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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (atlanticlegal.org) is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts.

ALF has an abiding interest in the primacy of the Federal Arbitration Act ("FAA") and application of sound principles of law to the enforcement of arbitration agreements. The primary question presented in this case—whether the FAA applies to arbitration agreements that include procedures designed to combat abusive mass arbitration tactics—is of exceptional importance to ALF. The opinion issued by the Ninth Circuit implicates fundamental principles under the FAA and the right for parties to

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[1] Petitioners' and Respondents' counsel were provided timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

contract freely, and fails to protect against the abuses of mass arbitration.

SUMMARY OF ARGUMENT

The American legal tradition rigorously protects the right to contract. Arbitration agreements are a prototypical example. To ensure that state contract law would not discriminate against this species of contract, Congress adopted the Federal Arbitration Act in 1925, 9 U.S.C. §§ 1-16, with its clear policy favoring arbitration. But the advantages of arbitration are at risk of falling victim to strategic litigation tactics that undermine the right to contract.

As businesses have developed barrier-free, cheaper, and quicker dispute resolution procedures for consumers through arbitrations, abusive mass arbitration tactics have pulled in the opposite direction. Mass arbitration is the practice of filing hundreds—or even thousands or tens of thousands—of "cookie-cutter" arbitration demands against a single business. Depending on the arbitration rules that apply, this scenario can potentially cause the business to incur substantial administrative fees—sometimes in the millions of dollars—on claims that could be invalid from the start. To capitalize off that procedural vulnerability, the plaintiffs' bar has weaponized arbitration agreements against businesses by filing mass arbitrations, often without any intent or ability to actually litigate, and leveraging those administrative fees to force a settlement on questionable claims. This strategy has often succeeded because arbitration providers historically imposed only minimal requirements for initiating a claim, specified little or no oversight for abusive tactics, and assessed mandatory fees on

businesses any time a claim is filed—meritorious or not.

In *Heckman*, the Ninth Circuit affirmed the denial of a motion to compel arbitration, holding that the entire arbitration agreement—which in that case specified streamlined procedures for mass arbitrations—was procedurally and substantively unconscionable. But the analysis and conclusions in *Heckman* invite improper challenges to sensible measures for mass arbitrations, in contravention of long-standing Supreme Court precedent. The plaintiffs' bar will likely attempt to extend the Ninth Circuit's analysis beyond its facts, arguing that arbitration agreements with mass arbitration procedures promoting efficiency and fairness—like bellwether proceedings, coordinated discovery, and batching—are not protected under the FAA and may be held unenforceable under state law. If accepted, that reasoning creates a slippery slope that may allow parties to sidestep class action waivers, pursue class proceedings despite their agreement to arbitrate, or exploit administrative procedures to extract unfair settlements in arbitration.

Because the pendulum has swung so far against the principles underlaying the FAA, ethical guideposts, and effective representation, ALF is filing this brief to urge the Court step in to uphold contractual terms that not only provide for arbitration generally, but also define its contours to avoid the potential for abuse by the plaintiffs' bar.

ARGUMENT

I. Arbitration Agreements Should Be Enforced According to Their Terms

Businesses, consumers, and employees regularly agree to resolve disputes through arbitration. Before 1925, American courts were hesitant to relinquish jurisdiction and were therefore loathe to enforce arbitration agreements. In response, Congress enacted the FAA, which embodies a "national policy favoring arbitration," to overcome this judicial skepticism and to ensure that "valid, irrevocable, and enforceable" arbitration agreements are enforced according to their terms in both state and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984); *see also Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) ("[T]he FAA's policy favoring arbitration" is "an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts."); *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 351 (2011) ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."). Indeed, the FAA requires courts to "rigorously enforce" arbitration agreements according to their terms to further the purpose of the FAA and to facilitate streamlined proceedings. *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013); *see also Concepcion*, 563 U.S. at 339; *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Since the FAA's enactment, this Court has repeatedly acknowledged the strong public interest in favor of

enforcing arbitration agreements, and has steadfastly enforced such agreements according to their terms. *See, e.g.*, *Concepcion*, 563 U.S. at 345-46; *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 284 (2002); *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 224 (1987).

