# Restoring Access to Justice: A State-Level Solution to Mandatory Arbitration in Employment

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*For decades, the Supreme Court has favored arbitration agreements in employment and struck down state attempts to limit their use. In so doing, the Court has often cited the Federal Arbitration Act's (FAA) supposed "liberal federal policy favoring arbitration." In its 2021–2022 term, the Court broke with prior precedent, signaling that future arbitration decisions will be rooted in the text of, rather than the policy behind, the FAA. This shift leaves room for states to pass statutes which prohibit employers from requiring employees to sign arbitration agreements. One such statute, California's A.B. 51, was only narrowly struck down as preempted by the Ninth Circuit in* Chamber of Commerce v. Bonta*, which was decided prior to the Supreme Court's textualist shift on the FAA. On a strict textualist reading, the FAA only regulates contracts already in existence and says nothing about behavior leading up to the formation of a contract. Thus, statutes like A.B. 51 are now likely to survive preemption due to the Court's newly textualist position on the FAA. This Note argues that states seeking to limit the use of arbitration agreements in employment should pass statutes like A.B. 51 and can expect that such laws will not be preempted.*

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## INTRODUCTION

Sara Fraga believed her employer, Premium Retail Services (Premium), was underpaying her.[1] Premium sends merchandisers like Fraga out to a long list of major retailers including Walmart and CVS, where they provide support by, among other things, conducting inventory audits, building merchandise displays, and updating prices.[2] Fraga traveled across Massachusetts, Connecticut, New Jersey, and New York to fulfill her duties.[3] She worked tirelessly for Premium, often putting in between 65 and 85 hours in a single week.[4] Premium allegedly never paid her for this extensive travel time or overtime, however, and in May 2021, she filed a class action suit on behalf of herself and other Premium merchandisers for violations of the Fair Labor Standards Act.[5] Unfortunately for Fraga, she had signed a predispute arbitration agreement with Premium, blocking her from suing Premium for employment law violations both individually and as part of a class action. Fraga spent nearly three years litigating an initial procedural hurdle before the U.S. District Court for the District of

1. *See* Fraga v. Premium Retail Servs., Inc., 61 F.4th 228, 231 (1st Cir. 2023).
2. *See* Fraga v. Premium Retail Servs., Inc., 583 F. Supp. 3d 275, 290 (D. Mass. 2022), *vacated*, 61 F.4th 228 (1st Cir. 2023).
3. *See id.* at 281–82.
4. *See Fraga*, 61 F.4th at 231.
5. *See* Complaint at 1, Fraga v. Premium Retail Servs., Inc., 583 F. Supp. 3d 275 (D. Mass. 2022) (No. 1:21-cv-10751), *vacated*, 61 F.4th 228 (1st Cir. 2023). The Fair Labor Standards Act requires employers to pay employees at one-and-a-half times their regular hourly rate for time worked in excess of 40 hours in a week. *See* Fair Labor Standards Act, 29 U.S.C. § 207.

Massachusetts sent her to arbitration.[6] Because arbitration is not public,[7] we may never know whether she received relief for the alleged violations of her employment rights.

Sara Fraga is far from alone. According to the Economic Policy Institute, 56.2% of nonunion, private-sector employees—60.1 million workers—are subject to arbitration agreements.[8] While a bevy of laws protect workers from unfair treatment by their employers,[9] most private-sector employees are shunted into arbitration and unable to access the courts to sue their employers for violations of those laws.[10]

Arbitration is an informal process where the disputing parties submit facts and evidence to a private individual called an arbitrator, who then determines the merits of the claims.[11] Using arbitration clauses, contracting parties agree to arbitrate any potential disputes that may arise during the life of the contract before a dispute actually materializes. Arbitration agreements prevent both parties from adjudicating contractual claims in court rather than through arbitration, which is why they are generally

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6. *See* Fraga v. Premium Retail Servs., Inc., 61 F.4th 228 (1st Cir. 2023); *see also* Fraga v. Premium Retail Servs., Inc., 704 F. Supp. 3d 289, 303 (D. Mass. 2023) (offering the parties the opportunity to arbitrate Fraga's claims).

7. *See* E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729, 1734 (2023) ("[A]rbitration in the United States almost always is private.").

8. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://epi.org/144131 [https://perma.cc/8UB2-D4FG]; *see also* Heidi Shierholz and Celine McNicholas, *The Supreme Court Is Poised to Make Forced Arbitration Nearly Inescapable*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 7, 2018), https://www.epi.org/blog/the-supreme-court-is-poised-to-make-forced-arbitration-nearly-inescapable/ [https://perma.cc/X982-4THT] (estimating that, by 2024, 80% of workplaces will be using mandatory arbitration agreements).

9. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (creating minimum employment standards such as minimum wage and maximum hours); National Labor Relations Act, 29 U.S.C. §§ 151–69 (granting employees the right to organize unions and creating an extensive federal regulatory scheme on labor relations); Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (prohibiting age discrimination in employment); Occupational Health and Safety Act, 29 U.S.C. §§ 651–78 (regulating health and safety in the workplace); Civil Rights Act, 42 U.S.C. §§ 2000e–2000e–17 (prohibiting a wide variety of discrimination in employment and public accommodations, including discrimination based on race and sex).

10. While arbitration agreements are used in a variety of contexts, this Note cabins its analysis to arbitration in employment contracts. For criticism of arbitration in the consumer context, see Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, CTR. AM. PROGRESS (Aug. 2, 2016), https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/ [https://perma.cc/6B5P-PX7R]; Jeff Sovern, *The FAA Should Not Cover Consumer Claims*, *in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND A ROADMAP FOR REFORM 197 (Richard A. Bales & Jill I. Gross eds., 2024).

11. *See Arbitration*, DUKE L. SCH. (March 2017), https://law.duke.edu/lib/research-guides/arbitration [https://perma.cc/84UJ-98CR].

referred to as "mandatory."[12] In theory, arbitration is a faster, cheaper, and overall better way for aggrieved workers to seek redress for violations of the law.[13] In practice though, the pervasive use of arbitration agreements effectively shuts out many workers from the courts and forces them into an inadequate private system of justice, where harms such as blatant race discrimination[14] and flat nonpayment of wages[15] are adjudicated in a process that has been criticized as deeply unfair by a "parade of scholars."[16] If arbitration agreements between employers and employees were truly consensual, arbitration would be far less controversial in this context. Unfortunately, most employees either fail to realize they have signed an arbitration agreement when they take a job or are coerced into signing an agreement by their need for employment.[17]

Though the Supreme Court has mandated the arbitral forum be sufficient to allow claimants to effectively vindicate their rights,[18]

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12. Michael H. Leroy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 254 (2003) ("This dispute resolution process is called mandatory employment arbitration because individuals are compelled to agree to arbitrate, rather than litigate, claims that arise from the employment relationship.").

13. *See* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 480–81 (2006) (arguing that arbitration should be protected as a mode of alternative dispute resolution, because it "might in fact be more effective than litigation at achieving accuracy of results," and "is often quicker and cheaper for the parties than litigation"); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001) (arguing that the availability of employment arbitration better distributes the benefits of employment legislation by allowing employees to bring small-dollar claims, while leaving litigation as the only option means lawyers will only take cases with large payouts: "In a world without employment arbitration as an available option, we would essentially have a 'cadillac' system for the few and a 'rickshaw' system for the many").

14. *See, e.g.*, Jennings v. Ed Napleton Elmhurst Imps. Inc., 2025 WL 461433, at *12 (N.D. Ill. Feb. 11, 2025) (granting car dealership's motion to compel arbitration where an African American former employee alleged race-based discrimination).

15. *See, e.g.*, Hernandez v. RNC Indus., LLC, 2024 WL 964932, at *1 (E.D.N.Y. Mar. 6, 2024) (granting defendant's motion to compel arbitration where plaintiff alleged nonpayment of wages).

16. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 14 (2019); *see infra* notes 19–26 (demonstrating that the arbitral process is unfair to employees due to its secrecy, bias toward repeat players, and connection with class action waivers).

17. *See* Dan Ocampo, *FAQ on Mandatory Arbitration in Employment*, NAT'L EMP. L. PROJ. (Oct. 30, 2024), https://www.nelp.org/insights-research/faq-on-mandatory-arbitration-in-employment/ [https://perma.cc/TL3S-35QY] ("Arbitration clauses are often buried in the fine print of one-sided employment contracts that businesses impose, and that workers have no power to contest. Workers must either accept the contract as is or reject the job.").

18. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985) (announcing the "effective vindication" doctrine).

major problems with arbitration remain. In arbitration, unlike in court, the proceedings are conducted in secret, reducing the accountability that accompanies a published opinion and public court filings.[19] Powerful companies are thus able to abuse the arbitration process while avoiding scrutiny from activists and government regulators.[20] Arbitration agencies have been criticized for their "repeat player" biases as well, as those parties who frequently arbitrate are more likely to prevail.[21] Naturally, employers are far more likely to be repeat players than their employees, meaning the employer may already have a relationship with a particular arbitrator.[22] Some scholars have reported statistically significant biases in favor of large employers who are involved in more arbitration cases.[23] Further, because arbitration agreements often include class action waivers, many potential claims simply disappear, as many individual claims offer too limited a recovery to justify filing for arbitration.[24] Workers' rights

19. *See, e.g.*, Spitko, *supra* note 7, at 1733 ("[A]rbitration secrecy may aid parties in hiding from the public their improper or discriminatory practices or defects in their products that otherwise would have been exposed in public litigation.").

20. *See, e.g.*, *id.* at 1733–34 ("[S]uch secrecy also detracts from the ability of arbitration to have a punitive and specific deterrent effect on the wrongdoer and to serve general deterrence and norm development functions.").

21. *See* Chandrasekher & Horton, *supra* note 16, at 24 (finding employees' odds of prevailing against companies that used arbitration repeatedly declined by 58% compared to employees whose used arbitration infrequently); *see generally* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998).

22. *See* Terri Gerstein, *Forced Arbitration: A Losing Proposition for Workers*, *in* INEQUALITY IN THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 179, 184 (Sharon Block & Benjamin H. Harris eds., 2021) (explaining how arbitrators may favor repeat players).

23. *See* Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. RELS. REV. 1019, 1019 (2015). *But see* Cynthia Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 430 (2006) (writing nine years prior to the Colvin and Gough study, observing that empirical evidence of a repeat player bias in arbitration has been "equivocal").

