ARTICLE: Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence has Created a Brand New Private Enforcement Regime in the Gig Economy Era

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Highlight

ABSTRACT

Wage theft is estimated to cost American workers more than $ 15 billion per year, but upwards of 60 million American workers cannot go to court to sue their employer if their rights are violated. This is because many American workers are subject to mandatory arbitration which forecloses their access to the court system--or an aggregate proceeding in arbitration. This problem has been long studied, but many scholars and lawyers concerned with mandatory arbitration doctrine have lamented the continued lack of remedial options available to those seeking redress from their employer. This Comment tracks an emerging innovation in the otherwise stagnant area of mandatory arbitration jurisprudence: the development of a new breed of aggregate litigation-- "Mass Arbitration"--in which large inventories of nearly identical claims are brought simultaneously in an arbitral forum. The result is an action that is individual in name, yet aggregate in practice and effect. This Comment traces the emergence of the Mass Arbitration strategy, describes the elements of the strategy that enable its success, and assesses its potential as a tool to remedy other types of harm outside of the gig economy. Mass Arbitration has created a precarious and imperfect, yet effective, private enforcement regime in which plaintiffs can pursue claims that were previously thought nonviable. Whether this new strategy will survive already-mounting counter efforts remains to be seen. Nonetheless, this Comment explores the significant contribution Mass Arbitration has already made as a private enforcement mechanism in an area in which logistical and financial barriers have made it all but impossible to bring meritorious claims.

Text

[*374] INTRODUCTION

Wage theft in America is estimated to cost workers more than $ 15 billion per year. [1]Yet an estimated 60.1 million American workers cannot go to court to sue their employer if their rights have been violated. [2]In recent years, many scholars, plaintiffs' lawyers, and judges have wrung their hands over this reality. [3]But most have declared defeat in the face of seemingly insurmountable odds. U.S. Supreme Court precedent, they lament, has foreclosed the remaining avenues for relief along which creative plaintiffs' lawyers have fought over the past decade. In 2018, when the Court handed down its decision in *Epic Systems v. Lewis*, [4]many declared this the final nail in the coffin of aggregate accountability for companies requiring their workers to submit to mandatory arbitration. The *Epic Systems* decision joined well-known cases like *AT&T Mobility v. Concepcion* [5]and *American Express v. Italian Colors Restaurant*, [6]which dealt decisive blows to the class action mechanism. In short, the near universal conclusion was this: Corporate America **[*375]** successfully killed off the class action--and accountability for certain types of harm along with it.

This is because, unlike in many other countries, the means for vindicating substantive rights in the American justice system revolves in large part around the private enforcement of substantive rights via privately initiated lawsuits. [7]In order to seek a remedy for the violation of a protected substantive right, an individual--rather than the government--must, in most cases, initiate their own case in the court system. Indeed, many cherished Civil Rights Movement-era substantive rights and rights protected by federal statutes passed in the latter half of the twentieth century can only be vindicated by aggrieved individuals via private lawsuits, without the assistance or expertise of their government. [8]This reality makes those underlying substantive rights vulnerable because those with interests opposing the

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[1] *See* DAVID COOPER & TERESA KROEGER, EMPLOYERS STEAL BILLIONS FROM WORKERS' PAYCHECKS EACH YEAR, ECON. POL'Y INST. 28 (2017), *https://files.epi.org/pdf/125116.pdf* [*https://perma.cc/8CWT-2FZ5*].

[2] *See* ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION, ECON. POL'Y INST. 5 (2017), *https://files.epi.org/pdf/135056.pdf* [*https://perma.cc/Q9SU-QKDD*].

[3] *See, e.g.*, ***Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019)*** (Ginsburg, J., dissenting); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, *124 YALE L.J. 2804, 2904 (2015)*; Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, *80 BROOK. L. REV. 1309, 1310-12 (2015)*; Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, *75 MD. L. REV. 1, 4 (2015)*; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, *74 WASH. U. L.Q. 637, 644-74 (1996)*.

[4] *138 S. Ct. 1612, 1624-30 (2018)* (holding that employers can lawfully require employees to sign arbitration agreements waiving their right to class actions despite the protections the National Labor Relations Act (NLRA) enshrines for workers '"to engage in . . . concerted activities for . . . mutual aid or protection"' because the Federal Arbitration Act (FAA) preempts the NLRA).

[5] *563 U.S. 333, 339, 350-52 (2011)* (holding that the FAA requires enforcement of class waivers deemed unconscionable under state law because the FAA's "liberal federal policy" favoring arbitration dictates that the FAA preempts state laws perceived to disfavor arbitration).

[6] *570 U.S. 228, 236 (2013)* (holding that the fact that a plaintiff's cost of individually arbitrating their claim would exceed the recovery does not invalidate the use of class waivers because "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").

[7] For a detailed history of the growth of the private enforcement system in the United States, see STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

[8] While some of the substantive protections in the Civil Rights Act are enforced via lawsuits initiated by the government, the latter half of the twentieth century saw a proliferation of federal statutes enshrining rights primarily enforced by private litigation. Substantive protections of a wide variety of rights, like many consumer protection rights and employment rights, have been funneled into private litigation. See BURBANK & FARHANG *supra* note 7, at 9-16, for an abbreviated history of the rising

enforcement of such substantive rights need not attack and change the substantive law that provides workers with protections. Instead, liability for employer malfeasance may be avoided by means of a strategy far harder to detect than the public undoing by the legislature of federal statutes that codify worker protections: by instead undoing the procedural mechanisms that enable the private enforcement of substantive rights. Without the procedural tools that allow for certain types of otherwise financially infeasible private claims to proceed--via mechanisms like the class action that enable lower value claims to be aggregated together, or tools like fee shifting statutes that allow plaintiffs to recover attorneys' fees from another party to overcome otherwise insufficient damages values--many cases will simply never be brought.

Beginning in 2018, an unusual and significant pattern appeared in mandatory arbitration jurisprudence. A brief story helps illustrate: Between 2013 and 2018, 10,000 employees of Chipotle Mexican Grill opted into a Fair Labor Standards Act (FLSA) collective action lawsuit alleging wage theft against their **[*376]** employer. [9]The workers alleged that Chipotle devised an electronic time card system that automatically clocked employees out of their shift each night at 12:30 AM--except many employees were required to continue their work of putting away food, cleaning the kitchens, and closing up shop after they were involuntarily clocked out at 12:30 AM. [10]

Between 2013 and 2018, as the plaintiffs cleared various procedural hurdles and amassed opt-in plaintiffs, Chipotle was engaging in a litigation strategy outside of court. The restaurant chain began placing mandatory [11]arbitration clauses in its employment contracts--unbeknownst even to the attorneys representing the Chipotle plaintiffs. [12]Based on these clauses, in 2018, Chipotle moved to eject 2814 of the 10,000 plaintiffs from the collective action on the ground that the employees' contracts barred them from resolving disputes in court. [13]

These events came against the backdrop of a growing patchwork quilt of U.S. Supreme Court precedent that narrowed the possible defenses plaintiffs could assert against mandatory arbitration. By 2018, in the wake of the Court's closely divided decision upholding the use of class arbitration waivers in employment contracts, [14]the judge presiding over the case against Chipotle proclaimed that his hands were tied and dismissed the 2814 claims from the collective action. [15]For **[*377]** many workers facing mandatory arbitration, this type of ruling is the end of the story. But this is where our Mass Arbitration story begins.

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prevalence of federal laws utilizing private enforcement regimes in the second half of the twentieth century, a trend the harbinger for which was arguably the legislative compromise that resulted in the creation of Title VII's private enforcement regime.

[9] *See* First Amended Collective Action Complaint & Demand for Jury Trial, Turner v. Chipotle Mexican Grill, Inc., No. 1:14-cv-02612-JLK-CBS (D. Colo. Jan. 21, 2015).

[10] *See id.* PP 56-92.

[11] Mandatory arbitration clauses are contract provisions that require the parties to resolve any contract disputes before an arbitrator rather than through the traditional court system. The employment arbitration clauses discussed in this Comment are also, by and large, contracts of adhesion, meaning that a party who wishes to be employed by a company must agree to the terms of the contract or otherwise will not be hired. As Chipotle's Chief Compliance Officer explained, "'if you choose not to agree to the arbitration agreement . . . then you don't have to be an employee.'" *See* Dave Jamieson, *Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly*, HUFFPOST (Dec. 21, 2018, 3:09 PM), https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd [https://perma.cc/3GYQ-Y49G].

[12] *See* Plaintiffs' Memorandum in Opposition to Chipotle Mexican Grill, Inc.'s Motion to Dismiss Opt-In Plaintiffs at 3, *Turner*, No. 1:14-cv-02612-JLK.

[13] *See* Chipotle Mexican Grill, Inc.'s Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement, *Turner*, No. 1:14-cv-02612-JLK.

[14] *See* Epic Sys. Corp. v. Lewis, 138 S. Ct 1612, 1616-19 (2018).

[15] *See* Order Granting Defendant's Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement at 2, *Turner*, No. 1:14-cv-02612-JLK ("I observed in my previous order that I found persuasive the Ninth and Seventh Circuit decisions holding

The story begins here because the 2814 workers' claims did not terminate when they were dismissed from the collective action. Instead of walking away, the employees took their claims to arbitration. [16]

Before the development of the new aggregate litigation strategy that this Comment will refer to as "Mass Arbitration," mandatory arbitration clauses thwarted claims for a few key reasons. The economics of individual litigation require that a plaintiff's claim yield sufficient damages to both compensate the plaintiff and cover the expenses of litigation. Litigation-related expenses include filing fees, attorney work product, retention of experts, and the cost of discovery, among others. Often in the wage and hour context, the damages value of individual claims, like those in the Chipotle episode, cannot offset the cost of attorney time; sometimes, an individual's damages are less than the cost of filing fees. In arbitration, however, filing fees are primarily borne by the defendant, to the tune of $ 1500 to $ 1900 per plaintiff--and a plaintiff's share of the upfront fee is typically limited to $ 300 and, oftentimes, $ 0. [17]By filing thousands of individual arbitration claims at the same time, the Chipotle Mass Arbitration plaintiffs were able to flip the economics of a nonaggregate arbitration proceeding by saddling the defendant company with millions of dollars in upfront costs.

The unusual conditions that made the Chipotle episode possible raised questions about whether this Mass Arbitration strategy could ever be replicated. The Chipotle action's posture was irrefutably unique, born of a years-long collective action proceeding in which only a subset of employees eventually became subject to mandatory arbitration, and only after forming a relationship with counsel. By virtue of its structural genesis, the Chipotle suit overcame many **[*378]** of the barriers to entry that stop otherwise meritorious low damage claims from reaching arbitration: the expense and logistical barriers of identifying and amassing enough individual claims to bring defendants to the settlement table.

But replicable, it was. The Chipotle episode was indeed a harbinger of a new litigation strategy--one that took root in the favorable conditions of the Chipotle case but is beginning to spread quickly and with profound effect through the gig economy [18]and beyond. [19]Threats and executions of the Mass Arbitration strategy have begun to send shock waves through general counsels' offices, courthouses, and arbitral forums. [20]The burgeoning strategy, seemingly

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that prohibitions on class and collective claims were unenforceable. But the Supreme Court reversed these decisions in *Epic Systems*, and I am thus compelled to find that the class and collective action waiver in Chipotle's Arbitration Agreement does not violate the NLRA or render the Agreement unenforceable." (footnote omitted).

[16] This was possible, in large part, because the individuals were already represented by counsel. As their attorney explained, "'[e]verybody that we file for has individually retained us. We've talked to them and interviewed them . . . . These are all solid claims, and they're not going away.'" Jamieson, *supra* note 11.

[17] See *infra* Subpart III.A.2 for a discussion of the assessment of filing fees for plaintiffs in arbitration. Many mandatory arbitration contracts limit a plaintiff's share to $ 300 of the filing fee, but due to state law in common Mass Arbitration forums like California, that fee is reduced to $ 0 for indigent plaintiffs. Other mandatory arbitration contracts do not assign a portion of the filing fee to plaintiffs in the first place, though this is a rarer phenomenon. Additionally, arbitration service providers have rules that govern the default share of filing fees for plaintiffs, in the absence of a different arrangement established by a contract, and these have been interpreted by courts as the ceiling for fee assessments.

[18] In this Comment, I use the phrase "gig economy" to refer to the rapidly growing sector of the service economy typified by freelance workers performing flexible, service-based tasks. "[A]t its core are app-based platforms that dole out work in bits and pieces--making deliveries, driving passengers or cleaning homes," which amount to individual gigs. Nicole Kobie, *What Is the Gig Economy and Why Is It So Controversial*?, WIRED (Sept. 14, 2018, 10:15 AM), https://www.wired.co.uk/article/what-is-the-gig-economy-meaning-definition-why-is-it-called-gig-economy [https://perma.cc/65RC-HS83].

[19] See *infra* Part IV for a discussion of the newest, fledgling species of Mass Arbitration that has emerged: consumer Mass Arbitrations.

[20] See *infra* Part II for a discussion of some of the most prominent episodes of Mass Arbitration and the reactions of defendants. See *infra* Part IV for a discussion of the responses by arbitration service providers, some of whom have altered the rules of their forums in reaction to Mass Arbitration.

born of the narrow and unique circumstances that made its execution possible against Chipotle, has taken off with a series of large scale Mass Arbitrations in the gig economy sector.

The Chipotle case and the episodes that have followed it are emblematic of a significant doctrinal development in an otherwise bleak area of the law for plaintiffs. While many of the procedural vehicles used by plaintiffs to vindicate substantive rights have been steadily weakened from the 1980s forward, [21]the new Mass Arbitration strategy has been the first strategic and doctrinal change in the realm of mandatory arbitration that has been both advantageous to plaintiffs and had any meaningful promise of staying power.

This Comment argues that Mass Arbitration has created a precarious and imperfect, yet effective, new private enforcement regime in which plaintiffs can pursue claims that were previously thought nonviable. Whether this new procedural avenue to enforcing substantive rights will survive already-mounting counter efforts remains to be seen. Nonetheless, this Comment explores the significant contribution Mass Arbitration has already made as a private enforcement mechanism in an area in which logistical and financial barriers have made it all but infeasible to bring meritorious claims.

[*379] In the last decade, mandatory arbitration has come under heightened scrutiny, both in the media and the academy. [22]Advocates and organizers have become increasingly vocal about the ways in which preventing courtroom access restrains the vindication of rights. These efforts have raised awareness about both access to justice and employment-related issues. And while scholars have written extensively of the twists and turns of class action jurisprudence and mandatory arbitration clauses generally, this Comment is the first to detail the newest chapter of the mandatory arbitration story: the realization of a Mass Arbitration strategy. Through the work of creative lawyering and grassroots organizing within the gig economy, plaintiffs have created an entirely new species of litigation: an individual, yet aggregate, arbitration proceeding, in which employees have harnessed proarbitration Supreme Court precedents and the financial inertia of the arbitration forum to realize a new means of private enforcement of employee rights.

This Comment will first describe what amounts to a truly novel litigation strategy--one which has the potential to bring about a dramatic shift in the landscape of private enforcement of employee rights and consumer rights more broadly. Because of the lack of existing scholarship on Mass Arbitration, it is important to first describe the careful strategic decisions and leverage points that have made the Mass Arbitration strategy possible and explore exactly how they function.

While the Mass Arbitration story has intrinsic descriptive interest--rarely does an episode of litigation read with as many unexpected twists and turns, nor feature such spirited rhetoric coming not just from the adversaries but also from the bench--the Mass Arbitration story is also a story worth telling because of its broader implications.

Mass Arbitration represents a consequential rebuilding effort of the private enforcement regime--indeed, creating what I argue amounts to a new, meaningful, but not unproblematic, aggregate private enforcement regime outside of the court system--opening up potential for a broader realization of corporate accountability to workers for meritorious claims. As plaintiffs invoke pro-arbitration Supreme Court precedents and create a quasi-aggregate procedural mechanism, Mass Arbitration has brought defendants to a challenging crossroads, trapped between the heavy load of Supreme Court precedents favoring their arbitration clauses [23]--precedents the defense bar itself has built over decades--and the plaintiffs who have called their bluff to the tune of millions of dollars.

[*380] As defendants have started responding to the Mass Arbitration strategy by altering their arbitration contracts and the underlying rules of the arbitral forums, plaintiffs' lawyers have already proven nimble in developing new means to amass plaintiffs, using traditional advertising efforts as well as organizational networks unique to the gig

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[21] *See* BURBANK & FARHANG, *supra* note 7, at 3.

[22] See *supra* note 3 for a survey of some such scholarship.

[23] *See infra* Part I.

economy in order to recruit and retain plaintiffs. [24]But these efforts by powerful defense entities underscore a somber truth: Mass Arbitration is a precarious counterweight to the anemic procedural mechanisms that are otherwise available to arbitration-bound plaintiffs, and the strategy may be too vulnerable to survive the onslaught of challenges already headed its way. As I argue, however, because the Mass Arbitration strategy rests on precedents created by defendants themselves--oftentimes concerning the exact arbitration agreements that the plaintiffs now seek to enforce--the desire to avoid undermining the legitimacy of an entire area of jurisprudence by unraveling these precedents may act as a barrier against the undoing of Mass Arbitration.

Mass Arbitration has left in its wake exasperated courts, caught in the middle of a battle between two fora. But where there once was, practically speaking, corporate exculpation for the class of meritorious claims that were infeasible to bring via isolated individual arbitration demands, plaintiffs have developed a modest means of redress for a subset of otherwise unvindicable claims. The civil justice system has so far obliged with this shift--but the future remains uncertain.

Part I of this Comment lays the groundwork for how we have arrived at this crossroads through the development of Supreme Court precedents that have narrowed the viable avenues for bringing claims subject to mandatory arbitration. Part II examines the Mass Arbitration strategy up close, through the lens of three major episodes of Mass Arbitration that are presently unfolding against Uber, DoorDash, and Postmates. Part III then explicates the anatomy of the strategy on a more granular level, pulling apart its mechanics and looking directly at how the strategy has filled in some of the gaps created by decades of procedural attacks on the private rights enforcement regime. Finally, Part IV examines defendants' attempts to counter the strategy as well as response efforts made by plaintiffs to bolster Mass Arbitration and, possibly, to extend its reach both within and beyond the gig economy. Part IV concludes by exploring the import of Mass Arbitration as a new means of private enforcement, creating a precarious and suboptimal--yet viable--system of vindicating rights within the confines of mandatory arbitration.

[*381] I. HOW WE GOT HERE: AN OVERVIEW OF THE SUPREME COURT'S MANDATORY ARBITRATION JURISPRUDENCE

A. Discussion of the Precedent

Rich scholarship exists charting the course of how we arrived here; only a rough sketch of its contours needs repeating. For nearly sixty years after its passage, the now behemoth Federal Arbitration Act (FAA)--which has been interpreted to provide the basis for an overarching federal policy favoring arbitration--was a relatively obscure and unknown statute. [25]This was the case until the 1980s, when the Burger Court decided a number of cases that catapulted arbitration onto the mainstage. [26]Chief Justice Burger welcomed arbitration as a panacea for the so-called "litigation explosion," [27]supercharging the FAA's stature and departing from the conventional view that arbitration was subordinate to the court system.

For decades since, corporations have undertaken significant effort to craft and enforce mandatory arbitration clauses. This effort to move cases from the traditional court system to arbitration has been one of the most pivotal procedural changes that has stymied vindication of substantive rights, such as employee wage and hour protections. Rather than contractually barring employees from suing to vindicate certain substantive rights--say, by

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[24] *See infra* Subpart III.A.4.

[25] *See generally* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 99-100 (2006) (concluding based on the legislative history of the FAA that the Supreme Court has misconstrued the original intent and scope of the Act; "[t]oday's statute . . . is [one] that would not likely have commanded a single vote in the 1925 Congress").

[26] *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 1-3 (1983); Southland Corp. v. Keating, 465 U.S. 1, 2-3 (1984); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 614-15 (1985).

[27] *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

adding a contract provision prohibiting plaintiffs from suing their employer for failure to pay overtime or a minimum wage, an action that would be deemed unconscionable and unenforceable--the procedural barrier of a nonaggregate arbitration proceeding often produces the same outcome of preventing employees from enforcing those substantive rights.

