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## INTRODUCTION

Since the Advisory Committee revised Federal Rule of Civil Procedure 23 in 1966,[1] multiparty dispute resolution has become one of the world's most expensive cat-and-mouse games. In an ever-changing aggregative landscape, both plaintiffs and defendants have aimed to establish a favorable legislative and jurisprudential body. But from the abundance of creative arguments and resourceful techniques, volatility has become the only constant. The defense has made the latest move in this space, and courts are currently evaluating the merits of a technique familiar to complex litigation but novel to arbitration: batch and bellwether proceedings.

Traditionally, batching is when numerous cases are aggregated and the parties agree to try a small number of cases before returning to the settlement table.[2] Similarly, a bellwether trial is when the parties with joined cases agree to try a representative case to anchor settlement talks.[3] The defense bar has not only adopted these proceedings in arbitration, but has also designed arbitration agreements that allow for a limited number of consecutive proceedings in order to accomplish its goals of reducing costs and adjudicating at a gradual pace. It has also

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1 *See* FED. R. CIV. P. 23 advisory committee's note to the 1966 amendment ("The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved . . . .").

2 For a discussion of the traditional litigation counterpart, see Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 818 (1992).

3 *See* Loren H. Brown, Matthew A. Holian & Arindam Ghosh, *Bellwether Trial Selection in Multi-district Litigation: Empirical Evidence in Favor of Random Selection*, 47 AKRON L. REV. 663, 667–69 (2014).

found a compatible arbitral institution that promotes batch and bellwether proceedings with streamlined discovery.[4] While litigation and arbitration procedures certainly overlap, they are not identical and certain practices cannot simply be grafted from one to the other. Batch and bellwether proceedings can work in the arbitration context but need significant structural adaptations to succeed. These revisions must embrace what can be termed the elastic bellwether method, where the parties are adequately incentivized to resolve disputes because failure to do so will proportionately increase or decrease the number of arbitrations per batch, or eventually bring all the claims back into court. An elastic system will foreclose both "bottleneck" delay tactics by defendants and "shakedown" arbitration-fee generation by plaintiffs because the process is dictated by the merits of the claims brought before the tribunal, not the creativity or gamesmanship of the parties.[5]

This Note will first succinctly review the history of aggregative litigation, including the decline of traditional Rule 23 class actions, the proliferation of arbitration agreements, and both the legislative and judicial support for this change. Next, it will examine plaintiffs' response to the rise of arbitration with the creation of mass arbitration networks and explain why some companies started to move away from arbitration. Then it will consider the defense bar's response to mass arbitration with batch and bellwether proceedings, examine the current bellwether arbitration cases moving through the courts, and introduce the latest arbitral institution making headways with its rules and procedures: New Era ADR. Finally, it will identify the additional needs of batch and bellwether arbitration, advance the elastic bellwether model, and demonstrate the theory's ability to remedy the current issues plaguing mass arbitrations.

4 *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1369 (2022) ("Unlike the CPR, New Era ADR provides for three bellwether trials, the results of which are precedential in cases involving common issues of law and fact.").

5 *See* Alison Frankel, *Column: Ticketmaster Customers Attack 'Kafkaesque' Mass Arbitration Rules*, REUTERS (Mar. 20, 2023, 5:10 PM), https://www.reuters.com/legal/litigation/column-ticketmaster-customers-attack-kafkaesque-mass-arbitration-rules-2023-03-20/ [https://perma.cc/D9YL-HJEG]; ANDREW J. PINCUS, ARCHIS A. PARASHARAMI, KEVIN RANLETT & CARMEN LONGORIA-GREEN, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, MASS ARBITRATION SHAKEDOWN: COERCING UNJUSTIFIED SETTLEMENTS 25 (2023).

## I. HISTORY OF AGGREGATIVE LITIGATION

### *A. Foundations of Rule 23*

Prior to the 1966 amendments, class actions were used predominately as a tool for civil rights litigants to achieve structural reform.[6] Because courts were struggling to establish a consistent or dependable class action jurisprudence, the Advisory Committee revised Rule 23 to include different subcategories of classes that could be certified under various standards.[7] The Committee recognized multiple situations where class treatment was appropriate and landed on four main subcategories. First, Rule 23(b)(1)(A) protected the defendant's interests by aggregating cases that, if decided individually, would leave the defendant with "incompatible standards of conduct."[8] Second, Rule 23(b)(1)(B) prevented a race to the courthouse when the defendant had finite assets by joining individual claims into a class to ensure fair distribution of limited funds.[9] Traditional civil rights class actions were categorized under Rule 23(b)(2) and allowed for litigants to seek injunctive relief from the courts.[10]

Finally, Rule 23(b)(3) was an "adventuresome innovation" that allowed for "class certification in a much wider set of circumstances."[11] This subcategory was intended to provide litigants the opportunity to seek monetary damages.[12] The Committee had twin aims in creating this subcategory. First, it recognized that many injuries were "negative value" claims that were not substantial enough to be brought on an individual basis.[13] The Committee wanted to provide a path to aggregate these claims because they were both valuable to plaintiffs'

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6 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Hansberry v. Lee, 311 U.S. 32 (1940).

7 *See* FED. R. CIV. P. 23 advisory committee's note to 1966 amendment ("In practice the terms 'joint,' 'common,' etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. . . . The courts had considerable difficulty with these terms. . . . Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions.").

8 2 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:5 (6th ed. 2022) (quoting FED. R. CIV. P. 23(b)(1)(A)).

9 *See id.* § 4:16.

10 *See id.* § 4:26. This is a slight generalization of Rule 23(b)(2), for there were situations where plaintiffs could also seek damages that were "incidental" to the primary injunctive relief. *Id.* This practice has been extensively debated in both judicial decisions and academic writing, but for the purposes of this Note, it is important to focus on the theories behind the rule rather than the mechanics.

11 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (Scalia, J.) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997)).

12 *See* RUBENSTEIN, *supra* note 8, § 4:47.

13 *See id.*

attorneys and could achieve substantial reform on behalf of the injured parties. Second, the Committee was concerned with efficient resolution and judicial economy. If conduct was substantial enough to be brought to court on an individual basis, the Committee did not want dockets "flooded by particular types of claims" and believed that class certification would "enable faster processing of the multitude of claims."[14] Thus, Rule 23(b)(3) was created to provide for efficient representation of otherwise neglected claims in hope of securing damages and correcting commonly injurious conduct.

While the aims of Rule 23(b)(3) were admirable, the mechanics of the rule leave it vulnerable to exploitative practices that disregarded the Committee's true intentions. Rule 23(b)(3) is unique because it was drafted with opt-out requirements not found in other subcategories.[15] The "default position in an opt-out class action like Rule 23(b)(3) is 'remain': unless a person takes the affirmative step of opting out, the person remains in the class and is bound by the outcome."[16] This means that, knowingly or unknowingly, class members are presumptively included in the definition of the class and excluded from pursuing individual litigation unless they notify representatives of their intent to withdraw. This allows for staggering class sizes, sometimes exceeding a million plaintiffs.[17]

These large classes provide plaintiffs' attorneys with a twofold benefit: the size of the class not only increases bargaining power, but it also makes it easier to control the direction of the litigation. Outside of class representatives, class members are frequently lost in the shuffle. They rarely participate in mass tort or consumer litigation because the value of their claims is often too insubstantial to take an active role, and the size of the class diminishes the interpersonal relationship between the plaintiff and the attorney.[18] Even if individual plaintiffs did want to take a more active role, the sheer volume of information would make it impractical for each class member to take the proverbial "stand." Given this impracticality, individual class members' interests have been synthesized and portrayed by expert testimony, which has become pivotal for class certification.[19] Thus, class action attorneys do

14 *Id.*

15 *See* JAY TIDMARSH & ROGER H. TRANGSRUD, COMPLEX LITIGATION AND ITS ALTERNATIVES 145 (2d ed. 2018).

16 *Id.*

17 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 342 (2011) ("The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs . . . .").

18 William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2162 (2004).

19 *See, e.g.*, Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

not have the traditional agency relationship and are given significant discretion to navigate the case in a direction that maximizes their interests.[20] These extraordinary agency costs provide minimal safeguards and high incentives to maximize the balance between hours worked and fees received.[21] While Rule 23(b)(3) created a vehicle that opened the door for otherwise neglected claimants, it also held it open for opportunistic settlements from entrepreneurial attorneys.

### *B. The Decline of Rule 23*

The previous Section describes just one interpretation of how Rule 23 litigation evolved in the late twentieth century.[22] This Note does not attempt to evaluate the merits of Rule 23; rather, it seeks to explain what prompted the move away from class actions towards other forms of multiparty dispute resolution. This change was inspired by a generation of jurists, lawmakers, and academics who commonly shared the opinions expressed above and were eager to decertify classes. As Professor Jay Tidmarsh explains, it is an oversimplification to call this era the "death of class actions" because class actions remain a major aspect of American civil litigation.[23] That said, the legislation, judicial decisions, and private agreements from the 1980s to today have "woven a leash that bites deeply into [class actions'] throat," severely restricting the reach of Rule 23.[24]

This change was not the product of a few rogue judges or idealistic academics. It was advanced by the most powerful private and public institutions and carried out on the biggest stages. Before making any judicial appointment, President Reagan personally met with candidates to ensure they shared his "'[s]pecial ire' toward class-action impact litigation."[25] Every year from 2003 to 2008, President George W. Bush called for class action lawsuit reform, frequently characterizing such lawsuits as wasteful, frivolous, and irresponsible, or junk.[26] This

20 *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–84 (1987) (describing class action attorneys "as . . . independent entrepreneur[s]" instead of "agent[s] of the client," and noting that class members have "very little capacity to monitor their agents").

