MATTHEW FRITZ-MAUER*

Naked Class Waivers

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* Executive Director, Denver Labor Division of the Denver Auditor's Office, Denver, Colorado; Adjunct Professor of Law, University of Colorado Law School, Boulder, Colorado. J.D., University of California, Irvine School of Law (2015); Ph.D., Department of Criminology, Law and Society, University of California, Irvine School of Social Ecology (2019). Thank you to David Seligman for coining the phrase "Naked Class Waivers," and to Elizabeth Hoffman, Achalie Kumarage, Ratana Ly, Diana Reddy, Ryan Nelson, and Andrew Elmore for graciously reading drafts of this Article and providing feedback.

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INTRODUCTION

Mandatory arbitration agreements have become commonplace. These contracts bind tens of millions of workers and consumers. The mandatory arbitration agreements typically do two things: (1) force individuals to privately arbitrate all disputes and (2) require them to waive their right to participate in class action lawsuits. Legal scholars and experts have criticized this phenomenon for worsening the access to justice crisis, stymying corporate accountability, depriving the public of oversight, and preventing millions from vindicating their civil rights. Class action lawsuits are often the only way to pursue small, widespread violations of the law. And, without a group mechanism, the fundamental rights of millions of people are systematically foreclosed from a legal claim.

But something worse than mandatory arbitration is coming—and in many places, is already here: "Naked Class Waivers" that force individuals to give up their ability to participate in group lawsuits without any accompanying arbitration agreement. This Article is the first to explore the increasing prevalence of these coercive and one-sided agreements. Fifteen years ago, Naked Class Waivers were unconscionable and unenforceable in many parts of the country. Now, the opposite is true.

This Article explains how mandatory arbitration normalized the idea that individuals could freely give up their right to participate in a group lawsuit. Over the last thirty years, the Federal Arbitration Act (FAA) has served as a Trojan horse to smuggle waivers of a key right into mainstream legal acceptance, transforming these once-unconscionable terms into something the courts now routinely uphold.

Naked Class Waivers threaten to be even worse for consumers, workers, and the public interest than mandatory arbitration. Arbitration, at least sometimes, plants the seeds of its own destruction. Recently, plaintiffs' attorneys have begun mass-filing individual arbitration demands. This strategy threatens enormous up-front costs for defendants, forcing them to either reenter the class action arena or else pay millions in fees. Mass arbitration has been hailed for reversing the trend and, perhaps, reviving the class action. None of this is possible with Naked Class Waivers.

This is the new frontier of the attack on worker and consumer rights, and it will succeed unless advocates and activists invoke the right strategies to fight back. Doing so will require formal legal reform, creative litigation strategies, and increased action by government agencies. Congress and the states must pass legislation prohibiting Naked Class Waivers; courts should revive old legal doctrines deeming class waivers unconscionable; and government actors must recognize this threat for what it is and respond through creative, bold enforcement strategies.

* * *

When she started working as a barista at Bean City Coffee Roasters, Amanda did not think much of signing the mandatory arbitration agreement and class action waiver that Bean City presented her. After all, who anticipates legal action against their brand new employer?

A few weeks later, the COVID-19 pandemic hit, and Amanda—like millions of others—got laid off. Her manager told her it had nothing to do with her or her performance but the unfortunate result of the budding crisis. Nonetheless, Amanda's final paycheck never arrived. And, when she contacted Bean City, the owner made it clear that he had no intention of paying her.

Amanda sought the advice of a local nonprofit, which connected her with a pro bono attorney. Amanda could not file a lawsuit because she had given up that right. But, in this instance, the arbitration agreement worked in her favor. While Amanda would have had to pay $300 to bring her claim, Bean City would have been on the hook for much more. The American Arbitration Association's (AAA) rules impose significant, nonrefundable costs on companies. Bean City would have almost immediately had to pay more than $2,600 in filing and administrative fees, and eventually many thousands more for the arbitrator's fees, venue rental costs, and other expenses—to say nothing of the coffee shop's own attorneys' fees.

Amanda's lawyer offered Bean City a straightforward choice: the business could either pay Amanda her earned wages plus damages or pay thousands more than that to AAA. Bean City made the rational, economical choice. Amanda walked away with her paycheck, about $600 in damages, and a nondisparagement agreement.[1]

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[1] This is a real story, although I have anonymized it by changing names and some small details.

Amanda signed away two of her fundamental rights in return for a minimum wage job. First, she promised never to file a lawsuit in civil court against Bean City and instead could enforce her rights only through private arbitration. While this portion of her employment agreement was only a short paragraph, it covered a breathtaking range of possible problems, including wage theft, discrimination, harassment, and personal injury. Perversely, it even gave the arbitrator the authority to decide whether the agreement was enforceable.[2] Second, Amanda agreed that no matter how widespread, systemic, or pervasive her employer's bad acts were, she would not join with any other potential plaintiffs in any class action, either in court or arbitration.

In some ways, these facts are absurd. Bean City was a small coffee shop with fewer than fifteen employees. The danger of *any* lawsuit was remote, and a class action was a vanishingly minor threat, especially since the vast majority of wage workers who suffer rights violations never attempt formal legal action.[3]

In other ways, Amanda's employment contract is entirely understandable. Expected, even. Bean City followed a trend—requiring coercive contract terms with boilerplate language. For decades, employers, large corporations, and the defense bar have attacked the procedural rights necessary to enforce statutory protections and process large numbers of legitimate claims.[4] Since the 1980s, these actors have worked hard to normalize class waivers and arbitration clauses.[5] Persuaded by the defense bar's arguments, the United States Supreme Court has explicitly upheld mandatory arbitration agreements that include class waivers, holding that the Federal Arbitration Act establishes "a liberal policy favoring arbitration agreements,"[6] which offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved."[7] While paying lip service to the efficiency of joint actions, the Court views

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2 *See* David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 365 (2018).

3 Matthew Fritz-Mauer, *The Ragged Edge of Rugged Individualism: Wage Theft and the Personalization of Social Harm*, 54 U. MICH. J.L. REFORM 735, 768 (2021); *see* Catherine Albiston, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105, 106 (2014).

4 For a terrific and detailed discussion of this effort, see J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

5 *Id.* at 1297–98.

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

7 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

such lawsuits as involving purely *procedural* rights, which may be freely contracted around in the context of mandatory arbitration.[8]

Employers all over America, big and small, now require their workers to sign mandatory arbitration agreements with class waivers. In 1992, around two percent of workers were subject to mandatory arbitration. In 2018, more than *half* of private sector nonunion employees—more than *60 million* American workers—had signed away their right to access the courts over workplace rights violations.[9] Nearly 25 million had lost the right to bring or join a class action, even in arbitration.[10]

While much analysis has focused on workers, it is not only employers who regularly impose these agreements. Mandatory arbitration agreements are widespread in the consumer context too. As of 2020, over three-quarters of companies included arbitration clauses, and more than half of those explicitly included class waivers.[11] According to the Consumer Financial Protection Bureau, "Tens of millions of consumers use consumer financial products or services that are subject to predispute arbitration clauses," and almost all prohibit class-wide legal action.[12]

The defense bar's mission to undermine access to the courts and group litigation has been enormously, shockingly, distressingly successful. Efforts to stop, limit, or reverse these trends through

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[8] *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 265–66 (2009). In *14 Penn Plaza*, the Supreme Court distinguished "substantive rights," like the right to be free from employment discrimination, from "procedural rights," like "the right to seek relief from a court in the first instance." *Id.* Thirty years prior, the Court explicitly explained that the class action right is procedural only, "ancillary to the litigation of substantive claims." Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 332 (1980).

[9] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 1–2 (2018).

[10] *Id.* at 2.

[11] CARLTON FIELDS, 2020 CARLTON FIELDS CLASS ACTION SURVEY 5 (2020), https://www.carltonfields.com/getmedia/d179cb61-cc42-4e3f-871c-771fc13e4ee4/2020-carlton-fields-class-action-survey.pdf [https://perma.cc/5GSX-JSTU].

[12] CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 9–10 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/G5QG-QQWL].

legislation,[13] rulemaking,[14] and litigation have largely failed.[15] Worse, the number of people affected by these agreements only continues to increase. In 2019, the Supreme Court held that an *ambiguous* arbitration agreement waives the right to class actions,[16] sweeping away the ability for even more people to band together in the pursuit of justice.

In recent years, something fascinating has happened. With formal legal reform largely foreclosed, plaintiffs' attorneys developed a new and creative strategy—mass arbitration.[17] The attorneys began filing hundreds, thousands, and even tens of thousands of individual arbitration demands.[18]

The kicker of mandatory arbitration is that it places employers and corporations on the hook for most of the costs of disputing a claim, both as a matter of contract and as the result of rules imposed by national organizations that manage arbitrations. Both AAA's employment and consumer rules place sole responsibility for administrative costs, arbitrator fees, and other expenses on the business.[19] Sometimes, mandatory arbitration agreements go further, promising to reimburse some or all the filing fees incurred by individuals.[20]

This is all well and good for the entities that force these agreements but *only* as long as people do not demand arbitration. After all, the point of these contracts is to reduce legal and social liability for corporations and businesses. Arbitration agreements (1) ensure a private forum,

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13 *See infra* note 54.

14 *E.g.*, Andrew Ackerman & Yuka Hayashi, *Congress Makes It Harder to Sue the Financial Industry*, WALL ST. J. (Oct. 24, 2017, 10:57 PM), https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968 [https://perma.cc/DFU8-XSE5].

15 *E.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018); AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011). In 2022, however, Congress created a carveout for sexual assault and harassment claims. *See* discussion *infra* Section V.B.

16 Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); *see also* Grieco Enters., Inc. v. McNamara, No. PLCV201900989A, 2020 WL 2521215, at 5 (Mass. Sup. Ct. 2020 Apr. 2, 2020) (explaining that, absent an express agreement allowing for class-wide arbitration, claims must be arbitrated individually).

17 Glover, *supra* note 4, at 1360–62.

18 *Id.*

19 Patrick J. Bannon et al., *Is Arbitration the Answer: What About Mass Arbitration?*, SEYFARTH (Mar. 30, 2021), https://www.seyfarth.com/news-insights/is-arbitration-the-answer-what-about-mass-arbitration.html [https://perma.cc/9FXE-B3EC]. This write-up by attorneys at Seyfarth Shaw LLP, a large law firm specializing in commercial litigation, warns that mass arbitration is a "lethal weapon" that is "a disaster" for employers. *Id.*

20 Glover, *supra* note 4, at 1316.

hidden from the light of day[21] and (2) minimize access to justice.[22] The agreements minimize access to justice by prohibiting the use of the class mechanism,[23] which is frequently the only way to bundle small cases into something large enough to pursue.

By bringing thousands of claims, plaintiffs' attorneys have brought this system—sometimes, with some defendants—to its knees. These attorneys have imposed huge costs on the architects of mandatory arbitration: the very corporations that have done so much to ensure that these agreements are airtight and ironclad.

The list of targets is long and recent. In 2018, Uber became one of the first companies targeted by mass arbitration.[24] In 2019, it became one of the first companies to give up, agreeing to pay more than $146 million to settle wage and hour claims affecting more than 60,000 drivers who, undoubtedly, had no right to litigate as a group.[25] Two years later, white restaurant owners alleging racial discrimination targeted the company again, claiming—across 31,000 cases—that Uber's policy of waiving delivery fees for Black-owned restaurants during 2020's racial justice protests was discriminatory.[26] Whatever the ultimate merits of their claim, AAA's preliminary fees amounted to almost $100 million.[27] Amazon received 75,000 demands

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21 *See* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 155, 170–93 (2019) (discussing how "opaque" arbitration is, and how shutting claimants out of the courts "uniquely harms the most vulnerable members of our society by stultifying the development of progressive employment law"); Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1497 (2004) (explaining that employment arbitrations are typically kept private and frequently result in decisions without reasoned analysis, which do "not have educative or precedential value").

22 Sternlight, *supra* note 21, at 183–86 (discussing how mandatory arbitration stymies the claims of the most vulnerable among us).

23 Horton, *supra* note 2, at 398; Sternlight, *supra* note 21, at 183.

24 Alison Frankel, *Uber Sues AAA to Block $100 Million Fees in 'Politically-Motivated' Arbitration*, REUTERS (Sept. 20, 2021, 1:49 PM), https://www.reuters.com/legal/government/uber-sues-aaa-block-100-million-fees-politically-motivated-arbitration-2021-09-20/ [https://perma.cc/478Z-7HD3].

25 *See id.*

26 *Id.*

27 *Id.* This comes out to approximately $3,200 per claim, which is how mass arbitration really thrives. A large corporation can easily absorb the up-front costs of a single demand, or even a few dozen—less so when there are tens of thousands.

for individual arbitration before rescinding its policy.[28] Chipotle,[29] Chegg,[30] Postmates,[31] DoorDash,[32] JPMorgan,[33] Facebook,[34] Intuit,[35] FanDuel[36]—all these companies, and more, have been inundated with thousands of invocations of their coercive agreements. Many railed against the unfairness of it all—which one judge called "poetic justice"[37]—before agreeing to waive the agreements or settle the claims on a class-wide basis.[38]

Mass arbitration is exciting. It creates powerful economic incentives against arbitration agreements and upends the one-sided power dynamic that the defense bar has worked so hard to enshrine. "Lawyers are waging secret battles" and "winning big," *Business Insider* recently declared.[39] Employer groups and law firms have warned that "[m]ass

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28 Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [https://perma.cc/2UU9-DMJR].

29 Michael Hiltzik, *Column: Chipotle May Have Outsmarted Itself by Blocking Thousands of Employee Lawsuits Over Wage Theft*, L.A. TIMES (Jan. 4, 2019, 7:00 AM), https://www.latimes.com/business/hiltzik/la-fi-hiltzik-chipotle-20190104-story.html [https://perma.cc/Q8Q9-43LJ].

