COMMENTS

GENERAL ADMISSION, PRIVATE RULES: HOW LIVE NATION-TICKETMASTER'S ARBITRATION CLAUSE STRENGTHENS THE ANTITRUST CASE AGAINST IT*

I. INTRODUCTION

For decades, the ticket sales company Ticketmaster[1] has been the source of ire for concertgoers and artists alike.[2] Between increased pricing,[3] long wait times,[4] and arbitrary fees,[5] it is no surprise that the company has made enemies along the way.[6] Live

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1. In this Comment, "Ticketmaster" refers to the company that sells tickets and manages ticket resale, "Live Nation" refers to the company that owns concert venues and promotes events, and "Live Nation-Ticketmaster" refers to the merged entity, with Live Nation as Ticketmaster's parent company.

2. *See generally 30 Years of Clashes Between Ticketmaster, Artists and Fans*, AP NEWS (May 23, 2024, at 12:37 ET), https://apnews.com/article/justice-live-nation-ticketmaster-swift-cca2b9881881fb016d0862b945ccddee [https://perma.cc/6FKD-DEQ5] ("Taylor Swift posted a story on Instagram . . . expressing her anger and frustration over the hours spent by fans trying to buy tickets for her tour.").

3. Rachel Wolfe, *The Year of the $1,000 Concert Ticket*, WALL ST. J. (Apr. 20, 2023, at 12:01 ET), https://www.wsj.com/articles/concert-tickets-prices-expensive-cafb8dd1 (on file with the Temple Law Review).

4. *See* Michelle Gienow, *Technical Takeaways from the Taylor Swift/Ticketmaster Meltdown*, COCKROACH LABS (July 31, 2023), https://www.cockroachlabs.com/blog/taylor-swift-ticketmaster-meltdown/ [https://perma.cc/28JB-DFQQ] ("Thousands of furious fans vented their frustration on social media as they waited for hours in a virtual buying queue, only to be kicked out. Others finally got in, only to watch tickets disappear from their carts before they could check out.").

5. Marina Hyde, *Process Fee, Service Fee, Delivery Fee . . . Who Wouldn't Pay To See Ticketmaster Rinsed by the Regulator?*, THE GUARDIAN (Sep. 6, 2024, at 08:20 ET), https://www.theguardian.com/commentisfree/article/2024/sep/06/ticketmaster-oasis-fan-experience [https://perma.cc/CY5Y-5YDP]; Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks as Prepared for the South by Southwest Conference: The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective (Mar. 20, 2025), https://www.justice.gov/archives/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective?os=vbkn42tqhoPmKBEXtc&ref=app [https://perma.cc/2VQM-JLNS] ("We heard that it is impossible to understand the litany of fees and why those fees have proliferated.").

6. *See* ZACH BRYAN, All My Homies Hate Ticketmaster (Live from Red Rocks) (Warner Records, Inc. Dec. 25, 2022); *see also* Adrian Horton, *John Oliver Rips Ticketmaster and Live Music Costs: 'One of the Most Hated Companies on Earth,'* THE GUARDIAN (Mar. 14, 2022, at 11:31 ET), https://www.theguardian.com/tv-and-radio/2022/mar/14/john-oliver-ticketmaster-live-music-costs [https://perma.cc/UK3X-QJY3] ("John Oliver took a deep dive into the industry of exorbitant pricing for live events on Sunday's Last Week Tonight, and in

music has long been a great uniter—the intangible force that once drew nearly five hundred thousand spectators to the Woodstock Music Festival in 1969 to witness three days of live performances on a small stage in New York.[7] While a free concert of this magnitude is certainly an anomaly, the costs associated with attending shows have since made live music inaccessible to the masses.[8] Some claim this increased cost is a result of the digitization of music, as artists increasingly depend on ticket sales, rather than record sales, for revenue.[9] While this may be true, another significant factor is Ticketmaster's consolidation of market power in the ticket sales market.[10] Despite a long history of criticism and resistance, Ticketmaster has grown to dominate the live entertainment industry.

In 1994, one of the most prominent challenges to Ticketmaster's supremacy came from the band Pearl Jam, who took a bold, public stand to break Ticketmaster's stranglehold on the live music industry.[11] After Pearl Jam requested that Ticketmaster donate one dollar of the service fee to charity, Ticketmaster passed the cost to consumers, raising the cost of tickets proportionally.[12] In response, Pearl Jam attempted to present their 1994 Vitalogy tour using an independent ticketing company, but the group quickly hit a wall: Almost every major venue had exclusive deals with Ticketmaster.[13] Pearl Jam's public displeasure with Ticketmaster led the Department of Justice (DOJ) to launch an antitrust investigation against the company, and the band correspondingly filed a complaint alleging that the company had a monopoly on ticket distribution.[14] Following

particular the company Ticketmaster—or, as he called it 'one of the most hated companies on earth.'"); Hyde, *supra* note 5.

7. *Woodstock History*, BETHEL WOODS CTR. FOR THE ARTS, https://www.bethelwoodscenter.org/museum/woodstock-history [https://perma.cc/H2SR-V3M9] (last visited Feb. 8, 2026) ("The world was rapidly changing and a group of young Americans were searching for their place within it. In that time of conflict and uncertainty, three days of peace and music seemed to be just what a divided nation needed.").

8. Dylan Riches, *A Barrier to Fans: Concert Prices Slide Away*, GREENWICH DAILY (Oct. 15, 2024), https://thegreenwichdaily.co.uk/f/a-barrier-to-fans-concert-prices-slide-away [https://perma.cc/V84Q-8S62].

9. Finn Christensen, *Streaming Stimulates the Live Concert Industry: Evidence from YouTube*, INT'L J. INDUS. ORG., Dec. 2022, at 1–2 ("Digitization weakened the complementarity between concerts and album sales by allowing consumers to obtain recorded music without purchasing an album. Thus, ticket prices and revenue increased.").

10. *Busting the Live Nation-Ticketmaster Monopoly: What Would a Break-Up Remedy Look Like?*, AM. ANTITRUST INST. (July 11, 2023), https://www.antitrustinstitute.org/work-product/busting-the-live-nation-ticketmaster-monopoly-what-would-a-break-up-remedy-look-like/ [https://perma.cc/H59U-T4KT] ("Live Nation prioritizes the venues they own and operate, at the expense of [i]ndependent venues. . . . Independent venues are compelled to pass on monopoly service fees to fans, resulting in inflated ticket prices. Fans face high, and often duplicative ticket fees when they are driven back to Ticketmaster's ticketing platforms.").

11. John Colapinto, Eric Boehlert & Matt Hendrickson, *Eddie Veder: Who Are You?*, ROLLING STONE (Nov. 28, 1996), https://www.rollingstone.com/music/music-news/eddie-vedder-who-are-you-234741/ (on file with the Temple Law Review).

12. *Id.*

13. *Id.*

14. Maureen Tkacik & Krista Brown, *Ticketmaster's Dark History*, AM. PROSPECT (Dec. 21, 2022), https://prospect.org/power/ticketmasters-dark-history/ [https://perma.cc/39Q7-R3YN]; Chuck Philips, *Pearl Jam vs. Ticketmaster: Choosing Sides: Legal File: The Pop Music World Is Divided over the Seattle Band's Allegations, Which Led to a Justice Department Investigation Into Possible Anti-competitive Practices in the Ticket Distribution Industry*, L.A. TIMES (June 8, 1994, at 00:00 PT) [hereinafter Philips, *Pearl Jam vs.*

a yearlong investigation, the DOJ abruptly ended the probe and issued a two-sentence press release.[15] Pearl Jam was the first of many to attempt to wage the "unwinnable war" against Ticketmaster.[16] But what was once a formidable opponent has now evolved into a behemoth, casting an even larger shadow over the live entertainment industry.

In 2010, Ticketmaster underwent a $2.5 billion merger with the events promoter Live Nation, creating the colossus company every concertgoer has surely encountered: Live Nation Entertainment, Inc. (referred to in this Comment as "Live Nation-Ticketmaster").[17] The merger was approved by the DOJ under the conditions of a consent decree, in hopes of "safeguard[ing] competition in primary ticketing."[18] Since this merger, Live Nation-Ticketmaster's revenue has increased four and a half times, while concert ticket prices have risen four times as fast as the Consumer Price Index (CPI).[19]

Although the DOJ assured that the 2010 consent decree would "mitigate[] consumer harm" while allowing the merged entities to demonstrate a business model that would "benefit the live music industry and its fans," Live Nation-Ticketmaster is facing renewed scrutiny in the wake of widespread consumer outrage.[20] Ultimately, it was Taylor Swift's fans, better known as "Swifties," who lit the spark that may set the

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Ticketmaster], https://www.latimes.com/archives/la-xpm-1994-06-08-ca-1864-story.html (on file with the Temple Law Review).

15. Press Release, U.S. Dep't of Just., Antitrust Div. Statement Regarding Ticketmaster Inquiry (July 5, 1995), https://www.justice.gov/archive/atr/public/press_releases/1995/0264.htm [https://perma.cc/WNE3-TRJ6]. While it is unclear exactly why the Department of Justice dropped the investigation, it is speculated that the Antitrust Division thought it would be difficult to bring a case against Ticketmaster when venue owners and promoters "willingly signed the exclusivity contracts." Chuck Philips, *U.S. Drops Ticketmaster Antitrust Probe: Entertainment: Abrupt Closure of Investigation Lifts Cloud of Uncertainty over Firm, Catches Others in Industry Off Guard.*, L.A. TIMES (July 6, 1995, at 00:00 PT), https://www.latimes.com/archives/la-xpm-1995-07-06-fi-20642-story.html (on file with the Temple Law Review). Further, the Antitrust Division was dedicating most of its resources to investigating Microsoft and believed the Ticketmaster case to be too difficult and uncertain. *See id.*

16. *See* Colapinto et al., *supra* note 11.

17. Joint Press Release, Live Nation, Inc. & Ticketmaster Ent., Inc., Live Nation and Ticketmaster Ent. Complete Merger (Jan. 25, 2010), https://www.sec.gov/Archives/edgar/data/1335258/000119312510012287/dex991.htm [https://perma.cc/3RHX-6Q46]; *Ticketmaster, Live Nation Announce $2.5 Billion Merger into Live Nation Entertainment*, FORBES (June 19, 2013, at 16:47 ET), https://www.forbes.com/2009/02/10/ticketmaster-live-nation-technology_0210_paidcontent.html [https://perma.cc/WG2J-H8HX].

18. Varney, *supra* note 5, at 10. The consent decree required Ticketmaster to license its ticketing platform to its competitor, Anschutz Entertainment Group (AEG), and to refrain from servicing AEG venues. *Id.* Further, Ticketmaster had to sell its Paciolan business, which permitted venues to sell tickets on their own websites, to Comcast Spectacor. *Id.* In addition to these structural safeguards, the consent decree implemented various behavioral remedies that "forbid the post-merger company from engaging in various forms of anticompetitive conduct." *Id.* at 13.

19. Philip Svensson, *Master of Tickets: Breaking Down Live Nation Entertainment*, QUARTR (Sep. 4, 2025), https://quartr.com/insights/company-research/master-of-tickets-breaking-down-live-nation-entertainment [https://perma.cc/B88G-BSCD]; *see also Consumer Price Index*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cpi/ [https://perma.cc/NR6L-ASB7] (last visited Feb. 8, 2026) ("The Consumer Price Index (CPI) is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services.").

20. *See* Varney, *supra* note 5, at 15.

