It has been over a decade since the Supreme Court declared that the Federal Arbitration Act preempts state-law policies that stand as an obstacle to enforcement of the class-banning arbitration clauses that companies tuck into standard-form contracts. In that time, plaintiffs' lawyers have tried challenging class action–banning arbitration provisions on myriad legal grounds, as well as pressing for federal and state legislation to undo the Court's ruling in AT&T Mobility LLC v. Concepcion. Neither strategy has borne much fruit—until now. In the past few years, congressional action has exempted specific categories of cases from mandatory arbitration, suggesting that an area-by-area attack on the arbitral edifice may be fruitful. More consequentially, in my view, the Supreme Court has cast substantial doubt on the “liberal federal policy favoring arbitration” upon which contemporary FAA jurisprudence rests. This is big news, suggesting that all judge-made, arbitration-specific rules created in the service of a supposed policy favoring arbitration are ripe for reexamination. One consequence, I show, is that the FAA must now be understood to exempt the contracts of all workers engaged in interstate commerce.

Meanwhile, entrepreneurial plaintiffs' firms have sought to force corporate defendants to make good on their contractual promises to bear the cost of arbitrating large numbers of nominally individual claims. By marketing broadly to would-be
claimants via social media and then financing the claimants’ portion of arbitral filing fees, these firms have filed thousands of simultaneous claims, forcing defendants to either settle or spend tens of millions of dollars on arbitral fees alone. At present, companies are groping for contractual tweaks to foreclose the risk of mass arbitration. But I expect those efforts will be thwarted by state unconscionability law in many states. And I also expect that companies will increasingly drop their arbitration clauses altogether and seek to implement standalone class action–waiver clauses, removing any pretense that the defense community was ever interested in arbitration, as opposed to class-action bans. But here, too, I think state unconscionability law will bring us back full circle to the state-by-state map that existed prior to Concepcion.

In short, there are reasons to believe that the hegemony of class-banning arbitration is unraveling before our very eyes.

INTRODUCTION ......................................................................................................................... 1064

I. IN CONGRESS .......................................................................................................................... 1069
   A. Early Jurisprudence Under the EFAA .................................................................................. 1074
   B. Charting a Legislative Course Forward ............................................................................. 1077

II. IN THE COURTS ...................................................................................................................... 1081
   B. Waiving Arbitration: Morgan v. Sundance ........................................................................ 1089
   C. California’s Private Attorney General Act: Viking River v. Moriana .................................. 1095

III. IN THE MARKET ...................................................................................................................... 1100
   A. The Backlash to Mass Arbitration ..................................................................................... 1105
   B. Backlash to the Backlash ................................................................................................... 1111
   C. Standalone Class-Action Waivers? .................................................................................... 1117

CONCLUSION ................................................................................................................................ 1123

INTRODUCTION

In 2011, the Supreme Court in AT&T Mobility LLC v. Concepcion upheld class action–banning arbitration clauses in standard-form contracts, adopting a staggeringly expansive view of the Federal Arbitration Act’s (FAA) preemptive power to foreclose “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”1 In the decade or so since that watershed decision, plaintiffs’ lawyers have actively mounted legal challenges to arbitration provisions on myriad grounds, as well as lobbying for federal and state legislation to reverse Concepcion.2 Neither strategy has borne much

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2 See infra Parts I and III (describing these developments).
fruit—until now. In the past few years, three distinct provocations have emerged from different corners of the legal universe—Congress, the courts, and the plaintiffs’ bar—each exposing weaknesses in arbitration’s otherwise impregnable façade.

First, in 2021, Congress enacted the bipartisan Ending Forced Arbitration in Sexual Assault and Sexual Harassment Act (EFAA), which amended the FAA by invalidating pre-dispute arbitration agreements relating to sexual harassment or assault disputes. The amendment—the first major legislative change to § 1 of the FAA in nearly a century—revealed to legislators that the wizened statute can withstand revision without damage to its core mission. The EFAA’s passage has also inspired bills seeking to eliminate forced arbitration of other claims, such as those alleging racial discrimination.

Second, in a series of recent decisions, the Supreme Court has placed meaningful restraints on class action—banning arbitration provisions and—more portentously—has disavowed that any “federal policy favoring arbitration” warrants the employment of special arbitration-preferring rules. The Court’s unanimous decisions in New Prime Inc. v. Oliveira and Southwest Airlines Co. v. Saxon, for example, bespeak a willingness to apply FAA § 1’s exemption for workers more broadly than precedents might suggest. In the wake of these rulings, plaintiffs are flocking to court with putative class and collective actions, testing whether their specific jobs satisfy the Court’s evolving standard for § 1-exempted transportation work.

But what may truly upend arbitration is the Court’s unanimous 2022 decision in Morgan v. Sundance, Inc. announcing that the FAA’s “policy favoring arbitration” does not authorize the invention of “special, arbitration-

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6 139 S. Ct. 532, 543-44 (2019) (applying the FAA § 1 exemption to truck drivers who were independent contractors).
7 142 S. Ct. 1783, 1787 (2022) (holding that airline employees are engaged in interstate commerce and therefore exempt under § 1 of the FAA).
8 9 U.S.C. § 1 (exempting from its ambit “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce”).
9 See, e.g., Singh v. Uber Techs., Inc., 67 F.4th 550, 559 (3d Cir. 2023) (“Incidental border crossings are insufficient if a class of workers is not typically involved with the channels of interstate commerce.”); Canales v. CK Sales Co., LLC., 67 F.4th 38 (1st Cir. 2023) (“[A]n employee of a retail services company may qualify as a transportation worker for purposes of section 1, based on the work that she actually performed.”). The Supreme Court recently granted certiorari in Bissonnette v. LePage Bakeries Park St., LLC to determine whether interstate transportation workers seeking exemption under FAA § 1 must “also be employed by a company in the transportation industry.” See Petition for a Writ of Certiorari at 1, Bissonnette v. LePage Bakeries Park St., LLC, No. 23-31 (filed July 17, 2023), cert. granted, 2023 WL 6319660 (Sept. 29, 2023).
preferring procedural rules." In rejecting a heightened burden for proving waiver of arbitration procedures as distinct from other procedures, the Court explicitly disavowed the existence of special thumb-on-the-scale rules favoring arbitration. This is big news, suggesting that all judge-made, arbitration-specific rules created in the service of a supposed policy favoring arbitration are ripe for reexamination.

The most provocative implications of the Court’s recent jurisprudence disavowing special arbitration-prefering rules lie in the employment area. It was only arbitration favoritism that caused the Court in Circuit City Stores, Inc. v. Adams to ignore the plain statutory text of FAA § 1, which is explicit in exempting from the coverage of the FAA all contracts of workers engaged in interstate commerce, in order to find the statute exempts only workers in some subset of transportation businesses. The disavowal of special arbitration-prefering rules compels the application of ordinary principles of statutory construction to the plain text of the FAA. As I will argue, under the sort of straightforward textualism the Court would apply in any other area, FAA § 1 spells the end of mandatory employment arbitration because it removes from the coverage of FAA § 2 all employment contracts that affect interstate commerce.

Finally, in Viking River Cruises, Inc. v. Moriana, the Court sought to resolve an apparent disjuncture between the FAA and California’s Private Attorney General Act (PAGA). Given the Court’s track record for striking down state statutes as preempted by the FAA, observers were understandably concerned that PAGA would not survive. But in a surprisingly narrow 8-1 decision authored by Justice Alito, the Court held only that the FAA mandates arbitration of an individual employee’s claims, leaving to the California courts the question of whether that individual employee may nonetheless bring a

11 Id. (“[T]he FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-prefering procedural rules. . . . The policy is to make arbitration agreements as enforceable as other contracts, but not more so.” Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. . . . The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.” (internal citations omitted)).
12 532 U.S. 105, 111 (2001) (holding that the FAA was enacted in “response to hostility of American courts to the enforcement of arbitration agreements” and that “to give full effect to this purpose, the FAA compels judicial enforcement of a wide range of written agreements”).
13 See infra notes 152–154.
representative PAGA claim in court. And, on July 17, 2023, just thirteen months after Viking River, the California Supreme Court in Adolph v. Uber Technologies, Inc. unanimously held that an employee retains statutory standing to bring a PAGA claim, even where her individual claims have been sent to arbitration. In the wake of Viking River and Adolph, state legislatures are free—for the first time since Concepcion—to enact legislation that allows private plaintiffs to litigate claims on behalf of workers, consumers, small businesses and others, notwithstanding class-banning arbitration provisions. A number of states have actively considered such laws in recent years, and that process appears likely to accelerate.

This third provocation stems not from government actors but from a marketplace teeming with entrepreneurial lawyers and litigation funders who have successfully exploited class-banning arbitration provisions by bringing “mass arbitrations.” These mass arbitrations involve filing hundreds or thousands of separate arbitration demands on behalf of similarly situated claimants alleging identical claims against companies like Uber, DoorDash, Chipotle, and Samsung. Confronted with the prospect of paying the lion’s share of arbitral filing and neutrals’ fees, many companies have added anti-mass-arbitration provisions to their standard-form contracts. Typically, these new provisions roll back companies’ offers to pay arbitral filing fees and install MDL-like procedures for “bellwethers” and “batching” claims, cobbled together a process that bears little resemblance to the one-on-one arbitration provisions that the Concepcion Court held are protected against state-law unconscionability rules by the FAA. The new generation of contractual rules that expressly provide for aggregate claiming surely drift beyond the protective bounds of the Court’s FAA-obstacle preemption jurisprudence, leaving these contractual provisions vulnerable to claims of unconscionability under pre-Concepcion case law.

These developments—the disavowal of special arbitration-preferring rules, the pathway for nonpreempted state legislation, the revitalization of state unconscionability law in protecting mass arbitration, and even the first tentative steps of Congress in carving out arbitration-free zones—portend an unraveling of the hegemonic arbitration edifice that has stood now for decades.

16 See 142 S. Ct. at 1924-25.
19 See infra Part III.
20 See infra Part III.
21 See infra Part III.
By “unraveling,” I mean to suggest we are more likely to witness a gradual unwinding of mandatory arbitration than a sudden and decisive collapse of the entire edifice. Despite the passage of the EFAA, Congress has not mustered the support needed to enact the Forced Arbitration Injustice Repeal Act (FAIR Act), which would invalidate any pre-dispute arbitration clause imposed in an employment, consumer, antitrust, or civil-rights dispute. But still, legislation like the EFAA not only chips away at the edifice but also platforms the problem, informing the public of harms caused by forcing litigants into the secret chamber of arbitration. The EFAA may also motivate federal agencies to promulgate rules barring forced arbitration. Case in point: the Consumer Financial Protection Bureau (CFPB) recently accepted a petition by consumer groups imploring the agency to promulgate a rule requiring that consumers be given “a meaningful choice on whether to use arbitration after a dispute arises.”

Of course, it would be odd to expect the current conservative majority on the Supreme Court to disavow its forty-year project of elevating the FAA into a “super-statute” capable of preempting state laws and eliminating aggregate litigation. And yet, I think that the Rubicon has been partly crossed by the disavowal of “special rules” for arbitration in Morgan. I am unfashionably optimistic that the Court—even as currently constituted—will see the textualist logic of reading § 1 to exempt from the FAA all employment contracts that implicate interstate commerce.

And outside of the employment space, I predict that class-banning arbitration clauses may end very much where they stood before Concepcion.

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22 Fewer than 5% of Supreme Court cases are legislatively overridden. Michael J. Nelson & Alicia Uribe-McGuire, Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions, 70 POL. RSCH. Q. 632, 632 (2017); see, e.g., Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (extending the scope of Title IX to override the Court’s decision in Grove City College v. Bell, 465 U.S. 555 (1984)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (modifying the statute of limitations for pay discrimination claims to directly overrule the Court’s decision in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007)).

23 See Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 2 (2019); Paul Bland, The Time to Ban Forced Arbitration Is Now, HILL (May 7, 2023, 3:00 PM), https://thehill.com/opinion/judiciary/3986551-the-time-to-ban-forced-arbitration-is-now/ [https://perma.cc/7WRA-SYUF] ("It isn’t the first time the house has considered—or passed—[the FAIR Act], but it has not previously passed in the Senate . . . .").


Corporate defense counsel, seeking protection from class-action liability without the risk of mass arbitrations, have two choices. They can adopt arbitration clauses that prescribe complex methods for handling aggregate claiming, in which case they forfeit the protection of *Concepcion*. Or they can simply abandon arbitration provisions entirely and, in their stead, institute standalone class-action bans—a blunter but more straightforward device. After all, despite the politicking and boosterism, corporations never *really* cared about arbitration—i.e., about providing counterparties access to quicker or cheaper forms of dispute resolution. The standalone class-action ban achieves their preferred ends—eliminating aggregate liability—without all the fuss. And the issue of whether standalone class-action bans are enforceable will vary by jurisdiction. States with policies that were preempted by *Concepcion* will hold standalone class-action bans unenforceable. Others won't. But either way, we return to the state-by-state status quo as it existed at the time of *Concepcion*.

I. IN CONGRESS

On the morning of November 16, 2021, four women arrived at the Rayburn Building in Washington, D.C., to testify before the House Judiciary Committee about the harassment, assault, fear, and retaliation they had experienced at the hands of their bosses and coworkers. A Hollywood actress, a first-year law student, an in-house attorney, and a car dealer each recounted, in graphic and unflinching detail, workplaces in which rampant sexual misconduct went unpunished and victims suffered the consequences.27 This was the first time victims of sexual assault and harassment had been called to testify about their experiences—and to ensure they could speak without fear of breaching arbitral confidentiality or nondisclosure agreements, the Judiciary Committee sent each witness a formal subpoena compelling her attendance.28

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28 See *Hearing*, supra note 27, at 3 (statement of Rep. Jerrold Nadler) (“The four victims who appear before us today are only here because a congressional subpoena has compelled their testimony. Without that subpoena, they would still be unable to share their stories.”).
The public hearing was a somber affair. Many members of Congress were already familiar with Fox News anchor Gretchen Carlson’s experience of sexual harassment suffered at the hands of Roger Ailes, her boss at Fox News, and his efforts to invoke arbitration when she sued him and the company. But most had not known the other victims’ stories, told that morning in quiet but insistent tones. Indeed, even ordinarily combative representatives who have steadfastly supported mandatory arbitration could find no purchase, their questions impotent against the gravity of the victims’ stories.

The hearing was covered extensively in the press, and to capitalize on the momentum it generated, Democrats on the House Judiciary Committee quickly advanced a bill nullifying pre-dispute arbitration agreements in all

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29 See Cramer, supra note 27 (“The witnesses were all women who worked in different fields and described a range of experiences of misconduct, from verbal harassment to outright assault. They testified for hours, under protection of congressional subpoenas.”).


31 See Hearing, supra note 27, at 90. Tatiana Spottiswoode, a first-year student at Columbia Law School, bravely testified about years of violent sexual abuse meted out by her boss, Zia Chishti, an entrepreneur who co-founded the company behind Invisalign dental braces. See id. at 13-14 (statement of Tatiana Spottiswoode). Representative Darrell Issa used his allotted time attempting to browbeat Spottiswoode into submission, an oratorical reenactment of her abuse:

Mr. Issa. [Y]ours is a case of a criminal attack outside the United States, and you were not bound by a nondisclosure . . . . Is that correct?

Ms. Spottiswoode. I had a nondisclosure in my original employment contract.

Mr. Issa. Did you go through binding arbitration?

Ms. Spottiswoode. Yes.

Mr. Issa. At the end of binding arbitration, they compensated you for this wrongdoing in some way, and you, thus, were bound by a nondisclosure?

Ms. Spottiswoode. I was bound by a nondisclosure before I even got to arbitration. I was compensated because I won my arbitration, which is so unusual because it’s so—

Mr. Issa. Okay. So, I just want to go through, why is it you think that taking that out wouldn’t be an improvement? . . . .

Ms. Spottiswoode. Because secrecy isn’t the only problem with forced arbitration.

Mr. Issa. No, no. That isn’t—

Ms. Spottiswoode. It’s also very unfair.

Mr. Issa. That isn’t the question.

Ms. Spottiswoode. I’m sorry.

Id. at 90. The intense timbre of this exchange was palpable in the room.

claims involving sexual-harassment or sexual-assault claims. The bill, H.R. 4445, passed the committee by a bipartisan vote of 27–14. It then sailed through the House by another overwhelmingly bipartisan vote of 335–97. The table was already set in the Senate, as the bill's original co-sponsors, Senators Kirsten Gillibrand and Lindsey Graham, had worked to keep forced arbitration on the legislative agenda, and an earlier version of the bill had passed the Senate Judiciary Committee by a unanimous bipartisan vote. Indeed, even legislators who had historically voiced strong opposition to efforts to eliminate forced arbitration supported H.R. 4445. On February 10, 2022, the Senate passed the bill by voice vote.

33 See David Horton, The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, 132 YALE L.J.E. 1, 9–11 (2022) (describing #MeToo-related “public pressure” and subsequent congressional interest in arbitration of sexual-misconduct claims). The original bill was co-sponsored by Senators Kirsten Gillibrand and Lindsey Graham in 2017 but failed to gain sufficient support. See S. 2203, 115th Cong. (2017). Then, Senator Gillibrand and Representative Cheri Bustos reintroduced in both the House and the Senate the version of the EFAA that would ultimately become law. See S. 2342, 117th Cong. (2021); H.R. 4445, 117th Cong. (2021). Interestingly, nothing in the text of the EFAA is limited to the employment context. Employment is certainly where the statute will have the greatest impact, but it may be useful in consumer or other settings, depending on the scope that courts allow it.


37 For example, Representative Ashley Hinson remarked that “[t]hose who have endured sexual assault and harassment deserve to have their voices heard on their own terms, but mandatory arbitration silences victims and stops predators from being held accountable. This bipartisan legislation ensures that victims can have their day in court if they so choose.” Bustos’ Bill to End Forced Arbitration for Sexual Assault and Harassment Passes House, STATES NEWS SERV. (Feb. 8, 2022), https://bustos.house.gov/bustos-bill-to-end-forced-arbitration-for-sexual-assault-and-harassment-passes-house/ [https://perma.cc/8XVA-FEMT] (last visited Nov. 7, 2023). Compare id., with Roll Call | 81: Bill Number: H.R. 963; U.S. HOUSE OF REPRESENTATIVES OFF. OF CLERK (Mar. 17, 2022, 4:38 PM), https://clerk.house.gov/Votes/202281 [https://perma.cc/65AB-6XK9] (Hinson voting against the FAIR Act). See generally Voting Record for Ashley Hinson from Iowa, IONCONGRESS.COM, https://ioncongress.com/index.php?page=Vote&member_id=H001091&first_name=Ashley&last_name=Hinson&state=IA [https://perma.cc/82Z3-UH75] (last visited Feb. 23, 2024). See also Kathleen McCullough, Mandatory Arbitration and Sexual Harassment Claims: MeToo- and Time's Up-Inspired Action Against the Federal Arbitration Act, 87 FORDHAM L. REV. 2653, 2677 (2019) (observing that arbitration advocates “were hesitant to publicly denounce [the bill] for fear of criticism that they were silencing victims of sexual harassment”).