24. *See* Jane Flanagan & Terri Gerstein, *"Sign on the Dotted Line": How Coercive Employment Contracts Are Bringing Back the* Lochner *Era and What We Can Do About It*, 54 U. S.F. L. REV. 441, 451–52 (arguing that class action waivers paired with arbitration clauses prevent employees from bringing claims at all, as class action waivers "mean that there is effectively no vehicle by which to aggregate small claims"). For example, a worker whose employer illegally paid them their regular hourly rate for overtime hours over a short period of time might only hope to recover a few hundred dollars. Going through arbitration may simply not be worth the time and expense. Absent a class action waiver, this hypothetical employee could join their claim with those of other hypothetical employees (assuming the employer had behaved similarly with regard to others) and make the resulting payout attractive to prospective employment counsel. *Cf.* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696 (2018) (estimating that there were

advocates have lamented arbitration's corporate biases for some time, arguing that the widespread use of arbitration clauses in employment contracts has greatly reduced the ability of workers to vindicate their rights.[25]

Advocates have long sought to eliminate the use of mandatory arbitration clauses in employment contracts.[26] The 1925 Federal Arbitration Act (FAA), however, renders most arbitration clauses "valid, irrevocable, and enforceable,"[27] and the Supreme Court has interpreted the FAA to reach nearly all employment contracts,[28] leaving workers and advocates without much room to navigate around the FAA's enforceability guarantees.

Although Congress could amend the FAA to limit its reach,[29] with Congress perpetually stymied,[30] advocates have had more success enacting state-level arbitration regulations.[31] Unfortunately, to date, courts have held that the FAA preempts a wide variety of state statutes and common law rules that limit the use of mandatory arbitration agreements.[32] Most decisions striking

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between 315,000 and 722,000 "missing" arbitration cases in 2016 that simply were not brought).

25. *See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); *see also generally* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265 (2015); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669 (2001); Imre Szalai, *The Failure of Legal Ethics to Address the Abuses of Forced Arbitration*, 24 HARV. NEGOT. L. REV. 127 (2018).

26. *See generally* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015); *see also* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 575–76 (2020) (arguing that the "arbitration revolution vitiates collectivity and threatens democracy" and must be undone).

27. 9 U.S.C. § 2.

28. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105 (2001) (holding that only transportation workers are covered by the FAA § 1's exemption for workers "engaged in foreign or interstate commerce").

29. Congress has amended the FAA to prohibit the forced arbitration of sexual harassment disputes. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402 (2022).

30. *See generally* SARAH A. BINDER, STALEMATE: THE CAUSES AND CONSEQUENCES OF LEGISLATIVE GRIDLOCK (2003).

31. *See, e.g.*, KY. REV. STAT. ANN. § 336.700 (West 2019) (prohibiting employers from requiring arbitration clauses as a condition of employment); CAL. LAB. CODE § 432.6 (West 2020) (same).

32. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (holding that the FAA preempts a Montana statute imposing special notice requirements on arbitration agreements); *see also* Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. 246 (2017) (holding that the FAA preempts the Kentucky Supreme Court's "clear statement rule," which required

down state regulations as preempted have relied on the idea of a "liberal federal policy favoring arbitration agreements" embodied by the FAA.[33] But the Supreme Court's recent arbitration decisions indicate that it has shifted to a more textualist approach and will no longer rely on policy to justify an expansive reading of the FAA.[34]

The Court's textualist shift should make it possible for states to defend "pre-formation statutes" against preemption challenges. Pre-formation statutes prohibit employers from requiring employees to sign mandatory arbitration agreements as a condition of employment.[35] Because the FAA only comes into effect once contracting parties have formed an agreement, on a strict textualist reading of the FAA, these *pre*-formation statutes should not be preempted.

One such statute was recently held preempted by the Ninth Circuit in a 2-1 panel decision, *Chamber of Commerce of U.S.A. v. Bonta*.[36] In *Bonta*, the Ninth Circuit held that the FAA preempted a California pre-formation statute, A.B. 51, that disfavored arbitration agreements vis à vis other types of contracts.[37] The

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express authorization in powers of attorney to execute arbitration agreements); Preston v. Ferrer, 552 U.S. 346 (2008) (holding that the FAA preempts the California Talent Agencies Act, which gave jurisdiction over talent agency compensation disputes to state courts, notwithstanding an arbitration agreement); Perry v. Thomas, 482 U.S. 483 (1987) (holding that the FAA preempts California Labor Code requiring judicial forum for wage collection claims regardless of arbitration agreement); Marmet Health Care Ctr. Inc. v. Brown, 565 U.S. 530 (2012) (holding that the FAA preempts a West Virginia Supreme Court rule finding arbitration clauses in nursing home contracts unenforceable as a matter of public policy); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding an Alabama statute proscribing enforcement of arbitration clauses preempted by the FAA); *see also* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 399–405 (2004) (providing an overview of FAA preemption doctrine).

33. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

34. *See* Morgan v. Sundance, Inc., 596 U.S. 411 (2022); *see also* Badgerow v. Walters, 596 U.S. 1 (2022); Southwest Airlines Co. v. Saxon, 596 U.S. 450 (2022); New Prime, Inc. v. Oliviera, 586 U.S. 105 (2019); Imre Szalai, *The Supreme Court's 2021–2022 Arbitration Cases: A More Textualist Approach*, 40 ALTERNATIVES TO HIGH COST LITIG. 121, 126 (2022) [hereinafter Szalai, *Arbitration Cases*] (surveying the Court's recent arbitration cases and observing that it has taken a more textualist approach to the FAA: "The Court's decisions this term, however, backpedaled away from this former federal policy, and instead, focused more on the text of the law."); *see also* Alan S. Kaplinsky et al., *2022: A Supreme Year for Arbitration Decisions, and Congress Amends the FAA*, 78 BUS. L. 503, 504 (2023) ("Viewed collectively, the Supreme Court's rulings reflect a greater emphasis on textbased statutory analysis, a decreased reliance on the pro-arbitration policies embodied in the FAA, and a more nuanced approach to FAA preemption.").

35. *E.g.*, KY. REV. STAT. ANN. § 336.700 (West 2019); CAL. LAB. CODE § 432.6(f) (West 2020).

36. 62 F.4th 473 (9th Cir. 2023).

37. *See id.* at 483.

Ninth Circuit did not consider the Supreme Court's recent shift toward a textualist approach to the FAA, however, and relied heavily on the idea of a "liberal federal policy favoring arbitration agreements."[38] Now that the Supreme Court has severely undermined the policy foundation of *Bonta*, pre-formation statutes should be able to survive court review. States seeking to limit the use of mandatory arbitration in employment contracts should pass pre-formation statutes and can expect them to fare better than A.B. 51 did in *Bonta*.

This Note proceeds in three parts. Part I introduces the FAA and the Supreme Court's FAA preemption jurisprudence, including its recent textualist shift. Part II examines the differences between laws rendering arbitration agreements unenforceable and pre-formation statutes, showing why the textualist shift makes it improbable that reviewing courts will strike down pre-formation statutes as preempted. Part III discusses two key doctrinal challenges proponents of pre-formation statutes will need to overcome. First, in *Kindred Nursing Centers v. Clark*,[39] the Supreme Court rejected an argument similar to the one this Note advances. *Kindred Nursing* is distinguishable, however, due to differences between the preempted state rule at issue in that case and the pre-formation statutes proposed by this Note.[40] Second, under obstacle preemption, courts are directed to consider the broader policies of legislation to determine whether the state statute at issue stands as an obstacle to those purposes. This is likewise non-fatal, as the Court's recent shift away from purposivism on the FAA belies obstacle preemption's emphasis on legislative purpose.[41] Finally, this Note concludes that advocates seeking to limit the ability of employers to subject employees to mandatory arbitration should push to pass pre-formation statutes at the state level and can expect those statutes to survive an inevitable preemption challenge.

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38. *Id.* at 487 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). While *Bonta* was ultimately decided after the Supreme Court's 2022 textualist shift on the FAA, the parties filed their briefs and conducted oral argument in 2020. The Ninth Circuit does not discuss any of the Court's recent textualist cases in *Bonta*.

39. 581 U.S. 246, 255 (2017) (explaining that pre-formation statutes would render the FAA "helpless to prevent even the most blatant discrimination against arbitration").

40. *See infra* Part III.A.

41. *See infra* Part III.B.

# I. THE FAA'S HISTORICAL PURPOSES AND THE EVOLUTION OF THE SUPREME COURT'S FAA JURISPRUDENCE

This Part first explores the FAA's legislative history to contextualize modern debates about the Act's text and purposes. Next, it details the Supreme Court's historically purposivist stance on the FAA and obstacle preemption. It then examines several seminal FAA preemption cases to demonstrate, in broad strokes, the status of FAA preemption doctrine leading up to the Court's 2021–2022 term. Finally, this Part dives into a 2019 arbitration decision and the arbitration cases from the Court's 2021–2022 term, showing that those cases indicate the Court has broken from its former, purposivist understanding of the FAA and begun to adhere more closely to the text of the Act.

## A. THE HISTORY AND PURPOSES OF THE FAA

Throughout the late 19th and early 20th centuries, businesspeople increasingly formed private associations for the purposes of coordinating and streamlining business practices.[42] Those associations often required members to agree to arbitrate claims against other members in order to expedite dispute resolution.[43] Many judges, however, declined to enforce these arbitration agreements, citing concerns about the legality of private actors "ousting" the judiciary from its jurisdiction.[44] Judges instead treated arbitration clauses as revocable, meaning one party could simply decline to go to arbitration and sue the other instead.[45] This practice essentially nullified the trade associations' efforts to speed up the dispute resolution process.[46]

In response, state and federal legislatures stepped in to ensure that courts would respect and enforce arbitration agreements. New York passed a statute in 1920 that made

42. *See* Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 978 (1999).

43. *See id.* at 978.

44. *Id.* at 975.

45. *See id.* at 973.

46. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Walmart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 113 (2011) ("[D]uring the nineteenth century, courts protected their own jurisdiction by concluding that public policy did not permit the enforcement of an ex ante arbitration agreement over the objection of one side. Despite the then-reigning ideology of freedom of contract, courts 'jealously' guarded their monopoly on judgment.").

arbitration agreements "valid, irrevocable, and enforceable save on such grounds as exist at Law or in Equity for the Revocation of any contract."[47] Shortly thereafter, the New York Court of Appeals reversed a lower court judge's attempt to deny enforcement of an arbitration clause.[48] Judge Cardozo rejected the Appellate Division's argument that the New York arbitration law was unconstitutional for "ousting" judges from their jurisdiction.[49] Five years later, Congress followed New York's lead by passing the FAA.[50] The FAA guarantees that contracting parties who agree to arbitrate their claims will not be forced to adjudicate them in court instead.[51] Section 2 of the FAA, which is frequently held to preempt state arbitration regulations,[52] provides: "A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable."[53]

While the FAA has been interpreted to protect arbitration agreements in a wide variety of contexts (including, of course, employment), its proponents envisioned a narrower application.[54] Indeed, Julius H. Cohen, general counsel for the New York State Chamber of Commerce and the FAA's principal drafter,[55] specifically disclaimed the Act's application outside of the commercial context: "[Arbitration] is not the proper method for deciding points of law of major importance involving constitutional

47. Stone, *supra* note 42, at 982.

48. *See* Berkovitz v. Arbib & Houlberg, 230 N.Y. 261, 276 (1921).

49. *Id.*

50. *See* Pub. L. No. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–206 (1994)).

51. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953) ("Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment.").

52. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding preempted a California law that banned arbitration agreements for disputes between franchisors and franchisees); *see generally* 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 (2006) (critiquing the many cases in which the Supreme Court has held Section 2 of the FAA to preempt state law).

53. Federal Arbitration Act, 9 U.S.C. § 2.

54. *See* Moses, *supra* note 52, at 106 (positing that "the supporters of the [FAA] did not believe that it would apply to workers at all"); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 307 (2015) ("In passing the FAA, Congress intended to allow arbitration for only a narrow set of legal claims: inter-merchant contract disputes sounding in breach and maritime claims.").

55. *See* Moses, *supra* note 52, at 101–02.

questions or policy in the application of statutes."[56] According to Cohen, ordinary commercial disputes, with issues such as "quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like" were appropriate for arbitration, not statutory and constitutional claims.[57] Employment disputes often arise from statutory protections, such as the Fair Labor Standards Act, Title VII of the Civil Rights Act, or the Age Discrimination in Employment Act.[58] The FAA's legislative history has led some modern observers to argue that the FAA was never intended to apply to employment contracts at all.[59]

Others have taken issue with the application of the FAA to state law, arguing that the FAA is merely a procedural statute that should not preempt state substantive law. According to Professor Ian R. Macneil, Congress understood that the FAA would not apply to the states.[60] This has led some to argue that the FAA shouldn't preempt state law.[61] Professor Hiro N. Aragaki has concluded that "the weight of scholarly opinion is . . . that FAA preemption is unconstitutional."[62] Despite clear evidence of Congress' contrary intentions, the Supreme Court has held that the FAA preempts any state law which affects arbitration clauses, even those laws that

56. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 79 (1997) [hereinafter Schwartz, *Enforcing Small Print*].

57. *Id.* at 78.

58. *See* Fair Labor Standards Act, 29 U.S.C. §§ 201–219; *see also* Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34; Civil Rights Act, 42 U.S.C. §§ 2000e–2000e–17.

59. *See* Schwartz, *Enforcing Small Print*, *supra* note 56, at 76 ("The drafters and proponents of the FAA were extremely clear, both in congressional hearings and in contemporary commentary about the Act: when it came to enforcing agreements to arbitrate future disputes, their intention was limited to the commercial paradigm, and excluded contracts of employment."); Stone, *supra* note 42, at 992 ("In the 1920s, most supporters of the FAA and the state arbitration laws intended the new statutes to apply to disputes between members of the same trade association or between participants in a common line of business.").

60. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION-NATIONALIZATION-INTERNATIONALIZATION 122–23 (1992).

61. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L. & CONTEMP. PROBS. 5, 16 (Winter 2004) [hereinafter Schwartz, *Correcting Federalism*] (arguing that *Southland Corp. v. Keating* was wrongly decided).

62. Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1272 (2011).

don't affect the validity or enforceability of arbitration agreements.[63]

Today, arbitration agreements are common in employment contracts, and the Supreme Court's expansion of the FAA's preemptive scope has limited States' abilities to mitigate the use of arbitration agreements.[64] In early preemption cases, the Supreme Court held that the purpose of the FAA was "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate" and ensure arbitration agreements were enforced according to the terms agreed upon by the parties.[65] More recently, the Court has expanded its conception of the FAA's purpose to include providing for speedy, informal resolution of claims.[66]

## B. THE SUPREME COURT'S FAA PREEMPTION JURISPRUDENCE

The FAA's legislative history does not support a broad reading of the FAA's preemptive scope. Nevertheless, the Supreme Court has interpreted the FAA to have an "[e]xtraordinarily expansive preemptive reach,"[67] abrogating state legislation and judicial rules[68] so long as they take their meaning from the fact that an arbitration agreement is involved.[69] In *Southland v. Keating* the Court first declared that the FAA preempts state arbitration regulations that treat arbitration agreements differently than other contracts—state laws must instead place arbitration agreements on "equal footing" with other types of contracts.[70] Perhaps even more important for FAA preemption jurisprudence is

63. *See, e.g.*, Kindred Nursing Centers Ltd. v. Clark, 581 U.S. 246, 249–51 (2017) (holding as preempted a state law requiring nursing home patients' express consent to an arbitration agreement signed by someone with power of attorney).

64. *See* Arpan A. Sura & Robert A. Derise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 406 (2013).

65. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 (1985).

66. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (preempting a California rule that would have made the arbitration process less efficient).

67. Stone, *supra* note 42, at 946.

68. *See, e.g.*, *Concepcion*, 563 U.S. at 341 (invalidating California's common-law *Discover Bank* rule, *see* Discover Bank v. Superior Court, 113 P.3d 1100 (2005), which rendered certain types of arbitration agreements unconscionable).

69. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" the equal-footing principle).

70. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (citing H.R. REP. NO. 68-96, at 2 (1924)).

the notion of a "liberal federal policy favoring arbitration agreements," on which the Supreme Court has relied heavily in declaring state law preempted.[71]

This section traces the "equal footing" principle from *Southland* to *AT&T Mobility v. Concepcion*,[72] which marked a significant departure from equal treatment of arbitration agreements. This context is essential to understand the significance of the Court's holding in *Morgan v. Sundance* that courts may not fashion special, arbitration-favoring rules.[73] This section also highlights the relatively weak footing on which the Court's "liberal federal policy" doctrine once rested. The Court's recent retreat from that doctrine leaves the Ninth Circuit's *Bonta* decision without justification, and dramatically boosts the chances of future pre-formation statutes surviving preemption.

For the first nearly 60 years after Congress passed the FAA, the Supreme Court did not hold that the Act preempted state laws affecting arbitration agreements. In 1984, the Court charted a new course with *Southland Corp. v. Keating*.[74] *Southland* involved California's Franchise Investment Law,[75] which required parties to use a judicial forum for disputes in franchise agreements.[76] The Court held that the California law was preempted by the FAA,[77] with Chief Justice Burger writing that with "[Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[78] Of the Court's FAA preemption opinions, *Southland* is perhaps the most straightforward: because the FAA establishes a "national policy favoring arbitration," states necessarily cannot restrict parties' ability to choose to arbitrate certain types of claims.[79]

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71. *Concepcion*, 563 U.S. at 346 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

72. 563 U.S. 333, 346 (2011).

73. *See* 596 U.S. 411 (2022).

74. *See* 465 U.S. 1 (1984); *see also* Sura & Derise, *supra* note 64, at 412 (2013) ("The first case in which the Supreme Court held that the FAA preempted state law was *Southland Corp. v. Keating*.").

75. *See* CAL. CORP. CODE §§ 31000–31516, 31512 (West 1984).

76. *See Southland*, 465 U.S. at 5.

77. *See id.* at 16.

78. *Id.* at 10.

79. *Id.*

*Southland* has been heavily criticized for its preemption analysis, however.[80] Normally, federal courts will hold preempted state laws that stand as an obstacle to Congress' purposes in passing the conflicting federal law.[81] Since Congress likely did not intend the FAA to displace substantive law governing arbitration agreements, *Southland's* finding to the contrary is highly questionable.[82] *Southland* thus constitutes an exceptionally weak cornerstone for the Supreme Court's later FAA preemption cases, all of which rely on it.

Next, in *Perry v. Thomas*,[83] the Court considered whether the FAA preempted a provision of the California Labor Code that guaranteed workers the right to bring an action in state court to collect wages, notwithstanding the existence of an arbitration agreement.[84] The Court mostly repeated its reasoning from *Southland*, but *Perry* was significant in that the Court, for the first time, held that the FAA preempts state employment regulations involving arbitration.[85]

Though not explicitly defined in *Southland*, the "equal footing" principle runs throughout the Court's preemption decisions. This principle requires that state laws and judicial rules treat arbitration clauses as equal to other types of contract provisions.[86] Based on the Court's reading of the legislative history, Congress intended to "place arbitration agreements 'upon the same footing as other contracts.'"[87] In other words, courts and legislatures cannot single out arbitration clauses for special rules that do not apply to other types of contracts.

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80. *See* Schwartz, *Correcting Federalism*, *supra* note 61, at 8.

81. This is generally referred to as "obstacle preemption." *See* BRYAN L. ADKINS ET AL., CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 25 (2023). Obstacle preemption is controversial, as Congress can include an express preemption statement in federal law that it intends to abrogate contrary state law. *See id.* at 6. Justice Thomas, for example, has long criticized the Supreme Court's practice of holding preempted state laws which conflict with Congressional purposes. *See infra* Part II.A (discussing Justice Thomas' skepticism of obstacle preemption doctrine).

82. *See* Schwartz, *Correcting Federalism*, *supra* note 61, at 8 ("If original congressional intent is the touchstone of a statute's preemptive effect, *Southland* was plainly wrong.").

83. 482 U.S. 483 (1987).

84. CAL. LAB. CODE § 229 (West 1987).

85. *See Perry*, 482 U.S. at 489.

86. *See* Kristen M. Blankley, *Impact Preemption: A New Theory of Federal Arbitration Act Preemption*, 67 FLA. L. REV. 711, 767 (2015) ("The Supreme Court has long described the FAA as an antidiscrimination statute intended to put arbitration clauses on 'equal footing' with every other type of contract.").

87. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (citing H.R. REP. 68-96, at 2 (1924)).

Then, in *Allied-Bruce Terminix Cos. v. Dobson*,[88] decided in 1995, the Court more clearly illustrated the "equal footing" principle first developed in *Southland*. There, an Alabama Supreme Court ruling would have made arbitration agreements in consumer contracts unenforceable unless the parties appeared to have contemplated a transaction involving interstate commerce when they agreed to the contract.[89] The Court emphasized that arbitration agreements cannot be singled out for unequal treatment: "What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause."[90] Despite significant evidence that Congress did not intend the FAA to preempt state law,[91] Justice Breyer's *Dobson* opinion is unabashedly intentionalist in striking down the Alabama ruling, finding that state law placing "arbitration clauses on an unequal 'footing[ ]'" are "directly contrary to the Act's language and Congress' intent."[92]

From *Dobson* onward, the Court continued to expand the boundaries of FAA preemption. The following year, in *Doctor's Associates, Inc. v. Casarotto*,[93] the Court held preempted a Montana law that would have made arbitration clauses unenforceable unless the drafter placed a notice that the contract was subject to an arbitration clause in underlined, capital letters on the contract's first page.[94] Propelling arbitration agreements several steps beyond mere "equal footing" with other contracts, the majority took issue with the fact that the Montana statute treated arbitration provisions differently than other types of contract provisions. "Courts may not," wrote Justice Ginsburg, "invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."[95] The Court relied on *Dobson* and *Scherk v. Alberto-Culver Co.*[96] for the proposition that arbitration agreements must

88. 513 U.S. 265 (1995).
89. *See Allied-Bruce Terminix Cos.*, 513 U.S. at 269.
90. *Id.* at 281.
91. *See supra* Part I.A.
92. *Allied-Bruce Terminix Cos.*, 513 U.S. at 281.
93. 517 U.S. 681 (1996).
94. *See* MONT. CODE ANN. § 27-5-114(4) (1995).
95. *Doctor's Assocs., Inc.*, 517 U.S. at 687 (emphasis in original).
96. 417 U.S. 506 (1974). The Supreme Court frequently cites *Scherk* for support for the "equal footing" principle, though *Scherk* was not a preemption case. *See, e.g.*, Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474 (1989) (quoting *Scherk*, 417 U.S. at 511) ("The Act was designed . . . [to] place [arbitration] agreements 'upon the same footing as other contracts.'").

be treated the same as other contract provisions under state law.[97] *Casarotto* marks an expansion, however, in that the Court explained that state laws cannot "singl[e] out arbitration provisions for suspect status."[98] In other words, whereas states may pass laws specifically affecting other types of contracts, after *Casarotto*, states may no longer pass laws that target arbitration agreements. *Casarotto* thus privileges arbitration agreements as compared to other contracts.