The U.S. Chamber of Commerce--the "world's largest business organization representing [the interests of more than 3 million businesses] . . . [as] their voice in Washington"--has played an outsized role in **[*382]** these developments. [28]In fact, the Chamber's advocacy pre-dates the existence of the FAA. Over one hundred years ago, the New York Chamber of Commerce worked to draft and pass the precursor to the FAA, the New York Arbitration Act. [29]Then, after assisting in drafting the 1925 FAA, it lobbied Congress and secured the FAA's enactment. Over the past ten years, the U.S. Chamber of Commerce has weighed in as amicus in each major arbitration and class action case before the Supreme Court, helping craft the pro-defense, pro-arbitration precedents we have today. [30]

From the 1980s onward, the FAA has been interpreted capaciously by courts, to aggregate litigation's great detriment. In 1995, Justice O'Connor issued a salient warning about the path the Court was taking with its arbitration precedents: "[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation." [31]Since that time, many have levied similar complaints, asserting that the Court's precedents--and arbitration generally--serve as an exculpatory tool for corporations, allowing corporations to avoid liability altogether for many kinds of employment and consumer claims. [32]

From 2010 to 2020, the Court decided more than a dozen cases on various questions related to arbitration and aggregate litigation. [33]The rigid enforcement **[*383]** of arbitration clauses has rested on two key doctrinal pillars: (1) delegation doctrine, in which all questions, including threshold procedural questions, are delegated to an arbitrator to decide; and (2) enforcement of class action waivers, preventing claim aggregation. These two doctrinal guideposts illuminate why arbitration has been so advantageous to corporations and employers. They also frame the discussion for how Mass Arbitration plaintiffs have gained the upper hand by building on defense victories by: (1) leveraging delegation precedents to prevent defendants from blocking Mass Arbitration in court; and (2)

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[28] *About the U.S. Chamber of Commerce*, U.S. CHAMBER OF COM., https://www.uschamber.com/about [https://perma.cc/3QF3-D23W].

[29] *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS, ECON. POL'Y INST. (2015), https://www.epi.org/publication/the-arbitration-epidemic [https://perma.cc/8A6B-5STN].

[30] *See, e.g.*, Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893); Brief of the Chamber of Commerce of the United States et al. as Amici Curiae in Support of Petitioners, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (No. 12-133); Brief of the Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Respondents in No. 16-307, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (Nos. 16-285, 16-300 & 16-307).

[31] Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

[32] *See, e.g.*, **Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420-21 (2019)** (Ginsburg, J., dissenting); Resnik, *supra* note 3; Sternlight, *Disarming Employees, supra* note 3.

[33] *See, e.g.*, **Lamps Plus, 139 S. Ct. at 1407**; Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019); Epic Sys., 138 S. Ct. 1612; Kindred Nursing Ctrs. v. Clark, 137 S. Ct. 1421 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); BG Grp. v. Republic of Arg., 572 U.S. 25 (2014); Am. Express, 570 U.S. at 228; Nitro-Lift Techs., LLC. v. Howard, 568 U.S. 17 (2012); Marmet Health Care Ctr. v. Brown, 565 U.S. 530 (2012); CompuCredit Corp. v. Greenwood, 565 U.S. 95 (2012); KPMG LLP v. Cocchi, 565 U.S. 18 (2011); AT&T Mobility, 563 U.S. at 333; Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287 (2010); Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).

circumventing class waiver precedents by creating a proceeding that is nonaggregate in name but not in practice or effect.

Delegation doctrine requires that, when an arbitration agreement is in place, an arbitrator must "decide not only the merits of a particular dispute but also 'gateway questions of arbitrability.'" [34]This prevents a court from mediating threshold procedural, practical, and legal issues. For a number of years, an exception to the delegation doctrine--a sort of safety valve called the "wholly groundless" exception--took hold in the lower courts. [35]The exception allowed a court to prevent enforcement of an arbitration clause in instances it determined to be "wholly groundless" applications of the agreement, rather than requiring the parties to go before an arbitrator to rule on a seemingly baseless claim to arbitrability. In 2019, however, the Supreme Court eliminated the "wholly groundless" exception to delegation, holding that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract," even if the court finds the arbitrability claim wholly without merit. [36]As a result, lower courts must compel arbitration and leave litigants to raise such claims of groundlessness before an arbitrator.

In case after case between 2010 and 2019, the Supreme Court limited access to class and aggregate proceedings, both in court and in arbitration. The Court upheld class action waivers that were unconscionable under state law. [37]Two years **[*384]** later, the Court curtailed the use of the effective vindication doctrine--a doctrine used by courts to invalidate class arbitration waivers when a plaintiff's cost of individually arbitrating their claim would exceed potential recovery, causing claimants to forgo their claims altogether. [38]Although federal labor protections guarantee workers the right "to engage in . . . concerted activities," the Court held that these protections do not apply to arbitration-bound plaintiffs because of the FAA's supremacy over other statutes. [39]Finally, the Court ruled that even if an agreement does not contain an explicit class waiver, an ambiguous arbitration agreement cannot provide the contractual basis for allowing class arbitration. [40]

A common thread throughout the Court's arbitration cases has been invocation of the FAA's "federal policy favoring arbitration agreements." [41]According to the Court, the FAA preempts state law rules that "stand[] as an obstacle" to

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[34] *Henry Schein, 139 S. Ct. at 529* (quoting *Rent-A-Center, 561 U.S. at 68-69*). "[A]n 'agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.'" *Id.* (quoting *Rent-A-Center, 561 U.S. at 70*).

[35] *See id. at 528*.

[36] *Id. at 529*.

[37] *See AT&T Mobility, 563 U.S. at 333* (in which the Supreme Court held that a California rule--which provided that class action waivers in consumer contracts of adhesion were unconscionable, and thus unenforceable, where a party with superior bargaining power was alleged to have cheated large numbers of consumers out of small damages amounts--was preempted by the FAA).

[38] *Am. Express, 570 U.S. at 236* (reasoning 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").

[39] *Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018)*. The Court concluded that the FAA allows parties to "specify the rules that would govern their arbitrations, indicating their intention to use individualized rather than class or collective action procedures." *Id. at 1621*.

[40] ***Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019)*** (holding that "more than ambiguity [is required by the FAA] to ensure that the parties actually agreed to arbitrate on a classwide basis").

[41] *See, e.g., Epic Sys., 138 S. Ct. at 1621*.

the FAA's objectives. [42]So, even when "a doctrine [is] normally thought to be generally applicable, such as duress or . . . unconscionability," if the doctrine is "applied in a fashion that disfavors arbitration," it is preempted. [43]

It is because of these two doctrinal pillars--delegation doctrine and class waivers--that arbitration has so effectively served employer interests. Delegation doctrine foreclosed the ability of courts to intervene before claims were removed to the private world of arbitration. More significantly, class waivers have frequently prevented certain types of claims from moving forward altogether. This is because many of the claims raised by arbitration-bound plaintiffs are negative-value suits: claims in which litigation costs exceed the damages to which a plaintiff may be entitled. [44]When many plaintiffs with negative-value claims are **[*385]** joined together in an aggregate proceeding, the unforgiving economics of low-value claims can be overcome by spreading administrative and attorney costs across the many claims. But when claims cannot be aggregated, the costs of bringing an individual claim or of attempting to recruit multiple individual plaintiffs without claim aggregating procedures work to insulate defendants from liability.

What remains doctrinally after these Supreme Court cases is a narrow protective window for plaintiffs: as the Supreme Court has noted, the so-called effective vindication doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." [45]As the Court's dissenting justices have decried, however, no matter what is required by the actual contract the parties sign, "the [Supreme Court] majority will prohibit class arbitration." [46]

B. Limited Frontiers on Which the Fight Against Arbitration Continues

Much scholarship has been devoted to exploring the potential avenues that remain available to plaintiffs fighting mandatory arbitration clauses. [47]But by most accounts, the Court's arbitration jurisprudence has all but sealed off any plausible bases for challenges, reinforcing the FAA as supreme over conflicting state law or policy.

That is not to say that latent, remaining challenges to the FAA do not exist. [48]Arguably, those most promising have been undertaken outside of courtrooms. For example, the sustained public reckoning with sexual assault and harassment that has resulted from the second coming of Tarana Burke's #MeToo movement has influenced some employers to remove mandatory arbitration clauses from their employment contracts. [49]Beginning in 2017, as tremendous popular will and **[*386]** organizational strength coalesced around this renewed focus on sexual

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[42] ***Lamps Plus, 139 S. Ct. at 1415***.

[43] *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341 (2011)*.

[44] See *infra* Part III for a detailed discussion of the economics of negative-value claims. *See also* David Marcus, *The History of the Modern Class Action, Part I:* Sturm Und Drang, *1953-1980*, *90 WASH. U. L. REV. 587, 596 (2013)* (explaining that parties raising different normative questions about class litigation agree that "[i]f Rule 23 has any role to play . . . , it must apply when class members have undifferentiated, small-value claims that they would never litigate individually. . . . Absent class certification, no one would sue to vindicate these claims, and the substantive law would have no regulatory force whatsoever.").

[45] *Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013)*.

[46] ***Lamps Plus, 139 S. Ct. at 1435*** (Kagan, J., dissenting).

[47] *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data From Four Providers*, *107 CALIF. L. REV. 1, 61-64 (2019)*.

[48] *See, e.g.*, Vanessa K. Manolatou, *Court to Consider Whether California Ride Share Drivers Who Make Airport Runs Are Exempt From the Federal Arbitration Act*, 9 NAT'L L. REV. 337 (Dec. 3, 2019), *https://www.natlawreview.com/article/court-to-consider-whether-california-ride-share-drivers-who-make-airport-runs-are* [*https://perma.cc/E4YW-6QMC*].

[49] *See* Aisha Harris, *She Founded Me Too. Now She Wants to Move Past the Trauma*, N.Y. TIMES (Oct. 15, 2018), *https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html* [*https://perma.cc/DK3B-B89R*].

violence, celebrities, movie producers, elected officials, and CEOs came under the movement's scrutiny and have, to varying degrees, been held to account for their actions. [50]The ripple effects of the #MeToo movement have been felt in arbitration, as employers faced pressure to remove mandatory arbitration clauses for sexual harassment claims from their employment contracts. Widely publicized employee walkouts at Google prompted the company to end its policy of requiring that sexual harassment claims be brought in private arbitration. [51]Major law firms like Munger, Tolles & Olson and Orrick, Herrington & Sutcliffe eliminated their mandatory arbitration agreements in the wake of social media campaigns against the practice. [52]Remaining legal challenges to mandatory arbitration do exist on the margins, primarily in the form of contract formation challenges in extreme cases. [53]But by and large, potential legal challenges to arbitration are of limited efficacy and their potential for impact has been viewed with a healthy degree of skepticism.

II. NEWEST FRONTIER OF THE ARBITRATION GAME: MASS ARBITRATION

With few to no avenues remaining on which to challenge mandatory arbitration, many scholars fairly lamented the inability of plaintiffs to recover for meritorious low-damages employment claims. Individual arbitration of these claims was hampered by too many barriers--financial, logistical, even resolve-based--such that meritorious claims would simply never be brought and **[*387]** employers who broke the law would not be forced to bear the costs of that wrongdoing.

Enter the Mass Arbitration story. A small number of high-profile plaintiffs' firms representing a large number of workers have challenged these barriers through a simple paradigm shift: instead of fighting mandatory arbitration provisions, they have embraced them to the fullest extent by filing thousands of individual arbitration demands. By doing so, they have reclaimed some of the private rights enforcement ground lost to arbitration and made access to the underlying substantive rights possible for those with meritorious claims.

The strategy has spread with particular vigor within the gig economy, where claims over wage theft and independent contractor misclassification, among others, provide vast numbers of prospective plaintiffs with modest damage figures. [54]The following case studies examine a few such episodes--Mass Arbitrations initiated against Uber, DoorDash, and Postmates--and provide illustrative examples of the strategy, the many procedural twists it entails, and the varying responses and counterarguments of defendants.

Among these case studies, common features emerge. Most notably, each episode begins with the presentation of a large inventory of claims to the companies, with substantial batches of demands filed in quick succession. By doing

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[50] *See* Sara M. Moniuszko, *List: All of the Hollywood Power Players Accused of Sexual Assault or Harassment*, USA TODAY (Nov. 28, 2017, 6:07 PM), *https://www.usatoday.com/story/life/people/2017/11/03/list-all-hollywood-men-accused-sexual-assault-harassment/827004001* [*https://perma.cc/363E-NGK5*]; Press Release, GEO. L., After #MeToo, Over 100 Public Officials out of Office (Nov. 9, 2018), *https://www.law.georgetown.edu/news/after-metoo-over-100-public-officials-out-of-office* [*https://perma.cc/XDK2-5HQS*].

[51] *See* Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow.*, WASH. POST (Nov. 12, 2018, 1:42 PM), *https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow* [*https://perma.cc/MD62-63QX*].

[52] *See* Stephanie Russell-Kraft, *Munger Tolles, Orrick to Scrap Employee Arbitration Agreements*, BLOOMBERG L. (Mar. 26, 2018, 3:28 PM), *https://news.bloomberglaw.com/business-and-practice/munger-tolles-orrick-to-scrap-employee-arbitration-agreements* [*https://perma.cc/Q6CR-9EHR*].

[53] *See, e.g.*, *Samaniego v. Empire Today, LLC, 205 Cal. App. 4th 1138, 1145-48 (2012)* (holding arbitration provision procedurally and substantively unconscionable due to blatant lack of mutuality of provisions).

[54] This is a contested space, however, where the underlying substantive law itself is the site of contentious litigation and advocacy efforts to limit available causes of action related to independent contractor misclassification. See *infra* Subpart III.A.5 for discussion of the changing landscape of the underlying substantive law governing independent contractor misclassification.

so, the plaintiffs saddle defendants with huge costs at the outset of the process: millions of dollars in filing fees alone, not to mention attorneys' fees and actual damages figures. Defendants, by and large, have refused to pay these filing fees. As a result, plaintiffs have taken the table-turning step of moving to compel arbitration against the corporations--an action routinely taken by employers against employees. In the process, plaintiffs have directly engaged with the two doctrinal pillars outlined in Part I, delegation and class waivers, by proceeding together--but as individuals--to gain the collective leverage that attends claim amalgamation, and by invoking well-settled delegation doctrine to force defendants into arbitration without court intervention.

[*388] A. Uber

1. Background

Uber's meteoric growth over the last decade has transformed the transportation industry and many aspects of daily life, disrupting the taxi industry while creating positions for a great proportion of the gig economy workforce. [55]But amidst this historic rise, Uber has been no stranger to conflict and controversy, weathering many legal and public relations storms. [56]

A cluster of these controversies has surrounded the independent contractor status of Uber's workforce. Uber asserts--as do many gig economy companies--that it has only a small number of employees: just those who work for Uber in its headquarters. [57]All other workers--including the roughly four million drivers who provide ride services to Uber's customers--are not employed by the company, but are instead self-employed independent contractors. [58]This distinction, which is essential to Uber's business model, has opened the company up to countless wage and hour claims by those who assert that Uber has misclassified its drivers to avoid paying a minimum wage and benefits. [59]

The first large amalgamation of these claims came in 2013 when 350,000 Uber drivers filed a class action lawsuit against the company in Massachusetts and California, alleging worker misclassification. [60]That suit, and countless other parallel actions, [61]laid the groundwork for a future Mass Arbitration effort. This is because Uber sought to dismiss a large number of putative class members from the class action lawsuits based on their having signed "independent contractor" **[*389]** agreements with arbitration clauses. [62]The arbitration clause included two sections of note. First, the agreement contained a class waiver, requiring that an employee resolve "any dispute that is in arbitration on an individual basis only, and not on a class, collective action, or representative basis ("Class Action

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[55] *The History of Uber*, UBER, https://www.uber.com/newsroom/history [https://perma.cc/9AYW-J54J].

[56] *See, e.g.*, Kate Taylor & Benjamin Goggin, *49 of the Biggest Scandals in Uber's History*, BUS. INSIDER (May 10, 2019, 11:38 AM), https://www.businessinsider.com/uber-company-scandals-and-controversies-2017-11 [https://perma.cc/RM3N-9N7P].

[57] *See* Greg Bensinger, *Uber: The Ride-Hailing App That Says It Has 'Zero' Drivers*, WASH. POST (Oct. 14, 2019, 10:16 AM), https://www.washingtonpost.com/technology/2019/10/14/uber-ride-hailing-app-that-says-it-has-zero-drivers [https://perma.cc/5TGF-MQPG].

[58] *Id.*

[59] *See, e.g.*, Class Action Complaint & Jury Demand at 5, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

[60] *Id.*

[61] *See, e.g.*, Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1185 (N.D. Cal. 2015); Gillette v. Uber Techs., No. C-14-5241-EMC, 2015 WL 4481706, at *1 (N.D. Cal. Jul. 22, 2015); Yucesoy v. Uber Techs., Inc., 109 F. Supp. 3d 1259, 1259-60 (N.D. Cal. 2015).

[62] *See, e.g.*, Defendant Uber Technologies, Inc.'s Opposition to Plaintiffs' Motion for Class Certification at 38, O'Connor, 82 F. Supp. 3d 1133.

Waiver"). The Arbitrator shall have no authority to consider or resolve any claim or issue any relief on a class, collective, or representative basis." [63]

Each agreement also contained a provision regarding the sharing of arbitration-related fees between the parties that states:

> In all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s) will be apportioned equally between the Parties . . . . However, you will not be required to bear any type of fee or expense that you would not be required to bear if you had filed the action in a court of law. Any disputes in that regard will be resolved by the Arbitrator as soon as practicable after the Arbitrator is selected, and Company shall bear all of the Arbitrator's and arbitration fees until such time as the Arbitrator resolves any such dispute. [64]

Years into the litigation, the court deemed the arbitration clauses enforceable and removed those arbitration-bound plaintiffs from the class action. [65]As a result, the plaintiffs were left with the choice to walk away or bring their claims to arbitration.

2. The Mass Arbitration Episode

Instead of walking away, thousands of individual plaintiffs filed arbitration demands against Uber. The demands came in waves: 400 individual demands in August; 4525 demands in September; 5238 demands in October; 2376 more demands in November. [66]When all was said and done, 12,501 individual plaintiffs had filed arbitration demands and resolved to see their claims through. [67]At a **[*390]** price of $ 1500 to file per arbitration, Uber faced a staggering $ 18,751,500 in filing fees alone. [68]This figure does not include arbitrators' fees for a hearing itself and other costs, such as attorneys' fees. Each Arbitration Plaintiff individually retained one law firm: Keller Lenkner. [69]

By mid-November 2018, however, only a fraction of the 12,501 individual arbitrations filed by Keller Lenkner were moving forward. [70]This is because in order to commence an arbitration after a demand is filed, no further steps can be taken until the filing fees have been paid. [71]If there are threshold issues the parties wish to resolve--such as pro

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[63] Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration, Exhibit A at 20, Abadilla v. Uber Techs., Inc., No. 3:18-cv-7343-EMC (N.D. Cal. Dec. 5, 2018), ECF No. 3.

[64] *Id.* at 21.

[65] *See* O'Connor v. Uber Techs., Inc., 904 F.3d 1087, 1094 (9th Cir. 2018).

[66] *See* Petition for Order Compelling Arbitration at 2, *Abadilla*, No. 3:18-cv-7343-EMC, ECF No. 1.

[67] *Id.* The calculator-wielding reader may have noticed the sum of these filings is 12,539 rather than 12,501. The discrepancy is owed to a small number of plaintiffs who asked to withdraw their demands post-service. *See* Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration at 10 n.2, *Abadilla*, No. 3:18-cv-7343-EMC, ECF No. 3.

[68] Figure based on the $ 1500 per arbitration fee multiplied by the 12,501 claims, which totals $ 18,751,500. *See* Petition for Order Compelling Arbitration, *supra* note 66, at 6-7.

[69] Keller Lenkner is a central character in many chapters of the Mass Arbitration story. After selling their litigation finance business, Gerchen Keller Capital, for $ 175 million, the principals launched Keller Lenkner: their own elite plaintiffs' firm, touting Supreme Court law clerk pedigree and litigation strategy informed by their unique risk-calculation prowess based on a "marriage of law and finance." *See infra* Subparts II.B and II.C. Keller Lenkner represented plaintiffs in each of the three case studies.

