* itself.

Given that *Concepcion* ultimately pertains to a question of federal preemption of state law, it is necessary to examine how the case frames the FAA's preemptive power. In *Concepcion*, the Court proposed a two-step analysis to evaluate FAA preemption.⁷⁴ First, a court must determine whether the state law is eligible for protection under the FAA's savings clause by identifying whether it is a "generally applicable contract defense."⁷⁵ A law found to target arbitration directly would fail this step.⁷⁶ Second, the court evaluates whether the law is applied in a manner that disfavors arbitration.⁷⁷ This determination is largely based on whether the law stands as an obstacle to the FAA's objective of facilitating informal, streamlined proceedings.⁷⁸

In order for the Ninth Circuit's distinction between substantive and procedural complexity to conform with *Concepcion's* view of FAA preemption, substantively complex claims must pass the second step of this analysis, i.e., they must not obstruct the FAA's interest in efficient proceedings.⁷⁹ In *Concepcion*, the Court presented three additional factors to determine if state protections obstruct the purposes of the FAA: (i) whether the law will sacrifice the informality of arbitration by making it slower and more costly; (ii) whether the law increases the procedural formalities required at arbitration; and (iii) whether the law causes an increased risk to the defendant.⁸⁰ While the Court in *Concepcion* found that laws mandating the right to class action procedures failed on all three points,⁸¹

⁷⁴ See Lisa Tripp & Evan R. Hanson, AT&T v. *Concepcion: The Problem of a False Majority*, 23 KAN. J.L. & PUB. POL'Y 1, 6 (2013) (discussing how Justice Scalia's majority opinion in *Concepcion* first addresses rules that prohibit arbitration and are clearly preempted, and then turns to the more difficult issue of facially neutral rules that frustrate the purposes of the FAA).

⁷⁵ AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

⁷⁶ *Id.* at 341; see, e.g., *Casarotto*, 517 U.S. at 687 (holding the FAA preempted a Montana statute because the law "condition[ed] the enforceability of arbitration agreements on compliance with a . . . requirement not applicable to contracts generally"); *Perry v. Thomas*, 482 U.S. 483 (1987) (reversing a California state court decision that relied on a state law allowing plaintiffs to disregard arbitration agreements when bringing actions to collect wages); *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928 (9th Cir. 2013) (reversing a decision that exempted all claims of public injunctive relief from arbitration).

⁷⁷ See *Concepcion*, 563 U.S. at 341.

⁷⁸ See *id.* at 344. The Court specifically poses two hypotheticals to explain this step of the analysis: (i) a state rule demanding arbitration contain judicially-monitored discovery, and (ii) a state rule demanding arbitration include a final decision by a jury (or as Scalia proposes, "a panel of twelve lay arbitrators"). *Id.* at 341–42. These two scenarios would not be explicitly aimed at arbitration, but their effects would have a disproportionate impact on such procedures. See *id.* at 342.

⁷⁹ See *id.* at 348–51; *contra Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 441–42 (9th Cir. 2015) (Smith, J., dissenting).

⁸⁰ *Concepcion*, 563 U.S. at 348–51.

other laws creating only substantive complexity will likely fare better under the same analysis.

When the Court in *Concepcion* discussed how class protections make arbitrations slower and more costly, it specified that such procedures require an arbitrator to decide whether the class should be certified, whether the named parties were sufficiently representative of the broader class, and how discovery for the class should be conducted.⁸² The substantively complex PAGA claims at issue in *Sakkab*, however, have none of the same procedural requirements mandated by Rule 23 for class actions.⁸³ The dissenting opinion in *Sakkab* argued that, nevertheless, the substantively complex PAGA claims still increase the procedural formalities required at arbitration and slow the process by requiring an arbitrator to make fact-intensive judgments about absent parties.⁸⁴ The same argument could be made against *Blair*'s claims for public injunctive relief in which a defendant must account for the money obtained from consumers and notify these consumers of their statutory rights.⁸⁵

The difference between these claims and the class procedures addressed in *Concepcion* is that any added complexity in substantively complex claims is introduced *after* the arbitrator has already ruled on the legal questions at issue.⁸⁶ That is, in PAGA and public injunctive disputes, the added complexity facing the arbitrator is limited to determining the remedial actions required of the defendant. This distinction is important because *Concepcion* specifically focused on how the disruption of arbitration's bilateral nature—the fact that it is adjudicated between just two parties—distorts the objectives of the FAA.⁸⁷ Both PAGA claims and claims for public injunctive relief maintain the

⁸¹ See *id.* The breadth of the Court's holding has engendered significant dissent from commentators. See, e.g., Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? – Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systemic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800 – 2015*, 25 B.U. PUB. INT. L.J. 143, 225 (2016) (“[T]he *Concepcion* Court's conclusions are not well grounded in sound or statistically significant evidence. . . . [E]ven if simple percentages were powerful predictors, the reported percentages and statistically significant bivariate relationships in the present study do not support the *Concepcion* Court's general conclusion.”); Tripp & Hanson, *supra* note 74, at 2 (arguing that Justice Thomas's concurrence in *Concepcion* rejects the second step of Scalia's preemption analysis, therefore depriving the Court of a majority behind the reasoning of its holding).

⁸² *Concepcion*, 563 U.S. at 348.

⁸³ See *Sakkab*, 803 F.3d at 436 (“In a PAGA action, the court does not inquire into the named plaintiffs and class counsel's ability to fairly and adequately represent unnamed employees. . . . Moreover, unlike Rule 23(a), PAGA contains no requirements of numerosity, commonality, or typicality.”).

⁸⁴ See *id.* at 444–46 (Smith, J., dissenting) (explaining that the arbitrator would need to determine the number of parties affected by the labor code violation and the number of pay periods during which they were affected).

⁸⁵ See *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 823 (9th Cir. 2019) (“Plaintiffs seek a ‘public injunction’ on behalf of the people of California to enjoin future violations of these laws, and to require that Rent-A-Center provide an accounting of monies obtained from California consumers and individualized notice to those consumers of their statutory rights.”).

⁸⁶ Compare *Concepcion*, 563 U.S. at 349 (“For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”), with *Blair*, 928 F.3d at 830 (demonstrating that the responsibility of arbitrators to consider the interests of the public as a whole is not unique to public injunctions because arbitrators routinely consider such interests when issuing private injunctions), and *Sakkab*, 803 F.3d at 438 (“[T]he potential complexity of PAGA actions is a direct result of how an employer's liability is measured under the statute. The amount of penalties an employee may recover is measured by the number of violations an employer has committed, and the violations may involve multiple employees.”).

