AN ARBITRATION AGENDA FOR THE BIDEN ADMINISTRATION

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INTRODUCTION

In recent decades, legal scholars and political scientists have developed a sophisticated understanding of the role that private civil litigation plays in the U.S. regulatory system.[1] In areas as diverse as the environment, healthcare, consumer protection, worker protection, antitrust, civil rights, housing, and securities, private litigants and their attorneys serve as "private attorneys general," enforcing and elaborating regulatory policy at the same time that they pursue remedies for the violation of individual rights.[2]

Civil litigation's power as a tool of regulatory enforcement also makes it a target for efforts to retrench regulation.[3] Of interest to us here, a series of Supreme Court rulings at the behest of big business have blunted private enforcement's power by expanding the scope of arbitration under the Federal Arbitration Act ("FAA"). Those decisions have had the effect of ousting states' power to regulate arbitration, eliminating class actions and other tools that allow plaintiffs to spread the costs of litigation, and concealing evidence of wrongdoing.[4] Although empirically documenting the effect of the "arbitration revolution" is

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1. *See generally* THE RIGHTS REVOLUTION REVISITED INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. (Lynda G. Dodd, ed., 2018); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); JEB E. BARNES & THOMAS F. BURKE, HOW POLICY SHAPES POLITICS: RIGHTS, COURTS, LITIGATION, AND THE STRUGGLE OVER INJURY COMPENSATION (2015); SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

2. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

3. *See* BURBANK & FARHANG, *supra* note 1.

4. *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

tricky,[5] businesses' use of arbitration has skyrocketed.[6] And there is no serious question that it has blunted the real-world impact of regulatory schemes enforced through private litigation.[7]

Since the 1980s, the major institutional driver of expansions in arbitration law has been the Supreme Court. Congress occasionally makes noises about its interest in addressing arbitration. But as we have explored in prior work, federal administrative agencies and executive departments play an important, if underappreciated, role in addressing arbitration.[8]

The Biden administration, however, has taken only a handful of public actions to address arbitration's negative effects on private enforcement. In this essay—prepared for the *University of Illinois Law Review*'s symposium on the Biden administration's first 100 days—we take the opportunity to highlight the tools available to agencies and executive departments to address the effects of forced arbitration and offer suggestions for how they might be used. Executive branch action alone cannot undo all of the arbitration's effects on private enforcement; but it can do much to restore this engine of the U.S. legal system.

I. LEGISLATION

One way for the executive branch to address forced arbitration is by working with Congress to reform and modernize the FAA. Two pending legislative proposals backed by the Biden administration do just that.

First, the Forced Arbitration Injustice Repeal Act ("FAIR Act")[9] overrides a string of Supreme Court decisions that reinterpreted the FAA to allow repeat-player defendants to force individual arbitration of federal statutory claims.[10] If it became law, the FAIR Act would restore private enforcement of antitrust, civil rights, consumer, and employment laws to the status quo that prevailed before the Supreme Court began to expand the scope of arbitration by judicial fiat.

5. *See, e.g.*, Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS UNIV. L. REV. 375 (2018).

6. *See* ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 5 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/KJ7V-5G4V] (finding that 56.2% of private-sector nonunion employees are subject to mandatory employment arbitration).

7. *See, e.g.*, Sarah Staszak, *Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace*, 34 STUD. AM. POL. DEV. 239 (2020); Urja Mittal, Note, *Litigation Rulemaking*, 127 YALE L.J. 1010 (2018); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015).

8. *See, e.g.*, Zachary D. Clopton & David L. Noll, *How States Can Step in When Trump Doesn't Enforce Laws*, POLITICO (June 18, 2019, 05:04 AM), https://www.politico.com/agenda/story/2019/06/18/forced-arbitration-trump-administration-000925 [https://perma.cc/YN7W-2PDP]; David L. Noll, *Arbitration Conflicts*, 103 MINN. L. REV. 665 (2018); Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878 (2017); David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985 (2017).

9. *See* FAIR Act H.R. 963, 117th Cong. (2021).

10. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (enforcing arbitration agreement and class action waiver that made it cost-prohibitive to assert a claim for violation of the Sherman Act); Cir. City Stores v. Adams, 532 U.S. 105, 112 (2001) (holding that FAA exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" applies only to transportation workers); Shearson/American Express Inc. v. McMahon, 482 US 220 (1987) (enforcing contract provision that required arbitration of Securities Exchange Act and RICO claims).

