CHAPTER THREE

THE ENFORCEMENT OPPORTUNITY: FROM MASS ARBITRATION TO MASS ORGANIZING

Over the past thirty years, mandatory arbitration clauses have proliferated in employment contracts, preventing more than sixty million American workers from vindicating their civil rights in a courtroom and forcing them to pursue legal claims in private, confidential forums.[1] Nearly twenty-five million workers are also subject to waivers of class or collective actions, rendering many claims, especially low-value wage-and-hour claims, economically irrational.[2] Proponents portray arbitration as merely a shift in forum that promotes more efficient dispute resolution.[3] But the claim-suppressive effects of forced arbitration have eliminated up to ninety-eight percent of all employment claims and virtually insulated employers from liability altogether.[4]

In a poetic turn, mass arbitration has renewed the counteroffensive against arbitration. Mass arbitration is a strategy in which plaintiff-side attorneys file hundreds of near-identical arbitration claims against a single defendant, pressuring them to settle under the weight of significant filing fees.[5] The strategy has recovered more than $300 million for workers and consumers,[6] caused some companies to eliminate arbitration clauses altogether,[7] and, critically, revived the "market" for employment litigation to hold defendants accountable.

Yet mass arbitration does not change the litigation system and working conditions that enabled arbitration clauses to be so devastating in the first place. The private framework of rights enforcement, in which the plaintiffs' and defense bars are engaged in "procedural warfare"[8] and the workers' claims are worthwhile only if profitable, remains the same. The typical employer-employee power structure is disrupted only temporarily, if at all. And as gratifying as it feels to see defendants

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[1] ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2, 10 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/8CV3-UCTP].

[2] *Id.* at 11.

[3] *See infra* notes 17–21 and accompanying text.

[4] *See infra* notes 26–32 and accompanying text.

[5] *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022).

[6] *See* Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021, 7:30 AM), https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000 [https://perma.cc/WUT7-7J9R].

[7] *See id.*

[8] Scott Medintz, *How Consumers Are Using Mass Arbitration to Fight Amazon, Intuit, and Other Corporate Giants*, CONSUMER REPS. (Aug. 13, 2021), https://www.consumerreports.org/contracts-arbitration/consumers-using-mass-arbitration-to-fight-corporate-giants-a8232980827 [https://perma.cc/YW8N-89VV].

"hoisted by [their] own petard,"[9] mass arbitration is likely fleeting: defense firms have released guidance to mitigate mass-arbitration risk,[10] and private arbitration service providers (ASPs) are restructuring payment models, rendering arbitration less effective.[11]

But just beyond mass arbitration lies an opportunity to ensure that even a fleeting phenomenon has lasting structural impact, particularly within low-wage and gig-work industries. This Chapter proposes a novel model of leveraging mass arbitration to facilitate worker organizing, called "mass organizing." Under mass organizing, the culmination of all the effort put into developing and pursuing a mass-arbitration claim is not a settlement. Rather, the ideal outcome is for plaintiff-side attorneys to, through the mass-arbitration process, partner with organizers to fuel the development of collective platforms, enabling continuous worker-centered rights enforcement and political organizing.

Section A provides context regarding how arbitration agreements and class waivers have stymied employment-rights enforcement, and traces the burgeoning phenomenon of mass arbitration, its limits, and the opportunities that plaintiff-side attorneys are leaving on the table. Section B proposes that plaintiff-side attorneys adopt a "mass-organizing model" and outlines how mass arbitration, a significant economic win achievable only through collective power, can be leveraged to catalyze collective action. A mass-organizing coalition would then build around litigation, education, and organizing by partnering with existing platforms like unions and worker centers. Section C considers the benefits of mass organizing, as well as ethical concerns and legal challenges.

Shifting workers' rights enforcement from litigation to organizing is an effort of herculean proportions that requires collaboration among traditionally disconnected groups. But the success of mass arbitration has shown that to win big, the plaintiffs' bar must be creative and rewrite the typical playbook. Mass organizing would fulfill the true potential of mass arbitration and make the most of an enforcement opportunity that may not last long.

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[9] Alison Frankel, *Judge Breyer Rejects $40 Million Intuit Class Settlement amid Arbitration Onslaught*, REUTERS (Dec. 22, 2020, 5:09 PM), https://www.reuters.com/article/legal-us-otc-intuit/judge-breyer-rejects-40-million-intuit-class-settlement-amid-arbitration-onslaught-idUSKBN28W2M5 [https://perma.cc/Y9BW-XZMP] (quoting Judge Breyer).

[10] *See, e.g.*, Michael Holecek, *As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them*, GIBSON DUNN (May 24, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/05/as-mass-arbitrations-proliferate-companies-have-deployed-strategies-for-deterring-and-defending-against-them.pdf [https://perma.cc/VGE3-MRQ8]; Benjamin K. Jacobs et al., *Class Action Roundtable: Cutting Edge Issues Around Mass Arbitration*, MORGAN LEWIS (Sept. 21, 2021), https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2021/morganlewisbockiusllpwebinar_classactionroundtablecuttingedgeissuesaroundmassarbitration.pdf [https://perma.cc/Y2RA-DVZK].

[11] *See* Mark J. Levin, *New AAA Consumer Fee Schedule Addresses Mass Arbitration Costs*, BALLARD SPAHR (Mar. 1, 2021), https://www.consumerfinancemonitor.com/2021/03/01/new-aaa-consumer-fee-schedule-addresses-mass-arbitration-costs [https://perma.cc/PYJ2-TMEY].

A. The Enforcement Crisis

To understand why arbitration clauses and class waivers have devastated employment law and why mass arbitration is no silver bullet, it is necessary to contextualize the system of private law enforcement, which is deeply vulnerable to hurdles that make litigation economically irrational. While mass arbitration has revived employment law, it has two crucial flaws: the strategy does not build resilience against the structural conditions that empowered arbitration agreements, and it may be in danger of being foreclosed by defense-bar and ASP strategies.

1. The Rise of Arbitration and the Death of Employment Law. — The American system of individual-rights enforcement through private litigation rather than centralized state enforcement arose by political design in the 1960s and 1970s, when Congress passed statutes creating private causes of action, including those vindicating workers' rights, such as Title VII of the Civil Rights Act of 1964.[12] This system requires that plaintiffs have the capacity and resources to pursue litigation and that attorneys have the economic incentive to file claims. Congress addressed these limitations in part through fee-shifting provisions, heightened-damages schemes, and claim-aggregation mechanisms.[13] But, almost immediately, the system of so-called "free market" private rights enforcement became a target of political ire and distrust, with special ire reserved for "ambulance chas[ing]" lawyers[14] and the "for-profit civil rights bar."[15] Rather than rescinding statutory substantive rights, the conservative movement imposed procedural roadblocks against rights enforcement through the legislature and a conservative judiciary.[16]

Arbitration has been a highly successful strategy of this conservative judicial project, promoted, supposedly, to combat inefficient and wasteful litigation driven by greedy lawyers.[17] Forced arbitration in consumer and employment contracts prohibits plaintiffs from pursuing claims in court in front of a judge; instead, plaintiffs must pursue their

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[12] 42 U.S.C. §§ 2000e to 2000e-17; *see* STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 4–6, 8–9 (2017); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148–49 (2012).

[13] *See* Sean Farhang, *The Political Development of Job Discrimination Litigation, 1963–1976*, 23 STUD. AM. POL. DEV. 23, 38, 51 (2009); Glover, *supra* note 12, at 1162–63.

[14] Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 379.

[15] *Id.* at 378; *see* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 60 (2015) ("[W]e may well be on our way to a society overrun by hoards of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated." (quoting Chief Justice Burger)); Farhang, *supra* note 13, at 32–34.