21 *See id.* at 883.

22 For a persuasive account of Rule 23's value, importance, and effectiveness for employers, consumers, and the public at large, see Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103 (2006).

23 Jay Tidmarsh, *Living in CAFA's World*, 32 REV. LITIG. 691, 696, 695–96 (2013).

24 *Id.* at 696.

25 *See* Glover, *supra* note 4, at 1290 n.18 (citing Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 378–83.).

26 *Id.* at 1290 n.19.

movement can be explained by four phenomena: legislation under the Class Action Fairness Act, judicial "tightening" of class certification, judicial acceptance of private arbitration agreements, and a new interpretation of supplemental jurisdiction.[27] This Note will briefly explore the second category and discuss the third category in detail.

In his influential article *Class Certification in the Age of Aggregate Proof*, Professor Richard Nagareda explains that at the certification stage, plaintiffs provide evidence that "presupposes the proposed class as a unit and, from that vantage point, seeks to trigger an inference concerning the situation of each class member individually under applicable law."[28] Using statistical or sociological evidence, a class action attorney is able to "shape the proof as she wishes," and courts certify classes with "troubling circularity" because they "proceed[] only upon the say-so of one side."[29] Professor Nagareda's argument was adopted by the Supreme Court in the seminal case of *Wal-Mart Stores, Inc. v. Dukes*, which decertified a nationwide class alleging gender discrimination for Wal-Mart's "tap on the shoulder" compensation and promotion system.[30] Borrowing language from an earlier case, the *Dukes* Court recognized that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."[31] This meant probing beyond the common *questions* articulated by the class, and now requiring common *answers* in order to grant certification.[32] For critics like Justice Ginsburg, this heightened evidentiary standard "disqualifies the class at the starting gate" and denies class treatment for claims designed to be certified by the 1966 amendments.[33]

Even if a class had no intention of going to trial and only sought class certification for the purposes of settlement,[34] courts of this era remained hostile towards Rule 23. In *Amchem Products, Inc. v. Windsor*, the Court maintained that the foundational elements of a class action

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27 Tidmarsh, *supra* note 23, at 696.

28 Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 115 (2009).

29 *Id.* at 125, 126, 128, 125–28.

30 564 U.S. 338, 350 (2011); *id.* at 371 (Ginsburg, J., concurring in part and dissenting in part) (quoting Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 148 (N.D. Cal. 2004), *aff'd in part, remanded in part*, 603 F.3d 571 (9th Cir. 2010), *rev'd*, 564 U.S. 338).

31 *Id.* at 350 (majority opinion) (quoting Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 160 (1982)).

32 *Id.* (citing Nagareda, *supra* note 28, at 132).

33 *See id.* at 368 (Ginsburg, J., concurring in part and dissenting in part).

34 *See* Jay Tidmarsh & Tladi Marumo, *Good Representatives, Bad Objectors, and Restitution in Class Settlements*, 48 BYU L. REV. 2221, 2222 (2023) ("Class settlements are among the most fraught areas in class-action practice because the time of settlement, when the relief that class members might receive becomes apparent, often exposes rifts within the class.").

must "preexist any settlement" and this meant probing into the factual similarities of each class member's injury.[35] In affirming the Third Circuit's decision to decertify the settlement class of people injured by exposure to asbestos, the *Amchem* Court determined that the elements of Rule 23 were not met because "individual stakes are high and disparities among class members great."[36] Thus, regardless of the doctrinal context or stated purpose of the class, Rule 23 class actions faced serious scrutiny from the judiciary in the late twentieth and early twenty-first centuries.

### *C. The Arbitration Enforcement Era*

Dissenting in *American Express Co. v. Italian Colors Restaurant*, Justice Kagan commented that, "[t]o a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled."[37] *Italian Colors* was part of a series of cases that defined the other key element of this era's aggregative litigation jurisprudence—the endorsement of arbitration. This movement started to gain traction in the 1980s with the Court's recognition of the "broad import" of the Federal Arbitration Act (FAA) in *Southland Corp v. Keating*.[38] This decision expanded the reach of arbitration by recognizing the FAA as "substantive federal law" that applies "in both federal and state courts."[39] With the Court's blessing, the defense bar started drafting arbitration agreements at prolific rates. "In the early 1990s, only 2% of nonunionized employee contracts contained arbitration clauses."[40] By 2019, that number had grown to 53.9%, with scholars predicting that it will exceed 80% by 2024.[41] Beyond employment, arbitration clauses and class action waivers have exploded in the consumer, commercial, and civil rights contexts.

While an expansive reading of the FAA certainly contributed to this growth, what really ignited this change was the Court's delegation of control to the drafting party at the expense of legislatures and fact finders. Once the broad statutory protections of arbitration agreements were recognized, questions of enforceability, authority, and the FAA's relationship with other state and federal statutes quickly arose.

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35 521 U.S. 591, 623 (1997).

36 *Id.* at 625, 624–25.

37 570 U.S. 228, 252 (2013) (Kagan, J., dissenting).

38 Tidmarsh, *supra* note 23, at 702 & n.46 (citing Southland Corp. v. Keating, 465 U.S. 1, 10 (1984)); Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2018).

39 *See* Andrew B. Nissensohn, Note, *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225, 1235 (2022).

40 Glover, *supra* note 4, at 1303.

41 *Id.* at 1303–04, 1303 n.99.

Four decisions by the Roberts Court paved the way for the "defense bar's near-total victory in the arbitration revolution and class-action counterrevolution."[42] First in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[43] the Court considered whether an arbitral tribunal had the authority to adjudicate claims on a class-wide basis when the agreement was silent on the issue.[44] The Court determined that the tribunal "simply imposed its own conception of sound policy" by reviewing the claims as a class,[45] and because class adjudication departs from the perceived values of efficiency, low costs, and specialized adjudicators, any change from this norm must be accompanied by explicit, mutual consent from the parties.[46] For Professor J. Maria Glover, a leading scholar in mass arbitration, this case had a profound effect on aggregative litigation because it revealed a new benchmark for FAA cases: arbitration, by definition, is a "bilateral, non-class, private dispute resolution" mechanism that now carries a "normative judgment about the *in terrorem* settlement effects of class actions."[47]

Just one year after *Stolt-Nielsen*, the Court continued to protect the drafting party's control in *AT&T Mobility LLC v. Concepcion*.[48] This case featured an arbitration agreement with a class action waiver between AT&T and its consumers, and lower courts determined that compelling each claimant into individual arbitration would be unconscionable under California law.[49] The Ninth Circuit recognized that the class consisted of numerous negative-value claims, and if decertified, would not be pursued individually—thus effectively providing AT&T with a waiver from any liability.[50] The Supreme Court rejected this approach by relying on the preemptive force of the FAA.[51] It first articulated the principle that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."[52] Applying this principle, the Court maintained that California's unconscionability law "allows any party to a consumer contract to demand [class treatment] *ex post*" and

42 *Id.* at 1302.

43 559 U.S. 662 (2010).

44 *Id.* at 666.

45 *Id.* at 675.

46 *Id.* at 685–87.

47 Glover, *supra* note 4, at 1302.

48 563 U.S. 333 (2011).

49 *Id.* at 336, 338.

50 *See id.* at 338–40 (explaining the reasoning relied on by the California Supreme Court to find a similar class action waiver in an arbitration agreement, which the Ninth Circuit relied on in this case).

51 *Id.* at 341.

52 *Id.* at 344.

thus "interferes with arbitration."[53] As Andrew Nissensohn explains, "*Concepcion* made clear that a state cannot, through its legislature or its courts, circumvent the mandate of the FAA by relying on traditional state law contract defenses."[54] Thus, between *Stolt-Nielsen* and *Concepcion*, both the arbitral tribunal and state legislatures must yield to the interests of the drafting party and the predominance of the FAA.

The third pivotal decision was *American Express Co. v. Italian Colors Restaurant*.[55] American Express sought to compel individual arbitration against merchants who were charged approximately thirty percent more in fees by American Express than competing credit card companies.[56] To bring a successful case, plaintiffs had to allege antitrust violations.[57] To make these claims, plaintiffs would have needed to hire an economist to analyze and prove anticompetitive practices, and those fees alone would have cost the plaintiffs several hundred thousand dollars.[58] If successful, each plaintiff could only recover a maximum of $38,549 in treble damages under the Clayton Act.[59] Thus, the "only cost-effective way to enforce federal law" was through class treatment.[60] For Justice Scalia, "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."[61] The majority maintained that the FAA must govern unless it has been "overridden by a contrary congressional command."[62] Here, the Court determined that no command existed under the Sherman and Clayton Acts, for both "make no mention of class actions" and "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[63] *Italian Colors* recognized a second derivative of alternative dispute resolution: defendants are not only allowed to shield themselves from litigation through arbitration, but also from arbitration through private agreements that act as a prohibitively high bar when costs greatly exceed the benefits. In a system praised for its efficiency and low costs, the jurisprudence of this era continued to ignore negative-value claims.