⁸⁷ See *Concepcion*, 563 U.S. at 348 (“[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

bilateral nature of arbitration and therefore do not sacrifice informality or increase procedural formality in the manner envisioned by the majority in *Concepcion*.⁸⁸

Because the stakes of an arbitration vary across claims and contexts, it is difficult to imagine that the Court's remaining point regarding the level of risk to defendants can carry much weight on its own. While not addressed directly in *Blair*, the *Sakkeab* court responded to this concern, contending that state protections for remedies cannot be preempted solely on the level of risk they may pose to defendants.⁸⁹ Further, the Ninth Circuit suggests that parties can always prospectively decide to litigate high-stakes claims as many do in the antitrust context.⁹⁰ While this argument is internally consistent on its own, it is further supported by Supreme Court precedent establishing that arbitration agreements cannot bar substantive rights afforded by statute.⁹¹

2. The complexity distinction is necessary to reconcile Supreme Court precedent

The Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*⁹² places an important limitation on *Concepcion*. In the former case, the Supreme Court held that parties entering into agreements to arbitrate statutory claims do not forgo the substantive rights afforded by those statutes.⁹³ According to the Court, an agreement to arbitrate does nothing more than move a claim from a judicial to an arbitral forum, trading the additional procedures of a courtroom for the simplicity of arbitration.⁹⁴ In light of this holding, *Concepcion*'s preemption analysis must be limited and cannot be deployed in a manner that would deny a party's substantive rights as provided by law.⁹⁵ In the context of the laws at issue in *Sakkeab* and *Blair*, this means that the guarantees to pursue PAGA

⁸⁸ See *Blair*, 928 F.3d at 829 (“Crucially, arbitration of a public injunction does not interfere with the bilateral nature of a typical consumer arbitration.”); *Sakkeab*, 803 F.3d at 436 (“Nothing prevents parties from agreeing to use informal procedures to arbitrate representative PAGA claims.”).

⁸⁹ See *Sakkeab*, 803 F.3d at 437 (“[T]he FAA would not preempt a state statutory cause of action . . . merely because the action's high stakes would arguably make it poorly suited to arbitration.”). The court specifically cites *Medtronic, Inc. v. Lohr* in arguing that concepts of federalism lead to the presumption that “Congress does not cavalierly pre-empt state-law causes of action.” *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Similarly, the court cites *Booker v. Robert Half Int'l, Inc.* where it was assumed that a term in an arbitration agreement barring punitive damages was not enforceable. *Id.* (citing *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 83 (D.C. Cir. 2005)).

⁹⁰ *Id.* at 437–38.

⁹¹ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

⁹² *Id.* at 614.

⁹³ *Id.* at 628.

⁹⁴ *Id.*

⁹⁵ Although the Court in *Concepcion* contends that the FAA preempts state laws that interfere with its objective of facilitating informal, streamlined proceedings, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011), the Court in *Mitsubishi* ensures that this preemption cannot limit a plaintiff's right to pursue substantive statutory rights. See *Mitsubishi*, 473 U.S. at 628. It must be noted, however, that the Ninth Circuit does not agree with this interpretation of *Mitsubishi* and has indicated support for Justice Kagan's dissenting view in *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting), that *Mitsubishi* does not apply to state statutes. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013). Despite this disagreement, a majority of the Court in *Italian Colors* treated *Mitsubishi* as applying to state as well as federal statutes. *Italian Colors*, 570 U.S. at 238 (stating that in *Concepcion*, a case involving a state statute, the Court “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system’” and therefore applied the analysis in *Mitsubishi* to a state statute) (quoting *Concepcion*, 563 U.S. at 351).

claims and public injunctive relief cannot be eliminated through FAA preemption.

Even if the Court in *Concepcion* did not contemplate a distinction between substantive and procedural complexity itself, a limitless application of FAA preemption would veer too close to upsetting the holding in *Mitsubishi*, which has been specifically endorsed in cases following *Concepcion*.⁹⁶ As the Court in *Mitsubishi* stated, “potential complexity should not suffice to ward off arbitration,”⁹⁷ and arbitrators are sufficiently competent adjudicators to consider and manage substantively complex cases.

Between a straightforward reading of *Concepcion* and the need to harmonize *Concepcion* and *Mitsubishi*, the Ninth Circuit’s safe harbor for substantively complex claims is a fair interpretation of Supreme Court precedent. In order for the complexity distinction in *Sakkab* and *Blair* to remain viable across all federal courts, however, it is necessary that it accords with Supreme Court precedent decided after these Ninth Circuit cases.

B. The Complexity Distinction Is Consistent with Post-*Concepcion* Jurisprudence

1. *Epic Systems* has no measurable effect on *Sakkab*

While some commentators and courts have speculated that the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*⁹⁸ may cast doubt on the Court’s acceptance of the Ninth Circuit’s complexity distinction, their arguments fail to do more than appeal to the Court’s favorable view of arbitration.⁹⁹ In *Epic Systems*, the Court interpreted the National Labor Relations Act (NLRA) as not guaranteeing a right to class and collective action in arbitration proceedings.¹⁰⁰ The Court employed several canons of statutory construction to determine that there was no right in the NLRA that would cause it to conflict with the FAA.¹⁰¹ In an order from the Southern District of California, the judge inquired as to whether *Sakkab* remained good law after *Epic Systems* and whether the California law in *Sakkab* may be preempted by the FAA.¹⁰² Other courts within the circuit disagreed with this assessment, with one opinion calling the Southern District’s argument “conclusory” and

⁹⁶ See *Italian Colors*, 570 U.S. at 236 (“[The *Mitsubishi* exception to arbitration enforceability] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”).

⁹⁷ *Mitsubishi*, 473 U.S. at 633.

⁹⁸ 138 S. Ct. 1612 (2018).

⁹⁹ See, e.g., Stephanie Greene & Christine Neylon O’Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic*, New Prime, and Lamps Plus, 56 AM. BUS. L.J. 815, 845 (2019). Note, however, that this article does not give a specific reason why the Ninth Circuit’s interpretation would be at risk after *Epic Systems*, except for a broad argument concerning the Court’s favorability toward arbitration. *Id.*

¹⁰⁰ *Epic Sys.*, 138 S. Ct. at 1628.

¹⁰¹ See, e.g., *id.* at 1626–27 (explaining that Congress “does not . . . hide elephants in mouseholes”); *id.* at 1630 (arguing that courts should resist reading conflicts into statutes).

¹⁰² See *McGovern v. United States Bank N.A.*, 362 F. Supp. 3d 850, 862 n.5 (S.D. Cal. 2019). (“If a federal law . . . that applies regardless of the existence of an arbitration provision does not implicate the FAA’s saving clause to avoid preemption, presumably a state law . . . that applies regardless of the existence of an arbitration provision does not implicate the saving clause either.”).

“unpersuasive.”¹⁰³

The Ninth Circuit gave a conclusive answer to its view of *Epic Systems*’s effect on *Sakkab* when it returned to its complexity distinction in *Blair*. The court distinguished *Epic Systems* from the facts in *Blair*, concluding that the bilateral nature of arbitration remains undisturbed by the substantive right to seek public injunctive relief.¹⁰⁴ The court did not comment directly on *Epic Systems*’s potential impact on *Sakkab*, but the opinion implied a lack of conflict by treating *Sakkab*’s complexity distinction as good law.¹⁰⁵

In *Blair*, the defendant alleged a conflict between *Sakkab* and *Epic Systems*, arguing that the Supreme Court remained hostile to rules that interfere with enforcing the terms of an arbitration agreement.¹⁰⁶ In a similar manner to the Southern District of California,¹⁰⁷ the defendant failed to offer further explanation for why these two cases were specifically incompatible.¹⁰⁸

In sum, *Epic Systems* does not seem to pose any additional challenge to the Ninth Circuit’s complexity distinction beyond strengthening a heuristic presumption that the Supreme Court will uphold the terms of most arbitration agreements. While the Court’s affection for arbitration is manifest, there is not at present any coherent legal argument suggesting that *Epic Systems* conflicts with the holdings in either *Sakkab* or *Blair*.