In the 2010s, the Court moved beyond equal treatment for arbitration clauses and launched a regime of arbitration favoritism. In *AT&T Mobility v. Concepcion*, the Court took a far more expansive view of the policy favoring arbitration. In that case, the Court held that the policy meant more than placing arbitration agreements on equal footing with other contracts: instead, "the FAA was designed to *promote* arbitration."[99] According to the Court, the FAA was meant to secure access to streamlined, speedy dispute resolution proceedings.[100] So the state rule in that case, which would have mandated the availability of class arbitration proceedings (which are supposedly far more complex, costlier, and slower), necessarily stood as an obstacle to the FAA's purposes.[101] *Concepcion* marked a dramatic breaking point from the Court's earlier jurisprudence on the FAA's purposes,[102] which had rejected "the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."[103]

The 2015–2016 term's *DirectTV, Inc. v. Imburgia*[104] is another prime example of arbitration favoritism. In that case, DirectTV's consumer contracts contained an arbitration clause specifying that the contract was to be interpreted according to the law in the consumer's state.[105] Like many arbitration clauses, the provision

97. *See Doctor's Assocs., Inc.*, 517 U.S. at 687.
98. *Id.* at 687.
99. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345–46 (2011) (emphasis added).
100. *See id.* at 346.
101. *See id.* at 348 ("[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.").
102. *See* Resnik, *supra* note 46, at 117 ("[B]y 2011, the Court read 'bilateral' arbitration's perceived advantages over adjudication to have been a part of the 1925 statute's agenda. Arbitration's attributed utilities—speed, low cost, and informality—became more important as the Court lost interest in power imbalances and the idea that enforcement required negotiation and actual consent.").
103. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).
104. 577 U.S. 47 (2015).
105. *See DirectTV*, 577 U.S. at 49–53.

at issue was connected with a class action waiver, meaning the plaintiff had relinquished their right to bring collective claims.[106] Because the law in the plaintiff's state, California, at the time of formation made class action waivers unconscionable, the lower court determined that the arbitration clause was unenforceable.[107] Here, state law did not make arbitration clauses themselves unenforceable; rather, the lower court held that class action waivers incident to arbitration clauses were unenforceable.[108] The Supreme Court reversed, finding that the FAA preempted the lower court's holding because it did not "place arbitration contracts on equal footing with all other contracts" and did not "give due regard . . . to the federal policy favoring arbitration."[109] *DirectTV* thus constitutes a step beyond mere equal footing, and suggests that arbitration favoritism motivated the FAA's drafters.

In jumping from "equal footing" to arbitration favoritism, *AT&T Mobility* and *DirectTV* rely almost exclusively on the idea that the FAA embodies a "liberal federal policy favoring arbitration."[110] If arbitration clauses are merely to be treated "equally" to other contract provisions under state law, then there may be some room for states to regulate arbitration clauses. On the other hand, if the FAA was truly intended to *promote* arbitration, then any state laws that could jeopardize the efficiency benefits arbitration provides are suspect. In *Morgan v. Sundance* and related cases, discussed below, the Court appears both to have reverted back to the equal footing principle and to have cast doubt on any federal policy favoring arbitration. This has potentially massive ramifications for any future preemption litigation involving pre-formation statutes.

### C. THE SHIFT TO STRICT TEXTUALISM

Historically, much of the Court's FAA preemption jurisprudence has relied on the idea of a "liberal federal policy favoring arbitration" rather than the text of the Act itself.[111] In five of its

106. *See id.* at 47, 50.
107. *See id.* at 49–53.
108. *See id.* at 58.
109. *Id.*
110. *See* DirectTV, Inc. v. Imburgia, 577 U.S. 47 (2015); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011).
111. The Court's expansion of FAA preemption did not go without dissent, however. In *Concepcion*, for example, the Court's liberal wing dissented, arguing that the majority's description of the FAA's purposes had no basis in the history of the Act. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting).

most recent arbitration decisions,[112] however, the Court shifted course, signaling that policy arguments would get far less weight than they previously had.[113] In 2019, the Court decided *New Prime Inc. v. Oliviera*[114] on strictly textualist reasoning, and maintained its newfound disregard for the policy intentions of the FAA's drafters in four 2022 decisions.[115] While none of these cases involved preemption, they do signal a sea change in the Supreme Court's understanding of the FAA and make it more likely that state pre-formation statutes will survive preemption challenges.

The Supreme Court's first case marking a shift to textualism was *New Prime, Inc. v. Oliviera*.[116] In that case, a truck driver brought wage claims against his employer, arguing that the company misclassified its workers as independent contractors rather than employees.[117] After determining that a court, rather than an arbitrator, had jurisdiction, the Court engaged in plain-text analysis to determine whether Section 1's exemption applies to truck drivers like Oliviera.[118] The dispute came down to whether the phrase "contracts of employment" as used in Section 1 covered contracts for independent contractors.[119] Looking to dictionary definitions contemporary with the FAA's passage, the Court reasoned that "contracts of employment" would have been understood simply as contracts for "work" at the time the Act was passed.[120] Therefore, anyone who contracted to perform "work" for another was considered an employee for FAA purposes, and the Court held that Section 1's exemption applied to Oliviera.[121] On its way to this holding, the Court rejected New Prime's robust policy arguments. The Court held that it must "respect the limits up to which Congress was prepared to go when adopting the Arbitration Act" by adhering solely and strictly to the text of the FAA: "If courts

112. New Prime, Inc. v. Oliviera, 586 U.S. 105 (2019); Morgan v. Sundance, Inc., 596 U.S. 411 (2022); Badgerow v. Walters, 596 U.S. 1 (2022); Southwest Airlines Co. v. Saxon, 596 U.S. 450 (2022); Viking River Cruises, Inc. v. Moriana, 596 U.S. 639 (2022).

113. *See* Szalai, *Arbitration Cases*, *supra* note 34, at 126 (providing an overview of the Court's recent arbitration cases and observing that it has taken a more textualist approach to the FAA); *see also* Kaplinsky, *supra* note 34, at 503 (same).

114. *New Prime, Inc.*, 586 U.S. at 105 (2019).

115. *See generally Viking River Cruises*, 596 U.S. 639; *Badgerow*, 596 U.S. 1; *Southwest Airlines Co.*, 596 U.S. 450; *Morgan*, 596 U.S. 411.

116. *See* 586 U.S. 105 (2019).

117. *See id.* at 109.

118. *See id.* at 112.

119. *Id.* at 113.

120. *Id.* at 114.

121. *See id.*

felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to take account of legislative compromises essential to a law's passage."[122]

Only a few years later, in 2022, the Court decided four arbitration cases indicating that the Court's textualist positioning in *New Prime* was here to stay. In *Badgerow v. Walters*, the Court held that a federal court ruling on a motion to confirm an arbitral award cannot "look through" the winning party's petition to the underlying controversy to determine whether it has jurisdiction.[123] The Court had previously held in *Vaden v. Discover Bank* that federal courts can use this "look-through" approach when evaluating a motion to compel arbitration.[124] This is only because Section 4 of the FAA allows "a party to an arbitration agreement [to] petition for an order to compel arbitration in a 'United States district court which, save for [the arbitration] agreement, would have jurisdiction' over 'the controversy between the parties.'"[125] Because the statute expressly directs the district court to make a determination about its jurisdiction, the Supreme Court held in *Vaden* that the court may "look through" the petition to the underlying controversy.[126] Unlike Section 4, Sections 9 and 10 of the FAA (at issue in *Badgerow*) "contain none of the statutory language on which *Vaden* relied."[127] Importantly, the Court rejected a series of arguments relying on policy rather than the text of the FAA, noting that the plaintiff's "more thought-provoking arguments sound not in text but in policy."[128] The plaintiff urged the Court to apply the same rule to Sections 9 and 10 as it applied in *Vaden* to Section 4, emphasizing "the virtues of adopting look-through as a 'single, easy-to-apply jurisdictional test' that will produce 'sensible' results."[129] The Court did not waver in its textualist position, however, stating emphatically that "even the most formidable policy arguments cannot overcome a clear statutory directive."[130]

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122. New Prime, Inc. v. Oliviera, 586 U.S. 105, 120 (2019).
123. 596 U.S. 1, 5 (2022).
124. 556 U.S. 49, 62 (2009).
125. *Badgerow*, 596 U.S. at 10 (quoting 9 U.S.C. § 4).
126. *Id.*
127. *Id.* at 11.
128. *Id.* at 15.
129. *Id.*
130. Badgerow v. Walters, 596 U.S. 1, 16 (2022) (quoting BP p.l.c. v. Mayor of Baltimore, 593 U.S. 230, 232 (2021)).

The Supreme Court's strict textualist position in *Badgerow* is striking.[131] While it had previously justified expanding the FAA by appealing to the policy goals of the FAA's drafters, here, it explicitly rejected a fairly sound policy argument: that the same "look through" rule should apply to the section of the FAA concerning the confirmation of arbitral awards (Sections 9 and 10) as it applies to the section giving courts authority to compel arbitration (Section 4).[132] In his dissent, Justice Breyer argued that the majority's reasoning was textualist to the point of unreasonableness.[133] "When interpreting a statute," Breyer argued, "it is often helpful to consider not simply the statute's literal words, but also the statute's purposes and the likely consequences of our interpretation. Otherwise, we risk adopting an interpretation that, even if consistent with text, creates unnecessary complexity and confusion."[134] Perhaps more importantly, Breyer argued that the majority was departing from prior Court precedent "about the purposes underlying the FAA."[135] Breyer's dissent confirms that the Court has broken with its past emphasis on the federal policy favoring arbitration and will likely instead adhere strictly to the text of the Act. Many commenters have noted the same.[136] For pre-formation statutes, that means the absence of language in the FAA governing behavior leading up to contract formation is significant.