38 See Bonnie Johnston, Reaching Across the Aisle to End Forced Arbitration, 58 TRIAL MAG. 60, 60 (2022) (“The Senate . . . had advance[ed] the bill after a unanimous vote in the Senate Judiciary Committee. Not one senator spoke out against the bill during the committee markup, and a
On March 3, 2022, President Joe Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 into law. 39 The signing ceremony, held in the East Room of the White House, was attended by the five survivors whose emotional testimonies had played such a large part in the law’s passage. Speaking directly to them, the President declared it a “momentous day for justice and fairness in the workplace.” 40 Other legislators echoed the view that the EFAA represented “one of the most significant changes to employment law in years.” 41

Behind the scenes, the moment was bittersweet. On the one hand, after more than a decade of pro-arbitration decisions out of the Supreme Court and nearly a dozen congressional hearings examining the effect of those decisions on American workers and consumers, Congress had finally intervened. 42 And that itself was important, as a decade of judicial decisions preempting state law efforts to eliminate forced arbitration of sexual misconduct claims had made plain that federal legislation was necessary. 43

See also Horton, supra note 33, at 11 (“[T]he bill sailed smoothly through the legislative process”.


Numerous versions of the Arbitration Fairness Act (AFA) and the FAIR Act—which together sought to preclude arbitration in antitrust, consumer, civil rights, and employment cases—routinely died in committee. See, e.g., Arbitration Fairness Act of 2011, S. 987, 112th Cong.; Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019); Forced Arbitration Injustice Repeal Act, S. 610, 116th Cong. (2019); see also Myriam Gilles, The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans, 86 FORDHAM L. REV. 2223, 2225 (2018) (“[T]he AFA has never once made it out of committee and is surely no closer to enactment in today’s political environment.”).

Amidst the #MeToo movement, several state legislatures passed laws barring arbitration of sexual harassment claims. See, e.g., CAL. LAB. CODE § 432.6 (West 2023) (effective 2020); 820 ILL. COMP. STAT. § 96/1-25 (2023) (effective 2020); N.J. STAT. ANN. § 10:5-12.7 (West 2023) (effective 2019); N.Y. C.P.L.R. § 7515 (McKinney 2023) (effective 2019); WASH. REV. CODE § 49.44.085 (2023) (effective 2018); VT. STAT. ANN. tit. 21, § 495b (2023) (effective 2018). A number of these laws were later deemed preempted by the FAA. See, e.g., Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023) (invalidating the California statute as preempted by the FAA); Antonucci v. Curvature Newco, Inc., 270 A.3d 1088, 1091 (N.J. Super. Ct. App. Div. 2022) (finding the New Jersey statute preempted by the FAA); Latif v. Morgan Stanley & Co., No. 18cv11528, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019) (invalidating the New York statute as preempted by the FAA) (2018); see also Hearing, supra note 27, at 68 (statement of Myriam Gilles) (explaining that state laws limiting the ability of employers ability to compel arbitration of sexual harassment and assault claims—while commendable—were “exceedingly vulnerable to federal preemption” and that
Thus, in the minds of some, the EFAA represented “a milestone in the #MeToo movement”—a recognition that the silence surrounding sexual harassment and assault in the workplace was itself harmful as it “shields predators instead of holding them accountable.”

On the other hand, the EFAA was far narrower than the comprehensive statute—the FAIR Act—that had long been the real focus of arbitration-reform advocacy. The FAIR Act would ban mandatory, pre-dispute arbitration agreements in all types of employment disputes—not just claims of sexual assault and sexual harassment—along with consumer, antitrust, and civil-rights disputes. By carving out sexual misconduct, the EFAA resembled prior “piecemeal” legislation enacted to eliminate “mandatory arbitration clauses in certain instances or as against certain narrowly drawn claimants.”

While the EFAA may have initially been met with mixed reviews, its true reformist potential lay in interpretive questions concerning the statute’s breadth and scope—questions that were explicitly left for courts to later


46 See supra note 42 (describing the FAIR Act).


48 Gilles, supra note 42, at 2225.

untangle. Of course, a great many federal laws are enacted with the implicit understanding that their details will be resolved by judicial application of legislative text to real-world facts. But the EFAA is distinctive, as it completely disrupts prior understandings of the judicial role in determining the availability of arbitration. For decades before its passage, courts had been repeatedly cautioned that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” But in the wake of this amendment to the FAA, that admonition is no longer apt, and courts now find themselves enjoying a great deal of discretion on these matters.

A. Early Jurisprudence Under the EFAA

The EFAA provides, in relevant part, that “no predispute arbitration agreement . . . shall be valid or enforceable with respect to a case which is filed under Federal [or] State law and relates to the sexual assault dispute or the sexual harassment dispute.” In effect, the EFAA renders arbitration agreements voidable at the election of a plaintiff alleging sexual harassment or assault. But the statute does not explain what qualifies as a “case” that “relates to” a sexual-assault or sexual-harassment dispute. For instance,

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50 See 9 U.S.C. § 402(b) (“The applicability of [the EFAA] to an agreement to arbitrate and the validity and enforceability of an agreement to which [the EFAA] applies shall be determined by a court, rather than an arbitrator . . . .”).

51 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); see also Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218 (1985) (“By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”).


54 See 136 Stat. at 26-27 (codified at 9 U.S.C. §§ 401-402); 168 CONG. REC. S626 (daily ed. Feb. 10, 2022) (statement of Sen. Richard Durbin) (“[T]he EFAA ensure[s] that every survivor has the choice to go to court . . . and give[s] survivors a choice of whether or not to bring a claim in court after the sexual . . . harassment claim has arisen, notwithstanding the presence of a forced arbitration clause.”).

55 This question becomes even more difficult where the arbitration clause in question is drafted very broadly. See, e.g., Porcelli v. JetSmarter, Inc., 19 Civ. 2537 (PAE), 2019 WL 2371896, at *2 (S.D.N.Y. June 5, 2019) (granting motion to compel where agreement provided for arbitration of “[a]ny claim or dispute between the parties and/or against any agent, employee, successor, or assign of the other, whether related to this Agreement, any of the Terms and Conditions or the relationship or rights or obligations contemplated herein”); Kuchinsky v. Curry, 09 Civ. 00299(DLC), 2009 WL 1492225, at *2 (S.D.N.Y. May 28, 2009) (granting motion to compel where agreement provided that
would claims sounding in personal injury, discrimination, or retaliation that accompany sexual harassment or assault be subject to the statutory ban on arbitration? Are other statutorily proscribed harms—e.g., those stemming from racism, ableism, ageism—within the EFAA’s reach? If not, does the EFAA contemplate claim-splitting, wherein a plaintiff would litigate her sexual-harassment claims in court but arbitrate other workplace violations in a private arbitral hearing?\textsuperscript{56}

As of this writing, only a handful of federal district courts have engaged with these questions. For instance, in \textit{Johnson v. Everyrealm}, a case brought by a black male employee alleging both sexual and racial harassment in the workplace, the court denied the defendant’s motion to cleave the case in two and dispatch the race claim to arbitration.\textsuperscript{57} Reasoning that a “case,” as that term is used in the EFAA, encompasses an \textit{entire} legal proceeding, the court held that once a claim of sexual harassment is plausibly pled, all plaintiff’s claims remain in court.\textsuperscript{58} In support of this conclusion, the court observed that Congress, in enacting the EFAA, “amended the FAA directly,” which reinforces Congress’s intent to override—in the sexual harassment context—the FAA’s background principle that, in cases involving both arbitrable and

\textsuperscript{56} The law generally frowns upon claim-splitting. \textit{See}, e.g., \textit{Curtis v. Citibank, N.A.}, 226 F.3d 133, 138-39 (2d Cir. 2000) (explaining that in order to protect parties from “the vexation of concurrent litigation over the same subject matter,” the general rule holds that a plaintiff has “no right to maintain two actions on the same subject in the same court, against the same defendant at the same time” (citation omitted)); \textit{AmBase Corp. v. City Investing Co.}, 326 F.3d 63, 73 (2d Cir. 2003) (justifying the rule against claim-splitting on the grounds that it is “fairer to require a plaintiff to present in one action all of his theories of recovery relating to a transaction, and all of the evidence relating to those theories, than to permit him to prosecute overlapping or repetitive actions in different courts or at different times” (citation omitted)).

\textsuperscript{57} \textit{657 F. Supp. 3d 535, 539-40 (S.D.N.Y. 2023)}. Alternatively, the defendants argued that, should the court find that the plaintiff’s allegations of discrimination based on sex were subject to the EFAA, “those claims should be stayed pending the outcome of the arbitration” of the remainder of plaintiff’s claims. \textit{See Memorandum of Law in Support of Defendants Everyrealm Inc. (f/k/a Republic Realm Inc.), Julia Schwartz, and Janine Yorio’s Motion to Compel Arbitration at 14-15, Johnson v. Everyrealm, 657 F. Supp. 3d 535 (S.D.N.Y. 2023) (No. 1:22-cv-06669(PAE)(GWG)) (“Arbitrable claims accordingly predominate the dispute. In light of the foregoing, the Court should, respectfully, stay any potential non-arbitrable claims while arbitration is pending.”).}

\textsuperscript{58} \textit{Johnson}, \textit{657 F. Supp. 3d} at 558. The court observed that the plain text of the EFAA clearly “keys the scope of the invalidation of the arbitration clause to the entire ‘case’ relating to the sexual harassment dispute [and] does not limit the invalidation to the claim or claims in which that dispute plays a part.” \textit{Id.; see also id. at 560 (“Congress, in enacting the EFAA, thus can be presumed to have been sensitive to the distinct meanings of the terms ‘case’ and ‘claim.’”). A number of courts have adopted \textit{Johnson’s} approach. \textit{See}, e.g., \textit{Turner v. Tesla, No. 23-cv-02451-WHO}, 2023 WL 6150805, at *1 (N.D. Cal. Aug. 11, 2023) (“[W]hile the two other claims are not strictly sexual harassment claims, their resolution is intertwined with the resolution of the sexual harassment claims. Accordingly, the EFAA renders the parties’ arbitration agreement unenforceable in Turner’s entire case . . . .”).}
non-arbitrable claims, “the former must be sent to arbitration even if this will lead to piecemeal litigation.”

The Johnson court emphasized that the EFAA applies only if a plaintiff alleges plausible claims of sexual harassment. Accordingly, in a companion case decided on the same day, Yost v. Everyrealm, the court found the plaintiff had failed to carry its pleading burden. Clarifying that an employee cannot tack on an “implausibly pled” sexual-harassment claim in order to avoid arbitration of other claims, the court held the EFAA was not implicated and dismissed the Yost complaint in its entirety.

By contrast, a handful of courts have been unperturbed by the specter of claim-splitting created by selective application of the EFAA. Relying on Supreme Court decisions dating back to the 1980s announcing that litigants may have to tolerate greater inefficiency, wasted resources, and higher costs for the sake of arbitration, these courts have fragmented cases into separate judicial and arbitral parts. But these decisions ignore the legislative history of the EFAA, which reveals the drafters’ deliberate intent not to divide cases by sending some claims from the same case into arbitration. Several senators, including a lead sponsor of the EFAA, addressed this precise issue during debates leading up to its passage, stating that keeping cases whole “is exactly what we intended the bill to do.” Senator Gillibrand explained:

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59 Johnson, 657 F. Supp. 3d at 558 (“[I]f a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation . . . . A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration.” (quoting KPMG LLP v. Cocchi, 565 U.S. 18, 19 (2011))).

60 Id. at 551.

61 Yost v. Everyrealm Inc., 657 F. Supp. 3d 563, 579-83 (S.D.N.Y. 2023). The Yost plaintiff brought claims against the same employer as in Johnson for gender and disability discrimination, pay discrimination, and retaliation under federal, New York state, and New York City law—but did not plead sexual harassment. Id. at 556.

62 Id. at 567. The court observed that “requiring a sexual harassment claim to be capable of surviving dismissal at the threshold of a litigation fully vindicates the purposes of the EFAA.” Id. at 586.

63 See, e.g., Silverman v. DiscGenics, Inc., No. 2:22-cv-00354-JNP-DAO, 2023 WL 2480054, at *3 (D. Utah Mar. 13, 2023) (enforcing the parties’ arbitration agreement “even if doing so requires some claims to be resolved in arbitration while other closely related claims are litigated in court” (citing KPMG, 565 U.S. at 19)); Mera v. SA Hospitality Grp., LLC, 1:23-cv-03492 (PGG) (SDA), 2023 WL 3791712, at *4 (S.D.N.Y. June 3, 2023) (finding that plaintiff had to resolve his wage and overtime claims in arbitration, while his sexual-orientation claims would remain in court pursuant to the EFAA).

64 Silverman, 2023 WL 2480054, at *3 (holding that the FAA requires district courts to compel arbitration “even where the result would be the possibly inefficient maintenance of separate proceedings in different forums” (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985)); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 20 (1983) (“[R]elated federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.”).

When a sexual assault or sexual harassment survivor files a court case in order to seek accountability, her single case may include multiple claims. . . . But it is . . . essential that all the claims related to the sexual assault or harassment can be adjudicated at one time . . . . We don’t want to have to make a sexual assault or harassment victim relive that experience in multiple jurisdictions.66

In addition, Senator Dick Durbin, Chair of the Senate Judiciary Committee, expressed (without contradiction from any of his Republican colleagues) his understanding of the statute’s operation: “So to clarify, for cases which involve conduct that is related to a sexual harassment dispute or sexual assault dispute, survivors should be allowed to proceed with their full case in court regardless of which claims are ultimately proven. I am glad that is what this bill provides.”67

B. Charting a Legislative Course Forward

While questions surrounding the proper interpretation of the EFAA may continue to wend their way through the courts, one thing seems clear: the background “liberal federal policy favoring arbitration”68 against which the FAA has traditionally been interpreted is no longer as favorable as it once was. This shift in mindset suggests that the passage of the EFAA may spur future legislative action.69 Indeed, on May 2, 2023, Senator Cory Booker and Representative Colin Allred introduced a bicameral bill that would end the practice of forcing individuals who have experienced racial discrimination into arbitration.70 As one co-sponsor of the bill declared, “[V]ictims of sexual assault and harassment should have the right to sue in a court of law, rather than being forced into the secretive and pro-employer arbitration process.

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66 Id. (emphasis added).
68 Moses H. Cone, 460 U.S. at 24.
69 At the signing ceremony for the EFAA, Vice President Kamala Harris declared that “our administration will work with Congress on broader forced arbitration legislation . . . [a]nd we will . . . also protect the rights of workers in cases of wage theft, racial discrimination, and unfair labor practices.” Vice President Kamala Harris, Remarks by Vice President Harris at Signing of H.R. 4445, “Ending the Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021” (Mar. 3, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/03/remarks-by-vice-president-harris-at-signing-of-h-r-4445-ending-the-forced-arbitration-of-sexual-assault-and-sexual-harassment-act-of-2021/ [https://perma.cc/3UF6-CYCB].
The time has come for Congress to give that same protection to those alleging racial discrimination.”71 A month later, Senators Kristen Gillibrand, Lindsay Graham, and Richard Durbin introduced another bill, the Protecting Older Americans Act of 2023, prohibiting arbitration of age-discrimination claims.72 At a press conference announcing this bipartisan effort, its sponsors remarked that the proposed legislation “builds on the lawmakers’ success” to enact the EFAA.73

But not all observers are so sanguine about the prospects for future legislation. Some worry that, having at long last enacted the EFAA, members of Congress may have lost the political will to authorize broader legislation.74 After all, it took decades of hearings, testimony, and lobbying to build support for this relatively narrow amendment to the FAA—how much more effort would it take to enact the FAIR Act? History teaches that even auxiliary efforts to limit the reach of the FAA have failed. Take, for instance, the Civil Rights Procedures Protection Act, which sought to amend several specified statutes to exempt them from arbitration. Senator Russ Feingold introduced this bill in every Congress from 1994 to 2001,75 entreating his colleagues to “help restore the spirit of our nation’s civil rights . . . laws”—laws that Congress itself enacted and presumably intended to be enforced.76 But despite Feingold’s repeated calls to action, the bills never made it out of

71 Id. (quoting Rep. Hank Johnson).
committee. In recent decades, numerous other bills have likewise been aimed at amending the FAA or regulating arbitration.77

This persistent congressional inaction on arbitration has ceded tremendous authority to the Supreme Court, allowing a thin majority of Justices to dictate the permissible bounds of compulsory waivers of public rights via private contract. On the one hand, this dynamic is mundane: in numerous areas of public policy, political scientists observe the modern Court amassing greater political power as Congress becomes increasingly paralyzed by hyper-partisan gridlock.78

But on the other, the current Court lacks broad public support, making it a poor proxy for representative government. Researchers have documented a historic dip in the public’s approval of the Court, “the largest decline in legitimacy that’s ever been registered, through dozens and dozens of surveys using the same indicators,” according to one observer.79 Whatever its causes—ideological and unpopular decisions, ethical gaffes by individual Justices, a general deterioration in the public’s trust for government—this declining institutional credibility severely weakens the Court vis-à-vis Congress.80

Indeed, one study examining congressional overrides of Supreme Court decisions from 1973 to 2010 demonstrated that “a massive change in the court’s public approval can make a congressional override of a particular decision


78 See, e.g., German Lopez, A Powerful Court, N.Y. TIMES (June 30, 2022), https://www.nytimes.com/2022/06/30/briefing/supreme-court-us-democracy.html [https://perma.cc/BSC4-CLDP] (“Congress could pass a federal law guaranteeing access to abortion in the first trimester, which most Americans favor. Or Congress could pass laws giving the E.P.A. clearer authority to deal with climate change. Neither has happened... The courts fill the void.”).