2. Rejections of petitions for certiorari have not implicated the complexity distinction

While lower courts have at times appeared eager to discuss the viability of the Ninth Circuit’s complexity distinction, the Supreme Court has had decidedly less to say.¹⁰⁹ Despite numerous petitions for certiorari on cases related to the representative actions addressed in *Sakkab* and *Blair*, no petitions have been granted, and no dissents from the denial of certiorari have been published. Although the Court has emphatically disputed that such denials express any opinion on the merits of these cases,¹¹⁰ it is worth briefly examining the parties’ arguments for why the underlying jurisprudence does or does not deserve further review.

While neither party in *Sakkab* submitted petitions for certiorari, and *Blair* was settled out of court,¹¹¹ two Ninth Circuit cases addressing similar representative actions have been briefed and

¹⁰³ See *Echevarria v. Aerotek, Inc.*, No. 5:16-CV-04041-BLF, 2019 WL 2503377, at *4 (N.D. Cal. June 17, 2019).

¹⁰⁴ *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 829 (9th Cir. 2019).

¹⁰⁵ See *id.* at 825 (“The Supreme Court’s decision in *Concepcion* and our decision in *Sakkab* guide our analysis. Indeed, our decision in *Sakkab* all but decides this case.”).

¹⁰⁶ See Reply Brief for Rent-A-Center at 7, *Blair*, 928 F.3d 819 (No. 17-17221).

¹⁰⁷ See *McGovern*, 362 F. Supp. 3d at 862 n.5.

¹⁰⁸ See Reply Brief for Rent-A-Center, *supra* note 107, at 10.

¹⁰⁹ The Supreme Court has repeatedly denied petitions to decide whether the FAA preempts the individual state rule at issue in *Sakkab* itself. See *Delisle v. Speedy Cash*, No. 3:18-CV-2042-GPC-RBB, 2019 U.S. Dist. LEXIS 96981, at *36 n. 3 (S.D. Cal. June 10, 2019) (“Indeed, the Supreme Court has been asked to weigh in on whether the FAA preempts *Iskanian* on many occasions; each time it denied certiorari.”).

¹¹⁰ See *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 917 (1950) (“[I]t simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of sound judicial discretion.”); *United States v. Carver*, 260 U.S. 482, 490 (1923) (“The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.”).

¹¹¹ Importantly, although *Blair v. Rent-A-Center, Inc.* has been settled outside of court, its two companion cases,

petitioned to the Supreme Court.¹¹² Both cases involved employees seeking civil penalties and unpaid wages from the same employer on behalf of themselves and their coworkers under California's PAGA law.¹¹³ After losing at the Ninth Circuit, the defendants in both cases petitioned for Supreme Court review, arguing that PAGA claims should be preempted by the FAA.

Two common points across both petitions were that: (i) the California PAGA law is not a rule of general applicability;¹¹⁴ and (ii) PAGA claims frustrate the bilateral nature of arbitration.¹¹⁵ An amicus brief from members of the business community additionally emphasized the “deluge” of PAGA claims following *Sakkab* and argued the increase was a matter of significant practical importance.¹¹⁶ While the business community may be correct that the increase in PAGA claims will accentuate the stakes of future petitions for Supreme Court review, the other two arguments advanced by the petitioners are unlikely to hold up under scrutiny.

Regarding the first step of *Concepcion*'s preemption analysis,¹¹⁷ a law applying to all contracts, whether or not they pertain to arbitration, should be classified as a *per se* generally applicable rule.¹¹⁸ Laws that fail at this step in the analysis generally target arbitration directly as opposed to disfavoring it in application, and a rule forbidding PAGA waivers does not apply differently to arbitration than it does to any other contract.¹¹⁹ Further, the petitioners' contention that the California rule forbidding PAGA waivers has only ever been used to invalidate arbitration contracts is less a showing that the rule is not generally applicable and more a reflection on the propensity for arbitration agreements to deny plaintiff protections compared with other contracts.¹²⁰ The fact that parties generally allow

McArdle v. AT&T Mobility LLC, 772 F. App'x 575 (9th Cir. 2019), and Tillage v. Comcast Corp., 772 F. App'x 569 (9th Cir. 2019), may be reheard *en banc*. Daniel P. Pascucci, *Waiving Claims for Public Injunctive Relief in California Arbitration Agreements: The McGill Rule on Appeal*, NAT'L L. REV. (Oct. 18, 2019), <https://www.natlawreview.com/article/waiving-claims-public-injunctive-relief-california-arbitration-agreements-mcgill> [<https://perma.cc/7NTK-N4JG>]. The outcome of the rehearing of these companion cases will be an important indicator of the potential for a certiorari petition being granted in the future.

¹¹² See *Mandviwala v. Five Star Quality Care, Inc.*, 723 F. App'x 415 (9th Cir. 2018), *cert. denied*, 138 S. Ct. 2680 (2018); *Lefevre v. Five Star Quality Care, Inc.*, 705 F. App'x 622 (9th Cir. 2017), *cert. denied*, 139 S. Ct. 68 (2018).

¹¹³ See *Mandviwala*, 723 F. App'x at 416; *Lefevre*, 705 F. App'x at 622.

¹¹⁴ See Petition for a Writ of Certiorari at 7, *Five Star Senior Living Inc. v. Lefevre*, 139 S. Ct. 68 (2018) (No. 17-1470) [hereinafter Petition for a Writ of Certiorari, *Lefevre*]; Petition for a Writ of Certiorari at 12, *Five Star Senior Living, Inc. v. Mandviwala*, 138 S. Ct. 2680 (2018) (No. 17-1357) [hereinafter Petition for a Writ of Certiorari, *Mandviwala*]. Note that if this were true, the law would not pass step one of *Concepcion*'s preemption analysis. See *supra* Section II.A.1.

¹¹⁵ See Reply Brief of Petitioners at 9–10, *Mandviwala*, 138 S. Ct. 2680 (No. 17-1357) (arguing that bilateral arbitration in which one party is acting as a representative for other parties is not the sort of bilateral arbitration envisioned by the Court in *Concepcion*).

¹¹⁶ See Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae Supporting Petitioners at 18–19, *Mandviwala*, 138 S. Ct. 2680 (No. 17-1357) (“Representative PAGA actions have flooded California’s state and federal courts in the wake of *Iskanian* and *Sakkab*, as enterprising plaintiffs and their counsel seek to evade this Court’s decision in *Concepcion* and end-run their otherwise binding agreements to arbitrate employment-related claims on an individual basis.”).

¹¹⁷ See *supra* Section II.A.1.