[16] *See* BURBANK & FARHANG, *supra* note 12, at 3; Gilles, *supra* note 14, at 389–90; Glover, *supra* note 12, at 1160–75.

[17] *See* STASZAK, *supra* note 15, at 52–53.

claims in a private forum in front of a private arbitrator.[18] Because proceedings take place confidentially and often impose nondisclosure agreements, offenders avoid public accountability for their actions and alienate employees who may be undergoing similar workplace abuses at the hands of a particular employer.[19] Class waivers, which are often embedded within arbitration agreements and prohibit access to class actions, collective actions, or even class arbitration, go even further to make pursuing low-value claims economically irrational.[20]

Early discussions presented arbitration as a more efficient alternative, available in parallel with litigation.[21] But under the weight of Supreme Court precedent that has consistently upheld arbitration agreements and class waivers under the Federal Arbitration Act[22] (FAA) even in adhesive consumer and employment contracts,[23] arbitration has altogether replaced access to the public judicial forum.[24] Legal scholars have extensively criticized arbitration clauses and catalogued their many harms, including not only the structural implications of outsourcing public rights to private arbitration, but also their deleterious impact on a plaintiff's chances of winning a claim, prohibitive fee provisions, troubling lack of transparency, and removal of potentially precedent-setting litigation from the courtroom.[25] Most concerningly, arbitration clauses and class waivers have effectively enabled defendants to avoid accountability altogether; debates regarding the relative cost or efficiency of arbitration compared to litigation are moot when data shows almost no

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[18] *See* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018).

[19] *See* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 8–9 (2022). Although weaponizing arbitration to avoid public accountability has been particularly well documented in cases of sexual assault and harassment, similar concerns apply for other forms of discrimination and wage theft. *See, e.g.*, HUGH BARAN & ELISABETH CAMPBELL, NAT'L EMP. L. PROJECT, FORCED ARBITRATION HELPED EMPLOYERS WHO COMMITTED WAGE THEFT POCKET $9.2 BILLION IN 2019 FROM WORKERS IN LOW-PAID JOBS 1–2 (2021), https://s27147.pcdn.co/wp-content/uploads/Data-Brief-Forced-Arbitration-Wage-Theft-Losses-June-2021.pdf [https://perma.cc/KP28-77S2].

[20] "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.)).

[21] STASZAK, *supra* note 15, at 62–63.

[22] 9 U.S.C. §§ 1–16.

[23] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018); Kindred Nursing Ctrs. Ltd. v. Clark, 137 S. Ct. 1421, 1426–28 (2017); DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 468–71 (2015); *Concepcion*, 563 U.S. at 344–47; Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687–88 (1996).

[24] *See* STASZAK, *supra* note 15, at 62–73.

[25] *See* Gilles, *supra* note 14, at 409–22; 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, 2811 (2015).

consumers or employees actually *do* arbitration.[26] Arbitration clauses suppress claims and thus transform what was a free market for litigation into a *nonexistent* market for arbitration.

Particularly in employment law, the impact of arbitration clauses is staggering and multifold, as the enforcement regime is highly privatized, structurally underenforced, and dependent upon class proceedings. More than ninety-five percent of all federal employment-discrimination or wage-and-hour claims are brought through private litigation rather than government agencies.[27] Employees in nonunionized workplaces face significant enforcement challenges given the costs of bringing a lawsuit, including monetary, time, and opportunity costs, as well as the fear of retaliation, job loss, and stigma from future employers.[28] Individual costs may be so high that pursuing litigation is economically irrational, even if the collective workplace- or society-wide benefits would significantly outweigh individual costs.[29] Collective actions and class actions are therefore critical to make lawsuits more economically rational, especially for wage-and-hour claims in low-wage work.[30]

Arbitration clauses are estimated to have eliminated up to ninety-eight percent of employment claims from being pursued at all.[31] Employers have taken advantage of this claim-suppressive effect: today, more than half of nonunion, private-sector employers mandate arbitration.[32] Consequently, more than half of all workers are now subject to mandatory arbitration, up from as low as two percent in the 1990s.[33] By combining arbitration clauses and class waivers, employers can commit labor violations with impunity, contributing to the estimated fifty billion dollars that are stolen from American workers each year.[34] It is no coincidence that arbitration clauses in employment contracts are particularly prevalent in low-wage work and thereby disproportionately

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[26] Resnik, *supra* note 25, at 2812. Professor Judith Resnik attributes the claim-suppressive effects of arbitration to "the minimal oversight of arbitration's fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions requisite to augmenting complainants' resources, and the limited access accorded third parties to the claims filed, the proceedings, and the results." *Id.* at 2815.

[27] *See* Glover, *supra* note 12, at 1149–50.

[28] *See generally* David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets?* (Nat'l Bureau of Econ. Rsch., Working Paper No. 9565, 2003) (contending that unions and other labor organizations not only assist with implementing labor policies but also reduce the marginal cost of exercising workers' rights).

[29] *Id.* at 11.

[30] *See* Glover, *supra* note 12, at 1184–85.

[31] Glover, *supra* note 5, at 1305; Estlund, *supra* note 18, at 696–97.

[32] COLVIN, *supra* note 1, at 2.

[33] *Id.* at 1.

[34] BRADY MEIXELL & ROSS EISENBREY, ECON. POL'Y INST., AN EPIDEMIC OF WAGE THEFT IS COSTING WORKERS HUNDREDS OF MILLIONS OF DOLLARS A YEAR 2 (2014), https://files.epi.org/2014/wage-theft.pdf [https://perma.cc/YWK8-KL3X].

affect women and Black people,[35] stealing wealth and exacerbating economic inequality.[36]

2. Finding a Way to "Do" Arbitration. — Corporations designed arbitration clauses and class waivers with the assumption that they would suppress claims altogether.[37] To circumvent claims that arbitration agreements are unconscionable, corporations frequently promise they will pay the lion's share of upfront, mandatory arbitration fees charged by ASPs.[38] These fee-shifting-style provisions made arbitration *appear* fairer to courts — but in reality, since so few plaintiffs actually pursue arbitration, corporations rarely incurred these fees.[39] Thus, the arbitration system was not designed to handle the volume of claims actually reflective of the volume of violations.

As Professor J. Maria Glover explains in her seminal paper on mass arbitration, in 2018, the firm Keller Postman[40] began exploiting this weakness by filing thousands of individual arbitration claims at once.[41] Often, the facts pleaded within each claim are nearly identical, but each claim is distinct and traceable to an individual plaintiff.[42] Thus, mass arbitration is particularly time and resource intensive, as attorneys must individually identify each claimant and pay their share of upfront arbitration fees, if any.[43] But, mass arbitration is also more onerous for defendants than class actions, as defendants are exposed to not only massive liability but also tens of millions of dollars in upfront fees alone, without access to an appeal as of right, creating immense pressure to settle.[44] Plaintiff-side attorneys have successfully pursued mass arbitration against gig-economy companies such as DoorDash, brick-and-mortar stores and restaurants such as Family Dollar and Chipotle, and online services businesses such as Peloton.[45] Even a few hundred claimants can impose sufficient pressure to force a settlement, as was

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35 COLVIN, *supra* note 1, at 2.

36 *See* Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 510–13 (2017).

37 Estlund, *supra* note 18, at 682 ("Mandatory arbitration is less of an 'alternative dispute resolution' mechanism than it is a magician's disappearing trick or a mirage.").

38 *See* Glover, *supra* note 12, at 1166–67, 1166 n.136 (citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011)).

39 *See* COLVIN, *supra* note 1, at 11 ("[O]nly 1 in 10,400 employees subject to [arbitration agreements] actually files a claim under them each year.").