80 Cf. Zack Beauchamp, What Happens When the Public Loses Faith in the Supreme Court?, VOX (June 26, 2022, 11:01 AM), https://www.vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe [https://perma.cc/AC2P-Q4YW] (observing “something vital about the Supreme Court: It only has power inasmuch as people believe it does. Constitutionally speaking, the Court does not have the hard authority of the presidency or Congress. It cannot deploy the military or cut off funding for a program. It can order others to take actions, but these orders only hold force if the other branches and state governments believe they have to follow them. The Court’s power depends on its legitimacy—on a widespread belief, among both citizens and politicians, that following its orders is the right and necessary thing to do”).
more than 100 percent more likely.”
Recent polls indicate that we are, indeed, witnessing such a “massive change” in the Court’s public approval—and this falling esteem should signal to members of Congress that FAA precedents, among other policy areas, can be legislatively overridden without fear of electoral backlash.

Whether this message will be fully internalized by members of Congress, leading to real action on the FAIR Act, is difficult to predict. In the meantime, I expect sympathetic federal legislators will contribute to arbitration’s unraveling by platforming the problem—i.e., by putting forth legislation and holding hearings that lay bare the individual and societal harms caused by forcing litigants into the secret chamber of arbitration and sensitizing the public to these harms. Along the way, individual members of Congress—including some Republicans—may forcefully signal a willingness to amend the FAA, a threat which in itself may lead corporate defense counsel to back away from the most egregious forms of forced arbitration.

Congressional activity in this space may also embolden federal agencies to examine the use of arbitration provisions within their scope of authority. The CFPB, for instance, is facing pressure to issue a rule requiring that financial contracts offer consumers a post-dispute choice to opt into arbitration (as opposed to the imposition of pre-dispute, mandatory arbitration). This rule, like the agency’s broader effort to eliminate forced arbitration back in 2017, will likely face considerable opposition by industry.

82 Id. at 638 (“Congress also responds to changes in the court’s public support, becoming more likely to nullify the court’s policies when the court’s own public support is low.”).
83 President Barack Obama’s 2014 Executive Order barring federal contractors from imposing forced arbitration clauses on their employees had a similar effect of “nudging” federal agencies to act. See Exec. Order No. 13673, 79 Fed. Reg. 45309 (Aug. 5, 2014) (ordering agencies to require post-dispute consent by the employee or contractor to arbitrate any “sexual assault or harassment” claims for any contract exceeding one million dollars). For instance, in 2016, the Centers for Medicare and Medicaid Services (CMS) promulgated a rule barring nursing homes from Medicare and Medicaid programs unless they eliminated forced arbitration provisions in their agreements with residents. 42 C.F.R. § 483.70(n) (2017). This rule, as well as the Obama Executive Order, was subsequently rescinded during the Trump administration. See 42 C.F.R. § 483.70(n) (2019) (requiring facilities only to comply with certain safeguards should they ask residents to enter binding arbitration agreements); Exec. Order No. 13782, § 1, 82 Fed. Reg. 15607 (Mar. 30, 2017) (revoking the Fair Pay and Safe Practices Executive Order of July 31, 2014).
But the CFPB may well interpret Congress’s recent efforts to ban arbitration in specific areas as legislative signals of support for the agency reentering the fray.\(^{86}\)

In sum, Congress will pull at the threads of the modern arbitral framework by expressing displeasure with the Court’s jurisprudence, gathering evidence of abuses, and possibly spurring parallel actions by federal agencies. But arbitration’s unraveling will likely not come about as a result of federal legislation or regulation; rather, as the next two Parts reveal, the demise of arbitration requires other forces to coalesce.

II. IN THE COURTS

In 1983, some 58 years after the enactment of the FAA, the Supreme Court announced a “federal policy favoring arbitration.”\(^{87}\) In *Moses H. Cone*, the Court held that, “as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”\(^{88}\) In support of this proposition, the Court pointed to a series of lower court decisions from the 1970s favoring arbitration as a mechanism to clear crowded dockets.\(^{89}\) The *Moses H. Cone* Court also relied on decisional law applying the Court’s own prior decisions in the context of the Taft–Hartley Act, which

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\(^{86}\) Cf. William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 1994 LAW & CONTEMP. PROBS. 75 (suggesting that Congress can send “legislative signals” to agencies in many ways, including through oversight hearings, revised appropriations levels, and informal contacts).


\(^{88}\) *Moses H. Cone*, 460 U.S. at 24-25 (emphasis added).

\(^{89}\) Id. at 25 n.31. In his concurring opinion in *Calderon v. Sixt Rent a Car, LLC*, Judge Kevin Newsom carefully explains how, in the 1970s, “many courts almost simultaneously developed the same pro-arbitration canon through an aggressively purposivist reading of the FAA. They reasoned that whatever its text says, ‘the policy of the Federal Arbitration Act is to encourage arbitration and to relieve congestion in the courts.’” 5 F.4th 1204, 1217 (11th Cir. 2021) (Newsom, J., concurring) (quoting Seaboard Coast Line R. Co. v. Nat’l Rail Passenger Corp., 554 F.2d 657, 660 (5th Cir. 1977)); see also *Hanes Corp. v. Millard*, 531 F.2d 585, 598 (D.C. Cir. 1976) (explaining that a presumption in favor of arbitration “implies several important policies,” like alleviating “court congestion” and avoiding “delay[s] in dispute resolution”); Gen. Guar. Ins. Co. v. New Orleans Gen. Agency, Inc., 427 F.2d 924, 928 (5th Cir. 1970) (“[A]ny doubts as to the construction of the [FAA] ought to be resolved in line with its liberal policy of promoting arbitration . . . to help ease the current congestion of court calendars.”).
expressly provides that privately agreed-upon dispute-resolution procedures represent the “desirable method” for settling organized labor disputes. As Judge Newsom of the Eleventh Circuit has pointed out, “a surprising number of courts pretty nakedly transplanted the [arbitration favoritism] canon from an altogether different statute”—i.e., Taft–Harley.

Over the forty years since Moses H. Cone, the “federal policy favoring arbitration” has gone largely unquestioned in the dozens of Supreme Court cases addressing the FAA, including some twenty-one decisions since the 2010–2011 term alone. Repetition breeds automaticity: the lower federal courts, having fully internalized the lesson of FAA dominance, have echoed this refrain in more than three thousand decisions over the same time period—an overwhelming number of which are rulings that compel arbitration or reverse the failure of a lower court to do so. Predictably (and as predicted), this “arbitration favoritism” has fully destabilized the

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90 Pub. L. 80-101, § 203(d), 61 Stat. 136, 154 (1947) (codified at 29 U.S.C. § 173(d)). Under Taft–Harley, the Court has long held disputes must be arbitrated “unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582–83 (1960).

91 Calderon, 5 F.3d at 1216; see also id. at 1217 n.2 (citing Margaret L. Moses, Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress, 34 FLA. ST. U. L. REV. 99, 123 (2006) (noting that the federal judiciary “may have indiscriminately superimposed on the FAA the national labor policy favoring collective bargaining agreements”).

92 Not all of the Court's cases overtly reflect a favoritism policy. Some, like Kindred Nursing Ctrs. Ltd. P'ship v. Clark, recognize that the FAA merely establishes an "equal-treatment principle." 137 S. Ct. 1421, 1426 (2017). In others, it falls to the dissent to point out the favoritism policy that is at work. Coinbase, Inc. v. Bielski, 143 S. Ct. 1915, 1924 (2023) (Jackson, J., dissenting).


94 As of February 2024, a Westlaw search of "liberal federal policy favoring arbitration" in the federal district and circuit courts since 2010 resulted in 3,470 cases. Further refining the search by "motion type" using Westlaw’s “precision filters” results in 508 motions to compel arbitration, 148 motions to stay proceedings pending arbitration, 19 motions to vacate an arbitration award, and 14 motions to confirm an arbitration award. Switching the filter to “legal issue” results in 370 decisions relating to enforceability of arbitration provisions, 237 relating to “arbitration proceeding,” 79 on waiver of the right to arbitrate, and 24 cases on enforcing arbitration awards.

aggregate-litigation ecosphere,\textsuperscript{96} consigning huge swaths of claims to individual arbitration and all but ensuring that the vast majority of claimants will never pursue their disputes in any forum.

But the arbitration-favoritism policy of Moses H. Cone—-the substantive canon that instructs courts to resolve “any doubts” in favor of arbitration—appears ripe for reexamination. Unlike the type of canon that helps readers understand the meaning of text (usually referred to as a “semantic” or “linguistic” canon), a substantive canon is a principle that “instruct[s] courts to favor certain substantive policies in interpreting that text.”\textsuperscript{97} And some particularly influential commentators view substantive interpretive canons with great skepticism. Then-Professor Amy Coney Barrett warned that substantive interpretive canons “are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”\textsuperscript{98} Then–Circuit Judge Brett Kavanaugh made a similar point in a 2016 Harvard Law Review article.\textsuperscript{99} Arguably, the textualist orthodoxy of the current Court places the Moses H. Cone doctrine in jeopardy.

And there are other reasons to expect that the doctrinal hegemony ushered in by Moses H. Cone is imperiled. In three decisions from the 2021–2022 term and one from 2019, the Justices have pulled back from their pro-arbitration jurisprudence.\textsuperscript{100} For the first time since the displacement of Wilko v. Swan in the 1980s, the Justices have declined to enforce the terms of arbitration clauses urged upon them by corporate counsel.\textsuperscript{101} And they have

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\item \textsuperscript{97} Calderon v. Sixt Rent a Car, LLC, 5 F.4th 1204, 1219 (11th Cir. 2021) (Newsom, J., concurring); see also Caleb Nelson, What Is Textualism?, 91 VA. L. REV. 347, 393–94 (2005) (distinguishing “descriptive” canons that “help interpreters discern the enacting legislature’s likely intent” from “normative” canons that “represent value choices by the Court”); William Baude & Stephen E. Sachs, The Law of Interpretation, 130 HARV. L. REV. 1079, 1084, 1123 (2017) (distinguishing “linguistic” canons that reflect “linguistic practices” from “legal” canons that derive their validity from their “status in the legal system” and “higher-order rules and practices”).
\item \textsuperscript{98} Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. REV. 109, 123–24 (2010).
\item \textsuperscript{99} See Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 HARV. L. REV. 2118, 2121, 2144 (2016) (arguing that a court should first apply “semantic” canons to interpret a law, and only if the text remains ambiguous, apply “substantive” canons or legislative history).
\item \textsuperscript{100} New Prime v. Oliveira, 139 S. Ct. 532 (2019); Sw. Airlines v. Saxon, 142 S. Ct. 1783 (2022); Viking River Cruises v. Moriana, 142 S. Ct. 1906 (2022); Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).
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done so four times in recent terms—three unanimous decisions and another 8–1. One of these cases, *Morgan v. Sundance,*\(^\text{102}\) directly questions whether a “federal policy favoring arbitration” exists at all. And the others place meaningful restraints on class action-banning arbitration provisions and—more significantly—expose substantial fissures in the arbitral firmament.\(^\text{103}\)

If the arbitration jurisprudence of recent decades is to unravel, the threads on which plaintiffs might fruitfully pull have now been exposed by the Court itself. I begin with the employment-law thread, where the Court’s recent decisions were modest, but the goals of plaintiffs’ counsel should be anything but. In particular, I believe the time could be ripe for a sweeping challenge that would establish—as I submit Congress both intended and directed—that virtually all employment cases be exempted from arbitration under FAA § 1.

A. FAA § 1: New Prime v. Oliveira and Southwest v. Saxon

While the FAA provides that contractual provisions calling for disputes to be submitted to arbitration shall be enforced, it contains important exceptions. One such exception appears right up top in § 1, providing 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.”\(^\text{104}\)

Read literally, § 1 provides that the FAA does not cover arbitration clauses rooted in the employment contracts of “workers engaged in foreign or interstate commerce.” On a plain-meaning construction, the provision is pellucid: it is not limited to workers in transportation industries but expressly includes “any other class of workers engaged in foreign or interstate commerce.” And even if one were to venture beyond the confines of textualism, the plain meaning of § 1 is reinforced by the legislative history of the FAA, whose drafters understood that “[i]t is not intended this shall be an act referring to labor disputes, at all.”\(^\text{105}\)


\(^\text{103}\) See A Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9 (1923) (statement W.H.H. Piatt, American Bar Association). Justice Stevens recounted the relevant history in his *Circuit City* dissent:

[https://perma.cc/ADX5-24NS] ("Justice Neil Gorsuch’s opinion for a unanimous court rejects a claim for arbitration for the first time in a string of more than a dozen of the Supreme Court’s cases stretching back more than a decade. Indeed, I doubt the court has rejected such a claim in any previous decision since the turn of the millennium.").
Arbitration’s Unraveling

One might think the plain meaning of the statute would prevail. But even as plain-meaning textualism came to reign supreme in American legal analysis, it met its match in the opposing force of arbitration favoritism that gathered steam in the 1980s and 90s. The apotheosis of arbitration favoritism came in 2001, in *Circuit City Stores, Inc. v. Adams*, where a 5–4 majority eschewed the plain meaning of FAA § 1 in favor of an obscure construction doctrine with a Latin name. Instead of giving “any other class of workers” its plain meaning, the majority held: “The wording of § 1 calls for the application of the maxim *ejusdem generis*, the statutory canon that ‘[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.’”

Only arbitration favoritism can explain the Court’s tendentious decision to apply *ejusdem generis* where a plain-meaning construction was available. Outside of the FAA bubble, courts routinely hold that this canon and others like it have no application where statutory text can be given its plain meaning. But inside the bubble, different rules apply. Or at least they did in *Circuit City*, where the majority felt justified in ignoring the ordinary meaning of the text because of “the FAA’s purpose of overcoming judicial

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[T]he chairman of the ABA committee that drafted the legislation emphasized at a Senate Judiciary Subcommittee hearing that “[i]t is not intended that this shall be an act referring to labor disputes, at all,” but he also observed that “if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, ‘but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.’” Similarly, another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that “[i]f objection appears to the inclusion of workers’ contracts in the law’s scheme, it might be well amended by stating ‘but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.’” The legislation was reintroduced in the next session of Congress with Secretary Hoover’s exclusionary language added to § 1, and the amendment eliminated organized labor’s opposition to the proposed law.


106 Id. at 114-15.
107 See, e.g., United States v. DiCristina, 726 F.3d 92, 99 n.8 (2d Cir. 2013) (“The statutory canon of *ejusdem generis* has no place here because the plain meaning of the statute is apparent.”); Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1232 (10th Cir. 2016) (“[W]e decline to apply *ejusdem generis* . . . . Instead, we begin and end with the plain meaning of the words that Congress employed.”); Tourdot v. Rockford Health Plans, Inc., 439 F.3d 351, 354 (7th Cir. 2006) (“*Ejusdem generis* may not be used to defeat the . . . plain meaning of the text.”); United States v. Migi, 329 F.3d 1085, 1088-89 (9th Cir. 2003) (“The principle of *ejusdem generis* does not apply here because the statute’s plain meaning is apparent. An application of *ejusdem generis* would narrow Congress’s definition . . . .”).
hostility to arbitration.” Notably, the Court’s majority never took issue with Justice Stevens’s careful exposition of the history of FAA § 1, where he showed that “no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.” Rather, invoking the “pro-arbitration purposes of the FAA,” the Court looked past the statutory text and construed § 1 to exempt “only contracts of employment of transportation workers.”

Today, some twenty-plus years after the majority effectively rewrote FAA § 1, arbitration is ubiquitous in U.S. employment contracts. Experts estimate that a majority of U.S. private-sector nonunion employers—covering some 60 million workers—impose arbitration requirements in their agreements. By some counts, over 80% of private-sector nonunion workers are now or soon will be party to class action–banning arbitration clauses.

Nonetheless, in two recent decisions, the Justices have applied FAA § 1 to hold that certain workers are exempt from arbitration. First, in New Prime, Inc. v. Oliveira, an interstate truck driver brought a class action against a trucking company for misclassifying its drivers as independent contractors rather than as employees and failing to pay minimum wages in violation of federal law. The company sought to compel individual arbitration, arguing that because Oliveira was an independent contractor, his was not a “contract of employment” within the meaning of FAA § 1. In a decision that surprised some observers, Justice Gorsuch wrote for a unanimous Court that § 1’s exemption applies not only to contracts of “employees,” but more broadly to “agreement[s] to perform work”—including those of independent contractors. In addition, the Justices explained that judges (rather than

108 Cir. City, 532 U.S. at 106.
109 Id. at 128 (Stevens, J., dissenting); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 42-43 (1991) (Stevens, J., dissenting) (accusing the majority of having “effectively rewritten the statute”).
110 Cir. City, 532 U.S. at 115, 119.
113 139 S. Ct. 532, 536 (2019)
114 Id. at 537.
115 Id. at 539; see also id. at 540 (“We see here no evidence that a ‘contract of employment’ necessarily signaled a formal employer–employee or master–servant relationship.”).
arbitrators) have the ultimate authority to decide whether § 1’s “contracts of employment” exclusion applies.\(^\text{116}\)

Then, in *Southwest Airlines Co. v. Saxon*, a ramp-agent supervisor brought a collective-action suit against Southwest Airlines alleging overtime violations under the Fair Labor Standards Act (FLSA).\(^\text{117}\) Southwest moved to compel individual arbitration, but the plaintiff argued that she and other similarly situated employees were exempt under FAA § 1.\(^\text{118}\) In an 8–0 decision, the Court determined that employees who were “physically loading cargo directly on and off an airplane headed out of State” belong to a class of workers who are “actively” engaged in moving “goods across borders via the channels of foreign or interstate commerce.”\(^\text{119}\) Because these workers play a “necessary role in the free flow of goods” across state or international borders, wrote Justice Thomas for a unanimous Court, they fall well “within § 1’s exemption.”\(^\text{120}\)

It is easy to write off the plaintiffs’ victories in *Saxon* and *New Prime* as marginal.\(^\text{121}\) After all, in both cases, the Court is merely engaged in the very micro task of sorting out which subset of transportation workers fall within the FAA § 1 exemption. And according to the Department of Labor, the

\(^{116}\) Id. at 537. Thus, even where an employment contract includes a “delegation clause” contemplating that the arbitrator is to resolve issues related to the enforceability of the agreement, it remains for “a court [to] decide for itself” whether the § 1 exclusion applies. *Id.*

\(^{117}\) 142 S. Ct. 1783, 1787 (2022).