In *Morgan v. Sundance, Inc.*, the Court again retreated from the "liberal federal policy" justification for expanding the reach of the FAA.[137] In *Morgan*, the Court considered whether the FAA's "policy favoring arbitration" permitted a widely observed federal court rule allowing defendants to compel arbitration after litigating the issue in court for a significant period of time.[138] The Court answered in the negative, explaining:

> [T]he FAA's "policy favoring arbitration" does not authorize federal courts to invent special, arbitration-preferring

131. *See* Szalai, *Arbitration Cases*, *supra* note 34, at 127 (observing that "in *Badgerow v. Walters* . . . the Court heavily relied on a textual analysis" (citations omitted)).
132. *See Badgerow*, 596 U.S. at 15.
133. *See id.* at 19 (Breyer, J., dissenting).
134. *Id.* at 19 (Breyer, J., dissenting).
135. *Id.* at 27 (Breyer, J., dissenting).
136. *See, e.g.*, Szalai, *Arbitration Cases*, *supra* note 34, at 127; Lee Williams, *SCOTUS's Arbitration Winter: More FAA Refinement*, 42 ALTERNATIVES TO HIGH COST LITIG. 45, 46 (2024).
137. *See* 596 U.S. 411, 414 (2022).
138. *Id.*

> procedural rules. Our frequent use of that phrase connotes something different. "Th[e] policy . . . is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." Or in another formulation: The policy is to make "arbitration agreements as enforceable as other contracts, but not more so." Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.[139]

In *Southwest Airlines Co. v. Saxon*,[140] the Court again repudiated the notion that policy arguments can justify expanding the reach of the FAA.[141] Saxon was a ramp supervisor whose job duties included occasionally loading and unloading cargo to assist non-supervisor ramp agents.[142] The Court considered how to define the relevant "class of workers" to which Saxon belonged and whether that class of workers was "engaged in foreign or interstate commerce" and thus covered by the FAA's Section 1 exemption for transportation workers.[143] Using dictionary definitions from the time of the FAA's passage, the Court determined that the FAA's drafters would have understood Saxon to belong to the class of workers engaged in interstate commerce exempted by Section 1.[144] The Court was careful to emphasize that its analysis was rooted in the text of the FAA.[145] The Court also emphatically rejected the policy-based approach Southwest urged the Court to take, instead holding that "[Section] 1's plain text suffices to show that airplane cargo loaders are exempt from the FAA's scope, and we have no

139. *Id.* at 418 (internal citations omitted).
140. 596 U.S. 450 (2022).
141. *See* Kaplinsky et al., *supra* note 34 ("As in *Morgan v. Sundance, Inc.*, the Court rejected arguments based upon the FAA's pro-arbitration policies, instead basing its conclusion on the plain text of the FAA." (citation omitted)).
142. *See Southwest Airlines Co.*, 596 U.S. at 454.
143. *Id.* at 455–57.
144. *See id.* at 456.
145. *See id.* at 457 ("As always, we begin with the text.").

warrant to elevate vague invocations of statutory purpose over the words Congress chose."[146] Observers have understood the holding and reasoning in this case to be a clear departure from the arbitration purposivism and favoritism prior decisions had shown.[147] Just as it did in *New Prime*, the Court showed that the days of expanding the FAA's reach for policy reasons are over.

*Viking River Cruises v. Moriana* gave anti-arbitration advocates another glimmer of hope.[148] Though less strictly textual in its analysis of the FAA than the above decisions, the case marked a departure from the arbitration extremism of the past and further highlights the Court's shifting tone on the FAA. In *Viking River*, the Court considered whether the FAA preempted California's *Iskanian* rule.[149] The rule had prohibited individuals from waiving their right to bring representative *qui tam* claims under California's Private Attorneys General Act (PAGA), via arbitration or otherwise.[150] The Court held the *Iskanian* rule to be preempted only insofar as it applied to individual claims.[151] Whether an individual could still represent a class of plaintiffs in a representative PAGA suit was held to be a matter of state law.[152] The case was a surprise victory for advocates and gave states the freedom to pass laws allowing individual plaintiffs to bring representative, collective claims in court, notwithstanding the existence of an arbitration agreement.[153]

These cases thus marked a significant departure from the Supreme Court's prior readings of the FAA. According to Professor Myriam Gilles, a leading scholar on the Supreme Court's arbitration jurisprudence, *Morgan* "was explicit in repudiating the understanding—widely shared among lower courts—that the past 40 years of Supreme Court case law demands a thumb on the scale in favor of finding that disputes are subject to arbitration."[154] Such

146. *Id.* at 463.

147. *See* Gilles, *supra* note 136, at 1088–89 (speculating that *Saxon* and *New Prime* may indicate that "textualism . . . could prevail in a rematch with arbitration favoritism"); Louis Lopez, *The Supreme Court's 2021–22 Term in Review*, 37 ABA J. LAB & EMP. L. 1, 10 (2023) ("The decisions [of the Court's 2021–2022 term] also suggest that, while the Court may adhere to precedent as it continues to shape arbitration law, it also may seek to ground more cases in the FAA's statutory text rather than in a more general policy favoring arbitration.").

148. 596 U.S. 639 (2022).

149. *See id.* at 643.

150. *See id.* at 645.

151. *See id.* at 662.

152. *See id.* at 663.

153. *See* Gilles, *supra* note 136, at 1097.

154. Gilles, *supra* note 136, at 23–24.

a disruptive clarification of the meaning of a "liberal federal policy favoring arbitration" surely has consequences for the Court's analysis of arbitration clauses beyond procedural rules. If courts are prohibited from developing special, arbitration-favoring procedural rules, perhaps they likewise cannot develop special, arbitration-favoring preemption rules that would prohibit states from passing legislation affecting arbitration.

In sum, the legal landscape for state-level arbitration restrictions is more favorable than it has been in decades. While *Morgan* prohibits courts from unduly favoring arbitration, *Saxon*, *New Prime*, and *Badgerow* show that the Court gives far greater importance to the text of the FAA than it did in prior cases, and *Viking River* offers hope to anti-arbitration advocates by validating a different kind of state restriction on arbitration. Combined, these cases signal that a regulation that is not in conflict with the plain text of the FAA is likely to avoid preemption.

## II. PRE-FORMATION STATUTES AND PREEMPTION

Future attempts to prohibit coercive arbitration agreements in employment contracts should be informed by states' past experience with pre-formation statutes. Two states, California and Kentucky, have attempted to limit the use of arbitration agreements in employment by passing pre-formation statutes.[155] California's A.B. 51 was struck down as preempted by the Ninth Circuit in *Chamber of Commerce v. Bonta*.[156] Kentucky's KRS 336.700(2), on the other hand, survived a preemption challenge in *Northern Kentucky Area Development District v. Snyder*,[157] but the state legislature subsequently amended the statute to remove its prohibition against requiring employees to sign arbitration agreements.[158] This Part examines the *Bonta* and *Snyder* decisions and argues that *Bonta* was wrongly decided in light of the Supreme Court's textualist shift on the FAA, thus illustrating that future

155. As discussed in the introduction to this Note, these laws prohibit employers from requiring, as a condition of employment, that prospective or current employees waive their right to bring claims against the employer in court. *See, e.g.*, KY. REV. STAT. ANN. § 336.700 (West 2019); CAL. LAB. CODE § 432.6(f) (West 2020).

156. 62 F.4th 473, 478 (9th Cir. 2023).

157. *See* 570 S.W.3d 531 (Ky. 2018).

158. *See* 2019 Ky. Acts 310 (amending KY. REV. STAT. ANN. § 336.700 (West 1994)). Kaentucky's legislature acted quickly, perhaps reflecting deep concerns with the *Snyder* decision.

preemption cases on pre-formation statutes should be decided in states' favor.

### A. A.B. 51 AND KRS 336.700

California's A.B. 51 expressly prohibited employers from requiring their employees to sign arbitration agreements as a condition of employment: "A person shall not, as a condition of employment . . . require an applicant for employment or any employee to waive any" substantive employment rights under California law, "including the right to file and pursue a civil action or a complaint . . . ."[159] A.B. 51 relied on both criminal and civil penalties for enforcement, making it a misdemeanor for an employer to force an employee to sign an arbitration agreement and subjecting the employer to civil damages arising from the employee's lawsuit.[160] The remaining sections of A.B. 51 detail that discrimination, retaliation, and like actions against employees who refuse to waive their rights to a judicial forum are prohibited. Kentucky's KRS 336.700(2) proceeds in similar fashion. It provides that "no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right or benefit to which the employee or person seeking employment would otherwise be entitled under" any federal or state law.[161]

Both statutes fulfill the same purpose: to prohibit requiring a current or prospective employee to sign a predispute arbitration agreement. They differ functionally only in that A.B. 51 protects employees from waiver of their right to litigate claims under California's Labor Code and Fair Employment and Housing Act, while KRS 336.700 protects employees from waiving the right to bring both state and federal claims.

Since each statute clearly disfavors arbitration and creates hurdles to the formation of mandatory arbitration agreements in employment, one might expect courts to hold that the FAA preempts both statutes with a simple citation to the Supreme Court's many FAA preemption cases. After all, in *Concepcion*, the Supreme Court held that the FAA embodies a "liberal federal policy

159. CAL. LAB. CODE § 432.6 (West 2020).
160. Chamber of Com. v. Bonta, 62 F.4th 473, 480 (9th Cir. 2023).
161. 2019 Ky. Acts 310.

favoring arbitration"[162] and announced that state laws which "interfere[ ] with fundamental attributes of arbitration . . . create[ ] a scheme inconsistent with the FAA."[163] Both A.B. 51 and KRS 336.700(2) certainly interfere with the fundamental attributes of arbitration, the most important of which is the waiver of the right to bring claims in a judicial forum.[164]

Both bills would thus appear to be dead to rights. Yet the Kentucky bill survived a preemption challenge at the state Supreme Court,[165] while A.B. 51 was originally upheld by the Ninth Circuit, before it was reversed on rehearing.[166]

The Chamber of Commerce quickly challenged A.B. 51 after its passage, arguing it was preempted by the FAA. Initially, in September 2021, a Ninth Circuit panel held the law was not preempted.[167] The panel found that state laws merely ensuring arbitration agreements are "voluntary and consensual" and do not pose an obstacle to the purposes of the Act.[168] For reasons unexplained, the same panel of judges granted a rehearing in the case nearly a year later, in August 2022.[169] Following rehearing, the Ninth Circuit panel flipped, holding in February 2023 that A.B. 51 was, indeed, preempted by the FAA, with one judge changing his position.[170]

In holding the law preempted under an obstacle preemption analysis, the Ninth Circuit echoed some familiar and unsurprising arguments. For example, by prohibiting employers from requiring employees to waive their rights to a judicial forum, the court found that A.B. 51 "interferes with fundamental attributes of arbitration."[171] The law also implements a "penalty-based scheme to inhibit arbitration agreements before they are formed . . . and is the type of 'device[ ]' or 'formula[ ]' evincing 'hostility towards

162. AT&T Mobility, Inc. v. Concepcion, 563 U.S. 333, 346 (2011).

163. *Id.* at 344.

164. *See, e.g.*, Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000) ("[B]y agreeing to arbitration [the plaintiffs] necessarily waived: (1) their right to a judicial forum, and (2) the concomitant right to a jury trial.").