40 Formerly known as Keller Lenkner. Sara Merken, *Keller Lenkner Co-founder Departs from Plaintiffs' Law Firm*, REUTERS (Apr. 25, 2022, 4:42 PM), https://www.reuters.com/legal/legalindustry/keller-lenkner-co-founder-departs-plaintiffs-law-firm-2022-04-25 [https://perma.cc/9FJM-WB4Q].

41 Glover, *supra* note 5, at 1323–24.

42 *See id.* at 1334–35.

43 *See id.* at 1288–89, 1334–35.

44 *Id.* at 1328–31; *see also* Joan C. Grafstein, *Yes, You Can Appeal an Arbitration Award*, JAMS (Jan. 28, 2015), https://www.jamsadr.com/publications/2015/yes-you-can-appeal-an-arbitration-award [https://perma.cc/2N4P-8WJC] (clarifying that the grounds for appeal are narrow).

45 *See* Glover, *supra* note 5, at 1323–24.

true with the approximately four hundred individual wage-and-hour claims filed against Buffalo Wild Wings.[46]

Companies have tried various strategies to avoid mass arbitration, including alleging that ASP fees are exorbitant or that the company would prefer to be sued in a class action.[47] The irony that defendants, which have for decades insisted that arbitration agreements should be upheld, now seek to evade arbitration has not been lost on judges, who have expressed little sympathy.[48] Defendants have gone so far as to pursue litigation against ASPs as well.[49] Nonetheless, Keller Postman has reportedly earned more than $375 million in settlements within just a few years.[50]

3. Limitations and Concerns of Mass Arbitration. — Even as mass arbitration has been gaining steam, there are signs the approach is both short lived and structurally flawed. Specifically, restructured arbitration clauses and judicial backlash threaten the potency and viability of mass arbitration. Moreover, the strategy does not go far enough to protect workers' rights against procedural barriers.

As market-driven organizations, ASPs are likely to restructure their fees to accommodate for mass arbitration, as corporate clients will otherwise remove arbitration clauses from contracts altogether or switch to a competitor. DoorDash did exactly this by switching ASPs, upon the advice of Gibson Dunn, when facing a mass arbitration.[51] Doordash's new ASP, the International Institute for Conflict Prevention & Resolution (CPR), implemented "bellwether protocols" that force random individual claims to be arbitrated, supposedly to screen out frivolous claims from the mass arbitration.[52] The American Arbitration Association, too, has released a new sliding scale that charges lower fees per arbitration claim as the number of claims increases.[53]

Defendants have also begun to restructure their arbitration clauses to alleviate the risk of mass arbitration; law firms recommend strategies such as levying deterrent fee-shifting provisions against frivolous claims

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[46] Ben Penn, *Buffalo Wild Wings Case Tests Future of Class Action Waivers*, BLOOMBERG L. (July 12, 2018, 6:16 AM), https://news.bloomberglaw.com/daily-labor-report/buffalo-wild-wings-case-tests-future-of-class-action-waivers [https://perma.cc/6SAW-UZP4]; *see also* Glover, *supra* note 5, at 1346 ("[I]t might only take about 150 cases to generate significant [settlement] pressure for all claims.").

[47] *See* Glover, *supra* note 5, at 1344–46, 1350.

[48] *See, e.g.*, Frankel, *supra* note 9.

[49] *See, e.g.*, Glover, *supra* note 5, at 1347–49.

[50] Randazzo, *supra* note 6.

[51] *See* Susan Antilla, *Arbitration Storm at DoorDash*, AM. PROSPECT (Feb. 27, 2020), https://prospect.org/labor/doordash-company-arbitration-storm-workers [https://perma.cc/QKJ2-N3BV].

[52] *See* Glover, *supra* note 5, at 1368–70; Mitchell L. Marinello, *CPR Issues New Employment Rules and Updates Mass Claims Protocol*, ABA (June 25, 2021), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2021/cpr-issues-new-employment-rules-and-updates-mass-claims-protocol [https://perma.cc/B37A-EPE8].

[53] Levin, *supra* note 11.

and adding premediation requirements with built-in waiting periods.[54] It remains to be seen if any of these strategies would be preempted by the FAA or circumvented through state legislation.[55]

While the judiciary is currently sympathetic to mass arbitration, plaintiff-side attorneys may soon face judicial backlash. First, mass arbitration raises legitimate ethical issues because arbitral settlements lack the oversight of judicially enforced settlements, which ensure attorneys achieve fair outcomes for clients.[56] A defendant could leverage just one unfortunate example of abuse to convince a court to invalidate the scheme altogether. Second, since settlements are based largely on fee pressure, the frequent defense-bar talking point that mass arbitration raises concerns of sham lawsuits has some truth to it. For example, Uber was recently ordered to pay more than $90 million in arbitration fees as a result of thirty-one thousand customers alleging reverse discrimination because Uber Eats had discounted delivery fees only for Black-owned restaurants.[57] Ironically, the customers were represented by a typical defense firm — the same one fighting affirmative action at the Supreme Court in the October Term 2022[58] — and the attorneys defending Uber alleged that the claims sought merely to "prove a political point."[59] The Uber Eats case offers two lessons: first, that like litigation, mass arbitration is not an inherently progressive phenomenon but merely a tool; second, that judges who have previously lauded mass arbitration might, upon seeing more conservatively tilted cases, become increasingly concerned about meritless lawsuits. Regardless of how the judiciary responds, this case is a warning shot to plaintiff-side attorneys that the defense bar, too, can exploit mass arbitration.

Most concerningly, however, mass arbitration does not solve the structural issues that make barriers like class waivers and arbitration clauses so devastating in the first place. As Glover notes, defendants'

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[54] *See* Michael E. McCarthy et al., *Stemming the Tide of Mass Arbitration*, GREENBERG TRAURIG (June 7, 2021), https://www.gtlaw.com/en/insights/2021/6/stemming-the-tide-of-mass-arbitration [https://perma.cc/9577-PEZF]; Jacobs et al., *supra* note 10; Holecek, *supra* note 10.

[55] California, for example, has mandated pursuant to state legislation that defendants pay arbitration fees within a certain timeline of a claim being filed or else forfeit arbitration as a mandatory forum. *See* Alison Frankel, *Calif. Judge Upholds State Law Penalizing Companies for Stalling on Arbitration Fees*, REUTERS (Jan. 20, 2021, 4:49 PM), https://www.reuters.com/article/us-otc-postmates-idUKKBN29P2S3 [https://perma.cc/N4N5-Y9YF].

[56] *See* JASON C. MARSILI, ETHICAL CONSIDERATIONS IN NEGOTIATING AGGREGATE SETTLEMENTS 7–9 (2022), https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2022/midwinter/flsl/ethical-considerations-in-negotiating-aggregate-settlements/ethical-considerations-negotiating-aggregate-settlements.pdf [https://perma.cc/JA2K-NG2B].

[57] Alison Frankel, *Uber Loses Appeal to Block $92 Million in Mass Arbitration Fees*, REUTERS (Apr. 18, 2022, 4:54 PM), https://www.reuters.com/legal/litigation/uber-loses-appeal-block-92-million-mass-arbitration-fees-2022-04-18 [https://perma.cc/4APH-GSZ4].

[58] *Id.*; *see* Stephanie Saul, *A Look at the Lawyers Who Are Arguing in the U.N.C. Case*, N.Y. TIMES (Oct. 31, 2022), https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-lawyers-supreme-court.html [https://perma.cc/VV8C-YZUY].