The final case that completed the arbitration enforcement era was *Epic Systems Corp. v. Lewis*.[64] So far, the Court had protected the

53 *Id.* at 346.
54 Nissensohn, *supra* note 39, at 1237.
55 570 U.S. 228 (2013).
56 *Id.* at 231.
57 *See id.*
58 *Id.*
59 *Id.*; *see also* Nissensohn, *supra* note 39, at 1240.
60 *See* Tidmarsh, *supra* note 23, at 697 n.33.
61 *Italian Colors*, 570 U.S. at 236.
62 *Id.* at 233 (quoting CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012)).
63 *Id.* at 233–34.
64 138 S. Ct. 1612 (2018).

drafting party against active tribunals in *Stolt-Nielsen*, state laws in *Concepcion*, and federal laws that are silent on aggregation in *Italian Colors*. But in *Epic Systems*, plaintiffs sought collective representation under two textbook federal laws with well-established collective action mechanisms: the Fair Labor Standards Act and the National Labor Relations Act.[65] The Court determined that the FLSA and NLRA do not override the FAA because even if the statutes cannot be read compatibly, the plaintiffs had to show that the FAA should be displaced by a "clearly expressed congressional intention."[66] In reading the two statutes, the Court agreed that the labor laws may allow for the parties to bargain around arbitration, but the text of the statutes do not provide an "express approval or disapproval of arbitration."[67] As such, there was no clear congressional intention, or even a "telling clue" that the FLSA and NLRA were designed to preempt arbitration, and the Court refused to stray from its precedent to find one.[68] Thus, these four cases provided defendants with almost complete substantive and procedural control over dispute resolution. But as the following Sections will demonstrate, this cat-and-mouse game was far from finished.

### *D. Effects of Arbitration*

The effects of the arbitral revolution have been profound in the employment and consumer spaces.[69] Beyond the increase in the number of arbitration agreements described in the previous Section, studies have revealed that when individuals are subject to arbitration agreements, they rarely pursue their claims.[70] In a landmark study, Professor Cynthia Estlund concluded that in 2016 "well under two percent of the employment claims that one would expect to find in some forum, but that are covered by [mandatory arbitration agreements], ever enter the arbitration process."[71] She arrived at this conclusion by reviewing the number of reported American Arbitration Association (AAA) employment arbitrations in 2016, calculating AAA's "market share" in employment arbitrations, the estimated percentage of private employees covered by mandatory arbitration agreements, and the number of

65 *See id.* at 1620.

66 *Id.* at 1624 (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

67 *Id.*

68 *Id.* at 1627.

69 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, 2863–74 (2015).

70 *See* Glover, *supra* note 4, at 1305 ("Studies have found that almost no one pursues individual arbitration.").

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

employment cases filed in federal court.[72] From this information, she was able to calculate the number of "expected" employment arbitrations in 2016 and the number of "missing" arbitrations if employees had entered into arbitration at the same rate they filed in federal court.[73] She then looked at state-court claims and those excluded by the fact that individuals can participate in class and collective actions in litigation but not in arbitration, and arrived at the conclusion that there were "5126 claims actually filed in arbitration" but between "315,000 to 722,000 'missing' arbitration cases."[74] Thus, using even the most conservative estimates, recent aggregative jurisprudence has produced "jaw-dropping disparities in estimated filing rates between court and arbitration."[75]

For those who do decide to pursue their claim in arbitration, studies have also revealed that both the success rate and amount of damages are far inferior to comparable claims in court. In a 2015 study for the Economic Policy Institute, Professors Katherine V.W. Stone and Alexander J.S. Colvin compared the outcomes for employment discrimination claims in AAA arbitration over a five-year period with similar claims in federal and state court.[76] They found that

> [e]mployee win rates in mandatory arbitration are much lower than in either federal court or state court, with employees in mandatory arbitration winning only just about a fifth of the time (21.4 percent), which is 59 percent as often as in the federal courts and only 38 percent as often as in state courts. Differences in damages awarded are even greater, with the median or typical award in mandatory arbitration being only 21 percent of the median award in the federal courts and 43 percent of the median award in the state courts.[77]

While it might come as no surprise that arbitration produces less favorable results and awards than litigation for plaintiffs, Stone and Colvin uncovered several notable outcomes. First, the two recognized that arbitration plaintiffs had more difficulty finding representation than litigation plaintiffs.[78] Their research revealed that, although plaintiffs had counsel in roughly the same proportion in litigation and arbitration, plaintiffs' attorneys "accepted 15.8 percent of potential

72 *Id.* at 689–91.

73 *Id.* at 692.

74 *Id.* at 696.

75 *Id.* at 698.

76 KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS 20 (2015).

77 *Id.* at 19.

78 *Id.* at 21.

cases involving employees who could go to litigation, [and] they accepted about half as many, 8.1 percent, of the potential cases of employees covered by mandatory arbitration."[79] Second, the two recognized that defendants were succeeding as "repeat players" with familiarity and knowledge of the claims and fact finders.[80] They found that employees succeeded against first-time employers in 17.9% of claims, then that number dropped to 15.3% when the employer had used the same arbitrator four times, and down to 4.5% when the employer used the same arbitrator twenty-five times.[81] This suggests that defendants who are frequently arbitrating cases will find a favorable arbitrator and know how to be persuasive in the proceedings. Thus, plaintiffs are not only failing to pursue their claims in arbitration, but if they do choose to proceed, they ultimately face significant challenges both in finding an attorney to represent them and in convincing an arbitrator who frequently has an established relationship with the defendant.

### *E. Legislative Intervention*

Aware of the impact on consumers and workers, various public institutions have attempted to provide a remedy through legislation and administrative rulemaking. But "[f]or decades, Congress has been presented with opportunity upon opportunity to reform arbitration through 'arbitration-fairness' bills. Almost all have died in committee."[82] Congress has been able to pass narrowly tailored bills to exempt certain subject matter from arbitration like sexual harassment or workplace conditions in nursing facilities, but any sweeping reform has been stalled by the Senate Judiciary Committee.[83] Certain administrative agencies like the CFPB have tried to intervene with rulemaking but have been rejected by the Senate under the Congressional Review Act.[84] State legislatures and agencies have also tried to intervene, but reform efforts have had limited success. When California passed its Private Attorneys General Act (PAGA),[85] scholars were optimistic that this could provide significant change because a plaintiff "basically

79 *Id.* at 22. Additionally, if arbitration plaintiffs are represented as frequently as litigation plaintiffs, these numbers would suggest that attorneys specializing in arbitration are taking twice as many clients. This raises the question of who is representing individuals going into arbitration, and whether as much time and effort is being put into their cases.

80 *Id.*

81 *Id.* at 23.

82 Glover, *supra* note 4, at 1312.

83 *Id.* at 1312–13.

84 *Id.* at 1312.

85 Labor Code Private Attorneys General Act of 2004, ch. 906, 2003 Cal. Stat. 6628 (codified as amended at CAL. LAB. CODE §§ 2698–2699.5).

stands in the shoes of the state enforcement agency" which is not subject to arbitration.[86] However, there "has not been a boom in PAGAs across the country"[87] because the Court has made individual, arbitrable PAGA claims severable from representative PAGA claims, and certain interests groups have commandeered the statutes for impact litigation that states are hesitant to endorse.[88] While the public sector certainly seems to have an appetite to balance the arbitral revolution, it has struggled to this point to make any significant changes.

## II. MASS ARBITRATION

### *A. Private Enforcement*

With little government support and an increasingly hostile body of caselaw to navigate, the plaintiffs' bar felt pressure to improvise. One of the few options still available was to succeed within the context of arbitration. Through sharp tactics and clever resourcefulness, they were able to breakthrough and organize the next revolution: mass arbitration. Professor Glover provides the following definition for mass arbitration: "Some enterprising and (highly) capitalized attorneys file arbitration demands on behalf of individual claimants subject to mandatory arbitration agreements. The claims are brought against the same defendant for the same course of conduct. The attorneys then do this again. And again. And again."[89] To fully elucidate this definition, this Section begins by examining the basic economic and legal principles that set mass arbitration in motion.

The *sine qua non* of mass arbitration is fee structuring. As seen in the cases above,[90] the defense was continually urging courts to accept a more restrictive, defendant-friendly jurisprudence. Because it was straddling the line of substantive and procedural fairness, it often tried to make its arbitration agreements seem more appealing to courts by providing "friendly" provisions.[91] The most common benefit was agreeing to pay for arbitration costs:

> [A]rbitration agreements in the early 2000s tended to get struck down on unconscionability and effective-vindication grounds. To avoid such rulings, corporations removed some of their more draconian arbitration-related clauses and added provisions that they

86 Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411, 451 (2018).

87 *Id.* at 453.

88 Glover, *supra* note 4, at 1314–15.

89 *Id.* at 1289.

90 *See* discussion *supra* Section I.C.