[70] Petition for Order Compelling Arbitration, *supra* note 66, at 7.

hac vice admissions, arbitrator selection, or even a challenge to the sufficiency of the underlying claims--the nonrefundable filing fee must be paid first. [72]

On December 5, 2018, the 12,501 arbitration plaintiffs--now known as the *Abadilla* arbitration plaintiffs--filed a motion to compel arbitration in the Northern District of California, explaining that, of the demands filed, "in only 296 has Uber paid the initiating filing fees . . . only 47 have appointed arbitrators, and . . . in only *six* instances has Uber paid the retainer fee of the arbitrator to allow the arbitration to move forward." [73]

Responsibility for the delay was vigorously debated by the parties. [74]Uber argued that the arbitration demands had myriad deficiencies that needed to be adjudicated before filing fees should be paid, including the adequacy of the plaintiffs' counsel, potential issues with Keller Lenkner attorneys' pro hac vice **[*391]** admissions, and the proportion of each filing fee for which the company was responsible. [75]Regarding fees, Uber invoked the arbitration clause language, which stated that plaintiffs would "not be required to bear any type of fee or expense that [they] would not be required to bear if [they] had filed the action in a court of law." [76]Uber argued this meant plaintiffs were responsible for $ 400 of the $ 1500 filing fee, "consistent with the amount Petitioners would have had to pay [to file] if they had brought their claims in court." [77]The plaintiffs pointed out, however, that "Uber would be required to pay the filing fees even if Petitioners were unrepresented and proceeding pro se." [78]

Uber's desired solution--delaying filing fee payment until an arbitrator decided basic threshold issues--produced a greater uproar. "[W]hat Uber wants is individual arbitration when it helps Uber avoid the specter of class-action liability, but group adjudication when it allows Uber to avoid its drivers' claims." [79]

Between rounds of briefing, many of Uber's arguments were mooted when JAMS, the contracted-for arbitration service, weighed in: "[T]he parties' arbitration agreement appears to clearly prohibit collective determination of any issue absent party agreement." [80]JAMS explained that the arbitrations could not be delayed awaiting an arbitrator's decision on pro hac vice admissions in a few of the earlier-filed cases because that decision would not apply beyond the individual arbitrations that were then pending before that arbitrator. Instead, the identical issue would have to be redetermined in each subsequent arbitration. JAMS noted: "[i]t is JAMS desire and obligation to provide

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[71] *See JAMS Employment Arbitration Rules & Procedures* (effective July 1, 2014), JAMS, https://www.jamsadr.com/rules-employment-arbitration/english#one [https://perma.cc/73DC-8M3B].

[72] *Id.*

[73] *See* Petition for Order Compelling Arbitration, *supra* note 66, at 1. Put more pointedly, "[a]t the rate at which Uber is paying the initial arbitration fees, it would take approximately 10 years before the last Petitioner's arbitration even commenced." *Id.*

[74] *Id. Compare* Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration, Abadilla v. Uber Techs., Inc., No. 3:18-cv-07343-EMC (N.D. Cal. Jan. 14, 2019) *with* Declaration of Tom Kayes in Support of Reply to Motion to Compel Arbitration, *Abadilla*, No. 3:18-cv-07343-EMC (Jan. 24, 2019).

[75] *See* Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration, *supra* note 74, at 9-13.

[76] *Id.* at 3. For the entirety of the arbitration clause's fee provision, see Petitioner Marciano Abadilla, et al.'s Motion to Compel Arbitration, Exhibit A, *supra* note 63, at 5.

[77] Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration, *supra* note 74, at 3.

[78] Petitioners' Reply to Respondent Uber Technologies, Inc.'s Opposition to Petitioners' Motion to Compel Arbitration at 5, *Abadilla*, No. 3:18-cv-07343-EMC (Jan. 24, 2019).

[79] *See id.* at 2-3.

[80] Petitioners' Reply to Respondent Uber Technologies, Inc.'s Opposition to Petitioners' Motion to Compel Arbitration, Exhibit O at 108, *Abadilla*, No. 3:18-cv-07343-EMC (Jan. 24, 2019).

an efficient and effective process. . . . And while it is not our preference to force the parties to litigate these issues seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each case." [81]

[*392] Out of the blue, on May 8, 2019, the *Abadilla* plaintiffs voluntarily dismissed their action to compel arbitration. [82]The next day, an explanation for this dismissal emerged in a required filing to the U.S. Securities and Exchange Commission made by Uber in advance of its public offering. [83]In Uber's own words, "more than 60,000 drivers in the United States . . . have filed (or expressed an intention to file) arbitration demands against us . . . . [W]e have reached agreements that would resolve the classification claims of a large majority of these Drivers." [84]The filing listed the anticipated aggregate settlement, with attorneys' fees, to "fall within an approximate range of $ 146 million to $ 170 million." [85]Little is known about this settlement. Given the settlement's estimated value and scope, however, it bears important hallmarks of a class action settlement: an aggregate sum resolving a large number of claims. [86]

Because the order to compel was never granted or denied, the Uber episode does not shed light on the efficacy or shortcomings of the arguments advanced by the parties. But each of the parties' arguments and the back-and-forth which played out between them have been repeated elsewhere. Such events outline a blueprint for Mass Arbitration.

B. DoorDash

1. Background

DoorDash, a food delivery service company founded in 2013 by four Stanford University students, first launched under the nondescript URL paloaltodelivery.com. [87]In the ten years since DoorDash's founding, the **[*393]** company has grown to be valued at tens of billions of dollars, [88]but the company's business model still rests on the use of an almost entirely contracted workforce, raising misclassification issues that boiled over in 2019. [89]

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[81] *Id. at 107*.

[82] *See* Notice of Voluntary Dismissal Without Prejudice, *Abadilla*, No. 3:18-cv-07343-EMC (May 8, 2019).

[83] *See* Uber Techs., Inc., Issuer Free Writing Prospectus (Form S-1) (May 9, 2019), *https://www.sec.gov/Archives/edgar/data/1543151/000119312519142095/d727902dfwp.htm* [*https://perma.cc/S3Y4-FBRS*].

[84] *Id.*

[85] *Id.*

[86] See *infra* Subpart IV.A.3 for a discussion of class settlement and Mass Arbitration.

[87] *See* Steven Levy, *DoorDash Wants to Own the Last Mile*, WIRED (Nov. 9, 2015, 12:00 AM), *https://www.wired.com/2015/11/doordash-wants-to-own-the-last-mile* [*https://perma.cc/F5EE-6XU2*]. In an effort to learn the dynamics of delivery service for the purpose of building an app-based business powered by a contractor workforce, the company's founders set up a Google Voice number linked to their website which they used to field delivery orders; then, they placed their own calls for Thai food pickup, climbed into their 2001 Honda Accord, and delivered the orders across Palo Alto. *Id.*

[88] *See* DoorDash, Inc., Annual Report (Form 10-K) (Mar. 5, 2021), https://sec.report/Document/0001628280-21-004032/dash-20201231.htm (last visited Apr. 18, 2022).

[89] *See* Ian Millhiser, *DoorDash's Anti-Worker Tactics Just Backfired Spectacularly*, VOX (Feb. 12, 2020, 3:30 PM), *https://www.vox.com/2020/2/12/21133486/doordash-workers-10-million-forced-arbitration-class-action-supreme-court-backfired* [*https://perma.cc/Y2CS-BC46*].

In 2015, the first largescale lawsuit litigating the issue of DoorDash worker misclassification was brought on behalf of a class of so-called "Dashers"--delivery persons who use DoorDash's app, match with delivery jobs, and don the company's signature red shirts to deliver orders using their personal vehicles. [90]These Dashers may work as little or as much as they please, but they cannot earn any of the standard benefits associated with fulltime employment, like health insurance and vacation. [91]The 2015 class action lawsuit eventually reached a proposed settlement, from which an estimated 33,744 Dashers were to collectively receive a five million dollar payout over their contractor status. [92]The settlement stalled, however, after the state court judge rejected numerous proposed settlement agreements. [93]

From 2016 to 2019, DoorDash required each of its Dashers to "sign"--by clicking through a series of acknowledgment screens on their smartphones, called "clickwrap"--an Independent Contractor Agreement (ICA) before completing any deliveries. During this three-year period, the content of the ICA's mandatory arbitration clause remained largely consistent, requiring mandatory arbitration of **[*394]** all employee disputes on an individual basis. [94]The agreement also delegated questions of arbitrability to the arbitrator and required use of the American Arbitration Association (AAA), one of the largest private arbitration services providers. [95]

2. Mass Arbitration Episode

Pursuant to the ICA's mandatory arbitration clause, in July of 2019, 250 plaintiffs represented by Keller Lenkner--the same firm that amassed the Uber arbitration demands--filed arbitration demands against DoorDash. [96]Each demand was submitted individually on the AAA's official demand form and each contained information about one individual Dashers's claim. But demonstrative of the low transaction costs of the Mass Arbitration strategy, the demand forms included only a short claim description, copied verbatim for each separate filing. [97]

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[90] *See What Is DoorDash*, DOORDASH, https://www.doordash.com/dasher/signup [https://perma.cc/K9MX-4M82]; Marciano v. DoorDash, Inc., No. CGC-18-567869 (S.F. Super. Ct. Dec. 7, 2018).

[91] Motion to Compel Arbitration at 1, *Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020)*, ECF No. 4.

[92] *See Marciano*, No. CGC-18-567869 (discussing that in this early lawsuit against DoorDash, numerous settlements were proposed throughout a period of years, and each settlement offer was rejected by the court until the plaintiffs ultimately abandoned settlement in this action in favor of consolidating claims in another state court case, *Marko v DoorDash, Inc.*, No. BC659841 (Los Angeles Super. Ct. May 2, 2017), which remains unresolved as of late spring 2021); *see also* Levy, *supra* note 87.

[93] *See* Megan Rose Dickey, *DoorDash Will Pay $ 5 Million to Settle Class-Action Lawsuit Over Independent Contractors*, TECHCRUNCH (Apr. 10, 2017, 4:00 PM), https://techcrunch.com/2017/04/10/doordash-will-pay-5-million-to-settle-class-action-lawsuit-over-independent-contractors [https://perma.cc/BU4E-LQ6S]. The proposed settlement did not occur. See *infra* Subpart IV.A.3 for a discussion of the resurfacing of the unsettled *Marciano* case years later.

[94] *See* Declaration of Ashley Keller in Support of Petitioner's Motion for a Temporary Restraining Order, Exhibit B at 7, *Abernathy, 438 F. Supp. 1062*, ECF No. 11-2.

[95] *See id.*, § XI (2019 agreement); Declaration of Ashley Keller in Support of Petitioner's Motion for a Temporary Restraining Order, Exhibit C, § XI, at 24-26, *Abernathy, 438 F. Supp. 1062*, ECF No. 11-3 (2016 agreement).

[96] Motion to Compel Arbitration, *supra* note 91, at 5.

[97] The description stated:

> Claimant has been a courier for DoorDash. DoorDash has exercised significant control over Claimant, including by determining which deliveries it has offered Claimant and how much it has paid Claimant for each delivery. Because DoorDash sets the material terms of its couriers' conduct, Claimant has not used managerial skill to increase profits. Claimant, along with other couriers, has made up DoorDash's core workforce; Claimant is integral to DoorDash's business. While working for DoorDash, Claimant has not operated a transportation-based business independent of DoorDash. DoorDash has thus misclassified Claimant as an independent contractor instead of an employee. Claimant seeks all

In the wake of these filings, DoorDash requested a two-week extension of its initial deadline to pay its share of the filing fees. [98]When the extended deadline arrived, DoorDash paid the fees necessary to commence the 250 arbitrations without incident. [99]

[*395] About two months later, another batch of Dasher plaintiffs filed arbitration demands, except this time, the number had grown nearly tenfold to 2250 Dashers. [100]The plaintiffs swiftly paid their share of the filing fees: $ 300 per arbitration demand, as required by the AAA's rules. [101]As a result, the AAA billed DoorDash for its share of the filing fees: $ 1900 per arbitration, totaling $ 4,275,000. [102]

DoorDash failed to pay the required fees by its initial deadline or the two deadline extensions it was granted, the last of which gave DoorDash until November 7, 2019 to pay. [103]One week before the final November fee deadline, for the first time throughout the process, DoorDash raised concerns about the potential deficiency of the arbitration demands. [104]The company alleged "significant" though unspecified "deficiencies" with the demands, and asserted that some number of plaintiffs had never been employed by DoorDash. [105]In response to these objections, the AAA reiterated that, pursuant to the rules contracted for by the parties, the AAA had made the binding "administrative determination that the minimum filing requirements have been met by Claimants." As a result, DoorDash was obligated to pay the balance of fees. [106]

By this time, a third wave of arbitration demands had been filed: on September 27, 2019, Keller Lenkner added 4000 more individual arbitration demands, rounding out the total number of arbitrations with unpaid initial filing **[*396]** fees at 6250. [107]On November 7, the deadline to pay fees for all 6250 claims--to the tune of over $ 11

> available relief under the following provisions, as showing to be applicable following discovery of information exclusively within the control of Respondent . . . .

Declaration of Ashley Keller in Support of Petitioner's Motion to Compel Arbitration, Exhibit C at 4, *Abernathy, 438 F. Supp. 1062*, ECF No. 5-3.

[98] *See* Motion to Compel Arbitration, *supra* note 91, at 6.

[99] *Id.*

[100] Declaration of Ashley Keller in Support of Petitioners' Motion to Compel, Exhibit E, *Abernathy, 438 F. Supp. 1062*, ECF No. 5-5.

[101] See Declaration of Ashley Keller in Support of Petitioners' Motion to Compel Arbitration at P 11, *Abernathy, 438 F. Supp. 1062*, ECF No. 5 [hereinafter *Abernathy* Keller Declaration in Support of Motion to Compel]; see also Employment/Workplace Fee Schedule, AM. ARB. ASS'N (Nov. 1, 2019), *https://www.adr.org/sites/default/files/Employment_Fee_Schedule1Nov19.pdf* [*https://perma.cc/29QV-ULRR*].

[102] *See* Declaration of Ashley Keller in Support of Petitioner's Motion for a Temporary Restraining Order, Exhibit D, *Abernathy, 438 F. Supp. 1062*, ECF No. 11-4 (containing email dated September 23, 2019, from AAA to DoorDash and the Dasher plaintiffs informing all parties of the payment due by DoorDash on or before October 14, 2019).

[103] *See Abernathy* Keller Declaration in Support of Motion to Compel, *supra* note 101, at PP 12-19.

[104] *See* Declaration of Ashley Keller in Support of Petitioners' Motion for a Temporary Restraining Order, Exhibit G, *Abernathy, 438 F. Supp. 1062*, ECF No. 11-7.

[105] *Id.*

[106] Declaration of Ashley Keller in Support of Petitioners' Motion to Compel Arbitration, Exhibit K, *Abernathy, 438 F. Supp. 1062*., ECF No. 5-11 (containing email from the AAA, noting "AAA's filing requirements are specified under Rule 4 . . . . [AAA has] made an administrative determination that the minimum filing requirements have been met by Claimants.").

million--came and went. [108]Based on DoorDash's failure to pay, the AAA terminated the plaintiffs' arbitration actions on November 8, 2019. [109]

Following the dismissal, Keller Lenkner filed a motion to compel arbitration. [110]In their motion, the Dashers and their counsel found themselves in the unusual position of invoking the Federal Arbitration Act's Section 4 [111]--a provision which has vexed employees, consumers, and plaintiffs' lawyers for decades--to seek an order compelling a major corporation to arbitrate individual plaintiffs' claims. In a quintessentially table-turning moment, the plaintiffs argued that DoorDash had enforced the "Mutual Arbitration Provision" of its ICA numerous times before in lawsuits raising employee misclassification claims--when the misclassification claims were brought by a smaller number of single plaintiffs--leaving DoorDash unable to argue that the agreements themselves were unenforceable. [112]Even if this irony were ignored, the plaintiffs contended that the ICA's delegation provision ended the inquiry by requiring that disputes "with respect to whether th[e] Mutual Arbitration Provision is . . . applicable . . . shall be determined exclusively by an arbitrator, and not by any court." [113]

Two days after the Motion to Compel was filed, the case's profile was raised ten-fold, with numerous news stories breaking to cover a developing controversy in the case. [114]It came to light that the day after the arbitrations were **[*397]** administratively dismissed for DoorDash's failure to pay, DoorDash rolled out a new clickwrap agreement that changed which arbitration service provider the Dashers were required to use to bring their claims--and, by extension, changed the very rules that would govern the process. [115]In an explosive Motion for a Temporary

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[107] *See* Declaration of Ashley Keller in Support of Petitioners' Motion to Compel Arbitration, Exhibit I, *Abernathy, 438 F. Supp. 1062*, ECF No. 5-9.

[108] *See* Declaration of Ashley Keller in Support of Petitioners' Motion to Compel Arbitration, Exhibit L, *Abernathy, 438 F. Supp. 1062*, ECF No. 5-12.

[109] *Id.* ("Respondent has failed to submit the previously requested filing fees for the 6250 individual matters; accordingly, we have administratively closed our files.").

[110] *See* *Motion to Compel Arbitration, supra note 91*.

[111] Fed. Arb. Act, *9 U.S.C. § 4*.

[112] *See* Motion to Compel Arbitration, *supra* note 91, at 1-2 (citing DoorDash's Motion to Compel Arbitration, McKay v. DoorDash, Inc., No. 3:19-cv-04289-MMC (N.D. Cal. 2019), ECF No. 26).

[113] *See* Motion to Compel Arbitration, *supra* note 91, at 2 (citing the Independent Contractor Agreement § XI.3). The agreements themselves contain a delegation clause, mirrored in the AAA's Commercial Rules, which requires that "any objections with respect to the existence, scope, or validity of the arbitration agreement" or to the "arbitrability of a claim or counterclaim" must be decided by an arbitrator. *See* AM. ARB. ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 12 (2009), *https://www.adr.org/sites/default/files/EmploymentRules_Web_2.pdf* [*https://perma.cc/T2HH-JNGA*].

[114] *See, e.g.*, Alaina Lancaster, *'Poetic Justice': Judge Alsup Berates DoorDash for Trying to Escape Its Own Arbitration Agreement*, LAW.COM (Nov. 26, 2019, 12:17 AM), *https://www.law.com/therecorder/2019/11/26/poetic-justice-judge-alsup-berates-doordash-for-trying-to-escape-its-own-arbitration-agreement/?slreturn=20210207151725* [*https://perma.cc/49N2-AYBQ*] ("'We're here because your client had an agreement to go to AAA, and when it came time to pay the fee, you backed out and reneged the agreement,' said [Judge] Alsup.").

[115] One Dasher explained that:

> [B]efore I could begin making deliveries, DoorDash presented me with its new terms and agreement. It would not let me proceed until I accepted its terms. I thought that the new agreement was merely an update to the app. I did not realize that this agreement contained new provisions that could affect my ongoing case against DoorDash. I did not have enough time to thoroughly read through the agreement. The update caught me at a time where, if I did not sign quickly, I would lose the hours that I was signed up to work. I accepted the terms of the agreement even though I did not have the time to fully read through and understand them.

Restraining Order, the plaintiffs surmised that DoorDash's failure to pay the filing fees was part of a broader plan to have the arbitrations administratively closed due to nonpayment, and then change the contract's arbitration rules to avoid facing the magnitude of these arbitrations altogether. [116]

The new agreement required that any arbitration be administered by a smaller and lesser-known arbitration provider, the International Institute for Conflict Prevention & Resolution (CPR), [117]which had just undergone changes of its own. On November 6, 2019--three days before DoorDash altered the ICA--CPR rolled out a new set of procedural rules for large numbers of employment arbitrations, referred to as the "Employment-Related Mass-Claims Protocol." [118]The new protocol dictated that when "greater than 30 individual **[*398]** employment-related arbitration claims of a nearly identical nature [119]are . . . filed . . . against the same Respondent(s)" in close proximity to one another, a bellwether-type process [120]will be employed. [121]CPR "will randomly assign sequential numbers" to the arbitration demands and "[t]hose claims assigned numbers 1 through 10 will be the initial Test Cases to proceed to arbitration." [122]

The plaintiffs argued that these new rules would, by design, tie up their claims for many years, as, under the rules, the vast majority of claims are stayed indefinitely while the bellwether test arbitrations move forward. [123]The rules require that the bellwether arbitrations be followed by a mandatory mediation period before any remaining claims can be arbitrated in batches. [124]Because CPR only contracted with 60 arbitrators for its employment panel, the plaintiffs raised questions about CPR's ability to timely arbitrate large numbers of claims. [125]

Declaration of Alison Jackson in Support of Motion for a Temporary Restraining Order at PP 8-11, *Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020)*, ECF No. 10-2.

[116] Motion for a Temporary Restraining Order at 6, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 10 ("Only later did it become clear why DoorDash refused to explain its objections . . .: DoorDash never intended to abide by the agreement it forced Petitioners to sign.").

[117] *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL., *https://www.cpradr.org* [*https://perma.cc/D892-5UFQ*].

[118] *See CPR Launches New Mass Claims Protocol and Procedure*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Nov. 6, 2019), *https://www.cpradr.org/news-publications/pressreleases/2019-11-06-cpr-launches-new-massclaims-protocol-and-procedure* [*https://perma.cc/BCD6-HND9*]; *see Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2019)*, ECF No. 35.

[119] With respect to the threshold question of which types of arbitration demands are funneled into the Employment Related Mass-Claims Protocol and corresponding bellwether process, CPR defines claims of a "Nearly Identical" nature as "aris[ing] out of a factual scenario and rais[ing] legal issues so similar [to] one [] another that application of the Protocol to the number of claims at issue will reasonably result in an efficient and fair adjudication of the claims." INT'L INST. FOR CONFLICT PREVENTION & RESOL., EMPLOYMENT-RELATED MASS-CLAIMS PROTOCOL 2 (Nov. 4, 2019), *https://www.cpradr.org/dispute-resolution-services/employment-related-mass-claims-documents/emp-mass-claims-protocol* [*https://perma.cc/Q4SG-2MDK*]

[120] A bellwether proceeding is one that "the court and the parties select to test their arguments, with the goal of moving the overall litigation towards resolution. . . . Bellwether cases generally have facts that are typical and representative of other cases in the wider litigation, and the outcome of a bellwether trial often informs the parties on whether they will continue to litigate or settle their claims, and on what terms." *What Is a Bellwether Trial?*, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, *https://www.lieffcabraser.com/injury/what-is-a-bellwether* [*https://perma.cc/8UFB-G425*].