30 Alison Frankel, *Mass Consumer Arbitration Is On! Ed Tech Company Hit with 15,000 Data Breach Claims*, REUTERS (May 12, 2020, 10:51 PM), https://www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22O33E [https://perma.cc/6RHP-TWHF].

31 Quinn Emanuel Urquhart & Sullivan, LLP, *Lead Article: Proliferation of Mass Arbitration: Ballooning Costs and Emerging Tactics*, JD SUPRA (Dec. 2, 2021), https://www.jdsupra.com/legalnews/lead-article-proliferation-of-mass-7129882/ [https://perma.cc/H2B9-YHRH].

32 Petition for Order Compelling Arbitration at 2, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d. 1062 (N.D. Cal. 2019) (No. 3:19-cv-07545-WHA).

33 Erin Mulvaney, *JPMorgan, Facebook Fight Mass Arbitration Legal Strategy*, BLOOMBERG NEWS (July 3, 2019, 2:58 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XFJSJ2QK000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/7CYV-ARDZ].

34 *Id.*

35 Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Settlement Amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 2:09 PM), https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5 [https://perma.cc/3LTE-84ER].

36 Alison Frankel, *FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration*, REUTERS (Jan. 14, 2020, 2:48 PM), https://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK [https://perma.cc/N2XX-QBKR].

37 Petition for Order Compelling Arbitration, *supra* note 32, at 27.

38 See generally Glover, *supra* note 4, for a detailed discussion of this phenomenon.

39 Jack Newsham, *Lawyers Are Waging Secret Battles Against Uber, DoorDash, and Lyft on Behalf of Thousands of Workers. And They're Winning Big—Here's How*, BUS.

arbitration can create significant cost and risk for a company,"[40] calling it a "lethal weapon"[41] that plaintiffs' lawyers wield to "abuse the arbitration system."[42] This strategy has been hailed for causing a "massive retreat" by the very entities that until very recently appeared to achieve "total victory" in making mandatory arbitration agreements with class action waivers "bulletproof."[43] Recently, *The American Prospect* wondered aloud if we were nearing the end of forced arbitration and its harms.[44]

If only.

In the last few years, worker and consumer advocates have subverted widespread mandatory arbitration through (1) mass claiming, (2) extracting class-wide settlements, and (3) expanding access to justice despite a system designed to protect corporations from liability. In many places, something worse than widespread arbitration is coming and, in fact, is already here. Some businesses and defense attorneys have charted a new path forward to evade lawsuits and culpability: "Naked Class Waivers." These waivers require workers and consumers to waive their right to participate in any class, collective, or consolidated action—without *also* shrouding this waiver of a basic right in the context of arbitration. Rather than deal with the financial agony and ongoing headache of mass arbitration, and instead of facing the prospect of broad accountability, enterprising corporations now require consumers and workers to give up the right to participate in a class, collective, or other group action.

This is the next frontier of the decades-long attack on worker and consumer rights, and it flows directly from the FAA while undercutting any of that statute's procedural guarantees. At least arbitration offers a process that, for all its flaws, is often a faster and cheaper form of dispute resolution. Naked Class Waivers eviscerate the mass arbitration

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INSIDER (Nov. 10, 2021, 9:49 AM), https://www.businessinsider.com/how-plaintiffs-law-firms-bring-mass-arbitration-cases-class-actions-2021-11 [https://perma.cc/8CSH-HQBP].

40 Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, GIBSON DUNN (May 24, 2021), https://www.gibsondunn.com/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them/ [https://perma.cc/9D4E-Z5N3].

41 Bannon et al., *supra* note 19.

42 *Mass Arbitration Is an Abuse of the Arbitration System*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (June 4, 2021), https://instituteforlegalreform.com/mass-arbitration-is-an-abuse-of-the-arbitration-system/ [https://perma.cc/U2LD-62KD].

43 Glover, *supra* note 4, at 1293, 1311.

44 Susan Antilla, *The End of Forced Arbitration?*, AM. PROSPECT (Oct. 6, 2021), https://prospect.org/justice/end-of-forced-arbitration/ [https://perma.cc/K7TC-LE9S].

strategy and promise to worsen the social ills caused by mandatory arbitration.

And it is the FAA itself that has rendered these provisions enforceable. For decades, the FAA has been the vehicle for ending representative lawsuits. The litigation around arbitration, however, has also downplayed the fundamental importance of class actions. According to the prevailing logic of the courts, joint lawsuits are nothing more than a convenience—an optional tool for efficiently litigating claims. Class actions are a purely *procedural* right; as such, parties to a contract can decide to bargain them away.[45]

This has been a stunning, rapid development. As recently as 2015, Professor Christopher Leslie warned of the "arbitration bootstrap," arguing that companies bundle unenforceable contract terms into arbitration agreements, which courts then approve wholesale.[46] Chief among Professor Leslie's examples was the class action waiver. Less than a decade later, the bootstrapping of the class waiver into the realm of legitimacy appears complete.

This Article is the first to explore Naked Class Waivers. These waivers are becoming prevalent and, therefore, deserve scholarly attention. The legal landscape allows courts to uphold Naked Class Waivers; worse—except for one circuit in one context[47]—many already have. With a circuit split, the Supreme Court is increasingly likely to act. When it does, it will almost certainly uphold the validity of these one-sided, coercive agreements.

Part I details the legal history of how we got here. Decades of litigation have ensured the primacy of arbitration agreements and diluted the importance of class and collective actions. At this point, the courts have a long history of defining representative suits as nothing more than a procedural tool—a convenience, not a necessity—which means this mechanism for ensuring accountability and enforcing the law may be "freely" given up.

Part II reviews the strategy of mass arbitration and explains how it has upended the coercive, one-sided power dynamic that the defense bar worked so hard to create. Part III explains how courts have, so far, upheld Naked Class Waivers. And, for the few courts that have not upheld Naked Class Waivers, the United States Supreme Court

45 *See* Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 332 (1980).

46 Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 319 (2015).

47 Killion v. KeHe Distribs., LLC, 761 F.3d 574, 590–92 (6th Cir. 2014).

overruled those decisions. Part IV explains why a civil justice system with widespread Naked Class Waivers will likely be even worse for workers and consumers than a status quo defined by mandatory arbitration. Mandatory arbitration at least sometimes—*sometimes*—provides individual plaintiffs, like Amanda, with significant economic leverage. And, as many large corporations and employers have lately discovered, ironclad arbitration agreements leave these entities open to assault by enterprising plaintiffs' lawyers. This strategy of mass claiming is not feasible in the public courts. Finally, Part V discusses possible legal and social solutions to this burgeoning problem, which will require persuasive legal advocacy, new laws, and a more active government.

I
STRIPPING THE RIGHT TO CLASS ACTION LAWSUITS

While Naked Class Waivers are a new phenomenon, their legal and social roots are decades old. Understanding how these coercive agreements have come to be the new frontier in the assault on worker and consumer rights requires tracing legal development and history back a century. This history reveals that class actions have long been a vital tool for holding corporations accountable, advancing social and civil rights, and helping ordinary people find justice. Through the FAA, class actions have also been systematically undermined and legally devalued, and this trend has only accelerated in the past fifteen years.

In 1925, Congress passed (what would become) the Federal Arbitration Act,[48] which generally provides that arbitration agreements "shall be valid, irrevocable, and enforceable."[49] At the time, courts were hostile to arbitration and unwilling to enforce such agreements,[50] treating them differently than other contracts. Quoting from the FAA's legislative history, the Second Circuit famously explained that "the effect of the bill is simply to make the contracting party live up to his agreement. . . . An arbitration agreement is placed on the same footing as other contracts, where it belongs."[51] To that end, the FAA compels arbitration when one party invokes a valid agreement.[52] The

48 United States Arbitration Act, Publ. L. No. 68-401, 43 Stat. 883 (1925).

49 9 U.S.C. § 2.

50 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

51 Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

52 9 U.S.C. § 4.

law, in short, created a "liberal federal policy favoring arbitration agreements."[53]

Today, mandatory arbitration restricts access to justice.[54] For decades, however, these agreements were *not* meant to deprive most of the population from accessing the courts. Instead, mandatory arbitration primarily existed in collective bargaining agreements (CBAs). The agreements were an efficient, cost-effective way of addressing the range of disputes arising between labor unions and employers. By 1944, seventy-five percent of CBAs used arbitration as the endpoint for resolving disagreements;[55] in 1988, labor cases consisted of about two-thirds of AAA's caseload.[56]

This decades-long state of affairs is consistent with what Congress intended from the FAA. When it passed, the central concern was enforcing arbitration agreements between *sophisticated business entities*, such as an employer and a union or two corporations.[57] "Congress," argues Christopher Leslie, "never considered the possibility that retailers would impose mandatory arbitration clauses on their customers, let alone that these arbitration clauses would" impose strict limitations and remove key procedural protections.[58]

But, three decades ago, things changed, and dramatically so. In 1991, the United States Supreme Court upheld the broad enforceability of mandatory arbitration agreements in *Gilmer v. Interstate/Johnson Lane Corp.*,[59] emphasizing the "liberal federal policy favoring arbitration agreements."[60] *Gilmer* declared that arbitration could validate substantive legal rights like a court[61] and imposed a heavy

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

54 For years, advocates have urged Congress to reform the FAA by passing the Forced Arbitration Injustice Repeal (FAIR) Act. *E.g.*, Letter from Advocates for FAIR to Nancy Pelosi and Kevin McCarthy, RE: Support for H.R. 963, the Forced Arb. Injustice Repeal Act (FAIR) (Mar. 15, 2022). This letter, signed by dozens of think tanks, legal services organizations, and nonprofits, argues that passing the FAIR Act will "protect working families from forced arbitration," "restore access to our courts and . . . reinvigorate important civil rights, employment, and consumer protections." *Id.* at 3.

55 Daniel Centner & Megan Ford, *A Brief History of Arbitration*, AM. BAR ASS'N (Sept. 19, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration/#ref24 [https://perma.cc/TS3K-93AA].

56 *Id.*

57 Leslie, *supra* note 46, at 300–20.

58 *Id.* at 269.

59 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

60 *Id.* at 25–27.

61 *Id.* at 30–31.

burden on those seeking to challenge the enforceability of these contracts.[62] In short, the Court endorsed arbitration for a myriad of statutory claims, including age discrimination, civil racketeering, and antitrust.[63]

This created a sea change. *Gilmer* heralded a new age of ironclad arbitration agreements, ensuring that a broad range of civil rights disputes would move into a system of private resolution, individualized and out of the public eye. Almost overnight, the use of arbitration agreements increased exponentially and expanded beyond the realm of disputes between sophisticated, repeat players.[64]

However, *Gilmer* was not the last word from the courts. In particular, two threads of legal development have contributed to this new status quo and the emerging threat of Naked Class Waivers: (1) the expansion of *Gilmer*'s logic and (2) the implementation of some crucial guardrails regarding the enforceability of arbitration agreements.

A. The Rapid Expansion of Gilmer's Logic

In the last three decades, an increasingly conservative Supreme Court has taken *Gilmer* and run with it. The Court has repeatedly upheld the enforceability of arbitration agreements and class waivers in various contexts and consistently rebuffed challenges from workers and consumers.

This was never an inevitable result. A different Supreme Court could have read meaningful limitations into the law. The FAA contains a savings clause[65] that, textually at least, provides a pathway for courts to limit mandatory arbitration. Section 2 of the FAA states that arbitration agreements are "valid, irrevocable, and enforceable" *except* "upon such grounds as exist at law or in equity for the revocation of any contract."[66] In theory, this language, if read broadly, limited the scope of mandatory arbitration based on a range of state-level considerations, including concerns over public policy, fairness, and access to justice.

Nevertheless, courts narrowly interpret Section 2 of the FAA. In the 2010 landmark case *AT&T Mobility v. Concepcion*, the Court held that

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62 *Id.* at 26–29.

63 *Id.* at 28.

64 COLVIN, *supra* note 9, at 3–4, 12–13.

65 9 U.S.C. § 2.

66 *Id.*

the FAA preempts a broad range of "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[67] The decision arose from a consumer class action lawsuit in California. The plaintiffs sued AT&T Mobility LLC, asserting false advertising and fraud.[68] AT&T moved to compel arbitration and invoke a contractual class waiver.[69] The Ninth Circuit Court of Appeals eventually declared the parties' agreement unenforceable under California law, and held that the class action could proceed.[70] In doing so, the Ninth Circuit relied on *Discover Bank v. Superior Court*,[71] in which the California Supreme Court held that class waivers are unlawful if

> 1. They are found in a nonnegotiable contract;
> 2. They govern disputes likely to involve small amounts of damages; and
> 3. The party with more bargaining power is accused of deliberately cheating large numbers of people out of small amounts of money.[72]

The *Discover Bank* decision confronted class waivers on their merits, giving credence to how hard it is, in practice, to enforce legal violations that just are not worth very much money *individually*. The decision relied on the reasoning that underscores what is known as the "effective vindication" doctrine, which allows parties to invalidate a contract if, in practice, it prohibits them from successfully asserting a right.[73] In other words, the California Supreme Court embraced the understanding that without a class action, there will often be neither meaningful sanctions for unlawful behavior nor justice obtained for victims of wrongdoing. This argument persuaded courts for years, striking down arbitration agreements in the 1980s, 1990s, and early 2000s.[74]

But the California Supreme Court's rulings did not persuade the Supreme Court, which rejected the argument that the *Discover Bank*

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67 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 343 (2011).

68 *Id.* at 337.

69 *Id.* at 337–38.

70 *Id.* at 338.

71 Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

72 *Id.* at 1110.

73 *See generally* Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 437–38 (2014).