¹¹⁸ See generally *Sakkab v. Luxottica Retail North America, Inc.*, 803 F.3d 425, 432–33 (9th Cir. 2015) (concluding that *Concepcion* took a broad view of the scope of the FAA’s Savings Clause, and with it the determination of which rules were generally applicable).

¹¹⁹ See, e.g., *supra* note 76.

¹²⁰ See Petition for a Writ of Certiorari, *Mandviwala*, *supra* note 115, at 15 (“[N]o state or federal court has cited any

PAGA restrictions in settlement agreements is equally unresponsive to the question because settlements are profoundly distinct from original proceedings, whether civil or arbitral.¹²¹

The second argument, that the California rule frustrates the bilateral nature of arbitration, has already been thoroughly and convincingly addressed in the Ninth Circuit's decisions.¹²² The Ninth Circuit has concluded that PAGA actions remain bilateral throughout their proceedings and only consider absent parties once the arbitrator has reached a legal conclusion and is calculating remedies.¹²³

Notably, neither petition included arguments targeting the Ninth Circuit's complexity distinction directly.¹²⁴ While far from conclusive, this observation supports the general proposition that, even if the individual rules at issue in *Sakkab* and *Blair* could be preempted on other grounds in some future case, there do not seem to be any legal arguments that can convincingly target the logic of the Ninth Circuit's complexity distinction itself.¹²⁵

C. The Complexity Distinction Is Consistent with Most Nationwide Precedent

1. The Eastern District of Pennsylvania's decision in *Joseph v. Quality Dining, Inc.* is inapposite

While the Ninth Circuit's complexity distinction seems to align with Supreme Court precedent issued both before and after the cases where it was developed,¹²⁶ an obstacle to the interpretation's nationwide adoption may have arisen in the unique caselaw of the Eastern District of Pennsylvania. In *Joseph v. Quality Dining, Inc.*, the District Court suggested that the substantive versus procedural rights distinction may not be an impactful element of the FAA's preemption analysis.¹²⁷ The court determined that *Mitsubishi* does not prohibit arbitration agreements from eliminating a plaintiff's ability to pursue a substantive right. Instead, the court interpreted *Mitsubishi's* language that agreements to arbitrate do not cause a party to forgo substantive rights as a merely descriptive statement as opposed to a mandatory instruction.¹²⁸ From this analytical standpoint, the Court in

case or example outside the arbitration context in which the supposedly 'generally applicable' *Iskanian* rule has been applied.”).

¹²¹ See *id.* at 15–16 (“[T]he *Iskanian* rule is plainly not applied in all contractual contexts. For example, while under the *Iskanian* rule employees may not waive representative PAGA claims in *arbitration agreements*, they may freely waive representative PAGA claims in *settlement agreements*. Applicability to arbitration agreements, but not settlement agreements, was the precise fact that this Court found to be ‘another indication’ that the disputed rule in *Kindred* impermissibly arose from the suspect status of arbitration.”).

¹²² See *Sakkab*, 803 F.3d at 435; see also discussion *supra* Section II.A.1.

¹²³ *Sakkab*, 803 F.3d at 435.

¹²⁴ See generally Petition for a Writ of Certiorari, *Lefevre*, *supra* note 115, at 1; Petition for a Writ of Certiorari, *Mandivivala*, *supra* note 115, at 1.

¹²⁵ The Ninth Circuit continues to assert that *Sakkab* has not been overruled by any subsequent Supreme Court precedent. See *Rivas v. Coverall N. Am., Inc.*, No. 20-55140, 2021 U.S. App. LEXIS 364, at *2–3 (9th Cir. Jan. 7, 2021) (“The Supreme Court . . . reiterated and reapplied [*Concepcion's* holding] in *Epic Systems* and *Lamps Plus*. But neither case expanded upon *Concepcion* in such a way as to abrogate *Sakkab*.”).

¹²⁶ See *supra* Sections II.A–B.

¹²⁷ 244 F. Supp. 3d 467, 474 (E.D. Pa. 2017).

¹²⁸ See *id.* (“It is unreasonable to take the simple recognition that a party’s substantive rights afforded by a statute may be equally enforced through court or arbitration and turn it into a key point of analysis mandating that ‘substantive rights’ as a

Mitsubishi was commenting on a trend in arbitration agreements, not dictating how they must operate.

If the District Court is correct that *Mitsubishi* does not guarantee plaintiffs' ability to pursue statutorily granted substantive rights, the FAA's preemptive power over state protections would go unchecked, and any rule that guaranteed substantive or procedural rights would be preempted if it led to *any* increased complexity in arbitration. Put differently, the Ninth Circuit's distinction between substantive and procedural complexity would be inapplicable, with all forms of complexity now putting state regulation of arbitration at risk of preemption.

It seems likely, however, that further review should overturn *Joseph*. The decision has generated little to no scholarly discussion, and the relevant passage has not been cited in any subsequent case.¹²⁹ Further, the language conflicts directly with Supreme Court precedent acknowledging plaintiffs' "right to pursue" statutory remedies.¹³⁰ If the substantive complexity of statutory claims could put their statutes at risk of preemption, the decision to arbitrate would have a direct impact on a plaintiff's ability to pursue a claim, in direct contrast to the Court's directive in *Mitsubishi*. A plaintiff attempting to cite the Ninth Circuit's complexity distinction in the Eastern District of Pennsylvania may have some difficulty in distinguishing *Joseph*, but *Joseph*'s conflict with *Mitsubishi* makes it highly unlikely that a future court would uphold the case if challenged.¹³¹

2. Support for the complexity distinction is found in the pre-*Epic Systems* circuit split

While the Eastern District of Pennsylvania is unique in concluding that the distinction between substantive and procedural rights has little impact on a preemption analysis under the FAA, the potential for other jurisdictions to adopt the Ninth Circuit's distinction between substantive and procedural rights may depend on a previous circuit split that culminated in *Epic Systems*. (Recall that this case held that the NLRA does not guarantee a right to class and collective action in arbitration proceedings.¹³²)

When the case was heard by the Seventh Circuit Court of Appeals, the defendant argued that if the NLRA guaranteed a right to collective action, the right was procedural in nature rather than substantive, and therefore it could not interfere with the FAA's mandate to enforce a pre-dispute arbitration clause barring class proceedings.¹³³ The Seventh Circuit rejected this argument, holding that the right to collective action was, in fact, a substantive right because it was at the heart of the remedy that Congress was attempting to provide through the statute.¹³⁴ On review, the Supreme Court did not address whether the right to collective action was per se procedural or if it could be

category may not be affected by an agreement to arbitrate").

¹²⁹ The few cases that do cite to this decision do not specifically rely on its rejection of the substantive versus procedural complexity distinction.

¹³⁰ See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 235–38 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

¹³¹ For a broader discussion on the interplay between the substantive and procedural aspects of federal law, see generally Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH U. L. REV. 1027, 1032–33 (2013) (exploring a growing trend of courts using cloaking efforts to target social ends with substantive consequences through restrictions on mechanisms of procedure; a phenomenon arguably occurring in many of the arbitration decisions discussed in this Article).

¹³² *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1628 (2018); see *supra* Section II.B.1.

¹³³ *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1160 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612.