[121] *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL., *supra* note 119, at 2.

[122] *Id.* at 2-3. In addition to the 10 randomly selected cases, each side has the possibility of selecting five additional cases for inclusion in the bellwether process. *Id.* at 3.

[123] *See* Motion for a Temporary Restraining Order, *supra* note 116, at 12.

[124] *Id.* at 8; *see also* INT'L INST. FOR CONFLICT PREVENTION & RESOL., *supra* note 119 at 5-7.

At the end of 2019, DoorDash agreed to a $ 39.5 million preliminary class-wide settlement in *Marciano v. DoorDash, Inc.* [126] *Marciano*, a long-running class action that had stalled out years before, sought to adjudicate the rights of all Dashers in California and Massachusetts--estimated to be more **[*399]** than 400,000 individuals. [127]Importantly, the proposed settlement was drafted to include the arbitration plaintiffs, knocking the legs out from under their Mass Arbitration effort and doing so at a significantly lower per-claimant recovery. After deducting the proposed $ 13.2 million in fees for the plaintiffs' firm representing the class, each class member would have been awarded $ 122 based on an estimated 50 percent participation rate. [128]The existence of this proposed settlement highlights the myriad complexities, ethical pitfalls, and potential hypocrisies of the mandatory arbitration landscape, discussed in more detail in Part IV. Normative judgments about mandatory arbitration's use in this context as a procedural tool to thwart the bringing of meritorious claims rather than as a tool for efficient dispute resolution, however, seem to be bolstered: After many months of contentious and expensive motions practice challenging the arbitration actions' resemblance to contractually prohibited aggregate adjudication, the company now seeks an aggregate settlement mechanism, suggesting that if a large number of meritorious claims are indeed able to be brought, defendants too may see aggregating mechanisms as a more efficient means of resolving disputes.

DoorDash sought a stay of the motion to compel arbitration in the *Abernathy* proceedings pending approval of the class settlement. [129]In an unexpected result, however, the judge declined to stay the proceedings, citing the inevitable delay, and ultimate uncertainty of the class settlement's approval, which itself had already weathered multiple iterations and numerous rejections by the state court judge. [130]Instead, the judge granted the plaintiffs' motion to compel arbitration. After approximately ten months of docket silence, the parties in *Abernathy* entered into a joint stipulation of dismissal, ending the protracted court battle with a threadbare three-page filing. [131]Months later, it was revealed in a DoorDash filing with the Securities and Exchange Commission that the company had settled more than 35,000 claims with Dashers and workers employed by a related subsidiary "who have entered into arbitration agreements . . . [and] have filed or expressed an intention to file arbitration demands against us"--for $ 85 million. [132]As in the case **[*400]** of the Uber episode, there is little official information available about the settlement, but based on the public SEC filing and information shared between Dashers on public chat forums, [133]this settlement too bears the hallmarks of an aggregate settlement.

C. Postmates

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[125] Motion for a Temporary Restraining Order, *supra* note 116, at 8.

[126] No. CGC-18-567869 (S.F. Super. Ct. Dec. 7, 2018).

[127] *See* Petitioner's Opposition to DoorDash, Inc.'s Motion to Stay Proceedings at 5, *Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020)*, ECF No. 165.

[128] *Id.*

[129] DoorDash's Notice of Motion to Stay Proceedings Pending Final Approval of Class Settlement, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 158.

[130] *See Abernathy, 438 F. Supp. 3d at 1067*.

[131] *See* Joint Stipulation of Dismissal, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 185.

[132] *See* DoorDash, Inc., Form S-1 Registration Statement under the Securities Act of 1933 (Nov. 13, 2020), *https://www.sec.gov/Archives/edgar/data/1792789/000119*

[133] *Keller Lenkner Settlement*, REDDIT (Sept. 30, 2020), *https://www.reddit.com/r/doordash/comments/j2w7jj/keller_lenkner_settlement* [*https://perma.cc/4P4D-BJBT*] (providing access to forums in which Dashers discuss their communications with Keller Lenkner regarding the settlement and when they might receive payment).

1. Background

Postmates is an app-based food delivery service, operating on a nearly identical business model to DoorDash. To become a "courier" for Postmates, a person must execute a "Fleet Agreement," which classifies the courier as an independent contractor rather than an employee and mandates individual arbitration for any legal claims the employee may subsequently wish to bring. [134]Postmates's original contract further provided that the company would bear all costs related to arbitration, including filing fees and hearing costs: "Postmates shall pay the arbitrator's and arbitration fees and costs, unless applicable law requires otherwise. Notwithstanding applicable law to the contrary, Postmates shall pay the arbitrator's and arbitration fees and costs related to any payment dispute." [135]

[*401] 2. Mass Arbitration Episode

In March 2019, Keller Lenkner informed Postmates that the firm represented more than 3000 Postmates couriers who planned to initiate individual arbitrations against the company and estimated that Postmates would be responsible for $ 20 million in filings fees as a result. [136]Within a month of learning about the arbitration claims it faced, Postmates rolled out a new "Fleet Agreement," changing the arbitration fee arrangement. Now, couriers would be required to split the cost of arbitration equally with Postmates:

> Unless applicable law provides otherwise, as determined by the Arbitrator, Postmates and You shall equally share filing fees and other similar and usual administrative costs, as are common to both court and administrative proceedings. Postmates shall pay any costs uniquely associated with the arbitration, such as payment of the Arbitrator and room rental. [137]

Any courier who logged on to the app was required to agree to the new Fleet Agreement containing the updated fee arrangement provision in order to make a delivery. [138]In spite of this, between late April and early May, 5274 couriers filed individual arbitration demands with AAA. [139]These plaintiffs--the *Adams* arbitration plaintiffs--were invoiced, and after the granting of fee waivers to those eligible, [140]they paid $ 99,600 in fees. [141]The AAA assessed fees of $ 1900 per claimant against Postmates, amounting to $ 9,360,000. [142]Postmates refused to pay said fees

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[134] *See* Exhibits in Support of Respondent Postmates Inc.'s Opposition to Petitioners' Motion to Compel Arbitration, Adams v. Postmates, 414 F. Supp. 3d 1246 (N.D. Cal. 2019), ECF No. 112-2 (containing copies of Fleet Agreements, effective May 11, 2018, and April 3, 2019, respectively).

[135] *Id.* at 12, P 11B.vi.

[136] *See* Declaration of Ashley Keller in Support of Motion to Compel Arbitration at P 4, Adams, 414 F. Supp. 3d 1246, ECF No. 5 [hereinafter *Adams* Keller Declaration]; *see also* Declaration of Ashley Keller in Support of Motion to Compel Arbitration, Exhibit A, Adams, 414 F. Supp. 3d 1246, ECF No. 5-1.

[137] Declaration of Ashley Keller in Support of Motion to Compel Arbitration, Exhibit C at 10, Adams, 414 F. Supp. 3d 1246, ECF No. 5-3 (2019 Fleet Agreement). For a comparison to the original fee provision, see *supra* source accompanying note 135.

[138] *See Adams* Keller Declaration, *supra* note 136, at P 8. It is well documented that many individuals sign off on a new agreement without realizing or understanding that the terms have been changed. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648-49 (2005).

[139] *See Adams* Keller Declaration, *supra* note 136, at P 12.

[140] *See* Declaration of Theane Evangelis in Support of Respondent Postmates Inc.'s Cross-Motion to Compel Arbitration and Stay Proceedings at P 7, Adams, 414 F. Supp. 3d 1246, ECF No. 228-1. See also *infra* Subpart III.A.2 for a discussion of fee waivers.

[141] *See Adams* Keller Declaration, *supra* note 136, at P 14.

on the basis that the individual arbitrations were not sufficient. [143]The **[*402]** AAA disagreed, making clear that the fees were still due. [144]The deadline for payment passed and Postmates declined to pay. [145]

Predictably, the *Adams* arbitration plaintiffs filed a Motion to Compel Arbitration, but in a move unseen in other Mass Arbitration episodes, Postmates answered back with a Cross-Motion to Compel and Stay Proceedings. [146]Postmates took up a line of argument not yet adopted by corporate defendants in gig economy Mass Arbitrations, arguing that the 5257 individual arbitration demands are tantamount to a "de facto class arbitration" in violation of the class action waiver. [147]Because the plaintiffs' legal and factual claims were identical and filed contemporaneously, they argued, the claims were not individual. [148]Postmates asserted that in the plaintiffs' correspondence before filing the arbitrations, "Keller Lenkner threaten[ed] to bring a *de facto* class arbitration in an attempt to shake down Postmates using AAA's billing practices." [149]Finally, Postmates made a novel argument that because its agreement delegated all questions of arbitrability, but reserved the question of enforceability of the class waiver to the courts, the District Court could properly determine whether the *Adams* arbitration plaintiffs' claims too closely resembled a class action. [150]

[*403] In October 2019, after months of contentious motions practice, the judge partially granted the *Adams* arbitration plaintiffs' motion to compel and ordered Postmates to arbitrate the workers' claims. [151]She stopped

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[142] *Id.* at P 15; *Adams Keller Declaration, Exhibit A, supra note 136*.

[143] *See* Declaration of Theane Evangelis, *supra* note 140, at PP 10-13.

[144] *Id.*

[145] *Id.* Postmates asserted that it was willing to pay fees only for individual claims brought separately from what it termed Keller Lenkner's "collective demand." *Id.* at P 13. In the interim, there were failed attempts at mediation, which the plaintiffs required to occur before the May 31 deadline. Postmates was not amenable to mediation before the May 31 deadline without a deadline change. *Id.* at P 9.

[146] *See* Respondent Postmates Inc.'s Notice of Motion & Cross-Motion to Compel Arbitration & Stay Proceedings; *Memorandum of Points & Authorities, Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal 2019)*, ECF No. 228.

[147] *Id.* at 5.

[148] *Id.* at 2. Postmates stated that:

> [T]his Court should enter an order: (1) requiring each Petitioner to refile his or her demand as an *individual* arbitration demand that sets forth the facts and legal theories of relief applicable to the particular Petitioner; and (2) requiring each Petitioner, after refiling, to proceed to arbitration on an *individual* basis--i.e., without improperly invoking the benefits of class arbitration, such as collective administration by AAA, the application of settlement pressure stemming from the aggregate assessment of fees, or objecting to a payment plan that compensates AAA for arbitrations as they proceed and are prosecuted.

Id.

[149] *Id.* at 5.

[150] *Id.* at 13-14 ("[W]here an arbitration agreement permits a court to enforce a class waiver, the court may enter an order specifically requiring the parties to proceed in individual arbitrations, rather than class arbitrations. . . . Because the parties' arbitration agreement specifically leaves the enforcement of its class action waiver to a court, and because Petitioners' previously filed arbitration demands violate that class action waiver, this Court should enter an order compelling individual arbitration on the terms set forth by the Fleet Agreement.").

[151] *Adams, 414 F. Supp. 3d at 1255-56*.

short, however, of ordering the defendants to pay filing fees within any prescribed time period, as plaintiffs requested of her--or even to pay the fees at all--citing her lack of authority to do so and explaining that the authority to assess and enforce payment was properly vested in the arbitration service. [152]Regarding the defendant's assertion that the action amounted to a "de facto class action," the judge determined that, properly interpreted, the class action waiver was only reviewable by a court on the limited questions of whether the clause itself is "unenforceable, unconscionable, void, or voidable." [153]

About a month later, the parties returned to court, on the plaintiffs' assertion that Postmates should be held in civil contempt. [154]Immediately following the judge's issuance of the order to compel arbitration, the plaintiffs notified AAA, which reassessed filing fees. [155]While Postmates requested--and was granted--a payment deadline extension, the company ultimately refused to pay the filing fees, resulting in AAA again "administratively clos[ing] [the Plaintiffs'] case files due to Postmates's noncompliance." [156]

In response to the plaintiffs' contempt allegations, Postmates filed a motion to stay, citing the "irreparable harm" the company would face if forced to proceed and pay filing fees. [157]The judge had little patience for the argument:

> Postmates's obligation to tender $ 10 million in filing fees as a result of those arbitration demands is a direct result of [its own] agreement--which Postmates drafted and which Postmates required each courier to sign as a condition of working for Postmates. It strains credulity for **[*404]** Postmates to argue that the amount of filing fees due constitute irreparable harm when that "harm" is entirely of its own making. [158]

The judge unequivocally ordered Postmates to proceed with arbitration, denying Postmates's emergency bid for a stay and concluding that Postmates is unlikely to win on its "de facto" class arbitration argument. [159]Indeed, on appeal to the Ninth Circuit, Postmates sought a determination that the de facto class action question is determinable by a court, rather than delegated to the arbitrator. [160]But in an unpublished disposition, the Ninth Circuit agreed with the district court "that the parties' agreement clearly delegates responsibility for resolving that dispute to the arbitrator." [161]

Postmates continued its fight along other, ultimately unsuccessful, avenues. A few weeks after the judge issued her denial of the stay, the newest wrinkle in the Mass Arbitration story began unfolding. On March 25, 2020, Gibson

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[152] *Id.*

[153] *Id. at 1254* (citing § 10B.iv of the 2019 Fleet Agreement). Any other determinations were properly delegated to arbitration.

[154] Petitioners' Motion for an Order for Postmates to Show Cause Why It Should Not Be Held in Civil Contempt, *Adams, 414 F. Supp. 3d 1246*, ECF No. 256.

[155] *Id.* at 1.

[156] *Id.*

[157] Respondent Postmates Inc.'s Notice of Motion & Motion to Stay Order Granting in Part and Denying in Part Cross-Motions Pending Appeal at 1-2, *Adams, 414 F. Supp. 3d 1246*, ECF No. 261.

[158] Adams v. Postmates, No. 4:19-cv-03042, *2020 WL 1066980, at *6 (N.D. Cal. 2020)*.

[159] *Id.* at *7.

[160] *See Opening Appellant Brief, Adams v. Postmates, Inc., 823 F. App'x 535 (9th Cir. 2020)*.

[161] *Adams, 823 F. App'x at 535-36*.

Dunn filed a new action on Postmates's behalf. In a case captioned *Postmates, Inc. v. 10,356 Individuals*, [162]Postmates sued for declaratory and injunctive relief asserting that:

> [A]ny attempt by Defendants--who are 10,356 purported users of the Postmates platform--to pursue de facto class arbitration against Postmates violates the parties' agreement to resolve disputes in individual arbitration, and that those purported users may not enforce SB 707 [163]against Postmates because it is preempted by the FAA and unconstitutional. [164]

Just over a year later, in April 2021, the parties voluntarily dismissed the case following an attempted appeal in the Ninth Circuit. [165]While it is not publicly known what prompted the voluntary dismissal by the parties and what, if any, agreement the parties came to, this short-lived parallel suit further underscores both the creativity of the parties to these actions and the vigor with which the litigation has been fought.

[*405] III. THE ANATOMY OF THE MASS ARBITRATION STRATEGY

A. Mechanics of the Strategy

Mass Arbitration strategy is still very much in its infancy. But despite its short life span, the Mass Arbitration strategy has already developed interesting hallmarks and complexities. In order to understand its broader implications, this Part explores the essential characteristics of a successful Mass Arbitration, cataloging the necessary ingredients and key strategic choices that have been made by the plaintiffs' lawyers who crafted the strategy: choices that have rebuilt access to the underlying substantive employment rights they seek to enforce by creating makeshift aggregating mechanisms. The Uber, DoorDash, and Postmates arbitration episodes all featured elements of five hallmarks of Mass Arbitration: (1) leveraging pro-arbitration precedents by plaintiffs' lawyers against defendants; (2) leveraging filing fees to overcome the unfavorable economics of individual claims; (3) leveraging the coordination and collaboration of the plaintiffs' bar by recruiting other attorneys to assist; (4) leveraging client outreach, by taking advantage of existing aggregate proceedings, advertising, and gig economy social networks; and (5) leveraging favorable state laws which force defendants into timely payment of fees.

1. Leveraging Defense Arguments

For decades, as Supreme Court precedent has become increasingly pro-arbitration, the defense bar has honed its strongest arguments in favor of mandatory arbitration. These arguments boil down to a few major themes: challenging laws that purportedly weaken arbitration, in conflict with the FAA's policy favoring arbitration; invoking Supreme Court precedent and emphasizing the impropriety of courts ruling on threshold questions in light of clauses delegating the job to an arbitrator; and touting the supremacy of contractual agreements and the need to "honor the parties' expectations" by compelling arbitration. Now, these very same arguments have new, unexpected champions: the plaintiffs' lawyers who use the former words of their adversaries to compel arbitration against those very same adversaries.

Over the course of the last decade, from 2010 to 2020, the defense bar has consistently challenged legislative efforts that it asserts undermine the Federal Arbitration Act--something the Supreme Court has repeatedly held is **[*406]** impermissible. [166]The overarching rationale behind the argument--explicitly invoked in the Supreme Court's

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[162] No. 2:20-cv-02783-PSG-JEM (C.D. Cal. Mar. 25, 2020).

[163] For a discussion of S.B. 707, see *infra* notes 210-213.

[164] Complaint for Declaratory & Injunctive Relief & Demand for Jury Trial at 2, *Postmates, Inc.*, No. 2:20-cv-02783.

[165] *See* Stipulated Motion to Voluntarily Dismiss Appeal, *Postmates, LLC v. 10,356 Individuals*, 2:20-cv-02783-PSG-JEM (9th Cir. Apr. 7, 2021); Order Granting Joint Stipulation of Dismissal, *Postmates, LLC v. 10,356 Individuals*, 2:20-cv-02783-PSG (C.D. Cal. Apr. 16, 2021).

decisions--is that laws impacting arbitration must effectuate the broad purpose of the FAA in favoring and bolstering arbitration. [167]Plaintiffs in the Mass Arbitration episodes have adopted a proarbitration posture in their arguments, invoking the very precedents that stalled their efforts in the court system. [168]At each turn, plaintiffs have argued that arbitration must be favored and that the defendant's actions, whatever they may be, are impeding the arbitrations by seeking inappropriate redress in the court system. Examples abound, like this statement from the plaintiffs' opposition motion to the proposed parallel class settlement in the DoorDash episode stating that:

> DoorDash cannot avoid its obligation to arbitrate Intervenors' claims by asserting that class-wide resolution of those claims would be more efficient or reflect better public policy. The Supreme Court has squarely held [in *AT&T v. Concepcion*] that the FAA preempts any attempt to override the plain meaning of an arbitration agreement based on a public policy favoring class-wide resolution. [169]

Furthermore, past defendants have successfully challenged laws that disfavor arbitration. But now, plaintiffs have turned those arguments around as well: For example, legal penalties for delayed payment of arbitration fees, as enacted in California, are not preempted by the FAA because the law helps ensure the robust enforcement of arbitration agreements. [170]As counsel representing the DoorDash plaintiffs made clear:

> DoorDash's assertion that the California Legislature intended to aggressively enforce arbitration agreements in order to deter the use of **[*407]** such agreements is unsupported and implausible. DoorDash points to no evidence to support this claim, and the Legislature would have had no reason to think § 1281.97 would deter adoption of arbitration agreements unless most parties who adopt arbitration agreements do so with the intention of later violating them. Tortured speculation does not satisfy DoorDash's burden. [171]

Where plaintiffs' arguments have been most on all fours with prior defense arguments is in their efforts to compel the defendants to arbitration. In doing so, plaintiffs have taken up the vein of popular defense arguments about the importance of staying faithful to the contractual agreements each party entered into. [172]In fact, in each of the

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[166] *See supra* notes 41-42 (cataloguing the Supreme Court's pro-arbitration precedents and FAA preemption and supremacy arguments made by defendants and accepted by the Court).

[167] *Id.*

[168] *See, e.g.*, Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration, *supra* note 67, at 8. "In its effort to remove its drivers' legal claims from courts to arbitration, Uber has repeatedly extolled the virtues of arbitration, the Federal Arbitration Act ('FAA'), and the FAA's policy favoring arbitration. It has, for instance, touted the 'liberal federal policy favoring arbitration,' which requires courts to 'honor the parties' expectations' by enforcing arbitration provisions 'according to their terms.'" *Id.*

[169] Opposition to Preliminary Approval of Class Action Settlement at 4-5, Marciano v. DoorDash, Inc., No. CGC-18-567869 (S.F. Super. Ct. Dec. 10, 2019). There have been similar efforts by defendants to challenge the laws that are discussed in greater detail in Subpart III.A.5 below--laws which have made California a potentially more hospitable forum for the Mass Arbitration strategy.