Live Nation-Ticketmaster empire ablaze.[21] In 2022, Swifties attempting to get tickets to Taylor Swift's Eras Tour experienced the usual hallmarks of a Ticketmaster user experience—delays, astronomical prices, and glitches.[22] But this time, the "historically unprecedented demand" for tickets caused the Ticketmaster website to crash, leaving many with presale codes empty-handed.[23] Live Nation-Ticketmaster ultimately canceled the public sale of tickets due to "insufficient remaining ticket inventory."[24]

This debacle forced the DOJ to once again confront Live Nation-Ticketmaster's unchecked market power.[25] On May 23, 2024, the DOJ and twenty-nine states, along with Washington, D.C., filed a complaint against Live Nation-Ticketmaster for antitrust violations, including violation of the Sherman Act through "expansive forms of anticompetitive conduct and exclusionary practices."[26] The Eras Tour ticketing fiasco marked a shift, as consumers—long frustrated with Live Nation-Ticketmaster's market dominance—were not only heard but also taken seriously. For years, individuals have been unable to challenge the company's market dominance in court, forced instead into arbitration by a clause that sidelines antitrust claims. The DOJ's intervention is significant precisely because it responds to a groundswell of consumer outrage that, until now, had been systematically suppressed.

Recently, the Court of Appeals for the Ninth Circuit ruled that Live Nation-Ticketmaster had used an unconscionable arbitration clause as a "critical prophylactic measure"[27] to shield itself from a flood of consumer claims—many of them antitrust-related[28]—following the Eras Tour fiasco. Simply put,

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21. Adrian Horton, *Taylor Swift Slams Ticketmaster over 'Excruciating' Ticket Debacle*, THE GUARDIAN (Nov. 19, 2022, at 13:28 ET), https://www.theguardian.com/music/2022/nov/18/taylor-swift-tickets-ticketmaster-live-nation-us-justice-department [https://perma.cc/5UZP-EC73].

22. *Id.*

23. *Id.*

24. *Id.*

25. *See* David McCabe & Ben Sisario, *Justice Dept. Is Said To Investigate Ticketmaster's Parent Company*, N.Y. TIMES (Jan. 24, 2023), https://www.nytimes.com/2022/11/18/technology/live-nation-ticketmaster-investigation-taylor-swift.html (on file with the Temple Law Review) ("The Justice Department has opened an antitrust investigation into the owner of Ticketmaster, whose sale of Taylor Swift concert tickets descended into chaos this week . . . . The investigation is focused on whether Live Nation Entertainment has abused its power over the multibillion-dollar live music industry. That power has been in the spotlight after Ticketmaster's systems crashed while Ms. Swift fans were trying to buy tickets in a presale for her tour, but the investigation predates the botched sale . . . .").

26. Complaint at 7, United States v. Live Nation Ent., Inc., No. 24–cv–3973 (S.D.N.Y. filed May 23, 2024), 2024 U.S. Dist. LEXIS 149682.

27. Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 677 (9th Cir. 2024) (quoting Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 962 (C.D. Cal. 2023)), *cert. denied*, 146 S. Ct. 96 (2025).

28. *See generally* Barfuss v. Live Nation Ent., Inc., No. 22STCV37958 (Cal. Dec. 14, 2022) (involving 256 plaintiffs alleging antitrust violations against Live Nation-Ticketmaster under California law); First Amended Complaint, Sterioff v. Live Nation Ent., Inc., No. 22-cv-9230 (C.D. Cal. Dec. 20, 2022), 2023 U.S. Dist. LEXIS 120894 (alleging antitrust violations against Live Nation-Ticketmaster under California law on behalf of nationwide class and Washington subclass). Following the Eras Tour, a group of lawyers who were Taylor Swift fans formed a group called Vigilante Legal, which sourced evidence from Swifties to assist the government in their antitrust efforts against Ticketmaster. Nicole Tabak, *A Group of Taylor Swift Fans Who Are Also Lawyers Is Organizing To Take on Ticketmaster*, BUS. INSIDER (Nov. 21, 2022), https://www.businessinsider.com/taylor-swift-lawyer-fans-are-organizing-against-ticketmaster-mergers-2022-

Live Nation-Ticketmaster attempted to avoid accountability to angry customers by forcing consumer claims into arbitration proceedings that were highly biased toward Live Nation-Ticketmaster.[29] The Ninth Circuit's ruling was a small victory in a much larger battle against Live Nation-Ticketmaster.

It appears the time of reckoning has come for Live Nation-Ticketmaster. Recent litigation and growing public discontent have created the opportune landscape to hold the company accountable for its unchecked monopoly power and push for Live Nation's divestiture from Ticketmaster. This Comment argues that the Ninth Circuit's finding that Live Nation-Ticketmaster's arbitration clause was unconscionable is further evidence of Live Nation-Ticketmaster's anticompetitive conduct in violation of Section 2 of the Sherman Act.

Part II.A of this Comment details the original ethos of antitrust laws, while Part II.B discusses the key objectives of the Federal Arbitration Act (FAA). Part II.C then analyzes the debate over the arbitrability of antitrust claims. Part II.D details the series of legal battles Live Nation-Ticketmaster has encountered in recent years, focusing on both their antitrust violations and arbitration provisions. Part II.D.1 presents Live Nation-Ticketmaster's ongoing antitrust litigation in the Southern District of New York, while Part II.D.2 discusses a recent court ruling that deemed Live Nation-Ticketmaster's arbitration clause to be unconscionable. Part III.A argues that the Ninth Circuit's finding that Live Nation-Ticketmaster implemented an unconscionable arbitration clause, and the details underlying that decision, provide further evidence of Live Nation-Ticketmaster's anticompetitive conduct in violation of Section 2 of the Sherman Act. Finally, Part III.B advocates for the statutory codification of the effective-vindication principle.

II. OVERVIEW

A. Antitrust Principles & Policy Goals

Since their inception, the policy goals and values espoused by antitrust laws have been in dispute.[30] Despite evolving policy goals, antitrust laws were originally focused primarily on consumer welfare.[31] On July 2, 1890, federal antitrust policy was first codified when "President Benjamin Harrison signed Bill S. I, which later became known as the Sherman Act."[32] This statute targets cartels, monopolies, and predatory business tactics, but gives courts discretion to frame ancillary issues within the policy goal of advancing consumer welfare.[33] In fact, when Senator John Sherman of Ohio drafted the

11 (on file with the Temple Law Review). The group is comprised of "over [fifty] professionals across industries, including law, government, public relations, and computer science." *Id.*

29. *See Heckman*, 120 F.4th at 677.

30. ROBERT H. BORK, THE ANTITRUST PARADOX 7 (1978) ("[T]here exists among those professionally concerned with antitrust a surprising lack of agreement concerning the most basic questions. The disagreement, though variously phrased, is finally two issues: (1) the goals or values the law may legitimately and profitably implement; and (2) the validity of the law's vision of economic reality.").

31. *Id.* at 20–21 ("The wide variety of other policy goals that have since been attributed to the framers of the Sherman Act is not to be found in the legislative history.").

32. *Id.* at 19.

33. *Id.* at 20.

statute, he "outlawed arrangements 'designed, or which tend, to advance the cost to the consumer.'"[34]

1. Protecting the Consumer

The Supreme Court first gave meaningful shape to the Sherman Act in two landmark decisions decided on the same day in 1911—*Standard Oil Co. of New Jersey v. United States* and *American Tobacco Co. v. United States*.[35] These rulings clarified that the goal of antitrust law is to maximize consumer welfare.[36] While the *Standard Oil* opinion did not explicitly reference consumers, it underscored concerns about the potential harm to consumers that could result from the abuse of monopoly power.[37] In *Standard Oil*, Chief Justice White outlined the evils to be avoided through the enforcement of antitrust laws against monopolies, including: (1) the power given to the monopoly holder to "fix the price" and "injure the public;" (2) the ability to limit production through monopoly power; and (3) the danger of deteriorating quality of the monopolized product.[38]

Consumers were protected through further development of antitrust laws with the passage of the Clayton Act in 1914.[39] The Clayton Act deems business practices that seek to create a monopoly to be unlawful and restricts acquisitions designed to increase market power and reduce competition.[40] Ultimately, "competition" in the context of antitrust law is a technical term, referring to any situation where consumer welfare has reached an optimal state that cannot be further improved through judicial intervention.[41] In essence, antitrust laws are not designed to safeguard competition for its own sake, but to ensure the ultimate protection of consumers.[42]

With consumer protection in mind, Section 4 of the Clayton Act allows recovery of damages by any person "injured in his business or property by reason of anything forbidden in the antitrust laws."[43] This private cause of action entitles a successful plaintiff seeking relief under the Sherman Act to recover "threefold the damages by him sustained," also known as "treble damages."[44] The treble damages private remedy provides both incentive for private antitrust enforcement and "fosters four interrelated

34. *Id.*

35. BORK, supra note 30, at 33. *See generally* Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911) (alleging illegal monopolization of petroleum industry); United States v. Am. Tobacco Co., 221 U.S. 106 (1911) (alleging restraint of trade and attempted monopolization of the tobacco industry).

36. BORK, *supra* note 30, at 33–34.

37. *See Standard Oil*, 221 U.S. at 52 ("[I]ndividuals, by the abuse of their right to contract, might be able to usurp the power arbitrarily to enhance prices.").

38. *Id.* at 52.

39. *See* BORK, *supra* note 30, at 47.

40. *See* 15 U.S.C. §§ 3, 7.

41. BORK, *supra* note 30, at 50–51. ("The antitrust laws, as they now stand, have only one legitimate goal, and that goal [is] . . . the maximization of consumer welfare; therefore . . . 'competition' for purposes of antitrust analysis must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.").

42. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/KC9V-9JXG] (last visited Feb. 8, 2026).

43. 15 U.S.C. § 15(a).

44. *Id.*; *see* 26 C.F.R. § 1.162-22 (2025).

goals: (1) compensation of victims; (2) deterrence of violators; (3) forfeiture of ill-gotten gains; and (4) punishment for wrongdoing."[45]

2. Defining Monopolization Under Section 2 of the Sherman Act

The foundation of consumer protection informs the application of antitrust laws today, particularly in the enforcement of the Sherman Act. Section 1 of the Sherman Act makes "contract[s] . . . or conspirac[ies], in restraint of trade or commerce" illegal.[46] Correspondingly, Section 2 makes monopolization, attempted monopolization, and conspiracy to monopolize a felony.[47] Monopolization under Section 2 requires both "the possession of monopoly power in the relevant market and . . . the willful acquisition or maintenance of that power."[48] Monopoly power is characterized as the "power to control prices or exclude competition."[49] Often, the existence of monopoly power "may be inferred from the predominant share of the market."[50] However, a Section 2 claim will only stand if possession of monopoly power is "accompanied by an element of anticompetitive conduct."[51] In other words, mere possession of monopoly power does not violate Section 2—it must be maintained by improper means.[52] The "improper means" element is often referred to as the "deliberateness" requirement and is distinct from "growth or development as a consequence of superior product, business acumen, or historic accident."[53]

One of the challenging issues in antitrust law is determining when someone with monopoly power has acquired or preserved that power unlawfully, turning it into illegal monopolization.[54] The difficulty in establishing "deliberateness" arises from issues of proving unlawful intent and in determining what conduct is a violation of Section 2 of the Sherman Act.[55]

In *United States v. Aluminum Co. of America* (*Alcoa*), Judge Hand more readily defined the circumstances under which someone is guilty of monopolization under Section 2 of the Sherman Act.[56] In *Alcoa*, the court found that the defendant company had demonstrated a "persistent determination to maintain the control," which was

45. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 783 (1987).

46. 15 U.S.C. § 1.

47. *Id.* § 2.

48. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

49. *Id.* at 571 (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

50. *Id.*

51. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (emphasis omitted).

52. *See Grinnell*, 384 U.S. at 570–71.