This Court's longstanding practice of honoring and enforcing the terms of arbitration agreements has extended to provisions delegating issues of arbitrability to the arbitrator and to class-action waivers contained within arbitration agreements. *Concepcion*, 563 U.S. at 344-47; *see, e.g.*, *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract."). In that regard, while some class actions may involve meritorious claims, the latter part of the 20th century brought an onslaught of abusive class actions. These claims were often filed on behalf of hundreds or thousands of putative class members (regardless of merit) for the strategic purpose of extracting hefty settlements from companies. Because of the large scale of the alleged injuries, class certification often became a death sentence for companies. They therefore needed to defeat a lawsuit on a motion to dismiss or promptly settle the case before litigation costs, reputational harm, and the risk (however low) of a plaintiffs' verdict ruined their businesses. To cabin the threat and staggering costs of defending against abusive class actions, companies began including class-action waiver provisions in their arbitration agreements. Although plaintiffs

resisted the enforcement of such provisions, this Court stayed true to the FAA and determined that such provisions are enforceable.

In *Concepcion*, the arbitration agreement at issue required claimants to file claims in their "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." 563 U.S. at 336. Despite acknowledging that the arbitration procedures appeared "quick" and "easy to use" and that the arbitration agreement contained several consumer-friendly provisions that provided safeguards and incentives to pursue claims on an individual basis,[2] the district court nonetheless denied defendant's motion to compel arbitration upon finding that the arbitration agreement's class-action waiver provision was unconscionable under California law. *Id.* at 337-38.

The Ninth Circuit affirmed the district court's decision, *id.* at 338, but this Court reversed, recognizing that "[t]he principal purpose of the FAA is to ensur[e] that private arbitration agreements are enforced according to their terms." *Id.* at 344. As this

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[2] These incentives included, for example, (i) cost-free arbitration for non-frivolous claims; (ii) allowing arbitration to take place in the county where the consumer received his or her monthly bill and enabling the consumer to choose how the arbitration should proceed (i.e., in person, by telephone, or by written submission); (iii) allowing consumers to opt out of arbitration and file a claim in small-claims court; (iv) waiver of confidentiality; and (v) a success premium (minimum of $7,500 plus double attorneys' fees) for any recovery above defendant's written settlement offer. *Id*. at 337.

Court explained, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* Finding California's prohibition against class-action waivers in adhesion contracts impermissibly "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA," the Court held the California state law was preempted by the FAA. *Id.* at 344-47.

Similarly, in *Lamps Plus, Inc. v. Varela*, this Court held that consent to arbitrate on a class-wide basis may not be inferred absent an "affirmative 'contractual basis for concluding that the part[ies] *agreed* to [class arbitration].'" 587 U.S. 716, 189 (2019) (alterations and emphasis in original) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)). In so holding, the Court reiterated the parties' freedom to shape arbitration agreements to their liking "by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019). "Whatever they settle on, the task for courts and arbitrators at bottom remains the same: to give effect to the intent of the parties." *Id*. *See also Epic Sys. Corp. v. Lewis*, 584 U.S. 497 (2018) (upholding an employer/employee right to contract under the NLRB and holding that employers can require employees to arbitrate their claims on an individual basis without violating employees' NLRA-protected right to engage in concerted activity for their mutual aid or protection).

As this Court has made clear, "parties remain free to alter arbitration procedures to suit their tastes"—including by agreeing to class-action waivers or other non-traditional arbitration procedures. *See Epic Sys.*, 584 U.S. at 509. Here, the Ninth Circuit's refusal to enforce the parties' arbitration agreement is once again in direct tension with this Court's commitment to the FAA's policy favoring arbitration and its requirement that courts "rigorously enforce" arbitration agreements pursuant to their terms. ALF therefore urges the Court to grant certiorari and confirm that parties can agree to the terms that best suit their dispute-resolution needs, and more importantly, protect them from abuse.