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

> described as "friendly" to consumers and employees: provisions requiring them to reimburse some or all of a claimant's arbitration fees, or even to pay bonuses to prevailing claimants.[92]

This was a calculated bargain for the defense. It sought to downplay the bitterness of class action waivers and other restrictive provisions with the promise of bearing the costs, and it succeeded in convincing courts that this was a fair trade. But this provision was far from charitable; rather, it was a solemn recognition that it was "far better to foot the bill associated with 'friendly' fee-shifting provisions in a small handful of individual arbitrations than to bear the expense of litigating class actions . . . . The gambit worked."[93] But the gambit only works if the costs associated with arbitration are outweighed by the costs associated with class action litigation. The plaintiffs' bar saw through this calculus and used mass arbitration to swing the balance back in its favor.

While this may seem painfully obvious, it is worth noting that arbitration fees are used to cover the administrative costs for the arbitral institution. They are not payments to plaintiffs' attorneys. But these fees are incredibly valuable to plaintiffs' attorneys because of the time and manner in which the defendant must pay them. As Cheryl Wilson explains, defendants must pay the full amount for each individual arbitration and must pay the costs upfront.[94] By virtue of these requirements, "plaintiffs were able to flip the economics of a nonaggregate arbitration proceeding by saddling the defendant company with millions of dollars in upfront costs."[95] These aggregated upfront costs can run deep into the seven figures, with a recent DoorDash mass arbitration exceeding over $9 million in fees alone.[96] These entry fees do not account for damages, potential plaintiffs' attorney's fees, or defense counsel's fees.[97] When faced with the prospect of these additional costs, defendants recognize the "financial inertia of the arbitration forum" and start to look for ways to settle before even getting into the merits of the disputes.[98] Paradoxically, mass arbitration has been effective because it "inverts" the perceived benefits of arbitration: it "*harnesses* individual claiming and *eschews* class claiming in order to extract

92 *Id.*

93 *Id.* at 1316–17.

94 *See* Cheryl Wilson, *Mass Arbitration: How the Newest Frontier of Mandatory Arbitration Jurisprudence Has Created a Brand New Private Enforcement Regime in the Gig Economy Era*, 69 UCLA L. REV. 372, 377 (2022).

95 *Id.*

96 *See* Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html [https://perma.cc/9V74-MBV9].

97 *See* Wilson, *supra* note 94, at 387.

98 *Id.* at 379.

settlements for claimants."[99] By generating a formidable bill with more costs on the horizon, the plaintiffs' bar was able to bring defendants back to the bargaining table with the same force of the class action era.

At this point, the defense bar's solution might seem apparent: remove the "friendly" fee structuring provision and shift the allocation of costs. This has been recommended by many of the top corporate firms,[100] but there are three issues with implementing this change. First, state legislatures have recognized the effectiveness of mass arbitration and, with the appetite to protect individuals with minimal bargaining power described above, have created laws to prevent costs from being shifted onto plaintiffs.[101] Second, even in the absence of such protections, fees are set by the arbitral institution and not the parties.[102] This means that institutions would have to be persuaded to restructure the fee arrangements, and it is safe to assume that these institutions would prefer to do business and receive one payment from corporate entities instead of having to track down a series of individual payments from different claimants.

Third, the parties could of course draft agreements so that costs are more evenly allocated, but plaintiffs' firms have hedged their bets against this possibility because of the jurisprudence developed during the arbitration enforcement era. In cases like *Concepcion* and *Italian Colors*, the Court drew certain lines on substantive and procedural fairness.[103] Though never invoked by a Roberts Court majority, the "effective vindication doctrine" looms over these cases and maintains that an agreement cannot be so one-sided that it amounts "to a prospective waiver of their *right to pursue* statutory remedies."[104] In 2000, the Court

99 Glover, *supra* note 4, at 1295.

100 *See, e.g., As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them,* GIBSON DUNN (May 24, 2021), https://www.gibsondunn.com/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them/ [https://perma.cc/6JBM-N96J]; Andrew Soukup, Ashley Simonsen & Kanu Song, *A Closer Look: Avoiding a "Mass"-ive Arbitration Problem,* COVINGTON & BURLING (Mar. 2, 2022), https://www.insideclassactions.com/2022/03/02/a-closer-look-avoiding-a-mass-ive-arbitration-problem/ [https://perma.cc/BW35-5PW3]; *How Companies Can Hedge Risk of Mass Arbitration,* COOLEY (June 30, 2022), https://www.cooley.com/news/insight/2022/2022-06-30-how-companies-can-hedge-risk-of-mass-arbitration [https://perma.cc/UJQ5-LDY5].

101 *See* Glover, *supra* note 4, at 1352.

102 *See, e.g.*, AM. ARB. ASS'N, CONSUMER ARBITRATION RULES: COSTS OF ARBITRATION (2023).

103 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 238 (2013) ("Truth to tell, our decision in *AT&T Mobility* all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law 'interfere[d] with fundamental attributes of arbitration.'" (alteration in original) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011))).

104 Nissensohn, *supra* note 39, at 1272.

considered whether a plaintiff was effectively precluded from pursuing its claims because of high entry costs in *Green Tree Financial Corp.-Alabama v. Randolph*.[105] While the Court enforced the agreement because "the plaintiff did not adequately prove that they would incur the alleged costs,"[106] it seemed to have entertained the idea that an arbitration agreement could be waived if a party provided sufficient evidence of prohibitively high expenses.[107]

*Italian Colors* certainly constrained this idea when it compelled individual arbitration on an exceptionally negative-value claim,[108] but Professor Glover is optimistic that there are limits to this holding as an approval of class action waivers instead of an endorsement of restrictive contract provisions.[109] In her mind, the defense got what it wished for in eliminating class claims and defining "the FAA's preference for *bilateral* arbitration."[110] But now that claims are operating on an individual basis, the Court would be hesitant to condone any practices that prevent this reading of the FAA.[111] Thus, "it would be a stretch, even for a defense-minded Court, to disapprove of any quantity of bilateral arbitration proceedings,"[112] and "the FAA is not so broad as to prohibit legislatures (or courts) from deeming 'pay-defendant-to-play' or 'adjudication-by-defendant' provisions void as against public policy."[113] Under this interpretation of *Italian Colors*, the effective vindication doctrine still has life. But even without invoking the effective vindication doctrine, courts have struck down fee-shifting provisions as unconscionable.[114] Thus, with the support of judicial and legislative action, plaintiffs can now operate on equal footing in mass arbitration and bring defendants back to the bargaining table.

### *B. Early Mass Arbitration*

Before mass arbitration grabbed headlines as a systematic crusade against tech companies, early efforts were lean, experimental, and cautiously optimistic. One of the earliest examples was with Darden Restaurants in the mid-2010s.[115] When I discussed this case with plaintiffs'

105 531 U.S. 79 (2000).
106 Nissensohn, *supra* note 39, at 1273.
107 *See Randolph*, 531 U.S. at 92.
108 *See* Nissensohn, *supra* note 39,. at 1274.
109 *See* Glover, *supra* note 4, at 1318.
110 *Id.*
111 *See id.*
112 *Id.*
113 *Id.*
114 *See id.* at 1366 n.452.
115 *See Class Action Litigation*, TRIEF AND OLK, https://www.triefandolk.com/practices/class-action-litigation/ [https://perma.cc/BB2S-KWZM] ("Approximately $8 million in

counsel,[116] they explained that their efforts to certify a collective wage and hour action under the FLSA were denied because the court found that the plaintiffs lacked cohesiveness.[117] Motivated to pursue their claims, a small yet substantial portion of claimants agreed to continue their claims despite this setback.[118] Because workers came from all over the country and could no longer be moved into one forum, logistics became a primary concern for plaintiffs' counsel.[119] Information not only had to be shared across thousands of claims when cloud computing was in its very beginning stages,[120] but each claim required local representation to file and participate in the proceedings.[121] The firm was able to recruit a group of attorneys from around the country and organize a mass arbitration network that provided direct communication and efficient exchange of information.[122]

But even with an established network, the plaintiffs faced another hurdle with their arbitral institution. The AAA had not anticipated this influx of claims and did not have a department or process for mass arbitration.[123] The plaintiffs were operating in completely uncharted territory, made more difficult by the defendants' internal dispute resolution processes that required employees to jump through various hoops before they could even seek arbitration. Eventually, a three-step process was created, and the parties attempted to resolve claims without resorting to arbitration.[124] After filling out a claim form, the parties agreed to preliminary settlement negotiations.[125] If the claims did not settle, they went to mediation, and if mediation was unsuccessful, they proceeded to arbitrate on an individual basis.[126] This process required

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settlements for approximately 2,500 servers and bartenders employed by the world's largest full-service restaurant group, Darden Restaurants, whose chains included Red Lobster, Olive Garden, Longhorn Steakhouse, Bahama Breeze, and Seasons 52, in a nationwide case alleging violations of the Fair Labor Standards Act (FLSA), specifically off-the-clock work, inappropriate payment of the sub-minimum tip credit wage, and unpaid overtime.").

116 Telephone Interview with Shelly Frieldland, Partner, Trief & Olk (Oct. 19, 2023).

117 Mathis v. Darden Rests., No. 12-61742-CIV, 2014 WL 4428171, at *3–4 (S.D. Fla. Sept. 1, 2014).

118 *See* Telephone Interview with Shelly Friedland, *supra* note 116.