53. *See* JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, ANTITRUST LAWS AND TRADE REGULATIONS § 25.04[1] (2d ed. 2024); *Grinnell*, 384 U.S. at 571.

54. KALINOWSKI ET AL., *supra* note 53, § 25.04[1].

55. *Id.*

56. *See* 148 F.2d 416, 431–32 (2d Cir. 1945). Because there was not a quorum of six Justices to sit on appeal of the case, statute authorized the Second Circuit's decision to be rendered "in lieu of a decision by the Supreme Court," and "final . . . [with] no review of such decision by appeal or certiorari or otherwise." Am. Tobacco Co. v. United States, 328 U.S. 781, 811–12 (1946) (citations omitted).

evidence of monopolization.[57] The court determined that the exclusionary conduct amounted to illegal monopolization under the Sherman Act because it consisted of "maneuvres [sic] not honestly industrial"—that is, actions taken "solely by a desire to prevent competition"—and that a company may rebut allegations of monopolization by affirmatively demonstrating that its monopoly position was "thrust upon it" through legitimate competitive success.[58] In other words, "deliberateness" is found if the monopolist had a "general intent to achieve or maintain its monopoly" rather than acquiring it through business savvy.[59] A company violates the Sherman Act only when it seeks to maintain its monopoly power through unjustifiable methods, and courts assess the reasonableness of such practices by examining whether they serve a legitimate business purpose.[60]

B. Arbitration Principles and Policy Goals

Private antitrust claims are often resolved through arbitration where they are procedurally governed by the Federal Arbitration Act (FAA). The FAA requires courts to compel arbitration where there is an enforceable arbitration agreement.[61] The FAA's central purpose is to ensure judicial enforcement of private agreements to arbitrate and to encourage the efficient resolution of disputes.[62] The FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract,"[63] and recognizes that arbitration agreements are subject to "generally applicable contract defenses, such as fraud, duress, or unconscionability."[64] The Supreme Court has declared that under the FAA, an arbitration agreement created through "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'" should not be enforced.[65]

Under the FAA, the court's role is limited to determining if a valid arbitration agreement exists and whether that agreement "encompasses the dispute at issue."[66] The validity of an arbitration agreement is governed by state law principles that control the formation of contracts.[67] Furthermore, the FAA itself does not confer federal jurisdiction.[68] Consequently, motions to compel arbitration can only be brought in federal court if the underlying substantive controversy arises under federal law.[69]

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57. *Alcoa*, 148 F.2d at 430.

58. *See id.* at 429–30.

59. KALINOWSKI ET AL., *supra* note 53, § 25.04[2]; *see also Alcoa*, 148 F.2d at 432 ("[N]o monopolist monopolizes unconscious of what he is doing.").

60. *See* KALINOWSKI ET AL., *supra* note 53, § 25.04[1]–[2]; *The Antitrust Laws*, supra note 42.

61. *See* 9 U.S.C. § 3.

62. *See id.* §§ 2–4; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

63. 9 U.S.C. § 2.

64. *Concepcion*, 563 U.S. at 339 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

65. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (quoting 9 U.S.C. § 2).

66. Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000); *see* 9 U.S.C. § 4.

67. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

68. Vaden v. Discover Bank, 556 U.S. 49, 59 (2009).

69. *See id.* at 62; 9 U.S.C. § 4.

Arbitration is one of the most ubiquitous forms of dispute resolution, with virtually every American being subject to a forced arbitration agreement with a class action waiver,[70] which is a "contractual provision by which a party explicitly forgoes the right to take part in a class action."[71] In fact, seventy-eight companies in the Fortune 100 use such agreements, and from 2011 to 2019 the number of businesses using "arbitration agreements with class-action waivers in their consumer contracts tripled."[72] This trend towards arbitration is a symptom of an effort by corporations to engineer "contractual immunity against a vast array of claims" and has been dubbed the "arbitration revolution."[73]

1. The Strategic Shift from Litigation to Arbitration

The arbitration revolution describes a crusade spearheaded by the defense coalition to shift disputes from public litigation into private arbitration, ultimately diminishing the plaintiff's ability to assert their claims.[74] The biggest act of attrition towards eliminating consumer claims was the introduction of the class action waivers in arbitration agreements, which, as stated, have become nearly ubiquitous.[75] In *AT&T Mobility LLC v. Concepcion*, the Supreme Court ruled that the FAA preempts California's ban on class action waivers in arbitration agreements and that such waivers were not per se unconscionable.[76] The Court believed that the prohibition on class action waivers in arbitration agreements was an "obstacle to the . . . objectives of Congress" when passing the FAA.[77] The Court held that the "overarching purpose of the FAA" was to enforce arbitration agreements "according to their terms . . . to facilitate streamlined proceedings" and that requiring class wide arbitration to be available interferes with "fundamental attributes of arbitration," thus conflicting with the FAA.[78] Notably, the Court in *Concepcion* neglected to define what the "fundamental attributes of arbitration" really are.[79] *Concepcion* was one of several Supreme Court cases that dramatically expanded the scope of the FAA and was a key case in the arbitration revolution.[80]

By pairing mandatory arbitration agreements with class action waivers, the defense bar has effectively "eliminated a wide range of consumer, employee, and civil rights claims."[81] Class action waivers discourage individual claimants from pursuing legal

70. J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1303 (2022).

71. *Class-Action Waiver*, BLACK'S LAW DICTIONARY (12th ed. 2024).

72. Glover, *supra* note 70, at 1304.

73. *Id.* at 1292.

74. *Id.* at 1295–96.

75. *See id.* at 1292.

76. 563 U.S. 333, 352 (2011).

77. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

78. *Id.* at 344.

79. *See id.*

80. *See* Andrew B. Nissensohn, *Mass Arbitration 2.0*, 79 WASH. & LEE L. REV. 1225, 1230 (2022) ("Beginning in the 1980s, the defense bar, corporate interests, and conservative lawmakers embarked on a decades-long crusade through consumer and employee statutory rights . . . . The Supreme Court, through a series of misguided decisions, aided and abetted this crusade and held that the FAA demanded the enforcement of egregiously one-sided pre-dispute arbitration agreements, including ones that forbade class treatment.").

81. Glover, *supra* note 70, at 1296.

action by creating high barriers to entry and offering relatively low success rates to individuals pursuing arbitration.[82] Many meritorious claims are eliminated by forced arbitration with class action waivers because they are not economically viable in the individual context.[83]

2. From Class Action to Mass Arbitration

Mass arbitration has emerged as the natural counterrevolution to class action waivers in arbitration agreements.[84] In response to the Supreme Court limiting the availability of class actions in arbitrations, litigators turned towards mass arbitration as a means of coordinating individual cases against a company.[85] Mass arbitration is distinct from class arbitrations in that the former involves several individual claims being filed by common counsel against the same respondent, as opposed to appointing a class representative on behalf of the class.[86] In other words, individual claims arising out of similar alleged misconduct "that make up the multifarious one-on-one arbitrations" are repeatedly brought against the same defendant.[87]

Plaintiffs' firms have used the Supreme Court's enforcement of arbitration agreements "according to their terms" to reclaim consumer substantive rights, leveraging forced arbitration clauses and class action waivers in contracts of adhesion.[88] For example, some plaintiffs' firms are fronting the costs of fee-shifting agreements, where they pay the upfront costs of arbitration filing fees in anticipation of reimbursement from the corporation once their claim prevails.[89] In doing so, plaintiffs' firms have recognized that "[t]he potential for low-value cases to generate significant settlement pressure comes from a mass of claims, which can exist independently of any specific aggregate device."[90]

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82. *See id.* at 1304–06 ("Individuals tend to fare poorly even when they do arbitrate, a fact many attribute to the repeat-player advantages that corporate entities enjoy in arbitration.").

83. *See id.* at 1307–08 ("The fact that a claim's value is less than the cost of pursuing that claim says nothing of the claim's worth. It may say something about the high cost of litigation."); *see also id.* at 1329 ("In many cases, just the filing fee for the arbitration demand can exceed the value of any individual claim.").

84. *See id.* at 1321 ("[M]ass arbitration is fundamentally a reactionary phenomenon. . . . Corporations created such a force . . . through their resistance to the class action.").

85. Adam Shoneck, *Mass Arbitration - How Did We Get Here & Where Are We Now?*, AM. ARB. ASSOC. (June 6, 2024), https://www.adr.org/news-and-insights/mass-arbitration-how-did-we-get-here-where-are-we-now/ [https://perma.cc/LZY6-5BH7]; Nissensohn, *supra* note 80, at 1247 ("Plaintiffs have begun to leverage arbitration provisions en masse to inflict maximum cost on corporate defendants.").

86. *See* Clifford D. Bloomfield, *Mass Arbitrations: The New Landscape of Dispute Resolution and Its Challenges*, JAMS ADR (May 2, 2024), https://www.jamsadr.com/blog/2024/mass-arbitrations-the-new-landscape-of-dispute-resolution-and-its-challenges [https://perma.cc/6YXR-NP92].

87. Glover, *supra* note 70, at 1289.

88. *See* Nissensohn, *supra* note 80, at 1247–48 ("In recent years, plaintiffs' attorneys have acquiesced to the Supreme Court's demand that arbitration agreements 'be enforced according to their terms' . . . . Conforming to the letter, but not the spirit, of the Court's FAA jurisprudence, plaintiffs' attorneys compiled thousands of individual claims against companies, filing demands for arbitration en masse."); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); Glover, *supra* note 70, at 1307 ("It is not arbitration alone, however, that eliminates most claims. Instead, it is the combination of forced arbitration and class-action waivers in contracts of adhesion.").

89. *See* Nissensohn, *supra* note 80, at 1250.

90. Glover, *supra* note 70, at 1319 (emphasis omitted).

Mass arbitration has impacted corporations much like they once feared class actions would, by leveraging consumer power to exert pressure and drive settlements.[91]

While many scholars have analyzed the arbitration revolution and its impact on substantive rights enforcement, there is comparatively less scholarship regarding mass arbitration.[92] Mass arbitration is a relatively novel and evolving niche with limited precedent,[93] prompting both defense and plaintiffs' firms to explore innovative strategies for leveraging its potential, and avoiding its deleterious effects.[94] Professor Maria Glover of the Georgetown University Law Center, a leading expert in private litigation and dispute resolution, published the "first and only case study of mass arbitration" in 2022.[95] The case study outlines the key features of the mass-arbitration model, examines its current challenges, and explores its future implications.[96]

Professor Glover views mass arbitration as a direct challenge to the premise that drove the arbitration revolution and its attack on class actions: the notion that pursuing individual claims is economically irrational.[97] While optimistic about mass arbitration's potential for consumers to vindicate their claims, Professor Glover cautions that the defense bar, given its history of influence on the arbitration landscape, is likely to mount significant countermeasures.[98] In her own words, "defendants still have the power: They drafted the agreements, which means they can change them."[99] Professor Glover warns of three defense mechanisms corporations would likely impose to avoid the onslaught of individual claims: "(1) the elimination of fee-shifting provisions; (2) the insertion of 'batching' provisions; and (3) the insertion of provisions that move mass-arbitration claims to defendant-friendly arbitral fora."[100]

As an initial matter, Professor Glover notes that fee leveraging by plaintiffs' firms was "essentially a chance to short sell on a market error," and companies who are quick to adapt will seek to eliminate fee-shifting provisions.[101] Conversely, corporations with fewer resources and less sophistication will retain their fee-shifting clauses, leading to

91. *See id.* at 1380 ("The mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure."); *id.* at 1352 ("[T]he leverage of a large number of individual arbitrations can sometimes *exceed* the leverage created by aggregate proceedings.").

