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An Employment Discrimination Class Action by Any Other Name

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AN EMPLOYMENT DISCRIMINATION CLASS ACTION BY ANY OTHER NAME

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In a few years, four out of every five nonunion workers in America will have been forced by their employers to sign an individual arbitration agreement as a condition of employment. This new reality, coupled with the U.S. Supreme Court's fealty to compelled arbitration and cramped reading of Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), has killed the employment discrimination class action. But that does not imply the death of collective redress for workers suffering from discrimination. In that spirit, this Article engages in two analyses to keep equal employment opportunity alive at scale.

First, it examines forty years' worth of litigation strategies to assess which ones have been the most successful at collectively accessing justice on behalf of work discrimination victims. It argues that relatively unsuccessful strategies attacked the applicability of the Federal Arbitration Act to employment contracts, the scope of that act and Rule 23, and the enforceability of contracts containing individual arbitration agreements. In contrast, relatively successful strategies—such as public enforcement, qui tam actions, and states using their parens patriae powers to sue employers under Title VII and related statutes—accepted the validity and ubiquity of individual arbitration agreements but nevertheless found a way around them by litigating through nonworker real parties in interest.

Second, this Article applies the principle that nonworker real parties in interest cannot be compelled into arbitration in furtherance of closing the justice gap for workers suffering discrimination. To that end, it advances the provocative claim that the private rights of action in employment

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antidiscrimination statutes like Title VII countenance private enforcement actions by nonworkers whose interests arguably align with workers, such as certain nonprofit organizations, even when those nonworkers bring claims on their own behalf and not on behalf of workers. Accordingly, one such plaintiff—that is, a real party in interest that did not sign an arbitration agreement with the employer-defendant, that cannot be compelled into arbitration, and that need not be concerned with certifying a class—can file an action seeking remedies that would inure to the benefit of a class of work discrimination victims.

This Article maintains that overcoming our contemporary barriers to workplace equality requires not just attacking those barriers head-on, but also leveraging heterodox avenues for enforcement as a means of navigating around those barriers. A functional, modern enforcement paradigm calls for nonworker real parties in interest to bring private enforcement actions that would inure to the benefit of classes of workers suffering from discrimination, thereby fashioning an employment discrimination class action by any other name.

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INTRODUCTION

Once upon a time, if an employer discriminated against a class of employees, one member of that class could file an employment discrimination action against the employer and move to certify a class of similarly situated workers, facilitating "just, speedy, and inexpensive"[1] relief for everyone at once.[2] However, over the past forty years, the U.S. Supreme Court has increasingly let employers close the book on that era. Today, employers can condition employment on workers agreeing to individually arbitrate all of their work-related disputes. What's more, for that ever-shrinking universe of employees not bound by an individual arbitration agreement, the Court has made it nearly impossible to certify a class premised on unlawful work discrimination. Accordingly, many scholars (this author included) believe that the employment discrimination class action is dead.

However! This Article argues that the death of employment discrimination class actions—tragic as it has been for workers' rights—does not imply the death of all collective relief for workers suffering from discrimination. To that end, it builds on the lessons learned from nearly half a century of litigation strategies opposing compelled arbitration and/or seeking collective redress for workers suffering from discrimination to develop a novel method for securing relief for the benefit of workers suffering from discrimination, despite their having signed individual arbitration agreements. To that end, it conducts two analyses.

Parts I and II look backward. Part I starts with a parallel chronology and analysis of the dual phenomena that heralded the death of the employment discrimination class action: the Supreme Court facilitating individual arbitration agreements and hindering discrimination class actions. Then, Part II categorizes the resistance to these phenomena to distinguish between strategies that worked well and strategies that did not. It resolves that relatively unsuccessful strategies attacked the Federal Arbitration Act's[3] (FAA) applicability to work contracts,[4] the scope of the FAA and Rule 23 of the Federal Rules of Civil Procedure ("Rule 23"), and the enforceability of contracts with individual arbitration agreements. But the most successful strategies accepted the validity and ubiquity of individual arbitration

1. FED. R. CIV. P. 1.

2. *See generally* Judith J. Johnson, *Rebuilding the Barriers: The Trend in Employment Discrimination Class Actions*, 19 COLUM. HUM. RTS. L. REV. 1, 9–24 (1987); George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688, 706–12, 720–24 (1980).

3. 9 U.S.C. §§ 1–15.

4. *Id.* § 2. This provision was enacted by the Act of July 30, 1947, ch. 392, § 2, 61 Stat. 669, 670 (1947) (codified as amended at 9 U.S.C. § 2), which reenacted the United States Arbitration Act, Pub. L. No. 68-401, § 2, 43 Stat. 883, 883 (1925) (current version at 9 U.S.C. § 2).

agreements and still found a way around them by litigating using nonworker real parties in interest. Put another way, less successful strategies searched for a cure; more successful strategies found ways to live with and treat the virus.

Parts III and IV look forward. Part III takes the lessons learned in Part II from the workers' rights movement's decades of resistance to the FAA and uses them to pave the path forward and close the justice gap for victims of work discrimination. To that end, it considers the breadth of private rights of action in work law, focusing on Title VII of the Civil Rights Act of 1964[5] and similar laws. It advances a provocative claim that such employment antidiscrimination statutes' private rights of action are far broader than the academy, judges, and practitioners appreciate, going so far as to countenance private enforcement actions by nonworkers whose interests arguably align with workers, such as certain nonprofit organizations, even when those nonworkers bring a claim on their own behalf and not on behalf of workers.

The import of this forward-looking analysis is that one such plaintiff—that is, a real party in interest that did not sign an arbitration agreement with the employer-defendant, that cannot be compelled into arbitration, and that need not be concerned with certifying a class—can likely file a Title VII action seeking remedies (e.g., injunctive relief, even on a national scale) that would benefit not just the plaintiff but classes of workers suffering from discrimination as well. Importantly, these plaintiffs can most likely proceed under existing federal law without resorting to impractical tactics like uprooting or substantially amending the FAA or Rule 23, changing this Supreme Court's beliefs vis-à-vis how to best interpret those laws, relying on public enforcement actions by underfunded, legally weak agencies like the U.S. Equal Employment Opportunity Commission (EEOC), or (progressive) state-specific tactics that only benefit those workers fortunate enough to work there.

Finally, Part IV considers the implications of Part III's conclusions. It first looks at the effects of nonworker real parties in interest serving as Title VII plaintiffs on closing the justice gap for workers suffering discrimination. Next, it reflects on the implications of this analysis for class actions (Rule 23) and party joinder (Rules 19 and 24 of the Federal Rules of Civil Procedure). Finally, it assesses the potential ramifications of this analysis on the civil litigation system, including whether it might open the floodgates and usher in a wave of litigation, what types of nonworkers might join that wave, and the benefits and drawbacks of such a result.

For too long, advocates for workplace equality have acquiesced in traditional modes of enforcement like worker class actions and public enforcement actions run by the EEOC. We must abandon fealty to this tradition. To that end, recent academic literature has developed innovative ways of closing the justice gap on behalf of workers suffering from

5. 42 U.S.C. §§ 2000e to 2000e-17.

discrimination and other marginalized parties.[6] This Article joins that chorus. Overcoming contemporary barriers to workplace equality requires not only attacking those barriers head-on—as workers, advocates, and scholars have been doing for decades—but also leveraging heterodox avenues for enforcement as a means of navigating those barriers. A functional, modern enforcement paradigm calls for nonworker real parties in interest that bring private enforcement actions under Title VII and similar statutes for the benefit of entire classes of workers suffering from discrimination—effectively fashioning an employment discrimination class action by any other name.

I. EPIDEMIC

Compelled individual arbitration is bad for workers. To that end, empirical evidence collected over roughly the past decade has demonstrated "that the proliferation of mandatory arbitration agreements . . . likely restricts access to justice," especially for workers.[7] Recent scholarly literature has generally echoed a similar refrain.[8] For example, Professors Judith Resnik, Stephanie Garlock, and Annie J. Wang have framed the rise of compelled arbitration as "a wave of activity aiming to suppress knowledge" that has wrested information regarding allegations of unlawful behavior from those with less power, like workers and the public writ large, leading to far fewer attempts to vindicate rights through arbitration.[9] However, the yawning justice gap

6. *See generally* Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 MINN. L. REV. 811 (2019); Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489 (2020) [hereinafter Gilles & Friedman, *New Qui Tam*]; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012) [hereinafter Gilles & Friedman, *After Class*]; Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447 (2014); Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223 (2018).

7. Andrew Elmore, *The State Qui Tam to Enforce Employment Law*, 69 DEPAUL L. REV. 357, 381 (2020) (first citing Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 6 (2011); and then citing David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 99 (2015)).

8. *See generally* Myriam Gilles, *When Law Forsakes the Poor*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 162 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022); Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 88 FORDHAM L. REV. 2319, 2321 n.11 (2020) (first citing Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 90 (2014); then citing Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015); and then citing Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 988–91 (2012)).

9. Judith Resnik, Stephanie Garlock & Annie J. Wang, *Collective Preclusion and Inaccessible Arbitration: Data, Non-Disclosure, and Public Knowledge*, 24 LEWIS & CLARK L. REV. 611, 679 (2020); *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private*

for workers is not the only consequence of the epidemic of compelled individual arbitration.

As Professor Eric K. Yamamoto has argued, such a justice gap has "undercut major businesses' and institutions' substantive legal liability and diminish[ed] their public accountability—thereby undermining the rule of law."[10] Moreover, the individual nature of most of the arbitration that workers are being compelled into nowadays undermines the efficiency of aggregate litigation as envisioned by the drafters of Rule 23.[11] Furthermore, as Professor Myriam Gilles has noted, the coming arbitration of practically all employment-related disputes will "fully arrest common law development" of employment law.[12] Understandably, such insulation and ossification are bound to "prevent the laws from accounting for and evolving to address various claims and disputes,"[13] widening the justice gap even further by freezing legal thinking in place for decades to come.

This part tells the story of how the Supreme Court has wielded the FAA and Rule 23 to inflict harms like these on workers. It recounts the birth of the FAA, its half-century of resilience as an aid to ordered commerce, and its rebirth as a bludgeon against workers' rights from the mid-1980s to today. It then weaves into that history the Supreme Court's narrow reading of Rule 23 as a hurdle to certifying employment discrimination class actions in federal court. To be clear, litigation, and especially class litigation, has always been an imperfect mechanism for resolving work-related disputes, including disputes concerning employment discrimination.[14] Nevertheless, employment discrimination class actions still carried restorative and deterrent utility for workers—utility that the Supreme Court has eroded over and over again.

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of Arbitration, the Private in Courts, and the Erasure of Rights, 124 YALE L.J. 2804, 2862, 2878 (2015).

10. Eric K. Yamamoto, *Critical Procedure: Alternative Dispute Resolution and the Justices' "Second Wave" Construction of Court Access and Claim Development*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 8, at 349, 350; *see also* Stephanie Bornstein, *When Forum Determines Rights: Forced Arbitration of Discrimination Claims*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 8, at 368, 371–74 (arguing that the confidential and individual nature of most arbitration stymies redress for systemic justice, which most likely contributed, in large part, to the degradation of liability, accountability, and the rule of law, as highlighted by Professor Eric K. Yamamoto).

11. Suzette Malveaux, *The Benefits of Class Actions and the Increasing Threats to Their Viability*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 8, at 67, 69 (citing Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions:* Wal-Mart v. Dukes *and* AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL'Y 73, 76 (2011)).

12. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 420–21.

13. Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 163–64 (2015).

14. *See generally* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017).

A. More Individual Arbitration

The Second Industrial Revolution brought with it an unprecedented increase in commercial activity and, ipso facto, commercial disputes.[15] To accelerate and standardize resolution of these disputes by relevant experts, merchants began to include in their commercial agreements promises to arbitrate all disputes arising therefrom.[16] However, many judges were disenchanted with the idea that these arbitration agreements could oust the judiciary of its jurisdiction, leading early twentieth century courts to void arbitration agreements and refuse to enforce arbitration awards.[17] Moreover, courts declined to compel arbitration via specific performance—instead awarding only nominal damages for breaching an arbitration agreement—and allowed any party that had chosen to submit to arbitration to revoke that submission at any time before an award was issued.[18]

This led to pushback by legislators who valued arbitration as an efficient way for subject-matter experts, not generalist judges, to resolve commercial disputes, as well as a means of lessening burdens on the publicly funded judicial systems employing those judges.[19] New York took the lead in 1920

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15. Scott R. Thomas, *Pre-Dispute Mandatory Arbitration of Sexual Harassment Complaints: Bad for Business Too*, 16 BERKELEY BUS. L.J. 102, 108 (2019) (citing John C. Norling, Note, *The Scope of the Federal Arbitration Act's Preemption Power: An Examination of the Import of* Saturn Distribution Corp. v. Williams, 7 OHIO ST. J. ON DISP. RESOL. 139, 140 (1991)).

16. John C. Norling, Note, *The Scope of the Federal Arbitration Act's Preemption Power: An Examination of the Import of* Saturn Distribution Corp. v. Williams, 7 OHIO ST. J. ON DISP. RESOL. 139, 140 (1991); Kristen Porter, Comment, *Upholding Precedent: How the U.S. Supreme Court Should Approach the* Green Tree *Circuit Split*, 26 WM. MITCHELL L. REV. 1075, 1075–76 (2000); Preston Douglas Wigner, Comment, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

17. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1917 n.3 (2022) (citing Kill v. Hollister (1746) 95 Eng. Rep. 532 (KB)); *Illegal Contracts—Contracts Against Public Policy—Agreement to Arbitrate All Differences—Executed Award*, 34 HARV. L. REV. 557, 558 (1921) (first citing Conant v. Arsenault, 119 Me. 411 (1920); then citing J.T. Williams & Bro. v. Branning Mfg. Co., 154 N.C. 205 (1911); and then citing Bauer v. Int'l Waste Co., 201 Mass. 197 (1909)); *see also* 65 CONG. REC. 1931 (1924) (statement of Rep. George Graham, Chairman of the U.S. House Comm. on the Judiciary) ("Originally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts. That has come into our law with the common law from England."). *Cf.* Norling, *supra* note 15, at 140 (citing Snodgrass v. Gavit, 28 Pa. 221 (1857)) (discussing a mid-nineteenth century court upholding an arbitration award—an exception that proves the rule).

18. *Viking River Cruises*, 142 S. Ct. at 1917 n.3 (citing 21 R. LORD, WILLISTON ON CONTRACTS § 57:2 (4th ed. 2017)) (no specific performance of arbitration agreements); Vynior's Case (1609) 77 Eng. Rep. 597 (KB) (pre-award revocability of arbitration agreements); Amy J. Schmitz, *Refreshing Contractual Analysis of ADR Agreements by Curing Bipolar Avoidance of Modern Common Law*, 9 HARV. NEGOT. L. REV. 1, 31–32 nn.147–48 (2004) (collecting cases).

19. *See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7–8 (1924) (statement of Julius Henry Cohen, General Counsel, New York Chamber of Commerce). Cohen was one of the chief drafters of the New York and federal laws compelling enforcement of arbitration awards. For commentary on the import of Cohen's testimony to the

by adopting a statute requiring its courts to enforce arbitration agreements.[20] Shortly thereafter, the federal government followed suit by enacting the FAA, section 2 of which mandated that any

> written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . , or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract [or] transaction . . . , shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[21]

Furthermore, although section 1 of the FAA defined the term "commerce" broadly, the definition explicitly excluded "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[22]

The legislative history of the FAA suggests that Congress intended to limit its scope solely to commercial and maritime contracts and, even then, only when the arbitration agreement was "voluntarily placed in the document by the parties to it."[23] That intent was realized for more than half a century. Well into the 1980s, arbitration agreements were limited to commercial contracts between businesses of relatively equal bargaining power[24] and collective bargaining agreements.[25] No one seriously thought that the FAA was applicable to disputes between employers and individual nonunion employees. To that end, one leading 1979 treatise, *Labor Arbitration Law & Practice* by Professor Dennis R. Nolan, dedicates a lone page to the FAA.[26]

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congressional intent behind the FAA, see Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 589 n.7 (2008).

20. *See* Norling, *supra* note 15, at 140 (citing N.Y. C.P.L.R. 7501 (McKinney 1920)).

21. 9 U.S.C. § 2; *see supra* note 4. The FAA has since been amended to exclude from its scope all predispute agreements to arbitrate disputes involving sexual assault and sexual harassment. 9 U.S.C. § 402.

22. 9 U.S.C. § 1.

23. 65 CONG. REC. 1931 (1924); *accord Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, *supra* note 19, at 13 ("If you let the people sign away their rights, the powerful people will come in and take away the rights of the weaker ones."); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, Chairman, American Bar Association's Committee of Commerce Trade and Commercial Law); *see also* Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2050–51 (2011); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101–14 (2006).

24. Norling, *supra* note 15, at 140 (citing Alan I. Widiss, *Introduction* to ARBITRATION: COMMERCIAL DISPUTES, INSURANCE AND TORT CLAIMS 1 (Alan I. Widiss ed., 1979)); Resnik, *supra* note 9, at 2838 (collecting examples).

25. Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 IND. L.J. 83, 83–84 (2001).

26. DENNIS R. NOLAN, LABOR ARBITRATION & PRACTICE 39–40 (1979). The 2020 version of Nolan's treatise—now coauthored by Professor Richard A. Bales and appropriately titled *Labor & Employment Arbitration*—dedicates three chapters spread over approximately eighty pages to employment arbitration under the FAA. DENNIS R. NOLAN & RICHARD A. BALES, LABOR & EMPLOYMENT ARBITRATION 387–462 (2020).

Therein, he dismisses the FAA's relevance to individual employee contracts by pointing to the FAA's exception for "contracts of employment [of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce],"[27] understandably presuming that all employees engage in commerce and thus fall within that exception—a conclusion the Supreme Court would eventually rebuke.[28]

However, in 1984, the Supreme Court embarked on what has now become roughly forty years of pro-arbitration, antiworker jurisprudence. In *Southland Corp. v. Keating*,[29] the Supreme Court concluded that the FAA preempts "state legislative attempts to undercut the enforceability of arbitration agreements," as California had done via a state statute requiring "judicial consideration of claims brought under that statute."[30] One year later, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[31] the Supreme Court held that the FAA requires courts to uphold agreements to arbitrate not only private contract disputes but also disputes regarding alleged violations of certain public laws (e.g., the Sherman Act[32]) as well.[33] Then, in 1991's *Gilmer v. Interstate/Johnson Lane Corp.*,[34] the Court extended *Mitsubishi Motors Corp.* to the workplace, finding that courts must uphold agreements to arbitrate disputes over statutory employment antidiscrimination rights.[35]

In the years that followed, employers realized something monumental: they could take advantage of *Gilmer*, especially in light of the uniquely American default of at-will employment,[36] its corollary that employers can unilaterally direct work conditions absent some law or contract restricting them,[37] and declining union density across the country.[38] Employers started to offer their nonunion employees what Justice Ruth Bader Ginsburg dubbed

27. NOLAN, *supra* note 26, at 39–40 (citing 9 U.S.C. § 1).

28. *See infra* note 72.

29. 465 U.S. 1 (1984).

30. *Id.* at 3, 16.

31. 473 U.S. 614 (1985).

32. 15 U.S.C. §§ 1–7.

33. *Mitsubishi Motors Corp.*, 473 U.S. at 625; *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling Wilko v. Swan, 346 U.S. 427 (1953)); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987).

34. 500 U.S. 20 (1991).

35. *Id.* at 23. Unionized workers tried to leverage earlier case law that ostensibly disfavored compelled arbitration arising from collective bargaining, *see, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), to distinguish arbitration agreements signed by workers from arbitration agreements signed by workers' representatives in collective bargaining agreements. The Supreme Court rejected this argument, too, holding that arbitration agreements in collective bargaining agreements can be as enforceable as those signed individually. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009).