[170] Petitioners' Reply in Support of Amended Motion to Compel Arbitration at 10, *Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020)*, ECF No. 163-4.

[171] *Id.* at 11.

[172] *See, e.g.*, Motion to Compel Arbitration, *Abernathy, supra* note 91, at 2 ("This motion asks the Court to require DoorDash to honor the contract it drafted and has wielded as a club against any Dasher who has attempted to vindicate his or her rights in court."); Motion to Compel Arbitration at 2, *Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019)* ("This motion asks the Court to require Postmates to honor the contract it drafted and has wielded as a club against any courier who dared to file a lawsuit seeking to enforce his or her rights.").

motions to compel drafted by Keller Lenkner, the plaintiffs have used identical language, imploring that "[insert name of company] honor the contract it drafted and has wielded as a club against any [insert name of plaintiff]." [173]

In the Uber episode, the plaintiffs were particularly effective in drawing upon the procedural history of parallel actions by other drivers against Uber. Uber had already secured rulings from the court system upholding the validity of their arbitration agreement and compelling arbitration-bound plaintiffs to arbitrate, from both the trial and appeals court level in prior cases. As the plaintiffs reminded the court: "There is no question that the parties entered into a valid arbitration agreement; Uber has previously argued as much. And in reversing the district court's denial of Uber's motion to compel arbitration, the Ninth Circuit has already ruled that the arbitration provision is enforceable." [174]

[*408] These arguments about honoring the parties' expectations in compelling arbitration have been readily applied to disputes concerning delegation. For years, plaintiffs argued along what was one of the final frontiers for opposing mandatory arbitration, by asserting that certain threshold issues related to the enforceability and applicability of an arbitration clause should be determined by the court system. But over time, even limited opportunities for courts to interject were precluded by the Supreme Court. [175]

These cases have come back to haunt defendants faced with massive nonrefundable filing fees, who have looked to the courts to release them from the obligation to pay. The defendants have made myriad arguments about threshold issues and deficiencies that they contend should free them from payment obligations. [176]But plaintiffs argue that these are precisely the type of nondelegable threshold questions that the Supreme Court made clear must be decided by an arbitrator: an arbitrator who, consequently, cannot be impaneled until--and unless--the defendant pays the contested fees. All that the arbitration service must do as a threshold matter is resolve whether an arbitration demand meets minimum filing requirements, which the arbitration providers easily determined in each case analyzed in Part II.

When DoorDash argued that it should not have to pay because the arbitration plaintiffs' demands were deficient, it was pointed back to the AAA's determination that the filing requirements were satisfied. [177]Uber's and Postmates's

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[173] *See* Motion to Compel Arbitration, *Abernathy, supra* note 91, at 2; Motion to Compel Arbitration, *Adams, supra* note 172, at 2.

[174] Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration, *supra* note 67, at 13 (citing the Ninth Circuit's decision in ***Mohamed v. Uber Techs., 848 F.3d 1201, 1211 (9th Cir. 2016)***. *See id.* at 5 ("Indeed, Uber compelled arbitration when other drivers previously brought these exact claims in this Court."); Motion to Compel Arbitration, *Adams, supra* note 172, at 4 (citing the laundry list of cases in which Postmates has compelled arbitration under the same agreement at issue: "Postmates has repeatedly relied on its Fleet Agreement to force couriers' misclassification claims to arbitration and eliminate their ability to litigate collectively. *See* Postmates's Mot. to Compel Arbitration, *Lee*, Dkt. No. 36 (N.D. Cal. Nov. 5, 2018); Postmates's Mot. to Compel Arbitration, *Lee*, Dkt. No. 14; Postmates's Petition for Order Compelling Arbitration, *Rimler v. Postmates Inc.*, No. CGC-18-567868 (Cal. Super. Ct. Aug. 17, 2018), Keller Decl., Ex. H; Postmates's Mot. to Compel Arbitration, *Winns*. In doing so, Postmates has explained that a courier must 'resolve any dispute with Postmates--including her classification as an independent contractor--through final and binding arbitration.' *Lee*, Dkt. No. 14 at 4.").

[175] *See, e.g.*, *Henry Schein v. Archer & White Sales, Inc., 139 S. Ct. 524, 530* ("Just as a court may not decide a merits question . . . delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator."). For an extended discussion of the narrowing of opportunities for courts to interject in matters involving arbitration clauses, see *supra* Part I.

[176] For example, the defendants in the case studies described in Part II asserted that claims lacked merit, that claims should not move forward on the basis of attorneys' pro hac vice applications, and that the breakdown of each party's responsibility for filing fees should be determined before claims could move forward. *See supra* Part II.

[177] *See* *Abernathy Keller Declaration in Support of Motion to Compel, Exhibit K, supra note 106* (containing email from the AAA, noting "AAA's filing requirements are specified under Rule 4 of the Commercial Arbitration Rules. We have made an administrative determination that the minimum filing requirements have been met by Claimants.").

claims were more complicated, but just as easily disposed of. Uber's contract [178]made ambiguous whether plaintiffs would have to pay $ 400 of the $ 1500 filing fee or **[*409]** nothing at all. [179]Because of the contract's delegation clause, however, this question could not be answered until Uber paid the entirety of the $ 1500 fee to impanel the decisionmaker who could retroactively determine whether this was the right result. [180]Postmates asked the judge to find that the plaintiffs' Mass Arbitration strategy amounted to an attempt to "arbitrate on a class-wide basis." [181]Again, the judge held that she was bound to only determine the class waiver's enforceability, not make merits determinations about the plaintiffs' claims. [182]

For some time, scholars and litigants have raised a proverbial eyebrow at defendants' efforts to require litigants to arbitrate, contending that defendants' actual goal is to avoid liability entirely. [183]Supreme Court justices have acknowledged that irrespective of intentions, mandatory arbitration clauses in many instances will foreclose meritorious claims. [184]Many scholars have gone further, viewing the unforgiving impact of companies' actions as evidence of the companies' intent to exculpate themselves--the ultimate example of curtailing substantive rights via the creation of procedural barriers. [185]

Until the arrival of the Mass Arbitration moment, the exculpation theory was just that: a theory. Defendants were able to extend open-armed invitations to plaintiffs to bring their grievances to arbitration while reassuring courts and legislatures that they had every intention of facing all meritorious claims. Plaintiffs and plaintiffs' lawyers who could not yet overcome the economics of individual arbitration protested that the procedural barriers posed by arbitration alone made **[*410]** arbitration clauses de facto exculpatory. Now that plaintiffs' firms have figured out how to make individual arbitration feasible, they have dared defendants who oppose the actions to make the ultimate argument: that they should be able to avoid liability altogether for certain types of claims. Companies have long responded to critiques about the restriction of aggregate litigation actions, such as class and collective action, by saying that they are perfectly willing to face any and all meritorious claims, just not in aggregate proceedings. But when faced with thousands of individual claims, their efforts to prevent these arbitrations have suggested that the issue for

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[178] The contract provided that the plaintiffs would "not be required to bear any type of fee or expense that [they] would not be required to bear if [they] had filed the action in a court of law." *See* Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration, *supra* note 67, at 7.

[179] *See supra* notes 75-77.

[180] *See* Joint Case Management Statement at 2, Abadilla v. Uber Techs., Inc., No. 3:18-cv-07343-EMC (N.D. Cal. Feb. 7, 2019) ("Respondent has asserted and continues to assert that, respectfully, this Court lacks jurisdiction because Petitioners agreed to arbitration, and the delegation clause in the applicable arbitration agreement requires that all disputes regarding arbitrability, including filing fee payments, must be resolved by the arbitrator."); ***Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1209 (9th Cir. 2016)*** (enforcing delegation clause that "clearly and unmistakably delegated the question of arbitrability to the arbitrator for all claims except challenges to the class, collective, and representative action waivers"). *See also* *O'Connor v. Uber Techs., 904 F.3d 1087, 1093 (9th Cir. 2018)* ("Based on our decision in *Mohamed*, the district court's orders denying Uber's motions to compel arbitration must be reversed").

[181] *See supra* notes 146-153.

[182] *See supra* note 153.

[183] See generally *supra* note 3 for an abbreviated survey of such scholarship.

[184] *See, e.g.*, *AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011)* (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a $ 30.22 [individual] claim?").

[185] *See, e.g.*, Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, *91 NOTRE DAME L. REV. 1831, 1888 (2016)*; Resnik, *Diffusing Disputes*, *supra* note 3, at 2904 (concluding, based on consumer data, that "private enforcement of smallvalue claims depends on collective, rather than individual, action."); Sternlight, *Disarming Employees, supra* note 3; Sternlight, *Panacea or Corporate Tool?*, *supra* note 3.

defendants may not, in fact, be how claims are brought, but rather how many claims are brought--and thus how much they will have to pay to satisfy such claims. [186]

The adoption of defense arguments by the plaintiffs' bar naturally raises two questions, one strategic and one normative. First, is it wise for plaintiffs to further entrench precedents they believe to be patently unfair for prospective litigants, even if such action provides the means to rebuilding access to underlying substantive rights? This question is particularly salient given that the Mass Arbitration strategy may not be readily adaptable to all other types of claims outside of the gig economy and certainly cannot change the economies of scale for truly individual, one-off arbitration actions. The second, normative question is posed to the system more broadly: When parties on both sides of the adversarial process have asserted (albeit at different times) that arbitration does not serve the interests of efficiency and justice, can the system, as it stands, be reasonably maintained? The legitimacy and sustainability of the current system certainly comes into doubt.

2. Leveraging Fees

The most essential aspect of the Mass Arbitration strategy is the leveraging of filing fees, made possible by amassing a large number of claims. The unforgiving economics of bringing individual claims without an aggregating procedure poses the greatest barrier to the private enforcement of rights in low damage claims. But in Mass Arbitration, filing fees have been used to flip the underlying economics of nonaggregate arbitration proceedings. The types of gig economy claims profiled in **[*411]** the case studies in Part II are claims with low damages values, [187]called negative value claims, wherein the cost of litigating exceeds the value of prospective damages. [188]For decades, advocates and dissenting Supreme Court justices have lamented the unforgiving economics of arbitration for these types of claims. [189]In state and federal court, filing fees for a class action are in the neighborhood of a few hundred dollars and can be spread across thousands of plaintiffs; individual damages claims, on the other hand, can be dwarfed by filing fees alone, which don't account for the cost of attorney work product in preparing pleadings or conducting depositions or for expenses related to expert testimony. For workers with claims in the hundreds or low thousands of dollars, these realities have made individual arbitration financially infeasible.

The Mass Arbitration strategy has reversed the financial inertia that prevents the bringing of arbitration claims by taking advantage of the steep administrative expenses involved in arbitration. While arbitration is often touted by proponents as an efficient and cost-effective dispute resolution system, [190]arbitration providers are nongovernmental business entities, [191]and thus their costs must be funded by users of the service. Arbitrators are

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[186] "DoorDash's actions make clear that it does not actually support the right of a meaningful number of Dashers to pursue arbitration; rather, it is willing to comply with the Mutual Arbitration Provision it drafted only so long as a small number of Dashers invoke it. That is not a choice DoorDash's contract allows it to make." Motion to Compel Arbitration, *Abernathy, supra* note 91 at 8-9.

[187] It is important to note that these damages far exceed those of traditional negative-value claims seen in the context of many consumer class actions, wherein damages per consumer often total less than $ 100. For an illustration of the economics of those types of claims, see Justice Breyer in dissent: "What rational lawyer would have signed on to represent the [plaintiffs] for the possibility of fees stemming from a $ 30.22 [individual] claim?" *Concepcion, 563 U.S. at 365*.

[188] *See supra* note 44 for a discussion of negative value claims.

[189] *See, e.g.*, Resnik, *Revising Our "Common Intellectual Heritage," supra* note 185, at 1888.

[190] *Concepcion* extolled arbitration's advantages in "forgo[ing] the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion, 563 U.S. at 348*. Defendants have praised arbitration's advantages in "reduc[ing] dispute resolution costs" and giving companies "greater predictability in decisionmaking, budgeting, and planning as to litigation costs." Chipotle's Supplemental Brief in Support of Its Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement at 15, Turner v. Chipotle Mexican Grill, No. 1:14-cv-02612-JLK (D. Colo. Apr. 16, 2018).

often high-powered professionals--former judges and practitioners--whose fees must be paid based on hourly or daily rates. [192]Additionally, the filing and retainer costs in arbitration are much higher than those in public courts. But **[*412]** while the overall out-of-pocket expenses involved in administering an arbitration are comparatively high, employer-employee (or corporation-contractor) contracts do not typically allocate these costs to the parties in equal shares. In fact, most contracts provide for employees to pay a small portion of the fees--such as $ 300 of the filing fee compared to the $ 1900 share reserved for the employer. [193]

Irrespective of the language in individual contracts, arbitration service providers themselves also spell out default fee schedules, which allocate the majority of the filing fees to an employer or company. [194]Critically, arbitration providers have interpreted these fee schedules to act as the ceiling for employee or contractor filing fee responsibility, as demonstrated in the Uber episode. [195]

Employees have an otherwise unlikely source to thank for this contribution to the Mass Arbitration strategy: a doctrine from one of the precedents that limited the availability of aggregate proceedings and bolstered the Court's pro-arbitration jurisprudence. [196]In *American Express v. Italian Colors Restaurant*, the Court warned that the effective vindication doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." [197]While a court has yet to specifically rule on the enforceability of provisions splitting filing fees, lower courts have provided helpful guidance about permissible cost-sharing in line with the effective vindication dicta in *American Express*.

First, in 2000, the California Supreme Court held that employers must bear "all types of costs that are unique to arbitration," which include expenses like room reservations and arbitrator retainer fees. [198]Federal district courts have built upon **[*413]** this idea, finding unconscionable the mandated equal sharing of the arbitrator's expenses, which fund the arbitration hearing itself. For example, the District Court for the Northern District of California held that a gig economy arbitration agreement requiring the parties to "equally advance all of the arbitrator's expenses and fees"--which conflicted with JAMS' rules ascribing only a $ 400 share of the filing fees to a plaintiff--was unconscionable, severing that portion of the agreement. [199]While the contract language split total arbitration costs,

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[191] Some arbitration providers possess nonprofit status and others do not. *See The JAMS Foundation*, JAMS FOUND., https://www.jamsadr.com/jamsfoundation [https://perma.cc/SG53-HZZ8] (discussing that JAMS' nonprofit counterpart is separate from JAMS itself, which does not have nonprofit status). AAA, in contrast, does possess nonprofit status. *See About the AAA and ICDR*, AM. ARB. ASS'N, https://adr.org/about [https://perma.cc/8PTK-9MDS].

[192] *See, e.g., Employment/Workplace Fee Schedule*, *supra* note 101, at 4.

[193] For example, AAA's Employment/Workplace Fee Schedule provides for employees to pay $ 300 "unless the clause provides the individual pay less," and requires the company to pay $ 1900 plus the "balance of individual's filing fee when the clause provides the individual to pay less" and a $ 750 case management fee. *Id.* at 1. JAMS provides that "[f]or matters involving consumers, the consumer is only required to pay $ 250," and "[f]or matters based on a clause or agreement that is required as a condition of employment, the employee is only required to pay $ 400." *Arbitration Schedule of Fees and Costs*, JAMS, https://www.jamsadr.com/arbitration-fees [https://perma.cc/GLP9-9QD3].

[194] *See Employment/Workplace Fee Schedule, supra* note 101, at 2; *Arbitration Schedule of Fees and Costs, supra* note 193.

[195] *See supra* notes 178-182 for a discussion of delegation doctrine's role in delaying potential disputes related to fee allocation to the point in time after the defendants have paid the filing fees.

[196] *Am. Express Co. v. Italian Colors Rests., 570 U.S. 228, 228-29 (2013)*.

[197] *Id. at 236*.

[198] *Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000)*.

[199] *Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 936, 942 (N.D. Cal. 2015)*.

not just filing fees alone, this case disapproved of the departure of the contract's fee-splitting provision from the $ 400 filing fee cap written into the arbitration provider's rules, as well as the idea that a term which "require[s] that the arbitrator impose significant costs on the employee up front" was unconscionable. [200]

In an action against Uber--a different case than the one already profiled in Part II--the company stepped away from its agreement's fee splitting provision and agreed to pay "the full costs of arbitration." [201]In that case, the Ninth Circuit suggested that the fee-splitting provision could be enforced in the future, stating that:

> So long as Uber abides by this commitment, the fee term in the arbitration agreement presents Plaintiffs with no obstacle to pursuing vindication of their federal statutory rights in arbitration. As a result, we decline to reach the question of whether the fee term would run afoul of the effective vindication doctrine if it were enforced as written. [202]

The dicta in *American Express*, as partially animated by opinions in the lower courts, has resulted in employer-written contracts that willingly place the lion's share of forum-related costs on the employer. In fact, in many of the cases studied in Part II, employers pointed to the disparity in fee responsibility as a virtue of arbitration and a sign of the contracts' fairness. [203]

[*414] The fee-payment contract provisions in the three case studies differed, but in each, the gulf between plaintiff and defendant filing fee obligations opened the door to relief for plaintiffs.

[*415] *Table 1: Filing Fee Payment Responsibilities Allocated to Plaintiffs and Defendants*

Episode	**Plaintiffs' Filing Fee Obligation**	**Defendant's Filing Fee Obligation**	**Plaintiffs' Filing Fee Total**	**Defendant's Filing Fee Total**
Uber	$ 0 (maximum possible: $ 400)	$ 1500 (minimum possible: $ 1100)	$ 0	$ 18,751,500
DoorDash	$ 300	$ 1900	$ 1,200,000 less fee waivers (unknown)	$ 11,000,000
Postmates	$ 300	$ 1900	$ 99,600	$ 9,360,000

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[200] *See* id. at 942 (quoting Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 925-26 (9th Cir. 2013)).

[201] ***Mohamed v. Uber Techs., Inc., 848 F.3d 1201, 1212 (9th Cir. 2016)***.

[202] *Id.*

[203] For example, Chipotle's arbitration agreement provided that the "[e]mployee shall not be required to pay any cost or expense of the arbitration that [e]mployee would not be required to pay if the matter had been heard in court." Order Granting Defendant's Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement, *supra* note 15, at 10 (quoting Chipotle Arbitration Agreement at 7). In an effort to secure dismissal of arbitration-bound employees from the class action, Chipotle argued this fairness point, which was expressly adopted by the court in its order granting the defendant's motion to dismiss those plaintiffs: "These benefits [of arbitration to the employer] do not come at the expense of the employees, Chipotle maintains, because the Agreement provides that employees cannot be required to pay any cost of the arbitration that they would not be required to pay if the matter was heard in court." *Id.* at 7.

Uber hotly contested its responsibility to cover the entire filing fee. The contract provision left some room for argument about whether the plaintiffs could be responsible for $ 400 of the total $ 1500 filing fee. [204]The vigor with which Uber fought this fee dispute suggests that the company viewed even a partial sharing of expenses as a means to slow down the train of runaway arbitrations, perhaps stopping the strategy from moving forward altogether, or at least dwarfing its reach.

But the DoorDash and Postmates episodes demonstrate that plaintiffs' firms have been willing to take on the risk of paying significant filing fee sums: In both instances, the plaintiffs were assessed a $ 300 fee per arbitration (with exceptions based on inability to pay, and as compared to the $ 1900 fee assessed to their defendant counterpart). [205]And the plaintiffs paid. The most significant consequence of this fee assessment is the narrowing effect it has had--and necessarily will have--on the types of plaintiffs' firms capable of bringing these actions. In order to front $ 99,600 in filing fees alone, as Keller Lenkner did in the Postmates episode, a firm must have sufficient capital to take such a risk--meaning **[*416]** the firm must have the requisite sophistication to possess fairly large cash reserves. [206]

There is a critical caveat to this fee leveraging strategy: the role of state law. Two California laws have special import regarding this question. First, California law provides that individuals earning less than 300 percent of the federal poverty line are entitled to a waiver of arbitration fees and costs. [207]In the Postmates episode, the fee waiver provision dramatically altered the economics of the action. The vast majority of the arbitration plaintiffs--4593 out of the 4925 arbitration plaintiffs against whom fees were assessed, or 93.3 percent--were entitled to a fee waiver. [208]This reduced the total plaintiff filing fee burden from $ 1,477,500 to $ 99,600, or 6.7 percent of the filing fee expense they would have been responsible for absent the waiver rule. [209]

The second law of consequence is the brand new S.B. 707, which went into effect on January 1, 2020. [210]S.B. 707 imposes steep penalties on businesses who do not pay their arbitration filing fees within 30 days of their due date, considering said failure to pay to be a waiver of the contract provision, such that the opposing party may either

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[204] The contract provision provided that the plaintiffs would "not be required to bear any type of fee or expense that [they] would not be required to bear if [they] had filed the action in a court of law." Memorandum of Law in Opposition to Petitioners' Motion to Compel Arbitration, *Abadilla, supra* note 74, at 7.