92. Nissensohn, *supra* note 80, at 1231.

93. Glover, *supra* note 70, at 1343 ("It is premature at this juncture, however, to speculate as to whether courts—and ultimately the Supreme Court—will find that *mass* arbitration violates the FAA by treading too close to *class* arbitration.").

94. *Compare Class Actions & Mass Arbitrations*, JANOVE, https://www.janove.law/class-actions-mass-arbitrations [https://perma.cc/9E9G-2RTD] (last visited Feb. 8, 2026) ("Janove PLLC creatively uses . . . mass arbitrations to level the playing field against big tech and major corporations."), *with Mass Arbitration*, EIMER STAHL, https://www.eimerstahl.com/practices-mass-arbitration [https://perma.cc/2R32-US3D] (last visited Feb. 8, 2025) ("Eimer Stahl lawyers have developed extensive experience in proactively advising corporations on ways to reduce vulnerability before they become targets of mass arbitration demands.").

95. *See* Glover, *supra* note 70, at 1283.

96. *See id.* at 1283–84.

97. *See id.* at 1351.

98. *See id.* at 1315.

99. *Id.* at 1364.

100. *Id.*

101. *Id.* at 1365–66.

fewer claims against "the biggest and most sophisticated . . . corporations."[102] Further, corporations have already begun "batching" similar individual claims and resolving them in a singular proceeding, in order to reduce the settlement pressure imposed by the disproportionate financial burden of handling each arbitration case separately.[103] Batching claims dilutes the ability to leverage the individual cost of arbitration repeatedly and will make it such that only "easy-to-prove, near-slam-dunk cases will be economically attractive for firms to pursue."[104] Finally, Professor Glover cautions that defendant corporations have already begun revising their arbitration agreements to move arbitrations from neutral forums to more defendant-friendly outfits.[105] Professor Glover posits that if courts allow such defendant-friendly terms to prevail "then mass arbitration will have made consumers . . . better off in the short term, but worse off in the long term."[106]

C. The Intersection of Arbitration and Antitrust

The arbitrability of antitrust issues remains a contentious subject among legal scholars.[107] In 1985, the Supreme Court ruled in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, that "antitrust claims are arbitrable pursuant to the [FAA]."[108] In *Mitsubishi*, the Court reversed the First Circuit Court of Appeals' holding that "the nonarbitrability of antitrust issues in domestic contract disputes is established as solid and sound doctrine."[109] In reaching this decision, the First Circuit relied on the reasoning as outlined by the Second Circuit in *American Safety Equipment Corp. v. J. P. Maguire & Co*.[110] More specifically, the First Circuit acknowledged the role the private cause of action plays in enforcing the regime of the antitrust laws, and that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest."[111]

The First Circuit believed the policy of nonarbitrability to be supported by fourfold reasoning.[112] First, antitrust law is "vital to the successful functioning of a free economy"

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102. *Id.* at 1366–67.

103. *Id.* at 1367 ("The 'batch' then gets assigned to an arbitrator or panel of arbitrators, and it triggers a single filing fee. Notably, some batching provisions exist alongside contractual class-action waivers.").

104. *Id.* at 1367–68.

105. *Id.* at 1370–71 ("Ticketmaster, for example, changed its arbitral forum to New Era ADR shortly before a court granted its motion to compel arbitration on antitrust claims. This timing does not seem coincidental: New Era bills itself as cheaper for businesses than other arbitral fora.").

106. *Id.* at 1373.

107. *Compare* Gerald Aksen, *Arbitration and Antitrust—Are They Compatible?*, 44 N.Y.U. L. REV. 1097, 1097 (1969) ("[T]he author contends that the courts have erred in viewing arbitration as inconsistent with antitrust policy."), *with* J. Patrick Ovington, *Arbitration and U.S. Antitrust Law: A Conflict of Policies*, 2 J. INT'L ARB. 53, 54 (1985) ("This paper examines the differences between [antitrust and arbitration] and concludes that the differences are substantial enough to warrant a different treatment regarding their arbitrability.").

108. 473 U.S. 614, 615 (1985).

109. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 163 (1st Cir. 1983), *aff'd in part, rev'd in part*, 473 U.S. 614 (1985).

110. *Id.* at 162 (citing Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826–27 (2d Cir. 1968)).

111. *Id.* at 168 (quoting *Am. Safety*, 391 F.2d at 826).

112. *Id.* at 162 (citing *Am. Safety*, 391 F.2d at 826–27).

and its vindication is "delegated by statute to both government and private parties," with private parties being given the "incentive to supplement the efforts of the [government]," with "the work of both being equally the grist of judicial decisions."[113] Second, the "strong possibility" that contracts which lead to antitrust disputes are contracts of adhesion requires resistance to "automatic forum determination by contract."[114] Third, antitrust issues are incredibly complicated, often implicating "extensive and diverse" evidence that require an "increasingly sophisticated jurisprudence" that is unfit for the strengths of the arbitration process (i.e., "expedition," "simplicity," "concepts of common sense and . . . equity").[115] And fourth, decisions regarding antitrust regulation of businesses are too important to be delegated to arbitrators chosen by the business community.[116] The First Circuit referred to this reasoning as the "doctrine of *American Safety Equipment*," and noted that every other circuit that was faced with the issue of the nonarbitrability of antitrust claims has adopted the same approach.[117]

The Supreme Court rejected each of these arguments in turn, expressing "skepticism of certain aspects of the *American Safety* doctrine."[118] The Court dismissed concerns about antitrust issues frequently arising in contracts of adhesion as "unjustified," finding that a party wishing to resist arbitration "may attack directly the validity of the agreement to arbitrate," and one should not assume an arbitration clause to be automatically "tainted" or unfair.[119] Next, the Court cautioned that "potential complexity should not suffice to ward off arbitration."[120] The Court further rejected the "proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes."[121]

Finally, the Court gave credence to the importance of a private cause of action in enforcing the antitrust regime but ultimately determined that the "importance of the private damages remedy . . . does not compel the conclusion that it may not be sought outside an American court."[122] "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[123] This declaration became known as the

113. *Id.* at 162 (citing *Am. Safety*, 391 F.2d at 826).

114. *Id.* (citing *Am. Safety*, 391 F.2d at 827).

115. *Id.* (citing *Am. Safety*, 391 F.2d at 827).

116. *Id.* (citing *Am. Safety*, 391 F.2d at 827).

117. *Id.* at 162–63 (first citing Applied Digit. Tech., Inc. v. Cont'l Cas. Co., 576 F.2d 116, 117 (7th Cir. 1978); then citing Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974); then citing Helfenbein v. Int'l Indus., Inc., 438 F.2d 1068, 1070 (8th Cir. 1971); and then citing Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980, 983–84 (9th Cir. 1970)).

118. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 632 (1985).

119. *Id.*

120. *Id.* at 633 ("[A]daptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal.").

121. *Id.* at 634 ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.").

122. *Id.* at 635 ("The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators.").

123. *Id.* at 637.

"effective-vindication" principle.[124] The Court warned that when an arbitration clause operates to waive a party's right to pursue remedies for antitrust violations, "we would have little hesitation in condemning the agreement as against public policy."[125] Relying on this reasoning, the Supreme Court in *Mitsubishi* superseded the *American Safety* doctrine, uniformly followed by several courts of appeals,[126] and determined that antitrust disputes were arbitrable issues.[127]

Twenty-eight years later, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court revisited the question of the arbitrability of antitrust laws under a new lens: whether antitrust claims are subject to class action waivers when the cost of the expert analysis required to prove a violation greatly exceeds the potential maximum recovery for an individual plaintiff.[128] In an opinion authored by Justice Scalia, the Court ultimately held that "[n]o contrary congressional command requires us to reject the waiver of class arbitration here" and that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[129] Notably, the Court referred to the effective-vindication exception from *Mitsubishi* as "dictum."[130] The Court believed that the inability to justify the costs of proving a statutory remedy did not equate to the loss of the right to seek that remedy.[131]

In her dissent, Justice Kagan contended that by waiving class action procedures in the antitrust context, "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[132] For Justice Kagan, the majority's response to this concern was simply, "[t]oo darn bad."[133] Justice Kagan called the majority's opinion "a betrayal of our precedents," and of federal antitrust law.[134] In Justice Kagan's view, the effective-vindication principle was not "dictum," as the majority said, but a "mechanism . . . to prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights."[135] Because Congress created the Sherman Act to promote the private enforcement of antitrust laws for the public good, courts would decline to enforce a prospective waiver of the right to vindicate antitrust violations in arbitration agreements or otherwise.[136]

Justice Kagan stressed that effective vindication is most pertinent in the antitrust context because without it, "a company could use its monopoly power to protect its

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124. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 229 (2013).

125. *Mitsubishi*, 473 U.S. at 637 n.19.

126. *See, e.g.*, Am. Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826–28 (2d Cir. 1968); Cobb v. Lewis, 488 F.2d 41, 47 (5th Cir. 1974); Univ. Life Ins. Co. of Am. v. Unimarc Ltd., 699 F.2d 846, 850–51 (7th Cir. 1983); Helfenbein v. Int'l Indus., Inc., 438 F.2d 1068, 1070 (8th Cir. 1971); Lake Commc'ns, Inc. v. ICC Corp., 738 F.2d 1473, 1477–80 (9th Cir. 1984).

127. *See Mitsubishi*, 473 U.S. at 632–40.

128. *Italian Colors*, 570 U.S. at 231.

129. *Id.* at 233.

130. *Id.* at 235.

131. *Id.* at 236 ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

132. *Id.* at 240 (Kagan, J., dissenting).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 241.

monopoly power," by forcing acceptance of contract terms that shield it from antitrust accountability.[137] Justice Kagan listed a number of contractual methods a monopolist could devise when drafting an arbitration agreement to avoid antitrust accountability,[138] and emphasized that *Mitsubishi* established an unwavering principle—"[i]f an arbitration provision 'operated . . . as a prospective waiver of a party's right to pursue statutory remedies,' . . . we would 'condemn[]' it."[139] Additionally, *Mitsubishi* claimed that "such a clause should be 'set [] aside' if 'proceedings in the contractual forum will be so gravely difficult' that the claimant 'will for all practical purposes be deprived of his day in court.'"[140]

Justice Kagan posited that the effective-vindication rule not only furthers the goals of the Sherman Act, but also of the FAA itself, as it reflects a policy favoring arbitration as a "method of resolving disputes," rather than a means of warding off valid claims.[141] The effective-vindication rule supports the FAA's goals by ensuring arbitration remains a legitimate means of dispute resolution.[142] Without the effective-vindication rule, companies might draft their arbitration clauses to make arbitration "unavailable or pointless," leading to poorer enforcement of federal statutes.[143] As such, "[t]he effective-vindication rule asks whether an arbitration agreement as a whole precludes a claimant from enforcing federal statutory rights."[144]

Justice Kagan reminded the majority that the plaintiffs in *Italian Colors* were not insisting that class action was essential to overcome the obstacles an individual claimant might face.[145] Instead, they were simply asking for "some means of vindicating a meritorious claim."[146] Accordingly, the majority's reliance on *Concepcion* was misplaced, as that case addressed only whether class action waivers conflicted with the FAA and did not consider the effective-vindication rule.[147] As a result of the majority's narrow view of the issue, Justice Kagan warned that arbitration threatens to become a "mechanism . . . to block the vindication of meritorious federal claims and insulate wrongdoers from liability."[148] Justice Kagan's dissent offers a prescient warning regarding Live Nation-Ticketmaster's current arbitration practices.[149]

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137. *Id.*

138. *Id.* at 241–42 (listing "outlandish filing fees," "absurd (e.g., one-day) statute of limitations," "block[ing] the claimant from presenting the kind of proof that is necessary to establish the defendant's liability," and "appoint[ing] as an arbitrator an obviously biased person" (emphasis omitted)).