36. Payne v. W. & Atl. R.R., 81 Tenn. 507, 518 (1884) ("[M]en must be left, without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.").

37. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79, 83 n.16 (2022).

38. Doug Henwood, *Unions Still Haven't Rebounded*, JACOBIN (Jan. 25, 2019), https://jacobin.com/2019/01/union-density-united-states-2018-bls [https://perma.cc/36ED-FDWD].

a Hobson's choice: agree to individually arbitrate employment-related disputes or lose your job.[39] Unsurprisingly, when faced with the prospect of signing away their right to some far-off, theoretical procedural tool or losing the income they needed to pay their rent and feed their families, employees en masse did the only rational thing: they forfeited their right to sue their employers to redress work discrimination, regardless of whether it was discrimination that they suffered individually or as a class. Employers had discovered a way to thwart employment discrimination class actions before they had even begun by—borrowing the words of Professor Jean R. Sternlight—"using arbitration as a tool of oppression, rather than to achieve justice."[40]

Gilmer opened the floodgates. In 1992, a meager 2 percent of domestic employers forced their workers to sign an arbitration agreement.[41] However, as Professor Richard A. Bales recognized in 1994, more management advocates were starting to encourage employers to adopt compelled arbitration, and more employers were starting to heed their call.[42] By 1995, approximately 7 percent of American employers forced their employees to sign some form of arbitration agreement[43]—more than triple what that statistic had been three years earlier—and more employers were considering the same approach every day.[44] A few feverish years later, and notwithstanding the EEOC's intervening condemnation of forced predispute arbitration of discrimination claims in 1997,[45] the number tripled again—by

39. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1636 n.2 (2018) (Ginsburg, J., dissenting).

40. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 712 (1996).

41. ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE GROWING USE OF MANDATORY ARBITRATION 1 (2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/ZM56-3DZ7] (citing Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27, 31 (1995)); *see also* Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims with Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 263 (1996) ("Shortly after *Gilmer* was decided, a survey of Fortune 500 companies reported that most Fortune 500 companies felt that mandatory arbitration was unnecessary because employee lawsuits did not pose a serious problem." (citing *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, DAILY LAB. REP., Apr. 30, 1992, at A14)).

42. Richard Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1912 n.296 (1994) (citing contemporaneous employer recommendations); *see also* Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 100 (1996).

43. Colvin, *supra* note 41, at 4 (citing U.S. GEN. ACCOUNTING OFF., GAO-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 21–22 (1995)).

44. Robert J. Lewton, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 993 n.3 (1996) (citing *Big Companies Use ADR for Worker Cases: Factfinding Most Popular, GAO Study Finds*, 13 ALTERNATIVES TO HIGH COST LITIG. 127, 128 (1995)).

45. *EEOC Policy Statement on Mandatory Arbitration*, DAILY LAB. REP., July 11, 1997, at E-4.

2003, roughly 23 percent of nonunion workers across America in the telecommunications industry were bound by an arbitration agreement,[46] though data not focused on any particular industry still remained opaque. Only recently has such nationwide data come to light, revealing the sickening scope of this ongoing epidemic.

As of 2017, arbitration agreements afflicted roughly 56 percent of all nonunion, private-sector employees nationwide.[47] Thirty percent of those arbitration agreements were explicitly *individual* in nature, meaning that workers waived not only their right to all litigation (class or individual), but also their access to class-wide arbitration as well.[48] It is projected that, by 2024, the overwhelming majority—*more than 80 percent*—of nonunion, private sector workers in America will have been forced by their employers to consent to these individual arbitration agreements as a condition of continued employment.[49]

This metastasizing phenomenon of compelled individual arbitration has left workers with fewer avenues to collectively access justice. In theory, employment discrimination statutes like Title VII remain potent. In reality, it is an economic certainty that workers will not wage an individual fight against their employer if the estimated costs of doing so (e.g., time, energy, attorneys' fees, costs, and retaliation risks) outweigh the estimated gains.[50] As such, in reality, extant federal law protects most workers against discrimination only if that discrimination causes enough harm to a single employee such that the employee could rationally expect a net individual gain from challenging the discrimination via an individual arbitration.[51] The exact same aggregate quantum of harm, spread thinly across many workers, will evade challenge because no individual worker has the economic

46. *See* Colvin, *supra* note 41, at 4 (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 410 (2008)).

47. *See id.* at 5.

48. *See id.* at 11. Employers no longer need to explicitly state that arbitration will be one-on-one for that to be so because the Supreme Court has fashioned a presumption against class arbitration unless the agreement explicitly authorizes it. *Cf.* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (finding that the FAA bars an order compelling class arbitration when an agreement is ambiguous regarding class arbitration); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (finding that the FAA bars an order compelling class arbitration when an agreement is silent regarding class arbitration).

49. KATE HAMAJI, RACHEL DEUTSCH, ELIZABETH NICOLAS, CELINE MCNICHOLAS, HEIDI SHIERHOLZ & MARGARET POYDOCK, CTR. FOR POPULAR DEMOCRACY & ECON. POL'Y INST., UNCHECKED CORPORATE POWER: FORCED ARBITRATION, THE ENFORCEMENT CRISIS, AND HOW WORKERS ARE FIGHTING BACK 1, 4, 11, 21 (2019), https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf [https://perma.cc/Z3CE-EBPM].

50. *Cf.* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 241–43 (2013) (Kagan, J., dissenting) (detailing how arbitration agreements can "prevent[] the effective vindication of federal statutory rights" by foreclosing arbitration as a practical means of dispute resolution).

51. Title VII's fee-shifting provision, 42 U.S.C. § 2000e-5(k), might change this calculus a bit by incentivizing more individual arbitrations. Yet, that provision is discretionary, not mandatory, and its effects are limited; indeed, attorneys might recover attorneys' fees, but any contingency fee will be limited to a percentage of a single client's damages.

incentive to bring a claim, and few attorneys have the economic incentive to represent such a worker.

B. Fewer Discrimination Classes

To make things even more bleak, discrimination class actions are particularly difficult to maintain even for the increasingly small universe of workers who are not bound by individual arbitration agreements. Discrimination plaintiffs were already behind the (Rule) eight ball after *Bell Atlantic Corp. v. Twombly*[52] and *Ashcroft v. Iqbal*[53] imposed the heightened "plausibility" pleading standard on civil actions in federal court,[54] and cases like *General Telephone Co. v. Falcon*[55] restricted who could serve as a class representative in Title VII class actions.[56]

Thereafter, in the wake of *Wal-Mart Stores, Inc. v. Dukes*,[57] courts have required workers seeking to prove class commonality to point to a corporate policy or practice that caused the alleged discrimination instead of merely alleging that corporate dereliction resulted in disparate impact.[58] As such, *Dukes* made obtaining class certification in actions based on discrimination even harder than it already was under *Falcon*, *Iqbal*, and *Twombly*.[59] Accordingly, the few workers who will actually retain their right to bring suit amid this epidemic of individual arbitrations have an even narrower path to certifying a class of similarly situated workers in federal court. This leaves much discrimination against classes of workers unthreatened by the theoretical prospect of an employment discrimination class action.

Advocates also tried to argue that plaintiffs seeking class certification could do so "based on the pleadings or on only minimal evidentiary support."[60] The Supreme Court put a stop to that as well. In *Comcast Corp. v. Behrend*,[61] the Court held that Rule 23 "does not set forth a mere pleading standard"; rather, the party seeking class certification must prove every requirement in Rule 23, after which "courts must conduct a 'rigorous

52. 550 U.S. 544 (2007).
53. 556 U.S. 662 (2009).
54. *Id.* at 680; *Twombly*, 550 U.S. at 570.
55. 457 U.S. 147 (1982).
56. *Id.* at 156.
57. 564 U.S. 338 (2011).
58. *See* Ryan H. Nelson, *Substantive Pay Equality: Tips, Commissions, and How to Remedy the Pay Disparities They Inflict*, 40 YALE L. & POL'Y REV. 149, 193–96 (2021). Workers unable to prove commonality certainly have been unable to prove that common questions "predominate over any questions affecting only individual members," as required to certify a damages class. FED. R. CIV. P. 23(b)(3).
59. Natalie Bucciarelli Pedersen, *The Hazards of* Dukes*: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 132–34, 136–37, 141–43 (2012); Michael J. Zimmer, Wal-Mart v. Dukes*: Taking the Protection Out of Protected Classes*, 16 LEWIS & CLARK L. REV. 409, 455–61 (2012).
60. Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 747 (2013) (first citing Newman v. CheckRite Cal., Inc., No. Civ. S-93-1557, 1996 WL 1118092, at *2 (E.D. Cal. Aug. 2, 1996); and then citing Avila v. Van Ru Credit Corp., No. 94 C 3234, 1995 WL 22866, at *1 (N.D. Ill. Jan. 18, 1995)).
61. 569 U.S. 27 (2013).

analysis'" to determine whether they have satisfied the rule.[62] Furthermore, the *Comcast* Court doubled down on the *Dukes* Court's raising the bar on Rule 23's predominance requirement, reasoning that evidence of an individual's injury must be provable "through evidence that was common to the class rather than individual to its members," and that damages resulting from that injury must be measurable "on a class-wide basis" through the use of a "common methodology."[63]

In light of this case law, the future looks bleak. A few years from now, when four out of every five American workers will have signed an agreement forsaking their right to sue their employers for employment-related disputes, employment discrimination class actions will become practically illusory. Even the one worker in five who has not (yet) been forced to sign an individual arbitration agreement will be unable to certify a class in federal court, absent a near-perfect storm of employer malfeasance. Some state courts may provide a more hospitable forum for discrimination classes,[64] but successful state-court plaintiffs would need to avoid removal under, inter alia, federal question jurisdiction by limiting the causes of action to state or local Title VII analogues and the Class Action Fairness Act of 2005[65] (CAFA) by narrowly defining the class (e.g., by destroying minimal diversity or keeping membership under 100) or seeking damages of $5,000,000 at the most,[66] thereby weakening the attractiveness of such strategic forum shopping.

II. RESISTANCE

As management and its allies consistently eroded workers' access to justice, workers' rights advocates fought back, advancing three primary legal tactics for resisting the proliferation and enforcement of individual arbitration agreements.[67] Yet, as the following brief history of their

62. *Id.* at 33, 35 (quoting Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011)).

63. *Id.* at 30.

64. Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 433–34 (2018); Suzette M. Malveaux, *The Power and Promise of Procedure: Examining the Class Action Landscape After* Wal-Mart v. Dukes, 62 DEPAUL L. REV. 659, 668–69 (2013).

65. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

66. *See* 28 U.S.C. §§ 1331, 1332(d)(2), (5)(B); *see also* Zachary D. Clopton, *Class Actions and Executive Power*, 92 N.Y.U. L. REV. 878, 882 (2017); Andrew J. Trask, *Reactions to* Wal-Mart v. Dukes*: Litigation Strategy and Legal Change*, 62 DEPAUL L. REV. 791, 792 (2013). Because most state and local Title VII analogues substantially mirror Title VII and because most sufficiently large employee classes would destroy the complete diversity required by 28 U.S.C. § 1332(a) anyway, CAFA is the biggest hurdle to scaling state-level strategies.

67. Grassroots campaigns appealing directly to employers should not be discounted as a tool for materially curbing the use of forced arbitration agreements, though examining the efficacy of such projects is beyond the scope of this Article. For early examples of such campaigns, see Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 221–22 (1998). For one especially effective, modern example of such a campaign, see *Coercive Contracts*, PEOPLE'S PARITY PROJECT, https://www.peoplesparity.org/coercivecontracts/ [https://perma.cc/MT3Z-KTQ3].

resistance demonstrates, these strategies have almost always been unsuccessful in closing the justice gap for workers. To that end, this part collects and categorizes the resistance to the FAA's second life and the Supreme Court's reimagining of Rule 23, framing less successful strategies as those that "fight the law" or "fight the contracts," as contrasted with more successful strategies that "fight the system." Finally, it argues that what makes the "fight the system" tactics different in both kind and potency is their use of nonworkers as the real parties in interest.

A. Fight the Law

Initial attacks on arbitration agreements waged war on the FAA itself. For example, ever since the 1990s, after the losses in *Southland Corp.* and *Gilmer*, advocates and like-minded scholars have pushed for legislative solutions that would have prevented employers from compelling workers into mandatory predispute arbitration agreements under the FAA.[68] Such efforts have largely failed. A recent iteration of this fight was more targeted and, hence, successful, carving out an exemption to the FAA for forced predispute arbitration of sexual harassment and assault claims.[69] This carve-out was most welcome, but, as Professor Erik Encarnacion has aptly stated, "[c]arving out sexual harassment claims from the statute is a step in the right direction—though not enough."[70] Nevertheless, at present, broader efforts are doomed to fail because there is no serious traction in Congress to rescind the FAA or exempt from its scope compelled individual arbitration of employment discrimination (or other) claims.

Concurrent with these legislative battles, advocates worked to minimize the breadth of the FAA. That, too, mostly failed. In *Allied-Bruce Terminix Cos. v. Dobson*,[71] for instance, the Supreme Court concluded that the FAA's application to contracts "evidencing a transaction involving commerce" was

68. SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 93–94 (2019), https://uploads-ssl.webflow.com/5fa42ded15984eaa002a7ef2/5fa42ded15984ea6a72a806b_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf [https://perma.cc/K3EN-SEMK]; Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 902–03 (2020); John A. Gray, *Have the Foxes Become the Guardians of the Chickens?: The Post*-Gilmer *Legal Status of Predispute Mandatory Arbitration as a Condition of Employment*, 37 VILL. L. REV. 113, 135 (1992); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 121 (2000); Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 732 (2004); Brian K. Van Engen, Note, *Post*-Gilmer *Developments in Mandatory Arbitration: The Expansion of Mandatory Arbitration for Statutory Claims and the Congressional Effort to Reverse the Trend*, 21 J. CORP. L. 391, 410 n.209 (1996) (citing contemporaneous bills). For some recent examples of such legislation, see Restoring Justice for Workers Act, H.R. 4841, 117th Cong. (2021) (exempting only employment-related disputes); Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. (2019) (exempting disputes related to employment, consumer, antitrust, and civil rights).

69. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022).

70. Encarnacion, *supra* note 68, at 903.

71. 513 U.S. 265 (1998).

coterminous with Congress's broad Commerce Clause power, thereby inflicting the FAA on nearly all commercial and maritime agreements.[72] Conversely, in *Allied-Bruce*'s sister case, *Circuit City Stores, Inc. v. Adams*,[73] the Supreme Court narrowly read the FAA's exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" by confining its application to transportation workers.[74] Since then, workers' rights advocates have argued for broad interpretations of which workers qualify as transportation workers—sometimes successfully, as in *Southwest Airlines Co. v. Saxon*.[75] But those wins are mere table scraps; the overwhelming majority of American workers fall outside this limited exception. However, in *New Prime Inc. v. Oliveira*,[76] the Court confirmed that both employees and independent contractors are exempted as transportation workers under the FAA,[77] laying the groundwork for some gig economy workers, like certain rideshare drivers, to elude compelled arbitration.[78]

Shortly after *Gilmer*, some scholars, like Professors Christine Godsil Cooper and Joseph R. Grodin, argued that *Gilmer* did not extend to Title VII claims.[79] Yet, the Supreme Court rejected that contention in *14 Penn Plaza LLC v. Pyett*,[80] though it did so in dicta.[81] Even to this day, the Supreme Court has not explicitly extended *Gilmer* to Title VII claims in any opinion carrying precedential weight, notwithstanding the fact that all lower courts unanimously do so.[82] Nonetheless, in consideration of the weight of precedent in the lower courts and this Supreme Court's zeal for arbitration, reigniting this argument now seems like mere tilting at windmills.

Indeed, the FAA has stood relatively unscathed by all of these varied attacks, its scope broad and its exceptions limited. Therefore, advocates considered how they might render the arbitration agreements themselves invalid.

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72. *Id.* at 268. Curtailment of the Commerce Clause power, *cf.* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 315 (2004) (making the originalist case for overturning *Wickard v. Filburn*, 317 U.S. 111 (1942)), which may be forthcoming from this majority-originalist Supreme Court, might restrain the FAA's expansive application, but that prospect remains hypothetical for now.

73. 532 U.S. 105 (2001).

74. *Id.* at 109.

75. 142 S. Ct. 1783 (2022).

76. 139 S. Ct. 532 (2019).

77. *See id.* at 541.

78. *See generally* Conor Bradley, Note, *Seamen, Railroad Employees, and Uber Drivers?: Applying the Section 1 Exemption in the Federal Arbitration Act to Rideshare Drivers*, 54 U. MICH. J.L. REFORM 525 (2021).

79. *See* Christine Godsil Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 224 (1992); *see also* Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1, 30 (1996).

80. 556 U.S. 247 (2008).

81. *Id.* at 267 n.9.

82. *See* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 748–49 (9th Cir. 2003) (collecting cases).

B. Fight the Contracts

At first, workers' rights advocates believed arbitration agreements to be no different than any other agreement. In that vein, they reasoned that traditional contract law defenses could render an arbitration agreement void or voidable, as the FAA itself explicitly provided,[83] thereby preserving access to employment discrimination and other class actions. For example, at the insistence of such advocates, the Supreme Court of California held that, under its state's contract law, class action waivers in arbitration agreements were unconscionable and hence voidable, guaranteeing employees some class-wide procedural mechanism—be it litigation or arbitration—for challenging an employer's discriminatory policies or practices.[84] Yet, in *AT&T Mobility LLC v. Concepcion*,[85] the U.S. Supreme Court struck down that interpretation of state law because it was preempted by the FAA.[86] A related tactic contended that arbitration agreements containing class waivers divested workers of the ability to vindicate their statutory rights when arbitration costs exceeded the maximum possible award. In *American Express Co. v. Italian Colors Restaurant*,[87] however, the Supreme Court rejected this argument, concluding that arbitration agreements with class wavers were enforceable, notwithstanding their practical effect of divesting workers of the ability to vindicate statutory rights.[88]

Similarly, advocates argued that at least some arbitration agreements lacked sufficient consideration, either because they gave the employer unfettered discretion to amend their terms while affording no such discretion to workers, thereby rendering the agreements illusory, or because the employer imposed the contracts on workers in exchange for continued employment, which some courts contended was not new and valid consideration.[89] The Supreme Court has yet to weigh in on these arguments, and lower courts are divided, so workers' rights advocates' chances appear relatively milquetoast when it comes to leveraging this strategy to foment systemic change.

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83. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (citing 9 U.S.C. § 2).

84. Discover Bank v. Super. Ct., 113 P.3d 1100, 1103 (Cal. 2005).

85. 563 U.S. 333 (2011).

86. *Id.* at 352.

87. 570 U.S. 228 (2013).

88. *Id.* at 238–39.

89. *Compare* Bailey v. Fed. Nat'l Mortg. Ass'n, 209 F.3d 740, 747 (D.C. Cir. 2000), *and* Shockley v. PrimeLending, 929 F.3d 1012, 1019 (8th Cir. 2019), *and* Crump v. MetaSource Acquisitions, LLC, 373 F. Supp. 3d 540, 549 (E.D. Pa. 2019), *with* Edwards v. Doordash, Inc., 888 F.3d 738 (5th Cir. 2018), *and* Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 476 (10th Cir. 2006), *and* Peterson v. Binnacle Cap. Servs. LLC, 364 F. Supp. 3d 108 (D. Mass. 2019), *and* Durkin v. CIGNA Prop. & Cas. Corp., 942 F. Supp. 481, 488 (D. Kan. 1996). To be clear, the only way that the Supreme Court could be expected to weigh in here is if a state law targets arbitration like the majority in *Concepcion* said that California had, in which case the FAA will preempt said state law. It would be unprecedented and ultra vires for the Supreme Court to otherwise weigh in on state-specific contract law (e.g., what constitutes unconscionability or consideration).