Second, the Protecting the Right to Organize Act ("PRO Act"), a wide-ranging labor reform bill, includes a provision that addresses a use of arbitration that undermines workers' power to engage in collective action.[11] Section 104 of the PRO Act makes it unlawful for an employer to require employees to "agree" to waive their right to participate in class actions.[12] In doing so, the Act overrides the Supreme Court's 2018 decision in *Epic Systems Corporation v. Lewis*, which upheld the use of collective action waivers to bar employees from joining together to assert job-related claims.[13]

The Biden administration's support for the FAIR and PRO Acts, and Congress's potential return to defining the scope of arbitration, are welcome developments.[14] Yet neither Act is likely to pass through the budget reconciliation process in its current form, leaving them vulnerable to a Senate filibuster.

More targeted legislation, however, could conceivably be included in one of the three reconciliation bills that the 117th Congress is likely to pass.[15] One imaginative proposal suggested by Professor Rebecca Morrow is to tax arbitration provisions that transfer wealth from employees to employers by suppressing the assertion of labor law claims.[16] We urge the White House to propose and support targeted measures, while continuing to work for the FAIR's and PRO Act's more sweeping reforms.

II. PROGRAM-PARTICIPATION REQUIREMENTS

Even without new legislation, agencies possess some authority to discourage forced arbitration under existing law. One potentially powerful mechanism is to place conditions on participation in federal programs.

For example, the Centers for Medicare and Medicaid Services under President Trump promulgated a regulation that addresses nursing homes' use of

11. *See* Protecting the Right to Organize Act H.R. 842, 117th Cong. (2021).

12. *See id.* § 104 (providing that it shall be an unfair labor practice "to enter into or attempt to enforce any agreement, express or implied, whereby prior to a dispute to which the agreement applies, an employee undertakes or promises not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee in any forum that, but for such agreement, is of competent jurisdiction"). Section 104 also makes it an unfair labor practice "to coerce an employee into undertaking or promising not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee" and "to retaliate or threaten to retaliate against an employee for refusing to undertake or promise not to pursue, bring, join, litigate, or support any kind of joint, class, or collective claim arising from or relating to the employment of such employee."

13. 138 S. Ct. 1612 (2018).

14. *See* David L. Noll, *Response: Public Litigation, Private Arbitration?*, 18 NEV. L.J. 477, 487 (2018) (celebrating Congress's engagement with the scope of arbitration under the FAA as "an improvement over the court-dominated status quo").

15. *See* Li Zhou & Ella Nilsen, *Senate Democrats Can Now Officially Pass More Bills with 51 Votes*, VOX (Apr. 4, 2021, 6:48 PM), https://www.vox.com/2021/4/5/22367832/senate-democrats-budget-reconciliation-filibuster [https://perma.cc/QJS2-ZRFD].

16. Rebecca N. Morrow, *Taxing Employers for Imposing Mandatory Arbitration, Class Action Waiver, and Nondisclosure of Dispute Provisions*, 74 SMU L. REV. 59 (2021). Professor Morrow suggests that the Treasury Department has authority to treat gains from coercive dispute resolution provisions as income under existing law. As tax neophytes, we venture no opinion on that question.

forced arbitration provisions.[17] The Long Term Care Rule does not bar nursing homes from mandating arbitration through standard form contracts. Instead, it provides that, if a nursing facility wishes to participate in the federal Medicare and Medicaid programs, it cannot require residents to "agree" to arbitration as a condition of being admitted to a facility or continuing to receive care. In a detailed opinion upholding the rule, a federal court concluded the regulation does not conflict with the FAA because it merely proscribes conditions for participating in federal programs.[18] Similarly, a federal court upheld against an FAA challenge a Department of Education rule that required educational institutions to forego the use of class action waivers and pre-dispute arbitration agreements to participate in the federal direct loan program.[19]

As the government enters a period of significant federal spending, program-participation requirements may become even more consequential. Congress should require agencies to adopt appropriate arbitration-limiting conditions in spending legislation. And agencies should use their authority to set participation requirements to ensure that firms benefitting from the federal government's largesse do not use arbitration to undermine federal policy.