139. *Id.* at 242 (first omission in original) (second alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985)).

140. *Id.* at 242–43 (alteration in original) (quoting *Mitsubishi*, 473 U.S. at 632).

141. *Id.* at 243–44 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).

142. *Id.* at 244.

143. *Id.*

144. *Id.* at 249 ("No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open.").

145. *Id.* at 251.

146. *Id.*

147. *Id.* at 251–52.

148. *Id.* at 253.

149. *See infra* Part II.D.2.

D. Live Nation-Ticketmaster's Current Legal Controversies

1. Live Nation-Ticketmaster's Pending Antitrust Suit in the United States District Court for the Southern District of New York

On May 23, 2024, the DOJ, along with forty states and Washington, D.C., filed a civil antitrust lawsuit against Live Nation Entertainment Inc. and its subsidiary, Ticketmaster (collectively "Live Nation-Ticketmaster").[150] The United States brought action against Live Nation-Ticketmaster pursuant to Section 4 of the Sherman Act, "to prevent and restrain Defendants' violations of Section 1 and Section 2 of the Sherman Act."[151] The DOJ requested structural relief, whereby Live Nation-Ticketmaster would be broken up into separate legal entities.[152]

In its complaint, the DOJ pointed to Live Nation-Ticketmaster's exclusionary practices as a means of protecting the company's "flywheel."[153] The flywheel is Live Nation-Ticketmaster's self-perpetuating business strategy, whereby the company collects fees and revenue from concertgoers and sponsorships, uses that income to secure exclusive promotion agreements with artists, then leverages its stronghold on live events to sign venues into long-term exclusive ticketing contracts.[154] Live Nation-Ticketmaster's flywheel has been explained as a "live entertainment ecosystem" that creates a "self-reinforcing cycle of growth and efficiency."[155] The complaint alleged that Live Nation-Ticketmaster's conduct had "synergistic anticompetitive effects that have harmed competition and the competitive process."[156]

The DOJ cited to several anticompetitive and monopolistic practices Live Nation-Ticketmaster allegedly engaged in, including retaliating against potential entrants, acquiring competitors, locking out competition with exclusionary contracts, and restricting artists' access to venues.[157] What the complaint did not mention was that consumers have unsuccessfully been trying to hold Live Nation-Ticketmaster to account for its antitrust violations for some time.[158]

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150. *See* Complaint, *supra* note 26, at 2 ("One monopolist serves as the gatekeeper for the delivery of nearly all live music in America today: Live Nation, including its wholly owned subsidiary Ticketmaster.").

151. *Id.* at 76.

152. *See id.* at 102–04 ("To remedy these illegal acts, Plaintiffs request that the Court . . . [o]rder the divestiture of . . . Ticketmaster.").

153. *See id.* at 23–26; Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry (Feb. 6, 2025) [hereinafter Press Release, DOJ Sues Live Nation-Ticketmaster for Monopolizing], https://www.justice.gov/archives/opa/pr/justice-department-sues-live-nation-ticketmaster-monopolizing-markets-across-live-concert [https://perma.cc/T3MX-BBFN].

154. Press Release, DOJ Sues Live Nation-Ticketmaster for Monopolizing, *supra* note 153.

155. Svensson, *supra* note 19.

156. Complaint, *supra* note 26, at 79.

157. *Id.* at 3–5.

158. *See id*. at 1–124.

2. Live Nation-Ticketmaster's Mass Arbitration Disputes

Historically, consumer antitrust complaints against Live Nation-Ticketmaster have gone to arbitration.[159] In 2023, in the case *Oberstein v. Live Nation Entertainment Inc.*, the Ninth Circuit held that Live Nation-Ticketmaster's arbitration clause was enforceable and granted the company's motion to compel arbitration.[160] As such, ticket purchasers' claims against Live Nation-Ticketmaster for anticompetitive conduct in violation of the Sherman Act were shuffled into alternative methods of resolution.[161] In *Oberstein*, the Ninth Circuit upheld the lower court's ruling that Live Nation-Ticketmaster's websites provided sufficient constructive notice of the terms of use (TOU), and that purchasers "unambiguously manifested assent" to be bound by those terms, including the arbitration provision.[162] But in a subsequent case presenting essentially the same set of facts, the Ninth Circuit, which had earlier deemed Live Nation-Ticketmaster's arbitration clause to be enforceable, took pause.[163] In *Heckman v. Live Nation Entertainment, Inc.*, consumers once again brought a putative class action against Live Nation-Ticketmaster for its anticompetitive practices in violation of the Sherman Act.[164]

Importantly, in July 2021, prior to a decision being rendered in *Oberstein* and before the commencement of the *Heckman* suit, Live Nation-Ticketmaster updated its TOU and selected a new arbitration resolution forum.[165] Under the new TOU, Live Nation-Ticketmaster would use "New Era ADR" as opposed to its former arbitration provider "JAMS."[166] New Era ADR is a "technology startup that launched its alternative dispute resolution services in April 2021."[167] In May 2021, New Era ADR contacted Live Nation-Ticketmaster's legal counsel and secured a subscription agreement—Live Nation-Ticketmaster was New Era ADR's first subscriber.[168]

159. *See* Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 518 (9th Cir. 2023).

160. *See id.* at 518–19.

161. *See id.* at 509–10, 518–19.

162. *Id.* at 516–17.

163. *See* Heckman v. Live Nation Ent., Inc., No. CV 22-0047, 2022 WL 19376995, at *3 (C.D. Cal. June 7, 2022) (tentative ruling) ("While the Court recognizes that the complaint is very similar to that of *Oberstein*, Plaintiffs raise allegations in the Complaint and this Motion that are troubling.").

164. 686 F. Supp. 3d 939, 945–46 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

165. *Id.* at 946; Dan Papscun, *Ticketmaster Antitrust Suit Hinges On Arbitration Forum Discovery*, BLOOMBERG L. (June 16, 2022, at 05:00 ET), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X5B3E7G000000?bna_news_filter=antitrust (on file with the Temple Law Review).

166. *Heckman*, 686 F. Supp. 3d at 946; Indraneel Gunjal & Damini Mohan, *Ticketmaster's New Dispute Resolution Process – Rethinking Consumer Arbitration*, ARBITRATE (Oct. 19, 2023), https://arbitrate.com/ticketmasters-new-dispute-resolution-process-rethinking-consumer-arbitration/#d769dd82-4928-432d-b3d5-e9a6b43210c2 [https://perma.cc/5FZ5-DKEC].

167. Gunjal & Mohan, *supra* note 166.

168. *Id.*

a. Heckman v. Live Nation—*Central District of California*

Previously, courts have held that Live Nation-Ticketmaster's websites were designed so as to provide constructive notice of the TOU.[169] However, under the new TOU, the district court was not satisfied that customers had been put on notice as to the new arbitrator.[170] Applying California unconscionability law, the United States District Court for the Central District of California determined in *Heckman*, that Live Nation-Ticketmaster's arbitration agreement as a whole was unconscionable.[171] California unconscionability law requires both procedural and substantive unconscionability but uses a sliding scale approach, where "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."[172] As to procedural unconscionability, the court looks for factors such as oppression and surprise.[173] The court's inquiry into substantive unconscionability "pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided."[174]

Because the court's responsibility in enforcing an arbitration agreement is confined to assessing its validity, and because Live Nation-Ticketmaster's new TOU designates the arbitrator as the ultimate authority on enforceability, the court focused its unconscionability review solely on this conflict at the heart of the new TOU's delegation clause.[175] In pertinent part, the delegation clause granted the arbitrator, rather than the court, "exclusive authority . . . to resolve all disputes" related to the arbitration agreement, including the power to decide if "all or any part of [the] Agreement is void or voidable."[176]

The court held that the delegation clause was "procedurally unconscionable to an extreme degree,"[177] finding that both factors of oppression and surprise were present because the arbitration provision was offered on a "take-it-or-leave-it basis," leaving the consumer with no meaningful choice or opportunity to "negotiate individual terms."[178] Notably, the court highlighted Live Nation-Ticketmaster's market dominance when

169. *See, e.g.*, Oberstein v. Live Nation Ent., Inc., 60 F.4th 505, 515 (9th Cir. 2023); Dickey v. Ticketmaster LLC, No. CV 18-9052, 2019 WL 9096443, at *7 (C.D. Cal. Mar. 12, 2019); Nevarez v. Forty Niners Football Co., No. 16-CV-07013, 2017 WL 3492110, at *8 (N.D. Cal. Aug. 15, 2017).

170. *Heckman*, 686 F. Supp. 3d at 953 ("The fact that Defendants' customers received no notice of the significant change to the [terms of use (TOU)] creates a situation of unfair surprise. And, because it would seem trivially easy to provide customers with such notice, Defendants' failure to do so suggests a degree of intentionality and/or oppression.").

171. *Id.* at 967.

172. *Id.* at 950 (quoting Sanchez v. Valencia Holding Co., 353 P.3d 741, 748 (Cal. 2015)).

173. *Id.* at 952.

174. *Id.* at 957 (quoting OTO, L.L.C. v. Kho, 447 P.3d 680, 690 (Cal. 2019)).

175. *Id.* at 951–52; Brennan v. Opus Bank, 796 F.3d 1125, 1132 (9th Cir. 2015) ("Because a court must enforce an agreement that, as here, clearly and unmistakably delegates arbitrability questions to the arbitrator, the only remaining question is whether the particular agreement *to delegate* arbitrability—the Delegation Provision—is itself unconscionable."). See *supra* note 66 and accompanying text explaining that the court's role is confined to assessing the validity of an arbitration agreement.

176. *Heckman*, 686 F. Supp. 3d at 951.

177. *Id.* at 952.

178. *Id.*

evaluating the power imbalance between the company and its consumers.[179] The court also pointed to the absence of notice despite significant changes to the TOU from individual, bilateral arbitration to mass arbitration.[180] Further, the amended TOU extended the new arbitration agreement to any dispute, claim, or controversy, regardless of when it arose.[181] As such, customers who had agreed to the TOU prior to the change in arbitration providers were bound to bring disputes before New Era ADR, despite agreeing to arbitrate with JAMS, "merely because the customer opened Defendants' website."[182]

The court ended their procedural unconscionability analysis by noting that even if ticket purchasers had reviewed the updated TOU, it was "doubtful that they would understand that they were agreeing to resolve their claims in a novel mass arbitration procedure."[183] In fact, "[t]he revised TOU makes no mention of mass arbitration whatsoever."[184] The fact that the "agreed-upon terms" were hidden from the customer was another reason the court found the TOU procedurally unconscionable.[185]

The court then turned to its analysis of substantive unconscionability, noting that the analysis is concerned with "terms that are unreasonably favorable to the more powerful party."[186] The court further reemphasized that because they found the TOU to have an "extremely high degree of procedural unconscionability," even a small degree of substantive unconscionability would be sufficient for purposes of rendering the arbitration agreement unenforceable.[187] While the court considered New Era's alleged bias towards Live Nation-Ticketmaster, it ultimately ruled that based on the existing record, it was "not entirely persuaded that the evidence of bias is all Plaintiffs make it out to be."[188] Thus, regardless of New Era's alleged prejudice toward Live Nation-Ticketmaster, the court noted that a determination of substantive unconscionability turns on whether the protocol could be considered "fair and impartial" compared to "other generally accepted conventional arbitration rules."[189]

New Era's rules governing mass arbitration "apply if a neutral determines there are more than five cases presenting the same or similar evidence, witnesses, or issues of law

179. *Id.* ("[I]t is hard to imagine a relationship with a greater power imbalance than that between Defendants and [their] consumers, given [Live Nation-Ticketmaster's] market dominance in the ticket services industries.").