Advocates also targeted some arbitration agreements' silence and ambiguity, arguing that class arbitration must be available if workers did not unambiguously waive their rights to it. The Supreme Court disagreed in a pair of cases. First, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[90] the Court found that silence in arbitration agreements on the availability of class arbitration precluded class arbitration.[91] Second, in *Lamps Plus, Inc. v. Varela*,[92] the Court found that ambiguity in arbitration agreements with respect to the availability of class arbitration precluded class arbitration.[93] Together, these cases established a presumption against class-wide arbitration unless the employer and the employee explicitly agreed otherwise.[94]

Understandably, many advocates have moved past this "fight the contracts" strategy not only because it has not been working that well, but also because it does not think big enough. Had *Concepcion* come out the other way, the opinion would have been a win only for the employees in progressive states whose courts or legislatures had mimicked those in California. Had challenges to arbitration agreements' consideration come out the other way, they would have affected a few employers, but incentivized more to impose their arbitration agreements at the outset of employment or tied to some picayune bonus to ensure that lack of consideration would not be a problem. Had *Stolt-Nielsen* and *Lamps Plus* come out the other way, they would have merely incentivized savvy employers to craft arbitration agreements containing explicit class waivers.

Hence, advocates turned their focus to labor law, framing class litigation as protected concerted activity per section 7 of the National Labor Relations Act[95] (NLRA), thereby rendering agreements chilling such activity (e.g., arbitration agreements) ostensibly unenforceable.[96] Had this argument succeeded, it would have affected workers nationwide, making it far more attractive than any challenges focusing piecemeal on individual states or contracts. However, the Supreme Court shot down this approach in *Epic Systems Corp. v. Lewis*,[97] exempting class actions from the definition of protected concerted activity under section 7 of the NLRA and confirming, once again, that contracting away your right to sue your employer is just fine in the eyes of the Supreme Court.[98]

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90. 559 U.S. 662 (2010).
91. *Id.* at 687.
92. 139 S. Ct. 1407 (2019).
93. *Id.* at 1419.
94. *See* Am. Inst. for Foreign Study, Inc. v. Fernandez-Jimenez, 6 F.4th 120, 123 (1st Cir. 2021) (first citing Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1407 (2019); and then citing Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010)).
95. 29 U.S.C. §§ 151–169. For section 7 of the NLRA, see *id.* § 157.
96. At the time this strategy was in vogue, the operative precedent was *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004), which was overruled by *Boeing Co.*, 365 N.L.R.B. 154 (2017).
97. 138 S. Ct. 1612 (2018).
98. *Id.* at 1619.

Future variations on this "fight the contracts" theme will probably invoke the common-law contract defenses of impossibility or impracticability, fraud, and economic duress.[99] For example, workers' rights advocates might point to an alleged *unforeseeable* shortage in qualified, neutral arbitrators[100] or employer-led delays in arbitrating[101] as the grounds for contending that performance under an arbitration agreement should be excused for impossibility or impracticality. They might similarly point to an alleged *foreseeable* shortage of arbitrators or employer-led delays in arbitrating as the grounds for contending that performance should be excused because the employer fraudulently induced the employee into signing the arbitration agreement.

Alternatively, state legislatures might answer the rhetorical question posed by Justice Ginsburg's *Epic Systems* dissent—"were the [individual arbitration] 'agreements' genuinely bilateral?"[102]—by amending state law to render contracts relating to employment (and potentially other) disputes voidable on account of economic precarity. Certainly, duress would be an unsuccessful defense under extant contract law,[103] but that is not to say that such a conclusion is preordained. Congress has recognized that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment,"[104] which implies that states would be justified in expanding the breadth of their economic duress defenses by requiring courts to consider factors such as workers' financial vulnerabilities and lack of power to negotiate the contract terms with their employers. So long as such a law does not single out arbitration agreements for disparate treatment, but rather applies with equal force to all contracts regulating work (or other) disputes, it should survive FAA preemption.[105]

At best, these strategies suggest narrow wins for workers. Perhaps one state will pave the way forward for successfully challenging some workers' individual arbitration agreements, or perhaps some workers' agreements are poorly drafted enough to be vulnerable to attack. But none of these

99. For a general overview of the elements of these and other contract-law defenses, see ROBERT D. COLEMAN, AM. BAR ASS'N, THE AMERICAN BAR ASSOCIATION GUIDE TO CONSUMER LAW (2020), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/books_consumer_home/ [https://perma.cc/6HZW-6HCL] (click on "Ch. 3: Bars to a Contract").

100. Ralph S. Berger, *Training Programs for Neutrals*, *in* COLLECTIVE BARGAINING BY GOVERNMENT WORKERS: THE PUBLIC EMPLOYEE 205 (Harry Kershen ed., 2019).

101. Nicholas Iovino, *Judge Accuses DoorDash of Trying to 'Squirm' Out of Arbitration*, COURTHOUSE NEWS SERV. (Nov. 25, 2019), https://www.courthousenews.com/judge-accuses-doordash-of-trying-to-squirm-out-of-arbitration/ [https://perma.cc/9HKV-RYJZ].

102. *Epic Sys.*, 138 S. Ct. at 1636 n.2 (Ginsburg, J., dissenting).

103. Richard A. Bales, *Normative Consideration of Employment Arbitration at* Gilmer*'s Quinceañera*, 81 TUL. L. REV. 331, 375 (2006).

104. Norris-LaGuardia Act, ch. 90, § 2, 47 Stat. 70, 70 (1932) (codified as amended at 29 U.S.C. § 102).

105. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (holding that state laws must "place arbitration agreements on an equal footing with other contracts" to survive FAA preemption).

approaches can solve the bigger problem: the system denies workers the ability to collectively access justice.

C. Fight the System

The most successful strategies attacking forced worker arbitration have been those that attack the system that confines most workers to individual arbitration in the first place. To date, only two such real-world tactics can be appropriately categorized as this "fight the system" approach—representative private enforcement actions and public enforcement actions—though several academic proposals fall under this definition as well. All of these are worthy of intense scrutiny because they hold the greatest potential for closing the justice gap for workers.

1. Representative Actions

Recently, California—ever the innovative workers' rights pugilist—tried a novel strategy to get around individual employment arbitration agreements. The California Private Attorneys General Act[106] (PAGA) enables an employee to file a civil action on behalf of the state against their employer for alleged violations of the California Labor Code.[107] Under PAGA, an employee-plaintiff, acting similarly to a relator in a qui tam action, can file, solely on behalf of the state and not themselves, a claim that their employer's violation of the California Labor Code injured them (i.e., an individual claim) and join it with any number of claims that the employer's violation injured other employees, too (i.e., nonindividual claims).[108] Hence, some PAGA actions are representative in the sense that the plaintiff is seeking relief for injuries to others, but all PAGA actions are representative in the sense that the plaintiff always sues as an agent of the state, regardless of what types of claims are included in the action.[109] Yet, PAGA contains no mechanism for a plaintiff to bring nonindividual claims untethered to individual claims—that is, an action by an employee, acting as an agent of the state, seeking relief only for injuries to other employees.[110]

In *Iskanian v. CLS Transportation Los Angeles LLC*,[111] the Supreme Court of California handed down two discrete PAGA interpretations. First, the waiver of an employee's ability to bring a PAGA action as a representative of the state in any forum, be it through litigation or arbitration, is against

106. CAL. LAB. CODE §§ 2698–2699.8 (West 2022).

107. *See* Iskanian v. CLS Transp. L.A. LLC, 327 P.3d 129, 147 (Cal. 2014), *overruled in part on other grounds by* Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1924–25 (2022).

108. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1914–16 (2022) (first citing Iskanian v. CLS Transp. L.A. LLC, 327 P.3d 129, 147–48 (Cal. 2014); then citing Arias v. Super. Ct., 209 P.3d 923, 933 (Cal. 2009); and then citing ZB, N.A. v. Super. Ct., 448 P.3d 239, 243 (Cal. 2019)).

109. *Id.*

110. *Id.* at 1925 (citing CAL. LAB. CODE § 2699(a), (c) (West 2022)).

111. 327 P.3d 129 (Cal. 2014).

public policy and void.[112] Second, an agreement to separately resolve individual PAGA claims and nonindividual PAGA claims is likewise void as against public policy.[113] As such, under *Iskanian*, any agreement under which an employee waives the right to bring any sort of PAGA claim is void, as is any agreement under which an employee agrees to separately resolve different types of PAGA claims (e.g., an agreement to resolve individual claims in a separate action from nonindividual claims).

In *Viking River Cruises, Inc. v. Moriana*,[114] the U.S. Supreme Court considered whether the FAA preempted PAGA as interpreted by *Iskanian*. Importantly, the Court first held that the FAA does not preempt PAGA's mechanism for letting employees sue as agents of an absent principal like the state.[115] So, in theory, because *Iskanian* had invalidated waivers of an employee's ability to bring PAGA actions as a representative of the state, an employee could bring a PAGA action notwithstanding the fact that the employee had agreed to arbitrate employment disputes.

Yet, the Court in *Viking River Cruises* went on to hold that the FAA preempts PAGA's bar on agreements to resolve individual PAGA claims and nonindividual PAGA claims separately.[116] This second holding from *Iskanian*, the Supreme Court held, has the effect of "coerc[ing] parties into withholding PAGA claims from arbitration" because an employee can effectively abrogate an agreement to arbitrate only individual claims by filing a PAGA action that contains individual *and* nonindividual claims, notwithstanding the FAA's promise that parties have the freedom to decide which matters they will and will not arbitrate.[117] As such, the FAA preempts PAGA as interpreted by *Iskanian*'s second holding but leaves PAGA as interpreted by *Iskanian*'s first holding intact.

Viking River Cruises could represent a huge step forward for workers' rights, but its scope is necessarily limited by geography. If California amends PAGA such that an employee can bring only nonindividual claims—that is, an action by the employee, acting as an agent of the state, seeking redress only for injuries to other employees—the FAA should not preempt it, and any waivers of that employee's right to bring such a representative action would be void pursuant to *Iskanian*'s first holding. Under this "new PAGA," California employees could effectively mimic employment discrimination (and other) class actions by bringing a PAGA claim as an agent of the state for injuries suffered by their coworkers, though they would have no interest in the litigation themselves and, accordingly, have no financial incentive to bring suit.

To that end, PAGA's current language awards 25 percent of the civil penalties recovered to "aggrieved employees," and the remaining 75 percent

112. *Id.* at 133.
113. *Id.* at 149.
114. 142 S. Ct. 1906 (2022).
115. *Id.* at 1922.
116. *Id.* at 1924.
117. *Id.*

goes to the state,[118] meaning that a successful plaintiff, after bringing an entirely nonindividual claim under new PAGA, would get nothing. Thus, under new PAGA, the plaintiffs' bar could be expected to incentivize plaintiffs with some financial compensation for their troubles, which would in turn drive management to amend their model arbitration agreements such that employees agree not to accept compensation in exchange for serving as a new PAGA plaintiff. Therefore, California and like-minded states would do well to adopt or amend a PAGA-like statute so that it not only survives FAA preemption by letting employees bring solely nonindividual claims, but also provides a modest financial award to any successful plaintiff who, pursuant to new PAGA, would necessarily not be an aggrieved employee. Presumably, therefore, an agreement to waive any financial award for serving as a new PAGA plaintiff would be void as against public policy, although states could alternatively and explicitly bar waivers of the right to collect compensation in exchange for serving as a new PAGA plaintiff.

Finally, as Gilles and Gary Friedman have demonstrated, Article III standing in this sort of "new qui tam" action is "predicated on the government's general enforcement powers, and not on any injury-in-fact the government happens to have suffered in its proprietary capacity."[119] Thus, constitutional standing should be no hurdle for the new PAGA plaintiff serving as a mere agent of the state, even when they bring only nonindividual claims.

As such, given its potential to redress class-wide work discrimination, new PAGA might approximate employment discrimination class actions. Yet, that prospect is limited by geography and politics. New PAGA or some similar representative cause of action[120] might become law in a handful of states and municipalities. But the majority of employees work in jurisdictions that show no signs of adopting any such statute. Therefore, the question becomes—might the lessons learned from *Viking River Cruises* be leveraged to develop a procedural mechanism that approximates employment discrimination class actions without the geographic limitations of PAGA?[121]

118. CAL. LAB. CODE § 2699(i) (West 2022).

119. Gilles & Friedman, *New Qui Tam*, *supra* note 6, at 521–22; *see also* Elmore, *supra* note 7, at 394–95.

120. PAGA is not the only framework here. Certainly, other laws have enabled representative civil rights actions on behalf of similarly situated individuals. For example, the 1980s antipornography ordinances championed by Professor Catherine A. MacKinnon and Andrea Dworkin typically included a representative cause of action: "In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women . . . ." Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 50 n.109 (1985) (quoting Indianapolis & Marion County, Ind., General Ordinance No. 24 (Apr. 23, 1984)); *see also* Hudnut v. Am. Booksellers Ass'n, 475 U.S. 1001 (1986), *aff'g* 771 F.2d 323 (7th Cir. 1985) (ruling one such ordinance an unconstitutional restraint on speech).

121. *See infra* Part III.

2. Public Enforcement

In *EEOC v. Waffle House, Inc.*,[122] the Supreme Court concluded that arbitration agreements between an employer and an employee cannot prevent a nonparty to that agreement, such as the EEOC, the U.S. Department of Justice's (DOJ) Civil Rights Division, or their state or local analogue agencies, from filing a public enforcement action against that employer.[123] Justice John Paul Stevens wrote for the majority that, so long as that agency remains "in command of the process" and is not an agent of the employee, an agency can bring a public enforcement action even if the employee signed an individual arbitration agreement that prohibits them from bringing a private enforcement action themselves.[124]

This decision carries incredible potential. After all, the EEOC and the DOJ have authority to file not only individual actions for the benefit of a single employee,[125] as the EEOC did in *Waffle House*,[126] but also actions for the benefit of an entire class of employees under sections 706 and/or 707 of Title VII.[127] In reality, though, practical and political considerations (e.g., budget cuts and intentionally weak tools for preenforcement investigations) stymied these agencies' ability to file anywhere near the quantity and quality of enforcement actions that would be necessary to meet the moment.[128] EEOC-led actions have fallen to one-third of the level they had been at when *Waffle House* was decided in 2002.[129] Furthermore, the EEOC recently started publicizing its votes on initiating new actions, accompanied by information regarding each litigation up for a vote and including whether the EEOC would be litigating for the benefit of an individual employee or a group of employees, giving fresh insight into modern public enforcement trends.[130] In 2021, the EEOC authorized a grand total of *seven* enforcement

122. 534 U.S. 279 (2002).
123. *Id.* at 298.
124. *Id.* at 291.
125. *See* 42 U.S.C. § 2000e-5(f)(1).
126. *Waffle House*, 534 U.S. at 282–83.
127. 42 U.S.C. §§ 2000e-6(a), (c), 2000e-7(a).
128. *See generally* Indianapolis & Marion County, Ind., General Ordinance No. 24 (Apr. 23, 1984); THE AMERICAN MIDDLE CLASS: AN ECONOMIC ENCYCLOPEDIA OF PROGRESS AND POVERTY 392–94 (Robert S. Rycroft ed., 2017); Stephanie Bornstein, *Rights in Recession: Toward Administrative Antidiscrimination Law*, 33 YALE L. & POL'Y REV. 119, 131–41 (2014); Maryam Jameel, *More and More Workplace Discrimination Cases Are Being Closed Before They're Even Investigated*, VOX (June 14, 2019, 9:30 AM), https://www.vox.com/identities/2019/6/14/18663296/congress-eeocworkplace-discrimination [https://perma.cc/PA64-PESD]; Maryam Jameel, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/ [https://perma.cc/J5VS-23PL].
129. *See EEOC Litigation Statistics, FY 1997 Through FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/eeoc-litigation-statistics-fy-1997-through-fy-2021 [https://perma.cc/EX79-57QZ] (last visited Feb. 6, 2023).
130. *See Commission Votes*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/commission-votes [https://perma.cc/MP34-8KER] (last visited Feb. 6, 2023).

actions for the benefit of a group of employees[131]—a shameful indicator of public enforcement torpor at the federal level.[132] Without a massive budget infusion from Congress or an internal reallocation of their funding, these agencies must adopt wholesale paradigm shifts vis-à-vis how to administer public enforcement actions if there is to be any chance that such actions materially advance workers' rights broadly. Some scholars, like Professor Stephanie Bornstein, have proposed an original, public-private coenforcement approach that would do just that.[133]

One final brand of public enforcement is worth noting. Gilles and Friedman have convincingly argued that the states should use their parens patriae powers to sidestep employees' arbitration agreements and Rule 23, bring suit under Title VII,[134] and assert their "quasi-sovereign interest in the health and well-being—both physical and economic—of [their] residents in general."[135] To that end, and as Professor Margaret H. Lemos has contended,

131. *See, e.g.*, *EEOC Sues Air Control Heating & Electric, Inc. for Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 14, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-air-control-heating-electric-inc-sexual-harassment [https://perma.cc/6DS8-ZVGU]; *EEOC Sues Christopher's Dodge Ram for Sexual and Racial Harassment, Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 1, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-christophers-dodge-ram-sexual-and-racial-harassment-retaliation [https://perma.cc/8M6S-VKZP]; *EEOC Sues Dollar General for Age Harassment, Discrimination and Retaliation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 1, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-dollar-general-age-harassment-discrimination-and-retaliation [https://perma.cc/4L3M-UYDY]; *Hospital Housekeeping Services Sued by EEOC for Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 29, 2021), https://www.eeoc.gov/newsroom/hospital-housekeeping-services-sued-eeoc-disability-discrimination [https://perma.cc/FF2V-Z9UK]; *EEOC Files Disability Lawsuits in El Paso and Ft. Worth Based on COVID Related Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 24, 2021), https://www.eeoc.gov/newsroom/eeoc-files-disability-lawsuits-el-paso-and-ft-worth-based-covid-related-discrimination [https://perma.cc/Z2NA-U3GC]; *EEOC Sues BNSF Railway for Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 23, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-bnsf-railway-sexual-harassment [https://perma.cc/Y8FB-XQPP]; *EEOC Sues Green JobWorks LLC for Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 13, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-green-jobworks-llc-sex-discrimination [https://perma.cc/RJB3-6KXC].

132. The EEOC's recent focus has been on systemic litigation, implying that the quantity of EEOC lawsuits filed fails to account for the agency's efficacy. *See, e.g.*, *Advancing Opportunity A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (July 7, 2016), https://www.eeoc.gov/advancing-opportunity-review-systemic-program-us-equal-employment-opportunity-commission [https://perma.cc/N8SF-BZB7] ("EEOC's Strategic Plan requires 'the agency to prioritize the systemic cases it chooses to litigate and to bring fewer individual and small class claims of discrimination.'" (quoting *United States Equal Employment Opportunity Commission Strategic Plan for Fiscal Years 2012—2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/united-states-equal-employment-opportunity-commission-strategic-plan-fiscal-years-2012-2016 [https://perma.cc/H7PU-RMEQ] (last visited Feb. 6, 2023))). Still, there is no world in which seven systemic enforcement actions annually is sufficient.

133. *See* Bornstein, *supra* note 6.

134. EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (interpreting 42 U.S.C. § 2000e-5).

135. Gilles & Friedman, *After Class*, *supra* note 6, at 661 (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)).

states' interests in parens patriae litigation transform from private to quasi-sovereign if those interests have been "sufficiently aggregated" such that "the injury in question affects a 'sufficiently substantial segment of [the state's] population.'"[136] This tactic, just like the EEOC-helmed public enforcement in *Waffle House*, shifts the status of real party in interest away from the employee, which is indispensable for avoiding compelled arbitration.