[59] Frankel, *supra* note 57.

strategies "raise the prospect of protracted procedural warfare — an expensive game of whack-a-mole that . . . consumers, employees, and small businesses are likely to lose."[60] Thus, even if mass arbitration has achieved short-term change, workers' substantive rights remain highly vulnerable to procedural manipulation. And, if the relentless assault on class actions is any indication of where mass arbitration is headed, plaintiff-side attorneys should be worried about its long-term viability.[61] Arbitration clauses are merely the latest iteration of procedural barriers used to steal wealth — and mass arbitration does not build resilience against the next barrier.[62] Admittedly, these flaws are not unique to mass arbitration but reflect the shortcomings of litigation — and as the subsequent section explains, they are flaws that plaintiff-side lawyers can overcome by taking mass arbitration one step further.

B. The Mass-Organizing Model

Mass arbitration finds a way to vindicate workers' rights in a system designed to suppress claims — but it has the potential to do even more to transform workers' rights enforcement altogether. This Chapter posits that the ideal method of legal protection resides in building systems of collective worker power, fueling continuous structural economic and political change.[63] This is not to say that mass arbitration is unhelpful or necessarily counterproductive; public interest practitioners should welcome tangible incremental change as well as more aspirational transformative change. Critically, mass arbitration provides an opportunity to shift practices from the former to the latter.

In what this Chapter refers to as "mass organizing," a successful mass arbitration would not end with a settlement but instead would facilitate continuous rights enforcement by creating collective worker platforms supported by attorneys and organizers. The mass-organizing strategy aims to ensure there is a constant and real guarantor of accountability against an employer for workers' rights violations, including not only ex post consequences for violations but also incentives for ex ante compliance. Mass organizing, thus, has two central goals: first, to ensure enforcement of workers' rights as they currently exist in statutory employment law at the state and federal level; second, to overcome the procedural and structural barriers to bringing a suit.

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60 Medintz, *supra* note 8.

61 *See, e.g.*, *The Supreme Court, 2020 Term — Leading Cases*, 135 HARV. L. REV. 333, 341–42 (2021).

62 *See* Gilles, *supra* note 14, at 374–77. *See generally* Gupta & Khan, *supra* note 36.

63 *See generally* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001) (documenting the relationship between law and organizing through the typical practices of poverty lawyers and discussing the practical and ethical implications of such practices); Gerald P. López, *Living and Lawyering Rebelliously*, 73 FORDHAM L. REV. 2041 (2005) (advancing a "rebellious" paradigm of legal practice that prioritizes community-based problem solving, *see id.* at 2048).

The model this Chapter proposes is flexible and encourages partnering with existing organizations like unions, worker centers, or other employment-focused, community-based organizations. There may be different models of collectives, stretching from industry wide (such as gig workers' organizations) to employer specific (such as a collective of Chipotle workers). The engagement and commitment of plaintiff-side attorneys will likely vary; some attorneys may be highly committed and partner with organizers early in the mass-arbitration process, while others may take a more hands-off approach by contacting plaintiffs, post settlement, to connect them with organizers. While the particulars may differ, the key is that plaintiff-side attorneys and organizers, together, ensure claimants can develop a collective platform that is explicitly and strategically tilted toward organizing further economic action, including pursuing subsequent legal action and political advocacy.

Given the potentially short life of mass arbitration's success, it is all the more critical to ensure plaintiff-side lawyers take full advantage of this fleeting opportunity to transform rights enforcement and prevent the defense bar from erecting ever more procedural hurdles. And even more than typical class proceedings, mass arbitration is particularly well suited to shifting to mass organizing and empowering workers to overcome the traditional collective-agent issues, information gaps, and irrational economics that hinder private rights enforcement.[64]

1. The Hidden Potential of Mass Arbitration. — Mass-organizing models that bud out of mass arbitration will likely have key differences from existing union or worker-center models. Nonetheless, existing collective platforms serve as a source of comparison and inspiration for how well-positioned mass arbitration is to facilitate mass organizing. First, mass arbitration builds a potential membership base by leveraging technological infrastructure that could be transformative for organizing. Second, mass-arbitration claimants are likely to be highly engaged organizers, as they have made it all the way through a lengthy arbitration process and are motivated by a legal win. Finally, mass arbitration has managed to succeed in ubiquitous industries like gig work and low-wage work that have been exceedingly difficult to organize using traditional tools, heightening the stakes of mass organizing as an opportunity.

(a) Building Membership Base and Identifying Potential Organizers. — The earliest, and one of the most difficult, aspects of organizing workers is building a membership body. Worker centers, for example, often need to engage in campaigns using "word-of-mouth, radio and TV ads, flyers, door-to-door campaigns in target neighborhoods, and announcements at churches or religious centers."[65] Additionally,

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[64] *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 8–9 (1984) (arguing that workers' rights present a public-good problem); Weil, *supra* note 28, at 11 (same).

[65] Chesa Boudin & Rebecca Scholtz, *Strategic Options for Development of a Worker Center*, 13 HARV. LATINO L. REV. 91, 98 (2010).

organizers must identify workers who are well known, knowledgeable, and able to connect with and organize their coworkers.[66]

The process of identifying claimants, the most expensive and time-consuming aspect of mass arbitration, is thus also its most valuable for organizing purposes. Unlike class actions, mass arbitration requires attorneys to invest significant effort, upfront, to "identify, notify, contact, and ultimately retain" clients.[67] In addition to merely finding plaintiffs, then, attorneys must persuade plaintiffs of the strength of their claims and convince them to undergo the lengthy filing process.[68] Moreover, attorneys must harness highly sophisticated social media targeting tools to identify claimants and leverage proprietary software for claim management.[69] While many mass arbitrations in employment thus far have built off of Fair Labor Standards Act[70] (FLSA) collective actions, providing at least a starting base of claimants, there are notable exceptions.[71] For example, the mass arbitration against Family Dollar began organically; Glover attributes this success to workers being "connected and vocally disgruntled about wage theft."[72] Disparate minimum-wage workers at a brick-and-mortar, national-chain dollar store aren't typically workers considered to be "well connected" — but marketing and technology brought together nearly two thousand claimants.[73]

Beyond the difficulties from the attorney's side in the needle-in-a-haystack marketing search, individual workers also face time and opportunity costs, in addition to retaliation concerns. Under these conditions, an image emerges of the types of workers who are willing to join mass arbitrations. First, these workers are more likely to be concerned about employers violating their rights. Second, the lengthy timeline and various steps involved indicate these workers are engaged in the process of holding their employers accountable; they are not simply passively filling out an online form as in a class action but engaging directly with attorneys and tracking their claims.[74] Third, these workers are more likely to be willing to stick their necks out and take on the costs associated with pursuing litigation, as they have already done so in arbitration.

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[66] *See, e.g.*, Sameer M. Ashar & Catherine L. Fisk, *Democratic Norms and Governance Experimentalism in Worker Centers*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 141, 170–72; Jane McAlevey, *The Crisis of New Labor and Alinsky's Legacy: Revisiting the Role of the Organic Grassroots Leaders in Building Powerful Organizations and Movements*, 43 POL. & SOC'Y 415, 424–25 (2015); *see also* Sam Gindin, *The Power of Deep Organizing*, JACOBIN (Dec. 8, 2016), https://www.jacobinmag.com/2016/12/jane-mcalevey-unions-organizing-workers-socialism [https://perma.cc/T4SM-AUPR] (summarizing Jane McAlevey's approach to organizing, which requires reaching indifferent workers, centering class struggle, and identifying organic leaders).

[67] Glover, *supra* note 5, at 1330.

[68] *See id.*

[69] *Id.* at 1336, 1338–39.

[70] 29 U.S.C. §§ 201–219.

[71] Glover, *supra* note 5, at 1333.

[72] *Id.*

[73] *Id.* at 1348 n.344.

[74] *See id.* at 1336 n.282.