165. *See* N. Ky. Area Dev. Dist. v. Snyder, 570 S.W.3d 531, 535 (Ky. 2018).

166. *See* Chamber of Com. v. Bonta, 13 F.4th 766, 771 (9th Cir. 2021), *rev'd on reh'g*, 62 F.4th 473, 483 (9th Cir. 2023).

167. *See id.*

168. *Id.*

169. *See* Chamber of Com. v. Bonta, 45 F.4th 1113 (9th Cir. 2022).

170. *Bonta*, 62 F.4th at 483; see *supra* text accompanying note 38 (explaining why the Ninth Circuit was unaware of the Supreme Court's recent arbitration cases when it decided *Bonta*).

171. *Id.* at 483 (quoting AT&T Mobility, Inc. v. Concepcion, 563 U.S. 333, 343–44 (2011)).

arbitration' that the FAA was enacted to overcome."[172] And A.B. 51 is certainly inconsistent with a "liberal federal policy favoring arbitration agreements."[173]

However, the *Bonta* decision was more closely decided than one might expect, with the court in the first instance deciding against preemption.[174] Judge Lucero's dissent provides strong reasons why. While the FAA preempts state laws burdening arbitration agreements, and A.B. 51 appears to do just that, Judge Lucero was persuaded that the statute only regulated actions prior to the formation of a contract.[175] Indeed, the California Assembly took stock of the Supreme Court's hostile attitude toward state arbitration regulations and drafted the law so that, at least on its face, it could be compatible with the FAA by leaving the validity and enforceability of arbitration agreements untouched.[176] Section (f) of A.B. 51 provides: "Nothing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."[177] While state legislatures cannot simply write their way around the Supremacy Clause,[178] Section (f) demonstrates a key difference between A.B. 51 and the state laws the Supreme Court has repeatedly held preempted: A.B. 51 only governs *pre-formation* behavior and does not affect the enforcement or validity of the arbitration agreement itself.[179] The FAA provides only that a "contract" or "an agreement in writing" containing an arbitration clause is "valid, irrevocable,

172. *Id.* at 487 (quoting *Concepcion*, 563 U.S. at 342).

173. *Id.* (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

174. *See* Chamber of Com. v. Bonta, 13 F.4th 766 (9th Cir. 2021), *reh'g granted, op. withdrawn*, 45 F.4th 1113 (9th Cir. 2022), *and on reh'g sub nom*. Chamber of Com. v. Bonta, 62 F.4th 473 (9th Cir. 2023); *see also Ninth Circuit Holds that the Federal Arbitration Act Preempts California's Attempt to Criminalize Employment Arbitration Agreements*, GIBSON DUNN (Feb. 17, 2023), https://www.gibsondunn.com/ninth-circuit-holds-that-federal-arbitration-act-preempts-californias-attempt-to-criminalize-employment-arbitration-agreements/ [https://perma.cc/ZHE8-2HRG].

175. *See Bonta*, 62 F.4th 491–96 (Lucero, J., dissenting).

176. See *id.* at 478 ("Mindful of this history, the California legislature engaged in a prolonged effort to craft legislation that would prevent employers from requiring employees to enter into arbitration agreements as a condition of employment, while avoiding conflict with the FAA.").

177. CAL. LAB. CODE § 432.6(f) (West 2020).

178. U.S. CONST. art. VI, cl. 2; *see also* A BETTER BALANCE, LEGAL STRATEGIES TO COUNTER STATE PREEMPTION AND PROTECT PROGRESSIVE LOCALISM: A SUMMARY OF THE FINDINGS OF THE LEGAL EFFORT TO ADDRESS PREEMPTION PROJECT (2017) (evaluating strategies state and local governments can use to avoid preemption).

179. *See* CAL. LAB. CODE § 432.6(f) (West 2020).

and enforceable."[180] The statute is mum on activity leading up to the formation of such an agreement. For this reason, Judge Lucero dissented in *Bonta*, finding that A.B. 51's "purpose is addressing the conduct that takes place prior to the existence of an agreement, as opposed to dealing with the enforcement of an arbitration clause in an agreement."[181]

For the same reasons, Kentucky's pre-formation statute survived a preemption challenge in *Northern Kentucky Area Development District v. Snyder*.[182] In that case, a unanimous Kentucky Supreme Court held that the FAA did not preempt KRS 336.700(2) because the Kentucky law did not "attack, single out, or specifically discriminate against arbitration agreements."[183] Thus, it did not violate the Supreme Court's equal footing principle.[184] The court reasoned that KRS 336.700(2) did not affect the initial validity of arbitration agreements[185] and only prevented employers "from entering into any agreement whatsoever that conditions employment on the employee's agreement to waive any and all rights against the employer."[186] While the Kentucky Supreme Court did not delve into the details of the distinction between laws governing behavior occurring prior to the formation of an arbitration agreement and those affecting the later enforcement of arbitration agreements, its reasoning betrays an understanding that the two types of arbitration regulation are different.[187]

Several other judges in a variety of forums have distinguished between laws affecting validity and enforceability and those affecting pre-formation conduct.[188] Justice Black, writing in 1967, believed the FAA only exerts its regulatory force once the parties

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180. 9 U.S.C. § 2.

181. Chamber of Com. v. Bonta, 62 F.4th 473, 494 (2023) (Lucero, J., dissenting).

182. *See* 570 S.W.3d 531 (Ky. 2018).

183. *Id.* at 535.

184. *See id.* ("We cannot read KRS 336.700(2) as evidencing hostility to arbitration agreements.").

185. Such a law would have been preempted under *Kindred Nursing Ctrs. Ltd. v. Clark*, which held that "a rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." 581 U.S. 246, 254–55 (2017); *see infra* Part III.A (discussing *Kindred Nursing*).

186. *N. Ky. Area Dev. Dist.*, 570 S.W.3d at 536.

187. *See id.* at 537 ("KRS 336.700(2) is not an anti-arbitration clause provision—it is an anti-employment discrimination provision.").

188. *See, e.g.*, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 412–13 (1967) (Black, J., dissenting); Supak & Sons Mfg. Co. v. Pervel Indus., Inc., 593 F.2d 135, 137 (4th Cir. 1979); Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383, 1385 (W.D. Pa. 1984).

have agreed to a contract, as he expressed in his *Prima Paint* dissent: "Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract exists."[189] This formation-enforceability distinction has found purchase across a number of jurisdictions and in a wide variety of disputes.

In a 1979 decision, *Supak & Sons v. Pervel Industries*, the Fourth Circuit found that the FAA did not preempt Section 2-207 of the Uniform Commercial Code as applied to arbitration clauses in North Carolina.[190] Section 2-207 dictates that a written alteration to an oral agreement is not part of the contract if it materially alters what the parties previously agreed to orally.[191] In *Supak*, the written alteration in question was an arbitration clause, meaning the Fourth Circuit had to reckon with the possibility that the FAA preempts state rules that could be considered hostile to arbitration.[192] The Court found that the addition of the arbitration agreement was a material alteration, and, importantly, held that the FAA does not preempt such a rule because the FAA only applies to contract validity and enforcement, not formation.[193] *Supak* demonstrates the simple logic in distinguishing between regulations affecting pre-formation behavior and those governing enforceability.[194]

Much more recently, Justice Thomas embraced this limited interpretation of the FAA's preemptive scope in his *Concepcion*

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189. *Prima Paint Corp.*, 388 U.S. at 412–13 (1967) (Black, J., dissenting). Justice Black continued: "These provisions were plainly designed to protect a person against whom arbitration is sought to be enforced from having to submit his legal issues as to validity of the contract to the arbitrator. The legislative history of the Act makes this clear." *Id.* at 413.

190. *See Supak & Sons Mfg. Co.*, 593 F.2d at 137.

191. *See* U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM'N 2002) ("The additional terms are to be construed as proposals for addition to the contract.").

192. *See Supak & Sons Mfg. Co.*, 593 F.2d at 136–37.

193. *See id.* at 137 ("By its terms, [Section] 2 [of the FAA] does not apply until the arbitration clause in question is determined to be part of the contract. Section 2 dictates the effect of a contractually agreed-upon arbitration provision, but it does not displace state law on the general principles governing formation of the contract itself.").

194. *See also* Universal Plumbing & Piping Supply, Inc. v. John C. Grimberg Co., 596 F. Supp. 1383, 1385 (W.D. Pa. 1984) (reasoning that Section 2 does not displace rules governing the formation of contracts containing arbitration agreements); Duplan Corp. v. W.B. Davis Hosiery Mills, Inc. 442 F. Supp. 86 (S.D.N.Y. 1977) (holding that Congress did not intend Section 2 of the FAA to create a new body of federal law on arbitration or preempt state laws governing contract formation); Am. Airlines, Inc. v. Louisville & Jefferson Cnty. Air Bd., 269 F.2d 811 (6th Cir. 1959) (finding a distinction between rules affection contract formation and those affecting validity and enforceability).

concurrence.[195] Justice Thomas, who has long resisted the Court's purposivist obstacle preemption jurisprudence,[196] stated that he would have found the *Discover Bank* rule—designating certain arbitration agreements unconscionable[197]—preempted all the same, but because the rule "does not relate to defects in the *making* of an agreement," rather than because it creates an obstacle to the policy objectives of the FAA.[198] He went on to explain that the distinction between enforceability and formation is explicitly written into the FAA itself.[199] Reading Section 2 and Section 4 harmoniously, according to Justice Thomas, requires a finding that Section 2's savings clause, which allows for the revocation of an arbitration agreement on the same "grounds [as exist] for the revocation of any contract," allows parties to challenge the *making* of an arbitration agreement.[200]

In other words, long before the U.S. Supreme Court decided *Badgerow*, *Morgan*, and the like, the idea that pre-formation statutes might survive preemption challenges because they do not affect existing contracts had support from a number of judges at both the state and federal levels, including Supreme Court justices. Significantly, one of the two pre-formation statutes examined in this section actually survived a preemption challenge by unanimous decision while the other was only narrowly struck down. After the Court's recent arbitration decisions, the argument that the FAA does not preempt state laws affecting behavior prior to the formation of a contract is on even better footing.

## B. PRE-FORMATION STATUTES AND PREEMPTION UNDER THE SUPREME COURT'S RECENT ARBITRATION DECISIONS

Because the Supreme Court has so drastically changed its tone with regard to the federal policy favoring arbitration, *Bonta* would likely be decided differently today—or at least, the Ninth Circuit

195. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 353 (2011) (Thomas, J., concurring).

196. *See, e.g.*, Wyeth v. Levine, 555 U.S. 555, 593–94 (2009) (Thomas, J., concurring); David G. Savage, *Thomas Breaks with Conservative Justices to Criticize a Bush-Era Policy*, L.A. TIMES (Mar. 8, 2009), https://www.latimes.com/archives/la-xpm-2009-mar-08-na-thomas8-story.html [https://perma.cc/UC2D-37PA].

197. *See* Discover Bank v. Superior Ct., 113 P.3d 1100 (2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

198. *Concepcion*, 563 U.S. at 353 (Thomas, J., concurring).