74 Maria J. Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1751–55, 1767–69 (2006).

rule is a ground that "exist[s] at law or in equity for the revocation of any contract" under the FAA.[75] It narrowly read the statute's savings clause, declaring that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's"[76] objective—to ensure the enforceability of arbitration agreements according to their terms.[77] A state rule effectively requiring class-wide arbitration, notwithstanding a class waiver, is therefore invalid.[78]

Later, class waivers became the default rule in arbitration agreements. In *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[79] the Court held that where an arbitration agreement is silent on the matter, joint actions are precluded.[80] In 2019, the Court expanded this rule in *Lamps Plus v. Varela*: if the arbitration agreement is *ambiguous* regarding class-wide procedures, then joint actions are prohibited.[81]

The *Lamps Plus* majority issued this decision over outraged dissents.[82] Normally, the rule of *contra proferentem* controls ambiguities in a contract that are construed against the drafter[83] (and sometimes *strongly* so[84]). But since Lamps Plus wrote the unclear contract and sought to prohibit class-wide arbitration, joint actions should be allowed based on public policy considerations regarding the parties' relative bargaining strengths.[85] The majority, however, stated that *contra proferentem* could not displace a default statutory rule, and the FAA provided one: arbitration is individualized, and class waivers are the norm.[86]

Most recently, and perhaps most significantly, the Supreme Court struck down an interpretation by the National Labor Relations Board (NLRB) that would have significantly limited class waivers over

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75 *AT&T Mobility LLC*, 563 U.S. at 341–44.

76 *Id.* at 343.

77 *Id.* at 344.

78 *Id.*

79 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

80 *Id.* at 684–85.

81 Emulex Corp. v. Varjabedian, 139 S. Ct. 1407, 1415 (2019).

82 *Id.* at 1420–35.

83 *See id.* at 1431–32 (Kagan, J., dissenting).

84 *E.g.*, Cap. City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc., 747 A.2d 564, 567 (D.C. 2000) ("[I]f, after applying the rules of contract interpretation, the terms still are not subject to 'one definite meaning' . . . the ambiguities [will] be 'construed strongly against the drafter.'").

85 *Emulex Corp.*, 139 S. Ct. at 1428 (Kagan, J., dissenting).

86 *Id.* at 1418–19.

workplace rights.[87] In 2012, the NLRB held that the statute it interprets and enforces, the National Labor Relations Act (NLRA), voided class waivers of employment-related rights, even when paired with arbitration agreements.[88] According to the Board, the NLRA's protection of "concerted action for mutual aid and protection" encompassed the right of employees to link arms in litigation.[89] As discussed in detail in Section III.B, the Supreme Court roundly rejected this interpretation of the NLRA.

Employers and businesses have caught on quickly. In the last thirty years, mandatory arbitration agreements and class waivers have accelerated in prevalence and scope. Today, a typical agreement requires parties to individually arbitrate nearly *any* dispute arising out of their relationship, whether the parties are two businesses, a worker and their employer, or a consumer and a large corporation. Amanda's form contract with Bean City, for example, covered "[a]ny claim, complaint, or dispute that relates in any way to the Parties' employment relationship, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory . . . ."

This same expansive boilerplate language repeats across many other employment and consumer contracts.[90] Today, most disputes are forced out of the public justice system through contracts imposed by parties with significant resources and bargaining power.

B. Bare Limitations on Arbitrations

While the Supreme Court has ensured the validity of mandatory arbitration agreements and class waivers, it has placed *some* guardrails. Although the Supreme Court has read much of the force and meaning out of the FAA's savings clause, unconscionability doctrines still provide narrow means of evading the shackles of mandatory arbitration.[91]

The doctrine of unconscionability asks whether a term is so one-sided and unfair that it should not be enforced. There are two aspects

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87 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018).

88 D.R. Horton Inc. & Michael Cuda, 357 N.L.R.B. 2277 (2012).

89 *Id.*

90 *E.g.*, *Resolution of Disputes Through Individual Arbitration*, ZINUS, https://www.zinus.com/resolution-of-disputes-through-individual-arbitration [https://perma.cc/C3LB-4CXG] (last visited Aug. 8, 2023); *Arbitration Terms Sample Clauses*, LAW INSIDER, https://www.lawinsider.com/clause/arbitration-terms [https://perma.cc/3HYH-7YXQ].

91 Glover, *supra* note 74, at 1749–56.

to this question. First, courts examine whether a contract is procedurally unconscionable, which "concerns the manner in which the contract was negotiated and the circumstances of the parties at the time."[92] It focuses on the elements of oppression and surprise, ultimately examining whether a party with significantly more bargaining power unreasonably sprung terms on a weaker party—for example, by hiding them in a long contract filled with legalese.[93] The second aspect of this doctrine requires courts to examine substantive unconscionability, asking whether "the terms of the agreement . . . are so one-sided as to *shock the conscience*."[94]

Unless and until the Supreme Court decides otherwise, the unconscionability doctrine holds that arbitration must (on paper) be financially accessible for claimants. In the past two decades, state and federal courts nationwide have struck down mandatory arbitration agreements that require (or sometimes threaten) unique or prohibitive costs as part of the process.[95] For example, provisions requiring the losing party to pay the costs of arbitration[96] or the victor's attorneys' fees[97] have been deemed unconscionable.

But there are limits to these limits. While an arbitration agreement cannot impose unconscionable costs for bringing or litigating a claim, this doctrine applies only to *contractually mandated* costs. The "natural" costs of litigation—those that parties normally accrue, like fees for expert witnesses and attorneys—are no barrier at all. In other words, forced individual arbitration is valid even if it might be prohibitively costly over time.

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92 Kinney v. United Healthcare Servs., 83 Cal. Rptr. 2d 348, 352–53 (Cal. Ct. App. 1999).

93 Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 783 (9th Cir. 2002).

94 *Id.* at 784.

95 *See, e.g.*, Hall v. Treasure Bay Virgin Islands Corp., 371 Fed. App'x 311, 312–13 (3d Cir. 2010) (finding "substantively unconscionable" a "provision that required the non-prevailing party at arbitration to pay the costs of the arbitration"); Zaborowski v. MHN Gov't Servs., 601 Fed. App'x 461, 463 (9th Cir. 2014) (fee-shifting provision for prevailing party unconscionable because it would "chill employees from seeking vindication of their statutory rights by pursuing claims in arbitration"); Smith v. Beneficial Ohio, Inc., 284 F. Supp. 2d 875, 880 (S.D. Ohio 2003); Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 685–90 (Cal., 2000); Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1035 (Ariz., 2021); Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 368–71 (N.C. 2008); Delta Funding Corp. v. Harris, 912 A.2d 104, 111–13 (N.J. 2006); Wis. Auto Title Loans v. Jones, 714 N.W. 2d 155, 175–76 (Wis. 2006).

96 *Hall*, 371 Fed. App'x at 312–13.

97 *Zaborowski*, 600 Fed App'x at 463.

The Supreme Court drew this distinction in *American Express v. Italian Colors*,[98] an antitrust case in which the Court held that a class action waiver in an arbitration agreement was enforceable despite the prohibitively high cost of litigating. In a celebration of form over substance, Justice Scalia, writing for the majority, declared that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[99] This is, at best, abstract and technically true. For millions of people, their ability to access justice requires them to have an economical claim, and the only way to make a claim economical is to group it with dozens, hundreds, or thousands of others.

Reflecting these decisions, the major organizations providing arbitration services adopted rules placing the lion's share of filing, administrative, and arbitrators' costs on corporations and employers.[100] This is the circumstance that Amanda, for example, invoked to her benefit. And, as the next Part discusses, these rules have also provided enterprising plaintiffs' lawyers with an opening to turn the tables through a strategy known as mass arbitration.[101]

II
MASS ARBITRATION AND THE PITFALLS OF UNINTENDED LIABILITIES

The Introduction notes that mass arbitration is a litigation strategy that upends the normal power dynamic. By bringing large numbers of arbitration demands, plaintiffs can leverage the procedural costs of mandatory arbitration against employers and corporations, threatening massive up-front fees to negotiate class-wide settlement agreements or force defendants to give up their own individualized arbitration schemes. This Part explains this phenomenon and how it has developed quickly.

There have been two essential legal developments regarding mandatory arbitration. First, these agreements are now enforceable in a stunning array of circumstances. Formal statutory rights do not guarantee access to the public courts, and the FAA normalized waiving the right to initiate, join, or participate in joint actions. For tens of millions of people with as many potential claims, private dispute

98 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

99 *Id.* at 236.

100 Glover, *supra* note 4, at 1352–53.

101 *See generally* Glover, *supra* note 4.

resolution systems replaced going to court.[102] Second, arbitration must be accessible. Initially, arbitration needs to be inexpensive and easily invokable.[103]

Mandatory arbitration seemed like a death knell for consumer and workers' rights cases. And, for a time, courts consistently ruled against plaintiffs. Mandatory arbitration deprived advocates of the key mechanism that made litigating small but widespread and economically influential cases possible. As Professor David Horton recently wrote, by 2018, the proliferation of mandatory arbitration had "nearly eliminated consumer and employment class actions."[104]

All seemed well for those who wanted to minimize—and in many cases, entirely remove—liability for large corporations and employers. But, in the last few years, creative plaintiffs' lawyers created a new tactic. Georgetown Law professor Maria Glover calls it "mass arbitration."[105] Mass arbitration consists of filing large numbers of arbitration demands, maximizing leverage by taking advantage of the significant up-front costs imposed upon employers and corporations by arbitration agreements and associations like AAA.[106] Standing alone, these costs are not a big deal. For example, large companies like Uber or Amazon will absorb thousands of dollars for a single claim, because companies know that arbitration is a favorable forum. That is, most people will not bring a claim, and if they do, the details remain private from the public. But the calculus rapidly shifts when there are thousands of possible arbitration demands.

The strategy takes advantage of the new normal. Arbitration agreements and class waivers are unassailable. This is the status quo the defense bar spent decades creating and now—sometimes—regrets in ways that are public, horrifically expensive, and deeply ironic.

Inevitably, targets of mass arbitration campaigns seek to avoid the fees and costs of their own agreements, crafting various legal arguments as to why they should not be held to their own standard.[107] Courts tend to give these short shrift and at times are even openly disdainful.

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102 *Id.*; Horton, *supra* note 2.

103 *Am. Express Co.*, 570 U.S. at 236.

104 Horton, *supra* note 2, at 363.

105 Glover, *supra* note 4.

106 *Id.* at 1289.

107 *E.g.*, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1065–66 (N.D. Cal. 2020); Uber Techs., Inc. v. Am. Arb. Ass'n, 167 N.Y.S.3d 66, 68–69 (N.Y. App. Div., 2022).

In 2018, for example, 6,250 delivery drivers filed individual arbitration demands against DoorDash.[108] The plaintiffs asserted they were misclassified as independent contractors and denied basic employment rights under federal and state wage and hour law.[109] DoorDash had required its "Dashers" to sign nonnegotiable mandatory arbitration agreements and class action waivers.[110]

These allegations were the kind of run-of-the-mill wage and hour claims of which the class action was designed. Individually, each Dasher's damages were almost certainly far too low to justify legal action. As a rule, many lawyers will not—and financially cannot—represent workers cheated out of a relatively small amount of money.[111] This dynamic makes class waivers so devastating to the access of justice.

Mass arbitration, however, upended the expected power structure. Suddenly, DoorDash found itself saddled with almost $12 million in up-front fees.[112] Desperate to avoid paying $12 million to AAA before it even hears the merits of any claim, DoorDash tried instead to ignore the problem. DoorDash's attorneys told AAA that they had "determined that there are significant deficiencies with the claimants' filings" and that DoorDash was "under no obligation to" and would not "tender to AAA the nearly $12 million in administrative fees."[113]

The plaintiffs then moved to compel arbitration in federal court.[114] DoorDash opposed, but to no avail.[115] The court granted plaintiffs' motion to compel. In doing so, the judge did not even try to hide his feelings on the matter:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus

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108 *Abernathy*, 438 F. Supp. 3d at 1064.

109 *Id.*

110 *Id.*

111 This is the case even where there is a fee-shifting statute, like the Fair Labor Standards Act. *See, e.g.*, Fritz-Mauer, *supra* note 3, at 762–63 (discussing the cost-benefit analysis plaintiffs' attorneys engage in when evaluating wage theft cases).

112 *Abernathy*, 438 F. Supp. 3d at 1064.

113 *Id.*

114 *Id.*

115 *Id.* at 1065–66. DoorDash argued, among other things, that the motion to compel should be stayed pending resolution of a separate, similar class action lawsuit, but the court was not persuaded. As the judge pointed out, "Ironically, DoorDash originally sought to dismiss [that class action] on the ground that couriers had a duty to arbitrate." *Id.* at 1066–67.

> taking away their ability to join collectively to vindicate common rights. . . . The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, 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 clause. . . . Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.[116]

Some other courts have taken the same tone.[117]

Mass arbitration has had two effects. First, its wielders have successfully used it to force class-wide settlements against large corporations. Keller Postman, one of the leading firms to pioneer the strategy, reports that it has obtained more than $375 million in two years for more than 100,000 people.[118]

Second, it has caused the defense bar and its clients to cry foul and demand procedural changes to the arbitral process.[119] Law firms urged businesses to experiment with new clauses and procedures designed to deter mass arbitration. Popular contractual solutions to the "problem" of mass arbitration[120] include (1) requiring informal dispute resolution prior to arbitration, (2) forcing claimants to pay a higher filing fee, or (3) making the losing party pay the winner's fees.[121]

AAA and its sister organizations have also responded to this new form of pressure by adopting special procedures for mass arbitration. These typically include new fee structures or a way to arbitrate a limited number of "test cases" to resolve disputes *en masse*.[122] In

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116 *Id.* at 1067–68.

117 Bostick v. DST Sys., No. 4:21-09133-NKL, 2021 WL 6050907 (W.D. Mo. Dec. 21, 2021).

118 *Keller Postman Named Trial Strategy Innovation Law Firm of the Year by National Law Journal and American Lawyer Media at 2021 Elite Trial Lawyer Awards*, KELLER POSTMAN (July 30, 2021), https://www.kellerlenkner.com/keller-lenkner-named-trial-strategy-innovation-law-firm-of-the-year-by-national-law-journal-and-american-lawyer-media-at-2021-elite-trial-lawyers-awards/ [https://perma.cc/KQF2-4G46].