[205] *See Employment/Workplace Fee Schedule, supra* note 101, at 1.

[206] See *infra* Subpart III.A.3 regarding plaintiffs' bar organization and the need for more sophisticated and well-capitalized actors in the plaintiffs' bar to take complex and expensive cases such as these.

[207] Per AAA's fee schedule: "For Disputes Arising Out of Employer or Company Plans: Pursuant to *Section 1284.3 of the California Code of Civil Procedure*, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements . . . and to all consumer arbitrations conducted in California." *Employment/Workplace Fee Schedule, supra* note 101, at 2.

[208] *See* Declaration of Theane Evangelis, Exhibit B at 4-5, *Adams v. Postmates, Inc., 414 F. Supp. 3d 1246 (N.D. Cal. 2019)*, ECF No. 112-2 (presenting a letter from Keller Lenkner to AAA delineating the number of plaintiffs eligible for fee waivers).

[209] The plaintiffs were assessed $ 99,600 in filing fees after fee waivers, compared to Postmates's $ 9,360,000 in filing fees. The numbers break down as follows: after learning of the plaintiffs' intention to bring a large number of arbitrations, Postmates changed its arbitration agreement to require that plaintiffs split costs equally with defendant. This action violates AAA's fee schedule, which only allows for $ 300 of the $ 2200 filing fee to be paid by plaintiffs, and so all plaintiffs subject to the updated agreement were assessed a fee of $ 300. This applied to 4925 plaintiffs. A total of 349 plaintiffs had not agreed to the new terms because they had not completed a delivery since the new contract was put in place. The old agreement placed all costs for arbitration on the defendant, so these 349 plaintiffs were assessed $ 0 in fees. For the 4925 plaintiffs subject to fee payment, the cost would have been $ 1,477,500 without fee waivers. Instead, only 332 plaintiffs had filing fees assessed and 4593 plaintiffs were granted fee waivers. *Id.*

[210] *See CAL. CIV. PROC. CODE §§ 1281.97*-.99 (West 2020).

move the dispute to court for adjudication on the merits or seek a **[*417]** court order to specifically compel payment of arbitration fees. [211]The law also imposes mandatory monetary sanctions on any drafting party who fails to abide by their agreement, and goes further to allow the court or arbitrator to levy evidentiary, terminating, or contempt sanctions on the party. [212]While the law has already begun to face legal challenges, there is an argument to be made that it will not be preempted by the FAA by virtue of the fact that it actually encourages arbitration through enforcing timely fee payment. [213]However, legal challenges up to and including Supreme Court review are certainly anticipated.

The centrality of fee leveraging to the overall efficacy of the Mass Arbitration strategy is perhaps most evident in the actions companies have taken to alter their contracts when faced with the anticipated weight of the fees. For example, in the Postmates episode, upon learning of the impending arbitration demands, Postmates issued a new "Fleet Agreement." Under the old agreement, however, Postmates assumed responsibility for all fees associated with arbitration; under the new agreement, an employee must bear half of the administrative costs of arbitration. [214]Even though this new agreement violates the AAA's cap on employee-paid fees ($ 300 for an employment/workplace arbitration) and is likely unconscionable, [215]it succeeded in raising the plaintiffs' filing fee liability to the maximum amount that the arbitration service's rules provided for, which raised **[*418]** plaintiffs' filing fees from $ 0 to $ 99,600 and reduced the defendant's filing fees by $ 300 per arbitration demand. [216]

To some degree, the companies are stuck between a rock and a hard place. If they leave their contracts as they are, they face tremendous liability in the form of huge sums of filing fees; if they alter their agreements to provide for equal or near-equal financial responsibility, they risk the very real possibility that their contracts are declared unconscionable and unenforceable. [217]

The ultimate import of fee leveraging is this: The filing fees themselves have become a secondary form of merits liability in a company's settlement calculus. Indeed, the burden of filing fees is perhaps more onerous than the merits-based liability defendants may be responsible for, by virtue of the fact that this amount is a guaranteed loss if defendants do not settle quickly. This reality is one that can--and has--pushed defendants to the settlement table where they would otherwise have the ability to ignore meritorious low-damages claims. [218]The impact of the fees is

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[211] *See* Alison Frankel, *California Is on the Verge of a Law to Punish Companies for Stalling Arbitration Fees*, REUTERS (Sept. 24, 2019, 3:15 PM), https://www.reuters.com/article/us-otc-arbitration/california-is-on-the-verge-of-a-law-to-punish-companies-for-stalling-arbitration-fees-idUSKBN1W932T [https://perma.cc/9ZZ5-JETX]; *see also* CIV. PROC. §§ 1281.97-.99.

[212] These include evidentiary sanctions that "prohibit[] the drafting party from conducting discovery" and terminating sanctions that "strike[] out pleadings by the drafting party or issue[] a default judgment against the drafting party." Benjamin Ebbink, *Pay Your California Arbitration Fees on Time--Or Else*!, JD SUPRA (Oct. 14, 2019), https://www.jdsupra.com/legalnews/pay-your-california-arbitration-fees-on-44195 [https://perma.cc/8CTN-JYVJ]; *see also* CIV. PROC. §§ 1281.97-.99.

[213] For examples of the FAA-based arguments upholding this law, see Petitioners Marciano Abadilla, et al.'s Motion to Compel Arbitration, *supra* note 67, at 8, and *supra* note 170.

[214] The new agreement provides that "Postmates and [the courier] shall equally share filing fees and other similar and usual administrative costs." Motion to Compel Arbitration, *Adams, supra* note 172, at 5 (citing to § 10B.vi.2 of the 2019 Fleet Agreement).

[215] *See* Am. Express Co. v. Italian Colors Rests., 570 U.S. 228, 236 (2013); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000); Cobarruviaz v. Maplebear, Inc., 143 F. Supp. 3d 930, 936, 942 (N.D. Cal. 2015); ***Mohamed v. Uber Techs. Inc., 848 F.3d 1201, 1212 (9th Cir. 2016)***; *see also* Order Granting Defendant's Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement, *supra* note 15.

[216] See *Adams Keller Declaration, supra note 136* for a discussion of the Postmates plaintiffs' filing fees.

[217] *See, e.g.,* Am. Express Co., 570 U.S. at 236 (providing that effective vindication doctrine "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable").

perhaps best attested to by some of the charged rhetoric companies have used to oppose this aspect of Mass Arbitration: as Gibson Dunn described in a filing, "DoorDash refused to pay the *ransom* Keller Lenkner demanded." [219]

3. Leveraging Plaintiffs' Bar Cooperation

Plaintiffs' bar cooperation has been an essential ingredient to many large-scale changes in U.S. litigation demography. [220]Equally influential are instances of **[*419]** plaintiffs' bar infighting. The Mass Arbitration strategy features elements of both, and both are significant to the strategy's development. The plaintiffs' bar consists of diverse players in practice sites ranging from solo practitioners to law firms with national reach and hundreds of attorneys. These varied players have, over time, created systems to work together through informal referral networks constituting ad hoc consortiums, in which cases move within the plaintiffs' bar by referral and land with the attorneys best suited to invest the necessary resources into them. [221]To an impressive degree, the referral structure has facilitated cooperation and information sharing within the plaintiffs' bar.

As the scope or complexity of a matter increases, this informal coordination becomes increasingly formalized. Before the creation of the formal multidistrict litigation system (MDL)--which, by formal rules, directs large numbers of similar cases to a transferee court for case management in pursuit of aggregate settlement--plaintiffs' lawyers worked to amass inventories of cases and then cooperated with one another to share information. For example, the first instance of a mass tort drug case in the renowned MER/29 litigation resulted in the creation of a litigation group made to reduce overall plaintiffs' bar costs through collaboration. [222]The group eventually grew to 288 members, who paid membership fees to spread discovery expenses, share information through a periodic newsletter, and provide other support services to plaintiffs' attorneys who had each amassed their own inventory of similar cases. [223]

One of the key difficulties in successfully executing the Mass Arbitration strategy is the amassing and managing of claim inventories. [224]And because of the potential filing fee expenses plaintiffs may face, the Mass Arbitration strategy has primarily been undertaken by a specialized segment of the plaintiffs' bar. Firms like Keller Lenkner

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[218] *See, e.g., supra* Subpart II.A for a discussion of the Uber episode. *See also* Notice of Withdrawal of Motion to Compel Arbitration, Abarca v. Lyft, Inc., No. 3:18-cv-07502-WHA (N.D. Cal. Jan. 24, 2019) (notice by plaintiffs to withdraw their motion seeking to compel Lyft to arbitration; this is a common indicator that a settlement has been reached); Ben Penn, *Buffalo Wild Wings Case Tests Future of Class Action Waivers*, BLOOMBERG L. (July 12, 2018, 3:16 AM), https://news.bloomberglaw.com/daily-labor-report/buffalo-wild-wings-case-tests-future-of-class-action-waivers [https://perma.cc/Z5DQ-474S].

[219] Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order at 4, *Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2019)*, ECF No. 35 (emphasis added).

[220] *See generally* Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, ***51 N.Y.L. SCH. L. REV. 243, 244-45 (2006)***; Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, *57 VAND. L. REV. 1975, 1996 (2019)* (citing Sara Parikh, *Plaintiffs' Practitioners: Competition and Cohesion in the Personal Injury Bar*, 14 RESEARCHING LAW: AN ABF UPDATE 2 (2003)).

[221] *See generally* Yeazell, *supra* note 220.

[222] For a firsthand account of this information-sharing phenomenon at work in the MER/29 litigation, see Paul D. Rheingold, *Looking Back at the First Mass Tort Drug Case*, 50 TRIAL MAG. 26 (2014).

[223] *Id.*

[224] *See infra* Subpart III.A.4, Leveraging Notice Provisions and Traditional Client Outreach to Amass Claims.

possess the sophistication and, importantly, the capital necessary to engage in the kind of risk- and resource-intensive investment that Mass Arbitration entails. [225]

[*420] But there are indications of the strategy's scalability that provide interesting parallels to plaintiffs' bar interactions in informal mass litigation contexts like the MERS/29 litigation and the general phenomenon of amassing case inventories within the plaintiffs' bar. [226]While this level of plaintiffs' bar collaboration has not yet been realized in Mass Arbitration, there are signs of its emergence and potential, which are indicators of the role Mass Arbitration could play in rebuilding an atrophying private enforcement regime. In some Mass Arbitration episodes, a relatively prominent plaintiffs' firm has partnered with another firm to build their capacity to file hundreds or thousands of individual demands on behalf of their clients. For example, in a smaller Mass Arbitration episode against Buffalo Wild Wings, the prominent employment law firm Outten & Golden worked with a small firm, Werman Salas, to file the individual arbitrations. [227]And when DoorDash attempted to challenge the Mass Arbitration plaintiffs' effort--on the grounds that Keller Lenkner was bringing claims in bad faith because they lacked the manpower to bring to fruition thousands of individual arbitrations at the same time--the firm countered back that it had partnered with Quinn Emanuel, a massive firm with more than 800 attorneys, and the two stood prepared to proceed with individual arbitration on all claims. [228]In the Uber episode, Keller Lenkner partnered with Larson O'Brien to file the motion compelling Uber to arbitrate.

More importantly, there are indicators that the plaintiffs' bar is contemplating a fuller realization of internal collaboration in Mass Arbitration. To do so, many plaintiffs' lawyers and firms, as opposed to one or two, would each recruit and retain smaller arbitration inventories. This group would then possess the collective power to seek a global settlement. [229]The plaintiffs' bar has started promoting this possibility: the National Employment Lawyers Association 2018 Convention featured strategic discussions about pooling resources of mid- or smaller-sized firms in order to bring around one hundred individual arbitrations in coordination with other mid-sized firms who would themselves bring one hundred individual arbitrations. [230]Resource pooling may be the most effective means to get defendants to take seriously the threat of smaller-scale mass **[*421]** arbitration episodes, rather than perceiving the filing of a more modest number of claims as an empty threat. And if numerous smaller firms file alongside the large inventories of prominent firms like Keller Lenkner, they may be able to achieve greater capacity and thus greater settlement leverage.

4. Leveraging Notice Provisions and Traditional Client Outreach to Amass Claims

Arguably the greatest challenge for aggregate litigation is amassing claims. *Federal Rule of Civil Procedure 23*, the class action mechanism, overcomes this barrier by automatically capturing every plaintiff who fits within the prescribed class definition. Once a judge certifies the class, Rule 23 explicitly provides for notice communication with the class member litigants. [231]Collective actions, brought under the Fair Labor Standards Act (FLSA), [232]differ

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[225] *See, e.g.*, Penn, *supra* note 218 (quoting the co-chair of the wage and hour practice at the U.S.'s largest management-side workplace law firm: "It can be an expensive proposition [for employers] but it can be as well for plaintiffs' counsel, because they have to be able to staff and defend individual arbitrations.").

[226] *See* Rheingold, *supra* note 222.

[227] *See* Penn, *supra* note 218.

[228] *See Amended Motion to Compel Arbitration, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2019)*, ECF No. 151.

[229] A global settlement is one that extinguishes the claims of many plaintiffs at once, often accomplished when a high number of plaintiffs settle with a defendant through a settlement device such as the class action settlement.

[230] 2018 NELA Annual Convention, NAT'L EMP. LAWS. ASS'N (2018), *https://web.archive.org/web/20181026104855/http://exchange.nela.org:80/nelaconvention/program/schedule/thursday*.

in essential respects. The court's inquiry to approve the class is conducted in two phases, [233]such that upon meeting a permissive threshold for conditional certification, [234]a company's employees can be notified of the action and informed of their ability to "opt-in." It is only after this communication has been allowed that a second, more exacting phase of inquiry is undertaken by the court to determine whether the collective action members are sufficiently similar to allow the action to move forward. By this time, plaintiffs' counsel has already had the opportunity to get in touch with the potential universe of plaintiffs.

This aspect of FLSA collective action procedure has proved key to the Mass Arbitration story thus far. In the Chipotle episode, plaintiffs' counsel, and the **[*422]** plaintiffs themselves, were unaware that a number of collective action members were subject to arbitration agreements. [235]By the time the fact was realized, the employees' information had already been collected, their claims had already been vetted, and their relationship with counsel had already been established. [236]In sum, the most significant barriers to realizing their claims in arbitration had already been overcome.

The feasibility of this pathway to Mass Arbitration claim aggregation is under scrutiny, however, as procedural efforts to undercut the strategy have found favor in federal courts. The federal courts of appeals have only recently begun to consider whether employees who appear to be subject to arbitration agreements can receive collective action notice. These cases out of the Fifth and Seventh Circuits erect a barrier to the kind of notice leveraging seen in the Chipotle action.

In *In re JPMorgan Chase & Co*, [237]the Fifth Circuit held that employees who signed valid arbitration agreements cannot receive collective action notice. In that case, nearly 35,000 of 42,000 employees who were purportedly shorted wages were subject to arbitration clauses, but against JPMorgan Chase's objection, the district court permitted notice to be sent to all employees. [238]The Fifth Circuit held that the district court erred in doing so, and set out a test for district courts to determine whether employees who are potentially subject to arbitration agreements should receive notice: "if there is a genuine dispute as to the existence or validity of an arbitration agreement," the employer has the burden by a preponderance to show the existence of a valid arbitration

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[231] *Federal Rule of Civil Procedure 23* states that:

> For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class. . . . [And for] any class certified under Rule 23(b)(3)--or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)--the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.

FED. R. CIV. P. 23(c)(2)(A-B).

[232] Fair Labor Standards Act of 1938, *29 U.S.C. §§ 201*-19 (2018).

[233] This is known as the "Lusardi" framework. *See Lusardi v. Xerox Corp., 118 F.R.D. 351, 352-53 (D.N.J. 1987)*.

[234] *See id.* During an initial conditional certification stage, only a modest factual showing need be made, demonstrating that the lead plaintiff and the prospective, yet-to-be-joined plaintiffs are similarly situated.

[235] *See supra* notes 12-13.

[236] *See* Order Granting Defendant's Motion to Dismiss Opt-In Plaintiffs Bound by Chipotle's Arbitration Agreement, *supra* note 15.

[237] *916 F.3d 494 (5th Cir. 2019)*.

[238] *Id. at 498*.

agreement. [239]Because of delegation doctrine, this will likely pose little barrier to defendants so long as they can show that an arbitration clause exists.

In January 2020, the Seventh Circuit weighed in. In *Bigger v. Facebook, Inc.*, [240]the Seventh Circuit followed the Fifth Circuit's lead by holding that if either a plaintiff does not contest the arbitration agreement's existence and validity, or if the defendant establishes by preponderance the existence of a valid arbitration agreement, notice may not be sent to those individuals. [241]

If a group of plaintiffs are ultimately found to be subject to valid, enforceable arbitration agreements, such that they will not be permitted to proceed in court, **[*423]** then why the tremendous effort to prevent notice communication? The opt-in notification mechanism is a way to secure the contact information of potentially arbitration-bound employees, providing a direct path to those individuals whose claims could be filed as part of a Mass Arbitration. Thus, decisions like those made by the Fifth and Seventh Circuits present a valuable tool to defendants trying to prevent Mass Arbitration; defense lawyers have explicitly acknowledged as much. [242]

In the earliest Mass Arbitration episodes, plaintiffs have been amassed primarily as a byproduct of other aggregate proceedings. This occurs when plaintiffs are removed from a class or collective action, such as in the Chipotle or DoorDash episodes, and the law firm representing the plaintiffs proceeds with their claims in arbitration. But there are indicators that plaintiffs' firms have also begun to turn to more traditional methods of recruiting individual clients via advertisements. The Uber arbitration episode is especially instructive on this point:

> One way that our clients found us was by calling a 1-800 number in a radio advertisement. The advertisement advised Uber drivers that Uber may owe them unpaid wages, said that Uber previously settled a case brought by the Federal Trade Commission alleging that Uber lied about how much it pays drivers, and directed Uber drivers to call a toll-free number for more information. Phone calls to that number are answered by trained agents. Since mid-July 2018, those agents have received calls from more than 29,000 individuals, conducted roughly 63,500 separate phone calls, and spent more than 476,000 minutes on the phone with our clients and potential clients. [243]

[*424] Advertising and claims amassing unrelated to existing aggregate proceedings are particularly promising possibilities given other unique characteristics of the gig economy landscape. Many employees in this space are already conscious of their collective power and have created informal means of labor organizing. For example, prominent online chat boards and podcasts have begun to provide gig workers with updates about Mass Arbitration

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[239] *Id. at 502-03*.

[240] *947 F.3d 1043, 1043 (7th Cir. 2020)*.

[241] *Id. at 1043-44*.

[242] *See* Patrick Bannon & Michael Steinberg, *Invitations (to Join FLSA Collective Actions) Have Consequences: Seventh Circuit Rules That FLSA Opt-In Notice Should Not Be Sent to Employees With Valid Arbitration Agreements*, WAGE & HOUR LITIG. BLOG (Jan. 31, 2020), *https://www.wagehourlitigation.com/flsa/invitations-to-join-flsa-collective-actions-have-consequences* [*https://perma.cc/Y3NX-J8BE*] Seyfarth Shaw stated that:

> [these precedents] are especially important given the growing phenomenon of mass arbitration, in which plaintiffs' counsel file or threaten to file hundreds, thousands, or even tens of thousands of simultaneous individual arbitration demands--often for small amounts. For an employer that has agreed to bear the costs of arbitration, the up-front arbitration filing fees alone can create enormous Day 1 settlement pressure. While the overall mass arbitration problem remains, *Bigger* and *JPMorgan* make it harder for plaintiffs' counsel to use the FLSA notice process to identify and connect with individuals who could then pursue individual arbitration claims. *Id.*

[243] Declaration of Tom Kayes in Support of Reply to Motion to Compel Arbitration at 8, PP 36-38, Abadilla v. Uber Techs., Inc., No. 3:18-cv-07343-EMC (N.D. Cal. Jan. 24, 2019).

efforts. "RideGuru," an online chat board for Lyft and Uber drivers, frequently features these stories and information about how plaintiffs can join such actions. [244]These resources--paired with the wide reach of social media advertising--will almost certainly be the most important claims-amassing tools for Mass Arbitration strategy going forward.

5. Leveraging State Law

State law has become a significant consideration in the Mass Arbitration calculus, particularly in light of a panoply of new, plaintiff-friendly laws in California. Whereas Mass Arbitration's rebuilding of a fragile, but thus far effective, new private enforcement regime has operated largely by repurposing antithetical precedents to its own ends, the California legislature provided a welcome statutory boost to Mass Arbitration's new procedural strategy. These laws fall into two categories: (1) laws that impact the procedural dynamics of the arbitral forum; and (2) laws that impact the substantive law underlying gig economy arbitration claims.