Thus, mass-arbitration claimants are more likely to be open to forming organizations — and perhaps organizing others.

Plaintiff-side attorneys' technological tools would also be invaluable for organizers who, based on their expertise,[75] might trade best practices with attorneys on how to increase the number of workers engaged in mass arbitrations. The mutual expertise that attorneys and organizers can share is thus critical not only to increasing the potency of any individual mass arbitration but also to ensuring a sustainable platform with growing membership and growing strength beyond initial litigation.

(b) Winning Early, and Winning Together. — Mass arbitration is successful through the collective power of hundreds of individual claims, manifesting the value of collaborating with coworkers and organizing as a tactic. As a result, organizing momentum could be fueled from the start by an inspiring, collective win with economic, social, moral, and political consequences. And, in the world of organizing, "success breeds success and failure breeds failure."[76] Leveraging early legal wins as a platform for organizing "increases not only the chances that those nascent efforts will succeed but also the likelihood that workers will engage in and be able to succeed at subsequent and stronger forms of collective action."[77] As some worker centers have recognized, it can also be helpful to leverage litigation in early stages of organizing to identify and develop key worker-organizers' leadership skills.[78] There are limits, however, to the parallels between participation in a mass arbitration and participation in a true organizing campaign. From any one worker's perspective, pursuing their individual arbitration claim may not *feel* collective, especially if attorneys do not stress how the success of their claim depends on the aggregation of violations across their coworkers. As described in section C.1, some of these limitations may be mitigated if attorneys and organizers forge strong relationships early in the litigation process.

Successful organizing campaigns require moral, symbolic, and social capital; workers must demonstrate that their campaigns support important moral norms and gain the attention of important players like legislators and the media.[79] By beginning organizing with a legal win, workers have already gained moral capital by leveraging the expressive censure of the law against their employer. State courts and legislatures that disagree with the Supreme Court's decidedly proarbitration

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[75] *See* McAlevey, *supra* note 66, at 424–28 (describing organizers' role in motivating workers and identifying organic leaders).

[76] Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2690 (2008).

[77] *Id.*

[78] Ashar & Fisk, *supra* note 66, at 159–60.

[79] *See* César F. Rosado Marzán, *Worker Centers and the Moral Economy: Disrupting Through Brokerage, Prestige, and Moral Framing*, 2017 U. CHI. LEGAL F. 409, 415–21 (2018).

jurisprudence have long tried to skirt the FAA,[80] and even Congress has demonstrated it is willing to reconsider the merits of arbitration with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021.[81] Coupled with the headline-grabbing dollar amounts that mass arbitration often wins,[82] the momentum from a mass-arbitration victory enhances not only worker support for organizing but also critical public and political support.

(c) Reaching Historically Challenging Workplaces. — Mass arbitrations have managed to engage workers in industries that are traditionally very difficult to organize, including minimum-wage retail work and gig work.[83] For gig work in particular, the lack of a traditional workplace not only hinders workers from interfacing but also prevents workers from being able to demonstrate their displeasure at a physical worksite and inspire further boycotting.[84] It is unclear if previous attempts at gig-work boycotts and strikes have been effective.[85] To hinder organizing and rights enforcement, tech companies have also orchestrated multiple campaigns to ensure drivers are classified as "independent contractors" and hence unable to access the legal protections that are available for employees.[86]

While these barriers have quashed traditional organizing methods, mass arbitrations have proliferated against companies like Doordash and Postmates.[87] Gig-economy work is ubiquitous: from August 2020 to August 2021, nine percent of U.S. adults engaged in gig work, and sixteen percent of adults reported having ever done gig work.[88] Even the largest employer in the nation, Walmart, employed only around one

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[80] *See* Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–65 (2015).

[81] 9 U.S.C. §§ 401–402.

[82] *See supra* note 50 and accompanying text.

[83] *See* Avery Hartmans, *A Surge in Retail Union Organizing Is the Surest Sign Yet that Workers Are Fed Up*, INSIDER (Mar. 26, 2022, 7:25 AM), https://www.businessinsider.com/retail-unions-rise-worker-frustration-covid-pandemic-2022-3 [https://perma.cc/EAZ3-CHZM]; Ken Green, *Unionizing the Gig Economy: A Path Forward for Gig Workers*, UNIONTRACK: BLOG (Aug. 30, 2021), https://uniontrack.com/blog/unionizing-the-gig-economy [https://perma.cc/5R7C-XSVY].

[84] *See* Whitney Kimball, *The Case for Virtual Picket Lines*, GIZMODO (Apr. 12, 2021), https://gizmodo.com/the-case-for-virtual-picket-lines-1846654139 [https://perma.cc/UGN2-HFX7]; Green, *supra* note 83.

[85] *See WCP: The Challenges of Organizing "Gig" Workers*, KALMANOVITZ INITIATIVE FOR LAB. & WORKING POOR (Apr. 29, 2019), https://lwp.georgetown.edu/visitingscholars/wcp-the-challenges-of-organizing-gig-workers [https://perma.cc/EJP2-5BLV].

[86] *See, e.g.*, John Kingston, *East Coast's Prop 22? Massachusetts Facing Potential Vote on Gig Driver Status*, FREIGHTWAVES (Feb. 22, 2022), https://www.freightwaves.com/news/east-coasts-prop-22-massachusetts-facing-potential-vote-on-gig-driver-status [https://perma.cc/MNP9-A6BC].

[87] Glover, *supra* note 5, at 1327.

[88] Monica Anderson et al., *The State of Gig Work in 2021*, PEW RSCH. CTR. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021 [https://perma.cc/8DTY-QBGP].

percent of the U.S. labor force in 2022.[89] Evidently, whichever group cracks the code on organizing gig work could have massive (and perhaps international) potential to transform the economy in favor of worker power.[90] Moreover, social media posts indicate that at least some mass-arbitration claimants work across multiple gig-work platforms, indicating a potential for sectoral organizing.[91]

The success of mass arbitration at Family Dollar is perhaps even more shocking. Two serious and publicly visible attempts to organize workers at dollar stores within the past five years were both unsuccessful.[92] There is incredible potential in organizing dollar stores, which have more physical locations than Walmart and McDonald's combined,[93] and frequently have misclassification and workplace-safety violations.[94] Given the success of mass arbitration in large industries that are traditionally difficult to organize, plaintiff-side attorneys should ensure that it is leveraged to transform rights enforcement sustainably.

C. Strategy of a Mass-Organizing Platform

Through mass arbitration as it exists today, plaintiff-side attorneys have already identified highly engaged worker-organizers, particularly in high-potential industries, and energized them with early wins. Mass organizing takes these efforts a step further to create a sustainable platform for continual rights enforcement, lowering the typically high tangible and intangible costs of raising workplace claims.[95] Mass-organizing platforms would leverage three primary strategies: first, rights enforcement through litigation, including mass or individual arbitration, and class actions or individual lawsuits;[96] second,

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[89] *Compare* Melissa Repko, *Walmart Lays Off Corporate Employees After Slashing Forecast*, CNBC (Aug. 4, 2022, 10:44 AM), https://www.cnbc.com/2022/08/03/walmart-lays-off-corporate-employees-after-slashing-forecast.html [https://perma.cc/T3NV-GG5E] ("Walmart is the largest employer in the country, with nearly 1.6 million workers in the U.S."), *with Civilian Labor Force Level*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/CLF16OV [https://perma.cc/Z9ZC-M6WB] (tallying the labor force at roughly one hundred and sixty million workers in 2021).

[90] *See WCP: The Challenges of Organizing "Gig" Workers*, *supra* note 85.