\(^{118}\) Plaintiff v. Sw. Airlines Co., No. 2019-cv-0403, 2019 WL 4958247, at *3 (N.D. Ill. Oct. 8, 2019) (“Plaintiff acknowledges that she is neither a seafarer nor railroad employee but argues that she is ‘engaged in foreign or interstate commerce.’ In support, she points to her handling of baggage, freight, and other goods shipped interstate; her supervision of these shipments; and the fact that Defendant is an airline.” (internal citation omitted)).

\(^{119}\) *Saxon*, 142 S. Ct. 1783, 1790, 1792 (2022). In reaching its conclusion, the Court focused on Saxon’s specific job duties, reasoning that employees who physically load and unload cargo on planes traveling in interstate commerce, “are, as a practical matter, part of the interstate transportation of goods.” *Id.* at 1789.

\(^{120}\) *Id.* at 1789; *Id.* at 1788 (observing that a “class of workers” is defined by the “actual work” that employees do, rather than the industry in which they work). Note that the Court recently granted certiorari to *Bissonnette v. LePage Bakeries* to clarify this distinction. See Petition for a Writ of Certiorari at 1, Bissonnette v. LePage Bakeries Park St., LLC, No. 23-51 (filed July 17, 2023), cert. granted, 2023 WL 639660 (Sept. 29, 2023) (“The question presented is: To be exempted from the [FAA], must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?”).

\(^{121}\) See, e.g., Ian Millhiser, *The Supreme Court Gives Workers a Backhanded Victory*, VOX (June 6, 2022, 2:00 PM), https://www.vox.com/2022/6/6/23156420/supreme-court-saxon-southwest-airlines-forced-arbitration-clarence-thomas [https://perma.cc/ZKX9-8HW3] (“[T]’s worth emphasizing again how narrow the *Saxon* decision is. Justice Clarence Thomas’s 8–0 opinion for the Court (Justice Amy Coney Barrett was recused from this case) benefits workers who load and unload cargo for airplanes that travel across state lines—and it may benefit no one else.”).

More broadly though, Saxon and New Prime point up the vulnerability of the Court’s FAA § 1 jurisprudence. This is not to say the Court has backed off its biases in favor of mandatory arbitration in any intentional way. But the fundamental incoherence of the Court’s FAA § 1 cases—resting as they do on the bizarre anti-textualism of Circuit City—has left the courts on wobbly ground. Following Saxon and New Prime, we already see plaintiffs flocking to court with putative class and collective actions, testing whether their specific jobs satisfy the Court’s evolving standard for § 1-exempted transportation work.\footnote{Notably, the Saxon Court declined to decide how the FAA’s transportation-worker exemption applies to other industries and classes of workers whose duties are “further removed from the channels of interstate commerce or the actual crossing of borders” than the duties of the specific plaintiff there. Saxon, 142 S. Ct. at 1789 n.2. Indeed, the Justices previously denied review in Rittmann v. Amazon.com, Inc., where the 9th Circuit applied FAA § 1’s exemption to an Amazon worker tasked with picking up packages that had “certainly across state lines, [transported] them for the last leg of the shipmen to their destination.” 971 F.3d 904, 915 (9th Cir. 2020), cert. denied, 141 S. Ct. 1374 (2021); see also Carmona Mendoza v. Domino’s Pizza, LLC, 73 F.4th 1135, 1138-39 (9th Cir. 2023) (reaffirming on remand that Rittmann remains good law and survives Saxon and again holding that Domino’s Pizza’s supply-center truck drivers were exempt from the FAA under § 1); Mejia v. RKO Last Mile, Inc., No. 22-cv-0876-SI, 2023 WL 5184153, at *3 (N.D. Cal. Aug. 10, 2023) (finding last-mile delivery drivers qualified as “transportation workers” under § 1 of the FAA).}

routes in Massachusetts.” And as plaintiffs push for defensible lines, I suspect it will become impossible to ignore that the entire enterprise is built on a foundation of sand. At some point, I expect, plaintiffs’ challenges will take aim at Circuit City itself. And it strikes me as at least plausible that textualism, having suffered defeat in Circuit City, could prevail in a rematch with arbitration favoritism.

B. Waiving Arbitration: Morgan v. Sundance

The Court’s FAA § 1 decisions did not address arbitration favoritism in any direct way. But a 2022 Supreme Court decision arising in a different corner of the arbitration universe was explicit in repudiating the understanding—widely shared among lower courts—that the past forty years of Supreme Court case law demands a thumb on the scale in favor of finding that disputes are subject to arbitration.

In Morgan v. Sundance, Inc., the Court addressed a question that has arisen frequently in recent years: if a party initially pursues litigation instead of immediately invoking the right to arbitrate pursuant to a contractual agreement, at what point can it be deemed to have waived the right to insist on arbitration? Procedurally, this commonplace scenario arises when an arbitration-bound plaintiff files a lawsuit in court and the defendant responds by moving to dismiss or proceeding with discovery rather than moving to compel arbitration. Then, upon losing a dispositive motion or otherwise determining that the judicial avenue has lost its luster, the defendant pivots and moves to compel arbitration. At that point, the plaintiff argues that the defendant, having chosen to litigate for an extended period, has waived its right to compel arbitration.

In analogous contexts, courts do not hesitate to find waiver. For instance, a defendant waives the benefit of a forum-selection clause when, upon being sued in a nondesignated forum, it tests the waters by engaging in litigation activities rather than moving straightaway to transfer venue. Courts likewise do not hesitate to find that a litigant who fails to timely file a jury

commerce.”), cert. denied, No. 23-479, 2024 WL 7201 (Jan. 8, 2024); Capriole v. Uber Techs., Inc., 7 F.4th 854, 865 (9th Cir. 2021) (similar).

130 Canales v. CK Sales Co., 67 F.4th 38, 40 (1st Cir. 2023).

131 142 S. Ct. 1708, 1711 (2022).

132 Courts generally find that removal to and “active” litigation in a forum different from the one designated in a contract between the parties waives the right to later assert a forum-selection clause. See, e.g., San Miguel Produce, Inc. v. L.G. Herndon Jr. Farms, Inc., CV 616-035, CV 616-043, 2016 WL 6403964, at *3 (S.D. Ga. Oct. 27, 2016) (“[Defendant] acted inconsistently with the forum-selection clause when, on its own accord, it chose to pursue its claims in an improper forum.”).
demand has waived its rights.\textsuperscript{133} Courts in these contexts find waiver irrespective of whether the non-waiving party suffers prejudice.\textsuperscript{134}

But before \textit{Morgan}, nearly every circuit refused to follow these ordinary waiver principles when it came to arbitration clauses. Instead, invoking the oft-repeated “liberal national policy favoring arbitration,” the courts of appeals created a presumption against waiver in the arbitration context, requiring plaintiffs to meet a heightened burden of proving they would suffer “prejudice” if the defendant were allowed to switch to arbitration midway through the proceedings.\textsuperscript{135} The “heavy burden” imposed on plaintiffs, these courts postulated, ensured that “any doubts concerning the scope of arbitrable issues [would] be resolved in favor of arbitration.”\textsuperscript{136} Before \textit{Morgan}, only two circuits (and a number of state courts)\textsuperscript{137} treated waiver of the right to arbitrate like the waiver of any other contractual right by focusing solely on the defendant’s actions, without explicitly requiring that the plaintiff suffer prejudice from those actions.\textsuperscript{138}

In \textit{Morgan}, an hourly employee at a Taco Bell franchise owned by Sundance brought a nationwide collective action against her employer alleging overtime violations in contravention of the FLSA.\textsuperscript{139} While Morgan’s

\footnotesize{\textsuperscript{133} Although the right to a jury trial is guaranteed by the Seventh Amendment, like all constitutional rights, it can be waived by the parties. See, e.g., \textit{Fed. R. Civ. P. 38(d)} (“A party waives a jury trial unless its demand is properly served and filed.”); see also Rodenburg v. Kaufmann, 320 F.2d 679, 683-84 (D.C. Cir. 1963) (“[A] jury trial lawfully may be waived . . . by inaction . . . .”); First Union Nat. Bank v. U.S., 164 F. Supp. 2d 660, 663 (E.D. Pa. 2001) (“In some circumstances, the right to a jury trial can be waived by inaction or acquiescence.”).

\textsuperscript{134} See, e.g., \textit{First Union Nat. Bank}, 164 F. Supp. at 663 (“Waiver can be either express or implied and requires only that the party waiving such right do so voluntarily and knowingly based on the facts of the case.”).

\textsuperscript{135} At the time \textit{Morgan} was decided, nine of the eleven circuits required prejudice. See, e.g., O.J. Distrib., Inc. v. Hornell Brewing Co., 340 F.3d 345, 355-56 (6th Cir. 2003); PaineWebber Inc. v. Faragalli, 61 F.3d 1063, 1068-69 (3d Cir. 1995); Miller Brewing Co. v. Fort Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986); ATSA of Cal., Inc. v. Cont’l Ins. Co., 702 F.2d 172, 175 (9th Cir. 1983); Carcich v. Rederi A/B Nordie, 389 F.2d 692, 696 (2d Cir. 1968); Rota-McLarty v. Santander Consumer USA, 700 F.3d 690, 702 (4th Cir. 2012); Citibank, N.A. v. Stok & Assocs., P.A., 387 F. App’x 921, 924-25 (11th Cir. 2010), cert. granted, 562 U.S. 1215 (2011), cert. dismissed, 563 U.S. 1029 (2011); Erdman Co. v. Phoenix Land & Acquisition LLC, 659 F.3d 1115, 1117 (8th Cir. 2011); In re Tyco Int’l Ltd. Sec. Litig., 422 F.3d 41, 44 (1st Cir. 2005).


\textsuperscript{138} See St. Mary’s Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 590 (7th Cir. 1992); Nat’l Found. for Cancer Rsch. v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987); see also Timothy Leake, Note, \textit{Arbitration Waiver and Prejudice}, 119 MICH. L. REV. 397, 404 (2020) (explaining that all but three circuits, one of which considers prejudice a nondispositive factor, require a finding of prejudice in determining whether a litigant waived its right to arbitrate the dispute).

\textsuperscript{139} See Morgan v. Sundance, Inc., 142 S. Ct. 1708, 1711 (2022); Fair Labor Standards Act, 29 U.S.C. § 207(a) (setting maximum-hours standards for covered employees).}
job application mandated arbitration, Sundance proceeded to litigate the FLSA claim, filing an unsuccessful motion to dismiss and an answer—neither of which referenced the arbitration agreement. On the eve of the pretrial conference—eight months after Morgan had filed her complaint—Sundance changed course and moved to compel arbitration. Morgan opposed the motion on the grounds that Sundance waived its right to arbitrate by litigating for so long. The district court agreed, finding that Sundance had invoked “the litigation machinery” by waiting eight months to assert its right to arbitrate and, in doing so, had prejudiced Morgan. A divided Eighth Circuit reversed, concluding that Morgan had suffered no real prejudice from the eight-month delay—half of which was spent waiting for the disposition of Sundance’s motion to dismiss. Judge Colloton alone dissented, raising doubts about the Eighth Circuit’s prejudice requirement.

A unanimous Supreme Court reversed, recasting the federal “policy favoring arbitration” as one that prohibits courts from “invent[ing] special, arbitration-preferring procedural rules” and requires them instead “to place [arbitration] agreements upon the same footing as other contracts.” Justice Kagan’s opinion explains that the Court’s much-cited “policy” reflected a commitment to end the early 20th century hostility towards arbitration and to make arbitration agreements as enforceable as other contracts “but not

140 Morgan v. Sundance, Inc., No. 4:18-cv-00316-JAJ-HCA, 2019 WL 5089205, at *2 (S.D. Iowa June 28, 2019) (observing that Sundance’s motion to dismiss “made no mention of the existence or applicability of an arbitration agreement between the parties in this case”); id. at *7 (“Sundance failed to mention the arbitration agreement in its answer, which listed numerous (fourteen) other affirmative defenses.”).

141 Morgan, 142 S. Ct. at 1711.

142 Id.

143 Morgan, 2019 WL 5089205, at *3. The district court applied the Eighth Circuit’s test, which provides that a party waives its right to arbitration if it: “(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts.” Id. at *4 (quoting Lewallen v. Green Tree Servicing, L.L.C., 487 F.3d 1085, 1090 (8th Cir. 2007)); see also id. at *5 (“The timing of [defendant’s] actions demonstrates that it ‘wanted to play heads I win, tails you lose,’ which ‘is the worst possible reason for failing to move for arbitration sooner than it did.’ (quoting Messina v. N. Cent. Distrib., Inc., 821 F.3d 1047, 1050 (8th Cir. 2016))).

144 Morgan v. Sundance, Inc., 992 F.3d 711, 714 (8th Cir. 2021) (“[T]he parties spent very little of [the eight months] actively litigating and no time on the merits of the case. Thus, shifting to arbitration would not duplicate the parties’ efforts.”).

145 Id. at 715-17 (Colloton, J., dissenting). Outside the arbitration context, Judge Colloton observed, neither prejudice nor detrimental reliance is required to establish waiver, and “some circuits allow a finding of waiver of arbitration without a showing of prejudice.” Id. at 716-17 (Colloton, J., dissenting).

146 Morgan, 142 S. Ct. at 1713 (internal citations omitted); see also id. (“The policy is to make arbitration agreements as enforceable as other contracts, but not more so. . . . The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.” (internal quotation marks and citations omitted)).
more so."\(^{147}\) Observing that the judge-made "prejudice" requirement existed only in the arbitration context, the Court directed the Eighth Circuit and the other courts of appeals to abandon this special rule and determine the waiver of arbitration rights in the same manner as the waiver of any other contractual rights.\(^{148}\)

At a doctrinal level, \textit{Morgan} breathed new life into waiver as a basis for resisting arbitration requirements. In its wake, lower courts are now struggling to define the point at which a defendant’s litigation activities waive its right to seek an order compelling arbitration.\(^{149}\) For now, it appears consensus is some ways off, and further Supreme Court engagement would not be surprising.

At a deeper level, as the Ninth Circuit recently explained, "\textit{Morgan} teaches that there is no strong federal policy favoring enforcement of arbitration agreements."\(^{150}\) This is big news, suggesting that all judge-made, arbitration-specific rules created in the service of a supposed policy favoring arbitration should be reexamined.\(^{151}\)


\(^{148}\) \textit{Id.} at 1713 (directing the courts of appeals to "hold a party to its arbitration contract just as the court would to any other kind [but] not devise novel rules to favor arbitration over litigation").

\(^{149}\) Among courts finding waiver, see, for example, \textit{White v. Samsung Elecs. Am., Inc.}, 61 F.4th 334, 340 (3d Cir. 2023) (finding waiver where defendant, among other actions, "submitted an unopposed pro hac vice application, sought leave to file a reply in further support of its motion for reconsideration, requested additional time to file a response to the second amended complaint, and filed a motion for certification of an interlocutory appeal"); \textit{Soriano v. Experian Info. Sols., Inc.}, No.: 2:122-cv-197-SPC-KCD, 2022 WL 1755286, at *3 (M.D. Fla. Dec. 9, 2022) (finding waiver where defendant "filed an answer and an amended answer, exchanged discovery, participated in mediation, submitted a joint case management report seeking a jury trial, and attended an initial pretrial conference"); \textit{Laguna v. Chester Hous. Auth.}, 662 F. Supp. 3d 545, 547 (E.D. Pa. 2023) (finding waiver where the defendant was "actively participating in this litigation for approximately ten months with no mention of the arbitrability of [the plaintiff’s] claims").

Among courts refusing to find waiver, see, for example, \textit{Amargos v. Verified Nutrition, LLC}, 653 F. Supp. 3d 1269, 1276 (S.D. Fla. 2023) ("Defendant’s participation was not significant enough to support a finding that it acted inconsistently with its contractual right to arbitrate."); \textit{Holloman v. Consumer Portfolio Servs., Inc.}, No. RDB-23-134, 2023 WL 4027036, at *10 (D. Md. June 15, 2023) ("Defendants’ litigation activities were not inconsistent with a desire to arbitrate."); \textit{Nicosia v. Amazon.com, Inc.}, 21-2624-cv, 2023 WL 309545, at *4 n.2 (3d Cir. Jan. 19, 2023) (finding defendant had not waived its right to arbitrate where it "had not engaged in litigating any substantial merits questions before seeking arbitration"") (internal quotation marks and citation omitted).

\(^{150}\) \textit{Armstrong v. Michaels Stores, Inc.}, 59 F.4th 1011, 1014 (9th Cir. 2023) (internal quotation marks and citation omitted).

\(^{151}\) \textit{See, e.g.}, \textit{Deng v. Frequency Elecs., Inc.}, 640 F. Supp. 3d 255, 263 (E.D.N.Y. 2022) ("[A]s \textit{Morgan} makes clear, there can be no special arbitration tests that go beyond the requirements of the common law when it comes to a waiver of contractual rights.").
And while Morgan involved “special, arbitration-preferring procedural rules,” its logic would similarly doom the use of special, arbitration-preferring interpretive rules, such as the Court’s arbitration-specific application of *ejusdem generis* in *Circuit City*. In that case, the Court applied an arbitration-specific rule of statutory construction to give effect to the maxim *ejusdem generis* even in the face of an available plain meaning; in other words, it applied precisely the sort of “substantive interpretive canon” that Justices Barrett and Kavanaugh have criticized. From a textualist standpoint, applying special policy-driven rules in the interpretation of statutes should be an even greater sin than applying special rules of procedure. Accordingly, the logic of Morgan should pull the arbitration-favoritism rug out from under the entire FAA § 1 edifice.