II. Consumers Can Be "Better Off" In Arbitration Than Participating In Class Actions

Concepcion and *Epic Systems* allowed arbitration to evolve and provided companies with the opportunity to explore new options for resolving disputes. To safeguard consumers and promote efficient dispute resolution without procedural hindrances, businesses developed various incentives to make arbitration (and pre-arbitration resolution) attractive to individuals. Indeed, alongside class-action waivers, companies began including protections for consumers in their arbitration agreements that made the arbitration process more efficient, convenient, and cost-effective than litigating their claims in court—particularly on a class-wide basis.

For example, some arbitration agreements require claimants to submit an initial notice of the dispute to the company's legal department, so that the company can make a settlement offer before the claimant ever files an arbitration demand. Other agreements give claimants the right to schedule a pre-arbitration settlement conference by phone or videoconference.[3] Still others contain fee-shifting provisions that require the company to pay all or part of the claimant's arbitration filing fees in the event the dispute proceeds to arbitration. *See Lane v. Francis Capital Mgmt. LLC*, 224 Cal. App. 4th 676, 689, 168 Cal.Rptr.3d 800 (2014).[4]

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[3] *See, e.g.*, Airbnb Terms of Service, http://bit.ly/3DOI8RH ("At least 30 days prior to initiating an arbitration, you and Airbnb each agree to notify the other party of the dispute in writing and attempt in good faith to negotiate an informal resolution."); Verizon Wireless Customer Agreement, https:// vz.to/3DU1EMO; T-Mobile Terms of Service, http://bit.ly/3UFfDg5; Microsoft Services Agreement, https:// www.microsoft.com/en-us/servicesagreement ("[I]f you wish to pursue arbitration, you must first send an individualized Notice of Dispute …."); AT&T Consumer Service Agreement, https://www.att.com/consumerserviceagreement; Intuit Terms of Service, https://www.mint.intuit.com/terms.

[4] J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U. L. REV. 1617-1651 (2023). Similarly, the rules of both the American Arbitration Association and JAMS—the most widely used consumer and employee arbitration administrators—require companies to pay the entire cost of the arbitration except for a small filing fee that would not exceed court filing fees. *See* AAA, Consumer Arbitration Rules: Costs of Arbitration (Jan. 1, 2023), https://bit.ly/3CVqts3 ($225 default filing fee); AAA, Employment/Workplace Fee Schedule (Jan. 1,

Such procedures are designed to help consumers resolve disputes efficiently and with fewer procedural hurdles, as well as to provide both parties with a resolution process that is faster and less expensive than litigating in court. In addition, arbitration claimants have proven to (1) have better odds of success than in litigation; (2) receive higher net awards than in litigation;[5] and (3) receive awards quicker than in litigation. As demonstrated by one study, the median award won by consumers in arbitration "was more than three times the dollar amount in litigation."[6] The same study determined that "it took consumer claimants an average of 321 days … to prevail in arbitration," compared to an average of 439 days in litigation, making arbitration

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2023), https://bit.ly/3IyvSbT ($350 default filing fee); JAMS, Arbitration Schedule of Fees and Costs, https://www.jamsadr.com/arbitration-fees ($250 filing fee for consumer arbitrations and $400 filing fee for employee arbitrations).

[5] One reason for this is that plaintiffs' attorneys had often attempted to misuse the class action as a tool to extract unfair sums in attorneys' fees, without obtaining much (if any) financial benefit for the plaintiffs themselves. For example, many class actions had been resolved through (now disfavored) so-called "coupon settlements" that provided the class members with a coupon by which they can obtain future services or products from the defendant for free, but nonetheless result in large attorneys' fee awards to plaintiffs' counsel.

[6] Nam D. Pham & Mary Donovan, Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration, U.S. Chamber of Commerce Institute for Legal Reform 11 (Mar. 2022), https://bit.ly/3SK7QwA ("Fairer, Faster, Better III"), at p. 14.

27 percent faster.[7] Consistent with these findings, the Court in *Concepcion* observed that customers bound by the arbitration agreement at issue—which required, among other safeguards and incentives, the company to pay arbitration fees for non-frivolous claims and permitted the claimant to recover a bonus if he were to obtain an award greater than the company's last settlement offer—"were *better off* ... than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." 563 U.S. at 352 (emphasis in original).