119 *See id.*

120 *See, e.g.*, Sundar Pichai, *Introducing Google Drive . . . Yes, Really*, GOOGLE: OFFICIAL BLOG (Apr. 24, 2012), https://googleblog.blogspot.com/2012/04/introducing-google-drive-yes-really.html [https://perma.cc/G5HF-RAGZ].

121 *See* Telephone Interview with Shelly Friedland, *supra* note 116.

122 *See id.*

123 *See id.*

124 *See id.* Even arriving at this point was arduous, for Darden sought a four-step process which required internal review prior to settlement talks. The three-step process was not accepted until an arbitrator intervened. *See id.*

125 *See id.*

126 *See id.*

immense resources, time, and patience. It was a slow, tumultuous exercise of grinding out repetitive claims until each claim was resolved—with very few proceeding through a full arbitration hearing because the parties were able to predict future outcomes and facilitate settlements.[127]

While tedious, plaintiffs' attorneys started to recognize both the economic and social value of this new practice. They no longer had to wait for the ideal judge or legislation to make an impact. Aggregative claims can succeed within the world of arbitration, and this framework showed the potential for future, large-scale mass arbitrations. It also happened at the perfect time, for the increased sophistication of technology not only allowed for more efficient communication with a larger network of attorneys, but also introduced a new industry that was disrupting the traditional labor market—the gig economy.

### *C. Modern Mass Arbitration*

Over the last decade, tech companies have disrupted various industries by making services readily available on a digital platform. These companies have become extraordinarily profitable by operating with significantly lower overhead costs than the competition. 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."[128] Drivers are classified as independent contractors who drive as a "side gig" with control over their schedules and ability to work other jobs.[129] Leaning on this classification, Uber does not follow state or federal wage and hour provisions or provide traditional benefits for its drivers.[130] The target of countless lawsuits and legislation, Uber and other gig economy companies have required parties to sign independent contractor agreements with an arbitration clause and class action waiver.[131]

Since *Epic Systems*, challenges in court to employment status have been increasingly unsuccessful, but plaintiffs have sought to hold these

127 *See id.*

128 Wilson, *supra* note 94, at 388.

129 *See, e.g.*, *Drive with Uber: An Alternative to Traditional Driving Jobs*, UBER, https://www.uber.com/us/en/drive/ [https://perma.cc/6GWL-2SGT].

130 *See* Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019, 2:41 PM), https://www.reuters.com/article/legal-us-otc-uber-idUSKCN1PA2PD/ [https://perma.cc/ZEP4-WNBG].

131 *See* Kellen Browning, *California Court Mostly Upholds Prop. 22 in Win for Uber and Other Gig Companies*, N.Y. TIMES (Mar. 13, 2023), https://www.nytimes.com/2023/03/13/business/prop-22-upheld-california.html [https://perma.cc/2CCC-M8LH]; Wilson, *supra* note 94, at 388–89.

companies accountable through mass arbitration.[132] In 2018, a national plaintiffs' firm now called Keller Postman orchestrated its first of many mass arbitrations and, after a successful marketing and organizing campaign, filed 12,501 individual arbitration demands on behalf of drivers.[133] Based on the fee-structuring provisions of the arbitration agreements Uber made its drivers sign, Uber was responsible for $18,751,500.00 in entry fees alone.[134] Six months later, Uber announced in an SEC filing that it had settled the claims for between $146 and $170 million.[135] A watershed settlement for the plaintiffs' bar, mass arbitration was able to restore the "hallmarks of a class action settlement: an aggregate sum resolving a large number of claims."[136] The plaintiffs' bar quickly mobilized and expanded the horizons of mass arbitration beyond tech companies and employment disputes. Mass arbitrations were now arising against virtually any corporation with an arbitration clause and into the consumer space. From Postmates and Peloton to Centurylink and Chipotle, the "private attorney general" has found its home in private arbitration.[137]

## III. RESPONSE TO MASS ARBITRATION

### *A. Defense Strategies*

Settlements of this magnitude were unsustainable for corporations, and because many business models were reliant upon the use of independent contractors, the defense bar had to find a way to keep dispute resolution costs low and the business model intact. Over the past few years, defendants have tried four noteworthy strategies to combat mass arbitration: eliminating arbitration agreements altogether, refusing to pay arbitration fees, returning to court as a class action, and adding batch and bellwether provisions to arbitration agreements. As the cases will show, courts are highly skeptical of the second and third practices, leaving defendants with the choice to either roll the dice with Rule 23 or commit to arbitration and attempt to minimize the impact of mass arbitration with new provisions. This Section will demonstrate that recent batch and bellwether provisions, when used together, can be effective but should not withstand judicial scrutiny in

132 *See* Wilson, *supra* note 94, at 389.

133 *Id.* at 389–90; *From Keller Lenkner to Keller Postman: Doubling Down on Mass Practice*, KELLER POSTMAN (Apr. 25, 2022), https://www.kellerpostman.com/from-keller-lenkner-to-keller-postman-doubling-down-on-mass-practice/ [https://perma.cc/793Q-5AK3].

134 Wilson, *supra* note 94, at 390.

135 *Id.* at 392.

136 *Id.*

137 *See* J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U. L. REV. 1617, 1624, 1627 (2023).

their current form. Instead, an elastic bellwether approach that incrementally applies or reduces more pressure to bargain as time passes will benefit both parties as a fair, efficient tool for resolving disputes.

Courts do not look favorably upon perceived gamesmanship. Recent mass arbitration defense strategies have failed in a similar pattern. Defendants will have the class or collective action decertified and moved to arbitration, then after a multitude of individual arbitration fees, ask the court to bring the claims back into the fold of litigation or grant relief from paying the fees. Courts have lambasted defendants for these requests. In a recent DoorDash mass arbitration, the company accrued substantial individual arbitration fees and went back to the court to seek class treatment.[138] Judge Alsup in the Northern District of California denied the request, stating,

> The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.[139]

Similarly, Intuit had its motion to compel arbitration denied at the district level by Judge Breyer but appealed to the Ninth Circuit which granted the motion and moved the claims to arbitration.[140] After Keller Postman organized over 100,000 individual arbitration demands with $36 million in arbitration fees, Intuit went back to Judge Breyer to approve a settlement class to avoid paying the fees.[141] Judge Breyer was highly critical of the move, explaining to Intuit's counsel in a hearing, "You knew what the rules of arbitration were. . . . [Y]ou elected to go to arbitration. And you fought fairly, vigorously, and it turns out correctly, that you had this right to insist on arbitration."[142] But, "[n]ow you come in, when you see how it is unfolding, and say: 'Not so fast . . . Now we want to turn and do something else.'"[143] Judge

138 *See* Abernathy v. Doordash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

139 *Id.* at 1067–68.

140 *See* Arena v. Intuit Inc., No. 19-cv-02546, 2021 WL 834253, at *1 (N.D. Cal. Mar. 5, 2021).

141 *See* Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Settlement Amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 4:51 PM), https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idINKBN28W2M5/ [https://perma.cc/VX38-FS2R].

142 *Id.*

143 *Id.*

Breyer eventually denied the settlement,[144] holding true to his conviction that "Intuit was . . . hoisted by [its] own petard."[145]

Instead of asking for permission to return to court as a class, defendants have also outright refused to pay the fees. Postmates, another gig economy company that relies on independent contractors, succeeded in decertifying a wage and hour and employee misclassification collective action and compelling individual arbitration.[146] After organizing over 14,000 requests for arbitration,[147] Postmates refused to pay its fees to the AAA and challenged the mass arbitration on a "philosophical procedural approach."[148] Judge Gutierrez in the Central District of California rejected this claim and required Postmates to pay arbitration fees, all attorney's fees, and costs.[149] Judge Gutierrez made this ruling because of a recent California state law called SB 707 that protects individuals going into arbitration by holding companies accountable to the agreements.[150] SB 707 states that if a company defaults on its arbitral obligations by failing to pay fees within thirty days of the due date, the plaintiffs have the option to either remove the claims from arbitration and bring them back into court, or continue in arbitration and have their fees and costs paid for by the defendants.[151] Here, the delivery drivers decided to continue with arbitration,[152] but one can readily see the value of having the option to return to court and, if necessary, seek injunctive relief against unresponsive defendants. Thus, arbitration has always embraced the "pay-to-play" model, and courts are going to hold defendants accountable to both pay and play.

This leaves defendants with a precarious decision: either change the terms of the agreement or scrap the agreement entirely. Amazon decided to go with the latter in 2021 when it removed arbitration clauses from its consumer agreements following a lengthy dispute with over 75,000 individual arbitration claims.[153] For a company like

144 *Intuit*, 2021 WL 834253, at *11.

145 Glover, *supra* note 4, at 1360 n.417 (quoting Transcript of Proceedings at 10, *Intuit*, No. 19-cv-02546, 2021 WL 834253, ECF No. 206).

146 *See* Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 4:48 PM), https://www.reuters.com/article/us-otc-postmates-idUKKBN29P2S3/ [https://perma.cc/9S3R-KV3R].

147 *Id.*

148 Glover, *supra* note 137, at 1627.

149 *See* Postmates Inc. v. 10,356 Individuals, No. 20-cv-2783, 2021 WL 540155, at *13 (C.D. Cal. Jan. 19, 2021).

150 *Id.* at *6–8 (discussing Act of Oct. 13, 2019, ch. 870, 2019 Cal. Stat. 7189).

151 *See id.* at *6.