D. Synthesis

What makes the sort of representative actions ordained by "new PAGA" after *Viking River Cruises*—as well as the public enforcement actions blessed by *Waffle House* and envisioned by Gilles and Friedman—different in kind from all prior (read: less successful) attacks on individual arbitration agreements is their shift away from the employee as the real party in interest.[137]

"Fight the law" tactics (as seen in *Gilmer*, *Circuit City*, *14 Penn Plaza*, *Southwest Airlines*, and *New Prime*), as well as "fight the contracts" tactics (as seen in *Lamps Plus* and *Epic Systems*), all involved workers or their legal representatives (e.g., unions) as the real parties in interest.[138] However, one of the only consistent throughlines in this Supreme Court's FAA jurisprudence is its insistence that "arbitration is a matter of consent,"[139] so if a worker agrees to individually arbitrate employment-related disputes, and that agreement is valid, it is now clear that the worker's interest in resolving such disputes can be compelled into individual arbitration, regardless of who or what represents that worker's interests in litigation.

To that end, courts bind nonsignatories to arbitration agreements based on "common law principles of contract and agency law," like when a nonsignatory incorporates the agreement to arbitrate by reference into another agreement, assumes the obligation to arbitrate, serves as the agent or corporate alter ego of the signatory, or knowingly exploits the agreement and is accordingly estopped from avoiding arbitration.[140] In other words, once a worker signs a valid individual arbitration agreement, the employer can compel that worker and any of their assigns and agents (e.g., their union) into

136. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 495 (2012) (alteration in original) (quoting Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982)).

137. *See* FED. R. CIV. P. 17(a)(1); *see also* United States *ex rel.* Eisenstein v. City of New York, 556 U.S. 928, 934–35 (2009) (a real party in interest is "an actor with a substantive right whose interests may be represented in litigation by another").

138. *See, e.g.*, Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1787 (2022); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412 (2019); New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 536 (2019); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619–20 (2018); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 251 (2009); Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 110 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

139. Viking River Cruises, Inc. v. Moriana, 142 S. Ct. 1906, 1923 (2022).

140. Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d 773, 776–80 (2d Cir. 1995); *see also* Creative Telecomms., Inc. v. Breeden, 120 F. Supp. 2d 1225, 1240–41 (D. Haw. 1999) (collecting cases).

individual arbitration unless the employer is equitably estopped from doing so,[141] removing any avenue for that worker or any of their assigns or agents to seek collective relief from work discrimination.

However, the real parties in interest in *Viking River Cruises*, *Waffle House*, and Gilles and Friedman's proposal (regarding states using their parens patriae powers) were, respectively, California, the EEOC, and the states, none of which signed an arbitration agreement. Indeed, neither California in PAGA or "new PAGA" actions, the EEOC or the DOJ in Title VII public enforcement actions, nor the states in parens patriae actions act as an assign or agent of workers; rather, they act solely on their own behalf.[142] This key distinction should enable any of these plaintiffs to bring actions—including actions that inure to the benefit of workers even though those workers are not the real parties in interest—to vindicate the plaintiff's interests without fear of being compelled into arbitration.

Indeed, the interests of the states and the EEOC, though they overlap with those of employees substantially, are distinct. In enacting PAGA, for example, California was interested in "achiev[ing] maximum compliance with state labor laws," as well as "ensur[ing] an effective disincentive for employers to engage in unlawful and anticompetitive business practices."[143] Similarly, in authorizing the EEOC and the DOJ to bring Title VII public enforcement actions, Congress had sought "to further promote equal employment opportunities for American workers"[144] and to "broaden the enforcement powers of the EEOC."[145] These broad public interests in ensuring employers' legal compliance, or states' parens patriae interest in the general health and welfare of their residents, cover interests not covered by the narrow private interests pursued by most workers bringing private enforcement actions, such as restitution, deterrence of a single employer, and restorative and transitional justice.[146]

Yet, notwithstanding the fact that these plaintiffs should be able to maintain actions that approximate employment discrimination class actions without being compelled into arbitration, there are some major problems with relying on states' enacting new PAGA statutes or maintaining parens patriae actions, and with relying on the EEOC and the DOJ to engage in a significant quantity of quality litigation. For one thing, any state-specific approach is limited by geography and politics. While a handful of progressive states will

141. For a discussion of how equitable estoppel might prevent employers who have engaged in litigation from compelling employees into arbitration, see generally Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).

142. *See supra* notes 108, 124, 135 and accompanying text.

143. S. 796, § 1(a), 2003–2004 Leg., Reg. Sess. (Cal. 2003).

144. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, pmbl., 86 Stat. 103, 103.

145. United States v. New York, No. 77-CV-343, 1977 WL 15457, at *4 (N.D.N.Y. Nov. 18, 1977).

146. *See* McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358 (1995); Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 109.

likely continue to lead the way with such statutes and litigation,[147] as they should,[148] most workers live and work elsewhere. Furthermore, the EEOC is already running on fumes. Asking the commission to engage in the high caliber of litigation needed to effectively approximate the employment discrimination class action would be a nonstarter, absent some viable means of taking the onuses of funding and administering litigation off the agency, such as what Bornstein proposed via cooperative public-private enforcement[149] and what Gilles and Professor Anthony Sebok proposed via enabling mass arbitrations through the use of offensive nonmutual collateral estoppel.[150]

We need a different strategy to replace the employment discrimination class action at a national level—one that focuses on real parties in interest other than workers doing all the heavy lifting, and one that inures to the benefit of workers without the plaintiff actually representing them in the litigation. Unfortunately, such a paternalistic solution would likely be viewed as anathema to some of the core values of the labor movement, which prioritizes, inter alia, worker voice and agency.[151] To be clear, this Article's proposal would not require workers' rights advocates to jettison those ideals; rather, it calls for a recognition that the judiciary is highly unlikely to countenance litigation with workers' interests in focus if those workers signed an individual arbitration agreement, despite the interests of workers being the labor movement's primary and correct focus. Traditional enforcement paradigms grounded in the belief that workers can save themselves from collective discrimination are fantasies in the face of this Supreme Court's fealty to compelled individual arbitration. As such, the next part of this Article resolves that achieving workplace equality at scale without access to employment discrimination class actions requires an enforcement paradigm of a different kind—one that attacks work discrimination without any workers or their representatives doing the attacking.

III. A NEW ENFORCEMENT PARADIGM

The primary lesson learned in Part II is that in employment discrimination litigation, compelling the plaintiff into arbitration should fail when the real party in interest is a party other than the worker who signed the arbitration agreement or the worker's assigns or agents. This part leverages that lesson

147. *See* Gilles, *supra* note 6, at 2238 (recounting PAGA-like legislative proposals).

148. *See* Terri Gerstein, *State and Local Workers' Rights Innovations: New Players, New Laws, New Methods of Enforcement*, 65 ST. LOUIS U. L.J. 45, 88–92 (2020).

149. *See* Bornstein, *supra* note 6.

150. *See* Gilles & Sebok, *supra* note 6, at 468–71; *see also* Gilles, *supra* note 6, at 2234.

151. *See* Rachel Arnow-Richman, *Author Meets Reader, Scholar Meets Worker: An Introduction to the Section on Labor Relations and Employment Law 2011 AALS Panel Presentation*, 15 EMP. RTS. & EMP. POL'Y J. 443, 446 (2011) (reflecting on JULIUS G. GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT (2010)); KATE ADRIAS & BRISHEN ROGERS, ROOSEVELT INST., REBUILDING WORKER VOICE IN TODAY'S ECONOMY 4 (2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Rebuilding-Worker-Voice-201808.pdf [https://perma.cc/795F-YF5R].

by developing a unique argument that justifies a nonworker plaintiff and real party in interest bringing a private Title VII enforcement action that would approximate several key aspects of an employment discrimination class action. As such, it facilitates workers' rights advocates' attempts to fill at least some of the gaps in workers' access to justice caused by the death of the employment discrimination class action.

It begins with a thorough textual analysis of Title VII's private right of action (i.e., subsections (a)–(d) of section 703).[152] It then contextualizes that analysis with evidence of congressional intent, both structural and historical, that supports a more capacious reading of that private right of action than most stakeholders have traditionally appreciated. It also addresses the elephant in the room—even if Title VII countenances such a broad private right of action, how do nonworkers have constitutional standing to bring such an action? Finally, it considers the practical implications of its analysis. It concludes that most federal employment antidiscrimination statutes' private rights of action are likely much broader than currently understood, thereby affording workers' rights advocates with novel and sustainable avenues to access justice in service of the worker constituencies that they support.

To demonstrate the applicability of this theory, this part imagines a fictional entity that, given the right circumstances, would have statutory standing under Title VII. Consider a nonprofit organization named Women in Tech (WIT), the purposes of which are threefold: (1) to amplify the voices and lived experiences of women working in the technology industry who survived sex discrimination to help other women overcome similar discrimination, (2) to provide those women with direct services like mentoring programs, and (3) to leverage those women's lived experiences to help lobby industry groups and legislatures for positive legal changes that would decrease sex discrimination in the technology industry. Also assume that a large technology company named TechCo executes a reduction in force (read: a mass layoff) that disparately impacts women at TechCo on the basis of their sex without any legitimate business justification. Accordingly, the technology industry writ large employs fewer women, so WIT's testimonial and mentoring programs are less attended, WIT's lobbying events use fewer spokeswomen, and WIT is forced to expend more of its time and money to find more women working in technology so that it can maintain the same level of activity that it had before TechCo's reduction in force. Finally, assume that TechCo forced the women it terminated to sign individual

152. As I have discussed elsewhere, section 703(m) arguably contains not only instructions on how to prove certain violations of section 703(a)–(d), but also its own discrete private right of action for any individual whose "race, color, religion, sex, or national origin was a motivating factor for any employment practice," even if that individual is not employee or an employment applicant. Ryan H. Nelson, Hively v. Ivy Tech Community College, *853 F.3d 339 (7th Cir. 2017) (en banc)*, *in* FEMINIST JUDGMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS 301, 327–29 (Ann C. McGinley & Nicole Buonocore Porter eds., 2020) (quoting 42 U.S.C. § 2000e-2(m)). However, that opinion is not widely accepted, and this Article does not engage with section 703(m). So for clarity's sake, this Article's references to Title VII's private right of action intend to refer only to subsections (a)–(d) of section 703.

arbitration agreements with the company at the start of their employment, so they cannot bring an employment discrimination class action.

The remainder of this part demonstrates why WIT most likely has statutory and constitutional standing to bring a private Title VII enforcement action and seek equitable remedies (e.g., reinstatement for the terminated women) against TechCo, as well as the implications of that conclusion.

A. "Person Claiming to Be Aggrieved"

Each year, more than 10,000 private plaintiffs file new civil actions in federal court alleging violations of employment discrimination statutes.[153] Practically all these plaintiffs are current employees, former employees, and job applicants claiming that their former, current, or prospective employers discriminated or retaliated against them. A small handful of employment discrimination plaintiffs are representatives of one or more of the foregoing groups, as with labor unions and nonunion employee organizations suing as agents of their members.[154]

Thus, one might think that Title VII's private right of action authorizes suit solely by current, former, or putative employees and their legal representatives. Not so. True: section 703(a)–(d) of Title VII prohibits

153. Before the COVID-19 pandemic, the number routinely hovered around 15,000, dipping a bit as many employees started working from home more often. *See Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (December 31, 2021)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2021/12/31 [https://perma.cc/7833-WFPK] (last visited Feb. 6, 2023) (click on "DOWNLOAD DATA TABLE") (sum of total "Employment and ADA—Employment" cases for calendar year 2021); *Table C-2—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (December 31, 2020)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2020/12/31 [https://perma.cc/WCW2-WAGA] (last visited Feb. 6, 2023) (click on "DOWNLOAD DATA TABLE") (same for calendar years 2020 and 2019); *Table C-2—U.S. District Courts—Civil Statistical Tables For The Federal Judiciary (December 31, 2018)*, U.S. CTS., https://www.uscourts.gov/statistics/table/c-2/statistical-tables-federal-judiciary/2018/12/31 [https://perma.cc/8UAM-N6XH] (last visited Feb. 6, 2023) (click on "DOWNLOAD DATA TABLE") (same for calendar years 2018 and 2017); *see also* U.S. CTS., CIVIL NATURE OF SUIT CODE DESCRIPTIONS (2021), https://www.uscourts.gov/sites/default/files/js_044_code_descriptions.pdf [https://perma.cc/25GH-UW3Q] (describing the categories "Employment and ADA—Employment" as encompassing employment discrimination causes of action).

154. *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187, 192 (1991); Loc. No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 504 (1986); Int'l Bhd. of Elec. Workers v. Miss. Power & Light Co., 442 F.3d 313, 314 (5th Cir. 2006); Am. Postal Workers Union v. Postmaster Gen., 781 F.2d 772, 774–75 (9th Cir. 1986); Firefighters Inc. for Racial Equal. v. Bach, 731 F.2d 664, 666 (10th Cir. 1984); Int'l Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1097 (3d Cir. 1980); Image of Greater San Antonio v. Brown, 570 F.2d 517, 518 (5th Cir. 1978); *see also* Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 57 (1975) (nonunion employee organization brought suit under the NLRA on behalf of members who bypassed their union's grievance procedure and engaged in protected concerted activity against their employer because they believed it to have engaged in unlawful discrimination); Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193, 234 (2013). State laws may be more restrictive. *See, e.g.*, Amalgamated Transit Union, Loc. 1756 v. Super. Ct., 209 P.3d 937, 942–45 (Cal. 2009) (holding that a union can bring a private enforcement action under PAGA neither as an assign of member-employees' claims nor on member-employees' behalf).

employers, employment agencies, labor organizations, and joint labor-management committees from engaging in an unlawful employment practice against an "employee" (which section 701(f) defines to mean "an individual employed by an employer"), an "applicant[] for employment," and other "individual[s]."[155] Moreover, because neither Title VII nor the Dictionary Act[156] defines "individual," that word must be given its plain meaning[157]—that is, "a single human being as contrasted with a[n] . . . institution."[158] A select few cases interpret the word "individual" as used in other statutes to include corporations, and *Black's Law Dictionary* recognizes that linguistic possibility,[159] but such an interpretation likely strains credulity in the employment context (i.e., how could a corporation be employed by an employer?). Accordingly, the unlawful employment practices described in these subsections most likely can only be committed against natural persons.

Yet, Title VII's private right of action is not so limited. Although section 703(a)–(d) limits protection against unlawful employment practices to natural persons, section 706(f) states that "a civil action may be brought . . . by the *person* claiming to be aggrieved . . . by the alleged unlawful employment practice."[160] In turn, section 701(a) defines "person" to include one or more "individuals" and any of sixteen entities: "governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees

155. *See* 42 U.S.C. § 2000e-2(a) to 2000e-2(d); *see also id.* § 2000e(f). For example, it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any *individual*, or otherwise to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin," or "to limit, segregate, or classify his *employees* or *applicants for employment* in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an *employee*, because of such *individual's* race, color, religion, sex, or national origin." *Id.* § 2000e-2(a)(1), (2) (emphases added); *see also id.* § 2000e-2(b) to 2000e-2(d) (using similar language).

156. 1 U.S.C. §§ 1–8.

157. *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012).

158. *Individual*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/individual [https://perma.cc/RPQ6-QWY3] (last visited Feb. 6, 2023); *accord Individual*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/view/Entry/94633 [https://perma.cc/R6RV-E5SK] (last visited Feb. 6, 2023) (a "single human being"). The associated words canon (noscitur a sociis), or "a word is known by the company it keeps," also supports such an interpretation. *See* Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 226 (2008); *see also* SCALIA & GARNER, *supra* note 157, at 195. Indeed, "individual" in Title VII must mean only "a single human being" as it can be contrasted from a "corporation" or any of the other entities listed therein—that is, the company it keeps.

159. *Individual*, BLACK'S LAW DICTIONARY (2d ed. 1910) (noting that the "restrictive signification [of individual to natural persons] is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons" and collecting cases that reach such a conclusion).

160. 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

in [bankruptcy] cases under title 11, or receivers."[161] Thus, five discrete categories comprise the term of art "person" as used in Title VII:

(1) employees and job applicants (i.e., individuals);
(2) labor unions;
(3) public employers (i.e., governments, governmental agencies, political subdivisions);
(4) private employers (i.e., partnerships, associations, corporations, mutual companies, joint-stock companies, trusts, unincorporated organizations); and
(5) representatives and custodians (i.e., legal representatives, trustees, trustees in bankruptcy cases, receivers).[162]

Comparing these sections reveals a discrepancy rarely discussed in academic literature or leveraged in litigation: whereas unlawful employment practices can only be committed against "employees" or "individuals," any "person" can bring a Title VII private right of action, so long as they "claim[] to be aggrieved" by that unlawful employment practice. That begs a unique question of statutory interpretation: within this context, should "person" be limited to its traditional confines of employees, job applicants, and those representing them? Or might certain entities like corporations and unincorporated organizations that do not purport to represent employees or job applicants maintain a private right of action as a "person," so long as those entities are claiming to be "aggrieved" by some unlawful employment practice against employees or job applicants?

1. "Person"

Pursuant to the interpretive direction canon, "[d]efinition sections . . . are to be carefully followed."[163] To that end, had Congress intended to confine Title VII's private right of action to employees, applicants for employment, and their representatives, it would have more naturally drafted it to authorize actions by "an employee or applicant for employment claiming to be aggrieved, or a legal representative of the foregoing," and not a "person claiming to be aggrieved."[164]

Moreover, consider the language of Title VII's private right of action in light of the canon against surplusage (*verba cum effectu sunt accipienda*), which provides that, whenever possible, courts should avoid interpretations

161. *Id.* § 2000e(a); *see also* Frey v. Coleman, 903 F.3d 671, 679 (7th Cir. 2018) (noting Title VII's distinction between "individual" and "person"). The Dictionary Act defines "person" similarly, *see* 1 U.S.C. § 1, but a more specific definition in a statute supplants a general definition anyway. Spa Flying Serv., Inc. v. United States, 724 F.2d 95, 96 (8th Cir. 1984); Natures Image, Inc. v. U.S. Dep't of Lab., No. 819MC00014DOCKESX, 2019 WL 4316514, at *2 (C.D. Cal. June 19, 2019); *see also* SCALIA & GARNER, *supra* note 157, at 273.

162. *See* 42 U.S.C. § 2000e(a).

163. SCALIA & GARNER, *supra* note 157, at 225; *see also* Fox v. Standard Oil Co. of N.J., 294 U.S. 87, 96 (1935) ("There would be little use in [the definition set by the lawmakers] if we were free in despite of it to choose a meaning for ourselves.").

164. *See* Thompson v. N.A. Stainless, LP, 562 U.S. 170, 177 (2011) (making a similar point).

that "would render superfluous another part of the same statutory scheme."[165] That contextual canon suggests applying each and every one of the seventeen nouns in section 701(a)'s definition of "person" to every iteration of the word "person" in Title VII, so long as it is possible to do so.

Certainly, Title VII contains provisions under which it is possible to give effect to the full scope of the term of art "person." For example, Title VII authorizes the EEOC to give technical assistance to "persons subject to th[e statute]."[166] Accordingly, the EEOC has provided technical assistance to employees, labor unions, and all of the entities in section 701(a) that could be employers.[167] As another example, nothing said or done during the EEOC's informal attempts to resolve charges can be made public by the EEOC or used as evidence in any proceeding without the "written consent of the persons concerned,"[168] which might include individuals, employers, labor unions, or any of the other entities found in section 701(a).[169]

On the other extreme, Title VII certainly contains provisions using the term "person" under which it is impossible to give effect to all seventeen nouns itemized in section 701(a). For example, Title VII does not require preferential treatment on account of an imbalance between the total "persons of any race, color, religion, sex, or national origin" employed and the total "persons of such race, color, religion, sex, or national origin" in a given area,[170] but only natural persons have such demographic classifications—labor unions and employers do not. As another example, the EEOC can stop "any person" from engaging in unlawful employment practices,[171] but individuals cannot be held liable for committing unlawful employment practices under Title VII.[172]

The breadth of other iterations of "person" is less clear. Title VII precludes challenges "by a person who . . . had actual notice" of a proposed consent order resolving an employment discrimination claim that may have adversely

165. City of Chicago v. Fulton, 141 S. Ct. 585, 591 (2021) (quoting Yates v. United States, 574 U.S. 528, 543 (2015)); Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."); *see also* SCALIA & GARNER, *supra* note 157, at 174.

