No. 24-1145

In the Supreme Court of the United States

LIVE NATION ENTERTAINMENT, INC., ET AL.,
Petitioners,

v.

SKOT HECKMAN, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE DRI CENTER FOR LAW AND PUBLIC POLICY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The DRI Center for Law and Public Policy is the public policy arm of DRI—an international organization of approximately 16,000 civil defense attorneys and in-house counsel. DRI's mission includes promoting fairness, consistency, and predictability in the civil justice system and anticipating and addressing substantive and procedural issues in its quest to fulfill that mission. The Center regularly participates as amicus curiae in cases that affect the civil defense bar and the business community, including cases involving the Federal Arbitration Act (FAA).[2]

The FAA should receive uniform application across federal circuits. This ensures arbitration achieves its basic purpose of enforcing arbitration agreements and resolving disputes efficiently, predictably, and at minimal cost. The Center submits this brief in support of Petitioners, arguing that the Court should grant certiorari to restore FAA's primacy over modern arbitration procedures.

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[1] Petitioners' and Respondents' counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. This brief was authored by amicus curiae and its counsel listed on the front cover and was not authored in whole or in part by counsel for a party. No one other than amicus curiae, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief.

[2] See https://www.centerforlawandpublicpolicy.org/center.

SUMMARY OF ARGUMENT

Congress enacted the Federal Arbitration Act to ensure that private agreements to arbitrate are enforced according to their terms. Courts must treat arbitration agreements as "valid, irrevocable, and enforceable." Congress has never altered that purpose—the FAA's establishment of a liberal federal policy favoring arbitration agreements has endured for almost a century. Neither has Congress disturbed the broad scope of "arbitration" as used in the Act. In fact, Congress has chosen to leave the term undefined, despite amending the Act several times since 1925. Firmly established in the Court's FAA jurisprudence, then, are core principles that courts must apply when interpreting an arbitration agreement according to the FAA's central purpose.

One of those core principles requires courts to respect and enforce the parties' chosen arbitration procedures. Here, the parties agreed to arbitration procedures tailored for mass arbitration—the tactic of filing hundreds or thousands of near-identical arbitration claims against a single defendant to coerce a settlement under the weight of immense filing fees. The procedures including the batching of claims, bellwether arbitrations that would serve as precedent, and intermittent mediations to reach a global settlement. The Ninth Circuit's holding that the FAA does not apply to the parties' agreement because the Act protects only traditional, bilateral arbitrations, violates the Court's core interpretative principles and upends federal arbitration proceedings.

The Ninth Circuit also misconstrued statements in several of the Court's precedents that Congress had only bilateral arbitration in mind when it enacted the FAA because mass arbitrations did not exist in 1925. But by 1925,

aggregate and representative litigation had been a part of federal jurisprudence for 105 years. After the advent of formal class actions and aggregate litigation and then several years ago mass arbitrations, Congress chose not to define protected "arbitration" (for the first time) as bilateral arbitration, or as categorically excluding all other types of arbitration. The meaning of the term is as broad and open as it was a century ago.

But mass arbitration is not class or aggregate arbitration; rather, it consists of myriad singular arbitration demands simultaneously filed against one defendant. It is economically irresponsible, if not impossible, to conduct individual arbitration for each demand. Resolution of colossal numbers of near-identical demands is comparable to the resolution of suits that are transferred to MDL courts. MDL litigation involves batching of suits and bellwether trials, which often lead to global settlements, which is, after all, precisely the goal of attorneys who file mass arbitration claims.

The Ninth Circuit's dismissal of the MDL model and its remarkable success marginalizes the necessary balance between the informality of bilateral arbitration and its twin goal of expedient resolution of claims through arbitration—in whatever form that fulfills the purpose of the FAA. The court's rejection of all arbitration procedures involving any type of arbitration other than bilateral arbitration undermines the fairness and efficiency that the arbitration process was always designed to create.

Mass arbitration filings continue to proliferate. They comprise over 75% of the arbitrations conducted by the nation's two largest arbitration providers. A solution for efficiently resolving them is therefore imperative. The Ninth Circuit's "solution" was to expel mass arbitration

procedures from the FAA's protection, which is no solution at all. Parties, courts, arbitration providers, and arbitrators need guidance in adjudicating mass arbitrations in a manner that is consistent with—and honors—the enduring purpose for which Congress enacted the FAA so many years ago.