152 *See id* at *13.

153 Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000

Amazon, this decision was prudent for two reasons. First, its business model relies on more traditional techniques than other successful tech companies. Unlike Uber, Postmates, or DoorDash, Amazon has massive overhead, a substantial number of employees, and buys, sells, and delivers products in a more vertically integrated system.[154] This can be explained by "considerations unique to Amazon itself—reasons related to generating positive tort-law precedent vis-à-vis brick-and-mortar versus online distributor liability."[155] As a brick-and-mortar institution, Amazon does not need to rely on certain disruptive practices to succeed which makes it less averse to litigation. Second, Amazon removed its arbitration clauses from its consumer agreements but kept the agreements for its employees.[156] Given the vigorous marketing campaigns associated with mass arbitration, Amazon likely realized that it was more exposed to high fees as a producer of goods than as an employer, and the costs of mass arbitrating employment disputes were likely still below litigation costs for class and collective employment actions. While some have been quick to declare Amazon's decision to eliminate its arbitration clauses in the consumer space as a major victory for mass arbitration,[157] the decision may have been a calculated recognition that Rule 23 and its jurisprudence were more cost effective for Amazon with consumers as a brick-and-mortar retailer, with arbitration remaining more efficient for Amazon with its employees.

But other corporations with business models resting on turbulent legal grounds will be more averse to litigation and seek to modify instead of eliminate the terms of their arbitration agreements. As already discussed, Uber and other gig economy companies fall within this category. But another highly contentious business model that has recently drawn considerable attention in the field of antitrust is Ticketmaster and its parent company Live Nation. Ticketmaster is no stranger to public scrutiny, with influential artists like Pearl Jam calling

-arbitration-demands-now-it-says-fine-sue-us-11622547000 [https://perma.cc/XTF6-RXX2].

154 *See* Enrique Dans, *Amazon Ramps Up Its Logistics Integration, Threatening to Reshape the Future of the Industry*, FORBES (May 1, 2021, 5:49 AM), https://www.forbes.com/sites/enriquedans/2021/05/01/amazon-ramps-up-its-logistics-integration-threatening-to-reshape-the-future-of-theindustry/ [https://perma.cc/5SWG-YBVT].

155 Glover, *supra* note 137, at 1627.

156 *See, e.g.*, Jackson v. Amazon, Inc., 65 F.4th 1093, 1095 (9th Cir. 2023).

157 *See* Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html [https://perma.cc/H9LU-AZ2H].

on the corporation to change its practices since the early 1990s.[158] Most recently, Ticketmaster has been criticized for mishandling Taylor Swift's Eras tour.[159] Plaintiffs claim that "Live Nation and Ticketmaster eliminated market competition and let the companies charge higher prices for Swift tickets than they otherwise could."[160] Ticketmaster was able to decertify the antitrust class and compel individual arbitration, but it made an unprecedented move once the influx of individual claims arrived.[161] It abandoned its longtime arbitral institutional partner JAMS "mid-stream" and moved its claims into a new institution: New Era ADR.[162]

### *B. Batch, Bellwether, and New Era ADR*

Founded in 2020, New Era ADR markets itself as "advanced dispute resolution" where parties can "[s]pend less time mired in conflict and more time on things that matter."[163] Advertised as "[a] dispute resolution platform for modern times,"[164] critics have seen the services as postmodern—claiming it offered "Kafkaesque arbitration procedure[s] designed . . . to deter filing claims."[165] For example, Ticketmaster made the switch to New Era to incorporate batch and bellwether proceedings into its mass arbitrations with limited pleadings and discovery.[166] But before analyzing New Era's controversial practices and offering any solutions, it is helpful to consider how these practices developed in the litigation context.

Batch and bellwether proceedings are often used in tandem but are conceptually distinct. As an aggregative device intended to resolve

158 *See* Eric Boehlert, *Pearl Jam: Taking on Ticketmaster*, ROLLING STONE (Dec. 28, 1995), https://www.rollingstone.com/music/music-news/pearl-jam-taking-on-ticketmaster-67440/ [https://perma.cc/J6RD-RJQW].

159 *See* Mike Scarcella, *Live Nation in Consumer Ticket-Price Lawsuit Loses Bid for 'Mass' Arbitration*, REUTERS (Aug. 11, 2023, 3:23 PM), https://www.reuters.com/legal/litigation/live-nation-consumer-ticket-price-lawsuit-loses-bid-mass-arbitration-2023-08-11/ [https://perma.cc/GTC3-BJQ2].

160 Mike Scarcella, *Live Nation Says Taylor Swift Fans Can't Sue Over Ticket Debacle*, REUTERS (Feb. 27, 2023, 4:29 PM), https://www.reuters.com/legal/live-nation-says-taylor-swift-fans-cant-sue-over-ticket-debacle-2023-02-27/ [https://perma.cc/RGS9-6MCC].

161 Frankel, *supra* note 5.

162 Plaintiffs' Response in Opposition to Defendants' Motion to Compel Arbitration at 1–2, Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939 (C.D. Cal. 2023) (No. CV 22-0047).

163 NEW ERA ADR, https://www.neweraadr.com/ [https://perma.cc/DG5R-MPLY].

164 *Id.*

165 Plaintiffs' Response in Opposition to Defendants' Motion to Compel Arbitration, *supra* note 162, at 1.

166 *See* Frankel, *supra* note 5.

a "deluge of claims,"[167] batching is conceptually similar to the common class action practices of a trial by formula or sampling. The trial by formula is designed "to try a sample of the plaintiffs' cases and then to extrapolate the results of those trials to the group as a whole. As a result, the trial process is greatly shortened, and the entire group receives comparable treatment."[168] Batching happens when "a certain number of legally and factually related demands are filed, [and] those demands are 'batched' into a group for resolution in one proceeding. The 'batch' then gets assigned to an arbitrator or panel of arbitrators, and it triggers a single filing fee."[169] By contrast, bellwether trials in litigation have become the "present darling of trial planning" where parties "choose a limited number of cases and . . . try them to conclusion. The information obtained from those trials can then be used by both sides to assess whether and how to structure a settlement to resolve the remaining cases."[170] But these practices were not created in litigation to advantage either party; rather, they were created out of necessity.[171] Sampling was created because "aggregation would be impossible due to a lack of any realistic trial option" and bellwether trials serve to "avoid[] the outcome-skewing potential of bifurcation."[172] Both presuppose valid claims and seek to provide either more precise calculations or a "day in court" for logistically impractical claims.

Batch and bellwether proceedings are meant to be a bridge to full adjudication, but New Era has turned them into a gate with severe substantive and procedural restrictions. As the Ticketmaster plaintiffs explain in their briefing, antitrust claimants will have to "define the market, demonstrate anticompetitive conduct, [and] prove damages" to meet their burden.[173] Under the New Era rules, the plaintiffs claim that their complaint must be no more than ten pages and supporting evidence must be no more than ten total files, with twenty-five pages per file, and cannot exceed twenty-five megabytes in total storage.[174] Once the pleadings are made, there is no discovery.[175] New Era then appoints a single "neutral" to hear the case.[176] This neutral only accepts briefs that do not exceed 15,000 total characters, or

167 Saks & Blanck, *supra* note 2, at 817.

168 TIDMARSH & TRANGSRUD, *supra* note 15, at 383.

169 Glover, *supra* note 4, at 1367.

170 TIDMARSH & TRANGSRUD, *supra* note 15, at 389.

171 *See id.* at 383–89.

172 *Id.* at 383, 389.

173 Plaintiffs' Response in Opposition to Defendants' Motion to Compel Arbitration, *supra* note 162, at 16.

174 *See id.* at 3–4.

175 *See id.* at 3.

176 *Id.* at 4.

approximately five pages.[177] The parties then proceed with three bellwether claims, and the neutral's decision on those three cases are then applied to and decide "all similar cases" waiting to be adjudicated.[178] If claims are not deemed similar, each subsequent claim is heard by the same neutral on an individual, case-by-case basis.[179] For plaintiffs, this means that "[d]efendants can litigate individual issues seriatim, virtually indefinitely, producing a controlled drip of final decisions to reduce the pressure on [d]efendants."[180] New Era rules also allow for the removal of a neutral for any reason, and the making of any procedural changes "at its discretion and without notice."[181] If Ticketmaster disagrees with the outcome of the bellwether claims, it retains "the choice of leaving New Era" for another institution.[182] But before leaving, Ticketmaster also has the "*unilateral* right to a *de novo* appeal" where plaintiffs "cannot appeal the *denial* of injunctive relief."[183] Judge Wu in the Central District of California recognized that these practices have "stacked the deck" with unconscionable provisions and rejected a motion to move the claims into New Era's tribunal.[184] As of October 2023, the Ninth Circuit has agreed to hear the appeal on an expedited schedule.[185]

New Era's practices are not only extreme in degree, but at their core reject the utility and benefits of traditional bellwether proceedings. Judge Fallon in the Eastern District of Louisiana has tracked the development of bellwether trials during his time on the bench.[186] He recounts that "[i]nitally, courts attempted to use the results of bellwether trials to bind related claimants formally."[187] But "[a]ppellate courts have been skeptical of this practice" and the practice has been redefined to embrace the "ultimate purpose" of "provid[ing] meaningful information and experience to everyone involved in the

177 *See id.*

178 *Id.* at 5, 4–5.