[91] *See* u/devildug1_, REDDIT: R/POSTMATES (June 8, 2021, 9:38 PM), https://www.reddit.com/r/postmates/comments/nvk5ei/hey_everyone_hope_all_is_well_just_got_an_email [https://perma.cc/328S-WDP3] (featuring commenters sharing their experiences with actions against several gig platforms at once).

[92] *See* Greg Jaffe, *The Worker Revolt Comes to a Dollar General in Connecticut*, WASH. POST (Dec. 11, 2021), https://www.washingtonpost.com/nation/interactive/2021/worker-revolt-comes-dollar-general-connecticut/ [https://perma.cc/ZMZ2-NYZQ].

[93] *Id.*

[94] *Senator Murray Pushes to Protect Workers at Dollar Store Chains, After Reports of Egregious Labor Violations*, U.S. SENATE COMM. ON HEALTH, EDUC., LAB. & PENSIONS (Apr. 22, 2022), https://www.help.senate.gov/chair/newsroom/press/senator-murray-pushes-to-protect-workers-at-dollar-store-chains-after-reports-of-egregious-labor-violations- [https://perma.cc/MS9V-WA8D].

[95] *See supra* notes 27–29 and accompanying text.

[96] The nature of litigation would depend on what options are available. For example, an employer might eliminate arbitration clauses and class waivers after an initial mass arbitration, which would enable pursuing class actions.

worker-rights education and dialogue between workers, uncovering potentially illegal employer actions; and third, political organizing, particularly as it relates to enforcing workers' rights.

The combination of litigation, training, and political organizing draws from union and worker-center models,[97] and is intended to build solidarity among workers while helping uncover rights-enforcement needs and opportunities. Within a particular industry or among a particular group of workers in low-wage work or gig work, there are likely various potential claims under state and federal employment law, and perhaps opportunities to include consumer-based[98] or antitrust lawsuits.[99] However, some of these claims may become apparent only through engagement between organizers, workers, and attorneys, such as through rights education and training.[100] By understanding what workers are aiming to achieve, attorneys can achieve more ethical and more helpful remedies. For example, in Lyft's 2016, $12 million settlement with workers, plaintiff-side attorneys at Outten & Golden secured important injunctive wins, such as limiting Lyft's at-will termination policy, based on workers' concerns.[101] In the political prong of mass organizing, the primary goal should be to organize against procedural hurdles that hinder rights enforcement, such as worker-classification legislation funded by Uber and Lyft,[102] and in favor of state and federal legislation that can meaningfully increase the success of potential claims, such as the Forced Arbitration Injustice Repeal Act.[103]

Political organizing, educational trainings, and demonstration capabilities can also be important to combat tactics corporations are leveraging to skirt the law and avoid the consequences of mass arbitration, such as DoorDash's attempts to change its ASP in the middle of a mass-arbitration campaign.[104] Employees may be more motivated to organize when they know of the great lengths employers take to avoid accountability. Moments like this would be ideal for mobilization of workers through direct actions, boycotts, and awareness campaigns to incense politicians and the public. Ideally, political organizing would help spur

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97 *See, e.g.*, Ashar & Fisk, *supra* note 66, at 159–62; Benajmin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 152–53 (2013).

98 *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Sues Uber for Overcharging People with Disabilities (Nov. 10, 2021), https://www.justice.gov/opa/pr/justice-department-sues-uber-overcharging-people-disabilities [https://perma.cc/X7L4-GHER].

99 *See, e.g.*, Mike Leonard, *Uber Appears to Settle Last Major Antitrust Challenge by a Rival*, BLOOMBERG L. (Aug. 27, 2021, 11:40 AM), https://news.bloomberglaw.com/tech-and-telecom-law/uber-appears-to-settle-last-major-antitrust-challenge-by-a-rival [https://perma.cc/W8PS-BE2V].

100 *See* Cummings & Eagly, *supra* note 63, at 483–84.

101 Benjamin Sachs, Editorial, *Liss-Riordan Statement on Lyft Settlement*, ONLABOR (Jan. 29, 2016), https://onlabor.org/liss-riordan-statement-on-lyft-settlement [https://perma.cc/38RD-7TRN].

102 Jacob Silverman, *The Battle over the Future of Gig Work Isn't Even Close to Finished*, NEW REPUBLIC (Aug. 23, 2021), https://newrepublic.com/article/163343/proposition-22-uber-lyft-drivers-labor-wages [https://perma.cc/TP7C-S38A].

103 H.R. 963, 117th Cong. (2021).

104 *See supra* notes 51–52 and accompanying text.

the "significant policy reforms" necessary to protect rights enforcement, including eliminating arbitration and class waivers altogether and preventing other procedural barriers from cropping up.[105]

1. Structure, Partnership, and Co-optation versus Cooperation. — Partnerships between plaintiff-side attorneys and grassroots organizations raise concerns of striking the right balance between law and organizing. Developing the structure of mass organizing thus implicates intertwined challenges across what the role and engagement of plaintiff-side attorneys should be, which organizations attorneys should partner with, and how concerns of co-optation versus collaboration between attorneys, organizers, and workers should be managed.

Law-and-organizing strategies, especially when led by attorneys who may be from elite backgrounds and often lack prior organizing experience, are frequently criticized for their inability to build trust among low-wage workers; yet, at the same time, lawyers are also uniquely positioned to navigate the procedural hurdles necessary to lead economically successful legal campaigns.[106] Mass organizing proposes to bridge this gap by placing attorneys in a position to do what they do best: achieve legal wins amid procedural complexity. This would help overcome the traditional distrust of lawyers by grassroots organizations and deliver tangible economic benefit to workers — and energize lawyers by magnifying their impact.[107] Organizing, by contrast, should be led by those with experience and expertise, through partnerships with unions and worker centers, and by empowering worker-organizers.

There is a wide array of plaintiff-side firms, with varying levels of investment in pursuing more sustainable change for workers. In the most robust vision of mass organizing, plaintiff-side attorneys in the early stages of a mass arbitration would partner with organizers when identifying potential claimants and trade best practices across technology and worker mobilization; early partnerships are likely to lead to more robust collective platforms. Even in the weakest form of mass organizing, however, attorneys may assist organizers by "handing off" the group of workers following a mass-arbitration settlement and sharing the contact information of consenting workers, accompanied by potential leads of which workers might be targets for longer-term organizing. Mass organizing is experimental and flexible rather than a one-size-fits-all approach; the perfect need not be the enemy of the good.

The organizations that plaintiff-side attorneys can partner with, whether unions or worker centers, are flexible as well. Both organizational forms employ similar strategies in organizing, particularly leveraging momentum from successful employment litigation to mobilize

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105 *See* Medintz, *supra* note 8 (quoting Professor Glover).

106 *See* Cummings & Eagly, *supra* note 63, at 493–94 (discussing the "contradictory picture" that law-and-organizing proponents paint of lawyering, *id.* at 494).

107 *See id.* at 494–95.

workers.[108] However, there are key differences between unions and worker centers *post*-organizing that are important for plaintiff-side attorneys to consider beforehand, to ensure appropriate fit with their group of claimant-workers.[109] Typically, unions are most successful in high-density industries where workers can achieve collective bargaining agreements guaranteeing rights, wages, and benefits above the statutorily set floor, and create a continuous threat of enforcement through a grievance mechanism.[110] Organizing through nontraditional platforms, like worker centers, can be preferable to unionizing. First, not all workers are necessarily interested in collective bargaining, even if they want their *minimum* substantive rights to be respected.[111] Second, several of the primary benefits of unionization, like increased stability and job security, may be less important to gig work or low-wage industries;[112] instead, this type of work is typically plagued with wage-and-hour violations and harassment — protections that are guaranteed by traditional employment law rather than labor law.[113] Third, unionizing campaigns are particularly prone to managerial attacks, whereas models that focus on enforcing statutory rights rather than collective bargaining may be less likely to suffer from such concentrated attacks.[114] Finally, the National Labor Relations Board[115] (NLRB) is notorious for working at a glacial pace, particularly compared to courts in the private-enforcement model.[116] Unlike unions, however, worker centers tend to be organized more loosely, with fewer members and less institutional knowledge and expertise, which can decrease their political and economic leverage.[117]

Worker centers, which have typically been popular among immigrant communities working in informal industries and among highly subcontracted workforces, are community-based, worker-led organizations that "engage in a combination of service, advocacy, and organizing to provide support to low-wage workers";[118] they emphasize worker empowerment and "developing a base of workers to take action on their

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[108] *See* Jennifer Hill, *Can Unions Use Worker Center Strategies? In an Age of Doing More with Less, Unions Should Consider Thinking Locally but Acting Globally*, 5 FIU L. REV. 551, 568–72 (2010).