For all these reasons, arbitration can be a more consumer-friendly dispute-resolution process than class-action litigation.

III. Mass Arbitration Threatens The Original Purpose Of The FAA

Despite the benefits of streamlined, individual arbitration, the plaintiffs' bar has devised a new tactic to extort outsized settlement amounts and attorneys' fee awards: abusive mass arbitrations. Indeed, although *Concepcion* and *Epic Systems* upheld agreements requiring the individual arbitration of claims and thereby limited the ability of plaintiffs' attorneys to weaponize class actions, these decisions, perhaps unwittingly, also spurred innovation. In response to, and as part of an effort to circumvent

[7] *Id*. at p. 15.

the courts' enforcement of such agreements, plaintiffs' attorneys began experimenting with mass arbitrations around the time that *Epic Systems* was decided in 2018.

This mass-arbitration tactic, however, can have devastating consequences for businesses without protective measures under outdated rules, as it allows for the exertion of extreme financial pressure to resolve even the most frivolous of claims for a high-dollar amount; implicates attorney ethical issues; and disincentivizes arbitration, thus undermining the FAA's pro-arbitration policy. In response, businesses like Live Nation Entertainment ("Live Nation") and Ticket Master LLC ("Ticket Master") have developed arbitration procedures to protect themselves against the dangers of mass arbitrations. The requirements of the FAA and this Court's jurisprudence (set forth in Section I above) mandate that parties' arbitration agreements be enforced according to their terms.

A. Plaintiffs' Attorneys Have Seized the Opportunity to Extort Millions of Dollars from Businesses through Mass Arbitrations

Mass arbitration refers to the filing of hundreds or thousands of "cookie-cutter" arbitration demands against a single business. This mass filing may induce substantial automatic fees, sometimes in the millions of dollars, and many times are filed without any regard to the merits of the individual claims. Where the rules have failed to keep pace with these abusive tactics, the administrative fees are often due immediately upon filing, before a defendant even has

the opportunity to evaluate the claims' merits. This creates a high-stakes, time-pressured environment in which respondents must quickly decide whether to pay the fees or accept a settlement demand. These conditions have allowed plaintiffs' lawyers to extort significant settlements from businesses on frivolous claims, without ever addressing the claims' underlying merits.[8]

The success of this tactic has caused a flood of claims by plaintiffs' firms against businesses. In 2018, for example, one plaintiffs' firm that has led the charge in extracting these blackmail settlements through mass arbitration filed 12,501 wage-and-hour arbitration demands against Uber on behalf of drivers who claimed they had been improperly classified as independent contractors. The mere filing of these arbitration demands triggered an obligation for Uber to pay almost $19 million in initial filing fees. The agreements further obligated Uber to pay the arbitrator fees in each individual arbitration, not to mention the attorneys' fees Uber would incur to defend against the claims. After Uber paid initial filing fees in connection with 296 of these arbitrations (which amounted to almost half a million dollars), the plaintiffs filed suit to compel Uber to arbitrate the remaining 12,200 demands. Uber ultimately settled

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[8] *See, e.g.*, U.S. Chamber of Commerce Institute for Legal Reform, Mass Arbitration Shakedown: Coercing Unjustified Settlements, February 2023, https://instituteforlegalreform.com/research/mass-arbitration-shakedown-coercing-unjustified-settlements/ (last accessed June 10, 2025), p. 3.

these and other arbitrations for between $146 million and $170 million, rather than pay the filing fees or fight against the mass arbitrations in court.[9] There are countless examples of similar coercive tactics against other businesses, including DoorDash,[10] Postmates,[11] CenturyLink,[12] FanDuel and

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[9] Pet. for Order Compelling Arbitration ¶ 1, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-7343 (N.D. Cal. Dec. 5, 2018), ECF No. 1 (Abadilla Pet.); Uber Opp. to Mot. to Compel Arbitration 1, *Abadilla v. Uber Techs., Inc.*, No. 18-cv-7343 (N.D. Cal. Jan. 14, 2019), ECF No. 53 (Abadilla Opp.); *see also* Alison Frankel, Uber Tells Its Side of the Story in Mass Arbitration Fight with 12,500 Drivers, Reuters (Jan. 16, 2019), https://reut.rs/3MX3GzR.