166. 42 U.S.C. § 2000e-4(g)(3).

167. *See How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/how-file-charge-employment-discrimination [https://perma.cc/5EJ2-AAV5] (last visited Feb. 6, 2023); *Coverage of Labor Unions and Joint Apprenticeship Committees*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/coverage-labor-unions-and-joint-apprenticeship-committees [https://perma.cc/W6V9-9C5D] (last visited Feb. 6, 2023); *Employers Guide*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/employers-guide [https://perma.cc/P3K8-GKEK] (last visited Feb. 6, 2023).

168. 42 U.S.C. § 2000e-5(b).

169. *See* Mach Mining, LLC v. EEOC, 575 U.S. 480, 492 (2015) (noting that the "persons concerned" include "both the employer and the complainant").

170. 42 U.S.C. § 2000e-2(j).

171. *Id.* § 2000e-5(a).

172. *Cf. id.* § 2000e-2(a) to 2000e-2(d) (liability only for employers, employment agencies, labor organizations, and joint labor management committees); *see also* Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1077 (3d Cir. 1996) (collecting cases withholding individual liability under Title VII).

affected their interests and who had a reasonable opportunity to object to that consent order.[173] In theory, that provision could bar challenges by employers; in practice, however, case law and legislative history presume that, in this context, "person" only means "individual."[174] Section 706(k) is similarly confounding. It provides that Title VII does not exempt or relieve "any person" from liability under any state law, unless that law requires or permits an unlawful employment practice.[175] Yet, no cases apply the word "person" in this provision to employees, given that state laws typically do not impose on employees the sort of liability that would render this provision operative with respect to employees.

Nothing in the text of Title VII's provision creating a private right of action limits its application to employees or other individuals, implying that entities like "corporations" and "unincorporated organizations" could, given the right circumstances, bring a private right of action, lest those words be rendered unnecessarily superfluous in section 706(f). In fact, that authority would need to extend to entities that are not acting as legal representatives of an absent party, lest the word "legal representative" be rendered unnecessarily superfluous, too.

Yet, like all canons of statutory interpretation, the canon against surplusage is not absolute.[176] As Professors Abbe R. Gluck and Lisa Schultz Bressman's empirical research has confirmed, drafters of statutes may "intentionally err on the side of redundancy" when writing a laundry list of terms—not to give discrete meaning to every term but to try to "capture the universe" so that they do not accidentally miss something major.[177] Courts concur and occasionally reject application of the canon against surplusage because it provides "only a clue" as to the better interpretation of the statute; "[s]ometimes," the Supreme Court advises, "the better overall reading of the statute contains some redundancy."[178] However, courts have not offered any applicable way to discern when to avoid surplusage and when to acquiesce to it. Nevertheless, at least one case outside the Title VII context has found

173. 42 U.S.C. § 2000e-2(n)(1)(B)(i).

174. *See* Davis v. City & County of San Francisco, No. 91-16579, 1993 WL 268452, at *3 (9th Cir. July 15, 1993); United States v. N.Y.C. Bd. of Educ., 448 F. Supp. 2d 397, 444 n.54 (E.D.N.Y. 2006), *vacated in part on other grounds sub nom.* United States v. Brennan, 650 F.3d 65 (2d Cir. 2011); EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 199–200 (E.D.N.Y. 2003) (according to the House Report, this provision of Title VII "was intended to ensure that employers were not 'left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them'" (quoting H.R. REP. NO. 102-40, pt. 1, at 49–50 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549, 590–91)).

175. *See* 42 U.S.C. § 2000e-7.

176. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) ("[C]anons are not mandatory rules. They are guides that 'need not be conclusive.'"); *see also* SCALIA & GARNER, *supra* note 157, at 140.

177. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934 (2013); *see also* SCALIA & GARNER, *supra* note 157, at 176–77.

178. Rimini St., Inc. v. Oracle USA, Inc., 139 S. Ct. 873, 881 (2019); *accord* Sterling Nat'l Bank v. Block, 984 F.3d 1210, 1218 (7th Cir. 2021).

that "person" should be interpreted broadly in light of the canon against surplusage.[179]

There is some precedent for applying "person" in Title VII's *public* right of action to institutions and entities other than employers and labor unions, despite the norm that employers, employment agencies, and labor unions have traditionally been the only types of Title VII defendants. As an example, in *United States v. Board of Education*,[180] the Third Circuit upheld a public Title VII enforcement action against, inter alia, a state because "[o]ne need not be the employer of the employees whose Title VII rights are endangered in order to be liable" under section 707 of Title VII.[181] Similarly, in *United States v. Original Knights of the Ku Klux Klan*,[182] a district court upheld such an action against the Ku Klux Klan because it admittedly "beat and threatened Negro pickets to prevent them from enjoying the right of equal employment opportunity."[183] These cases suggest that courts are, and should remain, focused on the text of Title VII's rights of action and not the engrained norms of who or what can be a party in an enforcement action.

Precedent considering other titles in the Civil Rights Act of 1964[184] likewise interprets "person" broadly. For example, several lower courts have found that minority-owned corporations are "persons" with statutory standing to sue under Title VI.[185] Courts also let corporations sue under other civil rights statutes, like 42 U.S.C. §§ 1981[186] and 1983[187] and the Fair Housing Act,[188] that similarly provide a private right of action to "person[s]."[189] Again, these cases support the conclusion that some entities have statutory standing as "persons claiming to be aggrieved" under Title VII.

However, Congress's choice of pronouns could suggest otherwise. "Judges rightly presume . . . that legislators understand . . . noun-pronoun concord."[190] That is significant because, according to Professor Bryan A. Garner, the author of the relevant section of *The Chicago Manual of Style*'s current edition, modern English grammar prefers, but does not require, the

179. *See* Hall v. Fla. Dep't of Corr., No. 17CV467, 2018 WL 3134440, at *2 (N.D. Fla. May 23, 2018).

180. 911 F.2d 882 (3d Cir. 1990).

181. *Id.* at 892.

182. 250 F. Supp. 330 (E.D. La. 1965).

183. *Id.* at 356.

184. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

185. *See* Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth., 745 F.3d 703, 714–15 (4th Cir. 2014); Hudson Valley Freedom Theater, Inc. v. Heimbach, 671 F.2d 702, 706–07 (2d Cir. 1982); Innovative Polymer Techs., LLC v. Innovation Works, Inc., No. CV 17-1385, 2018 WL 1701335, at *11 (W.D. Pa. Apr. 6, 2018).

186. 42 U.S.C. § 1981.

187. *Id.* § 1983.

188. *Id.* §§ 3601–3619, 3631. The Fair Housing Act is also known as Title VIII of the Civil Rights Act of 1968. Pub. L. No. 90-284, 82 Stat. 73 (codified as amended in scattered sections of the U.S.C.); *see also Carnell Const. Corp.*, 745 F.3d at 714 (collecting cases).

189. *See* 42 U.S.C. §§ 1981(a), 1983, 3604(a)–(b), 3605(a).

190. SCALIA & GARNER, *supra* note 157, at 140.

relative pronouns "who" or "whom" when referring to natural persons but the relative pronoun "that" when referring to things.[191] Although the relevant text in Title VII's private right of action eschews pronouns—it says, "person claiming to be aggrieved" and not "person who claims to be aggrieved"—other provisions of Title VII utilize the phrases "person who" or "person whom," and not "person who or that" or "person whom or that," arguably implying Congress's belief that any "person claiming to be aggrieved" would be a natural person.

For example, Title VII's private right of action authorizes an action by any "person claiming to be aggrieved" who filed a charge with the EEOC and, if the charge was filed by a commissioner of the EEOC, "by any *person whom* the charge alleges was aggrieved by the alleged unlawful employment practice."[192] There is no rational reason for which Congress would authorize private actions by charging parties but disallow private actions by parties suing based on a commissioner's charge, so the type of party able to bring an action based on a commissioner's charge ought to be the same as the type of party able to bring an action based on filing a charge. Therefore, perhaps the word "whom" implies congressional intent to limit "person" in all of its iterations to natural persons.[193] Similarly, with the Civil Rights Act of 1991,[194] Congress added section 701(l) to Title VII to define the term of art "complaining party" as meaning "the Commission, the Attorney General, or a *person who* may bring an action or proceeding under this title."[195] Arguably, Congress presumed that the only sort of complaining parties under Title VII could be agencies and natural persons.

However, the "presumption of legislative literacy is a rebuttable one; like all the other canons, this one can be overcome by other textual indications of meaning."[196] Indeed, Congress did not use any pronoun when it wrote "person claiming to be aggrieved," so a pronoun probably should not be read into that provision. Moreover, modern English grammar merely prefers accord between "who" or "whom" and natural persons rather than requiring it.[197] William Strunk, Jr.'s *The Elements of Style*, one of the prevailing, twentieth century guides for English grammar usage, never mentions such a

191. *See 5.56: Relative Pronouns Defined*, CHI. MANUAL OF STYLE ONLINE, https://www.chicagomanualofstyle.org/book/ed17/part2/ch05/psec056.html [https://perma.cc/2EP3-DQUU] (last visited Feb. 6, 2023).

192. 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

193. *Cf.* Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); *see also* SCALIA & GARNER, *supra* note 157, at 170.

194. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S.C.).

195. *Id.* § 104, 105 Stat. at 1074 (emphasis added) (codified as amended at 42 U.S.C. § 2000e(l)); *see also id.* § 102, 105 Stat. at 1073 (codified as amended at 42 U.S.C. § 1981a(d)(1)).

196. SCALIA & GARNER, *supra* note 157, at 140–41.

197. *See supra* note 191.

preference or rule.[198] Some dictionaries and grammar guides even countenance phrases like "person that" and "man that" as acceptable alternatives to "person who" and "man who,"[199] respectively, suggesting that Congress's use of the phrase "person whom" in 1964 and "person who" in 1991 does not show an intention to limit the word "person" elsewhere in Title VII to natural persons. In fact, the editions of *The Chicago Manual of Style* in print around the time Title VII was enacted in 1964 and amended in 1991 said nothing of a rule about accord between the pronouns "who" or "whom" and natural persons.[200] The manual's fifteenth edition in 2003 first adopted the hardline rule that "who" "refers *only* to a person" (a natural person, presumably), only for the sixteenth edition in 2010 and the current seventeenth edition in 2017 to soften that rule—"who" "*normally* refers to a person."[201]

Additionally, Congress did not explicitly limit the "person claiming to be aggrieved" language to natural persons, instead choosing to define "person" broadly in the very first words of Title VII in section 701(a).[202] Congress also declined to amend this language in 1991 or at any other time since Title VII's inception, and the Civil Rights Act of 1991 had much different, clearly defined purposes having nothing whatsoever to do with limiting parties' ability to invoke Title VII's private right of action.[203]

Finally, using a phrase like "person who" when "person" is a defined term of art should imply, at best, only noun-pronoun accord between the term of art and the pronoun, as opposed to noun-pronoun accord between the nouns that that term of art represents and the pronoun. For instance, in *Burwell v. Hobby Lobby Stores, Inc.*,[204] the Supreme Court considered whether the word "person" as used in the Religious Freedom Restoration Act of 1993[205] (RFRA) included nonprofit corporations.[206] Justice Alito's majority opinion held that "person" was a term of art defined by the Dictionary Act to include such corporations, and RFRA did not alter that definition, so the term of art "person" as used in RFRA includes nonprofit organizations.[207] Importantly,

198. WILLIAM STRUNK JR., THE ELEMENTS OF STYLE (4th ed. 2000); WILLIAM STRUNK JR., THE ELEMENTS OF STYLE (3d ed. 1979); WILLIAM STRUNK JR., THE ELEMENTS OF STYLE (2d ed. 1972); WILLIAM STRUNK JR., THE ELEMENTS OF STYLE (1st ed. 1918).

199. *See, e.g.*, THE CONCISE OXFORD ENGLISH DICTIONARY 1331 (6th ed. 1976); GEORGE LYMAN KITTREDGE & FRANK EDGAR FARLEY, AN ADVANCED ENGLISH GRAMMAR 67, 70 (1913) (gendered language in original).

200. *See generally* THE CHICAGO MANUAL OF STYLE (14th ed. 1993); THE CHICAGO MANUAL OF STYLE (13th ed. 1982); THE CHICAGO MANUAL OF STYLE (12th ed. 1969); THE CHICAGO MANUAL OF STYLE (11th ed. 1949).

201. *See* THE CHICAGO MANUAL OF STYLE 220 (16th ed. 2010) (emphasis added); THE CHICAGO MANUAL OF STYLE 163 (15th ed. 2003) (emphasis added).

202. *See* 42 U.S.C. § 2000e(a).

203. *See generally* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (codified as amended at 42 U.S.C. § 1981 note).

204. 573 U.S. 682 (2014).

205. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended in scattered sections of 5 and 42 U.S.C.).

206. *Burwell*, 573 U.S. at 707.

207. *See id.* at 707–09 (citing 1 U.S.C. § 1).

the Court read "person" in RFRA as covering corporations notwithstanding RFRA using the phrase "person whose,"[208] thus further undercutting the import for statutory interpretation of the grammatical preference for noun-pronoun accord when that noun is a defined term of art. Hence, the best interpretation of Title VII's private right of action continues to permit entities to fall under the auspices of the term of art "person."

Consider the implications of this analysis for our fictional plaintiff, WIT. If WIT were to file a charge of discrimination against TechCo with the EEOC[209] on its own behalf (not on behalf of former female TechCo employees), alleging sex discrimination in violation of section 703(a) of Title VII based on a theory that TechCo's reduction in force resulted in sex-based disparate impact against TechCo's former female employees, then WIT most likely would be a "person" within the meaning of section 701(a) and, therefore, section 706(f). However, that begs the question: is WIT "aggrieved"?

2. "Aggrieved"

According to the Supreme Court, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly."[210] Thus, the Court has repeatedly extended the statutory phrase "person aggrieved" to the furthest limits of Article III standing.[211] However, that has not been the case with Title VII's private right of action.

a. Thompson *and the Zone of Interests Test*

In *Thompson v. North American Stainless, LP*,[212] an employee filed a Title VII retaliation action against his employer after it allegedly retaliated against him because another employee (the plaintiff's fiancée) had participated in their shared employer's equal employment opportunity process.[213] The employer contended that the plaintiff lacked statutory standing to bring a private enforcement action under Title VII because he had not been the employee who had participated in the equal employment opportunity

208. 42 U.S.C. § 2000bb-1(c).

209. Interestingly, "EEOC Form 5"—the template that a charging party must use to file a charge of discrimination with the EEOC—presumes that the charging party is a natural person given that the charging party must identify a name and "indicate Mr., Ms., Mrs., [etc.]" with that name, as well as provide a "Year of Birth." U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC FORM 5 (June 2022), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/foia/forms/form_5.pdf [https://perma.cc/TYL5-6THW]. The EEOC ought to amend this form to track Title VII's actual text (e.g., "Name of Person Claiming to Be Aggrieved") and rescind the requirement that a charging party reveal their gender identity via an honorific when it may be entirely irrelevant to that charge.

210. FEC v. Akins, 524 U.S. 11, 19 (1998).

211. *See* Dep't of Com. v. U.S. House of Reps., 525 U.S. 316, 328–29 (1999); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 103 n.9 (1979); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972).

212. 562 U.S. 170 (2011).

213. *Id.* at 172.

process.[214] Accordingly, the question presented was the scope of Title VII's private right of action.

The *Thompson* Court rejected its earlier dicta that "the Title VII aggrievement requirement conferred a right to sue on all who satisfied Article III standing," holding instead that Title VII's private right of action was narrower than what Article III would sanction, but not so "artificially narrow" that it applied "only to the employee who engaged in the protected activity."[215] As Justice Antonin Scalia stated in his majority opinion discounting such a cramped reading of the private right of action in section 706(f), "if that is what Congress intended it would more naturally have said 'person claiming to have been discriminated against' rather than 'person claiming to be aggrieved.'"[216]

Instead, the Court went a different route. Borrowing the zone of interests test from Administrative Procedure Act[217] case law, the Court reasoned that "the term 'aggrieved' in Title VII . . . enabl[es] suit by any plaintiff with an interest *arguably* [sought] to be protected by the statute."[218] Applying that test to the case at bar, the Court unanimously found that the plaintiff fell "within the zone of interests protected by Title VII," the purpose of which "is to protect employees from their employers' unlawful actions."[219]

The Court also found the plaintiff to fall arguably within Title VII's zone of interests, at least in part, after stating that he was "not an accidental victim of the retaliation—collateral damage, so to speak, of the employer's unlawful act," so "injuring him was the employer's intended means of harming [his fiancée]."[220] This language should be discounted as having relevance only in retaliation claims and not discrimination claims. To that end, statutory standing in this case helps effectuate the purpose of protecting employees from their employers' unlawful actions because, allegedly, this employer intentionally injured the plaintiff with the purpose of retaliating against another employee, and a desire to retaliate is a prerequisite to a viable Title VII retaliation claim.[221] In contrast, intent is not a prerequisite to all Title VII discrimination claims. If *Thompson* endorses statutory standing under Title VII only when the plaintiff is an intended victim of discrimination, it

214. *Id.*

215. *Id.* at 176–78 (rejecting dicta from *Trafficante*). As Professor Michael P. Healy has convincingly argued, *Thompson* was wrongly decided and should have endorsed *Trafficante*'s dicta that statutory standing under Title VII is as broad as Article III allows. *See* Michael P. Healy, *The Claims and Limits of Justice Scalia's Textualism: Lessons from His Statutory Standing Decisions*, 40 CARDOZO L. REV. 2861, 2902–03 (2019); *see also* Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1502 (2010) (criticizing the narrowness with which courts had been interpreting statutory standing under Title VII pre-*Thompson*). Nonetheless, this Article does not engage with arguments for or against overturning *Thompson*.

216. *Thompson*, 562 U.S. at 177.

217. 5 U.S.C §§ 551–559.

218. *Thompson*, 562 U.S. at 178 (emphasis added) (quoting Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 495 (1998)).

219. *Id.*

220. *Id.*

221. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 339 (2013).

would effectively read disparate impact theory out of the law because disparate impact plaintiffs are, ipso facto, unintended victims of discrimination.[222] The notion that *Thompson* overruled *Griggs v. Duke Power Co.*[223] and the entirety of disparate impact theory sub silentio is silly and, of course, not what the Court intended.

Thus, a "person" is "aggrieved" under Title VII if the "person" falls within the statute's zone of interests, which is when that "person" has an interest that Title VII at least arguably sought to protect, given that Title VII's purpose is to protect employees from their employers' unlawful actions.

b. Statutory Purpose Versus Congressional Intent

As the word "arguably" suggests, the zone of interests test "is not meant to be especially demanding."[224] For example, in *East Bay Sanctuary Covenant v. Biden*,[225] a recent case interpreting that test, the U.S. Court of Appeals for the Ninth Circuit held that several nonprofit organizations whose purposes included helping individuals apply for and obtain asylum fell within the zone of interests of a statute that shapes asylum eligibility requirements.[226] Because "the [o]rganizations' interests [were] 'marginally related to' and 'arguably within' the scope of the statute," the panel found that they had statutory standing to sue pursuant to the zone of interests test.[227] However, the U.S. Court of Appeals for the Second Circuit has recently called this conclusion into doubt. In *Moya v. U.S. Department of Homeland Security*,[228] the panel rejected the plaintiff–advocacy organization's claim that it fell within the zone of interests of a statute that regulated naturalization applications because the panel could not find evidence of congressional intent to afford standing to such organizations.[229]

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222. *See* Ricci v. DeStefano, 557 U.S. 557, 585 (2009).