III. INFORMATION GATHERING

Agencies' power to produce and disseminate information is another important tool in addressing forced arbitration.[20]

Federal agencies have unique powers to gather information about the uses of arbitration and how arbitration impacts statutory schemes. Agency-generated information can be used to develop the case for legislation and agency rulemaking, to identify when arbitration violates substantive regulatory standards,[21] and to highlight the racial and gender impacts of forced-arbitration clauses.[22] Scholarship on policy feedback effects suggests that, were agencies to produce more information, it would play an important role in limiting harmful uses of arbitration.[23]

We suggest that the President issue an Executive Order requiring agencies to collect and publish information about the effects of forced arbitration on their

17. Revision of Requirements for Long-Term Care Facilities: Arbitration Agreements, 84 Fed. Reg. 34718 (July 18, 2019) (codified at 42 C.F.R. § 483.70(n)).

18. Northport Health Servs. of Ark. v. United States HHS, 438 F. Supp. 3d 956, 966–67 (2020).

19. Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education, 81 Fed. Reg. 75926 (Nov. 1, 2016) (codified in scattered sections of 34 C.F.R.)

20. *See* Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 487 (2017) (observing that the production of high-quality information is "the bureaucracy's *raison d'être*").

21. *See* EEOC v. Doherty Enters., 126 F. Supp. 3d 1305, 1307 (S.D. Fla. 2015); Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381 (2018).

22. *See generally* Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507.

23. *See generally* Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595 (1992).

areas of regulation. The order should direct agencies to establish systems for collecting information about trends in private civil litigation and the impact of arbitration, including information that would allow agencies to identify disparities in race, ethnicity, gender, and other identity characteristics. Information gathered through these systems should be made available on a regular basis to Congress, the White House, and the public.

IV. PUBLIC ENFORCEMENT PRIORITIES

Private enforcement regimes undermined by arbitration are typically part of overlapping systems of criminal, administrative, and civil enforcement.[24] Indeed, in arguing for enforcement of its arbitral class action waivers, the petitioner in *AT&T Mobility v. Concepcion* pointed to these alternative enforcement mechanisms as a reason why class action waivers did not immunize corporate defendants from liability.[25]

Following AT&T's suggestion, public enforcement priorities should be informed by the use of arbitration: when arbitration insulates defendants from private enforcement, the need for other forms of enforcement increases. There is no legal requirement that public enforcers defer to private arbitration agreements.[26] Even when private claims would be channeled into individual forced arbitration, public enforcers may proceed in court—at times, in ways that can provide relief to large groups.[27] Perversely, the Department of Labor in the Trump administration seemed less interested in public action when private suits would be forced into arbitration.[28] This is exactly backwards.

It is too early to tell whether public enforcement in the Biden administration will align with the approach we suggest, but we are encouraged that Biden's proposed budget has called for increased funding for worker protection agencies in the Department of Labor, environmental justice initiatives in the Environmental Protection Agency, civil rights offices across the government, and more. A recent post from the Federal Trade Commission also suggested a potentially more ag-

24. Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 293–99 (2016) (collecting examples).

25. Brief for Petitioner at 44, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) ("[A] whole host of federal and state agencies—including the Federal Communications Commission, the Federal Trade Commission, the state attorneys general, and the state public utility commissions—are empowered to police systematic wrongdoing by telephone companies.").

26. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).

27. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CAL. L. REV. 411 (2018); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500 (2011); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 PENN. L. REV. 1385 (2011).

28. *See* David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. (forthcoming 2022); Zachary Clopton & David Noll, *Trump Labor Officials Are Secretly Using Forced Arbitration to Get Corporations Off the Hook*, SLATE (May 10, 2019, 12:23 PM), https://slate.com/news-and-politics/2019/05/trump-labor-officials-forced-arbitration.html [https://perma.cc/KN9H-TZJF].

gressive attitude toward enforcement, especially on issues implicating racial justice.[29] Along the same lines, we also hope that the improved information gathering we proposed above can inform enforcement priorities, directing prosecutorial resources toward areas where private civil litigation has been rendered less effective.

V. AMICUS WORK

Executive branch actors regularly participate as amicus curiae in federal and state courts. With so much arbitration law the product of judicial decision making, amicus work provides another opportunity to affect arbitration policy.