[10] The plaintiffs' firm filed more than 6,000 arbitration demands against DoorDash and, when DoorDash refused to pay nearly $12 million in arbitration fees, the plaintiffs filed a motion to compel arbitration. The district court granted their motion as to 5,010 of the arbitration demands. *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020); *see also* Nicholas Iovino, DoorDash Ordered to Pay $9.5 Million to Arbitrate 5,000 Labor Disputes, Courthouse News Service (Feb. 10, 2020), https://bit.ly/3D1oTDQ.

[11] *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1248 (N.D. Cal. 2019), aff'd, 823 F. App'x 535 (9th Cir. 2020); *see also McClenon v. Postmates, Inc.*, 473 F. Supp. 3d 803, 806 (N.D. Ill. 2020).

[12] *In re CenturyLink Sales Prac. & Secs. Litig.*, No. 17-cv-2795-MJD-KMM, 2020 WL 3513547 (D. Minn. June 29, 2020). In May 2019, the plaintiffs' firm threatened to file 12,000 consumer fraud arbitration demands "warn[ing] CenturyLink that, if it did not agree to a mass settlement, it would have to pay the AAA more than $30 million in initial fees and costs." *Id.* at *3.

DraftKings,[13] Intuit TurboTax,[14] Chegg,[15] and Samsung.[16] The number of known mass arbitrations is likely a vast undercount, owing to the typically confidential nature of arbitrations and any resulting settlement agreements.

B. Abusive Mass-Arbitration Practices Have Led to Protracted Litigation and Compromise Attorney Ethics Rules

Businesses have begun fighting back against mass arbitration, many times in court. For example, in *Tubi, Inc. v. Keller Postman LLC*, No. 1:24-cv-01616 (D.D.C. May 31, 2024), a video steaming service filed a tortious interference suit against the plaintiffs' firm

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[13] Alison Frankel, FanDuel Wants N.Y. State Court to Shut Down Mass Consumer Arbitration, Reuters (Jan. 14, 2020), https:// reut.rs/3Spv5v5.

[14] Alison Frankel, Intuit Defends $40 Million Class Settlement, Attacks Mass Arbitration Firm, Reuters (Dec. 9, 2020), https:// reut.rs/3eU2vV0; *see also Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at *2 (Cal. Ct. App. July 29, 2021); Justin Elliott, TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud, ProPublica (Feb. 23, 2022), https://bit.ly/3TLz0Uh.

[15] *See Lyles v. Chegg, Inc.*, No. 1:19-cv-03235-RDB, 2020 WL 1985043, at *4 (D. Md. Apr. 27, 2020).

[16] Resps.' Mot. to Dismiss Pet. to Compel Arbitration 2, *Wallrich v. Samsung Elecs. Am. Inc.*, No. 1:22-cv-5506 (N.D. Ill. Dec. 5, 2022), ECF No. 26 (emphasis omitted). In fact, Samsung informed the court that plaintiffs' counsel threatened to file more arbitrations if it did not settle "in excess of $400 million" in AAA arbitration fees.

based on allegations that the firm had induced Tubi users to breach pre-arbitration obligations in their user agreements so that the firm could file tens of thousands of meritless arbitration demands on the users' behalf, with the hope that Tubi would "quickly settle for an unreasonable amount or face tens of millions of dollars' worth of non-refundable arbitration fees." Complaint, *Tubi, Inc. v. Keller Postman LLC*, No. 1:24-cv-01616, ECF No. 1 at 3 (D.D.C. May 31, 2024). Related litigation is underway in California state court and in Delaware Chancery Court. This cumbersome and protracted litigation is exactly what individual arbitration was intended to avoid.