Other areas warrant similar rug-pulling. Most prominently, arbitration favoritism is evident in courts’ consideration of contract-formation questions, including the application of “equitable estoppel” principles allowing third parties to demand arbitration under contracts to which they were not a party. Courts routinely hold that, “if a plaintiff relies on the terms of an agreement to assert his or her claims against a nonsignatory defendant, the plaintiff may be equitably estopped from repudiating the arbitration clause of that very agreement.” Thus, nonsignatory defendants have been able to glom onto arbitration agreements entered by the plaintiff and the defendant’s corporate

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152 Morgan, 142 S. Ct. at 1713 (emphasis added).
153 See supra Section II.A.
154 See supra Section II.A. Notably, Justice Barrett has also expressed misgivings over the Supreme Court’s “super-strong presumption against overruling statutory precedents,” arguing that the doctrine of statutory stare decisis rests on shaky theoretical grounds. See Amy C. Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327 (2005). Then-Professor Barrett wrote that “[r]efusing to revisit statutory interpretations as a means of restraining judicial policymaking may or may not be appropriate in the Supreme Court, which settles the meaning of statutes on behalf of the entire judicial department.” Id. at 351-52. It stands to reason that Justice Barrett would support review of the *Circuit City* Court’s interpretation of FAA § 1.
155 *Pacific Fertility Cases*, 301 Cal. Rptr. 3d 611, 616 (Cal. Ct. App. 2022).
affiliates,156 subsidiaries,157 assignees,158 and co-conspirators,159 among others.160 For its part, the Supreme Court has held that a litigant who is not a party to an arbitration agreement may invoke arbitration under the FAA if “traditional principles of state law allow” it.161

But here again, the entire edifice of state-law estoppel principles supporting nonsignatory arbitration should, by all logic, come crumbling down in the wake of Morgan. In reality, “traditional principles of state law” do not lead to arbitration by estoppel—only arbitration-favoritism does. As the Sixth Circuit has now recognized, “[t]he federal decisions invoking estoppel” are not “ground[ed] . . . in anything resembling traditional estoppel at common law . . . . While they use the phrase ‘equitable estoppel,’ they rest more on the federal policy favoring arbitration and efficiency concerns than on a traditional view of that doctrine.”162

A hypothetical illustrates the point. Imagine a contract between a Texas plaintiff and a New York temporary-employment agency that has no arbitration clause but contains a jury waiver and a New York choice-of-law provision. If the temp agency sends plaintiff to work for a week at Company X in Texas where she suffers injury, no common-law “estoppel” principles dictate that the plaintiff’s suit against Company X (in Texas) is subject to the jury waiver or governed by New York tort law.163 And yet, if there had been

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156 See, e.g., Salerno Med. Assocs., LLP v. Riverside Med. Mgmt., LLC, 542 F. Supp. 3d 268, 279 (D.N.J. 2021) (“Ordinarily, only signatories to a contract with an arbitration clause have a valid arbitration agreement. But a non-signatory [e.g., an affiliate] ‘may be equitably bound to arbitrate under traditional principles of contract and agency law.’” (internal quotation marks and citations omitted)).

157 J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988) (“[A] court may refer ‘claims against [a] parent company to arbitration even though the parent is not formally a party to the arbitration agreement.’”).

158 See, e.g., Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc., 198 F.3d 88, 98 (2d Cir. 1999) (finding a party was estopped from resisting arbitration with a nonsignatory assignee).

159 See, e.g., Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 528 (5th Cir. 2000) (compelling arbitration where “a signatory non-defendant is charged with interdependent and concerted misconduct with a non-signatory defendant”).

160 See, e.g., Mey v. DIRECTV, LLC, 971 F.3d 284, 292 (4th Cir. 2020) (finding a claim against non-signatory was arbitrable given the “heavy presumption of arbitrability” and the “federal policy favoring arbitration”); Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 7-9 (1st Cir. 2014) (given the “presumption in favor of arbitration,” claim by sales agency against nonsignatory Verizon employee was arbitrable under agency’s arbitration agreement with Verizon); Long v. Silver, 248 F.3d 309, 317 (4th Cir. 2001) (holding that, given the “strong federal policy favoring arbitration,” nonsignatory was allowed to invoke arbitration against signatory).


163 See, e.g., Cooper v. Meridian Yachts, Ltd., 575 F.3d 1151, 1169 (11th Cir. 2009) (“A choice of law clause . . . is a contractual right that cannot ordinarily be invoked by or against a party who did not sign the contract in which the provision appears.”).
an arbitration clause in the temp agency’s contracts, courts generally would allow Company X to glom onto the arbitration agreement between plaintiff and the temp agency. The reason for this has little or nothing to do with ordinary state common-law rules but derives entirely from a perceived liberal policy favoring arbitration. Thus, some lower courts have refused to apply “cases [that] discuss[] equitable estoppel in contexts outside the arbitration arena [because they] simply do not offer any guidance for the application of equitable estoppel to the enforcement of arbitration agreements by or against non-signatories.” 164

In the wake of Morgan, I expect lawyers will investigate whether other legal principles have been shaped by arbitration favoritism. For example, to what extent is the willingness of courts to find arbitration agreements in “browse-wrap” driven by the perceived liberal federal policy favoring arbitration? Is the scope of matters covered by an arbitration agreement broader than the scope given outside the arbitration context?165 Given the disavowal of special federal rules favoring arbitration, enterprising plaintiffs’ counsel will find numerous threads on which to tug in an effort to unravel current doctrine.

C. California’s Private Attorney General Act: Viking River v. Moriana

In 2022, the Justices considered a unique threat to FAA hegemony in the form of state legislation deputizing arbitration-bound private citizens to bring representative lawsuits to enforce public law. As I and others have argued, this deputization model is uniquely situated to permit state lawmakers to ensure that private parties can vindicate public rights, notwithstanding the prevalence of class-banning arbitration agreements.166 In a post-Concepcion world, as private rights of action are consigned to futility in whole categories of cases, states are left with few meaningful options for harnessing private actors to effectuate legislative objectives. The most potent is what I have termed “new qui tam” legislation.167

165 See Traton News, LLC v. Traton Corp., 528 F. App’x 525, 528 (6th Cir. 2013) (explaining that the scope of matters covered by an agreement is defined more broadly for an arbitration clause than for a forum-selection clause because “Ohio has a strong public policy favoring arbitration, and when there is doubt as to whether an arbitration clause covers a dispute, such doubts should be resolved in favor of arbitration. By contrast, there is no principle that favors application of forum selection clauses” (internal citations omitted)).
166 See, e.g., Gilles & Friedman, supra note 18, at 512; see also Janet Cooper Alexander, To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion, 46 Mich. J.L. & Reform 1203, 1221 (2013).
167 See generally Gilles & Friedman, supra note 18.
The legislation at issue in *Viking River Cruises, Inc. v. Moriana* is such a statute. California's Private Attorney General Act (PAGA) authorizes workers to bring suit in the name of the state's Labor and Workforce Development Agency (LWDA) "on behalf of himself or herself and other current or former employees" to recover civil penalties for violations of the state's Labor Code. Thus, like the federal False Claims Act, PAGA authorizes individuals to assume the role of a qui tam relator. At the same time, PAGA also authorizes the individual to act as a traditional plaintiff and seek whatever damages she personally sustained as a result of the same violation.

The California Supreme Court in *Iskanian v. CLS Transportation* recognized that PAGA representative suits are a type of qui tam action in which workers pursue public claims for relief, and it held that the right to bring such actions cannot be waived by contract. Thus, where a contract provides that all disputes must be arbitrated but bans the arbitration of any "representative" claims, the arbitration clause cannot be enforced and a PAGA claim may proceed in court under California law. The *Iskanian* court also concluded that PAGA actions could not be split into "individual" and "non-individual" components in order to compel arbitration of the individual component.

*Viking River* concerned a provision in Viking River Cruises' employment contracts calling for all disputes to be arbitrated and also provided that workers waive their right to bring any dispute as a class, collective, or PAGA action in arbitration. The waiver did not distinguish an individual employee's claim, for herself, and the representative claims brought for others as a qui tam action. The company defended its clause on the ground that

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169 CAL. LAB. CODE § 2699 (West 2020). An "aggrieved employee" is defined as an employee "against whom one or more of the alleged violations was committed." *Id.* § 2699(c); see also *Arias v. Superior Ct.*, 209 P.3d 923, 929-30 (Cal. 2009) (observing that PAGA was enacted "to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts").
171 *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 133 (Cal. 2014). The *Iskanian* court also held that a PAGA claim "lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship"; rather, "[i]t is a dispute between an employer and the state" alleging violations of the labor code. *Id.* at 151 (emphasis omitted) (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 282 (2002) (finding that an employee's arbitration clause did not bar the EEOC from seeking "victim-specific judicial relief, such as backpay, reinstatement, and damages" for violations of the Americans with Disabilities Act)). This aspect of the *Iskanian* decision did not survive *Viking River*. *See* *Viking River*, 142 S. Ct. at 1919, n.4 (rejecting the idea that PAGA claims lie outside of FAA enforcement).
172 *Iskanian*, 327 P.3d at 137.
173 *Viking River*, 142 S. Ct. at 1915-16.
“representative actions” under PAGA are indistinguishable from class actions, and therefore any rule preventing such claims to be waived is preempted by the FAA under the Court’s decisions in *Concepcion*\(^{174}\) and *Epic Systems*.\(^{175}\) Both the state trial and appellate courts rejected these arguments and ruled the company’s PAGA waiver unenforceable, applying *Iskanian*.\(^{176}\)

Having declined six previous petitions to consider the *Iskanian* rule, the U.S. Supreme Court finally granted review in *Viking River*.\(^{177}\) Surprisingly, it left intact the California rule that qui tam PAGA claims—i.e., those asserted by a relator in the name of the LWDA on behalf of other workers—may not be waived in an employment contract. The 8-1 decision authored by Justice Alito held only that the FAA mandates arbitration of the claimant’s individual claim.\(^{178}\) Thus, while California is free to hold that qui tam actions are unwaivable—such that an arbitration clause that bans qui tam claims is unenforceable—that rule provides no basis for refusing to arbitrate the employee’s individual PAGA claim. Accordingly, the Court held the *Iskanian* rule, which prohibited splitting PAGA claims into individual and non-individual components, was preempted by the FAA.\(^{179}\)

So, the individual’s PAGA claim must be arbitrated, and the qui tam claim cannot be arbitrated, consistent with the text of the arbitration agreement banning “representative” actions. That leaves but one question: can the qui tam claim be litigated in state court if the qui tam relator (the titular plaintiff) is obligated to arbitrate her own personal claim? The answer, plainly, is a matter of state law. The state’s own standing rules or qui tam statute determine whether the qui tam relator must herself have a live personal claim in order to helm the qui tam case.\(^{180}\)

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178 *Viking River*, 142 S. Ct. at 1923 (finding California law preempted to the extent it “invalidates agreements to arbitrate only individual PAGA claims for Labor Code violations that an employee suffered” (internal quotation marks and citation omitted)).
179 Id. at 1924 (“[T]he FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate.”).
180 See, e.g., ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) (finding that, because federal law does not dictate the scope of state judicial power, “the constraints of Article III do not apply to
The fact that state law governs this question did not stop Justice Alito from offering his opinion of the matter: “[A]s we see it,” he wrote, “PAGA provides no mechanism to enable a court to adjudicate non-individual PAGA claims once an individual claim has been committed to a separate proceeding.”

181 But that’s just “as we see it,” as Justice Sotomayor pointed out in her concurrence. “Of course,” she wrote, “if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word.”

And so they did. On July 17, 2023, the California Supreme Court unanimously held in Adolph v. Uber Technologies that the Alito majority got it wrong in interpreting the California law’s standing requirements: “Where a plaintiff has brought a PAGA action comprising individual and non-individual claims, an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA.”

183 In other words, “[a]rbitrating a PAGA plaintiff’s individual claim does not nullify the fact of the violation or extinguish the plaintiff’s status as an aggrieved employee.”

In the wake of Viking River and Adolph, state legislatures now have a court-approved roadmap for ensuring that the private rights of action they have granted may survive the proliferation of class-banning arbitration provisions. As I have outlined in prior work, the key to the roadmap is qui tam. It should now be clear that state legislatures are free to enact qui tam legislation that allows private plaintiffs to litigate claims on behalf of workers, consumers, small businesses, and others, subject to the state’s ability to step in and exercise control if it so wishes.

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181 Viking River, 142 S. Ct. at 1925 (“When an employee’s own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit.”). In Justice Alito’s view, once a PAGA relator is sent to arbitration, she loses “statutory standing to continue to maintain her non-individual claims in court, and the correct course is to dismiss” the remaining PAGA claims. Id.

182 Id. at 1925 (Sotomayor, J., concurring).


184 Id. at 691.

185 See Gilles & Friedman, supra note 18, at 491, 512 n.19 (proposing “state legislation authorizing private citizens to bring actions on behalf of the state in the interests of consumers, workers, and other vulnerable communities” and describing bills circulating in New York, Vermont, Washington, Oregon, and elsewhere that would create a qui tam mechanism for enforcing state laws).
Still, there may be some political constraints on the qui tam model. In particular, some state legislators may have misgivings about empowering the private bar. But these concerns seem misplaced, inasmuch as qui tam litigation vests infinitely less power in private lawyers than class or collective actions, where the state has no control. Indeed, state agencies have (or may be given) the power to squelch qui tam actions of which they do not approve. Plus, successful qui tam suits direct significant funds to the state’s coffers.

Finally, a noteworthy feature of state qui tam enactments modeled on PAGA is that cases filed in state court will likely be unremovable to federal court for lack of standing. Where the PAGA relator’s individual claim is dispatched to arbitration, in keeping with Viking River, the qui tam relator will have no injury in fact and hence no Article III standing. Federal courts are clear that the absence of standing renders cases unremovable or subject to immediate remand. But even if the relator’s individual claim were not compelled to arbitration (thereby sustaining Article III), federal courts would still likely find the case nonjusticiable under the prudential rule against third-party standing.

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186 Id. at 531-32 (observing that qui tam legislation pits “progressives who advocate for the rights of consumers, workers, and disadvantaged populations, along with their natural allies in the plaintiffs’ bar, labor unions, civil rights groups, and liberal academia” against “big businesses and corporate defense lawyers[,] . . . the U.S. Chamber of Commerce[,] and other corporate lobbying groups”).

187 Id. at 496 (“[Business interests’] political claims will appeal to legislators’ fear of too-close an association with plaintiffs’ lawyers and a concern about the impact of increased litigation on in-state business.”).

188 Id. at 494 (observing that new qui tam statutes are based on the understanding that “[t]he state attorney general or other relevant public official . . . retain[s] broad authority to take control over the action, direct major litigation decisions, and approve proposed settlements”).

189 See Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 146-47 (Cal. 2014) (describing PAGA procedures, including the LWDA’s right to intervene or take over the action).

190 Gilles & Friedman, supra note 18, at 533 (“[Q]ui tam saves the state money on enforcement and generates money through penalties . . . .”). In California, for example, penalties collected under PAGA have grown from about $5 million in 2014 to a projected $50 million or more in 2022. Alison Frankel, California’s Private AG Act Is a Scourge, Employers Tell SCOTUS, REUTERS (Feb. 8, 2022, 4:46 PM), https://www.reuters.com/legal/government/californias-private-ag-act-is-scourge-employers-tell-scotus-2022-02-08/ [https://perma.cc/33DK-2CTD].

191 See supra notes 183-184 and accompanying text.

192 See, e.g., Collier v. SP Plus Corp., 889 F.3d 894, 895 (7th Cir. 2018) (holding that failure to remand was error where “the case was not removable, because the plaintiffs lack Article III standing—negating federal subject-matter jurisdiction”); La. Indep. Pharmacies Ass’n v. Catamaran Corp., No. 14-598-DD-RLB, 2015 WL 1922599, at *5 n.8 (M.D. La. Apr. 27, 2015) (“Where a federal court lacks Article III standing in an action removed pursuant to 28 U.S.C. § 1441, such as this action, the remedy is remand, not dismissal.” (internal quotation marks and citations omitted)).

193 As I have argued previously, PAGA does not satisfy any of the recognized exceptions to the rule against third party standing. See Gilles & Friedman, supra note 18, at 521-22 (“Article III prohibits a person from bringing suit on behalf of a third party in the absence of a recognized
III. IN THE MARKET

While legislative and judicial interventions may tug on specific strands of class-banning arbitration, the biggest threat to arbitration jurisprudence may come as a result of market innovations. In particular, arbitration’s unraveling may come about as a result of advances in the ability of entrepreneurial lawyers to reach and recruit large numbers of eligible claimants to pursue the procedural pathways prescribed by companies’ arbitration agreements. These pathways, of course, were never intended to be used. They were intended to deter claims in cases where corporate wrongdoing occasions large quantities of relatively modest per-plaintiff claims. The mass-arbitration phenomenon hoists the drafters of these clauses with their own petard.