223. 401 U.S. 424 (1971).

224. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 225 (2012) (quoting Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987)); *accord* Howard R.L. Cook & Tommy Shaw Found. *ex rel.* Black Emps. of Libr. of Cong., Inc. v. Billington, 737 F.3d 767, 771 (D.C. Cir. 2013); Fla. Transp. Servs., Inc. v. Miami-Dade County, 703 F.3d 1230, 1255–56 (11th Cir. 2012).

225. 993 F.3d 640 (9th Cir. 2021).

226. *Id.* at 667–68.

227. *Id.* at 668 (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224–25 (2012)); *see also* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 444–45 (D.C. Cir. 1998) (finding an animal welfare group to fall within the zone of interests of a statute regulating the treatment of animals).

228. 975 F.3d 120 (2d Cir. 2020).

229. *Id.* at 134–35; *see also* One Fair Wage, Inc. v. Darden Rests., Inc., No. 21-CV-02695, 2021 WL 4170788, at *12 (N.D. Cal. Sept. 14, 2021) ("No claimant can satisfy Title VII's zone-of-interests test when his or her 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" (quoting Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399 (1987)). Disclaimer: this Article's author was one of plaintiff's counsel in the *One Fair Wage, Inc. v. Darden Restaurants, Inc.* litigation. As of the printing of this Article, the *One Fair Wage* litigation remains ongoing, pending an appeal to the Ninth Circuit.

Comparing *East Bay Sanctuary*'s focus on statutory purpose with *Moya*'s focus on congressional intent highlights an ongoing lack of clarity in zone of interests jurisprudence. Indeed, Professor Jonathan R. Siegel clarified this point in a seminal article analyzing the zone of interests test: "[T]he courts seem unable to articulate the relationship between the test and congressional intent. The Supreme Court vacillates between holding that the test requires a showing that Congress *intended* to benefit a would-be plaintiff and holding that it requires no such showing."[230] This Article stakes out no position on whether congressional intent ought to be the polestar of the zone of interests test. Rather, it contends, solely from a descriptive standpoint, that evidence of congressional intent is unlikely to be required by this Supreme Court in assessing the zone of interests test for at least two reasons.

First, the Supreme Court opinion holding that, "for a plaintiff's interests to be arguably within the 'zone of interests' to be protected by a statute, there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff'" postdates the chief opinion indicating otherwise,[231] suggesting a shift away from reliance on congressional intent in the zone of interests test that this Court has yet to repudiate. In fact, the Supreme Court's most recent application of the zone of interests test, *Lexmark International, Inc. v. Static Control Components, Inc.*,[232] relied only on statutory purpose with no mention of congressional intent.[233]

Second, in *Bostock v. Clayton County*,[234] the Supreme Court noted that "expected applications" of Title VII by the Congress that enacted the statute are irrelevant if its text is unambiguous,[235] building on the Court's reflection from a generation earlier in *Oncale v. Sundowner Offshore Services, Inc.*[236] that Title VII can "reach[] 'beyond the principal evil' legislators may have intended or expected to address."[237] *Bostock* and *Oncale* appear to signal that, when it interprets Title VII, the Supreme Court might not be particularly interested in congressional intent, perhaps going as far as to reject its

230. Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 318 (2004).

231. Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co., 522 U.S. 479, 488 (1998) (quoting Clarke v. Secs. Indus. Ass'n, 479 U.S. 388, 399–400 (1987)). *Compare id.*, *with* Air Courier Conf. of Am. v. Am. Postal Workers Union, 498 U.S. 517, 524 (1991).

232. 572 U.S. 118 (2014).

233. *Id.* at 129–32; *see also* Brannon P. Denning & Sarah F. Bothma, *Zone-of-Interests Standing in Constitutional Cases After* Lexmark, 21 LEWIS & CLARK L. REV. 97, 118–19 (2017). Unfortunately, after *Lexmark*, the lower courts remain as confused as ever. *Compare* CSL Plasma Inc. v. U.S. Customs & Border Prot., 33 F.4th 584, 589 (D.C. Cir. 2022) (explicitly rejecting the relevance of congressional intent to the zone of interests test), *and* Texas v. Biden, 20 F.4th 928, 975 (5th Cir. 2021) (same), *rev'd and remanded on other grounds*, 142 S. Ct. 2528 (2022), *and* Cook County v. Wolf, 962 F.3d 208, 219 (7th Cir. 2020) (same), *with* Sierra Club v. Trump, 929 F.3d 670, 702 (9th Cir. 2019) ("*Lexmark* focuses on Congress's intent in creating statutory causes of action . . . ."). *Accord* Mantena v. Johnson, 809 F.3d 721, 733 (2d Cir. 2015); Kurapati v. U.S. Bureau of Citizenship & Immigr. Servs., 775 F.3d 1255, 1261 (11th Cir. 2014).

234. 140 S. Ct. 1731 (2020).

235. *Id.* at 1755.

236. 523 U.S. 75 (1998).

237. 140 S. Ct. at 1749 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998)).

relevance to the zone of interests test that *Thompson* incorporated into Title VII's private right of action. Therefore, it is likely that this Court will reject a search for congressional intent when assessing the zone of interests test, especially in the context of Title VII, and focus instead on the statute's purpose.

A devil's advocate might ask—would such an interpretation vitiate *Thompson*'s direction that statutory standing under Title VII is narrower than standing under Article III? After all, by bringing a Title VII enforcement action, wouldn't a plaintiff arguably serve the statute's purpose of protecting employees from their employers' unlawful actions by deterring future work discrimination, which might imply that anyone injured in the Article III sense would likewise secure statutory standing under Title VII? *Thompson* clarifies this line between statutory and constitutional standing by inventing a fictional plaintiff. The Court, in dicta, stated that a shareholder suing the company in which they had invested for firing a valuable employee for racially discriminatory reasons presumably has Article III standing, but not statutory standing under Title VII, since applying the zone of interests test in this case would "exclud[e] plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII."[238] Indeed, this shareholder's purpose qua shareholder—their raison d'être, as it were—is to maximize profits, not prevent discrimination. Maximizing profits is not even arguably the same aspiration as preventing unlawful discrimination. Therefore, this shareholder would have no statutory standing given that Title VII's purpose is to protect employees from their employers' unlawful actions.[239]

In contrast, consider WIT's multifaceted raison d'être: (1) to amplify the voices of women in the technology industry who have suffered discrimination, (2) to offer them direct services like mentoring programs, and (3) to leverage their experiences to lobby to prevent future discrimination. Its first purpose could arguably be one of the interests that Title VII sought to protect since, by facilitating women sharing their experiences with discrimination, WIT may reduce discrimination against women. To that end, two years after the #MeToo renaissance began, and women started to share more of their personal experiences of sexual assault and harassment, some scholars have presented empirical evidence that showed "decreased reports of unwanted sexual attention and sexual coercion, but increased reports of gender harassment," as well as a belief among women "that the increased scrutiny on the topic [of sexual assault and harassment] has decreased the most egregious sexual harassment behavior."[240] If it is true that women speaking publicly about their sexual assault and harassment experiences helps to prevent future sexual assaults and harassment, then WIT's first

238. Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 177–78 (2011).

239. *Id.* at 178.

240. Ksenia Keplinger, Stefanie K. Johnson, Jessica F. Kirk & Liza Y. Barnes, *Women at Work: Changes in Sexual Harassment Between September 2016 and September 2018*, 14 PLOS ONE 1, 8, 13 (2019).

purpose helps to achieve Title VII's purpose, or at least it *arguably* does so, which is all that the zone of interest test requires. WIT's third purpose—preventing discrimination through lobbying—is much more than arguably aligned with the purpose of Title VII; it is duplicative of it, certainly situating WIT within Title VII's zone of interests on that basis alone. As such, WIT's first and third purposes likely imbue it with statutory standing under Title VII, notwithstanding the absence of congressional intent to extend Title VII's private right of action that broadly.

However, WIT's second purpose—providing direct services like mentoring programs to women in the technology industry—is not materially different from the shareholder's purpose that the *Thompson* Court determined fell outside of Title VII's zone of interests. Both purposes are frustrated by discrimination: TechCo terminating more women likely means fewer women working in the technology industry who can serve as mentors, thus inhibiting WIT's purpose of providing mentoring programs; similarly, a company terminating a valuable employee for racially discriminatory reasons likely means a decrease in profits, thereby inhibiting the shareholder's purpose of maximizing profits. However, frustration of purpose is not the test. If it were, Title VII's private right of action would probably be coterminous with Article III. Rather, the test is whether the *plaintiff's* purpose is arguably related to the *statute's* purpose. Without further evidence of the effects of WIT's mentoring program on discrimination, its purpose of providing that program is not even arguably related to preventing unlawful discrimination. So, were this WIT's sole purpose, it would fall outside Title VII's zone of interests.

By focusing the inquiry in the zone of interests test on statutory purpose, as the Supreme Court has instructed, it appears that some entities can claim to be "aggrieved" by an employer's discrimination. Yet, as the next section shows, the lower courts have failed to faithfully apply *Thompson* in this way.

c. Application to Heterodox Title VII Plaintiffs

In applying *Thompson*'s standard in the context of Title VII's private right of action, the lower courts have come to inconsistent conclusions with respect to out-of-the-ordinary plaintiffs.[241] The district court in *Tolar v. Cummings*,[242] for example, aptly applied *Thompson*, holding that Title VII's "zone of interests test applie[s] broadly to reach beyond the confines of the employment relationship,"[243] at least in certain situations. In that case,

241. Some courts, on the other hand, have declined to weigh in yet. *See, e.g.*, Foust v. Safeway Stores, Inc., 556 F.2d 946, 947 (9th Cir. 1977) (reserving judgment as to "whether a corporation can be a 'person aggrieved' under Title VII" (quoting 42 U.S.C. § 2000e-5(f)(1))).

242. No. 13-CV-00132, 2014 WL 3974671 (N.D. Ala. Aug. 11, 2014).

243. *Id.* at *11–15 (quoting Lisa M. Durham, *The Pro-Employee Bent of the Roberts Court*, 79 TENN. L. REV. 803, 828 (2012)); *see also* Shotz v. City of Plantation, 344 F.3d 1161, 1181 n.31 (11th Cir. 2003) (collecting cases interpreting the right of "aggrieved persons" to maintain retaliation claims under the Americans with Disabilities Act of 1990 to apply to plaintiffs outside the employment context).

several nonemployee natural persons claimed to have been harmed by an employer in retaliation because their family member—one of the employer's employees—filed a charge against the employer.[244] The court examined the purpose of the relevant provision of Title VII and held that these plaintiffs' interests were more than arguably aligned with Title VII:

> Indeed, as it relates to the purpose of the anti-retaliation provision, the interests Plaintiffs seek to vindicate are not materially different from those of the *Thompson* plaintiff. The essence of [Title VII's antiretaliation provision] is that it safeguards the right of employees (and applicants for employment) to engage in protected activity by punishing employers who would take materially adverse action in retaliation. That translates here to protection of [the employee's] right as an employee of the [employer] to engage in protected activity by filing her EEOC charge and Title VII lawsuit against the [employer]. Plaintiffs have not engaged in any protected activity, so they are not who the anti-retaliation provision has primarily in mind. Nonetheless, *Thompson* makes clear that injuries to such a party may be within the zone of interests where a [sic] employer has purposefully targeted him because of his close association with an employee that has engaged in protected activity.[245]

It would nullify the purpose of Title VII's antiretaliation provision to let an employer intentionally harm someone related to an employee in retaliation for that employee filing an EEOC charge, and effectively get away with it, thereby deterring employees from filing future EEOC charges. Indeed, the employee's family members were the only plaintiffs who could have maintained a private enforcement action in *Tolar* because the employee herself was not injured.

Nevertheless, some courts, like the U.S. Court of Appeals for the Fifth Circuit in *Simmons v. UBS Financial Services, Inc.*[246] and the district court in *One Fair Wage, Inc. v. Darden Restaurants, Inc.*,[247] have applied an odd bright-line rule that only employees (and presumably applicants for employment and/or representatives) can maintain a private Title VII action.[248] These opinions contradict *Thompson* notwithstanding their repeated references to it. Had the *Thompson* Court intended to confine the scope of Title VII's private right of action only to employees, it could (and likely would) have said so. Such a test certainly would have been easier to apply. But it did not. On the contrary, it resolved that any party whose interests are those arguably sought to be protected by Title VII can bring suit. Applying that test to the plaintiffs in these two cases would have yielded very different results.

First, the *Simmons* plaintiff, just like the *Tolar* plaintiffs, was a nonemployee natural person who claimed to have been injured by an employer in retaliation because his family member—an employee of the

244. *See Tolar*, 2014 WL 3974671, at *5.
245. *Id.*
246. 972 F.3d 664 (5th Cir. 2020).
247. No. 21-CV-02695, 2021 WL 4170788 (N.D. Cal. Sept. 14, 2021).
248. *See Simmons*, 972 F.3d at 668; *One Fair Wage*, 2021 WL 4170788, at *17.

employer—participated in that employer's equal employment opportunity process.[249] Had the *Simmons* court applied *Tolar*'s logic, it would have allowed the plaintiff to maintain this action, given that his interests were entirely supportive of, and much more than arguably within the scope of, the interests that Title VII's antiretaliation provision sought to protect.[250] Second, the *One Fair Wage* plaintiff, just like WIT, was a nonprofit organization, one of the purposes of which was to help certain workers combat discrimination.[251] This type of interest much more than arguably promotes the interests that Title VII's antidiscrimination provision sought to protect[252]—the organization-plaintiff's interests are identical to those interests.

Additionally, a few courts have considered the issue of an employee bringing a private Title VII enforcement action against her employer for providing health insurance that allegedly denied coverage for the employee's dependent because of that dependent's protected classification. For example, in *Tovar v. Essentia Health*,[253] the U.S. Court of Appeals for the Eighth Circuit considered one such Title VII action after an employee's health insurance provider denied gender-affirming care to her dependent son allegedly on the basis of his gender identity and, ipso facto, sex.[254] The court rightly held that the employee-plaintiff lacked statutory standing to bring such an action because the employer's alleged discrimination targeted a nonemployee (i.e., the employee's son), and Title VII's section 703(a)–(d) requires an unlawful employment action against an employee, applicant for employment, or a legal representative of one of those to bring an action.[255] Accordingly, this case is distinguishable from our hypothetical case, *WIT v. TechCo*, since TechCo allegedly discriminated against its employees, after which a "person" claiming to be "aggrieved" by that action brought suit to seek redress for the harm TechCo caused.

B. Congressional Intent

Title VII's text, standing on its own or as interpreted by *Thompson*, supports a broader private right of action than has been previously understood. As such, this increasingly textualist judiciary should have no

249. *See Simmons*, 972 F.3d at 665.
250. *See* Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 178 (2011).
251. *One Fair Wage*, 2021 WL 4170788, at *1.
252. *See Thompson*, 562 U.S. at 178.
253. 857 F.3d 771 (8th Cir. 2017).
254. *See id.* at 777; *see also* Scott v. St. Louis Univ. Hosp., No. 21-CV-01270, 2022 WL 1211092, at *3 (E.D. Mo. Apr. 25, 2022).
255. *See Tovar*, 857 F.3d at 775–76. Even if section 703(m) provides a private right of action independent of those under section 703(a)–(d), *see supra* note 152, the *Tovar* plaintiff's son likely would not have had statutory standing to bring a private enforcement action under section 703(m) because, although his gender identity (read: sex) was allegedly a motivating factor in the employer's agent's denial of his coverage, *his* interests in avoiding discrimination are not even arguably the interests that Title VII sought to protect—that is, protecting *employees* from their employer's unlawful actions, *Thompson*, 562 U.S. at 178—so he had not been "aggrieved" under section 706(f)(1).

need to reference statutory structure or legislative history. However, for those who are either unpersuaded or find value in such tools, at least six arguments can be marshaled to shine light on congressional intent regarding the scope of Title VII's private right of action, given that the meager legislative history of Title VII does not clarify its scope[256]—five arguments favoring a broad scope that allows private plaintiffs to vindicate the public interest in private actions, and one argument favoring neither a broad nor a narrow scope. Thus, this section sketches an ethos for a modern Title VII private right of action that can fulfill congressional intent rather than stymie or circumvent it.

In that spirit, consider what it would mean for Title VII to facilitate private plaintiffs seeking to vindicate the public interest by protecting employees from their employers' unlawful discrimination. The terminated TechCo employees, for instance, have been denied access to collective redress for discrimination by virtue of TechCo forcing them to sign individual arbitration agreements. Other putative plaintiffs would fare even worse since at least some of those women—those that were unable to immediately mitigate their injury by finding equivalent employment—have an incentive to bring an individual arbitration (e.g., to seek reinstatement or damages). Discrimination victims suffering lesser injuries than termination, just like the consumers in *American Express* each suffering relatively minor injuries,[257] might have no incentive to pursue individual arbitration at all. And yet, the public's interest is in *fully* equal employment opportunity, meaning zero tolerance for unlawful work discrimination. If Title VII's private right of action is to further that public interest, as this section contends was Congress's intent, some party ought to be able to bring such an action for the purpose of curtailing work discrimination when the purported perpetrator of that discrimination has shut the employees out of the courthouse (and any other forum allowing collective relief) by compelling them into individual arbitration.

Our fictional plaintiff, WIT, is such a party. In the remainder of this section, consider the remedy WIT would secure if it had statutory standing under Title VII and succeeds in its enforcement action against TechCo—reinstatement of the women unlawfully terminated because of their sex. Such a remedy surely would further the public interest in protecting employees from their employers' unlawful discrimination—especially since a precondition to statutory standing is at least an arguable alignment of the plaintiff's interests with those that Title VII sought to protect[258]—notwithstanding that the employees themselves might be unable to further that interest. Thus, not only does the text of Title VII support statutory standing for certain entities, but affording statutory standing to those entities furthers congressional intent, too.

256. *See* CONG. RSCH. SERV., HD6305, EQUAL EMPLOYMENT OPPORTUNITY: LEGISLATIVE HISTORY AND ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1965).

257. *See supra* note 88.

258. *Thompson*, 562 U.S. at 178.

1. Structure

First, consider the structure of Title VII itself. While other titles in the Civil Rights Act of 1964 clearly seek to vindicate the public interest—for example, Title II's prohibition on discrimination in places of *public* accommodation, Title IV's prohibition on discrimination in *public* schools, and Title VI's prohibition on discrimination in the use of *public* funds[259]—Title VII's structure shows that it is also a public interest statute, just as judges and scholars routinely describe it to be,[260] notwithstanding the fact that Title VII regulates, inter alia, *private* workplaces. In fact, the Supreme Court has described employment discrimination plaintiffs as "private attorney[s] general" serving public policy "of the highest priority."[261]

To that end, ever since Title VII's inception in the mid-1960s, Congress has authorized injunctive relief as a remedy for successful Title VII plaintiffs, which necessarily requires proof that imposing the injunction would be in the public interest.[262] Moreover, the Supreme Court has commented that, "by authorizing the EEOC to bring a civil action . . . against private employers reasonably suspected of violating Title VII," pursuant to the Equal Employment Opportunity Act of 1972,[263] "Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights."[264] Furthermore, Title VII's fee-shifting provision supports the inference that the law's deputizing of private parties to help enforce its provisions serves the public interest,[265] as does the expenditure of public funds on its enforcement via the EEOC and the DOJ's Civil Rights Division.

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259. *See generally* CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW (2020).

260. Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1971) ("The vindication of public interest expressed by the civil rights act constitutes an important facet of private litigation under Title VII."); Richard R. Carlson, *Citizen Employees*, 70 LA. L. REV. 237, 269 (2009); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 399 (1999); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1664–65 (2005); Stephen J. Ware, *Is Adjudication a Public Good?: "Overcrowded Courts" and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 913 (2013).

261. Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 759 (1989) (alteration in original) (quoting Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968)).

262. EEOC v. KarenKim, Inc., 698 F.3d 92, 100 (2d Cir. 2012); White v. Carlucci, 862 F.2d 1209, 1212 (5th Cir. 1989). Courts do the same for injunctions to prevent or stop violations of the Americans with Disabilities Act of 1990. *See* Antoninetti v. Chipotle Mexican Grill, Inc., 643 F.3d 1165, 1174 (9th Cir. 2010); A Helping Hand, LLC v. Baltimore County, 355 F. App'x 773, 775–76 (4th Cir. 2009).

263. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended in scattered sections of 5 and 42 U.S.C.).

264. Gen. Tel. Co. of the Nw. v. EEOC, 446 U.S. 318, 325–26 (1980).

265. Melissa F. Wasserman, *Deference Asymmetries: Distortions in the Evolution of Regulatory Law*, 93 TEX. L. REV. 625, 677 n.161 (2015) (citing Barry R. Furrow, *Governing Science: Public Risks and Private Remedies*, 131 U. PA. L. REV. 1403, 1422 n.83 (1983)).

Second, other titles in the Civil Rights Act of 1964 similarly seek to vindicate the public interest (e.g., Title II,[266] Title IV,[267] and Title VI[268]), leading some scholars like Professor Robert L. Rabin to describe the late 1960s and the early 1970s as the "Public Interest Era" based on the statutes constitutive of it.[269] That strongly suggests that Title VII, bundled together with these other titles, was likewise intended to serve the public interest.

2. Legislative History

First, Congress could have restricted Title VII's private right of action in section 706(f) to individuals or employees, as it did in section 703(a)–(d) and dozens of other times throughout Title VII.[270] But it did not. Instead, it chose a different term of art—"person"—which it defined quite expansively. Its choice must be given due weight, implying that Title VII's private right of action ought to be read broadly.

Second, Congress amended Title VII several times since it first enacted the "person claiming to be aggrieved" language in the statute's private right of action in 1964,[271] but it never amended that language to apply only to "individuals" or "employees," even when it used such limiting language elsewhere. For instance, with the Civil Rights Act of 1991, Congress amended Title VII by authorizing the award of punitive damages to successful Title VII plaintiffs if the employer had "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an *aggrieved individual*."[272] To be sure, Congress not only knew how to limit the scope of certain provisions of Title VII to individuals or employees, but it actually did so here while leaving the private right of action untouched and just as broad as its text implies.

Third, congressional inaction could be read as adopting the status quo. The norm for more than half a century has remained that Title VII's private right of action is narrow—applicable only to employees, job applicants, and their

266. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401–02 (1968).

267. *See* Randolph D. Moss, Note, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1824 n.71 (1986) (citing testimony of Senators Hubert H. Humphrey, Jr. and Paul Howard Douglas).

268. N.Y.C. Env't Just. All. v. Giuliani, 50 F. Supp. 2d 250, 252 (S.D.N.Y. 1999), *aff'd on other grounds*, 214 F.3d 65 (2d Cir. 2000).

269. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1278–80 (1986); *see also* Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 287–88 (noting that the Civil Rights Act of 1964 is "at the public interest end of the continuum" opposed to the private deal end of the continuum); Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308, 314 n.28 (1979).

270. *See supra* note 155 and accompanying text.

271. Since its enactment in 1964, Title VII has always had the same operative language in its private right of action (i.e., "person claiming to be aggrieved"). Before 1972, however, that language was found at 42 U.S.C. § 2000e-5(e). Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 706(e), 78 Stat. 241, 260 (1964). In 1972, Congress relocated that language to its current location at 42 U.S.C. § 2000e-5(f)(1). Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 104.

272. 42 U.S.C. § 1981a(b)(1) (emphasis added).

legal representatives. Perhaps congressional inaction in the face of this norm is evidence of congressional intent favoring a traditionally understood and limited private right of action. However, judicial guidance on congressional inaction is murky. On one hand, the Supreme Court has said that "Congress' acquiescence to a settled judicial interpretation can suggest adoption of that interpretation,"[273] which would imply a narrow reading of Title VII's private right of action. On the other hand, the Supreme Court has also stated that "'[c]ongressional inaction lacks persuasive significance' in most circumstances,"[274] discounting the weight of congressional silence. Hence, this argument likely does not materially move the ball one way or the other.

Fourth, the history of statutes with language materially identical to that of Title VII's private right of action supports a broad congressional authorization. To that end, the phrase "person aggrieved" came to prominence during the New Deal era through statutes like the Communications Act of 1934,[275] the Public Utility Holding Company Act of 1935,[276] the Bituminous Coal Act of 1937,[277] and the Natural Gas Act,[278] as well as that era's watershed labor and employment laws enacted by the Fair Labor Standards Act of 1938[279] (FLSA) and the National Labor Relations Act of 1935 (NLRA).[280] Accordingly, it is no surprise that the landmark labor and employment statutes enacted in the civil rights era a generation later, such as Title VII[281] and the Age Discrimination in Employment Act of 1967[282] (ADEA), borrowed the phrase.

Courts may consult the legislative history of these earlier New Deal statutes to help discern the meaning of Title VII's similar language not only because the wording is identical, but also because the statutes are somewhat related.[283] Indeed, Title VII and the ADEA are of the same genre as the FLSA and the NLRA, and the FLSA and the NLRA are of the same era and congressional mindset as New Deal statutes like the Communications Act of 1934 and the Bituminous Coal Act of 1937. To that end, courts have

273. AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1351 (2021).

274. Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1015 (2017) (alteration in original) (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990)).

275. Ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of the U.S.C.); *see* 47 U.S.C. § 402(b)(6).

276. Ch. 687, 49 Stat. 803 (codified as amended in scattered sections of 16 U.S.C.); *see* 15 U.S.C. § 79(a) (2005).

277. Ch. 127, 50 Stat. 72 (repealed 1966).

278. Ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. §§ 717–717w); *see* 15 U.S.C. § 717r(a).

279. Ch. 676, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.); *see* 29 U.S.C. § 210(a).

280. *See* 29 U.S.C. § 160(f).

281. *See* 42 U.S.C. § 2000e-5(f)(1).

282. Pub. L. No. 92-02, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634); *see* 29 U.S.C. § 626(c)(1).

283. *See* Boumediene v. Bush, 553 U.S. 723, 738 (2008) (approving of the lower court interpreting a statute by reference to the legislative history of a related statute); Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 273 (1943) (interpreting a statute by reference to the legislative history of "related statutes"); *see also* SCALIA & GARNER, *supra* note 157, at 252.

interpreted these latter two statutes as containing broad private rights of action that exist to further the public interest. For example, in *Scripps-Howard Radio, Inc. v. FCC*,[284] the Supreme Court found that "persons aggrieved" under the Communications Act of 1934 "have standing only as representatives of the public interest."[285] The Court reiterated that stance in *FCC v. Sanders Bros. Radio Station*,[286] noting that Congress's purpose in enacting the private right of action in the Communications Act of 1934 was "to protect the public."[287] Similarly, the Second Circuit found a plaintiff to have "standing, under the Bituminous Coal Act of 1937, to vindicate the public interest."[288]

All told, the structure of Title VII and the Civil Rights Act of 1964 more broadly, as well as the legislative history of Title VII and related statutes, favor a congressional intent to vindicate the public interest. Plaintiffs aligned with the purpose of Title VII, like WIT, do so even when they fall outside the traditional categories of employees and job applicants.

C. Constitutional Standing

This part articulates a novel basis for statutory standing under Title VII, not constitutional standing under Article III. However, entities that satisfy statutory standing under this theory are also likely to have standing under Article III for the reasons explained in this section.

Although "organizations can assert the standing of their members,"[289] this Article's theory of statutory standing presupposes that there is no representation of workers' or job applicants' interests by the plaintiff. Therefore, this sort of associational standing is inapposite; a plaintiff-entity bringing a private Title VII enforcement action under this Article's theory would need to have constitutional standing independent of its members' standing. To that end, "organizations are entitled to sue on their own behalf for injuries they have sustained."[290] Under a doctrine established by the Supreme Court in *Havens Realty Corp. v. Coleman*,[291] this "organizational standing" exists when the defendant has allegedly "frustrated" or "impaired" the plaintiff-organization's ability to conduct "the organization's activities," resulting in a "consequent drain on the organization's resources."[292]

Consider this standard as applied to WIT. TechCo's reduction in force has frustrated and impaired not only WIT's ability to facilitate testimonials and provide direct services because fewer women now work in the technology

284. 316 U.S. 4 (1942).
285. *Id.* at 14; *see also id.* at 20 (Douglas, J., dissenting) ("Congress entrusted the vindication of the public interest to private litigants.").
286. 309 U.S. 470 (1940).
287. *Id.* at 475.
288. Assoc. Indus. of N.Y. State v. Ickes, 134 F.2d 694, 708 (2d Cir. 1943), *vacated on other grounds*, 320 U.S. 707 (1943).
289. Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009).
290. Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 n.19 (1982).
291. 455 U.S. 363 (1982).
292. *Id.*

industry, but also WIT's ability to lobby because fewer women can share their experiences with industry groups and legislatures now that their employment has ended. Also, WIT's resources were drained as it tried to make up for the harm that it suffered because of TechCo's reduction in force. Therefore, under *Havens Realty*, WIT should have Article III standing. That is not to say that WIT's injury necessarily is significant, but "plaintiffs who suffer concrete, redressable harms that amount to pennies are still entitled to relief."[293]

D. Application Beyond Title VII

If Title VII's private right of action is as broad as this Article contends, other employment antidiscrimination statutes' private rights of action may be read just as broadly, given that they either substantially mirror Title VII's enforcement scheme or explicitly incorporate its private right of action. The ADEA, as an example, allows private enforcement actions by "any person aggrieved,"[294] which is defined as one or more "individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons."[295] Interpreting that language just as the Supreme Court interpreted Title VII's private right of action, lower courts have applied *Thompson* with equal force to ADEA claims.[296] Hence, although the Supreme Court has not always interpreted the ADEA and Title VII identically,[297] the language here is materially identical such that the ADEA's private right of action is likely just as broad as Title VII's. Moreover, the ADEA, like Title VII, permits disparate impact claims,[298] though other differences between the statutes make such claims more difficult to maintain under the ADEA than under Title VII.[299]

Yet, congressional intent concerning the ADEA's private right of action is less than clear. Although the ADEA's "enforcement provisions . . . essentially follow those of the [FLSA],"[300] which were enacted alongside other statutes from the New Deal era whose private rights of action Congress intended to serve the public interest,[301] some of the ADEA's legislative history envisions only "individual[s]" as being able to bring private

293. E. Bay Sanctuary Covenant v. Biden, 993 F. 3d 640, 664 (9th Cir. 2021); *see also* Wallace v. ConAgra Foods, Inc., 747 F.3d 1025, 1029 (8th Cir. 2014).

294. 29 U.S.C. § 626(c)(1).

295. *Id.* § 630(a).

296. *See* Morgan v. Napolitano, 988 F. Supp. 2d 1162, 1178 (E.D. Cal. 2013); Dembin v. LVI Servs., Inc., 822 F. Supp. 2d 436, 438 (S.D.N.Y. 2011).

297. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 173 (2009).

298. *See* Smith v. City of Jackson, 544 U.S. 228, 232 (2005).

299. *See generally* Debra Burke, *ADEA Disparate Impact Discrimination: A Pyrrhic Victory?*, 9 U.C. DAVIS BUS. L.J. 47 (2008); Carla J. Rozycki & Emma J. Sullivan, *Employees Bringing Disparate-Impact Claims Under the ADEA Continue to Face an Uphill Battle Despite the Supreme Court's Decisions in* Smith v. City of Jackson *and* Meacham v. Knolls Atomic Power Laboratory, 26 ABA J. LAB. & EMP. L. 1 (2010).

300. S. REP. NO. 90-723, at 5 (1967); H. REP. NO. 90-805, at 5 (1967).

301. *See supra* notes 285–88 and accompanying text.

enforcement actions.[302] As such, from a textualist point of view, at least certain entities ought to have statutory standing under the ADEA for the same reasons that certain entities probably have statutory standing under Title VII, but the legislative history of the ADEA arguably undercuts that result.

In contrast, Title I of the Americans with Disabilities Act of 1990[303] (ADA) explicitly incorporates Title VII's private right of action and definition of "person," rendering its probable breadth coterminous with that of Title VII.[304] Lest there be any doubt, the original versions of the bills from the U.S. Senate and U.S. House of Representatives that enacted the ADA allowed private enforcement actions by "individuals" alleging discrimination based on disability, but amendments made after the conference committee changed that wording to "persons" alleging discrimination based on disability to better track Title VII's private right of action.[305] Indeed, legislative history evidencing a congressional belief that "individual[s]" would be the only private parties enforcing the ADA predates the conference committee's fixes,[306] although one committee report cites the ADA's use of the word "person" in the private right of action as allowing "organizations representing individuals with disabilities [to] have standing to sue under the ADA,"[307] implying, as per the negative implication canon (i.e., expressio unius est exclusio alterius),[308] that entities cannot have statutory standing under the ADA unless they represent individuals with a disability. Finally, lower courts have applied *Thompson*'s holding with equal fervor to the ADA's private right of action,[309] and the ADA countenances disparate impact claims at least technically,[310] although scholars like Professors Jasmine Harris, Michael Ashley Stein, and Michael E. Waterstone have aptly criticized judicial curtailment of such claims.[311] Thus, both the text and legislative history of the ADA generally point toward a private right of action that mirrors that of Title VII, although an argument can be marshaled against

302. S. REP. NO. 90-723, at 5, 10; H. REP. NO. 90-805, at 6, 10.

303. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.); *see* 42 U.S.C. §§ 12101–12213.

304. 42 U.S.C. § 12111(7) (incorporating language from, inter alia, 42 U.S.C. 2000e(a)); *id.* § 12117(a) (incorporating language from, inter alia, 42 U.S.C. § 2000e-6).

305. H.R. REP. NO. 101-596, at 66 (1990) (Conf. Rep.); H.R. REP. NO. 101-558, at 62 (1990) (Conf. Rep.); *see also* H.R. REP. NO. 101-485, pt. 3, at 48–49 (1990) (using the same "persons" language even before the conference committee amendments).

306. S. REP. NO. 101-116, at 43 (1989); H.R. REP. NO. 101-485, pt. 1, at 26; *id.*, pt. 2, at 82.

307. H.R. REP. NO. 101-485, pt. 3, at 49.

308. United States v. Vonn, 535 U.S. 55, 56 (2002) ("[E]xpressing one item of [an] . . . associated group or series excludes another left unmentioned . . . ."); *see also* SCALIA & GARNER, *supra* note 157, at 10.

309. *See, e.g.*, Morgan v. Napolitano, 988 F. Supp. 2d 1162, 1178 (E.D. Cal. 2013); Hovsepyan v. Blaya, 770 F. Supp. 2d 259, 269 (D.D.C. 2011).

310. *See generally* Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003).

311. *See* Jasmine Harris, *Disability Employment Class Actions*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES, *supra* note 8, at 75, 78–82; Michael Ashley Stein & Michael E. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861, 879–93 (2006).

statutory standing for entities under the ADA, unless they represent individuals with a disability.

Finally, though arguments might be made concerning the breadth of Title II of the Genetic Information Nondiscrimination Act of 2008's[312] (GINA) private right of action, which allows "any person" alleging a violation of GINA to bring an action to enforce the statute,[313] disparate impact claims are not cognizable under GINA.[314] Thus, such debates would be purely academic and useless when it comes to actually maintaining statutory standing for entities under GINA.

IV. IMPLICATIONS

This section considers how the foregoing analysis affects (1) the justice gap, (2) the Federal Rules of Civil Procedure (the "Federal Rules"), and (3) the litigation floodgates. It begins by recognizing the incredible potential for statutory standing for certain entities under Title VII to help close the justice gap for workers and how that potential is limited by the potential remedies available for disparate impact liability. Next, it examines the interplay between such statutory standing and the Federal Rules governing class actions, interventions, and required parties. Finally, it considers the magnitude of the practical implications of this analysis as it relates to the breadth of entities able to bring private enforcement actions under Title VII.

A. The Justice Gap

Public ordering ought to facilitate just, speedy, and inexpensive redress from broadscale work discrimination. Yet, the epidemic of compelled individual arbitration has sacrificed that priority at the altar of liberty of contract, relegating the best (albeit imperfect) tool for achieving the goal of fully equal employment opportunity—the employment discrimination class action—to the annals of history. That shift undercuts the goals of Title VII and exacerbates a justice gap for workers suffering from discrimination.

To that end, and as the title of this Article suggests, statutory standing for certain organizations under Title VII and similar employment antidiscrimination statutes might well approximate an employment discrimination class action and help close the justice gap. For example, if WIT were successful in its disparate impact claim against TechCo, it could secure equitable relief like reinstatement for the women that TechCo terminated to redress WIT's frustrated purpose and consequent resource

312. Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 26, 29, and 42 U.S.C.); *see* 42 U.S.C. §§ 2000ff to 2000ff-11.

313. 42 U.S.C. § 2000ff-6. GINA neither defines the term "person" nor incorporates Title VII's definition of that term of art, but the Dictionary Act instructs that, unless the context indicates otherwise, "person . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" throughout the U.S. Code, 1 U.S.C. § 1, suggesting that the scope of GINA's private right of action may be as broad as that of Title VII.

314. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 208, 122 Stat. 881, 917–18 (2008) (codified as amended at 42 U.S.C. § 2000ff-7).

drain,[315] a remedy that those same women would have been able to secure for themselves via an employment discrimination class action, had TechCo not wrested that procedural mechanism from them.[316] And WIT could accomplish all this without having to overcome the hurdles of class certification. Consequently, statutory standing for certain entities under Title VII and similar employment antidiscrimination statutes might be described as an employment discrimination class action by any other name.

However, this mechanism would not be able to close the justice gap entirely. For one thing, courts have erected a myriad of atextual hurdles that have rendered employment discrimination claims increasingly difficult for any plaintiff to be able to prove.[317] Furthermore, even if WIT could surmount those hurdles, its remedies would necessarily be limited. TechCo's former female employees—had they been charging parties and plaintiffs, and had TechCo not compelled them into individual arbitration—would have been able to pursue compensatory and punitive damages, as well as equitable relief, but WIT would be entitled only to equitable relief.[318] Perhaps such equitable relief could include an order that the women be paid back pay or front pay, but it might be difficult to show that such equitable relief would "redress" WIT's injury, as WIT would be required to demonstrate. This should be the same situation for any private entity-plaintiff under Title VII because it seems impossible for an employer to target such an entity with discrimination (which is a predicate for disparate treatment liability and the resulting access to damages remedies). Rather, entity-plaintiffs like WIT would need to articulate a disparate impact theory of Title VII liability to have statutory standing, and doing so limits those entities to equitable relief.

As such, the most salient victims of work discrimination—the workers themselves—would likely be denied restitution. They might be able to enjoy the fruits of injunctive relief, but they are unlikely to secure any monetary remedy like back pay, front pay, or damages for emotional distress. Hence, an employment discrimination class action by any other name may stop the discrimination from continuing, and the threat of such an action might deter similar discriminatory policies and practices going forward, but this mechanism is unlikely to be able to make workers whole. Moreover, because this strategy sits nonworkers in the driver's seat, it may secure a remedy that workers disfavor or even dislike, which undercuts its potential efficacy as a tool for closing the justice gap for workers.

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315. *See* Miller v. Bolger, 802 F.2d 660, 663 (3d Cir. 1986) ("Title VII remedies have generally been viewed as equitable make-whole relief to redress discrimination."); Johnson v. Mao, 174 F. Supp. 3d 500, 523 (D.D.C. 2016) (citing Title VII's section 706(g)(1) as "allowing the Court to award 'equitable relief as the court deems appropriate' to redress an 'unlawful employment practice' under Title VII" (quoting 42 U.S.C. § 2000e-5(g)(1)).