The Court should grant certiorari because the Ninth Circuit's holding contravenes the FAA's central purpose, contradicts the Court's FAA jurisprudence, and ignores the terms and provisions of the parties' arbitration agreement.

ARGUMENT

THE COURT SHOULD GRANT CERTIORARI TO REAFFIRM THE FAA'S PRIMACY OVER MODERN ARBITRATION PROCEDURES

I. Courts are required to interpret the FAA broadly to satisfy its overarching purpose—to enforce arbitration agreements.

In response to the perceived hostility courts held against arbitration a century ago, Congress enacted in 1925 what would be later renamed the Federal Arbitration Act (FAA) for an express, unambiguous purpose: courts must "treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018) (quoting 9 U.S.C. § 2). Based on the language throughout the FAA,[3] the Court has consistently stated that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quoting *Volt Info. Sciences., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 498 U.S. 468, 479 (1989), and citing 9 U.S.C. § 4 (remaining citation omitted)). And parties are "generally free to structure their arbitration agreements as they see fit." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

In accordance with the FAA's purpose, the Court has established fundamental principles that courts must

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[3] See, e.g., 9 U.S.C. § 4 (If "the making of the agreement for arbitration is not in issue," the court must order "the parties to proceed to arbitration *in accordance with the terms of the agreement*." (emphasis added)).

consider and apply when examining any arbitration agreement under the FAA, including:

- The FAA "establishes a liberal federal policy favoring arbitration agreements."[4]
- Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations."[5]
- Courts are required "to respect and enforce the parties' chosen arbitration *procedures*."[6]
- "It is appropriate to presume that parties that enter into an arbitration agreement *implicitly authorize the arbitrator to adopt such procedures* as are necessary to give effect to the parties' agreement."[7]
- Courts are required to "'rigorously'…enforce terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted."[8]

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[4] *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018) (citations omitted).

[5] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citations omitted).

[6] *Epic* Sys., 584 U.S. at 506 (emphasis added).

[7] *Stolt-Nielsen*, 559 U.S. at 684-85.

[8] *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013), *quoted in Epic Systems*, 584 U.S. at 506 (emphasis added by the Court).

In holding that the *only* type of arbitration that enjoys FAA protection is a traditional, bilateral arbitration, the Ninth Circuit ignored virtually every bedrock principle it was required to apply to the parties' arbitration agreement. Pet. App. 30a-31a (the FAA protects only bilateral arbitration; it does not protect "aggregative arbitration"). Stated another way, the Ninth Circuit has determined that the FAA *categorically* excludes all forms of arbitration from the Act's protection except bilateral arbitration. Therefore, even if the Ninth Circuit had *not* found the parties' arbitration agreement unconscionable, it still would have held that it falls outside the FAA's protection, *as a matter of law*, merely because the agreed-to procedures are tailored to address the resolution of hundreds or thousands of simultaneously filed arbitration claims against Petitioners. *See* Pet. App. 31a ("Even though some 'parties may and sometimes do agree to aggregation' of arbitration claims, the Supreme Court has emphasized that such parties would not be agreeing to 'arbitration as envisioned by the FAA.'" (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011)).

Certiorari is warranted because the Ninth Circuit's holding contravenes the FAA's primary purpose of enforcing the terms of parties' arbitration agreements, including the rules under which an arbitration will be conducted all while professing to promote the FAA's goal of providing a fair and efficient alternative to bilateral judicial litigation.

II. The Ninth Circuit created confusion in FAA jurisprudence when it misinterpreted the Court's criticisms of class arbitration as pronouncing a bright-line rule for what is and isn't FAA-protected arbitration—regardless of the terms of the parties' agreement.