These litigations have also exposed the staggering potential for abuse by plaintiffs' attorneys seeking to exponentially increase the number of arbitration claimants without determining whether they have valid claims, thus implicating attorney ethics rules. In *Tubi*, for example, Tubi alleged that "more than 30% of [the plaintiffs' firm] claimants have ***never*** been registered users" and thus were not proper claimants. *Id.* at 50(a).

Another plaintiffs' firm has similarly earned a reputation for its "long-running effort…to extract a settlement payment from Defendants based on demonstrably false claims" by threatening to "file thousands of arbitration demands in JAMS—thereby subjecting [defendants] to millions of dollars in filing fees." Defs' Mot. to Dismiss, *Baker v. Match Group Inc.*, No. 1:22-cv-06924, ECF. No. 18, at 1, 2 (N.D. Ill. Dec. 9, 2022). Consistent with this practice, in 2022,

the same firm alerted Epson, the printer and ink company, that it intended to file arbitration demands on behalf of more than 13,000 supposed customers of the company.[17] But when Epson requested serial numbers or some proof of purchase for each threatened claimant, the firm was only able to supply such information for approximately 2,000 individuals. *Id.* The firm ultimately filed 4,000 arbitration demands against Epson. Epson responded by filing two separate declaratory judgment lawsuits against those claimants. *Id.* The first lawsuit was brought against seemingly legitimate customers who allegedly failed to comply with contractually mandated pre-arbitration dispute resolution procedures and filed their arbitration claims in the wrong forum. The second was brought against claimants who did not appear to have purchased any Epson products at all. *See also* Complaint for Declaratory and Injunctive Relief, *Epson America, Inc. v. Graesen Arnoff et al*, No. 30-2023-01315890-CU-MC-CXC (Cal. St., Orange Co., Super. Ct., March 10, 2023); Complaint for Declaratory and Injunctive Relief, *Epson America, Inc. v. Matt Adams et al*, No. 30-2023-01313431-CU-MC-CXC, (Cal. St., Orange Co., Super. Ct., March 10, 2023).

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[17] *See* Alison Frankel, *Epson's unusual mass arbitration defense: Sue your (alleged) customers* (January 25, 2024), https://www.reuters.com/legal/litigation/column-epsons-unusual-mass-arbitration-defense-sue-your-alleged-customers-2024-01-25.

In yet another mass-arbitration case involving the same firm mentioned in the paragraph above, Samsung argued the firm had failed to vet its "client" list of more than 100,000 purported customers. According to Samsung, the firm's client roster included people who were deceased; people who never even owned a Samsung device; and people with obviously made-up names or addresses, including one claimant who listed their address as "Q" and another whose listed address was "This Fi Dhkhj." *See* Respondent's Opposition to Petitioner' Motion to Compel Arbitration, *Wallrich et al, v. Samsung*, No. 22-cv-05506, ECF No. 27, (N.D. Ill. Dec. 5, 2022); *see also Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 613 (7th Cir. 2024) (stating that consumers could have produced almost anything to meet their burden of the existence of an arbitration agreement like an order number, receipt, or even a declaration).

In addition, in 2024, L'Occitane sued another plaintiffs' firm for allegedly manufacturing arbitration claims by instructing people to visit the L'Occitane website and then claim the site violated their privacy through its use of third-party tracking software.[18] L'Occitane further alleged that of "the initial 103 claims filed [in arbitration], L'Occitane has no record of **over 90%** of these individuals ever purchasing anything from L'Occitane (or any other records)." Complaint for Declaratory Judgment and

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[18] David Thomas, L'Occitane Sues US Law Firm Over Wiretapping Law 'Shakedown,' Reuters (Feb. 9, 2024) https://www.reuters.com/legal/legalindustry/loccitane-sues-us-law-firm-over-wiretapping-law-shakedown-2024-02-09/.

Injunctive Relief*, L'Occitane v. Zimmerman Reed L.L.P.*, No 2:24-cv-1103, ECF No. 1 (C.D. Cal. Feb. 8, 2024). Similarly, in *Abernathy*, the court determined that there was insufficient evidence that 869 of the mass-arbitration claimants even had an arbitration agreement with DoorDash. *Abernathy*, 438 F. Supp. 3d at 1065. DoorDash itself asserted that it had no record that 936 of the claimants had ever worked for DoorDash. *See* Declaration of Richard Zitrin, *Abernathy v. DoorDash, Inc.*, No. 19-7545 (N.D. Cal. Nov. 22, 2019), ECF No. 35-1 ("Zitrin Decl."), at ¶ 18.