179 *See id.* at 5.

180 *Id.* at 1.

181 *Id.* at 10 (emphasis omitted) (citing Exhibit A to Declaration of Timothy L. O'Mara in Support of Defendants' Motion to Compel Arbitration at 17, Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939 (C.D. Cal. 2023) (No. CV 22-0047), ECF No. 30-4 (New Era Rule § 2(dd))).

182 *Id.* at 5.

183 *Id.* at 4.

184 *Heckman*, 686 F. Supp. 3d at 966, 965–66, 969, *appeal docketed*, No. 23-55770 (9th Cir. argued June 14, 2024).

185 Hillel Aron, *Ticketmaster 'Mass Arbitration' Class Action on Hold Pending Appeal*, COURTHOUSE NEWS SERV. (Oct. 19, 2023), https://www.courthousenews.com/ticketmaster-mass-arbitration-class-action-on-hold-pending-appeal/ [https://perma.cc/CJQ5-6YQJ].

186 Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008).

187 *Id.* at 2331.

litigations."[188] In addition to Judge Fallon's "nonbinding informational purposes" theory,[189] practitioners have explained that parties can "better evaluate claims and defenses related to common issues" and "understand the costs and burdens that will ensue as a result of the litigation."[190] Under this view, bellwethers are best categorized as a test drive that serves two purposes. First, the parties can discern the merits of their case and make critical decisions on evidentiary and witness presentation. Second, the parties can use the bellwether decisions to evaluate the overall likelihood of success and meet at the bargaining table with information instead of speculation. Bellwethers are a procedural tool with a constant eye towards the future, but New Era has turned this on its head by adding a "perpetual bottleneck that will allow [d]efendants to leverage near-indefinite delay to extract a deep settlement discount."[191]

The same can be said for batch proceedings. In a recent mass arbitration with Verizon, the plaintiffs challenged the agreement's unconscionability that had permitted only ten claims at a time and no more than twenty per year.[192] As the American Association for Justice explained in its amicus brief, "[t]he eleventh customer's claim cannot even 'be filed in arbitration until the first ten have been resolved.' The remaining claims can proceed to arbitration only ten at a time."[193] Because the mass arbitration contained 2,721 individual claims, the plaintiffs took the AAA's average resolution time of seven months and calculated that the current system would force the last third of claimants to wait 156 years to be heard.[194] Given that the "three- to four-year statute of limitations" still remains on these claims, "most of Verizon's consumers with claims will simply lose them."[195] And beyond mathematical impossibility, the batching system also places no incentives on the defendant to resolve the disputes. If Verizon starts winning the batches, it can move at rapid speed. But if it loses the early claims, Verizon is "incentivized to holdout and run the clock out on as many claims as it can" because "within just a few years most claims will be

188 *Id.* at 2331–32.

189 *Id.* at 2331 n.27.

190 Brown et al., *supra* note 3, at 669.

191 Plaintiffs' Response in Opposition to Defendants' Motion to Compel Arbitration, *supra* note 162, at 13.

192 Brief of American Ass'n for Justice as *Amicus Curiae* in Support of Plaintiffs-Appellees and Affirmance at 4, 9, MacClelland v. Cellco P'ship, No. 22-16020 (9th Cir. Mar. 24, 2023).

193 *Id.* at 4 (citation omitted) (quoting Excerpts of Record at 38, *MacClelland*, No. 22-16020 (Nov. 21, 2022)).

194 *Id.* at 5.

195 *Id.*

time-barred."[196] In litigation, this practice "doesn't bar plaintiffs from filing their claims and place them at risk of losing their claims under a statute of limitations; it just selects certain cases to be tried first and then imposes no additional time-based limitations on those that follow."[197] But in arbitration, batch proceedings have been designed to avoid global resolution and paying the arbitration fees that defendants had previously fought relentlessly to impose.

## IV. THE SOLUTION: ELASTIC BELLWETHER MODEL

At its core, batch and bellwether proceedings can work in the arbitration context but must remain true to the goals professed in litigation. To do so, courts and legislatures must take proactive steps to ensure that parties are bargaining in good faith. The most effective way to ensure good faith is to eliminate "bottleneck" delay tactics by defendants and "shakedown" arbitration fee generations by plaintiffs.[198] This can be done in two ways: first by making the merits of the early claims dictate the course of future proceedings, and second by allowing for the possibility of a change in venue. While a remarkable amount of academic and political capital has been spent debating litigation versus arbitration, this Note proposes a hybrid approach that embraces the benefits of both forums: the elastic bellwether model. This approach accepts that arbitration will remain a fixture in the multiparty dispute resolution world. Parties should have the right to draft agreements that enter into arbitration. But that right of entry should not guarantee a right to remain in arbitration in perpetuity. If the proceedings are either clearly harming one party or not progressing towards resolution, judicial intervention is warranted to break the stalemate.

Starting with the first element of the elastic bellwether model, parties are incentivized to bring legitimate claims and try those claims to the best of their abilities because the outcome of early claims will dictate future proceedings. This model is elastic because it rejects the idea of a rigid, preconceived procedural framework in favor of a proportionate, dynamic system that adjusts as the claims are resolved. It allows batch and bellwether proceedings at the start of the mass arbitration, and as the claims are decided, the next batch either grows or shrinks depending on the outcome. For example, if it becomes clear from the first batch of claims that a company has injured its consumers, the next batch is increased to include more claims. Then, if the following batches start to reveal a systematic injury, they would continue

196 *Id.* at 9, 11.

197 *Id.* at 10.

198 *See supra* note 5 and accompanying text.

to grow until sizeable enough to predict the outcome of global resolution and with significant enough costs to incentivize the parties to bargain. This would alleviate the problems associated with substantial delay and prevent the possibility of claimants waiting over 150 years to have their "day in court."[199]

But if the tribunal recognizes that a substantial number of claims have no possibility of recovery and were simply filed to increase the arbitration entry fee, the size of the batches should similarly be reduced to allow the defense to benefit from cost-effective measures and incentivize plaintiffs' attorneys to bring only legitimate claims. This would alleviate the problems associated with bringing empty claims for the sake of making arbitration prohibitively expensive. And just as increasing each batch size promotes settlement, decreasing would have the same effect because the parties could use prior results as a barometer for the number of future successful claims, and refine the settlement value based on the tribunal's rulings on key features or characteristics of similarly situated claimants.

Granted, this first element of the elastic bellwether model accepts that early batches and bellwethers will not be preclusive. If early claims were dispositive, there would be no need for increased or decreased batch sizes because the results of the first batch would be applied to subsequent claims. This is what happens in the sampling context, where courts "try a representative sample of cases and then extrapolate those awards to the nonsample cases."[200] Such extrapolation is unlikely to happen in mass arbitration because of the nature of the claims, the nature of the agreements, and recent court decisions in both arbitration and litigation. Sampling is different than batching because sampling does not occur until after the class is certified under Rule 23.[201] This means that prior to sampling, courts have analyzed and confirmed that class members share common questions of law or fact.[202] This commonality analysis is not required in mass arbitration, given the claims are not seeking class treatment or certification, but rather function as a group of distinct, individual claims. And when individual claims have been aggregated but not treated as a class, like in the context of multidistrict litigation, courts have refused to extrapolate earlier results onto later claims.[203]

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199 *See supra* note 194 and accompanying text.

200 *See* Saks & Blanck, *supra* note 2, at 824.

201 *See id.* at 821–23.

202 *See* FED. R. CIV. P. 23(a)(2).

203 *See, e.g.*, Home Depot USA, Inc. v. Lafarge N. Am., Inc., 59 F.4th 55, 61 (3d Cir. 2023) ("The law of the case doctrine cannot be applied across distinct actions in this multidistrict proceeding. Cases centralized in an MDL 'retain their separate identities' unless

Next, even assuming that the parties would agree to make early claims dispositive in an arbitration agreement, courts have expressed significant fairness concerns. As discussed above, New Era ADR gave binding effect to its initial bellwether claims.[204] In *Heckman*, plaintiffs brought a due process challenge to New Era's "Precedent" system on the grounds that it prohibited adequate representation, the opportunity to be heard, and the opportunity to remove the claims.[205] The parties disputed whether the New Era "neutrals" were required to bind subsequent claims or merely had the authority to discretionarily bind.[206] The court maintained that even if New Era's rules did not mandate preclusion "in all instances by the neutral without discretion,"[207] the rules provide "unfettered discretion" and "invite[] the potential for unfairness."[208] This "mechanical process for summarily disposing"[209] of claims without the opportunity to opt out prohibited the opportunity to be heard, "creates a process that poses a serious risk of being fundamentally unfair to claimants," and "evinces elements of substantive unconscionability."[210] Thus, beyond the practical question of whether the parties would actually agree to make batches and bellwethers binding, the structural differences between sampling and batching, coupled with overarching fairness concerns, makes it seem unlikely that early batches can bind subsequent claims.