As I have described elsewhere, state-law unconscionability principles have driven companies to offer to pay the lion’s share of arbitral filing and administrative fees for litigants who decide to individually arbitrate their claims. The offer of financial subsidies helped buttress advocates’ claims that arbitration is just as fair as the public legal system and less expensive to claimants. Companies rationally predicted that, even factoring in these subsidies, “consumers and employees would not think it worth the time and money to pursue their meritorious but likely monetarily small claims.” And the major arbitral bodies followed similar principles, as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) set default filing-fee schedules that place the vast majority of the financial burden of arbitration on the corporate defendant and only a small fraction on workers and consumers. As class-banning arbitration proliferated from the early 2000s until now, this state of affairs ensured that

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194 See Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) (“The employer . . . , faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration. No doubt, [the employer] never expected that so many would actually seek arbitration.”).
195 See Lynda J. Grant, Turnabout Is Fair Play: The Power of Mass Arbitrations, VERDICT, July 2023, at 3 (“Arbitrations were originally aimed at providing an efficient means for two commercial entities to resolve their issues without resorting to often expensive and time-consuming court litigation.”).
197 Grant, supra note 195, at 4.
most agreements remain fully enforceable, with the result being that only a tiny fraction of claimants have opted to arbitrate their small-value claims.\footnote{198 See, e.g., Alison Frankel, Consumer Arbitration is on the Rise—But the Numbers are Still Punny, REUTERS (May 9, 2019, 4:59 PM), https://www.reuters.com/article/us-otec-arbitrationdata/consumer-arbitration-is-on-the-rise-but-numbers-are-still-punny-idUSKCNi62eNI [https://perma.cc/V93U-RM6P] (examining data provided by the AAA which revealed that in the first quarter of 2019, it had resolved only 895 consumer arbitrations); Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America's Top Companies, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019), https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf [https://perma.cc/PL5W-MMV3] (determining there were over 825 million consumer arbitration provisions in force in 2018); AM. ASSOC. FOR JUSTICE, THE TRUTH ABOUT FORCED ARBITRATION 8 (2019) (reporting that the AAA and JAMS recorded an average of only 6,000 consumer arbitrations per year between 2014 and 2018).}

But then came mass arbitration. The first signs of this strategy appeared early on as the Chamber of Commerce (of all groups!) argued in American Express Co. v. Italian Colors Restaurant\footnote{199 570 U.S. 228 (2013).} that, contrary to plaintiffs' protestations, individual claimants can efficiently vindicate their rights under American Express's class-banning arbitration clause, because they can "easily identify and solicit large numbers of similarly situated businesses to file individual claims across which litigation costs can be spread" and can "pool[] information and evidence" in prosecuting their arbitrations.\footnote{200 Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae In Support of Petitioners at 1 (May 2019).} And then, starting around 2018, well-financed plaintiffs' lawyers with social-media chops began doing just this: exploiting arbitration agreements by simultaneously filing thousands of nearly identical individual arbitration demands.\footnote{201 Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett & Carmen Longoria-Green, Mayer Brown, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, MASS ARBITRATION SHAKEDOWN (2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf [https://perma.cc/JT9Y-3Q5P] [hereinafter MASS ARBITRATION SHAKEDOWN] ("The same year that Epic Systems was decided, . . . plaintiffs' lawyers turned to a new tactic [of] simultaneously filing thousands of arbitration demands with identical claims . . ."); id. at 21 ("To amass these large numbers of claimants, plaintiffs' firms advertise heavily on websites . . ., social media, and even radio.").} Confronted with the obligation to incur millions of dollars in arbitral fees, many defendants have responded by settling these claims rather than move forward with individual hearings.\footnote{202 See J. Maria Glover, Mass Arbitrations, 74 STAN. L. REV. 1283, 1341 (2022) (“Claims that were rendered unmarketable by class-action waivers suddenly became capable of generating settlement pressure greater than that produced by class certification.”); id. at 1345 (“As of January 2019, Uber faced over $18 million in arbitration fees alone.”); see also Sam Mellins, How Corporate America’s Favorite Legal Trick Is Backfiring, LEVER (May 27, 2022), https://www.levernews.com/how-corporate-americas-favorite-legal-trick-is-backfiring/ [https://perma.cc/7WzZ-HALJ] (reporting

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This “mass arbitration” strategy seems to be working, at least for now. Take, for example, the case of Twitter: after Elon Musk purchased the company and laid off a substantial portion of its workforce, a putative class of ex-employees filed suit alleging wrongful termination in violation of federal and state laws.203 The court compelled individual arbitration of these claims pursuant to the Twitter employment agreement, which designates JAMS as the arbitral provider.204 In turn, JAMS Rules governing employment arbitrations provide that employees are required to pay but a nominal filing fee (roughly the same amount that would be required for filing a lawsuit in state court).205 All other arbitration fees must be borne by the employer, including a $2,000 filing fee that “must be paid in full” at the commencement of proceedings, as well as all arbitrators’ hourly fees and JAMS administrative fees.206

Upon the court granting Twitter’s motion to compel arbitration, nearly 2,000 ex-employees inundated JAMS seeking to initiate individual arbitrations.207 But Twitter refused to pay JAMS’s $4 million nonrefundable filing fee—much less the arbitral fees that will come later—and, after multiple

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205 JAMS POLICY ON EMPLOYMENT ARBITRATION: MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 4, https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Stds-2009.pdf [https://perma.cc/sR7J-HKM4] (“The only fee that an employee may be required to pay is the initial JAMS Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fees and all professional fees for the arbitrator’s services.”) [hereinafter JAMS POLICY ON EMPLOYMENT ARBITRATION]; MASS ARBITRATION SHAKEDOWN, supra note 201, at 9 (“Under the rules of both the AAA and JAMS, which are the most widely used consumer and employee arbitration administrators, the company pays the entire cost of the arbitration except for a small filing fee, which is usually less than or equal to court filing fees.”). Further, JAMS Rules require that all employment-related arbitrations before JAMS comport with the JAMS Policy on Employment Arbitration: Minimum Standards of Procedural Fairness. JAMS POLICY ON EMPLOYMENT ARBITRATION, supra note 205, at 2.


attempts to secure payment, JAMS finally closed the delinquent file. The ex-employees have now returned to court—this time to compel Twitter to abide by its arbitration provision. While the plaintiffs’ motion in *Ma v. Twitter* is sub judice as of this writing, plaintiffs have prevailed in similar motions against Samsung, Postmates, Peloton, Intuit, and others, forcing companies to comply with their own arbitration clauses by paying outstanding fees relating to mass-arbitration filings.

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208 Petition to Compel Arbitration ¶ 35, Ma v. Twitter, Inc., No. 23-cv-03301-SK (N.D. Cal. July 3, 2023) ("On June 30, 2023, following Twitter’s notice of its refusal to pay these fees, JAMS notified the parties that: ’JAMS will close its file as JAMS will not proceed with cases that we have determined fall under our Employment Minimum Standards if Respondent will not abide by those standards.’"); see also Cyrus Farivar, *Ex-Employees Suing Twitter Say It’s Not Cooperating On Arbitration, Asks to Keep Case in Court*, FORBES (Feb. 10, 2023, 6:00 AM). See also John Doolittle, *California Leads the Way in Ending Big Tech’s Legal Shell Game*, CAL. GLOBE (July 10, 2023, 9:59 AM). See https://californiaglobe.com/articles/california-leads-the-way-in-ending-big-techs-legal-shell-game/ [https://perma.cc/SC8F-P762].

209 See Petition to Compel Arbitration, supra note 208.

210 See Wallrich v. Samsung Elecs. Am. Inc., No. 22 C 05506, 2023 WL 5935024, at *13 (N.D. Ill. Sept. 12, 2023) (granting 49,986 individual consumers’ actions to compel arbitration against Samsung, which moved to dismiss the case); see also John Doolittle, *California Leads the Way in Ending Big Tech’s Legal Shell Game*, CAL. GLOBE (July 10, 2023, 9:59 AM). See also JOHN Doolittle, *California Leads the Way in Ending Big Tech’s Legal Shell Game*, CAL. GLOBE (July 10, 2023, 9:59 AM). See also https://californiaglobe.com/articles/california-leads-the-way-in-ending-big-techs-legal-shell-game/ [https://perma.cc/HP4U-R2V] (reporting that Samsung refused to pay its $200 million share of costs and that plaintiffs have gone to court to compel payment); see also *MASS ARBITRATION SHAKEDOWN*, supra note 201, at 20 ("In 2022, Samsung faced nearly 50,000 arbitration demands [brought by consumers alleging privacy violations].").

211 In 2019, two plaintiffs’ firms filed 5,274 claims against Postmates and successfully obtained a district-court order directing payment of $8.36 million in fees to AAA. See Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019) ("Petitioners are 5,257 individuals who work as ‘couriers’ . . . . Postmates has refused to tender its share of the arbitration fees . . . ."); aff’d, 823 F. App’x 335 (9th Cir. 2020); id. at 1256 (ordering Postmates to submit to arbitration and holding that the fee payment was for the arbitrator to decide); id. at 1250 ("[T]he AAA informed Postmates that it had until May 31, 2019, to pay its share of the filing fees with respect to the 4,925 demands submitted on April 22, 2019, which was $1,900 per claimant (approximately 9.36 million in aggregate).”). In 2020, plaintiffs filed another 10,356 individual arbitration demands against Postmates. See Second Amended Complaint for Declaratory and Injunctive Relief ¶ 7, Postmates, Inc. v. 10,356 Individuals, No. 20-cv-02783, 2020 WL 8167433 (C.D. Cal. July 1, 2020) ("[C]ounsel then sent Postmates a single email that contained a link to 10,356 virtually identical arbitration demands . . . ."). The settlement status of these claims is unclear.

212 See Skillern v. Peloton Interactive, Inc., 21 Civ. 6808(ER), 2022 WL 3718279, at *2 (S.D.N.Y. Aug. 29, 2022) ("Peloton failed to pay the required filing fees to the AAA . . . . Thus, a group of consumers filed a class action . . . .") Grant, supra note 195, at 6-7 (reporting that Peloton refused to pay the new million filing fees . . . resulting in the filing of a class action, which is presently being litigated.")

213 See Intuit Inc. v. 9,933 Individuals, B308417, 2021 WL 3204816, at *7 (Cal. Ct. App. July 29, 2021) (rejecting Intuit’s complaints about the high costs of mass arbitration, noting that "[a]n unwise outcome is not an absurd result, as courts are not in the business of rewriting contracts to relieve parties like Intuit from bad deals they drafted for themselves"); see also Arena v. Intuit Inc., Case No. 19-cv-02546-CRB, 2021 WL 834253, at *2, *6-7 (N.D. Cal. Mar. 5, 2021) (rejecting as inadequate a class-action settlement of over 100,000 claims originally filed in arbitration).
But corporations continue to fight this result. In a bid to avoid paying $91 million in filing fees for 31,500 individual consumer disputes, Uber sued the AAA in New York state court, claiming the “exorbitant” fees violated the provider’s commitment to “a fair, cost-effective process.” The court was unimpressed, reminding Uber that it alone had “made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and [that the] AAA’s fees are directly attributable to that decision.” Other courts have similarly rejected companies’ attempts to avoid the implications of their own arbitration agreements.


215 *Uber*, 167 N.Y.S.3d at 70 (unanimously affirming the trial-court order rejecting Uber’s motion for preliminary injunction, in which Uber sought to enjoin the AAA from issuing any additional invoices).
provisions, and some state legislatures have enacted statutes requiring payment of arbitration filing fees.

**A. The Backlash to Mass Arbitration**

Responding to mass arbitrations by simply refusing to pay arbitral filing fees appears to be a losing strategy. But companies have other strategic options for trying to defeat mass arbitration. As discussed below, I believe all of those courses of action will have the practical effect of returning parties to the state-by-state status quo that existed at the time of Concepcion. But before unpacking those implications, it is useful to survey the specific options companies have taken to minimize mass arbitration exposure.

The most obvious set of options involves amending arbitration provisions—by exercising unilateral change-in-terms rights provided in the underlying contract—to repel mass arbitration in one of several ways. First,
companies can institute a requirement that each claimant must exhaust various time- and financially intensive pre-filing requirements with the hope of thwarting mass filings. Companies including Meta, Etsy, AT&T, Samsung, and Sony Interactive have added provisions requiring each claimant to participate personally in a pre-filing mediation as a condition to initiating arbitration. As Richard Frankel explains, the “[f]ailure to complete these pre-arbitration procedures can lead to an injunction barring the arbitration from going forward or to dismissal of the claim entirely.”

Second, companies can roll back their promises to pay the lion’s share of fees associated with arbitration. Typically, companies have accomplished this by


221 Frankel, supra note 217, at 18 (reviewing eighty-two arbitration provisions imposed by companies on consumers and finding that nearly 80% require claimants to complete pre-arbitration requirements).

222 Terms of Use, INSTAGRAM, https://help.instagram.com/581066165881870 [https://perma.cc/8A9F-REQ5] (last updated July 26, 2022) (utilizing an arbitration notice which states, in part, that disputes between the user and Instagram will “be resolved by binding individual arbitration,” that the user waives their “right to participate in a class action lawsuit or class-wide arbitration,” and that the user “must provide [Instagram] with a written Notice of Dispute”).

223 Terms of Use, ETSY, https://www.etsy.com/legal/terms-of-use/ [https://perma.cc/7AYT-7E5Z] (last updated July 24, 2023) (warning users that the terms include a “binding arbitration agreement and class action waiver” that bind users to submit disputes “exclusively to individual arbitration” and requiring users to resolve disputes “in good faith” by sending written Notice of Dispute).

224 AT&T Consumer Service Agreement, AT&T, https://www.att.com/legal/terms.consumerServiceAgreement.html (last visited Nov. 6, 2023) [https://perma.cc/7M47-TU92] (alerting users to the individual arbitration agreement included within and requiring users to first send a “written Notice of Dispute”).

225 Terms and Conditions, SAMSUNG, https://www.samsung.com/us/support/legal/LGL10000282/ [https://perma.cc/RN8C-C2Y5] (“If . . . a dispute cannot be resolved through the mandatory informal dispute resolution process (which includes a telephone settlement conference if requested), Samsung and its customers agree to address the dispute through binding individual arbitration (unless customers timely opt out) or in small claims court where the customers reside.”) (last visited Feb. 26, 2024).


227 Frankel, supra note 217, at 19.
by switching to arbitral providers whose rules require the parties to divide costs equally or impose a “loser pays” fee-shifting rule.228 Companies such as Snap,229 Spotify,230 Zoom,231 Klarna,232 HBOMax (now Max),233 and Ticketmaster234 have now migrated away from more traditional arbitral providers (such as AAA and JAMS) to new providers pledging cost-friendly rules and fee schedules.235 Hoping to stanch an exodus of corporate clients in

228 A handful of new entrants in the market for dispute resolution have developed rules and technologies that offer various ways of deterring mass arbitration. FedArb, for example, offers companies nominal front-end filing fees and tiered administrative fees. See ADR-MDL Framework for Mass Arbitration Proceedings, FEDARB, https://www.fedarb.com/framework-for-mass-arbitration-proceedings-adr-mdl/ [https://perma.cc/KHf7-ZUyF] (last visited Oct. 21, 2023) (“The Company will pay a $1,500 filing fee for each . . . claim as well as the costs and fees for any individual arbitrations.”). New Era ADR, which was started in 2020, advertises itself as “the first fully virtual mediation and arbitration platform that resolves legal disputes in less than 100 days, saves businesses and individuals up to 90% in time and expenses, and prevents the rampant gamesmanship in litigation.” Rich Lee, New Era ADR Announces Oversubscribed $4.6M Seed Round, NEW ERA ADR, https://www.neweraadr.com/blog/seed-round/#:--text-New%20Era%20ADR%20is%20the%2C%20and%20unnecessary%20litigation%20gamesmanship%20while [https://perma.cc/EqCG-Vj7N] (last visited Nov. 6, 2023); see also Glover, supra note 202, at 1364 (“[N]ew arbitration outlets are engaged in fierce competition with one another (not to mention the AAA) to cash in on what they see as a mass-arbitration business opportunity. Some small arbitration services . . . openly court businesses with promises of cost savings . . . .”); Alison Frankel, Facing Arbitration Onslaught, Samsung Changes the Rules for Consumer Claims, REUTERS (Apr. 11, 2023, 4:32 PM), https://www.reuters.com/legal/transactional/column-facing-arbitration-onslaught-samsung-changes-rules-consumer-claims-2023-04-11/ [https://perma.cc/Fy9SC-MRM8] (reporting on companies “abruptly switching from AAA to an arbitration provider that charge[s] smaller fees”).


231 Zoom Terms of Service, ZOOM, https://explore.zoom.us/en/terms/ [https://perma.cc/H269-8CCS] (last updated Aug. 11, 2023) (specifying that arbitration services will be provided by either ADR Services, Inc. or National Arbitration and Mediation depending on the user’s location).

232 Terms for Klarna Shopping Services, KLARNA, https://cdn.klarna.com/1/api/shared/content/legal/terms/o/en_us/user#mandatory-disputes [https://perma.cc/6ZSS-6AFZ] (last updated Jan. 18, 2024) (stating that arbitration will be conducted by FedArb).


235 See also Glover, supra note 202, at 1364 (describing how new arbitration outlets “openly court businesses with promise of cost savings”).
a race to the bottom, AAA responded by adjusting its own filing fee schedule in mass-filed consumer cases (albeit not in employment or other spheres). An extreme illustration of this race-to-the-bottom phenomenon is DoorDash, which was so eager to switch providers—after unsuccessfully trying to dodge a pricey mass arbitration by drivers in the AAA—that its outside counsel, Gibson Dunn, decided to write its own rules and fee schedule and find a pliant arbitral body willing to enact them. As a result, the International Institute for Conflict Prevention and Resolution (CPR) instituted a fee schedule under which corporate exposure in the mass-arbitration context is capped at a fraction of what it would have been for DoorDash in the AAA.

Third, some companies (like Match.com) have tried to escape mass arbitration by relying on the “small claims election” provisions that are common in arbitration agreements. These provisions declare that either party may elect at the outset to resolve the dispute in small-claims court and

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236 See AM. ARB. ASS’N, CONSUMER ARBITRATION RULES, COSTS OF ARBITRATION, https://www.adr.org/sites/default/files/Consumer_Fee-Schedule.pdf [https://perma.cc/PQ2D-4FFM] (last updated Jan. 1, 2023). The new rules operate on a sliding scale: companies are required to pay filing fees of $25 per case for the first 500 cases, $250 per case for cases 501-1,500, $75 per case for cases 1,501-3,000, and $100 per case for any additional cases. Id. at 3. As of this writing, JAMS has refused to adopt mass arbitration rules. See MASS ARBITRATION SHAKEDOWN, supra note 201, at 42 (“JAMS has taken no action to address the mass-arbitration phenomenon; it has not adopted a new fee schedule or developed new procedures to address mass filings.”).

237 See Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020) (ordering DoorDash to “tender to AAA the nearly $12 million in administrative fees” to resume arbitration proceedings with 5,800 drivers).

238 Grant, supra note 195, at 5 (reporting that DoorDash “contacted a new arbitration forum, the International Institute for Conflict Prevention and Resolution (‘CPR’) and aided CPR in devising a new protocol to address a mass number of employment arbitrations”); see also Vin Gurrieri, Gibson Dunn Helped Craft Arbitration Provider’s Rules, LAW360 (Feb. 28, 2020, 7:14 PM), https://www.law360.com/articles/1248227/gibson-dunn-helped-craft-arbitration-provider-s-rules [https://perma.cc/R35E-LzHF] (reporting that Judge Alsup unsealed documents relating to DoorDash’s decision to switch arbitral providers to aid “the public in evaluating the true extent to which CPR is impartial given that it traded draft versions of the protocol with Gibson Dunn and DoorDash’s in-house counsel” (cleaned up)).