199. *See id.* at 354–55.

200. *Id.*

panel would not be able to rely on the same reasoning. This section examines the aspects of *Bonta* that are no longer viable in order to project future pre-formation statutes' likelihood of prevailing on a preemption challenge.

In *Bonta*, the Ninth Circuit considered whether A.B. 51 created obstacles to the achievement of the "purposes and objectives" of the FAA.[201] The panel held that because the FAA was "designed to promote arbitration," any state rules which interfered with the promotion of arbitration must therefore be preempted.[202] The majority went on to reject the argument that A.B. 51 regulates pre-formation behavior rather than arbitration agreements themselves.[203] Finally, the Ninth Circuit found support from a 1989 First Circuit case, *Securities Industry Association v. Connolly*,[204] which held that the FAA preempted a Massachusetts pre-formation statute.[205] As the remainder of this Note will show, the Supreme Court's recent arbitration decisions considerably weaken the panel's reasoning on each of these points. Given how close the *Bonta* decision was, it likely would have been different had the panel taken the recent Supreme Court cases into account.

The *Bonta* panel's reliance on the FAA's broader "purposes and objectives" in finding A.B. 51 preempted was misguided. While the Supreme Court long maintained that the FAA "embodies a 'national policy favoring arbitration,'"[206] such purposivist statements have fallen out of favor in the Supreme Court's recent arbitration cases and thus no longer provide the same support for a finding of preemption. The Supreme Court in *Morgan* held that courts may no longer grant defendants' motions to compel arbitration after those defendants have litigated their cases in court.[207] The Court rejected the defendant's argument that such an arbitration-favoring rule was justified on the basis of the "liberal federal policy."[208] Likewise, in *Badgerow*, the Court again rejected an argument from policy despite the absurd resulting statutory

201. Chamber of Com. v. Bonta, 62 F.4th 473, 482 (9th Cir. 2023).
202. *Id.* at 483 (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011)).
203. *See Bonta*, 62 F.4th at 483–84.
204. 883 F.2d 1114 (1st Cir. 1989).
205. *See Bonta*, 62 F.4th at 485–86.
206. *Id.* at 478 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).
207. *See* Morgan v. Sundance, Inc., 596 U.S. 411, 416 (2022).
208. *Id.*

scheme.[209] Although similar provisions of the FAA would now be governed by different rules concerning the reviewing court's ability to determine jurisdiction—an inconsistency that Justice Breyer, in dissent, argued was likely to "create[ ] unnecessary complexity and confusion"[210]—the Court remained firm in its textualist position. "However the pros and cons shake out," declared Justice Kagan, writing for the majority, "Congress has made its call."[211]

In the same way, Congress "made its call" when it wrote the FAA to govern the "validity and enforceability," of contracts, but not the parties' behavior leading up to formation.[212] While obstacle preemption analysis admittedly invites analysis of policy arguments, the "liberal federal policy" does not justify expanding the FAA to reach before the time of contract formation, given the Court's recent decisions.[213] The *Bonta* panel, already divided and indecisive, likely would have come out the other way had it considered *Badgerow*, *Morgan*, and the Supreme Court's other recent arbitration cases. Central to Judge Ikuta's opinion was the notion that "AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'"[214] The Supreme Court's recent textualist turn has undermined, and perhaps even rejected, the possibility of such a policy justifying an expansion of the statute beyond its textual bounds. With how closely decided *Bonta* was, it is likely that future courts will find against preemption of pre-formation statutes.

Moreover, Judge Ikuta's opinion rested in part on *Securities Industry Association v. Connolly*, which held a similar pre-formation statute preempted.[215] *Connolly*, like *Bonta*, was decided when extant arbitration jurisprudence was far more purposivist. And, like *Bonta*, the *Connolly* court relied almost entirely on policy arguments in striking down the statute at issue: "[T]he federal policy requires that we resolve all doubts in favor of arbitration,

209. *See* Badgerow v. Walters, 596 U.S. 1 (2022); *see also supra* Part I.C (explaining the FAA's inconsistent jurisdictional standards post-*Badgerow*).

210. *Badgerow*, 596 U.S. at 19 (Breyer, J., dissenting).

211. *Id.* at 16–17.

212. 9 U.S.C. § 2.

213. *See infra* Part III.B.

214. Chamber of Com. v. Bonta, 62 F.4th 473, 487 (9th Cir. 2023) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

215. *See id.* at 485 (citing Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114, 1123–24 (1st Cir. 1989)).

finding the Regulations preempted."[216] The First Circuit also dismissed the appellants' argument that the Massachusetts law simply governed pre-formation behavior.[217] The court acknowledged that the Massachusetts law did not "clash head on with" the FAA, but held the statute preempted nonetheless as it conflicted with the FAA's "purposes and objectives."[218] *Connolly* came from a different period of Supreme Court guidance on the FAA. Its value as precedent is severely undermined by recent developments at the Supreme Court, and thus no longer supports the Ninth Circuit's decision in *Bonta* to the extent the *Bonta* majority relied on it. Future courts reviewing pre-formation statutes will not be able to rely so heavily on *Connolly* to justify preemption.

Given the foregoing discussion, the *Bonta* panel's policy *and* precedent arguments are questionable at best. In *Allied-Bruce Terminix v. Dobson*, Justice O'Connor's concurrence described the Supreme Court's FAA jurisprudence as "an edifice of its own creation," untethered from any actual examination of congressional intent with regard to the federal policies the FAA embodies.[219] Justice O'Connor wrote separately to express her concern about the Court's aggrandizement of the FAA. The Court in *Allied-Bruce* held that the FAA applied to any contract which affects commerce, defining "commerce" consistently with the Court's Commerce Clause jurisprudence.[220] As Justice O'Connor noted, the FAA was passed in 1925, a decade prior to the "switch in time,"[221] after which the Supreme Court interpreted Congress' legislative power under the Commerce Clause as extremely broad.[222] Therefore, O'Connor argued, Congress cannot have intended the phrase "a contract evidencing a transaction involving commerce," as used in the FAA, to signify the nearly all-encompassing understanding of commerce

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216. *Connolly*, 883 F.2d at 1123.
217. *See id.* at 1122.
218. *Id.* at 1123.
219. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).
220. *See id.* at 274.
221. In response to President Franklin Roosevelt's threat to pack the Court with Justices supportive of his New Deal agenda, the Supreme Court in 1937 began interpreting Congress' Commerce Clause power far more expansively than it had previously. *See generally* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine!"* 73 OK. L. REV. 229 (2021).
222. *See Allied-Bruce Terminix Co.*, 513 U.S. at 283 (O'Connor, J., concurring).

elucidated by the post-switch Court.[223] It simply could not have expected courts to interpret the statute to sweep so broadly, given the contemporaneous state of Commerce Clause jurisprudence.[224]

Recent cases like *Morgan v. Sundance* show that the Supreme Court is retreating from its previous approach to the policies embodied by the FAA.[225] If the Court's FAA jurisprudence truly is "an edifice of its own creation," then *Morgan* and the other recent arbitration decisions signal that there are cracks in that edifice.[226] In *Morgan*, the Court explained that the liberal federal policy language used so often to expand the FAA's reach is limited to the previously discussed equal-footing principle.[227] And in *Badgerow*, the Court outright rejected policy arguments in favor of a strict textual analysis.[228] These decisions were markedly different from classic FAA preemption decisions such as *Southland*, in which the Court declared that states could not regulate arbitration agreements almost solely due to the "national policy favoring arbitration."[229] They are also quite clearly at odds with the majority's purposivist reasoning in *Bonta*.

In *Bonta*, the Ninth Circuit examined the purposes of the FAA to determine whether A.B. 51 created obstacles to the achievement of those purposes. The primary purpose of the FAA, according to the Ninth Circuit, is not only to effect a "national policy favoring arbitration," but also "to give preference (instead of mere equality) to arbitration provisions."[230] The Court directly abrogated the idea

223. *Id.*

224. *See* David L. Franklin & Steven Greenberger, *"An Edifice of Its Own Creation": The Supreme Court's Recent Arbitration Cases*, 10 DEPAUL BUS. & COM. L.J. 495, 499 (2012) ("[T]he prevailing understanding of Congress's legislative power under the Commerce Clause was much narrower in 1925 than it is today. Recall that the FAA requires courts to honor arbitration clauses arising out of transactions 'involving commerce.' In 1925, Congress could not have had a broad understanding of what was meant by transactions involving commerce.").

225. *See* Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022).

226. Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

227. *See Morgan*, 596 U.S. at 418 ("The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" (quoting Prima Paint Corp., 388 U.S. at 404 (1967)).

228. *See* Badgerow v. Walters, 596 U.S. 1, 15 (2022) ("Walters's more thought-provoking arguments sound not in text but in policy . . . . Even the most formidable policy arguments cannot overcome a clear statutory directive . . . . [W]e cannot find much relevance in his ideas, even if plausible, about the optimal jurisdictional rule for the FAA. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction.") (internal quotations and citations omitted).

229. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

230. Chamber of Com. v. Bonta, 62 F.4th 473, 483 (9th Cir. 2023).

that arbitration is preferable to litigation in *Morgan*, in which the Court held that arbitration favoritism cannot justify expanding the FAA beyond its textual limits—arbitration clauses are to be as enforceable as any other contracts, "but not more so."[231] Any future court examining a pre-formation statute will not be able to point to a policy of favoring arbitration over litigation in order to justify finding the statute preempted by the FAA.

## III. OVERCOMING CHALLENGES TO PRE-FORMATION STATUTES

Two major doctrinal challenges could pose problems for states that pass pre-formation statutes. In *Kindred Nursing Centers v. Clark*,[232] the Supreme Court rejected an argument similar to the one advanced by this Note. *Kindred Nursing* is distinguishable, however, because the rule at issue in that case allowed courts to adjudge the initial validity of arbitration agreements, which is guaranteed under the FAA.[233] Beyond *Kindred Nursing*, obstacle preemption analysis is another challenge. Courts deciding whether a state statute is preempted through obstacle preemption must determine whether that statute interferes with Congress' purposes in passing the federal law.[234] This is an express invitation to examine the policy behind a federal statute. Fortunately, one of the FAA's policies is to respect the parties' wishes where both have consented to arbitration.[235] Pre-formation statutes merely ensure that the agreement is consensual, thus furthering the policy. In addition, a preemption challenge of this kind will provide the Court an opportunity to correct the logical incompatibility of textualism and obstacle preemption.[236]

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231. Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022); *see also* Gilles, *supra* note 136, at 26 (discussing *Morgan*'s holding that the federal policy favoring arbitration no longer justifies making arbitration agreements any more enforceable than other contracts).

232. 581 U.S. 246 (2017).

233. *See* 9 U.S.C. § 2 ("[An arbitration agreement] shall be valid, irrevocable, and enforceable.").

234. Under an obstacle preemption analysis, courts must ascertain whether the state law at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also supra* Part I.B (discussing obstacle preemption and *Southland*).

235. *See, e.g.*, Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion. . . .").