The first element of the elastic bellwether model operates in a postpreclusion landscape, yet still advances the fundamental goals of efficient, global resolution. Instead of having bellwethers immediately decide future claims, this model either tightens or relaxes the band around each following batch. In doing so, this model removes the opportunity for substantial delay, decides enough claims to accurately determine the cost of global resolution, and generates enough costs to ensure that the parties authentically participate in the proceedings. This model not only protects the fundamental individual right to state a claim, but also vests the critical decisions regarding finality with the parties themselves. The elastic bellwether model would benefit defendants who want to avoid being held hostage by fees, plaintiffs who

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they choose to proceed on a consolidated 'master' complaint." (quoting Gelboim v. Bank of Am. Corp., 574 U.S. 405, 413 (2015))).

204 *See supra* note 178 and accompanying text.

205 *See* Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 959 (C.D. Cal. 2023), *appeal docketed*, No. 23-55770 (9th Cir. argued June 14, 2024).

206 *See id.*

207 *Id.* at 961.

208 *Id.*

209 *Id.*

210 *Id.* at 963.

want equal and consistent bargaining power, and a judicial system that seeks to promote fair and efficient resolution of claims.

The second element of the elastic bellwether model advances a hybridization of litigation and arbitration. Just as the process is elastic because it depends on results, the forum is also elastic because the parties' actions will dictate where the claims will be decided. While parties can provisionally start in arbitration, this model allows judges to move claims back into litigation and under the court's control if it becomes clear that the parties are operating in bad faith or refusing to participate in the proceedings. By making it clear that failure to meet certain standards will result in a transfer back to court, judges can motivate the parties to work together in arbitration. This Damoclean sword will disincentivize delay tactics and other procedural gamesmanship that the parties might try to use when the "referee" is gone. The parties will know that their time away from judicial oversight is potentially limited, and their actions in arbitration are not shielded from eventual scrutiny. This hybridization can be achieved by embracing judicial and legislative developments already discussed in this Note.

Starting with the judiciary, courts have the authority to advance the elastic bellwether model through the effective vindication doctrine.[211] As Professor Thomas Lilly explains, this doctrine can be invoked when claimants are subject to conditions that effectively prohibit or foreclose the opportunity to pursue a statutory claim in arbitration.[212] While *Italian Colors* certainly limited the doctrine's reach, "there are several good reasons to believe that the effective vindication doctrine is still good law."[213] First, the majority in *Italian Colors* suggested that the doctrine could apply in various instances, including when "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable."[214] Second, the doctrine "is logically consistent with the general rule against prospective waivers of federal statutory rights that affect the public interest."[215] Third, the composition of opinions suggests ideological boundaries. Prior to *Italian Colors*, Justices Thomas, Kennedy, and Scalia had indicated a desire to revisit the doctrine's validity, but in *Italian Colors* Justice Thomas was alone in his concurrence that the effective vindication

211 *See supra* notes 104–14 and accompanying text.

212 Thomas J. Lilly, Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine after* American Express v. Italian Colors Restaurant*?*, 61 WAYNE L. REV. 301, 303 (2016).

213 *Id.* at 320.

214 *Id.* at 319 (quoting Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013)).

215 *Id.* at 320.

doctrine could not be used to invalidate an arbitration agreement.[216] Finally, in the years following *Italian Colors*, the composition of the Court has changed, and many Justices have yet to take a position on the effective vindication doctrine. Professor Lilly believes that these Justices could be persuaded by both the pre–*Italian Colors* lower court decisions that had "uniformly accepted the effective vindication doctrine as good law," and the post–*Italian Colors* lower court decisions that have refused "to wholly abandon the effective vindication doctrine."[217]

Moreover, the effective vindication doctrine does not merely contemplate costs, but also time. As Professor Lilly explains, "it seems likely that the effective vindication doctrine will continue to apply to arbitration agreements that unreasonably shorten the limitations period for a federal statutory claim."[218] This is based on both the general, well-established precedent against shortening limitation periods in litigation,[219] and the application of that doctrine for arbitration agreements.[220] Courts have invalidated arbitration agreements that provide an unreasonably short window to bring a claim, recognizing that it prevents "the plaintiff from obtaining 'meaningful relief.'"[221] By similar logic, claimants can be denied the opportunity for meaningful relief when a claim takes decades, and potentially centuries, to process.[222] The doctrine can be invoked if, for example, the parties refuse to participate or move at a pace that is intentionally slower than litigation. Through the hybridization of litigation and arbitration, the elastic bellwether model would remedy substantial issues plaguing multiparty dispute resolution, and judges have the tools to set this model in motion.

Hybridization can also be achieved with legislative action similar to California's SB 707. Such legislation supports the hybrid relationship between litigation and arbitration by providing the opportunity to bring claims back to court once the drafting party fails to pay its arbitration fees.[223] As discussed earlier, systematic legislative reform is unlikely to happen at the federal level.[224] But this does not foreclose the opportunity for state governments to "serve as . . . laborator[ies]; and try novel social and economic experiments without risk to the rest of

216 *Id.* at 321.

217 *Id.* at 322–23.

218 *Id.* at 336.

219 *See id.* at 336 & n.284.

220 *See id.* at 336 & n.285.

221 *Id.* at 336 (quoting *In re* Managed Care Litig., 132 F. Supp. 2d. 989, 1000 (S.D. Fla. 2000), *aff'd sub nom. In re* Humana Inc. Managed Care Litig., 285 F.3d 971 (11th Cir. 2002), *rev'd sub nom.* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401 (2003)).

222 *See supra* note 194 and accompanying text.

223 *See supra* notes 150–52 and accompanying text.

224 *See supra* notes 82–84 and accompanying text.

the country."[225] The FAA's preemptive force has recently been underscored by the Ninth Circuit's invalidation of a different California state law barring the formation of arbitration agreements as a condition of employment.[226] This state law was preempted because it "discriminate[d] against arbitration by discouraging or prohibiting the formation of an arbitration agreement."[227] But laws like SB 707 are distinguishable because they promote, instead of discourage, fair and efficient arbitral conditions. As the dissent recognizes, the FAA professes clear goals of "mak[ing] the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him."[228] State laws that hoist spurious parties by their own petards encourage resolution through arbitration and avoid the reach of the FAA.[229] Thus, state legislatures have an unobstructed opportunity to make the "day in court" ideal a reality.

However, SB 707 has given some practitioners pause and these concerns are warranted.[230] First, the bill vests removal authority with the parties instead of judges.[231] Second, the thirty-day provision could be exploited by entrepreneurial attorneys looking to bury defendants with empty claims to get back into court. The solution is to modify bills like SB 707 and add an intermediary step—increased batch sizes—before the last resort of returning to court. For example, the claims should stay in arbitration after the first thirty days of failing to pay, but the defendant should be penalized for its inaction. If another thirty days pass and the defendant is still delaying the proceedings, claims should be batched with a large enough band to pressure the defendant to act.[232] Only after another thirty days of inaction should the plaintiffs be allowed to petition the court to transfer the claims. This structure would facilitate settlements, punish bad actors, and embrace expedited practices without immediate opportunities for gamesmanship. State

225 Gonzales v. Raich, 541 U.S. 1, 42 (2005) (O'Connor., J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

226 *See* Chamber of Com. v. Bonta, 62 F.4th 473, 478 (9th Cir. 2023).

227 *Id.* at 486.

228 *Id.* at 493 (Lucero, J., dissenting) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

229 *See supra* note 145 and accompanying text.

230 *See* Daniel Jones, Archis Parasharami & Andrew Pincus, *Ninth Circuit Signals States Can't Skirt Federal Arbitration Law*, BLOOMBERG L. (Mar. 14, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/ninth-circuit-signals-states-cant-skirt-federal-arbitration-law [https://perma.cc/3CFG-AZZZ] ("But courts have thus far declined to hold that SB707 is preempted by the FAA—erroneously in our view.").

231 *See supra* note 146 and accompanying text.

232 Ideally, state legislatures would consult with statisticians to determine an appropriate range of percentages for each batch and the allow the arbitral institution to select the value from that range.

legislatures cannot overrule the FAA, but they can hold both parties accountable to its professed goals of fair, timely proceedings.

## CONCLUSION

The latest episode of the cat-and-mouse dispute resolution game has featured mass arbitration. Though not dead, Rule 23 has certainly been left beleaguered by public and private institutions succeeding in developing a more restrictive body of legislation and court decisions. Its successor, individual arbitration, has been protected in court and left virtually untouchable by tribunals, state law, and federal law. But the force of Rule 23 has returned with the mass arbitration revolution. By playing within the system its adversaries have created, the plaintiffs' bar has been able to use arbitration agreements to bring defendants back to the bargaining table by generating extraordinary entry fees. This revolution has been supported by courts and state legislatures who have previously expressed interest in holding defendants accountable and balancing the bargaining power.

In response to mass arbitration, a motivated defense bar has again started to reshuffle the deck by repurposing the litigation techniques of batch and bellwether proceedings. Courts have recently expressed severe reservations about how current batch and bellwether proceedings are being implemented, but this Note has proposed a solution that could finally end the back-and-forth by providing an efficient system for plaintiffs, defendants, and the public. The elastic bellwether model allows for defendants to slowly ease into the mass arbitration with an initial batch of test claims, but penalizes "bottlenecks" or "shakedowns" by adjusting the size of subsequent batches with the transfer to court looming over the parties.[233] Judges can use the effective vindication doctrine to make this model a reality, and legislatures can buttress this system by enacting laws that hybridize litigation and arbitration.

233 *See supra* note 5 and accompanying text.