The Ninth Circuit misconstrued certain statements by the Court in *Concepcion*, *Viking Travel*, and other cases in which the Court is critical of class arbitration as constituting a holding of the Court that the FAA applies only to bilateral arbitration. *See* Pet. App. 30a-31a (quoting *Viking River Cruises v. Moriana*, 596 U.S. 639, 656-57 (2022); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184-85 (2019); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508-09 (2018); *Concepcion*, 563 U.S. at 348-51. But the Court never made that holding in these opinions, or elsewhere. Rather, the Court's statements were made in contexts that did not require it to sanction a specific definition of "arbitration" as used in the FAA. Yet the Ninth Circuit remarkably ignores those important contexts to put words in the Court's proverbial mouth to its own narrow application of the FAA. For example, the Ninth Circuit ignored that the Court in *Lamps Plus* held that the FAA preempted an order requiring class arbitration when the parties' agreement was ambiguous as to whether it permitted class arbitration. *Lamps Plus*, 587 U.S. at 183; *see also Stolt-Neilsen*, 559 U.S. at 684 (the FAA preempted the arbitrator's ruling that the arbitration agreement authorized class arbitration when the agreement was "silent" on the matter; there was no evidence the parties had agreed to class arbitration).

Equally, in *Concepcion*, the Court the court did not rule that class arbitration is inherently inconsistent with the FAA. Rather, the Court held that the FAA

preempted California's *Discover Bank* rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. 563 U.S. at 352. As in *Stolt-Nielsen*, the issue was whether the parties had *consented* to arbitration: "class arbitration, to the extent it is manufactured by D*iscover Bank* rather than consensual, is inconsistent with the FAA." *Id.* at 348. It was the *California rule of law* that "condition[ed] the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" [9] that was inconsistent with the FAA. *See id.* at 346. The same is true in *Viking Travel* where the issue was whether the FAA preempted a California rule "that invalidates contractual waivers of the right to assert representative claims under California's Labor Code Private Attorneys General Act." 596 U.S. at 643.

Finally, the issue in *Epic Systems* was whether the FAA preempts the National Labor Relations Act's (NLRA) guarantee to workers the right to engage in concerted actions for collective bargaining or whether the NLRA nullifies the employment arbitration agreements that expressly excluded class or collective actions. 584 U.S. at 505-07. The Court's holding that the FAA preempts the NRLA and protects employment arbitration agreements that expressly exclude class or collective actions was based on the FAA's requirement *that courts enforce arbitration agreements according to their terms*. *Id.* at 525.[10]

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[9] "Classwide arbitration" and "class arbitration" are synonymous. Black's Law Dictionary, *Arbitration* (12th ed. 2024) (Westlaw).

[10] The Court also held that the FAA's saving clause in § 2 did not provide a basis for refusing enforcement of arbitration agreements waiving collective action procedures for claims under the Fair Labor Standards Act and state law. *Epic Sys.*, 584 at 509-10.

By selecting certain statements in several of the Court's decisions to cobble together a non-existent precedent from the Court, the Ninth Circuit critically ignores that the Court has acknowledged that a party may be compelled under the FAA to submit to class action if "there is a contractual basis for concluding that the party agreed to do so." *Stolt-Neilsen*, 559 U.S. at 684. Again, a fundamental principle undergirding the Court's FAA jurisprudence is that "arbitration is a matter of consent." *Id.*

Certiorari is warranted to eliminate the confusion in the Court's FAA jurisprudence created by the Ninth Circuit's opinion. The opinion creates a caveat to the well-established, FAA-mandated principle that courts are required "to respect and enforce the parties' chosen arbitration *procedures*"—but only if those procedures facilitate a *bilateral* arbitration. *See Epic Systems*, 584 U.S. at 506 (emphasis by the Court) (quotation marks and citation omitted). That caveat conflicts with the very purpose of the FAA—to ensure that private agreements to arbitrate are enforced according to their terms. Contracting parties, litigants, courts, arbitration providers, and arbitrators alike will benefit from the Court's clarification of its statements in the decisions on which the Ninth Circuit relies and the Court's confirmation that the FAA applies to all types of arbitrations (unless expressly excluded by Congress).

III. If Congress intended to exclude certain types of arbitration procedures or types of claims that can be arbitrated from FAA protection, it would have expressly done so.

A. Congress chose not to define "arbitration" when enacting the FAA and has chosen not to define the term in multiple amendments to the Act.

Although Congress may have "envisioned" only individual, bilateral arbitration when it enacted the FAA, *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 178 (2019), it chose to leave the term undefined. Of course, this choice was consistent with "a liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018) (citations omitted). And if Congress had intended the FAA to protect only bilateral arbitration, it would have expressly defined "arbitration" accordingly in the original Act or in amendments specifying the type(s) of arbitrations that are FAA-protected. But it did not.