[109] *See id.* at 572–76.

[110] *See id.* at 573; *see also* Charles O. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U. L.Q. 3, 18; 29 U.S.C. § 158(d).

[111] *See* Sachs, *supra* note 97, at 153.

[112] KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 203 (2004).

[113] *See* Sachs, *supra* note 76, at 2701–02.

[114] *See* Sachs, *supra* note 97, at 156–57.

[115] 29 U.S.C. § 153.

[116] *See* Sachs, *supra* note 76, at 2707–08.

[117] *See* JANICE FINE, ECON. POL'Y INST., WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 19 (2005), https://files.epi.org/page/-/old/briefingpapers/159/bp159.pdf [https://perma.cc/5XCM-PM8X].

[118] *Id.* at 3; *see also* Janice Fine, *New Forms to Settle Old Scores*, 66 INDUS. RELS. 604, 609 (2011).

own behalves."[119] Worker centers vary greatly. Some models are industry wide, while others focus on a particular geography or ethnic community, address abusive practices at individual companies, or lead individual one-off campaigns.[120] There are several organizations already dedicated to organizing low-wage workers and gig workers. For example, both Gig Workers Rising and Rideshare United were founded in 2018 with the explicit goal of organizing workers and engaging in demonstrations, such as against Proposition 22 in California,[121] and the New York Taxi Workers Alliance, a long-standing worker center that has organized drivers for more than two decades, has achieved significant wins in medallion debt forgiveness and unemployment insurance for rideshare drivers.[122] Restaurant Opportunities Center, United (ROC) has been politically successful by engaging in litigation and policy strategies across the nation.[123] In recent years, labor unions, too, have established formal ties with worker centers, strengthening their national and global reach.[124]

Partnership between plaintiff-side attorneys and organizers raises questions of mission and ethics. Generally, the strongest worker centers and unions are highly democratic institutions in which "workers directly participate in decision-making."[125] Existing grassroots organizations may be hesitant to partner with attorneys who are somewhat "resistant to the idea of workers learning to resolve problems on their own, *without* relying on a lawyer."[126] Mass organizing as a strategy, then, is in limbo between a traditional firm model, which may be antithetical to grassroots organizing, and a worker-center model, which is often committed to putting workers in the driver's seat. One can imagine that mass organizing might be attacked from the right *and* the left for co-opting radical language and some of the structure of worker centers and unions, while potentially limiting democratic practices due to its focus on litigation. Still, plaintiff-side attorneys and worker centers likely have the potential to learn from each other and collaborate in creative partnerships that achieve both short-term economic gains for workers and long-term aspirational change.[127]

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119 Fine, *supra* note 118, at 607; *see* FINE, *supra* note 117, at 5–7.

120 *See* FINE, *supra* note 117, at 5–7.

121 *About Us: Building a Movement for All Gig Workers*, GIG WORKERS RISING, https://gigworkersrising.org/get-informed [https://perma.cc/D8JP-YN4P]; *About Us*, RIDESHARE DRIVERS UNITED, https://www.drivers-united.org/about-us [https://perma.cc/228G-F4MN].

122 *Our Victories*, N.Y. TAXI WORKER'S ALL., https://www.nytwa.org/our-victories [https://perma.cc/F4BL-63R5].

123 *See* Boudin & Scholtz, *supra* note 65, at 103.

124 *See* Janice Fine, *Worker Centers: Entering a New Stage of Growth and Development*, 20 NEW LAB. F. 44, 48 (2011).

125 Boudin & Scholtz, *supra* note 65, at 98; *see also* Hill, *supra* note 108, at 582.

126 Saru Jayaraman, *Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers*, 27 N.Y.U. REV. L. & SOC. CHANGE 103, 105 (2001) (emphasis added).

127 *See, e.g.*, *supra* notes 75–78 and accompanying text.

2. Funding Models, Membership, and Ethical Concerns. — Attorneys and organizers are likely to face conflicting goals and must address tradeoffs between financial incentives and the strength of the collective organization they are building. For example, organizers may want to mandate that claimants commit a certain amount of time or effort to furthering the worker collective as a condition of joining the mass arbitration. This could potentially dissuade workers from joining, thereby decreasing the financial returns from mass arbitration, while furthering the strength of the organization in the long term. These concerns are salient for movement lawyers, who are careful to grapple with the ethical concerns of client representation much more deeply than traditional legal conflict-of-interest principles envision.[128] Although "no existing legal ethics principle holds movement lawyers accountable for the choice of whom to represent in the first instance,"[129] organizers and attorneys should ideally work through these concerns early in their partnership.

Funding for the ongoing collective platform also raises practical challenges and highlights the ethical concerns with which movement lawyers frequently grapple.[130] Unions typically collect dues as a small percentage of the wage premium they achieve for workers.[131] Beyond funding organizations, dues payments also serve an important practical function of building stronger relationships between the worker and the union; dues payments ensure that workers feel as though they are owed something by the organization and that they have a right to be served.[132] This creates a more robust link between the organization and the workers and motivates workers to hold the organization accountable to recoup their investment.[133] However, most worker centers do not collect dues: "Some groups aren't sure they believe in it on principle, some groups just don't think it is realistic, and others believe in it but haven't figured out how to do it consistently."[134] Instead, worker centers have largely depended on grant funding from foundations, which can at times lead to unstable budgeting.[135] Funding has historically been challenging for worker centers, and some scholars have suggested they partner with established unions, which typically have more funding resources because of dues collection.[136] At the same time, cementing membership through dues has drawbacks as well: "[T]he time that activists spen[d] organizing formal organizations (e.g., 'collecting dues cards' and

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128 *See* Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 460–61 (2018).

129 *Id.* at 461.

130 *See* Cummings & Eagly, *supra* note 63, at 502–13.

131 *See* MARSHALL GANZ, WHY DAVID SOMETIMES WINS: LEADERSHIP, ORGANIZATION, AND STRATEGY IN THE CALIFORNIA FARM WORKER MOVEMENT 99 (2009).

132 *See id.* at 99–101.

133 *See id.*

134 FINE, *supra* note 117, at 16.

135 *Id.* at 17.

136 *See* Boudin & Scholtz, *supra* note 65, at 121–22.

'writing constitutions') could [be] spent maximizing disruption and forcing concessions."[137] The mass-organizing model has a third option beyond dues and grants: payment via settlement fees, in which case ethical concerns regarding dues may be compounded with those around settlement.[138] Mass arbitration has produced significant settlements, and an appropriate middle ground may be requiring that workers provide a certain percentage of the recouped settlements specifically toward paying organizers and other nonattorneys contributing to mass organizing.

D. The Benefits and Legal Limitations of Mass Organizing

With a model of mass organizing sketched out, it's important to tally the scorecard of how it compares to mass arbitration alone. This section also begins to explore its legal implications, including legal regimes that can protect workers who engage in mass organizing, and the potential restrictions that hinder them from pursuing collective action.