119 Holecek, *supra* note 40.

120 Bannon et al., *supra* note 19.

121 Holecek, *supra* note 40.

122 Glover, *supra* note 4, at 1368–69. Professor Glover discusses how these test cases are frequently nonbinding as to all claims, but they may be used as precedent for common issues of law and fact. Following the resolution of test cases, parties engage in nonbinding mediation; if that fails to produce a settlement, then all filed cases proceed. In other words, this is a potentially useful way to settle on a class-wide basis, but it at most delays plaintiffs' financial leverage and does not get rid of it.

November 2020, AAA adopted a specific fee structure for "multiple consumer case filings."[123] The organization applies a sliding scale for fees involving twenty-five or more similarly situated consumer plaintiffs: businesses must pay filing fees of $300 per case for the first 500 cases, $225 per case for the next 1,000 cases, $150 per case for the next 1,500 cases, and $75 for any cases thereafter.[124]

Each of these approaches has pitfalls. For example, an approach that seeks to shift more costs onto claimants seems unlawful. There is only so much corporations can do without running afoul of the line of cases holding that initiating arbitration cannot be prohibitively expensive.[125]

Others are strategically uncertain. The new mass arbitration procedures adopted by providers only blunt, rather than remove, plaintiffs' lawyers' ability to threaten massive up-front costs. AAA's approach, for instance, is still an expensive cost every company or employer wants to avoid. Under AAA's new sliding scale, 5,000 arbitration demands would cost "only" $750,000 in up-front filing fees. But the new pricing structure does nothing to reduce individual arbitrators' fees and expenses, which may require a deposit of between $5,000 and $15,000 per case.[126]

Likewise, procedures that involve arbitrators deciding several "test" or "bellwether" cases sound like good, efficient ways to process large numbers of claims.[127] Some newer providers evaluate test cases but do not make the conclusions binding on the whole class, treating them as a tool for mediation or precedent to settle common factual and legal questions.[128] But, this starts to look a lot like the exact mechanism that the defense bar has sought to escape. Relegating the class action to the annals of procedural history has been one of the key goals and most significant victories of the mandatory arbitration movement, and a

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123 AM. ARB. ASS'N, CONSUMER ARBITRATION RULES 35–36 (2020).

124 *Id.* at 36.

125 *See* Hall v. Treasure Bay Virgin Islands Corp., 371 Fed. App'x 311, 312–13 (3d Cir. 2010); Zaborowski v. MHN Gov't Servs., 601 Fed. App'x 461, 463 (9th Cir. 2014); Smith v. Beneficial Ohio, Inc., 284 F. Supp. 2d 875, 880 (S.D. Ohio 2003); Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 685–90 (Cal., 2000); Rizzio v. Surpass Senior Living LLC, 492 P.3d 1031, 1035 (Ariz. 2021); Tillman v. Comm. Credit Loans, Inc., 655 S.E.2d 362, 368–71 (N.C. 2008); Delta Funding Corp. v. Harris, 912 A.2d 104, 111–13 (N.J. 2006); Wis. Auto Title Loans v. Jones, 714 N.W.2d 155, 175–76 (Wis. 2006) (cases discussing limitations on the costs of initiating arbitration).

126 Bannon et al., *supra* note 19.

127 *See, e.g.*, *Rules and Procedures*, NEW ERA ADR 28–31, https://www.neweraadr.com/rules-and-procedures/ (last updated Mar. 2, 2022) [https://perma.cc/FE3C-LPSG].

128 *Id.*

binding process that resolves large numbers of disputes for similarly situated people is effectively a class action lawsuit. Nor does this fully address the "problem" of mass arbitration, which is the massive financial inflection point caused by a multitude of claims.

This is a thorny, cutting-edge issue. For decades, the defense bar has achieved victory after victory. Recently, the tide has shifted, and plaintiffs have developed a new weapon that invokes the bulletproof nature of mandatory arbitration to force the kinds of bargains that seemed to be going extinct a few years ago. To be sure, there are some inherent limitations to mass arbitration. The strategy requires significant start-up costs and is effective only against employers that are large enough to generate a critical mass of complaints.[129] Even with these limitations and the procedural changes discussed above, mass arbitration will probably continue to be a viable—and powerful—strategy against large companies.[130]

Naked Class Waivers present another option, though—and one that promises to be worse for workers and consumers than mandatory arbitration. Naked Class Waivers provide a path for employers and corporations to avoid the financial hardship and accountability of mass arbitration, while making it even more difficult for individuals to assert their rights.

No need to shroud these waivers in arbitration agreements. No need to argue that individual disputes can be privately litigated in a faster, cheaper, more efficient forum. No need to hide the ball and claim that there is a mutual benefit in these mandatory contracts. And no need to give claimants a powerful procedural hook that they can use for negotiating leverage because, as the next Part shows, Naked Class Waivers are almost always enforceable.

III
DISROBING THE CLASS ACTION WAIVER

Naked Class Waivers are often brief, understandable, and straightforward. The waivers broadly waive the right to initiate, join, or otherwise participate in any class, collective, or joint legal action.[131]

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129 *See generally* Glover, *supra* note 4, at 1328–40.

130 *Id.*

131 *See, e.g.*, Niiranen v. Carrier One, Inc., No. 20-CV-06781, 2022 U.S. Dist. LEXIS 5123, at *7–8 (N.D. Ill. Jan. 11, 2022).

A few sentences in a binding—and sometimes lengthy—contract is all it takes to give up a core legal right.

Adhesive, nonnegotiable, and mass distributed contracts can prevent individuals from joining a class action. In general, private litigation has long been used and lauded as a necessary way to supplement public enforcement of the law.[132] Administrative enforcement agencies—like the Department of Labor and the Equal Employment Opportunity Commission—do not have the resources to find and process all or even most of the problems it is tasked to address.[133] Frequently, these problems are the kind that our society has worked to eradicate through the passage of broad, nationally applicable laws, like the Civil Rights Act of 1964[134] and the Fair Labor Standards Act.[135] Such statutes meld private and public enforcement, creating public enforcement agencies and deputizing private litigants to serve the public interest.[136]

A class action is an essential way to hold powerful actors accountable. In 1997, the Supreme Court declared:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[137]

While recognizing its importance, federal courts have *also* long insisted that a class action is merely a procedural tool. It does not create or reflect any substantive rights, but provides an efficient method for resolving disputes in court. The Supreme Court wrote more than forty

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132 *E.g.*, Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 313 (2007) (explaining that Congress, the courts, and the Executive Branch have "recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission").

133 *See, e.g.*, Daniel J. Galvin, *Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance*, 14 PERSP. ON POL. 324, 325 (2016) (discussing resource limitations at the U.S. Department of Labor); Janice Fine, *Enforcing Labor Standards in Partnership with Civil Society: Can Co-Enforcement Succeed Where the State Alone Has Failed?*, 45 POL. & SOC'Y 359, 360–61 (2017).

134 42 U.S.C. § 2000e.

135 29 U.S.C. § 201.

136 *See, e.g.*, Ryan H. Nelson, *An Employment Discrimination Class Action by Any Other Name*, 91 FORDHAM L. REV. 1425, 1470–72 (2023) (discussing the legislative history of laws like these).

137 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

years ago that "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."[138]

This idea has been pushed past its logical limit in the last three decades. As this Part explains, it has been tested, attacked, and inevitably expanded, creating a fertile landscape for Naked Class Waivers. The following subsections discuss three recent categories of cases:

1. Cases upholding Naked Class Waivers;
2. Cases rejecting Naked Class Waivers in the employment context based on the National Labor Relations Act's guarantee of the right to engage in protected and concerted activity to improve the workplace; and
3. A minority of decisions, in the Sixth Circuit only, rejecting Naked Class Waivers under the Fair Labor Standards Act.

The analysis of these cases points to one conclusion: under a shocking range of federal and state statutes and common law doctrines, Naked Class Waivers are entirely lawful.

A. Category One: Naked Class Waivers, Exposed and Unabashed

A significant—and growing—number of jurisdictions to evaluate Naked Class Waivers have held that the waivers are completely enforceable in various circumstances. Disturbingly, these courts frequently justify decisions by importing the logic that defines mandatory arbitration cases. The courts embrace the determination that the right to join together in the pursuit of justice is merely procedural—a nonsubstantive tool of convenience. Therefore, procedural rights may be "freely" given up.

A recent case from the Southern District of Florida exemplifies this category. In *Martins v. Flowers Foods, Inc.*,[139] a class of workers sought to bring a collective action under the Fair Labor Standards Act (FLSA), alleging that their employer illegally denied them overtime pay. Although the workers had signed a mandatory arbitration agreement and class waiver, the arbitration provision was not enforceable against them because the FAA did not apply to transportation workers.[140]

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138 Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper, 445 U.S. 326, 332 (1980).

139 Martins v. Flowers Foods, Inc., 463 F. Supp. 3d 1290, 1292–93, 1300 (M.D. Fla. 2020).

140 *Id.* at 1293, 1295–98.

But after declaring the FAA inapplicable, the court nevertheless enforced the waiver. It explained that "the FLSA contains no explicit provision precluding . . . a waiver of the right to a collective action" and that the statute's legislative history "do[es] not show that Congress intended the collective action provision to be essential to the effective vindication of the FLSA's rights."[141] In siding with the employer, the *Martins* court expressly relied on *Walthour v. Chipio Windshield Repair, LLC*,[142] an Eleventh Circuit case upholding an FLSA collective action waiver based on an applicable arbitration agreement.[143] That there was no enforceable arbitration agreement here was, more or less, a meaningless distinction to the *Martins* court. The reasoning in *Walthour* applied because it relied on the fact that "the FLSA's text, scheme, and legislative history reveal that [it] 'does not set forth a non-waivable substantive right to a collective action.'"[144]

This approach is consistent across the country. Other courts, outside the Eleventh Circuit, have embraced *Walthour*'s logic in non-FAA[145] and non-FLSA cases. The Southern District of New York[146] and the Eastern District of Pennsylvania[147] depended on *Italian Colors* to enforce Naked Class Waivers of RICO claims. In *Kubischta v. Schlumberger Tech Corp.*, the Western District of Pennsylvania likewise employed *Italian Colors*' reasoning to enforce Naked Class Waivers of wage theft claims under Ohio, Pennsylvania, and Texas state law.[148] In upholding Naked Class Waivers of FLSA rights under Florida, Mississippi, Illinois, North Carolina, and Pennsylvania law, the Western District of New York explained that while cases relied upon by the defendant arose "in the arbitration context, Plaintiffs have offered no argument as to why these cases should not apply."[149]

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141 *Id.* at 1300.

142 Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014).

143 *Id.* at 1334–35.

144 *Martins*, 463 F. Supp. 3d at 1300.

145 Feamster v. CompuCom Sys., Inc., No. 7:15-CV-00564, 2016 U.S. Dist. LEXIS 0150 (W.D. Va. Feb. 19, 2016); Hutchins v. Cap. One Servs., No. 3:19-CV-00546, 2020 WL 3053657 (E.D. Va. June 8, 2020).

146 U1IT4Less, Inc. v. FedEx Corp., No. 11-CV-1713 (KBF), 2015 WL 3916247 (S.D.N.Y. June 25, 2015).

147 Korea Week, Inc. v. Got Cap., LLC., No. 2:15-CV-06351-MAK, 2016 WL 3049490 (E.D. Pa. May 27, 2016).

148 Kubischta v. Schlumberger Tech Corp, No. 2:15-CV-01338-NBF, 2016 U.S. Dist. LEXIS 91556 (W.D. Pa. July 14, 2016).

149 Lusk v. Serve U Brands, Inc., No. 6:17-CV-06451-MAT, 2019 WL 4415122 (W.D.N.Y. Sept. 16, 2019).

While this trend is still developing, it is also one-sided. The campaign to eradicate class actions through the cudgel of the FAA is morphing into an all-out, direct assault on joint actions. In several districts, the analysis does not consider efficiency, fairness, and convenience. And the analysis is entirely removed from the context of the FAA.

The following two sections of this Article explore limited Naked Class Waiver pushback, which the Supreme Court and appellate decision-making have mainly quashed. By and large, courts are willing to ratify these provisions, which are only likely to accelerate.

B. Category Two: A Substantive Right to Engage in Protected, Concerted Activity to Improve the Workplace

The second category of cases reflects a hopeful, ambitious, and workers' rights-centered approach to law and justice that the Supreme Court destroyed in 2018.

In 2012, the National Labor Relations Board declared that Section 7 of the National Labor Relations Act provides a *substantive* right to bring a class action lawsuit over work-related violations.[150] Section 7 of the NLRA broadly protects the rights of employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[151] Since Congress passed the law seventy-five years ago, courts have broadly interpreted the "mutual aid or protection" clause because the drafters of the NLRA intended to do much more than narrowly defend the formation of labor unions.[152] So long as employees are *attempting* to join together to address work-related issues, the Act protects them. Even a single employee speaking up is protected if they are attempting to induce their coworkers to some action that will advance employees' interests.[153]

These protections apply even if the workers are not in a union.[154] In 1945, the Fifth Circuit addressed the purpose and breadth of the NLRA:

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150 D.R. Horton Inc. & Michael Cuda, 357 N.L.R.B. 2277, 2286 (2012).

151 29 U.S.C. § 157.

152 *See* D.R. Horton Inc. & Michael Cuda, 357 N.L.R.B. 2277, 2279–80 (2012) (discussing in detail "the core of what Congress intended to protect by adopting the broad language of Section 7").

153 *E.g.*, Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964); Alstate Maint., LLC, 367 N.R.L.B. No. 68, 2019 NLRB LEXIS 8, at *7–8 (Jan. 11, 2019).

154 *See, e.g.*, NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–15 (1962).

> Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit of labor unions . . . the right of employees to engage in concerted activities for the purpose of mutual aid, outside of a union, is specified by the Act.[155]

Armed with this history, in 2012, the NLRB adopted an interpretation of the NLRA that explicitly protected employees' right to bring or join a class action lawsuit.[156] After all, an employment-based class action is, at its heart, workers acting in concert to redress a workplace problem. In a carefully reasoned and thoroughly cited opinion, the Board explained "that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation," and even via group arbitration.[157]

Within a few years, federal circuits split on the question.[158] During this time, several federal district and circuit courts declared illegal work-related class action waivers, including Naked Class Waivers. The Ninth Circuit, for example, held that "[t]he pursuit of a concerted work-related legal claim 'clearly falls within the literal wording of § 7'" and that a Naked Class Waiver "is the 'very antithesis' of § 7's substantive right to pursue concerted work-related legal claims."[159] Adopting this reasoning, courts struck down class waivers under several workplace statutes.[160]

The Supreme Court ended this debate in 2018. In doing so, it eviscerated this line of cases and laid the groundwork for upholding Naked Class Waivers. Adopting a narrow view of the NLRA, the Court's conservative majority wrote that the Act "focuses on the right to organize unions and bargain collectively" and "does not mention

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155 NLRB v. Schwartz, 146 F.2d 773, 774 (5th Cir. 1945).

156 D.R. Horton Inc., 357 N.L.R.B 2277 (2012).

157 *Id.* at 2277–78.

158 The Sixth, Seventh, and Ninth Circuits agreed with the Board's basic premise; the Second, Fifth, Eighth, and Eleventh did not. Convergys Corp. v. NLRB, 866 F.3d 635, 640 (5th Cir. 2017); NLRB v. Alt. Ent., Inc., 858 F.3d 393, 403 (6th Cir. 2017); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1155 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975, 983 (9th Cir. 2016); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1334–36 (11th Cir. 2014); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053–55 (8th Cir. 2013); Sutherland v. Ernst & Young, LLP, 726 F.3d 290, 295–96 (2d Cir. 2013).

159 *Morris*, 834 F.3d at 982–83.

160 *Convergys Corp.*, 866 F.3d.635; *Lewis*, 823 F.3d 1147; *Morris*, 834 F.3d 975; *Walthour*, 745 F.3d 1326; *Owen*, 702 F.3d 1050; *Sutherland*, 726 F.3d 290; *see also* Tigges v. AM Pizza, Inc., No. 16-10136-WGY, 2016 U.S. Dist. LEXIS 100366 (D. Mass. July 29, 2016).

class or collective action procedures."[161] Essentially limiting Section 7 protections to the workplace alone, the conservatives excluded from the NLRA's ambit "the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum."[162]

This reasoning goes against decades of jurisprudence; it explains how the Court currently views the NLRA and class action lawsuits and how it will likely rule on similar issues. With approval from the courts, the NLRB has long held that Section 7 protects activities outside the "immediate employer-employee relationship."[163] In 1942, for instance, the Board determined that three employees who filed an FLSA suit engaged in protected activity.[164] Summarizing this long history of decisions, over forty years ago, the Supreme Court wrote that Section 7 "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."[165] Logically, this makes sense: there is no question that employees have the right to engage in a wide range of protected, concerted activity prior to litigation. There is no reason why this right would dissipate once employers crossed the Rubicon of initiating formal legal action.

No matter this precedent—the majority's analysis in *Lewis v. Epic Systems Corp.* now controls and either directly overturned or effectively gutted those decisions finding a substantive right for employees to bring joint lawsuits. Crucially, the Court did not *just* hold that, despite the NLRA, arbitration agreements with class action waivers are enforceable. Justice Gorsuch went further, declaring the "notion that Section 7 confers a right to class or collective actions seems pretty unlikely"[166] and repeatedly expressed substantial doubt that Section 7 provides any right to joint lawsuits.

These musings are dicta, but they are the dicta of a clear majority on the Supreme Court. And, not surprisingly, lower courts are beginning to enforce Naked Class Waivers. In January 2022, the Northern District

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161 *Lewis*, 823 F.3d at 1617.

162 *Id.* at 1625.

163 D.R. Horton Inc., 357 N.L.R.B. 2277, 2278 (2012).

164 Spandsco Oil & Royalty Co., 42 N.L.R.B. 942, 948–49 (1942).

165 Eastex, Inc. v. NLRB, 437 U.S. 556, 565–66 (1978).

166 *Lewis*, 823 F.3d at 1624.

of Illinois explicitly relied on these assertions, holding that the NLRA is no barrier to Naked Class Waivers in *Niiranen v. Carrier One, Inc.*[167]

The Seventh Circuit had been one of the main courts to endorse the NLRB's reasoning. For example, *Epic Systems* was a Seventh Circuit appeal. In addition, the *Niiranen* plaintiffs attempted to grasp onto and apply the Seventh Circuit's reasoning. The plaintiffs argued that the Supreme Court's *Epic Systems* decision did not control because that case involved an arbitration agreement. Further, *Epic Systems* held that Congress did not intend Section 7 of the NLRA to undercut the FAA. And, without an arbitration clause, Section 7 renders unlawful contract provisions, prohibiting joint actions.[168]

The District Court had little trouble rejecting this argument:

> The problem with Plaintiffs' argument is that the Supreme Court did not simply conclude that the FAA was not displaced by the NLRA. . . . While the Supreme Court did not squarely reject the possibility, its decision repeatedly expressed substantial doubt that Section 7 of the NLRA affords any protection to class and collective action procedures. Thus, there is no reason to believe that any part of the Seventh Circuit's rationale [finding a substantive right to join class actions] . . . survives such that it would preclude enforcement of a class-action waiver outside of the arbitration context.[169]

It is hard to argue with this assessment of *Epic Systems*, even as the application is a repudiation of decades of labor law.

C. Category Three: Collective Action as an Unwaivable Right

The final category of cases reflects a small but important pushback to Naked Class Waivers. The Sixth Circuit, standing alone, holds that Naked Class Waivers are unenforceable under the Fair Labor Standards Act,[170] which affirmatively includes a provision entitling claimants to join together in collective legal action.[171] Beginning in *Killion v. KeHe Distribs., LLC*,[172] the Sixth Circuit acknowledged that the Fair Labor Standards Act provision confers only a procedural right that cannot be waived.[173] The *Killion* line of cases relies on Supreme Court precedent,

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167 Niiranen v. Carrier One Inc., No. 1:20-CV-06781, 2022 U.S. Dist. LEXIS 5123, at *7–8 (N.E. Ill. Jan. 11, 2022).

168 *Id.* at *8.

169 *Id.* (internal citations and quotations omitted).

170 29 U.S.C. § 201.

171 *Id.* § 216(b).

172 Killion v. KeHe Distribs., LLC, 761 F.3d 574 (6th Cir. 2014).

173 *Id.* at 590–92.

holding that neither substantive *nor* procedural rights may be given up under the FLSA.[174] Additionally, the court held that these principles control where there is no arbitration clause. Without any trigger of the FAA's policies, there is just no countervailing consideration that can overcome "the general principle of striking down restrictions on . . . employees' FLSA rights that would have the effect of granting [an] employer an unfair advantage over its competitors."[175] Thus, the Sixth Circuit and its District Courts have repeatedly invalidated Naked Class Waivers of FLSA rights.[176]

Plaintiffs have failed to bring this reasoning into other circuits. Most courts allow waiver of procedural rights under the FLSA. Unlike Rule 23 class actions, which participants must opt *out* of, claimants must take action to join a collective action. "[I]f an employee must affirmatively opt in to any such class action," courts reason, "surely the employee has the power to waive participation" too.[177] To date, courts in the Second, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have all rejected the Sixth District's approach.[178]

Thus, the last decade of litigation points to a clear trend in favor of upholding Naked Class Waivers. Even before the Supreme Court's

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174 *See id.* (citing and discussing Boaz v. FedEx Customer Info. Servs., 725 F.3d 603, 605–06 (6th Cir. 2013)). The Sixth Circuit roots its analysis in decades-old Supreme Court precedent "express[ing] concern that an employer could circumvent the [FLSA's] requirements—and thus gain an advantage over its competitors—by having its employees waive their rights under the [FLSA]." *Id.* at 605 (citing Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–10 (1945)). Waivers, whether of substantive or procedural rights, would "nullify" the FLSA's purpose of "achiev[ing] a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act." Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 161, 167 (1945).

175 *Killion*, 761 F.3d at 592.

176 Kleinhans v. Greater Cincinnati Behav. Health Servs., No. 1:21-CV-70, 2021 WL 5048399, at *13 (S.D. Ohio Nov. 1, 2021) (collecting cases).

177 *E.g.*, Feamster v. CompuCom Sys., No. 7:15-CV-00564-GEC, 2016 U.S. Dist. LEXIS 20150, at *5 (W.D. Va. Feb. 19, 2016); Benedict v. Hewlett-Packard Co., No. 13-CV-00119-BLF, 2016 U.S. Dist. LEXIS 42810, at *5–6 (N.D. Cal. Mar. 29, 2016).

178 Martins v. Flowers Foods, Inc., 463 F. Supp. 3d 1290, 1300 (M.D. Fla. 2020); Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1334–35 (11th Cir. 2014); Kubischta v. Schlumberger Tech. Corp., No. 2:15-CV-01338, 2016 U.S. Dist. LEXIS 91556 (W.D. Pa. July 14, 2016); *Feamster*, 2016 U.S. Dist. LEXIS 20150; Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002) ("Adkins points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute."); Convergys Corp. v. NLRB, 866 F.3d 635, 639 (5th Cir. 2017); Lu v. AT&T Servs., No. C-10-05954-SBA, 2011 U.S. Dist. LEXIS 65617 (N.D. Cal. June 21, 2011); Lusk v. Serve U Brands, Inc., No. 6:17-CV-06451-MAT, 2019 WL 4415122 (W.D.N.Y. Sept. 16, 2019).

decision in *Epic Systems*, federal courts were likely to uphold them based on decades-old precedent establishing that the right to join together in the pursuit of justice is just a procedural right, a convenient—and ultimately unnecessary—means of litigating disputes. Since *Epic Systems*, that argument has strengthened as the Supreme Court bucked decades of labor law to excise joint actions from the NLRA's scope.

Now, a small but increasingly pronounced circuit split exists regarding Naked Class Waivers under the FLSA, raising the prospect of further action by the Supreme Court. When that day comes, it seems all but certain how the Court will rule.

IV
EXPOSING THE PROMISED HARM OF NAKED CLASS WAIVERS

Circumstances for litigating cases involving worker and consumer rights are already extremely dire. Mandatory arbitration agreements paired with class waivers have largely driven joint lawsuits from the justice system.[179] Tens of millions of people in America can no longer work together to seek justice over violations of their most basic legal rights. One 2018 study determined that if employees filed arbitration demands at the same rate they bring claims in court, there would be 320,000–727,000 claims yearly,[180] between thirty-five and eighty times the current rate.[181] The same study estimated that forced arbitration has eliminated ninety-eight percent of employment claims.[182] Likewise, of more than 826,000,000 consumer contracts in effect in 2018, 6,000 of those contracts resulted in arbitration.[183] These numbers do not capture claims made and settled prearbitration, but the difference is nevertheless stark.

It is not that these numbers reveal an overall system of relationships with very few legal violations. Nor is it that the overwhelming majority of potential claims are meritless and mandatory arbitration provides a more efficient way to weed out frivolous claims. As a baseline, people whose rights have been violated are extremely reluctant and unlikely to

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179 Horton, *supra* note 2.

180 Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018).

181 COLVIN, *supra* note 9, at 11.

182 Glover, *supra* note 4, at 1305.

183 *Id.*

take formal legal action.[184] Empirical research has long revealed that many people suffer discrimination, wage theft, harassment, retaliation, and other legal violations, but only a small percentage attempt formal legal action.[185] Many of these claims are entirely legitimate. For example, wage theft is a pervasive social problem affecting millions of workers every year. Yet, the number of wage theft claims reflects just a drop in the bucket of total offenses.[186] When people *do* file a complaint, it is usually because of a justifiable reason.

Proponents of arbitration frequently argue that it presents a fair trade-off. Employees and consumers lose their ability to go to court but, in return, can access a fundamentally fair, cheaper, and more efficient system.[187] The Supreme Court has endorsed this view as well.[188] But, empirical research rejects the Supreme Court's view. Even beyond the fact that most people do not try to litigate their problems in any forum, arbitration is simply worse for potential claimants. It is an extra hurdle that disincentivizes action. Many have argued that the process inherently benefits repeat players—employers and corporations.[189] After all, employers and corporations are the ones paying the fees, and particular arbitrators frequently have ongoing relationships with these entities, along with multiple simultaneous cases.[190]

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184 *See* Fritz-Mauer, *supra* note 3; Rebecca L. Sandefur, *Access to What*, 148 DAEDALUS, J. ARTS & SCI. 49 (2019); Albiston et al., *supra* note 3.

185 *See* Fritz-Mauer, *supra* note 3; Sandefur, *supra* note 184; Albiston et al., *supra* note 3.

186 Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1084, 1089 (2014); *see* Fritz-Mauer, *supra* note 3, at 791–92.

187 *E.g.*, David S. Baffa et al., *Workplace Arbitration & ADR*, SEYFARTH, https://www.seyfarth.com/services/practices/litigation/workplace-arbitration-and-adr.html [https://perma.cc/R4R9-75US] (last visited July 31, 2022) ("Alternative forms of dispute resolution can be effective in achieving favorable conclusions to workplace disputes, for both employers and employees. Whether voluntary, contractual, or judicially required, arbitrations are often more economical, faster, and less public than traditional courtroom litigation."); James M. Peterson, *Is Your Employment Arbitration Agreement Enforceable?*, HIGGS FLETCHER & MACK LLP, https://higgslaw.com/is-your-employment-arbitration-agreement-enforceable/ [https://perma.cc/R55J-YUFU] (last visited July 31, 2022) ("The majority view is that the use of an arbitrator to resolve employment-related disputes would be more expeditious, less expensive, private, and from the employer's perspective, avoid the possible 'runaway' jury verdict.").

