ALL ALONE IN ARBITRATION

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INTRODUCTION

To put it mildly, the relationship between the Federal Arbitration Act (FAA)[1] and class actions is controversial. Since 2010, the U.S. Supreme Court has decided a rash of cases that make it impossible for the millions of consumers and employees who are subject to forced arbitration clauses[2] to aggregate claims. Opinions such as *AT&T Mobility LLC v. Concepcion* have made class arbitration waivers bulletproof.[3] Likewise, in *Lamps Plus, Inc. v. Varela*, the Court prohibited judges and arbitrators from interpreting an arbitration provision that does not expressly authorize class arbitration to permit such proceedings.[4] Dozens of policymakers, lower courts, journalists, interest groups, and academics have objected that placing the onus on individuals to arbitrate their own small dollar complaints functions as a "'[g]et out of jail free' card" for corporate liability.[5]

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1. Federal Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (2020)).

2. *See, e.g.*, Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 5 (Sep. 27, 2017), https://files.epi.org/pdf/135056.pdf [https://perma.cc/A8VG-RQWU] (estimating that "60.1 million American workers who are now subject to mandatory employment arbitration procedures"); Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 238 (2019) (finding that "eighty-one companies in the Fortune 100, including subsidiaries or related affiliates, have used arbitration agreements in connection with consumer transactions").

3. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (holding that judges cannot find class arbitration waivers to be unconscionable); Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 238–39 (2013) (extending *Concepcion* to alleged violations of federal law); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (determining that the FAA preempts a California appellate court's conclusion that a class arbitration waiver did not apply to a specific dispute); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018) ("In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings.").

4. *See, e.g.*, Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."); *see also* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (overriding an arbitral panel's determination that an arbitration clause that was "silent" about class arbitration authorized such procedures).

5. Avery Anapol, *"Monopoly Man" Crashes Former Equifax CEO's Senate Hearing*, THE HILL, 2017 WL 4408876 (Oct. 24, 2017); CellInfo, LLC v. Am. Tower Corp., No. CV 18-11250-WGY, 2020 WL 7024651, at *2 (D. Mass. Nov. 30, 2020) ("it apparently makes no difference to the Supreme Court majority that . . . customers complaining about alleged telephone overcharges cannot, as a practical matter, afford to pursue their claims unless they can pursue a class action"); Aaron Blumenthal, Comment, *Circumventing Concepcion: Conceptualizing Innovative*

Nevertheless, Professor Hila Keren's *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution* manages to say something new about the "arbitration revolution."[6] This invited response to her article has two goals. First, this Response will discuss why I admire her piece while also flagging one constructive criticism. Second, this Response will use her analysis as the springboard to discuss the budding phenomenon of mass arbitration.

I. ALONE IN ARBITRATION

Professor Keren's paper makes two contributions to the debate over the Court's FAA jurisprudence. First, the Article steps back and situates these opinions with a larger context. The Article argues that the Justices' use of arbitration as a sledgehammer reflects the rise of neoliberalism: a shadowy free market ideology championed by the Federalist Society and funded by Koch Industries.[7] Specifically, Professor Keren argues that neoliberalism abhors "collectivity" and therefore goes to great lengths to "delegitimize[] coming together in response to being wronged."[8] Thus, Professor Keren describes the arbitration revolution as a front in the same war that has allowed corporations to "dominate campaign finance, hold First Amendment rights, [and] break up unions."[9]

Second, in my favorite part of the article, Professor Keren documents the real-world consequences of destroying the class mechanism. Professor Keren explains that citizens experience "a general 'sense of empowerment' that comes from the involvement in class actions."[10] In addition, class participants often describe being motivated by the wish to

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Strategies to Ensure the Enforcement of Consumer Protection Laws in the Age of the Inviolable Class Action Waiver, 103 CAL. L. REV. 699, 703 (2015); Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 166 (2015); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1221–22 (2013); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 267 (2015); Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 133 (2011); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, (Oct. 31, 2015) https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/BL6L-AE8K].

6. Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 579 (2020).

7. *See id.* at 603–16.

8. *Id.* at 601.

9. *Id.* at 582.

10. *Id.* at 623–24 (quoting Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 84 (2011)).

serve the common good.[11] But by preventing plaintiffs from banding together, forced arbitration "leaves people isolated from their peers and abandoned by the state."[12] By collecting testimonials of individuals who are "[a]ll alone" in arbitration, Professor Keren puts a human face on a problem that can seem bloodless and abstract.[13]

Of course, I would be abdicating my role as a reviewer if I did not flag at least one way that I think the article could have been better.[14] To cement the link between neoliberalism and the FAA, Professor Keren argues that the Court's conservative bloc "has not been driven by the often declared 'liberal federal policy favoring arbitration,' but by a premeditated anti-collective approach."[15] Yet to support this assertion, she analyzes opinions from the last decade.[16] If she had taken a broader view, she would have found even stronger evidence that the class action tail is wagging the arbitration dog.