In holding that the FAA protects only bilateral arbitration, the Ninth Circuit ignored the Court's guiding principle that "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Bostock v. Clayton County, Ga.*, 590 U.S. 644, 669 (2020) (addressing Title VII prohibition of discrimination "because of … sex" as applied to discrimination of homosexual and transgender employees). Here, "the broad rule" is: "A written provision in a contract to settle by arbitration a controversy thereafter arising out of such contract shall be valid, irrevocable, and enforceable [unless falling within the saving clause]." 9 U.S.C. § 2 (cleaned up). The Ninth Circuit improperly read into

this broad rule an exception Congress chose not to include. The court's action creates a dangerously wrong precedent that should not be left unaddressed by the Court.

Moreover, Congress has amended the FAA mutliple times since its enactment. It has amended Chapter 1 (FAA §§ 1 – 16), alone, eight times.[11] The most recent amendment in 2022 modified section 2, the "primary substantive provision of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 was amended with the passage of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFAA), Pub. L. No. 117-90, 136 Stat. 26, which primarily was codified in Chapter 4 of the FAA. *See* 9 U.S.C. §§ 401, 402. The EFAA amends the Act to give individuals who are parties to mandatory arbitration agreements the option of bringing claims of sexual assault or sexual harassment in a court, not through arbitration. *See id.*, § 402(a). The EFAA has been more bluntly described as "void[ing] predispute arbitration clauses in cases involving sexual-misconduct claims." David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 Yale L. J. Forum 1, 1 (2022).

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[11] *See* Oct. 31, 1951, c. 655, § 14, 65 Stat. 715 (FAA § 7, compelling witness to attend proceeding); Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233 (§ 4, seeking order compelling arbitration in district court); Pub. L. 100-669, § 1, Nov. 16, 1988, 102 Stat. 3969 (adding § 15, Act of State doctrine); Pub. L. 100-702, Title X, 1019(a), Nov. 19, 1988 (adding § 16, right to appeal); Pub. L. 101-552, § 5, Nov. 15, 1990, 104 Stat. 2745 (§ 10, grounds for vacating awards); Pub. L. 102-354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946 (§ 10); Pub. L. 107-169, § 1, May 7, 2002, 116 Stat. 132 (§ 10); Pub. L. 117-90, § 2(b)(1)(A), Mar. 3, 2022, 136 Stat. 27 (§ 2, enforcement of arbitration agreements).

True, the EFAA excludes two specific types of claims from predispute arbitration provisions and not a specific type of arbitration itself. But the EFAA demonstrates that if Congress ever wanted to define "arbitration" to exclude a specific type of arbitration from FAA protection, it knew how to so. *See Epic Systems*, 584 U.S. at 514 ("[W]hen Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so. Congress has spoken often and clearly to the procedures for resolving 'actions,' 'claims,' 'charges,' and 'cases' in statute after statute." (citations omitted)). Accordingly, parties have always been "generally free to structure their arbitration agreements as they see fit" under the FAA since 1925. *Stolt-Nielsen*, 559 U.S. at 683.

B. Nontraditional, nonbilateral litigation had long been a part of federal jurisprudence by the time Congress enacted the FAA.

Although aggregate arbitration may not have existed in 1925,[12] both aggregation of parties and claims based on common facts and legal issues into one action filed in one court—including representative litigation—had been a part of a federal jurisprudence for over a century when Congress enacted the FAA, since Justice Story's opinion in *West v. Randall*, 29 F. Cas. 718 (C.C.D.R.I. 1820). See E. Samuel Geisler and R. Jason Richards, *We, The Class What the Founding Generation Can Tell Us About Adequate Representation In Class Action Litigation*, 48 Suffolk U. L. Rev. 769, 782-

[12] *Concepcion*, 563 U.S. at 349 (citing *Discover Bank v. Superior Ct. of L.A.*, 113 P.3d 1100, 1110 (2005), *cited in* Pet. App. at 30a

83 & n.84 (2015) (citing Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action, 217 (1987) and West, 29 F. Cas. at 721.