180. *Id.* at 953 ("Specifically, the [TOU] were amended: (1) to bring about a significant change in the parties' agreement . . . ; (2) unilaterally; (3) in the midst of ongoing litigation; (4) to be applied retroactively to already accrued claims; (5) without giving any notice to existing customers about this major change; and (6) while burying the true nature of this change in New Era's difficult-to-parse Rules.").

181. *Id.* at 954.

182. *Id.*; *see also id.* at 945 n.10. ("Indeed, according to Defendants, 'virtually every Live Nation and Ticketmaster website page that users navigate' (including the homepage) contains a statement purporting to bind users to the latest version of the [TOU] merely by browsing the site.").

183. *Id.* at 956.

184. *Id.*

185. *Id.*

186. *Id.* at 957 (quoting OTO, L.L.C. v. Kho, 447 P.3d 680, 689 (Cal. 2019)).

187. *Id.*

188. *Id.* at 958.

189. *Id.* (quoting McGrath v. DoorDash, Inc., No. 19-CV-05279, 2020 WL 6526129, at *10 (N.D. Cal. Nov. 5, 2020)).

and fact."[190] Essentially, cases are grouped together for "administrative purposes," but whether they share common issues is ultimately determined by a neutral party.[191] Then, three key "bellwether," or representative, cases are chosen—one by each side and one by the neutral party.[192] Once a neutral party renders a decision in the three bellwethers, the parties enter settlement discussions.[193] If no settlement is reached, each party can present cases that they believe have unique issues that should not be influenced by the bellwether cases.[194] Decisions from these bellwether cases will serve as "[p]recedent" for other cases with similar issues, and only cases without any common issues can be removed from mass arbitration.[195]

Plaintiffs' primary concern centered on the final protocol, which mandated that the arbitrator treat decisions from bellwether cases as binding precedent.[196] Consequently, a claimant bringing a claim after the bellwether has been resolved would have already had the outcome of her case decided before even filing, without any representation, notice, or chance to opt out of the prior proceedings.[197] While defendants argued that the application of the precedent is discretionary and not mandatory, the court disagreed and said that the rule only said arbitrators could apply precedents in similar cases, but it did not explain how those precedents should be used specifically in mass arbitration.[198] To clarify how precedents are applied, the court turned to the specific rules governing New Era's mass arbitration.[199] After careful analysis of the rules, the court determined that they did not necessarily prove "that [p]recedent is to be applied in all instances by the neutral without discretion."[200]

Regardless, the court expressed concern about the application of precedent in mass arbitration, noting the rules contained a "substantial amount of ambiguity as [to] how [p]recedent is to be applied."[201] In fact, the rules provide the neutral the "sole discretion" to decide whether to group cases in a mass arbitration and how, or whether, to apply precedent to those cases.[202] The court determined that "[t]his unchecked power on the part of the neutral, combined with the ambiguity contained in the [r]ules, is uniquely problematic when considering that [p]recedent could be applied to thousands of claims at once."[203] The court cautioned that the way precedent is interpreted and applied could determine whether an arbitration process is fair, allowing each claimant a meaningful chance to be heard, or whether it becomes a "mechanical process for summarily

190. *Id.* at 959.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 960.
198. *Id.*
199. *Id.*
200. *Id.* at 960–61.
201. *Id.* at 961.
202. *Id.*
203. *Id.*

disposing of an entire class of claimants based on an earlier proceeding to which they were not a party."[204]

The court then addressed the due process concerns arising from the adjudication of thousands of claims based on ambiguous precedent and the absence of procedural protections.[205] For example, the rules lacked provisions for providing notice since the arbitrations are private, and there is no opportunity for parties to present their cases.[206] Most importantly, the claimants had no "opt out" option, as required for class actions under Rule 23(b)(3) of the Federal Rules of Civil Procedure (FRCP).[207] Ultimately, the court found the mass arbitration rules to be substantively unconscionable because they created a process that "pose[d] a serious risk of being fundamentally unfair to claimants."[208]

The plaintiffs further supported their claim of unconscionability by highlighting the restrictive discovery limitations set by the rules.[209] The rules capped complaints at ten pages, limited presentations of evidence to ten total references, and limited arguments to 15,000 characters.[210] Further, for expedited arbitrations, there was no formal process for discovery as a right and upgrading to "standard arbitration," where a claimant would be afforded discovery, required claimants to pay a fee and obtain the defendant's consent.[211] This is in sharp contrast to the initial disclosures mandated under the FRCP.[212] The court determined that the arbitrator would likely feel constrained under New Era's discovery rules and found that these limitations, in addition to the other procedural concerns, "further support[ed] a finding of substantive unconscionability."[213]

Plaintiffs further contended that the rules violated the California Arbitration Act (CAA) because the rules required claimants to waive a statutory right to "disqualify any arbitrator based on a mandated disclosure statement."[214] New Era's arbitration rules gave New Era the "power to override a claimant's decision to disqualify an arbitrator."[215] The California Court of Appeal, Third Appellate District had previously held that, in the context of arbitration agreements, "provisions for arbitrator disqualification established

204. *Id.*

205. *Id.* at 962.

206. *Id.*

207. *Id.*

208. *Id.* at 963.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*; *see* FED. R. CIV. P. 26(a)(1).

213. *Heckman*, 686 F. Supp. 3d at 963–64 ("Additionally, in mass arbitrations, '[t]he neutral has discretion to allow evidence in excess of the stated limits as necessary to ensure a fundamentally fair process . . . .' The Court therefore agrees . . . that while courts 'must assume an arbitrator will act in a reasonable manner, a reasonable arbitrator would feel constrained under [New Era's Rules] to expand discovery to the extent necessary to vindicate [claimants'] statutory rights.'").

214. *Id.* at 964 (citing CAL. CIV. PROC. CODE §§ 1281.9, 1281.91(b)(1) (West 2023)); CIV. PROC. § 1281.9(a) ("In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial . . . .").

215. *Heckman*, 686 F. Supp. 3d at 964.

by the California Legislature may not be waived or superseded by a private contract."[216] New Era attempted to argue that California's arbitrator disqualification procedures were preempted by the FAA.[217] The court determined that New Era failed to identify any conflict between California's arbitrator disqualification rules and the FAA, meaning the CAA was not preempted with respect to that provision in the agreement.[218]

Plaintiffs challenged the "non-mutual right of appeal" under the TOU.[219] The rules state that "[i]n the event that the arbitrator awards injunctive relief" against either party, the party against whom such injunctive relief was granted alone can appeal.[220] The court agreed with the plaintiffs' argument that "the right to appeal a grant, but not a denial, of injunctive relief," gave the defendant an unfair advantage.[221] The court recognized that claimants would likely be the only party seeking injunctive relief in the context of mass arbitration and agreed that the right to appeal grants of injunctive relief would only benefit the defendants in practice.[222] Due to the bellwether structure of New Era's arbitration clause, a denial of injunctive relief for a plaintiff representing several similar cases could "effectively foreclose the ability of the entire class of claimants to obtain injunctive relief."[223] Notably, the court found this outcome especially concerning in the context of antitrust, "where injunctive relief is a critical remedy for vindication of the public good."[224]

Additionally, under the updated TOU, the right to appeal rested solely with Live Nation-Ticketmaster. "[A]ny adverse decision against Defendants that would require them to alter their business practices" would be reviewed by a three-arbitrator panel from a different arbitration provider than New Era.[225] Meanwhile, claimants facing an unfavorable decision by the arbitrator "have no recourse at all."[226] Taken together, the court determined that the appeal provisions in the updated TOU contributed to the finding of substantive unconscionability.[227] The court ended its analysis with a succinct nod to the early *Concepcion* decision—which ruled class action waivers were not unconscionable—and declined to find New Era's class action waiver to be the basis for invalidating the agreement.[228]

In its finding that New Era's mass arbitration agreement was unconscionable, the court considered all the elements together: the application of precedent from bellwether

216. *Id.* (quoting Azteca Constr., Inc. v. ADR Consulting, Inc., 18 Cal. Rptr. 3d 142, 144 (Ct. App. 2004)).

217. *Id.*

218. *Id.* at 965.

219. *Id.*

220. *Id.*

221. *Id.* ("Plaintiffs argue that because it is claimants who will be seeking injunctive relief, the exclusive right to appeal only *grants* of injunctive relief favors Defendants. . . . Plaintiffs contend that the right of appeal would be valuable to a defendant when injunctive relief against it is granted, but only valuable to a claimant when injunctive relief is denied.").

222. *Id.*

223. *Id.* at 966.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *See id.* (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)).

decisions on similar fact patterns and the lack of procedural safeguards afforded to the claimant, the absence of a right to discovery, the arbitrator selection provisions, and the "limited right of appeal."[229] Section 1670.5(a) of the California Civil Code mandates that the court determine if severing the portions of the contract found to be unconscionable was an appropriate recourse.[230] In making its decision, the court examined: (1) whether the substantively unconscionable term "relates to the arbitration agreement's chief objective"; (2) whether multiple unconscionable terms suggest the arbitration agreement was designed as an "inferior forum" rather than as an "alternative to litigation"; and (3) whether "a lack of mutuality . . . permeated the entire agreement."[231]

The court reasoned that having so many unlawful provisions in tandem "indicate[d] a systematic effort to impose arbitration on [a ticket purchaser] not simply as an alternative to litigation, but as an inferior forum."[232] New Era's mass arbitration rules and appeal provisions gave defendants "superior bargaining power" and an "unfair advantage."[233] The court drew attention to the fact that New Era implemented the changes to arbitration protocols "unilaterally, and in response to the looming prospect of defending against large numbers of arbitration claims."[234] To the court, this signaled that the unconscionable impact of the provisions was both "foreseeable and intended."[235] For this reason, unconscionability permeated the entire agreement and the court refused to sever the offending provisions.[236] As a result, the court denied the motion to compel arbitration.[237]

b. Heckman v. Live Nation—*Affirmed by the Ninth Circuit*

On October 28, 2024, the Ninth Circuit affirmed that Live Nation-Ticketmaster could not force consumer litigation over exorbitant ticket prices into arbitration.[238] In an opinion written by Judge Fletcher, the Ninth Circuit held that "the delegation clause of the arbitration agreement, and the arbitration agreement as a whole, are unconscionable and unenforceable under California law."[239] The court further held that the California unconscionability law as applied in this case was not preempted by the FAA and that, on an independent ground, the FAA "does not preempt California's prohibition of class

229. *Id.* at 967 ("Each of these elements is present with respect to the delegation clause specifically, as each applies to threshold issues of arbitrability. Any one of these elements, standing alone, might not suffice to invalidate the agreement." (footnote omitted)).

230. *Id.*

231. *Id.* (quoting MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1044 (N.D. Cal. 2022)).

232. *Id.* at 968 (second alteration in original) (internal quotation mark omitted) (quoting Armendariz v. Found. Health Psychcare Servs., 6 P.3d 669, 697 (Cal. 2000)).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 969.