The foregoing cases demonstrate that unfair mass-arbitration tactics have raised concerns that plaintiffs' attorneys are violating attorney ethics rules by failing to vet their clients. Proper vetting could require massive effort for thousands of claimants, but that is exactly what the rules require. Settlements, which attorneys are obliged to convey to their clients, raise similar concerns because a meaningful discussion with thousands of individual claimants seems like too big of an undertaking for most plaintiff firms.[19] Abusive mass-arbitration tactics have spurred court intervention and prolonged litigation—the antithesis of the streamlined, efficient, and cost-effective dispute resolution mechanism that arbitration was intended to be.

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[19] *See, e.g.*, ABA Model R. of Prof. Conduct 1.4; Cal. Ethics R. 1.4.1 ("A lawyer shall promptly communicate to the lawyer's client … all amounts, terms, and conditions of any written offer of settlement made to the client[.]").

C. Parties' Agreements on Procedures Designed to Combat Abusive Mass-Arbitration Tactics Should Be Enforced

Just as the right to contract is the soil from which arbitration agreements grew, it is also the shear with which unwelcome developments are pruned. Businesses have responded to these abusive mass-arbitration tactics in differing ways. Some companies, such as Amazon, have decided they would rather litigate claims in court than be extorted. Accordingly, they have removed the arbitration clauses from their consumer agreements entirely. But a legal environment that discourages arbitration resurrects the pre-1925 era, before Congress expressed a clear national policy favoring arbitration and enacted the FAA. It is a step backwards, but one that this Court can correct by enforcing arbitration agreements that protect against mass-arbitration abuses.

Live Nation is typical of businesses trying to use thoughtful contracting to preserve arbitration as an efficient alternative to litigation but curb mass arbitration abuse. For example, Live Nation has subscribed to the services of a new arbitration provider, New Era ADR ("New Era"), which employs a procedure that is reminiscent of multi-district litigation ("MDL") in which plaintiffs with similar cases are "batched" into groups of five or more, of which three "bellwether" cases create binding "precedent" for all other batched cases. The Ninth Circuit's decision in this case held that New Era's MDL-like procedures are unconscionable under

California law and nullified the parties' entire arbitration agreement. In so holding, the Ninth Circuit concluded that the FAA "simply does not apply to and protect the mass arbitration model set forth in Ticketmaster's Terms and New Era's Rules," although the plaintiff's bar has suggested this analysis extends to all arbitration agreements seeking to limit mass arbitration abuses through streamlined, efficient procedures—e.g., bellwether cases, batching, and consolidation/coordination. *Heckman v. Live Nation Ent., Inc.*, 120 F.4th 670, 689 (9th Cir. 2024). That interpretation tramples the parties' right to contract and creates a textually indefensible exception to the FAA's protection for arbitration agreements. This Court has consistently held that arbitration agreements—including class-action waiver and delegation provisions included therein—should be enforced, so long as "there is a contractual basis for concluding that the party agreed to do so." *Lamps Plus*, 587 U.S. at 178-79; *see also Epic Sys.*, 584 U.S. at 509 (parties "remain free to alter arbitration procedures to suit their tastes"). Here, there is a strong contractual basis for concluding that the parties agreed to New Era's mass-arbitration procedures, and that agreement should be enforced according to its terms.

At its worst, and all too often, the practice of using mass arbitrations to extract early settlements is abusive, coercive, and threatens to undermine businesses, their consumers, and their mutual desire to resolve disputes in a cost-effective manner. Live Nation—and other businesses—should be able to employ procedures that allow them to efficiently and

fairly arbitrate disputes on the merits, without the threat of administrative costs being weaponized to extract unfair outcomes.

CONCLUSION

The Court should grant Live Nation's petition for a writ of certiorari.

Respectfully submitted,

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