¹³⁴ *Id.*

substantive, nor what effect this distinction may have. Instead, the Court held that the right to class proceedings did not exist in the NLRA at all.¹³⁵ On remand, the question of whether the right to class proceedings is substantive or procedural was not taken up again, and the case was dismissed.¹³⁶

In the wake of *Epic Systems*, many circuits have yet to determine whether the right to pursue a claim on behalf of a collective group in laws other than the NLRA is a substantive or a procedural right. Before *Epic Systems*, circuit courts were divided on this question. The Second and Fifth Circuits held that the right to proceed on behalf of others was a mere procedural right,¹³⁷ while the Ninth and Seventh Circuits, as well as the NLRB, held that the right was substantive.¹³⁸ As *Epic Systems* did not settle this issue, the prior dividing lines between circuits may influence whether courts will view the right for arbitration to affect absent parties (as it does in PAGA and public injunction claims) to be a procedural right creating procedural complexity or a substantive right creating substantive complexity. The analytical distinction very closely resembles the issue in *Sakkab* and *Blair*, and if PAGA or public injunction statutes are tested in these circuits, these previous lines may predict correspondingly disparate outcomes.

The Second and Fifth Circuits, holding that the right to a collective action is a procedural right, analyzed this guarantee in the abstract, without considering whether the substantive or procedural nature of such rights may depend on the different laws within which they were created.¹³⁹ By contrast, the Ninth Circuit, Seventh Circuit, and the NLRB looked at each statute individually and differentiated those where the use of collective action was a substantive right from those where it was a mere procedural device.¹⁴⁰ The Seventh Circuit described the distinction succinctly, explaining that “just because [a] . . . right is associational does not mean that it is not substantive. It would be odd indeed to consider associational rights, such as the one guaranteed by the First Amendment to the U.S. Constitution, non-substantive.”¹⁴¹ In other words, the Seventh Circuit believed there was a right to proceed collectively in the NLRA, and the fact that this right was associational did not require it to be procedural. Insofar as courts in the Seventh Circuit and elsewhere adopt this reasoning, they are

¹³⁵ See *Epic Sys.*, 138 S. Ct. at 1628; Greene & O’Brien, *supra* note 100, at 823.

¹³⁶ See *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, 2019 U.S. Dist. LEXIS 11937, at *2 (W.D. Wis. Jan. 24, 2019).

¹³⁷ See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.6 (2d Cir. 2013) (“We have previously explained that the procedural ‘right’ to proceed collectively presupposes, and does not create, a non-waivable, substantive right to bring such a claim.”); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) (“The use of class action procedures, though, is not a substantive right.”).

¹³⁸ See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016) (“The rights established in § 7 of the NLRA—including the right of employees to pursue legal claims together—are substantive. They are the central, fundamental protections of the Act. . . .”); *Lewis*, 823 F.3d at 1160 (“The right to collective action in section 7 of the NLRA is not, however, merely a procedural one. It instead lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute.”); *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2286 (N.L.R.B. Jan. 3, 2012) (“The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.”).

¹³⁹ See *D.R. Horton, Inc.*, 737 F.3d at 357 (“For example, the Supreme Court has determined that there is no substantive right to class procedures under the Age Discrimination in Employment Act despite the statute providing for class procedures. Similarly, numerous courts have held that there is no substantive right to proceed collectively under the FLSA. . . .”) (citations omitted); *Sutherland*, 726 F.3d at 297 (citing the same Supreme Court precedent).

¹⁴⁰ See *Lewis*, 823 F.3d at 1161 (“It bears repeating: just as the NLRA is not Rule 23, it is not the ADEA or the FLSA. While the FLSA and ADEA allow class or collective actions, they do not guarantee collective process.”).

¹⁴¹ *Id.* at 1161.

likely to view the right to proceed on behalf of others in PAGA and public injunction statutes as substantive and therefore sheltered from the threat of FAA preemption under the Ninth Circuit framework.

It bears repeating that when the Supreme Court took up the cases consolidated in *Epic Systems*, it did not determine whether the right to collective action was or was not substantive, only that such a right was not guaranteed in the NLRA.¹⁴² Therefore, the present circuit split over this issue could play a significant role in future applications of PAGA or public injunction statutes. For those who view such a right to be substantive, adoption of the Ninth Circuit's reasoning in *Sakkab* and *Blair*—and the resulting protection for state laws curtailing arbitration—appears likely.

III. THE PROMISING POTENTIAL OF THE COMPLEXITY DISTINCTION

With the Ninth Circuit's distinction between substantive and procedural complexity appearing reasonably secure (at least on the merits), state legislatures should feel empowered to examine what the application of this precedent throughout the country could mean for employee and consumer protections.

Section A of this Part explores the types of laws that state legislatures could likely pass without fear of preemption under the protection of Ninth Circuit precedent, Section B details the types of laws that would likely still be preempted despite Ninth Circuit precedent, and Section C examines the broader effect that such a rise in legislation could have on the practice of arbitration as a whole.

A. Effective Applications of the Complexity Distinction

1. Enacting statutes to protect PAGA and public injunction claims

The most straightforward use of the Ninth Circuit's cabined view of FAA preemption would be for states to pass laws implementing PAGA claims and rights to public injunctions, ensuring they could not be legally waived in any contract, including arbitration. This replication of the California system would grant expanded opportunities for relief to workers and consumers across the country by making otherwise daunting lawsuits economically viable. When the economic burdens of pursuing relatively small remedies for labor violations can be spread among a larger group of parties, the incentive to hold corporate abusers accountable increases significantly. An enforceable legal check on corporations with otherwise immense bargaining power would benefit workers, consumers, and the broader democratic public.

While PAGA laws have not yet been passed in any other states, bills have been proposed in Oregon, New York, Illinois, and Vermont.¹⁴³ With targeted activism and the spread of positive

¹⁴² See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1628 (2018).

¹⁴³ See H.B. 2205, 2021 Leg. Assemb., Reg. Sess. (Or. 2021); Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, Assemb. 2265, 2019–20 Leg., Reg. Sess. (N.Y. 2019); Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, S. 1848, 2019–20 Leg., Reg. Sess. (N.Y. 2019); Limitations on Forced Arbitration Act, S. 0983, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H. 789, 2018 Gen. Assemb., Reg. Sess. (Vt. 2018); see also Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2236–39 (2018) (discussing the attempts to enact *qui tam* legislation in various states); Josh Eidelson, *California Helps Workers Sue Their*

examples like California, state legislatures in all fifty states should introduce bills that both recognize PAGA and public injunction claims and establish the waiver of these claims in arbitration to be against public policy.