In *West*, a Massachusetts resident brought a claim in equity against several trustees who were residents of Rhode Island, claiming they had wrongfully denied his inheritance. *West* 29 F. Cas. at 722. Justice Story was concerned whether the other heirs, who resided in Rhode Island, had to be joined as plaintiffs, thereby defeating diversity jurisdiction. *See West*, 29 F. Cas. at 721-22. He "framed his discussion of joinder in terms of group litigation" and determined that the court was able to render a complete judgment between the parties and 'make it perfectly certain[] that no injustice shall be done, either to the parties before the court, or to others.'" Geisler & Richards at 782 (quoting *West*, 29 F. Cas. at 721). *West* established the "twin rationales [of] fairness and efficiency [that] would continue to shape what future courts would deem as adequate representation in group litigation." *Id.* at 782-83 (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999) (explaining how fairness and efficiency undergird modern class action practice).

By 1853, the Court recognized that "[t]he rule [had been] well established[] that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others…." *Smith v. Swormstedt*, 57 U.S. 288, 302 (1853) (citing J. Story, Commentaries on Equity Pleadings §§ 97-99, 103, 107, 110-11, 116, 120 (J. Gould 10th rev. ed. 1892) (other citations omitted)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 & n.14 (1999) (explaining the historical foundation of representative litigation). In sum, Justice

Story "identified a category of cases in which the suit could go forward without joinder of all interested parties." Geisler & Richards at 782 (quoting Yeazell at 217).

Although there is no record of attorneys having the temerity to file hundreds or thousands of individual arbitration claims against a defendant in 1925, the members of Congress who passed the FAA were certainly familiar with aggregate litigation[13] in 1925. If Congress had truly intended that the FAA would protect only bilateral arbitrations, it would have defined "arbitration" accordingly in the Act or expressly excluded nonbilateral arbitration from the FAA's protection. The Ninth Circuit's holding that the FAA has never protected any type of arbitration other than bilateral arbitration finds no support in the language Congress wrote into the FAA in 1925 or in the multiple amendments to the Act in the ensuing 100 years or the Court's FAA jurisprudence.

The Court should grant certiorari to confirm that its statements in the cases on which the Ninth Circuit relies did not constitute holdings of the Court that "arbitration" as used in the FAA categorically excludes all types of arbitration procedures except those for bilateral arbitration.

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[13] Aggregate lawsuit" is defined as "[a] single lawsuit that encompasses claims or defenses by multiple parties or represented persons." Black's Law Dictionary, Lawsuit (12th ed. 2024) (Westlaw) (citing *Principles of the Law of Aggregate Litigation* § 1.02, at 10 (ALI, 2010)). "Aggregate lawsuit" is "[a]lso termed *aggregate litigation; aggregate proceeding. I*d. (emphasis in original).

IV. The Court should grant certiorari to provide guidance to contracting parties and arbitration providers in developing mass arbitration procedures that are consistent with FAA's central purpose and are fair and efficient.

A. Mass arbitrations have become prevalent.

Although The modern tactic of mass arbitration is commonly defined as "a strategy in which plaintiff-side attorneys file hundreds of near-identical arbitration claims against a single defendant, pressuring them to settle under the weight of significant filing fees." *The Enforcement Opportunity: From Mass Arbitration to Mass Organizing*, 136 Harvard L. Rev. 1652, 1652 (2023) (citing J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1289 (2022)). Mass arbitration is not class arbitration; rather, it involves the filing—simultaneously or in a series—of hundreds or (usually) multiple thousands of *individual* arbitration demands based on the same conduct of one defendant. *See* Glover at 1289. In essence, mass arbitration consists of a deluge of thousands of bilateral arbitration demands that effectively perverts and undermines the fairness and efficiency that the arbitration process was designed to create in the first instance.

The number of mass arbitration demands has exponentially increased since the first one in 2018.[14] Indeed,

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[14] Commentators agree that the first example of mass arbitration occurred in 2018 when one law firm filed 12,501 arbitration demands against Uber. *See, e.g.*, Andrew J. Pincas, et al., *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, U.S. Chamber of Commerce Inst. For Legal Reform 19 (Feb. 2023), https://tinyurl.com/4dss22nc; Alison Frankel, *Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers*, Reuters (Jan. 16, 2019, 2:03 PM), https://perma.cc/4VQT-FHHM.

they "represent the newest and fastest-growing battleground in the arbitration wars between corporate America and its consumers or employees." Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act*, 78 Vand. L. Rev. 133, 136 (2025). See Andrew J. Pincus, et al., *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, U.S. Chamber of Commerce Inst. For Legal Reform 19-21 (Feb. 2023), https://tinyurl.com/4dss22nc. For example, in 2022, between 75% and 80% "of all arbitration claims handled by the country's two largest arbitration providers were mass arbitrations." Richard Frankel, *supra*, at 136, 150 (citing Am. Ass'n for Justice, Forced Arbitration by Corporations Surges to Unprecedented Levels, 3-4 (Dec. 2023), https://perma.cc/VDJ5-8Q54). And from 2018 to 2022, the number of individual arbitration demands that were simultaneously filed against a defendant ranged from 1,000 to 125,000 demands. *See* Pincus, *supra*, at 19-21.