239 Pricing and Fees, CPR DISPUTE RESOL., https://drs.cpradr.org/services/pricing-fees [https://perma.cc/86DG-N4PT] (last visited Oct. 23, 2023); see also Amir Alimehri, The Table-Turning Rise of Mass Arbitration, LOWEY DANNENBERG (Mar. 30, 2020), https://lowey.com/blog/the-table-turning-rise-of-mass-arbitration/ [https://perma.cc/YE4U-RAYN] (describing email messages showing that DoorDash’s counsel, “Gibson Dunn[,] worked with CPR to develop a mass arbitration system that would be friendly to corporations while the DoorDash matter was pending [and that o]nce finalized, DoorDash changed its terms of service to require couriers to agree to arbitrate all disputes using the new CPR rules, instead of the AAA rules that would require DoorDash to pay a larger share of fees”).

may do so even after an arbitration has been filed.241 Once this election is made, the arbitral provider must administratively close any pending arbitrations.242 While the original intent behind these small-claims elections was to give consumers the option to choose a localized court venue in lieu of arbitration, some companies have triggered these provisions to defeat mass arbitrations.243 For instance, Match.com recently invoked the small-claims election in response to thousands of consumer privacy arbitrations, seeking to channel cases out of JAMS and into small-claims courts in Illinois or Texas.244 Plaintiffs sued Match, asserting that this election was illusory because the small claims courts could not fully address their legal claims. The court agreed, finding “these alternative fora aren’t adequate” because “neither the small claims courts in Texas nor in Illinois can issue damages in [the amounts sought] or injunctive relief of the kind [plaintiffs demand].”245 In an attempt to salvage this strategy, companies have started tinkering with their small-claims elections. For example, Zoom recently amended its arbitration clause to provide that “[a]ny controversy over the small claims court’s jurisdiction shall be determined by the small claims court”—a change which makes it more time-consuming and costly to bring mass arbitrations.246

241 These provisions comport with rules promulgated by the major arbitral providers. For example, the AAA’s Consumer Arbitration Rules provide that either party can “send a written notice to the opposing party and the AAA that it wants the case decided by a small claims court.” CONSUMER ARBITRATION RULES R-9(b) (AM. ARB. ASS’N 2014). https://www.adr.org/sites/default/files/Consumer-Rules-Web_o.pdf [https://perma.cc/KNX8-T882].

242 Id. (upon receipt of either party’s notice of its intent to resolve the dispute in small claims court, “the AAA will administratively close the case”).

243 For instance, when Intuit confronted 40,000 mass arbitrations by TurboTax consumers, it sought to trigger R-9(b) and “requested that the AAA administratively close the vast majority of the pending arbitrations so they could be litigated in small claims court.” Intuit Inc. v. 9,933 Individuals, B308417, 2021 WL 3204816, at *2 (Cal. Ct. App. July 29, 2021). The court eventually held that the small-claims election in Intuit’s arbitration clause could only be triggered by the consumer, not the company. Id. at *5-6.


245 Id. at *3.

246 Zoom Terms of Service, supra note 231; see also id. (“If you or Zoom challenges the small claims court election in your Dispute, and a court of competent jurisdiction determines that the small claims court election is unenforceable, then such election shall be severed from this Arbitration Agreement as to your Dispute. However, such court determination shall have no preclusive effect in another arbitration or court proceeding involving Zoom and a different individual.”).
Fourth, a number of companies including Coinbase,\(^{247}\) AT&T,\(^{248}\) and Verizon\(^{249}\) have recently imposed rules that require “batching” or “queuing” mass claims.\(^{250}\) Typically, these clauses mandate the use of “test cases” or “bellwethers” for resolution of common issues, interstitial mediation sessions between each “batch” of arbitrations, virtual hearings, and severe limitations on common attorney representation.\(^{251}\) These new rules are designed to protect corporate defendants from owing arbitral fees on hundreds or thousands of mass claims all at once. Instead, mass claims are segmented and staged to minimize upfront costs and delay downstream costs. Coinbase, for instance, directs the AAA to resolve mass arbitrations “in batches of 100” where each batch requires only one arbitrator, “one set of filing and administrative fees due per side per batch, one procedural calendar, one hearing . . . , and one final award.”\(^{252}\) Other mass filings are put on “hold”—i.e., no filing or other fees are due—until the first batch is resolved and the parties have engaged in mediation to try to settle claims en masse.\(^{253}\) Verizon’s amended arbitration clause, triggered when “50 or more customers. . . attempt to commence an arbitration . . . which raise similar claims, and counsel for the Verizon customers bringing the claims are the same or coordinated for these customers,” contemplates that cases may only proceed to arbitration in batches of eighty.\(^{254}\) The company pays filing fees on each batch, successively. The remaining cases, meanwhile, are put on hold “until the arbitrations and mediation for prior sets has been completed.”\(^{255}\)

\(^{247}\) Coinbase User Agreement, https://www.coinbase.com/legal/user_agreement/united_states [https://perma.cc/Z7BZ-3ZZF] (last updated Feb. 6, 2024) (describing in § 1.8 the batch procedure process for arbitrations of “one hundred (100) or more individual Requests of a substantially similar nature”).

\(^{248}\) AT&T Consumer Service Agreement, supra note 224.


\(^{250}\) See MASS ARBITRATION SHAKEDOWN, supra note 201, at 50-52 (endorsing “batching” as a means of eliminating “extortionate fees” from abusive mass arbitrations).

\(^{251}\) See generally Glover, supra note 202, at 1367-70.

\(^{252}\) Coinbase User Agreement, supra note 247 (characterizing mass arbitration as “one hundred (100) or more individual Requests of a substantially similar nature filed against Coinbase by or with the assistance of the same law firm, group of law firms, or organizations, within a thirty (30) day period”).

\(^{253}\) Id. (providing for “the resolution of each batch as a single consolidated arbitration with one set of filing and administrative fees due per side per batch”).

\(^{254}\) Verizon Customer Agreement, supra note 249, § 16.6.

\(^{255}\) Id. § 16.6; see also CPR, EMPLOYMENT-RELATED MASS CLAIMS PROTOCOL (VERSION 2.0) 5-10 (2021), https://static.cpradr.org/docs/ERMCP-2021.pdf [https://perma.cc/RZ6J-WMUV] (providing that arbitration claims are randomly assigned numbers and that claims numbered 1-10 will proceed to arbitration as “test cases,” to be resolved within 120 days; that the results of the test cases go to a mediator, who will then attempt to resolve the remaining claims; that after a ninety-
Arbitration’s Unraveling

The final option (in all senses) is to drop the arbitration clause altogether.256 One prominent example of this approach is Amazon, which faced 75,000 privacy-related arbitrations stemming from the use of its Echo device and responded by dropping its arbitration provision.257 TikTok also recently removed arbitration from its terms and conditions.258 While both companies may have sui generis reasons for giving up on arbitration259 such that other companies may be unlikely to follow suit,260 I believe other corporate counsel would readily drop arbitration from their agreements if, in its stead, they could insert an enforceable standalone waiver of the right to pursue class actions in court. I will discuss the implications of standalone class waivers separately below, in Section III.C.

B. Backlash to the Backlash

While newly amended arbitration clauses impose severe obstacles to the maintenance of mass arbitrations, they are susceptible to legal challenges that may leave defendants with no arbitration clause at all. At the outset, the blunt instrument of saddling claimants with increased responsibility for the costs of a sixty-day mediation period, the parties can elect to opt out of arbitration and proceed with the remaining claims in court).

256 Another tactic, of course, is a combination of one or more of the above. OpenAI, for example, requires a sixty-day informal dispute-resolution process, followed by adjudication of ten bellwethers (within 120 days of filing), followed by a ninety-day mediation period, followed by a second sixty-day notice period, after which either party can go to court. See Terms of Use § 8(b)-(g), OPEN AI, https://openai.com/policies/terms-of-use [https://perma.cc/SU46-8372] (last updated Mar. 14, 2023). Thus, the company can delay all but ten of potentially thousands of demands for nearly a year, at the end of which it will have the option to start over at square one in court.

257 See Sara Randazzo, Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-1162547000 [https://perma.cc/UY5J-KLA2] (reporting that Amazon changed its terms of service to allow lawsuits after the 75,000 privacy-related arbitrations triggered millions of dollars in filing fees).


259 Arguably, Amazon affirmatively welcomes class-action litigation to establish, in a conclusive way with res judicata effect, that its privacy policies are consistent with applicable law. See Glover, supra note 202, at 1370 n.474 (suggesting that Amazon’s decision to drop its arbitration clause and require all claims be brought in its home state of Washington might be an effort to obtain “favorable precedent” in public court); see also Maheshwari, supra note 258 (describing a lawyer representing minor plaintiffs suing TikTok who “said he believed TikTok made the term changes in anticipation of a wave of litigation” by state attorneys general).

260 Frankel, supra note 217, at 20 (“Most companies have not eliminated arbitration and have continued to require customers or employees to submit all disputes to mandatory arbitration, notwithstanding any risks presented by the mass arbitration phenomenon.”).
of arbitration is a strategy that is fraught with legal risk for defendants. In employment cases, for example, courts have held that an arbitration agreement may not “require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.”\(^{261}\) Thus, the claimant cannot be forced to share the costs of arbitration other than initial filing fees.\(^ {262}\) A defendant attempting to allocate costs in this fashion risks a holding “that the unconscionable cost-sharing provision is not severable from the remainder of the Arbitration Agreement, and therefore the entire Arbitration Agreement is unenforceable.”\(^ {263}\)

More sophisticated corporate measures for discouraging mass arbitrations have likewise met formidable challenges. In California, Verizon consumers are (as of this writing) seeking to have the company’s new mass-arbitration provisions declared unconscionable. Plaintiffs in *MacClelland v. Cello Partnership* argue that under the “batching” and “queuing” protocols contemplated by the provision, “it would take approximately 156 years to resolve the claims of all 2,712 Verizon customers, given that the average arbitration takes 6.9 months to complete.”\(^ {264}\) In the meantime, the statute of limitations will expire on nearly all claims that are forced to wait at the back of this long, slow-moving line.\(^ {265}\) The district court concurred, finding that “[d]elaying the ability of one to vindicate a legal claim by years . . . conflicts with one of the basic principles of our legal system—justice delayed is justice denied.”\(^ {266}\) The case is currently *sub judice* before the Ninth Circuit, amidst a

\(^{261}\) Lim v. TForce Logistics, LLC, 8 F.4th 992, 1002 (9th Cir. 2021).

\(^{262}\) See id. ("[T]he employee should not be required to pay for the opportunity to present claims—especially where employees would not bear those costs in federal court."); Marquez v. Teufel Holly Farms, Inc., No. 3:22-cv-00060-SB, 2022 WL 18779710, at *12 (D. Or. 2022) ("Marquez was required to pay a $402 filing fee in this court, but win or lose, he would never be required to pay the compensation of his trial judge. Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 687 (Cal. 2000) ("[W]hen an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."); Schreiber v. K-Sea Transp. Corp., 879 N.E.2d 733, 739 (N.Y. 2007) (holding that a clause capping defendant’s exposure for arbitrator’s fees at $750 was not enforceable); Ragone v. Atl. Video at the Manhattan Ctr., 595 F.3d 115, 124-25 (2d Cir. 2010) (applying Schreiber to sever an unconscionable provision from an arbitration agreement).

\(^{263}\) Marquez, 2022 WL 18779710, at *13.

\(^{264}\) Plaintiffs’ Opposition to Defendants’ Motion to Compel Arbitration and Stay Proceedings at 17-18, MacClelland v. Cello P’ship, 609 F. Supp. 3d 1024 (N.D. Cal. 2022) (No. 21-cv-08592-EMC).

\(^{265}\) The district court refused to credit Verizon’s assertion at oral argument that it planned to “update the Agreement . . . to expressly provide that, upon initiating a notice of dispute or filing a complaint in court, the statutes of limitations applicable to a customer’s dispute are tolled until the completion of the coordinated arbitration proceeding . . . .” *MacClelland, 609 F. Supp. 3d at 1042* (cleaned up). Finding that the Verizon was precluded “from changing the terms of dispute resolution proceedings once a dispute is pending,” the court found that “efforts to cure the statute of limitations problem” would be unavailing. *Id.*

\(^{266}\) *Id.* (cleaned up).
flurry of amicus briefs representing the same corporate heavy-hitters that were instrumental in convincing the Supreme Court to enforce class-banning arbitration clauses a decade ago. A similar case challenging Ticketmaster’s mass-arbitration rules is also ongoing.

Whatever the outcome in *MacClelland* and other first-wave challenges to mass-arbitration rules, I believe there exists a powerful claim that these new rules fall outside the protections of *Concepcion*. Framing this argument requires revisiting the Supreme Court’s decision in that case. As I have argued in prior work, *Concepcion* is based entirely on obstacle preemption. The majority reasoned that Congress, in enacting the FAA, intended to ensure that parties could contract for individualized, bilateral arbitration and obtain the benefits of speed and informality. By “conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures,” the Court held, California’s unconscionability doctrine—the *Discover Bank* rule—stood as an obstacle to the purpose of Congress in enacting the FAA. In coming to this conclusion, the majority framed its reasoning based on cost and efficiency of the arbitration process, an issue the Court had repeatedly addressed in prior cases, including *Concepcion*:

> **Costs and Efficiency**
> 
> “In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, XYZ (2010); see also *id.* at 345 (emphasizing that a primary benefit of arbitration under the FAA is “informality,” which helps “reduce[e] the cost and increase[e] the speed of dispute resolution)."

In *Heckman v. Live Nation Entertainment, Inc.*, the district court refused to enforce an amended arbitration clause that would have forced ticket buyers to arbitrate claims in batches under an MDL-like regime calling for bellwether hearings during which all other cases are stayed. No. CV 22-0047-GW-GJSx, 2023 WL 5505999, at *10-13 (C.D. Cal. Aug. 10, 2023). The court ruled that the new arbitration procedures exceeded the scope of defendant’s power to unilaterally modify the agreement and that the agreement was unconscionable. *Id.* at *17. The case is currently on appeal to the Ninth Circuit (No. 23-55770).


271 *Concepcion*, 563 U.S. at 348 (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.” (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, XYZ (2010)); *see also id.* at 345 (emphasizing that a primary benefit of arbitration under the FAA is “informality,” which helps “reduce[e] the cost and increase[e] the speed of dispute resolution)"

272 *See Discover Bank v. Superior Ct. of L.A.*, 113 P.3d 1100, 1108-09 (Cal. 2005) (holding that some class-action waivers constitute exculpatory clauses that are substantively unconscionable under state law).
conclusion, the Justices placed great emphasis on the idea that requiring collective procedures “sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass . . . .” 274

Under Concepcion, then, California’s Discover Bank rule only stands as an obstacle to the FAA where it would render unenforceable an arbitration provision calling for individual claim adjudication. 275 But as applied to a contract that contemplates mass claiming, like Verizon’s “batching” provision, the obstacle-preemption argument falls apart. Obstacle preemption only applies where a state law as applied to the particular case would frustrate the purposes of federal law. The question is whether, “under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” 276

As applied to a contract that does not provide for collective adjudication, the Discover Bank rule is preempted by the FAA under Concepcion. But as applied to a contract that does provide for collective adjudication—like mass-arbitration provisions that provide for MDL-like procedures—the FAA would not preempt a state law prescribing how that collective adjudication inconsistent with the FAA.”); id. at 348 (“Classwide arbitration [procedures] include[] absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”).

274 Id. at 348; see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (“[B]y agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).

275 Stolt-Nielsen S.A., 559 U.S. at 683, 685 (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. . . . This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”).

should be organized. In such a case, state law would not serve as an obstacle to the FAA-enshrined value of individualized informal proceedings. And the Supreme Court has been clear that the FAA does not occupy the field of arbitration; states are free to regulate the form of arbitration in any way that does not conflict with the FAA.

To be clear, mass-arbitration rules like Verizon’s are not somehow “outside” the coverage of the FAA, but they are outside the coverage of Concepcion. The Court has been explicit that parties are free to contract for class arbitration; by the same token, parties are surely free to contract for “batching” and “queuing,” and FAA § 2 will ordinarily demand that such agreements be enforced as written. But where agreements contemplate the very “procedural morass” that we associate with MDLs and class actions, they may be subjected to a state policy reflecting a judgment that mass claiming requires the availability of class-action procedures. And the new mass-arbitration provisions are explicit in abandoning the conception of arbitration that underlay Concepcion. AT&T’s provision provides: “You agree to this process even though it may delay the arbitration of your claim.” Coinbase prescribes a baroque system of batches and bellwethers that mimic

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278 Id. at 477 (“The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”).
279 For example, New York has a substantive ban on arbitration clauses. See N.Y. GEN. BUS. LAW § 399-c(2)(a) (McKinney 2014) (“No written contract for the sale or purchase of consumer goods . . . shall contain a mandatory arbitration clause.”). While some courts have held the state ban preempted by the FAA, see, e.g., Caponera v. Atl. Bldg. Inspection Serv., 117 N.Y.S.3d 822 (N.Y. City Ct. 2020), those decisions are called into question in cases involving MDL-like procedures not contemplated by Concepcion.
280 See 9 U.S.C. § 2 (directing courts to treat arbitration agreements as “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); see also Stolt-Nielsen, 559 U.S. at 683 (“Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.”) (quoting Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995))).
281 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (“[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.”); Stolt-Nielsen, 559 U.S. at 685 (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”).
282 Alternatively, states could pass laws regulating mass-arbitration rules. See Frankel, supra note 217, at 49 (observing that states are free to “limit pre-arbitration requirements, to set a maximum time for arbitrators to decide cases in response to batching concerns [or] to restrict when mass arbitration questions can be delegated to arbitrators”).
283 AT&T Consumer Service Agreement, supra note 224, § 1.3.2.7 (“Administration of Coordinated Arbitrations”).
the stagnating features of MDL practice.\textsuperscript{284} And the Verizon agreement would extend the life of a simple consumer case to 156 years.\textsuperscript{285}

In the end, the current crop of unconscionability challenges to mass-arbitration clauses may or may not succeed. Even under Concepcion, those challengers argue, the mass-arbitration provisions are unconscionable on a theory of “justice delayed is justice denied.”\textsuperscript{286} However that shakes out, my argument here is that, as applied in the context of mass arbitration, state-law rules requiring the availability of class-action procedures are not preempted by Concepcion. And indeed, this same argument should prevail irrespective of whether a particular arbitration provision prescribes MDL-like practices or whether an arbitral body uses such processes to manage mass arbitrations.\textsuperscript{287}

So where does that leave us? Prior to Concepcion, there were twenty-two states representing over 60% of the U.S. population where courts had held, as the Massachusetts Supreme Court put it, that “a clause effectively prohibiting class proceedings in any forum violates the public policy of the Commonwealth.”\textsuperscript{288} In the context of mass arbitration, those policies should

\textsuperscript{284} See, e.g., Myriam Gilles & Gary Friedman, MDL Drano: Rule 23-Based Solutions to Mass Tort Buildup, 84 LAW & CONTEMP. PROBS. 121, 135 (2021) (describing procedures to “decoagulate” the clogged MDL system); see also, e.g., Eldon E. Fallon, Jeremy T. Grabbil & Robert Pitard Wynne, Bellwether Trials in Multidistrict Litigation, 82 TUL. L. REV. 2323, 2330 (2008) (describing MDLs as “black hole[s]” because cases that enter never escape).