There are two significant California laws that enhance a plaintiff's success in engaging with the arbitral forum by waiving filing fees for those without sufficient means, [245]and by punishing defendants who do not play by the payment rules outlined in their contracts. [246]These laws have been able to alter the underlying economics and inherent defense-side advantages of arbitration, in large part because much of the Mass Arbitration story occurs before the merits of a given controversy are ever addressed. If defendants are **[*425]** required to pay arbitration fees within thirty days of an arbitration demand being filed, the dynamics around settlement will undoubtedly change--especially if plaintiffs need not bear any financial responsibility until later in the game, if at all.

What was perhaps the most promising state law development for Mass Arbitration, however, is a law that no longer applies to key gig economy actors, A.B. 5. The recently enacted A.B. 5 concerns the merits of many gig economy claims: independent contractor classification. [247]A.B. 5 codified California's independent contractor test, established by a 2018 California Supreme Court decision, [248]and required that gig economy workers be reclassified as employees entitled to benefits, rather than as independent contractors. [249]The gig economy companies vigorously challenged the law: Uber and Postmates sued the State of California, contending that A.B. 5 was unconstitutional. [250]More significantly, numerous companies also undertook an alternate strategy by funding a California ballot

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[244] *See, e.g.*, Sergio Avedian (Uberserge), *Uber Wants Drivers to Be Forced Into Mandatory Arbitration With the New TOS--Time Is of the Essence--How to Opt Out Explained*!, RIDEGURU (Dec. 21, 2019), https://ride.guru/lounge/p/uber-wants-drivers-to-be-forced-into-mandatory-arbitration-with-the-new-tos-time-is-of-the-essence-how-to-opt-out-explained [perma.cc/HM9X-T8KU]; *Should You Opt-Out of Uber Arbitration?*, RIDESHARE GURU, *https://rideshareguru.com/should-you-opt-out-of-uber-arbitration* [*https://perma.cc/5F2J-R8AU*].

[245] *CAL. CIV. PROC. CODE § 1284.3* (West 2020) (requiring waiver of fees and costs for indigent party in arbitration).

[246] See *supra* text accompanying notes 210-213 for a discussion of S.B. 707.

[247] *CAL. LAB. CODE § 2775* (West 2021).

[248] *Dynamex Operations W., Inc. v. Superior Court, 4 Cal. 5th 903, 916-17 (2018)* (establishing the "ABC test" for determining whether a worker is an employee or an independent contractor, which creates a presumption of employment. Under the ABC test, workers are considered employees unless the hiring entity establishes that the worker is (a) "free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact"; (b) "performs work that is outside the usual course of the hiring entity's business"; and (c) is "customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.").

[249] *See* Assemb. B. 5, 2019 Leg., Reg. Sess. (Cal. 2019).

[250] Complaint for Violation of Federal & California Constitutional Rights, Declaratory, Injunctive, & Other Relief & Demand for Jury Trial at 1-2, Olson v. California, No. 2:19-cv-10956 (C.D. Cal. Dec. 30, 2019) (asserting that A.B. 5 was an unconstitutional

initiative seeking to overturn the law. [251]Uber and Lyft funded the ballot initiative known as Proposition 22, which was passed by voters in November of 2020. Proposition 22 exempts large swaths of gig workers from A.B. 5's employment classification rules, which would have otherwise altered gig workers' status to that of **[*426]** employees. [252]While Proposition 22 will severely curtail the effectiveness of misclassification claims in California going forward--and thus may shift the preferred forum for future Mass Arbitration actions to other states--the Proposition is not retroactive and therefore does not foreclose existing claims such as those highlighted in Part II of this Comment. The lengths companies ventured in order to challenge A.B. 5 is perhaps the best indicator of what favorable employee-independent contractor law can mean for the Mass Arbitration strategy, and other states may follow in the California legislature's footsteps.

Given these different laws and the advantages they provide for gig economy arbitration plaintiffs, it is unsurprising that the vast majority of Mass Arbitration demands have been filed in California. Californians comprise a sizable percentage of the estimated millions of gig economy workers nationwide. [253]And the state legislature has prioritized this sector in both its procedural legislation and its recent unsuccessful attempts to bolster substantive law impacting independent contractor classification.

IV. LESSONS LEARNED: THE IMPLICATIONS OF THE MASS ARBITRATION FIGHT, THE RESILIENCY OF AGGREGATION, AND THE FUTURE OF MANDATORY ARBITRATION

A. Can This Strategy Go the Distance?: The Prognosis for Mass Arbitration's Future

Against all odds, the Mass Arbitration strategy appears to have gained an initially small, but increasingly mighty foothold. Strong evidence for this comes **[*427]** not only from the growing prevalence of Mass Arbitration episodes, [254]but also from the fact that employers, the media, and the respective bars have all clearly begun to take notice. With increasing attention on Mass Arbitration, questions arise about the prognosis for the strategy's future and about its potential scope. This Subpart explores those questions on three fronts. First, it examines the response by arbitration services providers and the potential impact forum rule changes may have on the strategy. Next, it explores how the strategy can expand, not only within the gig economy but also to other sectors, considering whether the barriers to entry for consumer claims are too great to be overcome. Finally, it analyzes the greatest potential derailing force--ironically, the aggregate class action settlement mechanism--by parsing the ethical concerns it raises and the role judges must play in preventing its abuse.

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deprivation of liberty and a violation of the contracts clauses of the U.S. and California constitutions); *see* Olson v. California, No. 2:19-cv-10956, *2020 WL 905572, at *16 (C.D. Cal. Feb. 10, 2020)* (denying Postmates's and Uber's requested injunction).

[251] *See generally* Alexia Fernández Campbell, *Uber and Lyft Have Launched a Campaign to Avoid Government Regulation in California*, VOX (Oct. 29, 2019, 2:50 PM), *https://www.vox.com/identities/2019/10/29/20938109/ab5-uber-lyft-ballot-initiative-referendum* [*https://perma.cc/SCR3-6YNB*] (describing the efforts undertaken by Uber and Lyft to sponsor and fund Proposition 22, a ballot initiative which ultimately overturned California law that would have effectively classified all drivers servicing both companies as employees rather than independent contractors).

[252] *See* Sara Ashley O'Brien, *Prop 22 Passes in California, Exempting Uber and Lyft From Classifying Drivers as Employees*, CNN BUS. (Nov. 4, 2020, 4:02 PM), *https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html* [*https://perma.cc/RB5M-939K*].

[253] *Electronically Mediated Work: New Questions in the Contingent Worker Supplement*, U.S. BUREAU OF LAB. STATS., (2018), *https://www.bls.gov/opub/mlr/2018/article/electronically-mediated-work-new-questions-in-the-contingent-worker-supplement.htm* [*https://perma.cc/5DGE-HQK7*]. *See also* Annette Bernhardt & Sarah Thomason, UC BERKELEY CTR. FOR LAB. RSCH. & EDUC., WHAT DO WE KNOW ABOUT GIG WORK IN CALIFORNIA?: AN ANALYSIS OF INDEPENDENT CONTRACTING 7 (2017), *https://laborcenter.berkeley.edu/pdf/2017/What-Do-We-Know-About-Gig-Work-in-California.pdf* [*https://perma.cc/77FR-FKBC*] (finding that 8.5 percent of workers in California were independent contractors, compared to 6.3 percent nationwide).

[254] *See, e.g., supra* Part II; Petition for Order Compelling Arbitration, Abarca v. Lyft, Inc., No. 3:18-cv-07502 (N.D. Cal. Dec. 13, 2018).

1. Arbitration Services Providers' Response to Mass Arbitration

The Mass Arbitration strategy has upset the status quo of arbitration, aggregate litigation, and corporate liability more broadly. While the story is still unfolding, it is clear that one of the strategy's aftershocks will be significant change to the arbitration services provider market. As DoorDash forewarned in their filings: "Keller Lenkner's 'mass arbitration' tactics have wreaked havoc on the arbitration system and arbitration organizations are beginning to respond." [255]The question then becomes: Will the response of the arbitration services sector render the Mass Arbitration strategy infeasible? Can it?

Arbitration providers have already adjusted their rules and procedures in an attempt to respond to the unanticipated influx of filings. As market participants reacting to the interests of their most prominent repeat customers--large corporations--it is likely that arbitration service providers will make further modifications to their rules in the future. In exploring existing changes and anticipating those to come, it is important to consider how vulnerable the overall economics of the Mass Arbitration strategy are to alterations in procedure. Despite the disruption these changes have caused, because of the tremendous expense of arbitration hearings themselves and due to the precedents that limit plaintiffs' responsibility for expenses unique to arbitration, the prognosis for Mass Arbitration as a continued strategy remains strong.

[*428] The changes arbitration providers have undertaken to date were enacted swiftly and have caused great controversy. At least one smaller arbitration provider may be rising in prominence given its complete revamping of its arbitral forum rules. The International Institute for Conflict Prevention & Resolution (CPR) changed wholesale its arbitration rules, adjusting the rules based on input from parties active in the arbitration space, including Gibson Dunn and DoorDash. [256]Information regarding the extent of CPR's collaboration with defense-side players was fiercely guarded during much of the DoorDash Mass Arbitration episode, and was initially filed under seal. [257]But in one of its final orders before compelling arbitration, the court reversed the sealing order, releasing Gibson Dunn's communications with CPR. [258]Those communications reveal an initial request by Gibson Dunn for the development of new rules, and back-and-forth communication during their drafting, culminating in CPR seeking Gibson Dunn and DoorDash's final approval of the new rules before implementation. [259]The new rules--known as the "Employment-

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[255] Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order, *Abernathy, supra* note 219, at 5.

[256] *See* Letter Brief Filed by International Institute for Conflict Prevention and Resolution, Inc., Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020), ECF No. 137. "Earlier this year, the law firm of Gibson Dunn reached out to CPR to request assistance in administering--on a prospective basis--additional arbitrations expected to be brought against one of its clients, DoorDash," *Id.* at 2. Keller Lenkner, in its briefings, posited a different theory: It provided the Court with information about Gibson Dunn's high-level donations to CPR, suggesting further motivation for the change in CPR's rules was explicitly monetary. It is worth noting that, as Gibson Dunn highlighted in its brief, Quinn Emanuel--the firm retained by the Dasher plaintiffs and Keller Lenkner to assist in bringing the individual arbitrations if and when that number of attorneys is needed--also gave financial contributions to CPR at the same donorship level as Gibson Dunn and many other large law firms. *See* Letter From DoorDash, Inc. re CPR Discovery, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 141.

[257] *See* Order Approving Stipulated Protective Order Subject to Stated Conditions, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 155 (sealing order entered by the court).

[258] *See* *Abernathy, 438 F. Supp. 3d 1062, 1067* (denying the requested sealing order because "[t]he district court should not be a party to concealing this information from the public, especially as it concerns an arbitration organization that holds itself out to the public as impartial. These documents would be useful to the public in evaluating the true extent to which the organization is impartial.").

[259] *Id.* ("In short, the emails track the following events: in May 2019, Gibson Dunn reached out to CPR to discuss issues DoorDash was having with filing fees for mass arbitrations, and to find a solution to prevent 'an abuse of process.' In October 2019, CPR provided Gibson Dunn with a draft of a mass arbitration protocol for discussion. A week later, CPR provided Gibson Dunn with another draft of the protocol based on their discussion. Gibson Dunn 'interlineated comments, questions, and recommendations' in the new draft. CPR and Gibson Dunn traded additional drafts and revisions in the following weeks. On

Related Mass-Claims Protocol"--arrange for arbitrations to proceed under a bellwether-type **[*429]** process whenever more than thirty individual employment arbitration claims of "nearly identical nature" are filed against the same defendant. [260]Under the rules, a small handful of cases would proceed to arbitration while the remainder of those cases is stayed until the bellwethers' resolution. [261]The remaining arbitrations then enter a mandatory mediation period. [262]Gibson Dunn has celebrated these changes as "an innovative new protocol to foster a fairer, more efficient forum for mass arbitrations." [263]

CPR is not the only arbitration provider to have adapted its procedures for large numbers of claims. The changes CPR and others have made were arguably foreshadowed by the increased demand defendants have shown for adapted procedures. For example, when an initial 250 arbitration demands were filed against DoorDash in July 2019, the company contested the amount AAA charged DoorDash for its share of the arbitration filing fees. [264]In an email to AAA, DoorDash's outside counsel contested the assigned fees on two grounds: (1) that the 250 arbitration demands would "impos[e] unnecessary and excessive upfront costs," and (2) that AAA should apply a "separate fee schedule for group filings," which would allow DoorDash to stagger the Dasher plaintiffs' arbitration actions over a period of time. [265]

The arbitration providers have--like any successful for-profit company would--responded to their customer base. When the AAA did not initially alter its rules, DoorDash and Gibson Dunn turned to another provider in the marketplace--CPR--who met their request for an altered procedure. The AAA has since announced a new protocol for instances in which twenty-five or more **[*430]** demands are simultaneously filed against the same party by plaintiffs represented by the same counsel. [266]Some have speculated whether JAMS will also follow suit, having put out feelers to resolve a major threshold question related to filing fee allocation in a consolidated arbitration proceeding in Uber. [267]

November 4, CPR notified Gibson Dunn that it had posted the finalized new protocol and asked to be notified when the new DoorDash contracts providing for arbitration under CPR were distributed.")

[260] *See* INT'L INST. FOR CONFLICT PREVENTION & RESOL., *supra* note 119.

[261] *See supra* text accompanying notes 123-124.

[262] *Id.*

[263] *See* Respondent DoorDash, Inc.'s Opposition to Motion for Temporary Restraining Order, *Abernathy, supra* note 219, at 6 (quoting F. Peter Phillips, *New Protocol on Damages in Arbitration*, BUS. CONFLICT BLOG (Mar. 14, 2011), https://www.businessconflictmanagement.com/blog/2011/03/new-protocol-on-damages-in-arbitration [https://perma.cc/EEZ7-MNNX]) ("CPR's Mass Claims Protocol imposes reasonable up-front fees and contemplates 10 random bellwether arbitrations followed by a mediation, accompanied by detailed instructions for how the parties may resolve their dispute, and how objecting claimants may preserve their rights to arbitration on an individual basis. It even permits claimants who dislike the new protocol to opt out and go to court. CPR's creative protocols in other contexts have been 'endorsed by some of the most insightful practitioners in the field.'" (citation omitted).

[264] *See* Declaration of Ashley Keller in Support of Petitioner's Motion for a Temporary Restraining Order, PP 12-13, *Abernathy, 438 F. Supp. 3d 1246 (N.D. 2020)*, ECF No. 11.

[265] Declaration of Ashley Keller in Support of Petitioner's Motion for a Temporary Restraining Order, Exhibit I, *Abernathy, 438 F. Supp. 3d 1246*, ECF No. 11-9 (August 14 email from DoorDash's outside counsel to the AAA).

[266] *See Employment/Workplace Fee Schedule, supra* note 101, at 3.

[267] *See* Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight With 12,500 Drivers*, REUTERS (Jan. 16, 2019, 12:03 PM), https://www.reuters.com/article/legal-us-otc-uber/uber-tells-its-side-of-the-story-in-mass-arbitration-fight-with-12500-drivers-idUSKCN1PA2PD [https://perma.cc/E9AZ-EAFS] (discussing Uber's effort to convince JAMS to resolve questions around pro hac vice admissions and filing fee obligations in a consolidated proceeding).

Plaintiffs argue that these changes seek to create a sort of Frankenstein aggregate proceeding in which aggregate decisions are made when they suit defendants, but individual adjudication is required when they do not. [268]In this altered procedural landscape, plaintiffs would have to surmount the initial challenge posed by amassing enough claims to overcome the economics of the arbitral forum--but then would lose the early settlement leverage gained by the forum when defendants are able to secure aggregate rulings on preliminary questions. If the plaintiffs' claims survive this stage, then the defendants seem to possess the power to either force the claims to return to individual proceedings or to achieve an aggregate settlement solution. [269]

But even as filing fee leveraging power may be diluted by the rule changes, major defense-side expenses still loom in the background. Even if an arbitration provider were to waive filing fees altogether for the majority of claims--which itself seems unlikely--the effective vindication doctrine requires that if the claims move forward, expenses "unique to arbitration" must be borne by the corporation. [270]These expenses include hearing room rentals, hourly wages for the arbitrators, arbitrators' travel and related expenses, and case management fees, [271]which add up quickly and dwarf even meaty filing fee figures when multiplied across thousands of cases.

While both the plaintiffs and defendants will incur attorney costs, each plaintiff's claim in these episodes has been nearly identical. [272]As long as the legal issue is singular--like determining whether an employee can lawfully be classified as an independent contractor--and attorneys need only plug a number into the **[*431]** variable (such as the amount of time a person worked), the marginal cost of bringing each additional claim is essentially zero. In wage and hour cases, like the suit against Chipotle, where there is essentially no legal issue to be decided and only hour figures to be plugged in, the overall attorney cost is even lower. Ironically, the incredible similarity of each claim presents some of the best evidence for why these claims would most efficiently be conducted by formal aggregate proceedings.

The new rules, especially those outlined in CPR's Employment-Related Mass Claims Protocol, stall the vast majority of cases during the bellwether and mandatory mediation periods. This means that defendants are able to delay incurring big-ticket hearing expenses on the vast majority of claims. But this strategy, too, will have limits: Due process will constrain the defendants' strategy if plaintiffs' attempts to get justice are so frustrated--as would be the case in the predicted scenario in which some claims could be stalled for half a decade or more. [273]Because costs related to arbitration are not waivable, and dilatory tactics will run up against due process constraints, defendant-led changes to the arbitral forum rules will likely act as an annoyance, but ultimately not a prohibitive barrier, to the Mass Arbitration strategy. While adjustments to provider services and rules may make the economics of Mass Arbitration somewhat less favorable for plaintiffs, the weight of the doctrinal pillars favoring arbitration seem to help ensure the success of Mass Arbitration for some time to come, until and unless significant legislative intervention were to occur.

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[268] For a discussion of the arguments made by plaintiffs that defendants seek to have their cake and eat it too, see *supra* Part II and Subpart III.A.1.

[269] Aggregate settlement issues are discussed more fully *infra* in Subpart IV.A.4.

[270] *Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 689 (Cal. 2000)*.

[271] *Id.*

[272] For an example of the type of identical, form arbitration demand that can be filed on behalf of thousands of individual plaintiffs, see *supra* note 97.

[273] *See, e.g.*, Motion for a Temporary Restraining Order, *Abernathy, supra* note 116, at 7-8. ("The [Employment Mass-Claims] Protocol, in turn, would force most Petitioners covered by the agreement to delay their arbitration demands for years. . . . CPR lists only 60 arbitrators as part of its employment panel. Thus, if every arbitrator was able to decide 10 of Petitioners' arbitrations per year in addition to their normal case load, hundreds of claimants would not have a right to begin arbitration until four years from now." (internal citations omitted)).

2. Beyond Wage and Hour: The Potential for Consumer Mass Arbitration

As Mass Arbitration gains a foothold in the gig economy, we must examine both the prospects for the strategy's continued expansion within the gig economy sector and the applicability of the strategy to the other subset of class action claims that Supreme Court precedent has all but foreclosed: consumer claims. While gig economy Mass Arbitrations face continued challenges from defense-side interests, there remain opportunities to expand the strategy's reach via opt-out provisions embedded in employment contracts and via greater use of existing social and organizational networks. If exercised by a subset of employees, use of opt-out provisions could allow for parallel in-court aggregate proceedings **[*432]** alongside Mass Arbitrations. And greater use of existing social and organizational networks would allow for plaintiffs' lawyers to contact new streams of plaintiffs. The magnitude of financial and logistical roadblocks inherent to Mass Arbitration differ considerably in the consumer context, where individual claim values are often less than $ 10, and where those who are injured may have little interest in or attachment to their claims. Nonetheless, there have been surprising indicators that Mass Arbitration may be successful in the consumer context.

To be sure, employment and gig economy Mass Arbitration continues to face many obstacles: As mandatory arbitration clauses become ubiquitous, [274]and circuit court precedent forecloses sending notice to arbitration-bound prospective litigants, [275]the court-based aggregate litigations that have provided a natural bridge to Mass Arbitration episodes will be fewer and farther between. Perhaps more importantly, current barriers to Mass Arbitration are moving targets, as corporations adapt by changing the terms of their contracts [276]and the rules of the arbitral forums themselves. [277]

Despite the potential for increased roadblocks, there remain interesting opportunities for plaintiffs and their counsel to expand the strategy's reach within the gig economy. First, as seen in the Uber case study, [278]plaintiffs' lawyers can--and must--leverage traditional strategies for engaging clients by increasing the use of advertising. Social media and dedicated online gathering places for gig economy workers [279]provide unique opportunities for targeted outreach of perhaps unparalleled efficacy. Second, new opt-out provisions in employment contracts, which allow employees to opt out of mandatory arbitration and elect to use the court system for any future disputes, are a largely untapped resource. [280] **[*433]** The process of actually utilizing the opt out option presents challenges--most contracts require that the contracting party, not an attorney, type up a statement indicating their desire to opt out of mandatory arbitration, and either email or in many cases physically mail a signed copy of their statement to the

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[274] *See, e.g.*, COLVIN, *supra* note 2, at 4-6 (demonstrating that mandatory arbitration imposed by private-sector employers on nonunionized employees increased between 1995 and 2017 such that "access to the courts is now barred for more than 60 million American workers").