B. Individual arbitration of every claim in a mass arbitration is unworkable if not impossible.

Defendants in mass arbitrations are routinely charged millions of dollars just for the initial arbitration fee. *See id.* The expenses alone have necessitated companies to pay millions to settle an aggregation of arbitration demands before their validity could be determined. See Richard Frankel, *supra*, at 150. Adjudicating each arbitration demand one-by-one in a mass arbitration is unaffordable for the defending party, who is almost always obligated under the arbitration agreement to pay the costs of arbitration. *See id.* at 148-50. That process is also inequitable for claimants because

most would not have their claim adjudicated in a reasonable time—it would take decades to complete the arbitration of every demand in a protocol of separate, individual arbitrations. *See id.* at 191-92; Pincus, *supra*, at 54. Thus, a workable solution is imperative.

The Congressional mandate is clear: the Court has acknowledged that by enacting the FAA, Congress directed courts to abandon their hostility and instead treat arbitration agreements as "valid, irrevocable, and enforceable." 9 U.S.C. § 2. *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 505 (2018). Nonetheless, when presented with a real-world mass arbitration, the Ninth Circuit chose to eliminate any opportunity for a feasible solution by pronouncing traditional, bilateral arbitrations the only type of arbitration protected by the FAA. Pet. App. at 30a-32a. The court's decision effectively removes FAA protection from virtually every mass arbitration filed in the Ninth Circuit. For example, a claimant in a mass arbitration of 10,000 demands would undoubtedly wait an unreasonable time before an arbitrator became available to begin adjudicating their claim. See Richard Frankel, *supra*, at 192 ("The arbitration system simply does not have the resources to expediently arbitrate mass numbers of individual claims."). Although the claimant would undergo a private, "informal" arbitration, they would forego most of "the benefits of private dispute resolution," including "lower costs [and] greater efficiency and speed." *Concepcion*, 563 U.S. at 348. The Ninth Circuit's response to mass arbitration harms both sides and therefore is not in line with the FAA's purpose.

C. Solutions are imperative and also achievable—MDL procedures and their success present a potential formula for a path forward.

To meet the moment, the "modern" tactic of mass arbitration naturally requires "modern" procedures. Targeted companies and arbitration providers believe modern procedures consistent with the Congressional purpose of the Act exist. Indeed, the advent of mass arbitration has led companies and arbitration providers—both venerable and new—to develop arbitration procedures tailored for mass arbitrations. E.g., Andrew J. Pincus, *supra*, at 48, 51, 54, 56; Richard Frankel, *supra*, at 12-14. New Era ADR—Live Nation's first-choice arbitration provider—is one of the newer providers and specializes in handling mass arbitrations. *See* Pet. at 2, 8.

New Era's Rules, like most procedures tailored for mass arbitration, include "batching" (selecting) of arbitration claims and bellwether arbitrations, interspersed with mediation of all claims with the goal of reaching a global settlement. *See id.* at 9-10. This process mirrors the protocol use in multi-district litigation (MDL). A recent study of 106 arbitration clauses revealed "more than 40%" utilized the procedure of batching several claims "and trying individual bellwether cases in arbitration while all other cases are stayed. The results from the bellwether cases are then used to establish baseline case valuations that can be used in global settlement negotiations." Richard Frankel, *supra*, at 154.

Though MDL litigation has been remarkably successful in handling thousands of cases in one court, leading to global settlements in most of them, *see infra* at 21-22, the Ninth Circuit dismissed the comparison of the federal MDL model to New Era's Rules as "inapt." Pet.