When the Court first expanded the FAA in the late twentieth century, it did so over the furious *objections* of its right wing. Most scholars believe that Congress intended the statute to be a federal procedural rule that governed in federal court.[17] But in 1984, with the thinly reasoned

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11. *See id.* at 625.

12. *Id.* at 582.

13. *Id.* at 617. Professor Keren also examines online consumer complaints, which "frequently express a strong belief that . . . *collective* action is the exclusive coping mechanism and the only way to fight the paralyzing effect of powerlessness." *Id.* at 628.

14. In addition to the quibble I mention in the body text, I should also mention that I was not persuaded by Professor Keren's framing mechanism. She criticizes existing arbitration scholarship (including my own) for being "pessimistic[]" about the possibility of Congress overturning the Court's handiwork and thus "accept[ing] the revolution as a *fait accompli*." *Id.* at 580. Conversely, she presents her insights as a galvanizing call to arms that "forge[s] a new path to reform." *Id.* At the risk of seeming defensive, I find it hard to believe that the pro-business Republicans who blocked the Forced Arbitration Injustice Repeal (FAIR) Act, the Arbitration Fairness Act (AFA), and the Consumer Financial Protection Bureau's (CFPB) class arbitration ban will be swayed by the "long-term emotional and social consequences" that Professor Keren identifies. *Id.* at 580-81; *see also* Levi Sumagaysay, *FAIR Act is Being Revived in Washington, Raising Hopes for End to Forced Arbitration*, MARKETWATCH (Feb. 11, 2021), https://www.marketwatch.com/story/reintroducing-the-fair-act-bill-would-end-forced-arbitration-11613057369 [https://perma.cc/88Q2-G3HD] (discussing the FAIR Act, which passed the House in 2019 but stalled in the Senate); Alexia Fernández Campbell, *The House Just Passed a Bill that Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act [https://perma.cc/7JJJ-B4V7] (explaining that when Democrats introduced the AFA in 2018, "they were unable to get even one Republican to co-sponsor the bill in the Senate or House"); Act of Nov. 1, 2017, Pub. L. No. 115–74, 131 Stat. 1243 (repealing the CFPB's class arbitration ban).

15. Keren, *supra* note 6, at 581 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)).

16. *See id.* at 589–600.

17. *See, e.g.*, IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 83–147 (1992); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration*

Southland v. Keating, the Court held that the FAA embodied federal substantive law that applied in state court and preempted conflicting state law.[18] This maneuver did not sit well with the Court's federalists. Indeed, former Justice Sandra Day O'Connor wrote a forceful dissent, which former Justice William Rehnquist joined.[19] This conservative resistance to the FAA gained steam as the Court added former Justice Antonin Scalia in 1986 and Justice Clarence Thomas in 1991.[20] Then in 1995, in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, the Court rejected a request in an *amicus* brief filed by twenty state attorneys general to overrule *Southland*.[21] Justice Scalia dissented, calling *Southland* "a permanent, unauthorized eviction of state-court power," and declaring that he stood "ready to join four other Justices in overruling it."[22] Justice Thomas went even further, not only authoring a long dissent in *Allied-Bruce*, [23] but continuing to dissent from any case that invoked the FAA in state court.[24]

However, in the 2000s, companies began to rely on forced arbitration to deter class actions,[25] and Justices Scalia and Thomas suddenly saw the genius of the FAA. In *AT&T Mobility LLC v. Concepcion*, a wireless service provider asked the Court to hold that the FAA preempted a California Supreme Court opinion that deemed most class arbitration waivers in consumer contracts to be unconscionable.[26] For Justices Scalia and Thomas, this should have been an easy case. If *Southland* was wrongly decided, then using it to eviscerate a state high court's interpretation of its own contract law should have been grotesque. Nevertheless, the Court held 5–4 that the FAA eclipsed the California

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Act, 67 LAW & CONTEMP. PROBS. 5, 23–26 (2004). *But see* Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105 (2002) (conceding that *Southland*'s reasoning is weak but arguing that its outcome is correct).

18. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

19. *See id.* at 21-36 (O'Connor, J., dissenting).

20. *See* Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 WASH. L. REV. 967, 992 n.147 (2019) (listing appointment dates of various Justices).

21. *See* Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272 (1995).

22. *Id.* at 284–85 (1995) (Scalia, J., dissenting).

23. *See id.* at 285–297 (Thomas, J., dissenting).