188 Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20, 30–31 (1991).

189 *E.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190–91 (1991); Estlund, *supra* note 180, at 686.

190 See Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/9UY4-3K3K]; Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere,*

The companies that *do* go to arbitration fare much worse than those who make claims in court.[191] According to the Economic Policy Institute (EPI), employees who arbitrate their claims win about 21.4% of the time, 59% as often as in the federal courts and 38% as often as in state courts.[192] Even when claimants win, their victories are worth less: the median award in mandatory arbitration is only about 21% of the median award in federal courts and 43% of the average win in state courts.[193] As the EPI summed it up, "[M]andatory arbitration is massively less favorable to employees than are the courts."[194]

Notwithstanding this bleak status quo, Naked Class Waivers threaten worse outcomes than what plaintiffs already face under the regime of forced arbitration. As discussed in Part I, widespread mandatory arbitration planted the seeds of its own destruction. In the last few years, enterprising plaintiffs' lawyers *have* found a way to use the master's tools to tear down at least some of their houses through mass arbitration campaigns.

As this Part explains, however, these same procedural tactics just will not work in a landscape of Naked Class Waivers.

A. Litigation, Leverage, and Risk

Mass arbitration campaigns upend the power dynamic that employers, corporations, and attorneys set out to enshrine thirty years ago. But this strategy is flawed; it requires access to arbitration. The strategy works *only* by taking advantage of that system's unique procedural quirks to extract either a waiver of the agreement, a class-wide settlement, or both.

In the world of Naked Class Waivers, there is no equivalent strategy. This Part briefly explains why there is no equivalent strategy and then turns to an analysis of how widespread Naked Class Waivers will be even worse than the already devastating status quo.

Stacking the Deck of Justice, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/Z5WM-H8C2].

191 KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS (2015).

192 *Id.* at 19.

193 *Id.*

194 *Id.*

1. Fees and Financial Leverage

The lynchpin of a mass claiming strategy is that *any* arbitration demand, even if later dropped, requires defendants to pay thousands of dollars in nonrefundable fees, with more to come. Faced with prohibitive, stunning costs, many companies take the economically rational settlement path.

This same leverage does not exist in the public court system. Filing a civil suit costs the plaintiff a few hundred dollars.[195] These costs do not include the time, money, and effort it takes to investigate a claim, draft a reasonable complaint, and serve notice on a defendant.

In contrast, it costs a defendant nothing to file an answer to a claim. Of course, that defendant still has to pay attorneys' fees, which may be thousands of dollars, especially if their first reaction is to file a motion to dismiss. Those costs will only grow as a case progresses.

Yet mass arbitration thrives because it is a viable business model,[196] and it is a viable business model because the parties are *not* on even footing when it comes to litigation costs. Defending against a lawsuit will always be expensive, but that is the case for the litigation period, and the calculus shifts dramatically outside the strictures of arbitration.

2. Rule 11 and Disincentives to Mass Claiming

Another hurdle to mass claiming in the public justice system are rules of civil procedure and statutes that impose requirements on lawyers who submit filings to the court. The most prominent restriction is Rule 11 in the Federal Rules of Civil Procedure; every state has its version of this rule. While the details vary by jurisdiction, Rule 11 generally requires attorneys to "certif[y] that to the best of [their] knowledge, information, and belief," formed after a reasonable investigation, that anything they submit or argue to a court is

1. not being used for an "improper purpose," like harassment or a needless increase in "the cost of litigation";

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[195] *E.g.*, *Schedule of Fees*, U.S. DIST. CT. CENT. DIST. OF CAL. (Dec. 2020), https://www.cacd.uscourts.gov/sites/default/files/forms/G-072/G-72.pdf [https://perma.cc/5D8L-7AG2] (establishing $350 filing fee for civil suits); *Filing Civil Suits – Guide and FAQs*, D. Colo., http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/FilingCivilSuits.aspx [https://perma.cc/HX6F-X8NG] (last visited July 31, 2022) (establishing $402 filing fee for civil suits).

[196] *See* Glover, *supra* note 4, at 1340–60.

> 2. supported by existing law or based on a nonfrivolous argument about why the law should change; and
>
> 3. supported by evidence, or will likely be supported by evidence after discovery.[197]

The consequences for violating Rule 11 can be significant, especially since there are also statutes prohibiting and penalizing frivolous, unsubstantiated, or insufficiently investigated claims.[198] Attorneys and their law firms may be held personally liable for the fees and costs of the other party, subject to ethics charges, and face other sanctions or monetary penalties.[199]

One of the critical features of mass arbitration is that it requires relatively little input from plaintiffs to create a massive problem for defendants. The firms that run these campaigns often upload standardized forms that would-be claimants can use to input key information sufficient to file an initial arbitration demand. Realistically, this is the only cost- and time-effective way to manage thousands of claims. Compared to a civil court complaint, this method takes little time, energy, and money for all involved—except employers and corporations. Often, hundreds of claims are thrown out, deemed to be deficient, or not properly part of the dispute.[200]

This superficial "investigation" might fall short of what Rule 11 and its state-level equivalents require. But Rule 11 does not apply to private dispute resolution.[201] An arbitrator could, in theory, order a plaintiff's firm to pay costs and fees associated with a frivolous claim. In practice, however, that is not likely to happen because mass arbitrations frequently result in settlements and a mutual release of claims. Arbitrators do not hear frivolous disputes, or even the substantive ones, which plaintiffs could always drop if they do not have a claim.

3. The Social Cost of Mass Claiming in the Public Sphere

Finally—and perhaps most importantly—mass claiming in the courts will impose a significant cost on society writ large. Courts are a

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197 FED. R. CIV. P. 11(b)(1)–(4).

198 *E.g.*, 28 U.S.C. § 1927; COLO. REV. STAT. § 13-17-101.

199 *See* COLO. REV. STAT. § 13-17-102; FED. R. CIV. P. 11(c)(1).

200 Abernathy v. DoorDash Inc., 438 F. Supp. 3d 1062, 1065–66 (N.D. Cal. 2020) (declining to order arbitration as to 869 petitioners who failed to establish that they had a valid arbitration agreement with DoorDash).

201 By its own terms, Rule 11 and its corollaries encompass only claims made to courts. *E.g.*, FED. R. CIV. P. 11(b) ("Representations to the Court").

public good, funded by taxpayer dollars, and *should* provide an accessible and smooth process for resolving disputes.[202] Courts, however, have some well-documented flaws. Courts are frequently criticized for failing to provide meaningful access to justice, especially for the poor.[203] In 2020, courts struggled because of the coronavirus pandemic, which caused periodic, widespread, and lengthy shutdowns, creating a more extensive backlog and exacerbating existing delays.[204]

Despite these problems, courts still serve the public's interest. As bad as the civil justice system's problems might be, mass claiming would make it worse; thousands of individual complaints in a single court, whether state or federal, burden the system. For example, processing the initial complaint packets would take a staggering amount of time and energy, to say nothing of all that follows.

For good or ill, this parade of horribleness is largely speculative. Mass claiming is vanishingly unlikely to occur in the civil courts because the procedural hooks that make it an effective strategy for plaintiffs disappear without arbitration rules. As the following section details, where Naked Class Waivers are valid, the status quo they create is worse for consumers and workers than mandatory arbitration.

B. A New Normal of Restricting Access to Justice

The following section explains three ways Naked Class Waivers create worse outcomes for workers and consumers.

Most Americans enjoy some basic, important, and even powerful civil protections. For example, Americans are protected from fraud, deceit, wage theft, discrimination, etc. Yet, few who suffer a rights violation attempt formal legal action. This has likely always been the case, although researchers began to document this fact half a century ago.[205] The vast majority of people who experience illegal acts do

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202 The Federal Rules of Civil Procedure begin by stating that "[t]hey should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1.

203 *E.g.*, Llezlie L. Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1323–31 (2019) (discussing built-in barriers to claiming in small claims courts); Sandefur, *supra* note 184 (discussing issues with access to justice generally, especially for marginalized people).

204 Griff Witte & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delayed Justice Lingers*, WASH. POST (Dec. 19, 2021, 6:00 AM), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html [https://perma.cc/FZ2E-AXGW].

205 Albiston et al., *supra* note 3, at 112–13.

nothing. At most, they attempt to informally fix the problem by going to Human Resources with a complaint.[206] There are some good and understandable reasons for this. Many people do not have a clear understanding of their rights, so they are unaware of their mistreatment. Even those who know about their abuse are reluctant or unable to assert themselves. Most commonly, this is because individuals (1) do not know where to go for help; (2) are afraid of retaliation; (3) lack faith in the government and the "system," especially its ability to help; or (4) do not believe in their ability to navigate the civil justice system.[207] This yawning gap between the frequency of rights violations and the quantity of claims is often referred to as "the access to justice crisis,"[208] and has received a great deal of attention in recent years from bar associations, activists, and scholars.[209]

This crisis is socially and culturally patterned,[210] and disproportionately influences the most vulnerable—low-income people, minorities, immigrants, and others who find themselves on the margins of America's social and economic systems.[211] Those with less social clout and economic power are less likely to bring claims. That is, the legal disputes of the wealthy are usually worth more money, and therefore, it makes more sense economically to file a lawsuit. Sociologist Rebecca Sandefur, however, says that wealth is "clearly part of the story," but "an explanation based on cost, resources, and stakes is insufficient to explain the full pattern of class differences" here.[212] Factors related to social rank are essential to understanding why marginalized people are reluctant—or practically unable—to enforce their rights, including such factors as experiencing "a sense of entitlement" versus "feelings of powerlessness."[213]

The class action mechanism can and does partially remedy these problems. When people join together, they find strength in numbers. The economic and social disparities between ordinary people and the larger, moneyed entities who have violated their rights balance out somewhat. As the overall value of a case rises, litigation becomes more

206 Alexander & Prasad, *supra* note 186, at 1084; Fritz-Mauer, *supra* note 3, at 772.

207 Fritz-Mauer, *supra* note 3, at 772–85.

208 *E.g.*, Sandefur, *supra* note 184, at 49.

209 *See generally id.*

210 Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOC. 339, 346–49 (2008).

211 *Id.*

212 *Id.* at 347.

213 *Id.*

financially viable, and class members—especially workers—become harder to target and harass. Many class members, even the ones *most* intimidated by legal action, do not need to do anything during the litigation.

But the meteoric rise of forced arbitration has done extraordinary damage to anyone's ability to obtain justice. As discussed at the beginning of this Part, courts have eliminated hundreds of thousands of claims through class actions.[214]

Worse, these burdens have primarily fallen on certain kinds of people and claims. The disputes that have been harmed the most by mandatory arbitration and class waivers are the ones that benefit the most from—and in many cases, *require*—concerted action. For example, wage theft is highly influential overall, but a single person's damages are often too low to justify legal action.[215] The same applies to many other fundamental rights violations, including housing and employment discrimination and consumer fraud.[216] These kinds of low-value but endemic offenses disproportionately affect women, minorities, and those who are poor.[217] At the same time, arbitration agreements and class waivers tend to be more prevalent in frontline jobs and the workplaces of minorities.[218] It is no coincidence that almost sixty percent of African American workers and more than half of Hispanic workers and women are subject to forced arbitration.[219]

The access to justice crisis is—and has long been—a pressing problem.[220] Ideally, our justice system is fair, approachable, and capable of dispensing substantively right outcomes. There are even

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214 Estlund, *supra* note 180, at 696.

215 *See* Fritz-Mauer, *supra* note 3, at 762–63.

216 Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 187–89 (housing and employment discrimination); FED. TRADE COMM'N, SERVING COMMUNITIES OF COLOR: A STAFF REPORT ON THE FEDERAL TRADE COMMISSION'S EFFORTS TO ADDRESS FRAUD AND CONSUMER ISSUES AFFECTING COMMUNITIES OF COLOR 1–3 (2021) (consumer fraud).

217 *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 48 (2009) (wage theft); DAVID COOPER & TERESA KROEGER, ECON. POL'Y INST., EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR 8, 20 (2017) (wage theft).

218 COLVIN, *supra* note 9, at 8–9.

219 *Id.*

220 *See generally* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1981); Sandefur, *supra* note 184.

special efforts to help *pro se* claimants make their arguments and engage with our system of laws.[221] The reality is dramatically different. As sociologist Rebecca Sandefur has explained, "The access-to-justice crisis . . . is a crisis of exclusion and inequality. . . . [S]ome groups—wealthy people and white people, for example—get more access than other groups, like poor people and racial minorities."[222]

This broad and encompassing problem is a feature of the American civil justice landscape. The groups who are least able to enforce their rights in the formal legal system are the same that have faced decades or centuries of wide-ranging systemic discrimination.[223] That is, deliberate political and legal processes have prevented racial minorities, women, immigrants, and the poor from accessing benefits that should come with living in America.[224]

Under this system, it is not just that these are the wrong *types* of claims for the civil justice system, but that the kinds of people who bring them are the wrong types of claimants. As many have explained, the rising tide of mandatory arbitration agreements has had "profound . . . effects on social justice, racial justice, gender justice, and economic justice."[225] These contracts normalized a system that has always been "indifferent to systemic injustice faced by minorities, women, the working poor, and other marginalized groups."[226] Over decades of careful litigation that constantly, inexorably pushed the envelope to expand the mandate of the FAA and deemphasize the importance of fundamental civil and social rights, the defense bar has steadily whittled down the effect of those rights and the promise of a society free of the worst excesses of discrimination and abuse. What has developed is stark and inimical to the concept of a justice system freely accessible to all but *also* reflects only the latest variation in a system that has long prevented disadvantaged groups from obtaining justice.

In recent years, mass arbitration campaigns have provided a partial remedy to this widespread assault on collective legal action.