238. *See* Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 676 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

239. *Id.*

action waivers contained in contracts of adhesion in large-scale small-stakes consumer cases."[240]

The Ninth Circuit acknowledged that in the wake of *Concepcion*, small-stakes consumer claims were hampered by the enforceability of class action waivers, as the cost of bringing claims on an individual basis was often outweighed by any potential recovery.[241] In response, plaintiffs' attorneys have successfully used methods, including mass arbitration, to circumvent the enforceability of class action waivers and bring "parallel individual small-stakes consumer claims in arbitration."[242] The court emphasized that "[t]his case [arose] out of an attempt to counter this success" of making small-stakes consumer claims viable in arbitration.[243]

The court posited that while *Oberstein* was still pending in the district court, Live Nation-Ticketmaster anticipated that a successful motion to compel arbitration would likely trigger a flood of parallel individual claims from ticket purchasers.[244] Consequently, Live Nation-Ticketmaster "sought to gain in arbitration some of the advantages of class-wide litigation while suffering few of its disadvantages" by enlisting New Era's arbitration services.[245] The court highlighted that New Era's business model promoted its mass arbitration protocols as a "prophylactic measure" for mass arbitration risk, implying the arbitrator's desire to dispose of claims efficiently.[246] In a concurring opinion, Judge VanDyke also stated that New Era and Live Nation-Ticketmaster's attorneys had shown "a remarkable degree of coordination" in creating their mass arbitration procedures.[247]

The Ninth Circuit summarized all the ways in which New Era's rules for mass arbitration were procedurally and substantively unconscionable, noting that: it is "nearly impossible to avoid retroactive application of any changes Ticketmaster imposes";[248] "New Era will always unilaterally decide which cases will proceed in a batch";[249] "the neutral may be replaced at New Era's sole discretion";[250] bellwether precedent would be applied to those "who are ignorant of the decision until it is invoked against them";[251] and the provision allowing appeal of a grant, but not a denial of injunctive relief, "operates asymmetrically."[252]

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240. *Id.*

241. *Id.* at 677.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *See id.* (quoting Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 962 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025)).

247. *Id.* at 694 (VanDyke, J., concurring) (quoting *Heckman*, 686 F. Supp. 3d at 958 n.13).

248. *Id.* at 678.

249. *Id.* ("Under the Rules[] . . . , the arbitrator assigned to the batched cases cannot be determined without input from the lawyers representing the plaintiffs, and the lawyers representing the plaintiffs cannot be identified until after the batching decision is made.").

250. *Id.*

251. *Id.* at 679.

252. *Id.* at 680.

The Ninth Circuit agreed that the delegation clause was "procedurally unconscionable to an extreme degree" and "[b]oth oppression and surprise" are present in the agreement.[253] Notably, the court found oppression was present "[b]ecause Ticketmaster is the exclusive ticket seller for almost all live concerts," so prospective ticket buyers must choose between using Live Nation-Ticketmaster's website and being bound to their terms or being "entirely foreclosed from purchasing tickets on the primary market."[254] The element of surprise was satisfied because Live Nation-Ticketmaster changed its TOU without notice and applied them retroactively to disputes—the website provided that, "a person merely browsing the website without purchasing a ticket agrees to Ticketmaster's changed Terms."[255] Finally, the Ninth Circuit found the TOU on Ticketmaster's website to be "affirmatively misleading" because the "[r]ules [were] so dense, convoluted and internally contradictory [as] to be borderline unintelligible."[256]

The Ninth Circuit also affirmed the district court's finding of substantive unconscionability in the delegation clause on four grounds: "(1) . . . the application of precedent from bellwether decisions to other claimants; (2) procedural limitations . . . ; (3) the limited right of appeal; and (4) the arbitrator selection provisions."[257] The court cited due process concerns in binding litigants to the rulings in proceedings they had no right to participate in.[258] The court also acknowledged that the procedural limitations of New Era's rules were "inadequate vehicles for the vindication of plaintiffs' claims."[259] The court described the claimant's right to appeal as a "chimera," pointing out that because only awards of injunctive relief could be appealed, the right to appeal largely favored Live Nation-Ticketmaster.[260] Finally, the court found that the CAA was not preempted by the FAA and therefore, New Era's procedures for selecting an arbitrator were unconscionable under California law.[261]

Having found the delegation clause unconscionable, the Ninth Circuit then went one step further, determining that the arbitration agreement itself, and not just the delegation clause, was unconscionable and unenforceable.[262] The court held that New Era's provisions and rules that made the delegation clause unconscionable "also serve[d] to make the entire agreement unconscionable, both procedurally and substantively."[263] The court further found that the district court did not abuse its discretion when holding that unconscionability "permeate[d] all aspects of the arbitration agreement" and

253. *Id*. at 681–82 (quoting Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 952 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025)).

254. *Id.* at 682.

255. *Id.*

256. *Id.* at 683 (citation omitted).

257. *Id.* at 683–84 (citing *Heckman*, 686 F. Supp. 3d at 956–57).

258. *Id.* at 684.

259. *Id.* at 685; *see also id.* at 685–86 ("New Era's restrictions on briefing border on the absurd. A bellwether plaintiff would have to work a miracle to successfully brief the merits of his or her claim, make any arbitrability arguments, and provide all evidence in only [ten] documents totaling 250 pages, and with 15,000 characters of 'final arguments.'").

260. *Id.* at 686 (quoting Saika v. Gold, 56 Cal. Rptr. 2d 922, 925 (Ct. App. 1996)).

261. *Id.* at 687 ("If the selection Rules are unconscionable, any decision by an arbitrator selected under those Rules, including a decision under the delegation clause, is infected by that unconscionability.").

262. *Id.*

263. *Id.* at 688.

declining to sever the offending provisions.[264] Lastly, the court noted that the application of California's unconscionability law to the TOU did not interfere with the objectives of the FAA and, as such, was not preempted.[265]

The Ninth Circuit elaborated beyond the holding of the district court below, finding that because the FAA did not apply, the rules of the California Supreme Court govern the case before them.[266] In *Discover Bank v. Superior Court*, the California Supreme Court held class action waivers in consumer contracts of adhesion to be unconscionable under California law.[267] The California Supreme Court noted in *Discover Bank* that class arbitration came into existence after the FAA was passed in 1925 and therefore could not have been contemplated by Congress.[268] *Discover Bank* was later abrogated by the seminal *Concepcion* case, which held that the FAA preempts any application of the *Discover Bank* rule where it poses an obstacle to the objectives of the FAA.[269] In *Heckman*, New Era's mass arbitration procedures did not fall under the types of arbitration contemplated and covered by the FAA and therefore, did not pose an obstacle to the FAA.[270] As such, the TOU and New Era's rules were found to be independently unconscionable under *Discover Bank* because they contained an unenforceable class waiver in a consumer contract of adhesion.[271]

III. DISCUSSION

The Ninth Circuit's finding in *Heckman* that Live Nation-Ticketmaster's arbitration clause was "unconscionable and unenforceable" is further evidence of the company's anticompetitive conduct in violation of Section 2 of the Sherman Act.[272] At the same time, the unconscionable clause itself serves as a harbinger for the increasing use—and evolving sophistication—of arbitration clauses designed to shield companies from consumer claims. Accordingly, the time is ripe for Congress to reassess the importance of consumer welfare in antitrust enforcement and consider codifying the effective-vindication principle to better protect consumers and strengthen the antitrust regime.

Although the Ninth Circuit has already rendered the arbitration clause unenforceable,[273] that is beside the point: What matters is that Live Nation-Ticketmaster's effort represented an attempt at anticompetitive conduct—an attempt the DOJ failed to mention in its complaint.[274] Success is irrelevant;

264. *Id.* at 688–89.

265. *Id.* at 689.

266. *Id.*

267. *Id.* (citing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)).

268. *See id.*; *Discover Bank*, 113 P.3d at 1110.

269. *Heckman*, 120 F.4th at 689 (citing *Concepcion*, 563 U.S. at 352).

270. *Id.* ("It is clear that Congress did not have class-wide arbitration in mind when it passed the FAA.").

271. *Id.* at 690.

272. *Id.* at 676.

273. *Id.*

274. *See generally* Complaint, *supra* note 26 (omitting any allegation of this anticompetitive conduct).

it is the act of engaging in anticompetitive behavior that warrants scrutiny.[275] Live Nation-Ticketmaster has effectively foreclosed many private causes of action for antitrust violations through its arbitration clauses and will likely continue to do so in the future. As such, the DOJ's pending antitrust case against Live Nation-Ticketmaster is a crucial opportunity to hold the company accountable to consumers and improve the live entertainment industry by divesting Ticketmaster from Live Nation.

Part III.A of this Discussion argues that Live Nation-Ticketmaster's implementation of their unconscionable arbitration provision should be considered anticompetitive behavior in violation of Section 2 of the Sherman Act. Part III.B advocates for the statutory codification of the effective-vindication principle in order to protect consumers from increasingly sophisticated arbitration provisions designed to nullify their claims.

A. Live Nation-Ticketmaster Engaged in Anticompetitive Conduct in Violation of Section 2 of the Sherman Act by Implementing Their Unconscionable Mass Arbitration Clause

In order for Live Nation-Ticketmaster to be in violation of Section 2 of the Sherman Act, the existence of its monopoly power is not enough standing alone—it must be maintained by improper means.[276] The question of Live Nation-Ticketmaster's monopoly power is hardly up for debate as Live Nation-Ticketmaster "controls around 60% of concert promotions at major concert venues across the country."[277] Live Nation-Ticketmaster clearly has the monopoly power to "fix the price" and "injure the public."[278] In addition to the numerous allegations of anticompetitive conduct included in the DOJ's complaint, Live Nation-Ticketmaster attempted to maintain its monopoly power through improper means by forcing consumers to accept contract terms that shield the company from antitrust accountability.[279]

1. Live Nation-Ticketmaster Maintained Its Monopoly Power Through Improper Means

In many ways, Live Nation-Ticketmaster's unconscionable arbitration clause was a part of its "flywheel" or self-perpetuating business strategy.[280] Just as the company uses its market dominance to lock in artists and venues through exclusive contracts,[281] it leverages its arbitration clause to trap consumers into asymmetrical arbitration proceedings. By forcing disputes into a system stacked in its favor, Live Nation-Ticketmaster ensures control not only of the entertainment industry, but also

275. *See* 15 U.S.C. § 2 ("Every person who shall monopolize, or *attempt* to monopolize . . . shall be deemed guilty of a felony." (emphasis added)).

276. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

277. *See* Complaint, *supra* note 26, at 2; *Grinnell*, 384 U.S. at 571.

278. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 52 (1911).

279. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 241 (2013) (Kagan, J., dissenting).

280. *See* Press Release, DOJ Sues Live Nation-Ticketmaster for Monopolizing, *supra* note 153.

281. See *supra* note 154 and accompanying text describing Live Nation-Ticketmaster's flywheel business model.

of consumer antitrust claims against it. The favorable arbitration agreement Live Nation-Ticketmaster has entered with New Era has similar "synergistic anticompetitive effects" to their other alleged anticompetitive behavior.

As the Ninth Circuit noted, Live Nation-Ticketmaster showed a "remarkable degree of coordination" when devising their arbitration procedures.[282] This coordination demonstrates that their actions were "maneuvres [sic] not honestly industrial"[283] and were to serve as a "prophylactic measure" for their mass arbitration risk.[284] Live Nation-Ticketmaster's collusion with New Era to create corporation-friendly arbitration terms contributes to its "self-reinforcing cycle of growth and efficiency" that can only be described as anticompetitive.[285] Surely, Live Nation-Ticketmaster's mass arbitration clause and market dominance, through a symbiotic relationship, maintain and reinforce Live Nation-Ticketmaster's rank in the live entertainment industry.