24. *See, e.g.*, Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1429 (2017) (Thomas, J., dissenting); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 59 (2015) (Thomas, J., dissenting); Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); Doctor's Assocs. v. Casarotto, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting).

25. Professor Keren does a nice job summarizing these developments. *See* Keren, *supra* note 6, at 585–600. For the classic account, *see generally* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005) (offering "a dismal prediction of the near-total demise of the modem class action").

26. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340–41 (2011).

rule, with Justice Scalia writing for the majority and Justice Thomas both joining that decision and authoring a separate concurrence.[27] Both opinions are tour de forces of results oriented reasoning.[28] By omitting this backstory, Professor Keren misses an opportunity to highlight how conservatives *resisted* the FAA's displacement of state law until they recognized its class action killing potential.[29]

II. THE RISE OF MASS ARBITRATION

By focusing on the toll of being forced to arbitrate alone, Professor Keren offers a fresh perspective on the Court's class arbitration cases. However, one of the most intriguing trends in consumer and employment arbitration is the opposite of what she describes. Recently, plaintiffs' lawyers have begun filing scores of individual arbitrations against the same company.[30] This Part briefly explains how states, which have long been powerless in this sphere, can help facilitate these mass arbitrations.[31]

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27. *See id.* at 351─52; *id.* at 352 (Thomas, J., concurring).

28. Because I and many others have already critiqued *Concepcion*, I will not belabor the point. *See supra* text accompanying note 5. For explanations of why Justice Thomas's concurrence is borderline nonsensical, *see* Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 BERKELEY J. EMP. & LAB. L. 153, 172 n.103 (2014); David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 399─408 (2012).

29. To be fair, Justice Thomas's string of "the FAA does not apply in state court" dissents included one that involved class arbitration. *See DIRECTV*, 577 U.S. at 59 (Thomas, J., dissenting). But then again, his vote was not necessary for the Justices to reach an anti-class action result, so he lost nothing by sticking to his guns. Moreover, in *Lamps Plus, Inc. v. Varela*, when Thomas's vote *was* decisive, he conveniently abandoned his long-held "skeptic[ism] of th[e] Court's implied pre-emption precedents." *compare* 139 S. Ct. 1407, 1420 (2019) (Thomas, J., concurring), *with id.* at 1435 (Kagan, J., dissenting) ("Given this extraordinary displacement of state law[,] . . . I must admit to not understanding Justice Thomas's full concurrence in today's opinion.").

30. I recently discussed the mass arbitration phenomenon in David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 672─77 (2020). For empirical evidence of mass arbitrations, *see* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L .J. 57, 93 (2015) (examining data from the American Arbitration Association and finding that, in October 2012, a single law firm initiated 1,094 separate cases against AT&T Mobility LLC); Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 55 (2019) (surveying updated AAA records and discovering that another firm sued Macy's 1,354 times); Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 628 (2020) ("some law firms have become 'aggregators' by bundling claims"). For a prescient early suggestion that "lawyers might build practices around handling large volumes of relatively low-value claims" in arbitration, *see* W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 102 (2007).

31. Professor Keren mentions the mass arbitration phenomenon in passing, touting it as evidence "that people feel a need to band together and will make much effort to act in concert against injustice." Keren, *supra* note 6, at 627. As will become apparent, I am not sure I agree.

Mass arbitrations are the ultimate Judo move. They transform corporate efforts to individualize arbitration "into a weapon for [consumers and] workers."[32] The plaintiffs' firms that have launched these cases—in particular, Chicago's Keller Lenkner—exploit the fact that major arbitration providers, such as the American Arbitration Association (AAA) and JAMS, require defendants to pay a deposit of about $1,500 per matter.[33] These fees add up in mass filings. For example, when Keller Lenkner brought 6,000 standalone arbitrations alleging that DoorDash had misclassified its workers as independent contractors, the AAA presented the business with an initial bill of $9,000,000.[34] Thus, defendants face pressure to settle mass arbitrations simply "to avoid the administrative costs."[35]

Companies facing mass arbitrations have also found their own loophole. Some have refused to pay the AAA or JAMS fees, which causes the institutions to terminate the cases.[36] In turn, this plunges the cases into unsettled terrain. The majority rule is that a defendant that refuses to

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Mass arbitrations seem to be driven by enterprising plaintiffs' *lawyers* more than individuals who feel aggrieved.

32. Alison Frankel, *After Postmates Again Balks at Arbitration Fees, Workers Seek Contempt Order*, REUTERS (Dec. 2, 2019), https://www.reuters.com/article/legal-us-otc-massarb/after-postmates-again-balks-at-arbitration-fees-workers-seek-contempt-order-idUSKBN1Y62E8 [https://perma.cc/ZMN5-P7CS] [hereinafter Frankel, *Postmates*].