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221 *See, e.g.*, FED. BAR ASS'N, REPRESENTING YOURSELF IN FEDERAL DISTRICT COURT: A HANDBOOK FOR PRO SE LITIGANTS (2019).

222 Sandefur, *supra* note 184, at 49.

223 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE (2005).

224 ALEXANDER, *supra* note 223; KATZELSON, *supra* note 223.

225 Glover, *supra* note 4, at 1283.

226 *Id.* at 1384.

Naked Class Waivers, when enforceable, worsen every single aspect of this situation. The waivers will almost certainly continue to unfairly and excessively burden those who are the most likely to suffer abuse and the least capable of forcing solutions. But mass claiming will no longer be a viable option to force settlements and, perhaps, shift industry dynamics. Besides arbitration, that process will become too convoluted and expensive.

The rise of Naked Class Waivers also reflects another disturbing legal trend: how the law around unconscionability has contracted in recent years, making it easier for employers and corporations to impose terms that, until recently, would have been struck down by many courts.

C. Naked Class Waivers and the New Unconscionability

In 2015, law professor Christopher Leslie persuasively explored how employers and corporations have wielded arbitration clauses to create increasingly oppressive contracts.[227] Tracing the history of FAA jurisprudence, Professor Leslie explained that "[a]s the Supreme Court has expanded the categories of legal claims that are subject to mandatory arbitration, firms have begun to load their mandatory arbitration clauses with unconscionable contract terms." And courts have upheld these clauses based on a (mis)understanding of how much deference Courts owe arbitration agreements.[228] This is what Professor Leslie calls arbitration bootstrapping: tying illegal provisions to mandatory arbitration to grant them legitimacy.[229]

Professor Leslie's chief example of this phenomenon is class action waivers. The Supreme Court's decisions in *Concepcion*[230] and *Italian Colors*[231] substantially undermined the FAA's savings clause and the effective vindication doctrine in the early 2010s.[232] Before these decisions, several state courts invalidated class action waivers, relying on the understanding that the class action is a necessary tool for justice and accountability.[233] In 2008, for example, the New Mexico Supreme Court declared a consumer class action waiver "contrary to

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227 Leslie, *supra* note 46.

228 *Id.* at 266.

229 *Id.*

230 AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011).

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

232 *See supra* Part I.

233 *See infra* Part V.

fundamental New Mexico public policy."[234] To hold otherwise would have been "tantamount to allowing Defendant to unilaterally exempt itself from New Mexico consumer protection laws."[235] Other states followed suit,[236] but some went the other way.[237]

"The calculus fundamentally changed in 2011" when the Supreme Court issued *Concepcion*.[238] The situation for consumers and employees worsened in 2013 with *Italian Colors*. But, crucially, neither of these cases endorsed class action waivers; the Supreme Court based these decisions on deference to arbitration agreements. In the following years, firms increasingly bootstrapped previously unenforceable and unconscionable class action waivers into arbitration agreements.[239]

Naked Class Waivers illustrate just how far this bootstrapping has come. For years, the FAA has been the vehicle by which employers and corporations have made class action waivers largely unassailable. The FAA is like a Trojan horse; it has smuggled class waivers into the mainstream of legal acceptance. The class action is ready to be dismantled; arbitration agreements are not necessary to destroy class actions—and, as the growing trend of mass arbitration demonstrates, the agreements may even be a large liability.

Sometimes, courts upholding Naked Class Waivers do so without analyzing unconscionability, accepting that these terms are not so one-sided as to be unenforceable.[240] At other times, these courts apply the doctrine but import the logic of FAA decisions, legalizing class waivers without the benefit of bootstraps.[241] As the Fifth Circuit has declared, "there is no logical reason to distinguish a [class action] waiver in the

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234 Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1218 (N.M. 2008).

235 *Id.* at 1221.

236 *See* Leslie, *supra* note 46, at 278 n.77 (collecting and discussing cases).

237 *Id.* at n.78.

238 *Id.* at 278.

239 *Id.* at 281.

240 Martins v. Flowers Foods, Inc., 463 F. Supp. 3d 1290 (M.D. Fla. 2020); Feamster v. CompuCom Sys., No. 7:15-CV-00564, 2016 U.S. Dist. Lexis 0150 (W.D. Va. Feb. 19, 2016).

241 Korea Week, Inc., v. Got Capital, LLC, No. 2:15-CV-06351, 2016 LEXIS 69646, at *13 (E.D. Pa. May 27, 2016) ("We find the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant* supports our conclusion class action waivers outside of arbitration are enforceable."); U1IT4Less Inc., v. FedEx Corp., No. 11-CV-1713 (KBF), 2015 WL 3916247, at *5–6 (S.D.N.Y. June 25, 2015) (relying on *Italian Colors*); Hutchins v. Cap. One Servs., No. 3:19-CV-00546, 2020 WL 3053657, at *15 (E.D. Va. June 8, 2020) (relying on *Italian Colors*).

context of an arbitration agreement from a [class action] waiver in the context of any other contract."[242]

In many courts and under many legal regimes, Professor Leslie's bootstrapping is now complete. Only seven years after his analysis, courts nationwide have largely accepted the idea that class waivers are valid. Policy arguments to the contrary, centered on ideas like access to justice, basic fairness, and social benefits, have been unavailing. During this shift, the courts have narrowed the doctrine of unconscionability, paring it down to a form that excludes Naked Class Waivers.

The future may be even harsher for would-be claimants than the already distressing state of affairs. The justice system is increasingly characterized by its procedural hostility to the substantive rights of average people, especially those belonging to groups who today suffer the most frequent and egregious rights violations. When Justice Antonin Scalia wrote in *Italian Colors* that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy,"[243] he—wittingly or not—did two things: (1) laid the precedential and argumentative groundwork for the broad enforceability of Naked Class Waivers and (2) depicted a reality that has almost nothing to do with the real-life experiences of tens of millions of people.

But—and this is a large, significant, encompassing *but*—this future does not have to come to pass. It would take very little legislative action to ensure it does not. Naked Class Waivers promise a further degradation of workers' and consumers' rights. But, unlike so many problems in the law today, Naked Class Waivers are also surprisingly easy to fully and finally eradicate. Legislative reforms are, at best, an uncertain proposition, especially given the moneyed forces with a vested interest in expanding this new status quo. To defend against Naked Class Waivers—and even class waivers generally—advocates must fight for solutions in legislatures, the courts, and executive agencies. The next and final Part discusses solutions.

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242 Convergys Corp. v. NLRB, 866 F.3d 635, 639 (5th Cir. 2017).

243 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013) (emphasis in original).

V
STEMMING THE TIDE OF NAKED CLASS WAIVERS

Currently, there are three circumstances when Naked Class Waivers will be unenforceable, and saving the basic right of ordinary people to access justice over their rights violations will require the invocation of all three.

First, few states have common law rules that render most Naked Class Waivers unenforceable. Given the changes in law and judicial rhetoric in the past decade, however, this is far from certain. The understanding of unconscionability has changed, and advocates can no longer rely on principles that are less than twenty years old.

Second, legislatures can easily amend existing statutes or rules of procedure to preserve and strengthen the right to collective legal action. These first two circumstances are important exceptions to the rule. Yet these exceptions are uncertain and unlikely to make a significant difference in large swaths of the country. The exceptions, however, are instructive for decision-makers who wish to halt or even reverse the use of a procedural tool that harms statutory rights.

Finally, government agencies and private parties, other than the real parties in interest cabined by Naked Class Waivers, may provide an effective way to vindicate basic rights and redress social harms. Many already have the authority to do so, but few use it.[244] In a court system that keeps its doors closed, the prospect of broad utilization of the agency class action has taken on new urgency.

A. The Resurgence of the Discover Bank *Rule*

Almost twenty years ago, the California Supreme Court foresaw the significant harm threatened by class action waivers.[245] In *Discover Bank v. Superior Court*, it imposed significant guardrails on their enforceability. *Discover Bank* had a set of now familiar facts; the plaintiff asserted fraud against Discover Bank, which cost them a small amount of money but affected many people.[246] The plaintiff filed suit, but Discover Bank successfully invoked a mandatory arbitration agreement.[247] The plaintiff then attempted class-wide arbitration, but

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244 *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2016).

245 Discover Bank v. Superior Ct., 113 P.3d 1100 (Cal. 2005).

246 *Id.* at 1103–04.

247 *Id.*

the same consumer arbitration agreement included a class waiver.[248] The plaintiff then challenged the waiver as unenforceable under California law, claiming it was unconscionable and, therefore, void.[249]

Ultimately, the state supreme court agreed. The majority stressed the importance of class action lawsuits, not just for people seeking to join their claims in the pursuit of justice but for "legitimate business enterprises" who benefit from "curtailing illegitimate competition." Further, the majority stressed the importance of class actions for the judicial system, allowing it to deal with a single, more manageable case.[250] The California courts have long recognized that class action lawsuits are "often the only effective way to halt and redress . . . exploitation."[251] The United States Supreme Court recognized this same principle before it developed such a staunch aversion to joint legal actions.[252]

When the court decided *Discover Bank*, it was well settled that class action waivers may contradict California public policy. But the majority held that the FAA did not preempt that determination.[253] In reaching this conclusion, the court relied on the plain language of the FAA's savings clause, which limits enforcement of arbitration provisions based on general contract principles "at law or in equity for the revocation of any contract."[254] The FAA allowed California law to render class waivers as broadly unconscionable.[255]

While California's *Discover Bank* rule is the most famous example, California was not alone. A number of state and federal courts followed suit.[256] As Christopher Leslie explains, the courts followed California by declaring class waivers unconscionable or invalidating the waivers based on the effective vindication doctrine.[257]

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248 *Id.*

249 *Id.* at 1104.

250 *Id.* at 1105 (quoting and discussing Vasquez v. Superior Court, 484 P.2d 964 (Cal. 1971)).

251 *Id.* at 1108–09 (quoting Linder v. Thrifty Oil Co., 23 P.3d 27, 37–39 (2000)).

252 *Id.* at 1105–06 (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)).

253 *Id.* at 1103, 1110–18.

254 *Id.* at 1111 (discussing the FAA, 9 U.S.C. § 2).

255 *Id.* at 1112.

256 *See, e.g.*, Fiser v. Dell Comput. Corp., 188 P.3d 1215, 1218 (N.M. 2008); Schwartz v. Alltel Corp., No. 86810, 2006 WL 2243649, at *13 (Ohio Ct. App. June 29, 2008); Kinkel v. Cingular Wireless, LLC, 857 N.E. 2d 250, 278 (Ill. 2006); Muhammad v. Cnty. Bank of Rehoboth Beach, 912 A.2d 88, 100 (N.J. 2006); Scott v. Cingular Wireless, 161 P.3d 1000, 1009 (Wash. 2007).

257 Leslie, *supra* note 46, at 277–78.

Six years later, the Supreme Court rejected California's reading of the FAA's savings clause and overruled *Discover Bank* in *AT&T Mobility v. Concepcion*.[258] In *Concepcion*, the Court relied on the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[259] The Court's reasoning, however, does not apply in situations where the FAA is not involved. In these situations, *Discover Bank* is still good law in the context of Naked Class Waivers.

New York has adopted this approach. In *Meyer v. Kalanick*, the plaintiff filed a class action lawsuit against Travis Kalanick, former CEO of Uber, alleging price fixing in violation of state and federal antitrust laws.[260] The plaintiff signed a broad mandatory arbitration agreement and class action waiver with Uber, but Kalanick was not party to it.[261] Nevertheless, he creatively attempted to get rid of the suit by invoking *only* the class waiver aspect of the contract, arguing that it precluded the class allegations against him.[262]

The court interpreted the contract using California law, concluding that (1) there was no Naked Class Waiver,[263] and (2) even if there was a Naked Class Waiver, it would be unenforceable under *Discover Bank*.[264] And, under state and federal law, the court would void the class waiver in *all* claims, because *Discover Bank*'s holding goes to the basic enforceability of a contractual provision and is not pegged to the source of a claim.[265]

B. Legislating Away Naked Class Waivers

Local legislation should prohibit Naked Class Waivers. The enforceability of these waivers rests on the flawed but unassailable premise that mere procedural rights may be waived, unlike more important substantive rights that are crucial to the dispensation of justice.

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258 AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011).

259 *Id.* at 346 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

260 Meyer v. Kalanick, 185 F. Supp. 3d 448, 450 (S.D.N.Y. 2016).

261 *Id.* at 451.

262 *Id.* at 452–53.

263 *Id.* at 452–55.

264 *Id.* at 455–56.

265 *Id.* at 456–57.

Legislatures can invalidate Naked Class Waivers. Congress recently provided a template in passing the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.[266] This bipartisan bill gained support during and in the wake of the #MeToo movement,[267] and voids "predispute joint-action waiver[s]" for "sexual assault" and "sexual harassment dispute[s] . . . whether or not part of a predispute arbitration agreement."[268]

At the federal level, invalidating Naked Class Waivers is feasible yet unlikely. Although the Act is short and directly responds to a well-documented social and legal problem, the process nevertheless took four years[269] and likely would have failed if the issue did not cross party lines. This movement affected conservative elites like Gretchen Carlson, prominent host from the Fox News network, who helped spearhead the effort.[270] Absent social pressure, particularly from the political right, the Act likely would not have passed.

Indeed, a rare law like this underscores the lack of political incentives for broader action. After *Concepcion*, *Italian Colors*, *Epic Systems*, or *Lamps Plus*, Congress could have easily amended the FAA. But it never did, even in the face of overwhelming evidence of the crushing effect of joint action waivers on the effective vindication of worker and consumer rights.

In the last few decades, Congress has become increasingly inactive, partisan, and gridlocked on many issues.[271] This is most true when it comes to refining or updating laws that would help the least among us, like the minimum wage.[272] That is, politicians are more concerned with issues affecting the rich than the poor and middle class.[273]

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266 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 27.