[275] For a discussion of the circuit court precedents around collective action notice to arbitration-bound plaintiffs, see *supra* text accompanying notes 237-242.

[276] See, for example, text accompanying *supra* notes 115-125 regarding the changes made to DoorDash's contract during litigation.

[277] *See id.* For a discussion of changes to arbitral forum rules see also *infra* Subpart IV.A.1.

[278] *See* Declaration of Tom Kayes, *Abadilla, supra* note 243 (describing the extensive client outreach strategies undertaken by the plaintiffs' firm representing the Uber mass arbitration plaintiffs).

[279] *See* Sergio Avedian (Uberserge), *supra* note 244.

[280] The number of workers who have opted out of mandatory arbitration is low. For example, in *Tan v. Grubhub, Inc.*, class certification for opted-out plaintiffs was denied after Grubhub showed that only two out of thousands of drivers had opted out of their mandatory arbitration clauses in the few months after Grubhub added an opt-out clause. No. 15-cv-05128-*JSC, 2016 WL 4721439, at *2-3 (N.D. Cal. Jul. 19, 2016)*. In 2015, a judge found that only 270 of more than 160,000 Uber drivers had opted out of an Uber arbitration clause. Gillette v. Uber Techs., No. C-14-5241-*EMC, 2015 WL 4481706, at *4 (N.D. Cal. July 22, 2015)*.

company within 30 days of signing their contract. [281]As is well documented, most people do not read the contracts they sign, let alone know the import of proceeding in court versus in arbitration. [282]

Workers in the gig economy, however, have demonstrated unique awareness of their legal rights and available protections. This consciousness has translated into a segment of the gig economy workforce actively encouraging fellow workers to exercise their opt-out rights. [283]Numerous rideshare websites and chat boards feature posts imploring other drivers to opt out of mandatory arbitration, venturing so far as to provide a template for drivers to sign and detailed instructions on the steps they must take. [284]While this may sound like a theoretical and unrealistic opening--a fact defendants may themselves be counting on--it is not. In *Nicolas v. Uber Technologies*, [285]a group of opted-out Uber drivers filed suit **[*434]** in the Northern District of California in December 2019. [286]The lead plaintiffs of this wage and hour class action seek to certify a class of "approximately 50,000 to 75,000 current and former Uber employees who worked as Uber 'ride-share drivers' and who opted out of the arbitration provision." [287]As of spring of 2021, the case is still pending, such that it remains to be seen whether this lawsuit will prove effective and encourage the filing of others like it. Nonetheless, the speed with which plaintiffs' lawyers acted on the shift in the mandatory arbitration landscape occasioned by opt-out provisions speaks to the dynamic nature of this area of law and the vigor with which litigants on both sides of the issue continue to pursue their positions.

Mass Arbitration has gained a foothold in the gig economy sector. The question becomes whether this strategy can be applied in the consumer context, where claim values are often significantly lower than in the employment context and where claimants have no formal social ties to one another. The two greatest barriers to Mass Arbitration generally are the financial barriers posed by individual claim value and the logistical barriers posed by the assembly of claim inventories. In the employment context, wage and hour claims--while negative-value--still amount to hundreds or thousands of dollars of damage per claim, [288]allowing for a significant overall damage figure based on

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[281] For example, the opt-out provision in DoorDash's contract states:

> In order to opt out, CONTRACTOR must notify DOORDASH in writing of CONTRACTOR's intention to opt out by sending a letter, by First Class Mail, to DoorDash, Inc., 901 Market Street, Suite 600, San Francisco, CA, 94131. Any attempt to opt out by email will be ineffective. The letter must state CONTRACTOR's intention to opt out. In order to be effective, CONTRACTOR's opt out letter must be postmarked within 30 days of the effective date of this Agreement. The letter must be signed by CONTRACTOR himself/herself, and not by any agent or representative of CONTRACTOR. The letter may opt out, at most, only one CONTRACTOR, and letters that purport to opt out multiple CONTRACTORS will not be effective as to any.

Abernathy Keller Declaration in Support of Motion for TRO, Exhibit B, supra note 95, § XI.8.

[282] *See* Sovern, Greenberg, Kirgis & Liu *supra* note 3, at 4 (finding, based on an empirical study, that "[m]any [individuals who sign mandatory arbitration clauses] expect to have access to the judicial system and class actions regardless of what they sign.").

[283] *See supra* note 244 and accompanying text.

[284] *See, e.g.*, Sergio Avedian (Uberserge), *There Is an Update to the Uber TOS, You Have to Sign It in Order to Drive, Opt out of Mandatory Arbitration by Following These Steps*!, RIDEGURU, https://ride.guru/lounge/p/there-is-an-update-to-the-uber-tos-you-have-to-sign-it-in-order-to-drive-opt-out-of-mandatory-arbitration-by-following-these-steps [*https://perma.cc/5Y8T-M3DU*]. Leveraging union and organized labor partnerships could also help encourage employees to take advantage of these opt-out provisions.

[285] No. 3:19-cv-08228 (N.D. Cal. Dec. 18, 2019).

[286] Class Action Complaint for Damages, Penalties, Attorneys Fees & Injunctive Relief for, *Inter Alia*, Labor Code Wage & Hour Violations, P 2, at 1, *Nicolas*, No. 3:19-cv-08228.

[287] *Id.*

the amalgamation of a few thousand individual claims. Thus, by assembling a large but still feasible number of claims, Employment Mass Arbitration has been able to overcome financial barriers. Likewise, the inertia against claim assembly has been overcome by predicating Mass Arbitrations on existing aggregate litigation or via advertising targeted at existing communities of organized workers. [289]

Consumer claims are almost necessarily negative-value claims, often with individual damage figures of $ 10 or less. Beyond the financial difficulties these claims pose for plaintiffs' counsel, the damage figures are dwarfed many times over by the cost of an individual filing fee alone. *Section 1284.3 of the California Code of Civil Procedure*, which requires that plaintiffs whose gross monthly income is less than 300 percent of the federal poverty guidelines be exempt from arbitration filing fees, could provide an entry point for overcoming the filing fee barrier. [290]But the extremely low value of a consumer claim itself means that amassing a few **[*435]** thousand claimants would lead to a settlement figure too low to even cover an attorney's expenses.

Consumer claims also often lack intrinsic value to the consumers, which can be a necessary ingredient for expending the time and energy required to pursue a legal remedy. Consumer claims are the archetypal claims that the regulatory conception of the class action exists to remedy: claims where the objective is to change defendants' behavior through liability costs, rather than to compensate individual plaintiffs. [291]Beyond potentially lacking interest in their claims, consumers are diffuse: No social network exists that bands together consumers who purchased a certain type of battery or cleaning solution from a chain consumer store, a reality which itself poses an additional barrier to the amassing of claims. Consumer Mass Arbitration claim assembly, however, could presumably be aided by the vast quantities of consumer data that can be readily purchased, providing a means to collect prospective litigants' contact information.

Perhaps the most significant contribution that could be made to enable a consumer Mass Arbitration strategy is one envisioned by Andrea Cann Chandrasekher and David Horton in their latest article, *Arbitration Nation: Data from Four Providers*. [292]Cann Chandrasekher and Horton propose that state legislatures create an "arbitration multiplier," in which an arbitrator could increase the fees or expenses to which a prevailing plaintiffs' lawyer is entitled by a factor of the arbitrator's choosing. [293]As the authors note, this type of incentive would encourage arbitration and should thus survive judicial review for compliance with the FAA's policy favoring arbitration. [294]

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[288] *See* BRADY MEIXELL & ROSS EISENBREY, ECON. POL'Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), *https://www.epi.org/files/2014/wage-theft.pdf* [*https://perma.cc/6SRB-DG7R*].

[289] *See supra* Part II.

[290] *See supra* sources and text accompanying notes 207 and 245.

[291] *See, e.g.*, David Marcus, *The Short Life and Long Afterlife of the Mass Tort Class Action*, *165 U. PA. L. REV. 1565, 1569 (2017)* ("[T]he class action's primary objective was not individual compensation but regulatory efficacy, or the successful alteration of defendants' behavior through the vindication of substantive liability regimes. A class action properly targeted the aggregate effects of the defendant's conduct as experienced by a group of undifferentiated regulatory beneficiaries. Without aggregation, claims would lie dormant, and regulatory regimes would go unenforced. For these reasons, supporters argued, judges could rightly downplay conflicts of interest among individual class members, overlook or deemphasize individual legal issues that differed from one class member's claim to the next, and soften due process protections for class members.").

[292] Chandrasekher & Horton, *supra* note 47.

[293] *See id.* at 61-66.

[294] *See id. See also Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621*.

Despite seemingly long odds for consumer Mass Arbitration based on the underlying economics and logistical barriers, a few such episodes have in fact been **[*436]** initiated within the past year, [295]suggesting that there may yet be a role for consumer claims in the Mass Arbitration playbook.

3. The Issue of "Friendly" Class Settlement

Despite broad corporate resistance to class actions and aggregation, defendants have embraced one fixture of aggregate litigation: the class action settlement. As Mass Arbitration efforts are undertaken, defendants have revived preexisting class action settlement negotiations and attempted to stay Mass Arbitrations pending acceptance of the proposed class action settlement. In order to avoid paying high filing fee figures and achieve global peace--the widespread extinguishment of liability--at a discount, defendants seek to capture arbitration plaintiffs within class definitions, despite the existence of contractual agreements that prohibit aggregate litigation. Defendants have written into such settlements bounties for arbitration plaintiffs in order to induce those plaintiffs to remain in the class, and defendants have utilized settlement thresholds to prevent the adoption of the settlement if too many arbitration plaintiffs opt out.

The class settlement device brings with it a host of ethical issues--issues that seem to be moving towards a tipping point as Mass Arbitration gains prominence. To achieve a class settlement, defendants work with class counsel who is, by bargaining position, willing to give the defendants a better deal than arbitration counsel--in exchange for capturing more claimants, increasing the overall (but not marginal) value of the settlement and, by extension, class counsel's fees. As critics have noted, this becomes a sort of reverse auction, where the interests of the class counsel align more closely with the defendant's than with the interests of their own clients and to an even greater degree, plaintiffs pursuing Mass Arbitration. [296]In the reverse auction **[*437]** conceptualization, "the defendant effectively sells the case to the low-bidding class counsel," leveraging plaintiffs' counsel against plaintiffs' counsel--in this context, leveraging class counsel against Mass Arbitration counsel. [297]

The success of the Mass Arbitration strategy, then, depends on courts identifying and prohibiting collusive friendly class settlements. Judges already possess the tools to do exactly that: Under *Federal Rule of Civil Procedure Rule 23*, courts must approve proposed class settlements by making a finding that, among other things, the settlement is "fair, reasonable, and adequate," [298]and "the proposal treats class members equitably relative to each other." [299]A

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[295] *See generally* Alison Frankel, *Intuit Defends $ 40 Million Class Settlement, Attacks Mass Arbitration Firm*, REUTERS (Dec. 9, 2020, 2:42 PM), *https://www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A* [*https://perma.cc/6YMJ-SQ5D*] (consumer Mass Arbitration episode in which damages figures range from $ 2.10 to a few hundred dollars).

[296] *Tech. Training Assocs., Inc. v. Buccaneers Ltd. P'ship, 874 F.3d 692 (11th Cir. 2017)* provides a salient example of the phenomenon and the ethical shortfalls that attend it. In the case, one of the attorneys representing the class of plaintiffs left the firm that was working on the case and after joining another firm, the attorney discussed the possibility of finding a new lead plaintiff and entering a settlement directly with the defendant. *Tech Training Assocs., Inc., 874 F.3d. at 695*. The attorney and his new firm then did just that, and within a few months, they filed an unopposed motion for approval of a class settlement of $ 19.5 million, with up to 25 percent going to this new firm. *Id.* The original class action firm alleged that this settlement was a "'reverse auction,' in which a defendant picks out a plaintiff with weaker claims and weaker counsel in an effort to negotiate a more favorable settlement." *Id.* The Eleventh Circuit panel indeed found that "the record appears to show that the [new firm] deliberately underbid the movants in an effort to collect attorney's fees while doing a fraction of the work that the [original firm] did." *Id. at 697*.

[297] For a discussion of the "reverse auction" phenomenon, see Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, *31 HOFSTRA L. REV. 633, 649-50 (2003)*.

[298] *FED. R. CIV. P. 23(e)(2)*.

[299] *FED. R. CIV. P. 23(e)(2)(D)*.

judge considering a motion to compel a Mass Arbitration need only reject the defendants' requests to issue a stay pending acceptance of the class action settlement.

In recent cases, judges have done exactly that. For example, in the DoorDash episode, when the defendants sought a stay in *Abernathy v. DoorDash* until final acceptance of a proposed class settlement in *Marciano v. DoorDash*, [300]a parallel class action, the court not only denied the motion but also offered further comment on the underlying class settlement. [301]After noting the irony that DoorDash had previously removed certain arbitration-bound plaintiffs from the very class action it now sought to include them in for settlement purposes, [302]the *Abernathy* court offered a warning to the judge overseeing the class action settlement stating that:

> This order notes a concern that the proposed *Marciano* settlement seeks to prevent opt outs via petitioners' counsel and instead requires an original ink signature by each individual. This provision is an obvious attempt to make it as hard as possible for petitioners to opt out, thus binding them to the *Marciano* settlement. Perhaps the judge overseeing the proposed settlement will give this provision extra scrutiny. [303]

[*438] The plaintiffs have pointed out--both in contesting attempted stays and in opposing preliminary class settlements--the inappropriateness of using class action settlement to resolve claims that are contractually barred from court and aggregate proceedings in any form. The plaintiffs have noted the ethical shortcomings inherent to these efforts, like the proposed DoorDash settlement, which "would award class members 43% less on a per class member average than they received in a previous settlement entered into by the same parties" despite the intervening development of favorable independent contractor case law. [304]Plaintiffs have further noted the inherent conflict between the class action settlement plaintiffs and the arbitration plaintiffs, noting the "direct economic interest [the Settlement Plaintiffs have] in preventing absent class members from pursuing individual actions." [305]If Mass Arbitration plaintiffs continue to raise these arguments, and courts continue to exercise their power under Rule 23 to prohibit such settlements, Mass Arbitration will not be overtaken by this defense strategy.

4. The Best We Have?: The Import of This Newest, Imperfect Means of Private Enforcement of Rights

While the Mass Arbitration strategy--and the ingenuity, collaboration, and grassroots organizational strength it exemplifies--are, to many, overdue signs of hope in an area where the prognosis has long been bleak for plaintiffs, this new means of private enforcement is a plainly grotesque means of accessing and vindicating cherished substantive rights when the law has been violated. Although Mass Arbitration is the best means to realizing substantive rights for meritorious claims that is currently available for individuals bound by mandatory arbitration, the doctrinal contortions the strategy requires shed revealing light on the deep need for legislative intervention to rectify a system that has been created to operate in the shadows.

Our legal system, by and large, is one that privileges the private enforcement of substantive rights. While government entities are tasked with enforcement of certain civil rights, much of this country's landmark rights-protecting legislation--such as key provisions of the Civil Rights Act of 1964 and federal civil **[*439]** rights laws

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[300] See *supra* Subpart II.B for discussion of the *Abernathy* and *Marciano* cases.

[301] *See* Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067 (N.D. Cal. 2020).

[302] *See id.*

[303] *Id.*

[304] Declaration of Warren Postman in Support of Petitioners' Opposition to DoorDash, Inc.'s Motion to Stay Proceedings, Exhibit B at 1, *Abernathy, 438 F. Supp. 3d 1062*, ECF No. 166-2 (containing Opposition to Preliminary Approval of Class Action Settlement in *Marciano v. DoorDash*).

[305] *Id.* at 7 (emphasis omitted).

passed since--is enforced via private lawsuits brought directly by aggrieved citizens rather than by the government. [306]This means that vindication of many of our most closely held substantive rights is dependent upon private parties bringing suits to hold bad actors accountable. [307]As a result, those who wish to limit the scope and force of underlying substantive rights--rights to be treated fairly in the workplace or rights to a modicum of economic justice--can undo their protection by undermining the procedural infrastructure for enforcing those rights rather than by modifying the substance of the rights themselves. [308]

The limiting of rights via procedural changes is particularly troubling because "victories achieved in rulings centered on procedural and other seemingly technical issues," occur with relatively little detection from the public. [309]It is far easier to deal blows to the procedures that make private enforcement possible--fee-shifting mechanisms that force liable defendants to pay attorneys' fees to prevailing plaintiffs, class action rules that allow claims to be brought together, and punitive damages that facilitate the bringing of lower-damages claims [310]--than to overturn the substantive rights themselves. Political accountability looming over the legislative process, along with the opportunities for direct public participation and oversight of the administrative rulemaking process, make the more unpalatable undoing of substantive rights in the sunshine via legislative and **[*440]** administrative changes politically risky and, oftentimes, logistically infeasible. [311]While such efforts have historically failed, [312]procedural mechanisms have been successfully limited and at times, undone completely, via court battles that have resulted in the narrowing of procedural mechanisms by judicial interpretation rather than legislative processes. [313]

Unfortunately, undermining procedural mechanisms rather than substantive rights themselves often amounts to the same result: limited justice for wronged parties. Therefore, creative but precarious private enforcement systems like

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[306] *See* BURBANK & FARHANG, *supra* note 7.

[307] *See id.* at 11 (explaining that private enforcement provisions in the Civil Rights Act of 1964 and other, similar laws passed in the subsequent decade, "fostered the growth of a private for-profit bar to litigate civil rights claims." Burbank and Farhang explain that "[i]n the first half of the 1970s, the number of job discrimination lawsuits multiplied 10-fold, growing from an annual total of about 400 to 4000. Title VII's fee shifting provision, according to one practitioner in the field, had 'led to the development of a highly skilled group of specialist lawyers' to enforce it. This was true of civil rights more broadly." (footnotes omitted).).

[308] *See id.* at 1 ("Rule changes which relate directly to the strategic position of the parties by facilitating organization, increasing the supply of legal services (where these in turn provide a focus for articulating and organizing common interests) and increasing the costs of opponents--for instance, authorization of class action suits, award of attorney's fees and costs, award of provisional remedies--these are the most powerful fulcrum for change. The intensity of the opposition to class action legislation . . . indicates the 'haves' own estimation of the relative strategic impact of the several levels" (quoting Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 150 (1974))).

[309] *See* BURBANK & FARHANG, *supra* note 7, at 3-4 (explaining how the "legal campaign [seeking to undo expanded substantive rights] in the courts--with victories achieved in rulings centered on procedural and other seemingly technical issues--has been little noticed by the American public and thus posed little threat to the perceived legitimacy of the Supreme Court").

[310] Hampering procedural avenues to realizing substantive rights has been accomplished in a variety of ways, including limiting who has standing to sue, limiting the availability of money damages, and limiting the availability of attorney's fee awards--to name a few. *See id.* at 17.

[311] *See id.* at 25-129 (documenting the ultimate failure of legislative and rulemaking efforts to undo substantive rights in the later decades of the twentieth century).

[312] *See id.* at 25-129.

[313] *See id.* at 130-91 (describing the qualitative and quantitative study undertaken by the authors to document procedural rights retrenchment that has occurred via Supreme Court litigation). For example, the authors found that "in cases with at least one dissent, plaintiffs' probability of success when litigating private enforcement issues before the Supreme Court has been in decline for over 40 years, and that by 2014 they were losing about 90% of the time, an outcome driven by the votes of conservative justices." *Id.* at 21-22.

Mass Arbitration should give great pause to those who seek to maintain a legitimate system of justice where substantive rights provide meaningful protections for legitimately injured individuals.

CONCLUSION

As employment and consumer collective and class actions have faced legal challenges that have shrunk the class action's use to near extinction, the Mass Arbitration strategy has emerged as a less efficient and more haphazard, but decidedly aggregate, offspring. The Mass Arbitration chapter of the wage and hour litigation story, then, is both a hopeful sign that private actors will find and create pathways to the private enforcement of substantive rights when traditional avenues are foreclosed *and* a call to action to remedy a system that has required such creative solutions to remedy a longstanding problem. Mass Arbitration presents an answer, then, that raises more questions about the legitimacy of the private enforcement system that its innovation holds together.