236. *See, e.g.*, Concepcion, 563 U.S. at 353 (Thomas, J., concurring) (explaining concerns with obstacle preemption); Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J. L. & LIBERTY 63 (2010) (criticizing the Supreme Court for its inconsistent application of

### A. DISTINGUISHING *KINDRED NURSING*

Opponents might argue that *Kindred Nursing* poses a major obstacle to pre-formation statutes. In *Kindred Nursing*, the Court considered whether the FAA preempted Kentucky's "clear-statement" rule.[237] In instances where an individual with power of attorney signed an arbitration agreement on behalf of a nursing home patient, the clear-statement rule required a reviewing court to invalidate the arbitration agreement unless the patient had provided express consent for the person holding power of attorney to make an arbitration agreement specifically.[238] Relying on cases like *DirectTV v. Imburgia*,[239] the Court held that such a rule specifically disfavored arbitration agreements and was thus preempted by the FAA.[240]

The respondents, who were suing the petitioner-nursing homes for wrongful death of their family members, among other claims, argued that "Kentucky's clear-statement rule . . . affects only contract formation, because it bars agents without explicit authority from entering into arbitration agreements."[241] Writing for the majority, Justice Kagan rejected the argument, holding that the FAA affects both the enforcement and initial validity of arbitration agreements: "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made."[242]

Skeptics might argue that *Kindred Nursing* wholly dispenses with the possibility of pre-formation statutes surviving preemption. A closer examination of Justice Kagan's language, however, reveals two distinct possibilities for distinguishing the clear-statement rule from pre-formation statutes.

First, courts need not determine the initial validity of arbitration agreements under a pre-formation statute. The argument advanced by the respondents in *Kindred Nursing* would have allowed courts to determine that an arbitration agreement

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obstacle preemption); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991) (arguing that preemption should be used more sparingly).

237. *Kindred Nursing Ctrs. Ltd.*, 581 U.S. at 250–53.

238. *See id.* at 249–51.

239. 577 U.S. 47 (2015).

240. *See* Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. 252, 248 (2017).

241. *Id.* at 254.

242. *Id.* at 254–55.

was invalid because it was not properly formed.[243] Even though a court applying the clear-statement rule is examining activity that occurred prior to the formation of a contract—whether an individual explicitly gave permission for the person receiving power of attorney to make arbitration agreements on their behalf—the fact remains that the court must pass judgment on the validity of the contract after the parties have agreed to the contract. Pre-formation statutes, on the other hand, would not affect the validity of arbitration agreements—they would penalize the act of requiring an arbitration agreement to be signed as a condition of employment, but would not allow a court to hold an arbitration agreement invalid or unenforceable.[244] A.B. 51, for example, renders violation a misdemeanor offense and also opens violating employers to civil liability.[245] The *Kindred Nursing* majority did not discuss such a penalty and thus did not directly reject it like the *Bonta* majority held.[246]

Second, pre-formation statutes do not bar anyone from entering into an arbitration agreement, whereas the clear-statement rule did. Under a pre-formation statute, an employee is perfectly free to agree to arbitrate all disputes arising out of their employment and waive their right to a judicial forum for the resolution of those disputes—but the employer may not require this as a condition of employment. The clear-statement rule differs in that it prevents certain individuals from agreeing to arbitration, namely, those who have received power of attorney from an individual but did not obtain express consent to form arbitration agreements. Pre-formation statutes therefore do not implicate one of Justice Kagan's primary concerns about the clear-statement rule at issue in *Kindred Nursing*—if "[s]tates could just as easily declare everyone incompetent to sign arbitration agreements," such statutes could defeat the FAA entirely.[247] Pre-formation statutes only require

243. *See id.* at 254 ("But, the respondents claim, States have free rein to decide—irrespective of the FAA's equal-footing principle—whether such contracts are validly created in the first instance.").

244. *See* CAL. LAB. CODE § 432.6(f) (West 2020); Chamber of Com. v. Bonta, 62 F.4th 473, 483 (9th Cir. 2023) (Lucero, J., dissenting) ("[I]n *Kindred Nursing*, the Court only addressed pre-agreement behavior to the extent that it challenged the validity of executed contracts. The situation in this case differs, as AB 51 does not impact the validity of the contracts executed under the prohibited pre-agreement behavior.").

245. *See* CAL. LAB. CODE § 432.6(f) (West 2020); *Bonta*, 62 F.4th at 480.

246. *See Bonta*, 62 F.4th at 484 ("*Kindred Nursing* make[s] it clear that state rules that burden the formation of arbitration agreements stand as an obstacle to the FAA.").

247. Kindred Nursing Ctrs. Ltd. v. Clark, 581 U.S. 252, 255 (2017).

consent before an employer and employee agree to arbitration, which is one of the recognized purposes of the Act.[248]

## B. EXPLOITING INCONSISTENCIES IN OBSTACLE PREEMPTION

Another potential problem for pre-formation statutes is the fact that legislative intent is central to obstacle preemption analysis.[249] Courts assessing whether federal law preempts state law consider whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[250] In order to decide whether the state law is preempted, courts must first determine what Congress' "full purposes and objectives" were in passing the statute.[251] If the state law at issue stands as an obstacle to those purposes and objectives, courts will hold the state law preempted.[252] Obstacle preemption analysis thus explicitly requires judges to look beyond the text of a statute to determine legislative intent, which is contrary to the plain-text reading of the FAA adopted by the Supreme Court in recent years and urged by this Note.

This focus on congressional purpose could mean that, despite the Supreme Court's recent willingness to interpret the FAA through a strict textualist lens, when examining a state law under obstacle preemption analysis, the Court could revert to its old understanding of the "liberal federal policy favoring arbitration agreements."[253] In that event, *Badgerow*, *Morgan*, and the Court's other recent arbitration decisions would be far less impactful for the current analysis. Further propelling this argument is the fact that none of the Court's recent cases limiting the extent of the policy

248. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) ("Arbitration under the Act is a matter of consent, not coercion . . . .").

249. *See generally* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000) (providing a detailed account of the doctrine of preemption); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (describing preemption and Congress' ability to supersede any state law in conflict with its regulatory goals); *see also* Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2228–35 (2022) (arguing that the Supreme Court should "rein in its conflict preemption jurisprudence" to allow states to better function as laboratories of democracy).

250. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

251. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."); *see also* Arizona v. United States, 567 U.S. 387 (2012) (classic obstacle preemption case).

252. *See Crosby*, 530 U.S. at 373.

253. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

favoring arbitration were preemption cases. It is thus difficult to predict whether the Court's understanding of the policy goals of the FAA will more closely track *Morgan*,[254] cutting against a preemption finding, or *Concepcion*,[255] cutting in favor, when it decides its next arbitration preemption case.

There are two ways to address the issue. One factor leaning in favor of a finding that pre-formation statutes do not interfere with the purposes of the FAA is that the Court has long held that "[a]rbitration under the Act is a matter of consent, not coercion."[256] Consent has been described as "the first principle that underscores all of our arbitration decisions"[257] and a "basic precept" and "rule[ ] of fundamental importance" for the FAA.[258] It may then be entirely consistent with the purposes of the Act for a state to require consent from each of the contracting parties to an arbitration agreement, as states who pass pre-formation statutes do. Further, employment relationships—which generally exhibit marked power imbalances[259]—are especially appropriate for state regulation ensuring consent.

This issue may also bring the natural tension between the Court's textualist tendencies and purposivist obstacle preemption jurisprudence to a head.[260] It is plainly inconsistent to evaluate some disputes strictly by the text of the statute at hand, excluding all other evidence of legislative intent, and others almost solely based on the Court's interpretation of Congress' purposes in passing the FAA.[261] Preemption challenges to pre-formation

254. *See* Morgan v. Sundance, Inc., 596 U.S. 411, 418 (2022) ("The policy, we have explained, is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to palace such agreements upon the same footing as other contracts.").

255. *See Concepcion*, 563 U.S. at 345 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration.").

256. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

257. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 299 (2010).

258. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 681 (2010).

259. *See* Joseph A. Seiner, *Workplace Power*, 65 B.C. L. REV. 55, 56 (2024) (describing the "unsustainable power imbalance between corporations and their employees").

260. *See Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1056–57 (2013); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 7–8 (2013).

261. While the Supreme Court frequently decides in a manner inconsistent with logic and extant law, consistent application of its own doctrine in this situation would yield a win for critics of arbitration in employment. *See* Adam Liptak, *Supreme Court Justices Admit Inconsistency, and Embrace It*, N.Y. TIMES (Dec. 22, 2014), (on file with the *Columbia Journal of Law & Social Problems*), https://www.nytimes.com/2014/12/23/us/supreme-court-justices-admit-inconsistency-and-embrace-it.html.

statutes perfectly highlight this tension and could leave space for courts to choose to adhere to the text of the FAA over the purposes behind it. In any event, the Court has instructed that "Congress' intent . . . primarily is discerned from the language of the pre-emption statute."[262] Phrased differently, the text of the statute still controls, even when determining Congress' extra-textual purposes for passing the statute. Here, the text of the statute says nothing about behavior leading up to contract formation; it states only that contracts containing arbitration clauses will be "valid, irrevocable, and enforceable."[263] Behavior leading up to contract formation may thus be a "gap" in the legislation left unregulated by Congress—a gap which, notably, may have been intentional.[264] Moreover, the Court has set limits on the use of legislative intent to expand the law beyond the text of the statute: "[N]o legislation pursues its purposes at all costs . . . . [I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."[265]

## CONCLUSION

The Supreme Court's previous reliance on the "federal policy favoring arbitration" to interpret the FAA's preemptive scope expansively was never grounded in the text or history of the Act. Recent arbitration cases indicate that the Court is at least stepping back from its arbitration favoritism of the past. It may now be willing to allow state laws governing behavior left untouched by the text of the FAA to survive. At present, advocates could defend states' pre-formation statutes on these grounds. If the Supreme

262. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996).

263. 9 U.S.C. § 2; *cf.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 353 (2011) (Thomas, J., concurring) (urging different interpretations of the FAA as applied to contract formation as opposed to the contract's continuing validity).

264. Justice Scalia wrote that when a statute leaves something unsaid, it is improper for judges to supply the missing language themselves: "The principle that a matter not covered is not covered is so obvious that it seems absurd to recite it. The judge should not presume that every statute answers every question, the answers to be discovered through interpretation . . . . The traditional view, and the one we support, is to the contrary. The absent provision cannot be supplied by the courts. What the legislature 'would have wanted' it did not provide, and that is an end of the matter . . . . Judicial amendment flatly contradicts democratic self-governance." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 93–96 (2011).

265. Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 646–47 (1990) (quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987);; *see also* Nelson, *supra* note 249, at 280 (discussing the problematic assumption that Congress intends all of its legislation to displace any potentially conflicting state law).

Court were to take up a preemption case involving a pre-formation statute, its current trajectory on arbitration suggests such a statute could receive the Court's blessing. This would be a major breakthrough for anti-arbitration advocates and proponents of workers' rights.