267 Marianne Levine, *Why Congress Is Moving Against Sexual Harassment, 4 Years After #MeToo*, POLITICO (Feb. 10, 2022, 4:31 AM), https://www.politico.com/news/2022/02/10/congress-sexual-harassment-metoo-00007493 [https://perma.cc/7DHB-W8Z4].

268 Ending Forced Arbitration of Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 27.

269 Levine, *supra* note 267.

270 *Id.*

271 *See generally* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS (2010).

272 *See, e.g.*, *id.* at 53.

273 Martin Gilens & Benjamin Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014); KRISTINA C. MILER, POOR REPRESENTATION: CONGRESS AND THE POLITICS OF POVERTY IN THE UNITED STATES (2018).

For this reason, politics have become increasingly local; more states (and cities) are acting to build on national protections.[274] Advocates and those who care about access to justice must use the Ending Forced Arbitration Act as a template to legislatively ban Naked Class Waivers in their state.

C. Revisiting the Agency Class Action

This Article argues that Naked Class Waivers present a growing threat to the access to justice, and in many places will be—and are already—an effective solution to mass arbitration. While there are "easy" legal solutions to this problem, the simplicity of the fix is theoretical at best. It is unclear whether invoking the *Discover Bank* Rule will persuade judges in the 2020s. Over the last thirty years, specifically the last decade, the judicial system has been primed to discount collective legal action and prize "freely negotiated" contracts between private parties. And, in many jurisdictions, especially more conservative or "business-friendly" ones, the likelihood of new laws repudiating Naked Class Waivers is almost nonexistent. As a rule, the engine of politics runs slowly; therefore, passing even straightforward beneficial legislation may be difficult.

There need to be solutions other than private, contractual arrangements. One solution is administrative agencies; the dynamic is already part of the system, providing much-needed protections for workers and consumers who have been shackled with waivers. Even as ordinary people have increasingly become excluded from the access to justice, the system continues to run by and depend on government agencies. These agencies frequently have significant authority to interpret laws, make rules, conduct investigations, compel the production of evidence, hold quasi-judicial hearings, and order sanctions.[275]

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274 *See, e.g.*, ANDREW ELMORE & MUZAFFAR CHISHTI, MIGRATION POL'Y INST., STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS (Mar. 2018); Marc Doussard & Ahmad Gamal, *The Rise of Wage Theft Laws: Can Community–Labor Coalitions Win Victories in State Houses?*, 52 URB. AFFS. REV. 780 (2016).

275 *See, e.g.*, *What You Should Know: EEOC Regulations, Subregulatory Guidance and Other Resource Documents*, U.S. EQUAL EMP. OPP. COMM'N, https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-regulations-subregulatory-guidance-and-other-resource [https://perma.cc/3A3E-B67U] (last visited Aug. 5, 2022) (discussing the agency's authority to create and implement regulations); CAL. LAB. CODE § 98 (discussing

The most well-known agencies are national in scope, including the United States Department of Labor, Equal Employment Opportunity Commission, National Labor Relations Board, and Consumer Finance Protection Bureau. This federal system supplements a vast network of state and city agencies, who enforce local protections that go above and beyond the minimums guaranteed under federal law. For example, in New York City, aggrieved workers may contact (1) the United States Department of Labor Wage and Hour Division for help with federal wage and hour laws,[276] (2) the New York State Department of Labor regarding violations of state laws,[277] and (3) the New York City Department of Consumer Protection about city laws, like paid sick leave.[278]

Government agencies can be a partial, but crucial, solution to the problem presented in this Article. Although the focus is usually on the justice system, formal lawsuits are just the tip of the iceberg for dispute resolution. Each year, federal agencies hear almost twice as many cases as federal courts.[279] And local government actors address many more.

In short, the administrative state is large, sprawling, and armed with an incredible amount of responsibility and authority. For these reasons, the government itself *must* provide pushback against class action waivers, which have effectively locked millions of people out of the justice system.

To that end, two things must happen. First, administrative agencies must be scaled up in personnel and resources to be better equipped to find and address the kinds of widespread rights violations that have been hidden, excused, and ratified by class action waivers, both in and out of the context of mandatory arbitration. The budgets and staff, however, have not grown relative to the need that exists. The United States Department of Labor, for example, had only 100 more

broad authority of the California Labor Commissioner to investigate employee complaints, hold hearings, and recover civil penalties).

276 *See Local Offices*, U.S. DEP'T OF LAB. (July 20, 2022), https://www.dol.gov/agencies/whd/contact/local-offices#ny [https://perma.cc/682S-QVTB].

277 *See Labor Standards*, N.Y. STATE DEP'T OF LAB., https://dol.ny.gov/labor-standards-0 [https://perma.cc/3EL5-YG9Z] (last visited Aug. 5, 2022).

278 *See NYC Consumer and Worker Protection*, DEP'T OF CONSUMER & WORKER PROT., https://www.nyc.gov/site/dca/workers/workersrights/file-workplace-complaint.page [https://perma.cc/8GK6-7U3Y] (last visited Aug. 5, 2022).

279 Sant'Ambrogio & Zimmerman, *supra* note 244, at 1634.

investigators in 2014 than it did in 1948, despite covering a workforce *six times* the size.[280]

Second, agencies must adopt effective enforcement strategies. Without any additional resources, this can happen right now. Agencies are the appropriate entity to find, investigate, and remedy widespread collective rights violations.

Too many people take the view that the government should be a passive, "neutral" actor.[281] This framing, however, idealizes the government as an inactive, quasi-judicial decision-maker that merely evaluates allegations of wrongdoing and leaves active enforcement to private parties.[282] Nationwide, most agencies take this passive approach to rights enforcement.[283] Agencies have adopted complaint-based processes that exclusively wait for aggrieved individuals to come forward and report wrongdoing.[284] Or, as is more often the case, not report at all.[285]

In an era characterized by restrictive prohibitions on access to the courts, complaint-based approaches are wrong. Problems like wage theft and discrimination are frequent, severe, and affect many people.[286] Such problems are so significantly widespread that they are rightly hailed as social problems, echoing far beyond the individuals who experience them. For example, race-based employment discrimination is common. That is, Black employees are (1) less likely to receive interviews and offers than their white applicants,[287] (2) less

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280 Galvin, *supra* note 133, at 325.

281 *See* Julie Su, *Enforcing Labor Laws: Wage Theft, the Myth of Neutrality, and Agency Transformation*, 37 BERKELEY J. EMP. & LAB. L. 143 (2016) (discussing and contending with the "myth of neutrality").

282 *Id.* at 148–49.

283 Fine, *supra* note 134, at 361; David Weil, *Creating a Strategic Enforcement Approach to Wage Theft: One Academic's Journey in Organizational Change*, 60 J. INDUS. REL. 437, 440–41 (2018).

284 Fine, *supra* note 133, at 361.

285 *See, e.g.*, Fritz-Mauer, *supra* note 3, at 771–72; Sandefur, *supra* note 184, at 49.

286 *See, e.g.*, Pager & Shepherd, *supra* note 216, at 187–92 (discussing racial discrimination in a wide variety of contexts); Fritz-Mauer, *supra* note 3, at 744–57 (arguing that wage theft is a social problem).

287 Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 784–86 (2009).

likely to be promoted than their white colleagues,[288] and (3) scrutinized and disciplined more harshly than their white colleagues.[289]

These systemic problems—and many others—are perfectly suited to class actions, where a few people can serve as exemplars for many others. This kind of collective legal action, however, has stopped in the last thirty years. But that foreclosure is not complete. Even if employers and corporations undercut the strategy of mass arbitration through enforceable Naked Class Waivers in states that do not curb its use, government agencies can still address the problems that coercive contracts have shrouded. More than that, government agencies will be uniquely situated to fix widespread rights violations and, in many cases, will be the only entity that can do so.

This solution revolves around two related facts. First, government agencies frequently have an independent statutory mandate and *obligation* to find and fix problems within their purview. This authority is vague with very broad terms, leaving the details to the agencies themselves. The Equal Employment Opportunity Act of 1972, for example, empowers the EEOC "to prevent any person from engaging in any unlawful employment" discrimination without setting guidelines.[290] Similarly, the Wage and Hour Division of the United States Department of Labor

> may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records[,] . . . question such employees, and investigate such facts, conditions, practices, or matters as [it] may deem necessary to determine whether any person has violated any provision of this chapter . . . .[291]

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288 Lauren P. Bailes & Sarah Guthery, *Held Down and Held Back: Systematically Delayed Principal Promotions by Race and Gender*, 6 AERA Open 1, 2 (2020); David J. Maume, Jr., *Glass Ceilings and Glass Escalators: Occupational Segregation and Race and Sex Differences in Managerial Promotions*, 26 WORK AND OCCUPATIONS 483, 489–90 (1999). This is just one example of systemic discrimination, of course, and not meant to distract from the fact that other groups—women, minorities, LGBTQ people, and so on—also experience significant discrimination. *See id* at 485–89 (also analyzing how women experience systemic discrimination in promotions).

289 *See, e.g.*, Costas Cavounidis & Kevin Lang, *Discrimination and Worker Evaluation*, NAT'L BUREAU OF ECON. RSCH. 1, 2 (Oct. 2015), https://www.nber.org/papers/w21612 [https://perma.cc/SXX6-AN39].

290 42 U.S.C. § 2000e-5(a).

291 29 U.S.C. § 211(a).

Essentially, Congress and local legislatures pass laws creating a framework of rights. But it is up to the administrative state to decide the practical details of how to make those rights real and enforceable. To that end, agencies have much leeway to make rules and conduct enforcement actions.[292]

The second key fact is that the government is not part of any contract between private parties. From a legal perspective, it does not matter to an agency whether a person or even thousands of people have waived their right to join hands in litigation. Where a government entity has authority to investigate and fix a problem, it can do so whether or not the people affected by that problem have given up their private enforcement rights. Even as the Supreme Court upheld the broad enforceability of mandatory arbitration agreements with class waivers in *Gilmer*, it endorsed this theory, clarifying that "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."[293]

Given the broad powers of investigation and enforcement that most administrative agencies have, the agencies can investigate class-wide problems and craft resolutions for large groups of people. Professors Michael Sant'Ambrogio and Adam Zimmerman have most thoroughly investigated this issue.[294] As they explain, "Agencies generally enjoy even more authority than federal courts to aggregate common cases, formally and informally."[295] But, agencies only "rarely" do so.[296] According to these scholars, as of 2016, only two federal agencies had formally aggregated "large groups of plaintiffs' claims through consolidations, statistical sampling, and . . . class actions."[297] The NLRB has also *informally* aggregated claims,[298] while three other federal agencies "have considered and invited public comment on the use of aggregation in their administrative proceedings," although two

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292 *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.").

293 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

294 *See* Michael Sant'Ambrogio & Adam Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012); Sant'Ambrogio & Zimmerman, *supra* note 245, at 1634 (2016).

295 Sant'Ambrogio & Zimmerman, *supra* note 244, at 1644.

296 *Id.* at 1661.

297 *Id.* at 1663.

298 *Id.*

of these agencies later rejected that approach.[299] Overall, these efforts are paltry, and on the whole, "many federal agencies have not even begun to devote serious attention to whether or how they might benefit from aggregation in their adjudicatory proceedings."[300]

Now is the time. The use of class waivers has accelerated dramatically, even within the last few years. This Article explained how Naked Class Waivers are largely enforceable and will likely grow in prominence as a response to mass arbitration and as a way to further restrict corporate and employer accountability. The defense bar and conservative courts have waged a massively successful war on basic substantive rights. Procedural tools have been the weapons of choice and must be part of the response.

Mass arbitration reflects that understanding. Government action must also reflect that understanding because grouping similar cases to achieve economies of scale is not *just* within the scope of many agencies' authorities. It has become a moral imperative, and federal, state, and local government leaders must embrace that. Tens of millions of people in this country do not have access to the justice system, and it only stands to get worse. Absent government action, there can be no access to justice for those who live under the regime of class action waivers.

CONCLUSION

This Article paid attention to the effects of mandatory arbitration and class action waivers on the ability of ordinary people to find justice, access the public courts, and hold employers and corporations accountable for violations of law. This is not a problem that has been limited to individuals; it has broad social and legal effects. This phenomenon has worsened the access to justice crisis, especially for low-wage workers and people of color, and limited the public's ability to learn of and condemn corporate wrongdoing. The class action, once an effective tool for aggregating cases, has largely been eradicated.

Recent years have seen pushback in the form of mass arbitration. The procedural hooks of arbitration threaten large, moneyed defendants with prohibitive costs. In doing so, plaintiffs' lawyers have found a way to extract class-wide resolutions to widespread rights violations and to do so in a way that shines a light on those abuses. This

299 *Id.* at 1661–62.

300 *Id.* at 1663.

is a significant pushback to the previously unassailable tide of mandatory arbitration.

The law and reality of litigation are shifting again. This Article has explored a new frontier in the ongoing battle against joint lawsuits, exposing how Naked Class Waivers are increasingly accepted by the courts and successfully used by the defense bar. Terms unconscionable outside an arbitration agreement just a few years ago have now been widely accepted. Although the main feature of Naked Class Waivers is that there is no arbitration agreement, it is only because of mandatory arbitration that these waivers are broadly enforceable. Decades of litigation under the FAA downplayed how crucial class action lawsuits are, paving the way for a wholesale waiver of the right of litigants to join together.

This is an emerging problem that stands to only grow unless policymakers and advocates take note and work to stop it. To defend what remains of collective legal action, key actors must take a multipronged approach, utilizing the courts, local legislatures, and the administrative states. Lawmakers must prohibit Naked Class Waivers. Courts must recognize that the doctrine of unconscionability can still hold sway and issue decisions consistent with the significant line of cases finding class waivers unenforceable. Government agencies and actors must embrace the potential of the agency class action.

Taking these steps will not solve the access to justice crisis nor the problems posed by class waivers in general. But following these steps will (1) shore up a key right, (2) prevent the situation from worsening dramatically, and (3) help revive the idea of concerted legal action.