The pre-*Epic Systems* jurisprudence in some circuits likely presents the primary legal limitation to state implementation, but even so, such precedent is far from a guaranteed obstacle to state regulation. The precedent in the Second and Fifth Circuits primarily focuses on laws allowing plaintiffs to proceed collectively or as a class and does not directly address the representative form of proceedings present in PAGA and public injunction claims. Even if these circuits did have a propensity to view assembly rights as more procedural than substantive, the differences between class and representative actions may be sufficient for state laws to avoid FAA preemption.¹⁴⁴ Under the *Sakkab* and *Blair* precedents, a state should be able to avoid FAA preemption of state laws protecting PAGA and public injunction claims as long as they can show that any added arbitral complexity derives from a substantive element of their claim, as opposed to a procedural one.¹⁴⁵ Within this framework, the crux of a successful defense against preemption is to locate the complexity of PAGA and public injunction claims in the remedies determination of the arbitration as opposed to the merits stage.¹⁴⁶

Although these types of statutes may not have protected Vanina Guerrero, ensuring the viability of PAGA and public injunction claims outside of California would nonetheless strengthen the Ninth Circuit's complexity distinction across arbitration contexts. Were states to implement these laws and survive FAA preemption under judicial review, it would be a positive signal for the growing influence of the Ninth Circuit's cabined view of FAA preemption. Early successes would present opportunities for states to enact more stringent restrictions on the ability of arbitration agreements to waive substantive rights, as well as generating more expansive guarantees for what employees and consumers should expect in their arbitrations.

2. Enacting restrictions to arbitration confidentiality provisions

In addition to helping plaintiffs coordinate and bring small claims, the *Sakkab* and *Blair* precedents may be able to cure the confidentiality problem at the heart of many arbitration agreements. Arbitration gag rules prevent other victims from being emboldened to come forward and future victims from being aware of the harmful behavior by a company or supervisor.¹⁴⁷ Some

Bosses. New York Has Noticed, BLOOMBERG (Sept. 29, 2017, 5:00 A.M.), <https://www.bloomberg.com/news/articles/2017-09-29/california-helps-workers-sue-their-bosses-new-york-has-noticed> [<https://perma.cc/8NL9-YGB2>] (describing the spread of PAGA laws across the country).

¹⁴⁴ It is entirely possible that these circuits could view the right to class action proceedings in an arbitration as a procedural right but view the right for one plaintiff to proceed through an arbitration individually while seeking remedies for other parties as a substantive right.

¹⁴⁵ See *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 829 (9th Cir. 2019) (“A state-law rule that preserves the right to pursue a substantively complex claim in arbitration without mandating procedural complexity does not frustrate the FAA’s objectives.”).

¹⁴⁶ See discussion *supra* Section II.A.1.

¹⁴⁷ See, e.g., *Wakabayashi & Silver-Greenberg*, *supra* note 16 (recognizing that “because [harassment] claims are often kept under wraps in confidential arbitration hearings . . . harassers often move easily to other jobs without warning to future victims” and noting the Equal Employment Opportunity Commission has found “forced arbitration ‘can prevent employees from learning about similar concerns shared by others in their work place.’”).

commentators additionally worry about the difficulty of doctrinal development in a field where the lion's share of cases is decided behind closed doors.¹⁴⁸ How can the contours of an evolving jurisprudence take shape if each decision is private and discrete? Although some elements of confidentiality may be ameliorated if a party seeks judicial confirmation of an arbitration award under federal law, it is not necessarily the case that this will provide the sort of notice and awareness that our legal system encourages for exposing wrongdoers.¹⁴⁹

In response to arbitral gag rules that conceal credibly accused parties from findings of fault, some states have proposed legislative solutions.¹⁵⁰ California's legislation, for instance, mandates that parties disclose the matter at issue, the name of the nonconsumer party, the number of times the nonconsumer party has appeared before the particular arbitration provider, and whether the arbitration was demanded pursuant to a predispute clause.¹⁵¹ Some scholars speculate that the FAA may preempt these types of laws outright.¹⁵² In light of Supreme Court precedent, their arguments are well founded, as the laws at issue lack general applicability and can thus be said to "single out" arbitration.¹⁵³ If these laws are found to directly target arbitration, the Ninth Circuit's complexity distinction cannot save them when challenged on preemption grounds.¹⁵⁴

While those specific attempts to curb arbitration gag rules may be preempted, application of the Ninth Circuit's cabined version of FAA preemption provides a more promising avenue for diminishing the presence of confidentiality provisions. Since the Supreme Court has previously alluded to a presumption of privacy and confidentiality in many bilateral arbitrations,¹⁵⁵ some defendants may claim that state abrogation of confidentiality interferes with a fundamental attribute of arbitration and is therefore preempted by the FAA.¹⁵⁶ Under the Ninth Circuit framework, however, a law restricting confidentiality provisions would be an instance where a plaintiff could gainfully employ the distinction between substance and procedure to avoid preemption concerns.

In order to successfully follow the Ninth Circuit's precedent, states should be exceedingly

¹⁴⁸ See, e.g., Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 408–09 (2016).

¹⁴⁹ See generally 9 U.S.C. § 13 (requiring the submission of the arbitration agreement, information regarding the appointment of the arbitrator, and a statement of the award).

¹⁵⁰ E.g., CAL. CIV. PROC. CODE § 1281.96(a) (West 2020); D.C. CODE ANN. § 16-4430 (West 2008); ME. REV. STAT. ANN. tit. 10, § 1394 (2010); MD. CODE ANN., COM. LAW § 14-3903 (West 2011).

¹⁵¹ See CIV. PROC. § 1281.96(a).

¹⁵² See, e.g., Lampley, *supra* note 3, at 1764.

¹⁵³ See *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017) ("Such a rule is too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment."). Note also that at least one commentator has questioned whether arbitration as a field can be directly regulated by state legislatures at all. See Lampley, *supra* note 3, at 1764 n.188 ("The general import of the FAA is that arbitration agreements cannot be treated with more hostility than regular contracts. But does that mean the State cannot regulate arbitration providers?").

¹⁵⁴ See *supra* Section II.A.1 (explaining how the first step of the FAA's preemption analysis would immediately preempt these laws).

¹⁵⁵ See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

¹⁵⁶ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1616 (2018) (explaining that the FAA's savings clause does not provide shelter for state "defenses targeting arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration'" (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 334 (2011))).

careful in drafting laws prohibiting confidentiality clauses. One Washington state law, for example, is fairly reckless in this regard by placing the protected right in a decidedly procedural posture. The statute reads that “[a] provision of an employment contract or agreement is against public policy and is void and unenforceable . . . if it requires an employee to resolve claims of discrimination in a dispute resolution process that is confidential.”¹⁵⁷ By positioning the transparency of the *process* as the protected right, the interference with the presumption of confidentiality flows from a procedural and not a substantive element. Therefore, the law may fall outside the Ninth Circuit’s carveout and risks preemption. Similarly, a New York law pertaining solely to discrimination claims establishes that “no employer . . . shall have the authority to include . . . in any . . . agreement . . . any term or condition that would prevent the disclosure of the underlying facts and circumstances to the claim or action. . . .”¹⁵⁸ Although it avoids a reference to its impact on dispute resolution procedures themselves (unlike the Washington law), the New York law’s focus on restricting employer action, as opposed to guaranteeing a substantive right to an employee, resembles a procedural restriction more so than a substantive right. It is therefore still likely that such a law would face a serious FAA preemption risk.