\textsuperscript{285} See supra text accompanying notes 264–267.

\textsuperscript{286} See, e.g., MacClelland v. Cellic P’ship, 609 F. Supp. 3d 1024, 1042 (N.D. Cal. 2022).

\textsuperscript{287} The reality is that, even in the absence of a mass-arbitration rule that explicitly demands “batching” or “queuing,” arbitral providers would be forced to adopt some sort of process to manage and administer mass arbitrations. It seems likely that these providers would settle on a procedure that resembles the mass-arbitration rules adopted by individual companies or by the new crop of competitors.

have a new lease on life. The advent of mass claiming, then, marks a return to the state-by-state status quo that existed at the time of *Concepcion*, as illustrated in the following map:

**States Holding Class Action–Banning Arbitration Clauses Unconscionable, Pre-*Concepcion***

![](image)

**C. Standalone Class-Action Waivers?**

The most intriguing countermove that I predict we will see from corporate counsel, besieged by mass arbitrations on one flank and seeking to avoid class actions on the other, consists of abandoning arbitration clauses altogether and, in their stead, instituting standalone waivers of the right to pursue class actions in court.\(^\text{289}\) Not long ago, one might have expected that standalone class waivers, unprotected by the FAA, would be unenforceable.\(^\text{290}\)

\(^{289}\) The two contract terms are, after all, "conceptually distinct." *Laver v. Credit Suisse Sec. (USA)*, LLC, 976 F.3d 841, 846 (9th Cir. 2020) (explaining that "an agreement to arbitrate is a promise to have a dispute heard in some forum other than a court," while a class or collective action waiver "is a promise to forgo a procedural right to pursue class claims" (internal quotation marks and citations omitted)).

\(^{290}\) See, e.g., *Gilles*, supra note 95, at 429 (asserting back in 2005 that "current legal doctrine doesn't allow . . . prospective waivers of federal statutory liability"); see also David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 53-54 (2003) ("Courts generally refuse to enforce contract clauses whose effect is to exempt a party from liability for its own future fraud or intentional torts, violations of statute, and injuries caused by gross negligence or recklessness. Common law doctrine is particularly
Certainly, that intuition seems to have been the primary driver of class-banning arbitration in the first place.\textsuperscript{291} After all, companies have no obvious interest in arbitrating disputes with consumers or workers; what they are interested in is avoiding class-wide liability. Wrapping the class ban in arbitral dress was an ingenious and ultimately effective way to protect against class-action exposure. But none of that answers whether and when standalone class bans are enforceable or whether routine enforcement of class bans in the arbitration context has inured courts to class bans in all contexts.

Decisional law on the enforceability of standalone class bans is sparse. In 2001, the California Court of Appeal observed that “the right to seek class action relief in consumer cases has been extolled by California courts” and thus refused to enforce a clause that would have precluded class action treatment in court.\textsuperscript{292} A number of federal courts have similarly refused to enforce standalone class-action waivers in the context of the opt–in provisions of the Fair Labor Standards Act.\textsuperscript{293} More recently, both the district court of Rhode Island and a New Jersey intermediate state appellate court have held standalone class-action waivers in lease agreements unenforceable on similar public policy grounds.\textsuperscript{294} The New Jersey appellate panel observed that in the

\textsuperscript{291} Gilles, supra note 95, at 396 (“[C]orporate lawyers created the collective action waiver and wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now sacrosanct policies of the FAA.”).

\textsuperscript{292} Am. Online, Inc. v. Superior Ct., 108 Cal. Rptr. 2d 699, 712 (Cal. Ct. App. 2001). In that case, which arose outside of the arbitration context, the court held that a contractual forum-selection clause designating Virginia law was unenforceable because Virginia consumer law does not allow for class actions. The court held the "unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the [Terms of Service] forum selection clause." Id.; \textit{see also In re Yahoo! Litig.}, 251 F.R.D. 459, 469 (C.D. Cal. 2008) (reasoning that standalone class action waiver in commercial contract could be found unconscionable, deferring the issue to summary judgment);


\textsuperscript{294} \textit{See, e.g.}, Killion v. KeHe Distribrs., LLC, 761 F.3d 574, 591 (6th Cir. 2014) (explaining that the "line of precedents" involving class action–banning arbitration clauses "is of only minimal relevance here because the plaintiffs' collective-action waivers in this case contained no arbitration clause" and refusing to enforce the waiver on policy grounds); Hall v. U.S. Cargo & Courier Serv., LLC, 299 F. Supp. 3d 888, 893 (S.D. Ohio 2018) (“It cannot be disputed that this Court is bound by a published decision of the Sixth Circuit. Plaintiffs' class waivers do not contain an arbitration agreement.”).
absence of an “agreement to arbitrate contractual disputes . . . the policies favoring arbitration . . . do not apply and what the Supreme Court of the United States has said about class action waivers, [which] was all intended to enhance the FAA’s arbitration policies[,] is irrelevant.” On the other side, a handful of federal courts have unblinkingly applied standalone class-action bans outside the arbitral context.

In considering the enforceability of standalone class waivers, the starting point is the body of state law that existed before Concepcion. As illustrated in the map reproduced above, the policies of some twenty-two states held class-banning arbitration provisions unconscionable. By necessity, this means that twenty-two states held contractual bans on class actions in any forum unconscionable. These state policies “placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration.” Indeed, if the class bans had been understood to apply only to arbitration and not to judicial proceedings as well, the state policies would have been proscribed by the “equal footing” principle of FAA § 2. Thus, each of the twenty-two states have effectively

295 Pace, 295 A.3d at 577. On September 11, 2023, the New Jersey Supreme Court granted review in Pace to address the specific question of whether standalone class-action waivers are enforceable. See Track Appeals, N.J. CTS., https://www.njcourts.gov/courts/supreme/appeals [https://perma.cc/USX3-ZKX9] (last visited Nov. 7, 2023).

296 See, e.g., Bailey v. Vulcan Materials Co., No. 1:21-CV-0998-MHC, 2021 WL 5860743, at *3 (N.D. Ga. Nov. 16, 2021) (enforcing a standalone class-action waiver against a plaintiff seeking class certification against his employer for allegedly failing to pay overtime wages in violation of the Fair Labor Standards Act); Ordogoitti v. Werner Enterps., Inc., 8:20-CV-421, 2022 WL 874600 at *2, *10 n.2 (D. Neb. Mar. 24, 2022) (dismissing plaintiff truck driver’s class-action claims brought under Nebraska law based on a contract containing a standalone class-action waiver); Ulit4Less, Inc. v. FedEx Corp., No. 11-cv-1713 (KBF), 2015 WL 3916247, at *4 (S.D.N.Y. June 25, 2015) (“Nothing in Italian Colors suggests that class action waivers contained in a provision also containing an arbitration agreement should be treated as more sacrosanct than waivers in context of a contract without an arbitration agreement. To be sure, the particular congressional policies in the arbitration context give additional impetus to enforcing that arbitration portion of the agreement. But no legal principle or policy principle suggests that the rationale underlying the Supreme Court’s analysis in Italian Colors relating to the class action waiver should be different.”); Korea Week, Inc. v. Got Capital, LLC, No. 15-6351, 2016 WL 7049490, at *9 (E.D. Pa. May 27, 2016) (concluding that “class action waivers outside of arbitration are enforceable”).

297 See, e.g., Feeeney v. Dell Inc., 908 N.E.2d 753, 766 (Mass. 2009) (“Our decision is not based on any judgment about the merits of a particular forum for class action adjudication—arbitration or litigation—but rather on a determination that in the circumstances of a case such as this . . . a clause effectively prohibiting class proceedings in any forum violates the public policy of the Commonwealth.” (emphasis added)).

298 Shroyer v. New Cingular Wireless Servs., Inc, 498 F.3d 976, 990 (9th Cir. 2007).

299 See Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (“The FAA thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms.” (internal citations omitted)); Sanchez v. Valencia Holding Co., LLC, 353 P.3d 741, 749 (Cal. 2015) (“[O]ur unconscionability standard is, as it must be, the same for arbitration
ruled that standalone class-action bans offend public policy and are substantively unconscionable.

Meanwhile, federal courts have been clear that—as a matter of federal law—"the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims," and is therefore fully waivable. In *Italian Colors*, Justice Scalia explained that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights" and that "federal law [does not] secure[,] a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23." Justice Gorsuch amplified this position in *Epic Systems Corp. v. Lewis*, as have numerous lower federal courts.

But none of these federal principles affect the determination of twenty-two states that class-action waivers are substantively unconscionable and unenforceable as a matter of state contract law. Those state-law unconscionability rules—reflecting as they do substantive contract principles—should be controlling not only in the state courts, but also in the federal courts. Where the governing-law provision of the relevant contract designates one of the twenty-two states, federal courts faced with standalone class-action bans should give full effect to pre-*Concepcion* caselaw holding class bans unconscionable as a matter of state contract law. At least one district court faced with a standalone class ban has recognized as much, holding that "the analysis of the unconscionability of class-action waivers under Georgia law performed by [pre-*Concepcion* courts] was not impacted in any way" by *Concepcion*. And both prior to *Concepcion* and in the years since, federal courts apply state unconscionability law in evaluating contractual dispute-
resolution provisions, even where the underlying substantive claim is a federal one.  

So, where does that leave us? Where the law governing construction of the contract containing the standalone class waiver is among the twenty-two state laws holding class waivers unconscionable, then the standalone class waiver will be unenforceable in either state court or federal court. That leaves one critical question: can corporate counsel successfully foreclose class actions by instituting standalone class-action waivers along with governing law provisions designating the law of a state that is not among the twenty-two that hold such waivers unconscionable? For companies threatened by mass arbitration, the allure of jettisoning arbitration and instituting standalone class bans with carefully chosen governing law is plain. But will this strategy work? There are some big risks to consider.

First, judges may prefer class treatment as a matter of administrative convenience. Courts are free to employ aggregation tools to manage their dockets, irrespective of what the parties may have agreed to. While Rule 23(a) by its terms provides only that a member of a class “may sue or be sued” on a class basis, Rule 23(c)(4) provides that any action “may be brought or maintained as a class action with respect to particular issues.” As I have shown in prior work, the (c)(4) issue class is a potent tool that district judges may initiate sua sponte to determine liability on a class basis. Especially now, as entrepreneurial plaintiffs’ lawyers are perfecting the ability to aggregate thousands of claimants ever more cheaply, federal judges should consider whether they would prefer to try liability in an orderly (c)(4) class case or preside over a messy MDL-like docket of nominally individual claims. And while mass filings may not pose a realistic threat in certain small-value consumer cases, that threat will be very real in many employment and antitrust cases, among others. And even in consumer cases, plaintiffs’ lawyers will employ a matrix of filters to determine which cases warrant investments in digital marketing and filing fees, including not only the amount of damages but also the strength of the merits case, the shiftability of fees and costs, and

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305 FED. R. CIV. P. 23(a).

306 Id. 23(c)(4) (emphasis added).

307 See Gilles & Friedman, supra note 284, at 123 (discussing In re FCA US LLC Monostable Electronic Gearshift Litigation, 334 F.R.D. 96, 110 (E.D. Mich. 2009), where “the idea to certify a Rule 23(c)(4) issue class to determine key liability facts emanated from the MDL judge himself, sua sponte”).
the ease of client acquisition. Moreover, issue-classing is not the only technique available to the court. Mass joinder may be directed by courts sua sponte to say nothing of less formal structures of consolidation and cooperation.

Second, the contractual designation of governing law may not stand up. Under the dominant Restatement test, a court will disregard the contractual choice-of-law provision where, in the absence of that contractual designation, the court would apply the law of a state that has a fundamental public policy against enforcing class-action bans. In the pre-Concepcion era, numerous California courts held that the state observed a “fundamental” policy against class-action waivers and refused on that basis to enforce choice-of-law clauses.

308 In most cases, filing fees should not be an issue. Where the permissive-joinder requirements of Rule 20(a) are satisfied—permitting “[p]ersons” to “join in one action as plaintiffs”—one would think that a single complaint and filing fee would suffice. See FED. R. CIV. P. 20(a). Still, courts have taken various approaches to the issue. Applying West Virginia’s identical Rule 20, that state’s Supreme Court announced that, in order “[t]o relieve the significant financial burden imposed on circuit clerks by a complaint naming multiple plaintiffs,” the chief judge of each trial court has “the administrative authority to impose additional fees when multiple plaintiffs are joined in a single complaint.” State ex rel. J.C. v. Mazzone, 759 S.E.2d 200, 209 (W. Va. 2015). The Supreme Court of Mississippi ruled that trial courts abuse their discretion by assessing separate filing fees for each plaintiff in multiple-plaintiff cases. Hinds Cnty. Bd. of Supervisors v. Abnie, 934 So. 2d 996, 999 (Miss. 2006). Other courts have held each plaintiff must pay the required fee prior to joinder. See, e.g., Alleyne v. Diageo USVI, Inc., 69 V.I. 307, 327 (V.I. 2008) (“It would be patently unfair to allow 155 individuals to join together and seek individualized damage amounts and yet pay only 48¢ apiece to have commenced this civil action.”). This result seems unreasonable, given that Rule 20 allows courts to order that the claims of any “person” be joined, and is not limited to already-filed “parties.”

309 See FED. R. CIV. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a party.”); id. 16(c)(3)(L) (affording judges wide discretion to “adopt[ ] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems”).

310 See, e.g., In re Louisiana-Pacific Corp. Trimboard Mktg., Sales Pracs. & Prods. Liab. Litig., 867 F. Supp. 2d 1346, 1347 (J.P.M.L. 2012) (denying motion to transfer to centralized proceedings in part because “informal cooperation [was] practicable and [would] avoid duplicative proceedings”); In re Fresh Dairy Prods. Antitrust Litig., 856 F. Supp. 2d 1344, 1345 (J.P.M.L. 2012) (denying motion for transfer to centralized proceedings because “[g]iven the limited number of actions” and “informal cooperation among the involved attorneys [was] quite practicable”).

311 The Restatement (Second) Conflict of Laws § 187(2)(b) provides that courts have discretion to disregard a choice of law provision where its application would be “contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue.”
under the Restatement test. Other states’ unconscionability rules meet the “fundamental policy” standard as well.

Finally, companies considering a standalone class ban need to consider whether the state law they designate to govern the contract might be interpreted to prevent standalone class-action bans, even if the state courts never adopted such a stance vis-à-vis class-banning arbitration clauses. Even before Concepcion, the willingness of many courts to enforce class-banning arbitration clauses stemmed from a broad reading of FAA § 2, which demands enforcement of arbitration clauses as written and may not signal comfort with standalone class bans that impair the ability of plaintiffs to vindicate their rights. Of course, it is also possible that courts in some of the twenty-two states where class action–banning arbitration clauses had previously been declared unconscionable have become so conditioned to enforcing class bans that the import of removing arbitration will be insufficiently appreciated—at least in the short run.

CONCLUSION

The 21st century has been a bleak one for proponents of collective litigation. The hegemonic rise of class-banning arbitration provisions has thwarted workers and consumers across the legal landscape as the FAA has

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312 See, e.g., Hoffman v. Citibank (S.D.), N.A., 546 F.3d 1078, 1083 (9th Cir. 2008) (holding that “if Citibank’s class arbitration waiver is unconscionable under California law, enforcement of the waiver under South Dakota law would be contrary to a fundamental policy of California” and the contractual designation of South Dakota law would be disregarded under § 187(2)); Lopez v. Am. Express Bank, FSB, No. CV 09-07335 SJO (MANx), 2010 WL 1720993, *1 (C.D. Cal. 2010) ("[T]he cardmember agreement’s . . . choice of law provision is unenforceable because it includes a class action waiver, which is unconscionable under California law.").

313 See, e.g., Scott v. Cingular Wireless, 161 P.3d 1000 (Wash. 2007) (describing Washington’s fundamental public policy of protecting consumers through the availability of class actions); Fiser v. Dell Comp. Corp., 188 P.3d 1215, 1218-19 (N.M. 2008) (“The fundamental New Mexico policy of providing consumers a mechanism for dispute resolution . . . specifically empowers private individuals to bring rights of action in the name of the state and for ‘all others similarly situated.’” (internal citation omitted)).


315 Missouri may be an example of a state whose judges have forsaken pre-Concepcion unconscionability analyses. Compare Ruhl v. Lee’s Summit Honda, 322 S.W.3d 136, 140 (Mo. 2010) (finding a class-action waiver unconscionable where it would “unfairly . . . deprive consumers of the only practical means of retaining counsel to navigate the complexities of consumer law” and would “immunize . . . and allow it to continue in its allegedly deceptive practices”), with Hennessey v. Kohl’s Corp., 571 F. Supp. 3d 1060, 1074 (E.D. Mo. 2021) (“While the class waiver may discourage attorneys seeking to litigate via class action, it does not make all vindication of consumers’ rights economically infeasible. Enforcing the agreement as to the class action waiver, therefore, does not lead to economic infeasibility and an unconscionable result.”).
grown into a super-statute, frozen in a 1920s conception of individual claiming.

But recent developments signal a thaw. Green shoots have appeared in Congress, which in 2022 amended the FAA for the first time in its history to exempt one important subset of litigation activity, possibly setting the stage for further rollbacks. The Supreme Court, meanwhile, has explicitly rejected the assumption, widely held by lower courts, that the promotion of arbitration is a “favored policy” warranting the application of special rules of construction and procedure. The implications of this clarification are profound and should, by all rights, remove from the coverage of the FAA all claims by workers engaged in interstate commerce, among other effects.

And the recent development of mass-arbitration techniques has enabled some claimants to pursue collective action in the face of class action–banning arbitration provisions. But more consequentially, the very threat of mass arbitration leaves companies with choices that will, I believe, imperil their immunity from class liability. We can already see some companies responding to this threat by modifying their arbitration provisions to deter mass arbitration. But these modifications, I submit, drift beyond the protective bounds of the Supreme Court’s FAA obstacle-preemption jurisprudence, leaving them vulnerable to claims of unconscionability. Companies also have the option to jettison arbitration altogether and, instead, impose contractual bans on pursuing class actions in court. But in states representing more than half the U.S. population, dropping arbitration will have the immediate effect of reanimating pre-Concepcion case law holding class action bans unenforceable. Either way, then, companies seeking insulation against mass arbitration are courting a return to the status quo that existed before Concepcion. So, while opponents of class-banning arbitration cannot roll back the 21st century, we may well get back to 2011.