33. *See* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 56(a) (2016), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/6EWK-WPMF]; JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES R31(b), https://www.jamsadr.com/rules-comprehensive-arbitration [https://perma.cc/C3J7-DRSB]; Frankel, *Postmates*, *supra* note 32; Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, REUTERS (Jan. 16, 2019), 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/ZZ6E-CKD4].

34. *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/Y9FW-RND8].

35. Respondent DoorDash, Inc's Opposition to Motion for Temporary Restraining Order at 2-3, Abernathy v. DoorDash, Inc., No. 3:19-cv-07545-WHA (N.D. Cal. Nov. 22, 2019). Or as one plaintiffs' lawyer puts it, a corporation must "pay[] huge sums of money for essentially the right to have a hearing to litigate whether they owe a much, much smaller amount than they've paid just to get there." David E. Gottlieb et al., *Mass Arbitrations: Challenges, Benefits, and Proposals for Improvement,* THE FEDERALIST SOC.(Sep. 22, 2020), https://fedsoc.org/events/mass-arbitrations-challenges-benefits-and-proposals-for-improvement#:~:text=Employee%2Dside%20class%20action%20attorneys,of%20individual%20arbitrations%20filed%20simultaneously [https://perma.cc/3F2R-S2L8] (statement of David E. Gottlieb).

36. *See* Adams v. Postmates, Inc., 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020); Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

participate in arbitration either materially breaches the arbitration clause[37] or waives its right to arbitration.[38] Yet the remedy for these transgressions is to allow the plaintiffs to refile their claims in court.[39] In the mass arbitration context, this destroys the plaintiffs' settlement leverage.

This is where states come in. Although the scope of FAA preemption is notoriously hazy, the statute arguably does not override state laws that seek "to *encourage* resort to the arbitral process."[40] As a result, state lawmakers enjoy the freedom to penalize defendants that blanch at paying the costs required by their own dispute resolution schemes. For instance, in 2020, California passed Code of Civil Procedure sections 1281.97 through 1281.99, which empower consumers and employees to obtain sanctions against companies that refuse to pay arbitration expenses within thirty days of their due date.[41] In January 2021, a federal court held that the FAA did not override this rubric because it is "pro-arbitration."[42] Indeed, rather than invalidating an arbitration agreement, the state law merely "expand[s] the remedies available to parties seeking to enforce their rights through arbitration."[43] Thus, other states can follow California's lead and try to create incentives for plaintiffs to arbitrate en masse.

CONCLUSION

Professor Keren's article reinforces the need for policymakers "to reverse the [arbitration] revolution and give people back their freedom to act collectively."[44] Thanks to work like hers, the Democratically controlled Congress is already considering proposals to amend the FAA.[45] But if these bills fail, states should step in and try to facilitate

37. *See* Brown v. Dillard's, Inc., 430 F.3d 1004, 1012 (9th Cir. 2005); Nadeau v. Equity Residential Properties Mgmt. Corp., 251 F. Supp. 3d 637, 641 (S.D.N.Y. 2017).

38. *See* Cinel v. Barna, 142 Cal. Rptr. 3d 329, 334 (Ct. App. 2012); Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828, 838 (Miss. 2003). *But see* Fogal v. Stature Const., Inc., 294 S.W.3d 708, 718 (Tex. App. 2009) (holding that waiver means "attempt[ing] to 'have it both ways by switching between litigation and arbitration,'" and that merely failing to pay fees does not meet this test) (quoting Perry Homes v. Cull, 258 S.W.3d 580, 597 (Tex. 2008)).

39. *See* Roach v. BM Motoring, LLC, 155 A.3d 985, 995 (N.J. 2017).

40. Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (emphasis added).

41. *See* CAL. CIV. PROC. CODE §§ 1281.97-1281.99 (West 2021).

42. Postmates Inc. v. 10,356 Individuals, No. CV202783PSGJEMX, 2021 WL 540155, at *8 (C.D. Cal. Jan. 19, 2021).

43. *Id.*

44. Keren, *supra* note 6, at 638.

45. *See* Jill Gross, *Anti-Mandatory Arbitration Bills Introduced in Congress*, INDISPUTABLY (Feb. 19, 2021), http://indisputably.org/2021/02/anti-mandatory-arbitration-bills-introduced-in-congress/ [https://perma.cc/3RT7-QV7D] (observing that representatives have already introduced

mass arbitrations. Doing so would strike a blow against "[t]he isolation and resignation intentionally engendered by neoliberals and the corporations they promote."[46]

bills to amend the FAA and "[i]t will be interesting to see whether the currently Democratically-controlled Senate and House can agree on an FAA fix").

46. Keren, *supra* note 6, at 583.