App. at 19a-20a. But a closer examination of the MDL model and the resulting success merits more consideration than the Ninth Circuit gave it. *See id.*

It is commonly known that federal MDL procedure was developed in response to nearly 2,000 antitrust civil actions all related to the same electrical equipment. Andrew D. Bradt, *Multidistrict Litigation and Adversarial Legalism*, 53 Ga. L. Rev. 1375 & n.20 (2019). The MDL procedure is codified in 28 U.S.C. § 1407, which provides that all cases pending in all federal district courts with "one or more common question of fact" may be transferred to a single federal district court judge for "consolidated pretrial proceedings." 28 U.S.C. § 1407(a). When a claimant's suit is the subject of an MDL order, they usually do not have a choice to opt out. See Ryan C. Hudson, et al., *MDL Cartography: Mapping the Five Stages of a Federal MDL*, 89 UMKC L. Rev. 801, 803 (2021).

Although § 1407 states that each case is to be remanded to its original court upon completion of discovery, that rarely happens. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1168-69 (2018); *see* Ryan C. Hudson, *supra*, at 805. Less than 3% of MDL cases wind up back in their home courts, as most parties opt to have their claims adjudicated in the MDL court. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, *supra*, at 1169.

Like mass arbitrations, federal MDLs are prevalent and handle enormous numbers of claims. Since 1968, over one million cases have been transferred to MDL courts. Pincus, *supra*, at 50 (citing U.S. Judicial Panel on Multidistrict Litigation, Multidistrict Litigation Terminated Through September 30, 2021, at 3, https://bit.ly/3feso28). By 2021, a staggering "50% of

federal civil cases had become part of an MDL." Ryan C. Hudson, supra, at 803. As of July 2019, the top ten largest MDLs contained over 29,000 suits (the largest) to 2,918 suits (the smallest). Ryan C. Hudson, *supra*, at 803.

As in most mass arbitration protocols, the MDL judge in mass action MDLs will batch two or three cases and conduct test case trials, a bellwether trial, "to help the parties gauge the relative strength of their cases." *Id.* at 812 & n.38. After the trial "settlement often occurs rapidly because the losing party does not want to risk losing hundreds or thousands of cases at trial." *Id.* at 813 & n.39 (citing Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not Possible*, 82 Tul. L. Rev. 2205, 2208-09 (2008). Naturally, settlement does not always occur, and it may take years to consummate a settlement, or plaintiffs can elect not to settle and request a trial. Id.

However, a high percentage of MDLs conclude with settlement. An NYU Law School study found "that between 2000 and 2015, 72 percent of the MDL case terminations resulted from settlement." Pincus, *supra*, at 50 (citing NYU Center on Civil Justice, *What the Data Show: Mapping Trends in Multidistrict Litigation* (Sept. 2015), https://bit.ly/3zoDwAp; Sherman, 82 Tul. L. Rev. at 2206 n.4 ("Few cases are remanded for trial; most multidistrict litigation is settled in the transferee court."). Though the NYU study found that bellwether trials did not sway every settlement, Pincus notes that "those well-versed in MDLs have noted that 'nothing encourages global MDL settlement like setting bellwether trials.'" Pincus, at 50 (citing Stephen R. Bough & Anne E. Case-Halferty, *A Judicial Perspective on*

Approaches to MDL Settlement, 89 UMKC L. Rev. 971, 977 (2021) (quoting Special Master David Cohen)).

To be sure, distinctions exist between MDL procedures and mass arbitration procedures. Unlike New Era's Rules, the results of bellwether trials in MDL litigation are generally non-binding on the other plaintiffs unless the parties agreed to the contrary. *See* Eldon E. Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2331 n.27, 2337 (2008). But both protocols share the same ultimate goal in using bellwether trials and arbitrations: to efficiently reach a global settlement as soon as possible.

Is there room under the umbrella of FAA protection—and within the "liberal federal policy favoring arbitration agreements"—for new or hybrid arbitration protocols? *See Epic Systems*, 584 U.S. at 505. There should be; there must be. At least 75% of the arbitrations before the two largest arbitration providers are mass arbitrations. *See supra* at 3, 17. The Ninth Circuit's ruling would push all mass arbitrations from under the umbrella forcing out into the quagmire of thousands of individual arbitrations conducted over countless years at prohibitive costs. The consequences are unmistakable: company defendants will be coerced into settling numerous arbitration claims for untold millions of dollars without ever knowing the number that are completely groundless. Such a consequence is neither fair nor efficient.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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