316. *See* 42 U.S.C. § 2000e-5(g) (authorizing equitable relief to all successful Title VII plaintiffs).

317. *See generally* SPERINO & THOMAS, *supra* note 14.

318. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 533–34 (1999) (citing 42 U.S.C. § 1981a(a)(1)); *see also* 42 U.S.C. § 2000e-5(g) (authorizing equitable relief to all successful Title VII plaintiffs).

B. The Federal Rules

The district court in *One Fair Wage* considered statutory standing for entities under Title VII to be off the table, explaining that it "would circumvent class certification pursuant to Rule 23" because the entity was not representing anyone other than itself, let alone a class.[319] As a result, the court averred, the plaintiff-entity sidesteps the requirements of Rule 23 and "ignore[s] the protection afforded to the class via Rule 23's requirements of notice, objection rights, and judicial scrutiny of any class settlement," which the court thought "particularly pertinent" since "there may well be employees who object to the changes sought by [the plaintiff-entity]."[320]

This analysis misinterprets Rule 23 and ignores other relevant provisions of the Federal Rules. First, when there are no absent parties to represent, Rule 23's safeguards of numerosity, commonality, typicality, and adequate representation are irrelevant.[321] Second, since the plaintiff in *One Fair Wage* filed only disparate impact claims,[322] it could only pursue equitable relief like an injunction.[323] Yet, Rule 23 only requires notice to classes seeking damages, not those seeking only injunctive relief,[324] so the court's reference to "Rule 23's requirement[] of notice" is inapposite.[325] Third, if employees, as putative class members, wished to object to a potential settlement, they could intervene and force a global settlement.

To that end, and contrary to Title VII's provision for employee intervention as of right in public enforcement actions and permissive intervention by the EEOC or the DOJ in private enforcement actions "of general public importance,"[326] Title VII is silent on employee intervention in private enforcement actions filed by entities—but that does not foreclose intervention. On one hand, Federal Rule of Civil Procedure 24(a)(2) ought not to permit intervention as of right by employees in such actions because, to the extent those employees have "an interest relating to the . . . transaction that is the subject of the action," that interest should be "adequately represent[ed]" by an "existing part[y]"[327] (i.e., the plaintiff-entity whose interest, by virtue of the entity having statutory standing, arguably aligns with

319. One Fair Wage v. Darden Rests., Inc., No. 21-CV-02695, 2021 WL 4170788, at *17 (N.D. Cal. Sept. 14, 2021).

320. *Id.*

321. *Cf.* Frank v. Cap. Cities Commc'ns, Inc., No. 80 CIV. 2188, 1983 WL 643, at *2 n.1 (S.D.N.Y. Oct. 11, 1983) (recognizing that Rule 23's "requirements of numerosity, commonality, typicality, and adequacy of representation" were "designed to protect the due process rights of absent class members").

322. *See* Complaint ¶¶ 79–99, at 29–32, One Fair Wage, Inc. v. Darden Rests. Inc., No. 21-CV-02695, 2021 WL 4170788 (N.D. Cal. Sept. 14, 2021), 2021 WL 1425203.

323. *See supra* note 315 and accompanying text.

324. *See* FED. R. CIV. P. 23(c)(2)(A) (for Rule 23(b)(2) classes, "the court *may* direct appropriate notice to the class" (emphasis added)); *id.* 23(c)(2)(B) (for Rule 23(b)(3) classes, "the court *must* direct to class members" (emphasis added)).

325. *See One Fair Wage*, 2021 WL 4170788, at *17.

326. 42 U.S.C. § 2000e-5(f)(1).

327. *See* FED. R. CIV. P. 24(a)(2).

Title VII's purpose[328]). On the other hand, Federal Rule of Civil Procedure 24(b)(2) should facilitate permissive employee intervention as the employees have "a claim . . . that shares with the main action a common question of law or fact" (e.g., if TechCo's reduction in force adversely impacted women because of their sex).[329] However, some courts do compel employee-intervenors into arbitration in suits brought by parties seeking to vindicate other interests, despite the employee-intervenors having signed individual arbitration agreements, although there is a split in authority on that issue.[330]

In fact, this analysis suggests that in a Title VII private enforcement action brought by an entity, the employees who allege to have been discriminated against might be more than permissive intervenors—they may be required parties under Federal Rule of Civil Procedure 19 ("Rule 19"). Pursuant to Rule 19, a party is required if they claim an "interest relating to the subject of the action" and, inter alia, the party's absence would likely impair the party's ability to protect that interest.[331] Yet, satisfying those two elements is more difficult than it might seem. Foremost, what are the employees' interests? In one sense, the employees are interested in the relief resulting from the action. For instance, in *WIT v. TechCo*, perhaps the women would prefer reinstatement rights with back pay, whereas WIT may not be concerned with back pay so long as the women can return to their jobs and begin repopulating WIT's testimonial, mentoring, and lobbying events. Using that conceptualization, these employees would be required parties, and their absence would likely impair their ability to protect their interest.

However, per Rule 19, the absent party's interest must relate to the "subject of the action," not the relief sought.[332] The subject matter of the *WIT v. TechCo* action could arguably be defined as TechCo's allegedly discriminatory reduction in force and not the relief being pursued in litigation. Using that definition, what interest do the employees have in that personnel action other than the very same interest shared by WIT? In other words, if we conceptualize the employees' "interest relating to the subject matter of the action" as an interest in the alleged discrimination, and any injunctive relief secured by WIT necessarily remedies that discrimination—albeit not in the way that those employees might prefer—it necessarily follows that the employees' absence would not impair their ability to protect that interest. Thus, if the "interest" that Rule 19 concerns itself with is remedying the alleged discrimination, the affected employees should not be required parties, but if the "interest" is remedying the alleged discrimination

328. *See supra* note 218 and accompanying text.

329. *See* FED. R. CIV. P. 24(b)(2).

330. *See* EEOC v. Woodmen of World Life Ins. Soc'y, 479 F.3d 561, 568 n.2 (8th Cir. 2007) (noting the split in authority); *see also* Bornstein, *supra* note 6, at 879–80; Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 219–22 (2014).

331. FED. R. CIV. P. 19(a)(1)(B).

332. *Id.*

in the manner preferred by the absent party, the employees should be required.

But resolution of this quandary is unnecessary. Even if employees are required parties or permissive intervenors, there is no significant risk of that designation diluting the efficacy of the employment discrimination class action by any other name. To that end, it is true that in some situations, Rule 19 can be used as a sword by a defendant who files a motion to dismiss under Federal Rule of Civil Procedure 12(b)(7) premised on the plaintiff's failure to join a required party whose joinder is infeasible, which triggers a battle over the Rule 19(b) factors to determine whether the court will proceed without the required party or dismiss the action.[333] Here, however, it would be feasible to join the employees. Their joinder would not deprive the federal court of federal question jurisdiction, even if it might destroy complete diversity. Furthermore, it is not infeasible to join employees under Federal Rules of Civil Procedure 19 or 24 simply because they agreed to individually arbitrate their employment-related disputes; rather, lower courts facing a similar issue in the context of employees who signed individual arbitration agreements and sought to intervene in a public Title VII enforcement action brought by the EEOC merely bifurcated the two actions—compelling the joined employees into arbitration and proceeding with the original action without them.[334]

C. The Floodgates

One final consideration is the apocryphal opening of the floodgates: would this Article's analysis herald an unsustainable or disfavored increase in private Title VII enforcement actions? After all, opening the courthouse doors wider leads to increased case filings, more work for judges and courthouse personnel, and a possible tax hike for the taxpayers funding the civil litigation system. One argument against this Article's analysis is that such ramifications stress an already overstressed system. Perhaps, to minimize these public burdens, the resolution of allegations of class-wide work discrimination ought to be left to private ordering (e.g., workers collectively bargaining for the elimination of problematic policies or practices) or government actors like the EEOC, which can prioritize enforcement actions against the worst offenders and help to deter class-wide employment discrimination without the proliferation of private actions, all while remaining responsive (relative to the private bar, at least) to the public's interest in equal employment opportunity.

Foremost, such public policy decisions are best left to legislatures and not courts. Furthermore, anything approximating the world in which employment discrimination class actions were relatively common from the

333. 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1607 (3d ed. 2002).

334. EEOC v. Hooters of Am., Inc., No. 06-CV-6138, 2007 WL 64163, at *5 (W.D.N.Y. Jan. 9, 2007); EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 273 F. Supp. 2d 260, 264–65 (E.D.N.Y. 2003).

mid-1960s to the early 1980s would further fully equal employment opportunity at the expense of those employers who have, for far too long, escaped scrutiny by hiding behind their individual arbitration agreements, so such an increase would be good, all things considered. Yet, there is no reason to suspect that an increase in litigation would actually occur, even though it should. To that end, entities like WIT would need (1) a purpose arguably in furtherance of Title VII's purpose of protecting workers from their employers' unlawful discrimination, (2) a specific set of facts wherein a particular employer has frustrated that purpose and caused resource drain on the organization, and (3) allegations of disparate impact factually sufficient to satisfy Federal Rule of Civil Procedure 8(a)(2) in light of *Twombly* and *Iqbal*. Clearing those successive hurdles is not technically impossible, but it would be difficult, suggesting that the floodgates would hold any deluge of litigation at bay.

For instance, consider organizations like churches, temples, mosques, and other houses of worship. On one hand, a church should have constitutional standing if one of its purposes were frustrated by an employer's discrimination (e.g., their parishioners being fired because of their religion may be strapped for cash and need to work on Sunday instead of attending services). On the other hand, few (if any) churches or other houses of worships' purposes are even arguably aligned with protecting employees against employers' unlawful discrimination. Facilitating prayer, worship, religious rituals, community service, evangelism—of course. But protecting employees against their employers' discriminatory actions? That is almost certainly a bridge too far.

Moreover, Article III serves as an added safety net. For instance, a legal services organization that represents workers in private Title VII enforcement actions—like Lambda Legal vis-à-vis workers alleging discrimination based on sexual orientation or gender identity[335] or Alliance Defending Freedom vis-à-vis workers alleging discrimination based on religion[336]—ought to have statutory standing under Title VII because its purpose includes protecting employees from their employers' unlawful discrimination. However, these organizations' ability to offer legal services typically would not be frustrated by an employer's unlawful discrimination against its own employees, as constitutional standing under *Havens Realty* requires;[337] if anything, employment discrimination tends to facilitate these entities' ability to achieve their purpose of offering legal services. In a similar vein, consider what would have happened if the women terminated by TechCo had bounced back immediately and found replacement employment in the technology industry, so WIT's testimonial, direct

335. *See Employment and Rights in the Workplace*, LAMBDA LEGAL, https://www.lambdalegal.org/issues/employment-and-rights-in-the-workplace [https://perma.cc/Y5C8-YCRV] (last visited Feb. 6, 2023).

336. *See Adams v. Trustees of the University of North Carolina-Wilmington*, ALL. DEFENDING FREEDOM, https://adflegal.org/case/adams-v-trustees-university-north-carolina-wilmington [https://perma.cc/YV8G-LVMX] (Feb. 3, 2023).

337. *See supra* note 292 and accompanying text.

services, and lobbying efforts never really suffered, and it was not forced to expend any resources to maintain the status quo. In that situation, Article III standing appears to be lacking, too.

In contrast, unions would usually have statutory and constitutional standing if their members suffered certain forms of discrimination. To illustrate, consider a union representing a bargaining unit that included some of the women selected for termination by TechCo. If that union were a party to a collective bargaining agreement with TechCo under which TechCo had agreed not to discriminate against bargaining unit members based on their sex—or even if the union had attempted to secure such antidiscrimination protections and failed—the union's purpose certainly would include protecting employees from their employers' unlawful discrimination, thus implying statutory standing under Title VII. Furthermore, TechCo terminated members of the union, which deprives the union of future dues that would have gone to any host of things like lobbying, a strike fund, and union governance, thus implying constitutional standing under Article III. So, unless the collective bargaining agreement compelled the union to arbitrate such matters, the union likely could maintain a Title VII enforcement action against TechCo seeking redress (e.g., recoupment of lost union dues qua equitable relief) for TechCo's unlawful employment practice against the union's members—not as a representative of those members but on its own behalf, and notwithstanding those members having signed individual arbitration agreements.

Finally, what of sham plaintiffs—organizations created or modified for the purpose of bringing suit under Title VII using this new theory? For instance, if an organization called Men in Tech pops up as a response to WIT, would it have statutory standing to bring suit against an employer that it believes discriminated against male employees? It should, given the right set of facts.[338] On one hand, that is no cause for concern. After all, if fully equal employment opportunity is the goal (and it is), we ought not cower at the prospect of uniform enforcement of Title VII—blind justice, as it were—regardless of the enforcers' motives. Yet, on the other hand, there is good reason to be weary of trying to achieve that goal by handing the reins to this judiciary. Reliance on the courts when those courts are increasingly hostile to workers' rights[339] may be misplaced.

338. For one thing, the organization "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending," Clapper v. Amnesty Int'l USA, 568 U.S. 398, 402 (2013), so the organization must have suffered an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Id.* at 409. Men in Tech ought to be able to satisfy these requirements if a particular employer's actual or imminent personnel action has frustrated, or threatens to imminently frustrate, the organization's purpose, and that frustration can be redressed by a favorable ruling.

339. *See* NAT'L EMP. LAWS. ASS'N, JUDICIAL HOSTILITY TO WORKERS' RIGHTS: THE CASE FOR PROFESSIONAL DIVERSITY ON THE FEDERAL BENCH 7–8 (2012), https://exchange.nela.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=952ae48d-9dc1-4377-935e-a38ce5241d8e&forceDialog [https://perma.cc/A9ZF-3MP6].

Yet, the Supreme Court has so limited workers' substantive and procedural rights when it comes to securing relief from class-wide work discrimination that the courts might be primed to equilibrate (read: narrow) the justice gap for workers. This is the hallmark of Professor Richard H. Fallon, Jr.'s "Equilibration Thesis," which contends that courts "decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[340] Put another way, judges who think the courts too hostile to the rights of workers suffering from class-wide discrimination may be looking for justifiable ways to swing the pendulum back in favor of workers' rights and herald an equal employment opportunity renaissance. If that thesis is true, then this Article's analysis lays the groundwork for equilibration.

CONCLUSION

All too frequently, American workers labor on islands unto themselves—an archipelago of workers segregated from their coworkers, forced to challenge the discrimination they suffer as individual Davids against a Goliath, surrounded by riptides and undertows that threaten to drown them if they dare to brave the waters and try to join their coworkers in solidarity. For most such workers, seeking to enforce their rights is more than just an uphill battle. That's not a hill in front of them—it's a stone wall.

And yet, wholesale repudiation, legislative or otherwise, of compelled, predispute, individual arbitration for employment discrimination claims seems like sheer fantasy, ideal as that solution is. Solidarity in dispute resolution amongst the victims of work discrimination will soon be a relic. That void leaves space for this Article's analysis to forward the ideal of true workplace equality, primarily utilizing an interpretive methodology that the federal courts are more likely than ever to countenance (i.e., textualism).[341] Indeed, as some scholars, like Professor Richard L. Hasen, convincingly argued even before Justice Barrett ascended to the Supreme Court in 2020,[342] why not seek out and press textualist arguments that might help achieve progressive ends with fervor, knowing full well that some self-described

340. Richard H. Fallon, *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2013).

341. Today, textualists arguably occupy all nine seats on the Supreme Court, although the justices themselves dispute which of them can claim the mantle of the "true textualists." *Compare* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it."), *with id.* at 2625 (Gorsuch, J., concurring) (denying that "the Court strays from its commitment to textualism"). Self-described textualists likewise fill most of the seats in the lower federal courts. Steven B. Katz & Alexandria Gilbert, *Dueling Dictionaries?: Litigating Like a Textualist*, FOR THE DEF., Mar. 2021, at 28.

342. *See* Richard L. Hasen, *Liberals Must Embrace a Bankrupt Judicial Philosophy to Have Any Chance of Winning at the Supreme Court*, SLATE (Oct. 18, 2018, 9:30 AM), https://slate.com/news-and-politics/2018/10/originalism-textualism-supreme-court-liberal-strategy.html [https://perma.cc/6KE4-UR9C].

textualists will accept them[343] while others will not, either because they disagree with what textualism requires[344] or because they disfavor the results?[345] Agreed. To that end, the foregoing analysis hopefully serves as a model for the potential of textualism to serve as a tool for progressive ends.[346]

Despite the drawbacks of this Article's proposal (e.g., decentering workers, reliance on a potentially hostile judiciary, resistance to a half-century of norms engrained into employment discrimination law), placing organizations front and center in employment discrimination litigation has several benefits. It leverages a real party in interest other than an individual arbitration agreement signatory and, therefore, allows the plaintiff to elude compelled arbitration. Furthermore, statutory standing is justified by the text, structure, and legislative history of Title VII and similar employment antidiscrimination statutes, grounding this proposal with a realistic chance for success in the courts. Most importantly, such actions can approximate at least some of the benefits of the employment discrimination class action, such as collective redress for workers suffering from discrimination. Thus, statutory standing for certain organizations in private

343. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020); Baxter v. Bracey, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) (arguing for reexamining the Supreme Court's qualified immunity jurisprudence "[b]ecause our § 1983 qualified immunity doctrine appears to stray from the statutory text"); *see also* Cristian Farias, *Is Neil Gorsuch the New Anthony Kennedy?*, GQ (June 15, 2020), https://www.gq.com/story/neil-gorsuch-scotus-lgbt-decision [https://perma.cc/GKB5-HJUL] (noting that, after *Bostock*, Chief Justice Roberts and Justice Gorsuch can "claim that textualism, as a methodology for interpreting the law, isn't some results-oriented device conservative legal theorists invented to get what they want in the courts, as liberals have long feared"); *id.* ("This new ruling, going against current right-wing orthodoxy as it does, lays those worries to rest.").

344. *See Bostock*, 140 S. Ct. at 1755–56 (Alito, J., dissenting); *see also* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67 (2021); Josh Blackman & Randy Barnett, *Justice Gorsuch's Halfway Textualism Surprises and Disappoints in the Title VII Cases*, NAT'L REV. (June 26, 2020, 6:30 AM), https://www.nationalreview.com/2020/06/justice-gorsuch-title-vii-cases-half-way-textualism-surprises-disappoints/ [https://perma.cc/Q4H4-Q5CZ].

345. *Cf.* Mark Joseph Stern, *The Gorsuch Brief*, SLATE (Oct. 11, 2018, 6:29 PM), https://slate.com/news-and-politics/2018/10/nielsen-preap-aclu-neil-gorsuch-briefs.html [https://perma.cc/LG4C-7YUC] ("[P]ast conservative justices have abandoned textualist interpretations when they might produce a progressive outcome.").

346. Progressive textualism is gaining traction within the academy. *See generally* Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 135 (2019); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 890 n.55 (2013) (citing James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011)); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437 (2022); Katie Eyer, *Symposium: Progressive Textualism and LGBTQ Rights*, SCOTUSBLOG (June 16, 2020, 10:23 AM), https://www.scotusblog.com/2020/06/symposium-progressive-textualismand-lgbtq-rights/ [https://perma.cc/42CR-RPVB]; Doug Kendall & Jim Ryan, *The Case for New Textualism*, DEMOCRACY, Summer 2011, at 66. However, it is not without its detractors. *See, e.g.*, Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 672 (2021); Jeffrey Rosen, *How New Is the New Textualism?*, 25 YALE J.L. & HUMAN. 43, 53 (2013).

Title VII and other similar enforcement actions should be heralded with a healthy dose of cautious optimism, like the accession of a new monarch to the throne—"the employment discrimination class action is dead; long live the employment discrimination class action."