Among the arbitration issues percolating in the courts are:

- Whether the FAA applies to drivers for Amazon, Uber, Grubhub, and other "gig economy" employees;[30]
- Whether forced arbitration provisions survive a personal bankruptcy;[31]
- Whether confidentiality provisions that prevent workers from sharing information conflict with the National Labor Relations Act;[32] and
- Whether arbitral class action waivers may be included in retirement plans under the Employee Retirement Income Security Act of 1974.[33]

The Biden administration should not be shy about seeking to influence judicial policymaking on arbitration. Nor should the administration feel constrained by the previous administration's litigation positions—after only a few months in office, the Trump administration switched the government's position in the labor arbitration cases that became *Epic Systems*.[34]

VI. THE STATES

State governments have an important role in arbitration policy.[35] For example, New Jersey and Virginia decline to provide funding to students who enroll in postsecondary programs that use forced arbitration provisions, ensuring that

29. Elisa Jillson, *Aiming for Truth, Fairness, and Equity in your Company's Use of AI*, FED. TRADE COMM'N (Apr. 19, 2021, 9:43 AM), https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai [https://perma.cc/K6J4-FK9V]

30. *See* Waithaka v. Amazon.com, Inc., 966 F.3d 10, 26 (1st Cir. 2020); Singh v. Uber Techs. Inc., 939 F.3d 210, 226 (3d Cir. 2019); Rittmann v. Amazon.com, Inc., 971 F.3d 904, 915 (9th Cir. 2020); Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 803 (7th Cir. 2020).

31. *See In re* Belton v. GE Cap. Retail Bank, 961 F.3d 612, 613 (2d Cir. 2020).

32. *See* Dish Network, LLC, 370 NLRB No. 97 (2021).

33. *See* Hensiek v. Bd. of Directors of Casino Queen Holding Co., Inc., No. 3:20-CV-377-DWD, 2021 WL 267655 (S.D. Ill. Jan. 25, 2021).

34. *See* Amy Howe, *Murphy Oil's Law: Solicitor General's Office Reverses Course In Arbitration Cases, Supports Employers*, SCOTUSBLOG (June 19, 2017, 7:12 AM), https://www.scotusblog.com/2017/06/murphy-oils-law-solicitor-generals-office-reverses-course-arbitration-cases-supports-employers [https://perma.cc/57B2-7T3A].

35. *See* Aaron Bibb, *Vindicating Statutory Employment Rights in the Age of Mandatory Arbitration: State Attorney General* Parens Patriae *Litigation as an Alternative to Class Actions* (2018) (unpublished manuscript) (on file with IIT Chicago-Kent College of Law), https://scholarship.kentlaw.iit.edu/louis_jackson/57/ [https://perma.cc/9Y5F-RR5V].

private civil litigation is available to police fraudulent marketing and misuse of public funds.[36] Federal agencies should actively share information about the effects of arbitration with their state counterparts, and the Biden administration should encourage states to adopt enforcement priorities and program-participation requirements that account for arbitration's effects on regulatory policy.

In addition, there is an important role for state law in areas where the FAA does not govern a dispute. If the FAA were held not to apply to gig workers, for example, then state law would govern the availability of arbitration. The Biden administration should encourage states to affirmatively regulate arbitration in ways that support the administration's goals of addressing racism and the climate crisis and building a twenty-first-century economy.

VII. APPOINTMENTS

Each of the tools we have highlighted depends on agency heads appreciating the dynamics of public and private enforcement and exercising their authority to address the effects of forced arbitration. President Biden's early selections give us confidence that the White House understands the importance of appointments. We hope this trend continues.

Judicial appointments also matter. Even if legislation such as the FAIR Act passed, the federal courts will still make many decisions about the scope and limits of arbitration. Republicans' success in filling the judiciary with ideological conservatives means that the judiciary will often be an obstacle to arbitration reform.[37]

President Biden, however, can blunt the impact of judicial resistance to arbitration reform by acting swiftly to fill vacancies with jurists who are sensitive to the interplay between arbitration and substantive regulatory regimes. Again, Biden's initial appointments give a reason for hope. Biden's initial slate of nominees are not only more diverse in terms of race and gender than the mainly white, mainly male judges installed by Trump, but their diverse professional backgrounds also make them much more likely to appreciate the dynamics of public and private enforcement.[38]

Our suggestion is more of the same—and quickly.

36. *See* S.B. 1851, Gen. Assemb., Reg. Sess. (N.J. 2021); VA. CODE ANN. § 23.1-230 (2020).

37. *See* Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019) (tracing the Republican Party's use of judicial appointments to entrench the party's policy positions against democratically-enacted change).

38. *See* David Lauter, *Biden's Diverse First Judicial Picks Put a Black Woman on the Path for the Supreme Court*, L.A. TIMES (Mar. 30, 2021, 5:14 PM), https://www.latimes.com/politics/story/2021-03-30/biden-names-first-nominees-for-trial-and-appeals-court-judges [https://perma.cc/Q23E-Y6QU].