2. Live Nation-Ticketmaster Used Mass Arbitration To Thwart Antitrust Claims

It is notable that Live Nation-Ticketmaster implemented its new arbitration provisions "in response to the looming prospect of defending against large numbers of arbitration claims."[286] More specifically, the new arbitration provision was implemented following the Taylor Swift ticketing incident, whereafter the company anticipated a wave of consumer antitrust claims to go to individual arbitration. Live Nation-Ticketmaster demonstrated "persistent determination to maintain [market] control" by summarily dismissing antitrust claims that might challenge its market dominance.[287] The Ninth Circuit found that the unconscionable impact of Live Nation-Ticketmaster's arbitration provisions was both "foreseeable and intended."[288] These facts demonstrate that Live Nation-Ticketmaster's actions were a deliberate attempt to avoid challenges to their market dominance and were not the result of "superior product, business acumen, or historic accident."[289]

Live Nation-Ticketmaster's arbitration clause is the result of a decades-long attempt to quash the private cause of action and insulate corporations from liability.[290] In fact, the Ninth Circuit acknowledged that Live Nation-Ticketmaster's new arbitration clause was an attempt to counter plaintiffs' attorney's success in using mass arbitration to bring individual small-stake consumer claims.[291] Should this strategy gain traction among other corporations, it could establish a concerning trend where mass arbitration

282. Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 677 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

283. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 431 (2d Cir. 1945).

284. *Heckman*, 120 F.4th at 677.

285. Svensson, *supra* note 19.

286. Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 968 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

287. *Alcoa*, 148 F.2d at 430.

288. *Heckman*, 120 F.4th at 688 (internal quotation mark omitted) (quoting MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024, 1046 (N.D. Cal. 2022)).

289. United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

290. *See* Glover, *supra* note 70, at 1292.

291. *Heckman*, 120 F.4th at 677.

clauses become a standard tool for shielding businesses from accountability, effectively silencing consumer claims.

B. Safeguarding Consumer Antitrust Claims in the Current Landscape: Codifying the Effective-Vindication Rule

1. The Corporate Playbook: Using Mass Arbitration To Dismiss Consumer Claims

Scholars and jurists predicted the exact strategic move Live Nation-Ticketmaster has taken to maintain its monopoly power.[292] Live Nation-Ticketmaster made use of two of three predicted defense mechanisms to co-opt mass arbitration in its favor: It inserted "batching" provisions, which allow their arbitrating fora to unilaterally group similar claims, and moved mass-arbitration claims to defendant-friendly arbitral fora.[293] Justice Kagan warned about the possibility of a monopolist using its monopoly power to deprive its victims of legal recourse and to "block the vindication of meritorious federal claims" by insulating themselves from liability.[294] The self-proclaimed "largest live entertainment company in the world"[295] has manufactured arbitration clauses that both prevent the legitimate pursuit of federal claims against them and shield the company from antitrust accountability. Live Nation-Ticketmaster's tricky move is the next logical step in the arbitration revolution, whereby the consumer's private cause of action in arbitration is rendered obsolete.[296]

Live Nation-Ticketmaster is an early mover in using mass arbitration to do what many corporations have done for decades: resist consumer claims.[297] It is predictable that other companies will follow suit and attempt to turn the tables on successful litigants by limiting the efficacy of mass arbitration provisions.[298] For the time being, unconscionable arbitration clauses will continue to be struck down until they can evolve to be legally apt, while still disfavoring the consumer.[299]

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292. See *supra* note 100 and accompanying text for Professor Glover's predictions on how corporations would respond to mass arbitration. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (2013) (Kagan, J., dissenting) ("The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.").

293. Glover, *supra* note 70, at 1364.

294. *Italian Colors*, 570 U.S. at 253 (Kagan, J., dissenting).

295. LIVE NATION ENT., LIVE NATION ENTERTAINMENT 2023 ANNUAL REPORT 2 (2024), https://ia800700.us.archive.org/23/items/live-nation-entertainment-lyv-annual-report-2023/Live%20Nation%20Entertainment%20%28LYV%29%20Annual%20Report%2C%202023.pdf [https://perma.cc/3V42-ANBS].

296. See *supra* notes 97–106 and accompanying text predicting how mass arbitration may become the defense bar's next target to undermine the private cause of action.

297. See *supra* notes 74–83 and accompanying text chronicling the arbitration revolution.

298. *See* Nissensohn, *supra* note 80, at 1260 ("Given the profound impacts of Mass Arbitration, it is inevitable that businesses, the defense bar, and interest groups will jump into action and try to circumvent its affects.").

299. *See id.* at 1264 ("Corporations, to ensure their compulsory arbitration agreements will be enforced according to their terms, include provisions that give the illusion that arbitration is a practical forum for consumers and employees to adjudicate disputes.").

2. Consumer Protection: The Overlooked Foundation of Antitrust Enforcement

Live Nation-Ticketmaster's arbitration agreement exemplifies the kind of business practice that undermines consumer welfare and runs counter to the fundamental objective of antitrust enforcement.[300] In reaching their decision that Live Nation-Ticketmaster's arbitration clause was unconscionable, the *Heckman* court took Live Nation-Ticketmaster's market dominance into consideration and determined that consumers were left with no meaningful choice.[301] While consumers may choose to withdraw from the predispute arbitration agreement, doing so eliminates their ability to enjoy Live Nation-Ticketmaster's products and services, and by virtue of their monopoly power, live entertainment entirely.[302] This outcome is the exact harm to consumers the Sherman Act seeks to prevent.[303]

Without the protection of individual consumer causes of action, the Sherman Act will be stripped of its ability to serve both its "remedial and deterrent function."[304] The private cause of action for antitrust violations provided by the Clayton Act is useless if meritorious consumer claims disappear in the morass of arbitration clauses akin to Live Nation-Ticketmaster's.[305] When the "private attorney-general who protects the public's interest" is effectively powerless to bring antitrust claims, the deterrent function of the statute is not being served, and the monopolist goes unpunished.[306]

3. The Mass Arbitration Vacuum

In a field as novel as mass arbitration, where there is no precedent to apply, it will be quite easy for corporations to implement mass arbitration provisions that are prima facie legal and enforceable but highly inequitable to consumers. The unpredictable nature of mass arbitration and its implications for consumer claims create a legislative void. As the Ninth Circuit indicated, "[i]t is clear that Congress did not have class-wide arbitration in mind when it passed the FAA."[307] Consumers seeking to leverage mass arbitration are left with increasingly less protection as savvy companies retaliate using mass arbitration for their own purposes.[308]

Live Nation-Ticketmaster's recent legal controversies are indicative of what happens when a void such as this exists—monopolists will use their monopoly power to solidify their position by avoiding litigation that challenges that position. If history is any indication, the courts will continue to tacitly endorse this behavior by allowing businesses to devise clever arbitration procedures that are favorable to the corporation.

300. *See* BORK, *supra* note 30, at 20.

301. Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 952 (C.D. Cal. 2023), *aff'd*, 120 F.4th 670 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

302. *See* Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 682 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025).

303. See *supra* Part II.A.1 establishing consumer protection as one of the Sherman Act's primary goals.

304. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

305. *See* 15 U.S.C. § 15(a).

306. *Mitsubishi*, 473 U.S. at 635 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 168 (1st Cir. 1983)); Cavanagh, *supra* note 45, at 783.

307. *Heckman*, 120 F.4th at 689.

308. *See* Glover, *supra* note 70, at 1315.

As Professor Glover cautioned, "defendants still have the power: They drafted the agreements, which means they can change them."[309]

4. The Path Forward: Statutory Codification of the Effective-Vindication Principle

Given the defense bar's historical influence on the arbitration landscape through the courts,[310] it is best in the hands of Congress to check this power imbalance by providing guidance on what types of consumer claims are worth statutorily protecting. In light of the critical role that private causes of action play in enforcing the antitrust regime—and the growing trend of rendering such claims ineffective through arbitration—Congress should codify the effective vindication doctrine. Doing so would preserve the enforceability of antitrust claims while maintaining the procedural efficiencies arbitration is intended to provide.[311] The "effective-vindication rule comes into play only when the FAA is alleged to conflict with another federal law, like the Sherman Act."[312] Antitrust claims specifically should be subject to the effective-vindication principle, as companies are poised to do just as Justice Kagan warned—"use [their] monopoly power to protect [their] monopoly power[] by coercing agreement to contractual terms eliminating its antitrust liability."[313]

The Supreme Court in *Mitsubishi* determined that where an arbitration agreement operates to foreclose a party's private remedy for antitrust violations, it would be condemned.[314] The effective-vindication rule evaluates whether an arbitration agreement, in its entirety, prevents a claimant from enforcing federal statutory rights.[315] But what happens when companies do not explicitly "foreclose" private remedies but instead render them "pointless" by crafting arbitration provisions designed to ensure the company's victory?[316] That is functionally equivalent to precluding statutory protections altogether. This troubling scenario becomes increasingly plausible as companies exploit mass arbitration protocols to tilt the process in their favor. In the rapidly evolving landscape of mass arbitration, Congress must act proactively to safeguard consumer claims before they are rendered entirely obsolete.[317]

Statutory codification of the effective-vindication principle would help Congress to achieve its goals under both the FAA and antitrust laws such as the Sherman Act. While the Supreme Court has not defined what the "fundamental attributes of arbitration" are,

309. Glover, *supra* note 70, at 1364.

310. See *supra* notes 74–83 and accompanying text chronicling the arbitration revolution.

311. See *supra* note 62 and accompanying text emphasizing that the purpose of the FAA is to promote judicial enforcement of arbitration agreements.

312. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 252 (2013) (Kagan, J., dissenting).

313. *Id.* at 241.

314. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 652 n.19 (1985) (Stevens, J., dissenting).

315. *Italian Colors*, 570 U.S. at 249 (Kagan, J., dissenting) ("No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open.").

316. *Id.* at 244.

317. Glover, *supra* note 70, at 1372 ("Contracts that specify wholly defendant-created arbitration procedures are not contracts for alternative dispute resolution permitted by the FAA; they are contracts designed to ensure defendant-friendly outcomes and eliminate claims.").

it is indeed fundamental that the claim be heard at all, whether that be in arbitration or otherwise.[318] Where pursuing individual claims becomes not only economically irrational,[319] but also impossible due to the nature of arbitration provisions, surely we are not honoring the principle that arbitration serves as an alternative forum for the resolution of disputes, rather than a means to suppress legitimate claims altogether. By ensuring that consumers can effectively vindicate their claims against companies, integrity will be restored to arbitration as a viable means of enforcing federal statutory rights "outside an American court."[320]

Further, protecting the private cause of action in arbitration for antitrust claims will lead to more effective enforcement of antitrust law. Consumers are the first to experience the negative impacts of anticompetitive conduct as they directly engage with the company's products and services. Accordingly, consumers are best poised to detect and challenge anticompetitive business practices using the private cause of action, enabling them to disrupt monopolistic behavior before it becomes entrenched and further distorts the competitive landscape.

IV. CONCLUSION

Live Nation-Ticketmaster's pending antitrust suit in the Southern District of New York is a renewed opportunity to hold the monopolistic company accountable to concertgoers and fans. The Ninth Circuit's determination that Live Nation-Ticketmaster employed arbitration procedures that were both procedurally and substantively unconscionable suggests the company is acting in bad faith—driven by a fear of antitrust accountability and a deliberate effort to shield itself from legal consequences. This effort is a willful attempt by Live Nation-Ticketmaster to maintain its monopoly power by improper means in violation of Section 2 of the Sherman Act.[321] Live Nation-Ticketmaster's arbitration clause serves as a warning of what companies may attempt to enforce in the years ahead,[322] and calls for a radical solution to protect the antitrust private cause of action: the statutory codification of the effective-vindication principle.[323]

318. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); *Mitsubishi*, 473 U.S. at 637 ("[S]o long as the prospective litigant may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.").

319. Glover, *supra* note 70, at 1351.

320. *Mitsubishi*, 473 U.S. at 635; *Italian Colors*, 570 U.S. at 244 (Kagan, J., dissenting) ("The effective-vindication rule furthers the statute's goals by ensuring that arbitration remains a [legitimate] . . . method of dispute resolution.").

321. *See supra* Part III.A.1.

322. *See supra* Part III.B.1.

323. *See supra* Part III.B.4.