States could chart a safer course by modeling their legislation on a section of the NLRA that has been interpreted as a substantive guarantee against forced confidentiality.¹⁵⁹ The statute’s language—“Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”—is far closer to a substantive right than a procedural restriction.¹⁶⁰ According to the NLRB, Section 7 of the NLRA protects employees’ right to discuss any sexual harassment complaints they have against employers,¹⁶¹ exchange the terms of their wages,¹⁶² and bring complaints about their employment to the media.¹⁶³ A recent NLRB decision has further interpreted the NLRA to provide a substantive right that cannot be infringed by arbitration confidentiality clauses.¹⁶⁴ This decision is particularly relevant here, finding that the substantive nature of the right distinguished it from the right rejected in *Epic Systems*.¹⁶⁵ While the judge’s reasoning draws an important distinction between procedural and substantive rights, the opinion’s citation of *Epic Systems* is somewhat tenuous, as that decision did not address the

¹⁵⁷ WASH. REV. CODE ANN. § 49.44.085 (West 2018).

¹⁵⁸ N.Y. C.P.L.R. 5003-b (McKINNEY 2019).

¹⁵⁹ See 29 U.S.C. § 157 (“Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .”).

¹⁶⁰ *Id.*

¹⁶¹ See *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002), *enforced*, 63 Fed. Appx. 524, 525 (D.C. Cir. 2003) (invalidating a confidentiality rule barring employees from discussing sexual harassment complaints).

¹⁶² See *Waco, Inc.*, 273 N.L.R.B. 746, 748 (1984) (invalidating a rule barring employees from discussing wages).

¹⁶³ See *Case Farms of N.C.*, 353 N.L.R.B. 257, 260 n.12 (2008) (explaining that the NLRA “may encompass employee communications about labor disputes with newspaper reporters”); *Leather Center, Inc.*, 312 N.L.R.B. 521, 528 (1993) (“The Board has consistently held employees have a right under Section 7 of the [NLRA] to convey their complaints or grievances against their employers to representatives of the media. . .”).

¹⁶⁴ See *Pfizer, Inc.*, Case No. 10-CA-175850, slip op. at 9 (N.L.R.B. Mar. 21, 2019), <https://www.nlrb.gov/case/10-CA-175850> [<https://perma.cc/ANK3-V5QC>]; see also Greene & O’Brien, *supra* note 100, at 846–53 (discussing the *Pfizer* decision in great detail).

¹⁶⁵ See *Pfizer*, Case No. 10-CA-175850, at 9.

substantive/procedural distinction.¹⁶⁶ A more trenchant opinion would have distinguished this substantive right from the sort of procedural rights that have been previously preempted by the FAA.¹⁶⁷

A state interested in protecting workers from the restrictions of confidential arbitration should pass a law similar in substance to Section 7 of the NLRA and should use the Ninth Circuit's carveout to argue that any complexity or obstacles to arbitration caused by the legislation flow from the substance of the right itself. It would also be wise to carefully enumerate this substantive right to avoid the risk of a court reading it out of the statute, as the Supreme Court did to the NLRA's right to collective action in *Epic Systems*, and could do once again to the somewhat vague language of the NLRA.¹⁶⁸

B. Limits to the Application of the Ninth Circuit's Precedent

While exporting the Ninth Circuit's distinction between substantive and procedural complexity could lead to significant improvements over today's arbitration regimes, distinct limits to its application would likely stretch the precedent beyond its capacity.

1. Rejecting arbitration outright

One of the more drastic state initiatives to combat arbitration can be found in a California law forbidding employers from mandating that workers enter into arbitration agreements altogether.¹⁶⁹ The law prohibits employers from requiring the waiver of any rights, forums, or procedures that are otherwise guaranteed by state employment law.¹⁷⁰ This is a clear-cut instance of a state forbidding employers from altering dispute resolution procedures in a manner that is both inconsistent with *Concepcion* and not salvageable through the Ninth Circuit's carveout. The law attempts to skirt Supreme Court precedent by continuing to enforce arbitration agreements entered into willingly while establishing that employers may neither require such agreements nor retaliate against applicants who fail to sign them.¹⁷¹ It is unlikely that this law targeting arbitration through a "more subtle method"¹⁷² can avoid FAA preemption, as it pertains to purely procedural rights.¹⁷³ Foreseeably, this law has been challenged in federal court and preliminarily enjoined.¹⁷⁴

¹⁶⁶ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1628 (2018) ("Nothing in our cases indicates that the NLRA guarantees class and collective action procedures. . .").

¹⁶⁷ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

¹⁶⁸ See *Epic Sys.*, 138 S. Ct. at 1628.

¹⁶⁹ See CAL. LAB. CODE § 432.6(a) (West 2020); Alexia F. Campbell, *Hollywood and Silicon Valley Can No Longer Silence Women with This Contract Clause*, VOX (Oct. 11, 2019, 12:40 P.M.), <https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51> [<https://perma.cc/96C8-WTC6>].

¹⁷⁰ LAB. § 432.6(a).

¹⁷¹ See *id.* § 432.6(a)–(b).

¹⁷² *Epic Sys.*, 138 S. Ct. at 1622.

¹⁷³ State laws granting purely procedural rights that interfere with arbitration could not even survive the Ninth Circuit's preemption analysis. See *supra* Section I.B.2.

¹⁷⁴ See Complaint for Declaratory and Injunctive Relief, Chamber of Com. of the U.S. v. Becerra, No. 2:19-AT-01142 (E.D. Cal. Dec. 6, 2019); *Becerra*, No. 2:19-CV-02456-KJM-DB (E.D. Cal. Feb. 7, 2020) (enjoining the California law).

Other states have taken a more circumscribed approach to combatting arbitration by limiting their restrictions to cases involving sexual misconduct.¹⁷⁵ Many of these laws, passed in the wake of the #MeToo movement, acknowledge the significant danger that arbitration inflicts on women in the workforce.¹⁷⁶ In one of the first challenges to these laws, overzealous drafting led to the predictable preemption of a New York law.¹⁷⁷ The Southern District of New York dismissed arguments that the law should avoid preemption because it only targeted one specific type of arbitration as opposed to disfavoring arbitration generally.¹⁷⁸ The court's finding that the New York law was preempted by the FAA is entirely consistent with *Concepcion*'s analysis of FAA preemption, and a similar preemption verdict should be expected in the case against New Jersey's version of this law.¹⁷⁹ Even when designed narrowly, any legislation that directly targets arbitration will certainly fail the first step of an FAA preemption inquiry.¹⁸⁰

2. Securing a right to appeal

The lack of judicial review is a valid and common critique of arbitration, and a substantive right to appeal may seem like a desirable choice for additional legislation.¹⁸¹ Unfortunately, federal law limits the occasions when judicial review is permitted, and this limitation is so fundamental to arbitration that any attempt to guarantee such a right would conflict directly with the FAA.¹⁸²

The likelihood that a state law mandating a right to appeal would be preempted does not mean that it is impossible to write an arbitration agreement providing for a more substantial right to review.¹⁸³ It is theoretically feasible to write appellate procedures into an arbitration agreement, so long as the provisions are reasonably specific and review is conducted by subsequent arbitrators outside the judicial system.¹⁸⁴ Despite this possibility, such a guarantee does not appear to be a right that states could require under the aforementioned precedent.¹⁸⁵

¹⁷⁵ See MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018); N.J. STAT. ANN. § 10:5-12.7 (West 2019); N.Y. C.P.L.R. 7515(b) (MCKINNEY 2019); VT. STAT. ANN. tit. 21 § 495h(g) (West 2018).

¹⁷⁶ See Frances Kulka Browne & Erika Ghaly, *Mandatory Arbitration of Sexual Harassment Claims and FAA Preemption*, N.Y.L.J. (Aug. 19, 2019), <https://www.law.com/newyorklawjournal/2019/08/19/mandatory-arbitration-of-sexual-harassment-claims-and-faa-preemption/> [https://perma.cc/5BGR-MCU9].

¹⁷⁷ See *Latif v. Morgan Stanley & Co. LLC*, 2019 U.S. Dist. LEXIS 107020 (S.D.N.Y. June 26, 2019).

¹⁷⁸ See *id.* at *10.

¹⁷⁹ See *generally* N.J. Civ. Just. Inst. v. Grewal, 2020 U.S. Dist. LEXIS 127806 (D.N.J. July 21, 2020) (denying defendant's motion to dismiss).

¹⁸⁰ See discussion *supra* Section II.A.1.

¹⁸¹ See, e.g., Saxe, *supra* note 14.

¹⁸² See 9 U.S.C. § 10 (permitting judicial review only in circumstances that clearly undermine the legitimacy of the arbitration); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350–51 (2011).

¹⁸³ Merrill Hirsh & Nicholas Schuchert, *Writing Arbitration Clauses to Get the Arbitration You Want*, LAW360 (Aug. 9, 2016), <https://www.law360.com/articles/826544/writing-arbitration-clauses-to-get-the-arbitration-you-want> [https://perma.cc/2AVF-BJFL] (arguing that it would be possible to write a method of appeal into an arbitration agreement with a second arbitrator or panel of arbitrators reviewing the first decision for legal error or lack of substantial evidence).

¹⁸⁴ See *id.* But see *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008) (insisting that parties cannot expand judicial review under the FAA).

¹⁸⁵ See *supra* note 183.

C. The Ultimate Effect on Arbitration Agreements: Walking the Tightrope

While this Article argues that arbitration agreements are a net harm to workers, consumers, and civil society, states must take the existing legal landscape as it is and not how it ought to be. Legislation must be carefully tailored, both to avoid preemption and to decrease the risk of creating an easy case that is ripe for appeal to a court sympathetic to arbitration.

Increased state regulation on consumer and employee protections may eventuate in an outcome in which corporations find arbitration less attractive.¹⁸⁶ If arbitration awards require corporations to pay remedies to a representative group of victims, the resulting liability from these binding and unreviewable decisions would dramatically increase. Corporations would need to determine whether they were interested in designing the complicated terms of an agreement to allow PAGA claims and public injunctions or whether it would be more advantageous to abandon the process altogether and hope for a favorable decision in court.¹⁸⁷ While this trend would not prescribe the end of arbitration, the increased liability risk could have a measurable impact on corporate incentives to bind their employees and consumers to mandatory arbitration.¹⁸⁸ This prediction that companies will abandon arbitration once it becomes a liability was borne out by Amazon's recent decision to drop a mandatory arbitration provision from its consumer terms of service.¹⁸⁹ The decision came after 75,000 demands for arbitration inundated the retailer with millions of dollars' worth of filing fees.¹⁹⁰

Although a decrease in the total number of arbitration agreements would be beneficial to employees and consumers, this outcome cannot be the express or plainly discoverable objective of any state legislation.¹⁹¹ Once this objective becomes more than a beneficial byproduct of a state law, it would expose the law to immediate preemption.¹⁹² This Article in no way advocates for legislators to

¹⁸⁶ See Alison Frankel, *The 9th Circuit Just Blew Up Mandatory Arbitration in Consumer Cases*, REUTERS (July 1, 2019), <https://www.reuters.com/article/us-otc-injunction/the-9th-circuit-just-blew-up-mandatory-arbitration-in-consumer-cases-idUSKCN1TW3O0> [<https://perma.cc/RW7G-XAK4>] (“[C]orporations will be faced with the interesting choice of whether to attempt to set the terms of injunctive arbitration in order to avoid litigating class actions in court.”).

¹⁸⁷ See *id.* (explaining corporations' belief that classwide arbitration is tilted against companies, expensive, and unwieldy, and thus gives undue leverage to consumers).

¹⁸⁸ *Concepcion* contains some dicta that may be construed as disfavoring any rule that has a deterrent effect on the incentives to arbitrate. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 n.8 (2011) (“The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.”). Like other aspects of the decision, it is necessary to read these statements in light of *Mitsubishi* to understand the precedential limits. It simply cannot be the case that any state law making arbitration less attractive is immediately preempted, and appealing to the distinction between substantial complexity and procedural complexity is a viable and straightforward interpretation of this potential contradiction.

¹⁸⁹ Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000?st=wqwtogn3y1nywin&reflink=article_imessage_share [<https://perma.cc/3XXX-NBSK>].

¹⁹⁰ *Id.*

¹⁹¹ But see Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121 (2019) (arguing that states should pass legislation with the intent of deterring parties from entering into arbitration in the first place).

¹⁹² See *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (“The [FAA] also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (*oh so incidentally*) have the defining features

fabricate pretextual objectives that obscure their true intentions; instead, it urges states to recognize and emphasize the value and necessity of generally applicable protections from restrictive arbitration clauses. Mandatory arbitration will persist until Congress takes more direct action, but in the interim, consumers and employees deserve assurances that their substantive rights will not be stripped away. Protecting the right to discuss the terms of one's employment or the freedom to work together with other consumers to vindicate a wrong are beneficial ends unto themselves and are valuable safeguards in any contractual context. With mandatory arbitration becoming a fact of modern life,¹⁹³ states must provide the protections that those with diminished bargaining power cannot ensure for themselves.

CONCLUSION

Even as the prevalence of arbitration agreements seems inevitable for the foreseeable future, legislative protections can and must be implemented at the state level to counter their worst abuses. In the absence of bipartisan support for federal legislation and the limited reach of direct action, state legislatures have the greatest capacity to stem the tide of arbitration in the United States and restore the promise of just restitution to a class of mistreated workers and consumers.

The Ninth Circuit has offered a cure to a decade of detrimental judicial decisions and a blueprint for building a new generation of safeguards against rising corporate power and abuse. The complexity distinction is a logically sound and easily exported analysis that is compatible with established arbitration law in many jurisdictions. States have already shown that they are eager to intervene to combat excessive arbitration, but they must draft careful and precise legislation to ensure a lasting impact. The Ninth Circuit's cabined view of FAA preemption provides a guide to crafting legislation that accurately harnesses the power of the disparate, mistreated majority of which Vanina Guerrero is so emblematic—a majority that seeks to counter and expose a pattern of commercial misconduct that might otherwise proceed unabated.

of arbitration agreements.”) (emphasis added).

¹⁹³ See discussion *supra* Section I.A.