1. Benefits of Mass Organizing. — The mass-organizing model delivers tangible and intangible benefits to workers incremental to those achieved through mass arbitration alone, and offers a win-win for attorneys and organizers. In the legal world, and particularly in the workers' rights arena, litigation and organizing have traditionally been considered polar opposites, as the former regime is controlled by private enforcement in employment law, while the latter is typically done via unionization under the National Labor Relations Act[139] (NLRA).[140] Mass organizing pulls from the best of each of these practices, and aligns with a growing body of scholarship arguing there is immense potential for change through the combination of collective action and employment litigation, absent traditional unionization.[141]

Worker-centered and worker-led enforcement through mass organizing provides an optimal middle ground between fully private and fully public enforcement. While public enforcement is subject to interest-group capture and political swings,[142] workers always have their own interests in mind in terms of rights enforcement.[143] And particularly in employment contexts, the best source for understanding harms that have occurred is often the workers themselves[144] — although these workers may not know their legal rights or have the

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[137] Rosado Marzán, *supra* note 79, at 416 (quoting FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL, at xxi–xxii (1979)).

[138] *See generally* Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1 (2018) (contending that in public interest suits, clients may irrationally refuse settlement as they do not pay legal fees, straining the limited resources of public interest attorneys).

[139] 29 U.S.C. §§ 151–169.

[140] *See* Sachs, *supra* note 76, at 2685–90.

[141] *See id.*

[142] *See* Glover, *supra* note 12, at 1153–55.

[143] *See* Weil, *supra* note 28, at 23–27.

[144] *See* Glover, *supra* note 12, at 1154.

capacity to vindicate their interests.[145] Organized workers overcome the information gap, individual costs, and retaliation fears that traditionally suppress claims through a collective agent that gathers and disseminates information, engages in advocacy and litigation, and protects individuals from blowback, equipped with the protective power of the employment law antiretaliation scheme that threatens hefty fines.[146] Most importantly, collective enforcement returns the threat of employer accountability, heightens the chance of ex ante compliance with the law, and increases the likelihood of achieving critical policy change.[147]

Although not necessarily under a formal union model, the ethos of mass organizing, with a focus on collective power, is similar to that driving unions. Notably, the paradigm shift from public enforcement of individual rights to private enforcement coincided with the beginning of the slow decline of labor power.[148] The decline in union membership[149] and Congress's inability to reform labor laws[150] have correlated with increasing wealth inequality,[151] wage stagnation,[152] and racial or gender-based wealth gaps.[153] Mass organizing seeks to contribute to reviving the tradition of collective action with society-wide impact.

Mass organizing must benefit plaintiff-side attorneys as well in order to incentivize shifting away from the current model of individual litigation. Such incentives may be economic: by building a stronger relationship with grassroots organizations and workers, plaintiff-side attorneys have access to engaged, informed, and organized workers who can recognize violations of their rights and more easily raise claims to be pursued in mass arbitration, class or collective actions, or even individual arbitrations.[154] If engaged early in the process, organizers may assist

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145 *See* Weil, *supra* note 28, at 8–11.

146 *See id.* at 12–13.

147 *See* FREEMAN & MEDOFF, *supra* note 64, at 10–11, 20–22.

148 *See* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 293–97 (2003).

149 *See id.*; Barnes & Thornburg LLP, *Unions by the Numbers: 2022 Edition*, NAT'L L. REV. (Jan. 24, 2022), https://www.natlawreview.com/article/unions-numbers-2022-edition [https://perma.cc/3JFJ-BAW3]; Quoctrung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015, 11:04 AM), https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map [https://perma.cc/25UB-DQFK].

150 Don Gonyea, *House Democrats Pass Bill that Would Protect Worker Organizing Efforts*, NPR (Mar. 9, 2021, 9:18 PM), https://www.npr.org/2021/03/09/975259434/house-democrats-pass-bill-that-would-protect-worker-organizing-efforts [https://perma.cc/5FMT-YGR4].

151 RYAN NUNN ET AL., HAMILTON PROJECT, THE SHIFT IN PRIVATE SECTOR UNION PARTICIPATION: EXPLANATION AND EFFECTS 3 (2019) ("[T]he decline of union participation was an important driver of the increase in wage inequality and wage stagnation for some workers.").

152 *Id.*

153 *See* Elise Gould & Celine McNicholas, *Unions Help Narrow the Gender Wage Gap*, ECON. POL'Y INST.: WORKING ECON. BLOG (Apr. 3, 2017, 8:00 AM), https://www.epi.org/blog/unions-help-narrow-the-gender-wage-gap [https://perma.cc/4QXS-U79U]; ECON. POL'Y INST., UNIONS HELP REDUCE DISPARITIES AND STRENGTHEN OUR DEMOCRACY 1–3, 6 (2021), https://files.epi.org/uploads/226030.pdf [https://perma.cc/2Z5B-KJWD].

154 *See supra* notes 118–24 and accompanying text.

with increasing the number of workers involved in a mass arbitration.[155] Plaintiff-side attorneys therefore achieve greater returns from the significant investments necessary for mass arbitration. Moreover, plaintiff-side attorneys' businesses are under continuous pressure from legislative and judicial efforts to hinder rights enforcement,[156] so organizing workers against these barriers economically benefits attorneys in the long run.

Beyond economic benefits, expansion into political organizing improves the image of attorney ethics. Critics deride plaintiff-side attorneys for profiting from frivolous lawsuits without benefiting vulnerable populations.[157] For example, the U.S. Chamber of Commerce has criticized mass arbitration by stating "[w]e shouldn't let plaintiffs' lawyers abuse the arbitration system to reap massive legal fees at the expense of workers and consumers, and the business community."[158] By engaging in mobilization and organizing, plaintiff-side attorneys can demonstrate a genuine commitment to workers' rights. This won't stop corporations from maligning plaintiff-side attorneys — but it does paint a more sympathetic picture for politicians. That there may be some "political-image" benefits for attorneys does not undermine the fact that mass organizing is also critically important work to bridge the traditional gap between litigation and organizing to build worker power.

Finally, employment law firms must invest in organizing for the health of the long-term labor movement. The defense bar already organizes and lobbies on behalf of corporations quite successfully,[159] and educates corporations on plaintiff-side tactics.[160] Indeed, the rapid proliferation of arbitration as a defense strategy should signal to plaintiff-side attorneys that they, too, must organize more effectively.

2. Legal Protections, Legal Challenges. — Of the many legal challenges mass organizing might face, this section considers some of the most pressing, including protections and concerns under the NLRA and the force of confidentiality agreements akin to "gag orders," which prohibit workers from discussing their mass-arbitration settlements.

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155 *See* McAlevey, *supra* note 66, at 424–28.

156 *See supra* notes 15–20 and accompanying text.

157 *See supra* notes 14–16 and accompanying text.

158 *Mass Arbitration Is an Abuse of the Arbitration System*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (June 4, 2021), https://instituteforlegalreform.com/mass-arbitration-is-an-abuse-of-the-arbitration-system [https://perma.cc/2QUC-D42Y].

159 *See, e.g.*, *Eimer Stahl Attorneys File Amicus Brief on Behalf of the U.S. Chamber of Commerce*, EIMER STAHL (Jan. 6, 2022), https://www.eimerstahl.com/news-eimer-stahl-attorneys-file-amicus-brief-on-behalf-of-the-us-chamber-of-commerce [https://perma.cc/2YFA-KPTS]; Stephen R. Williams, *The Tricks Biglaw Firms Use When Selling Lobbying Services*, ABOVE L. (Jan. 18, 2018, 10:44 AM), https://abovethelaw.com/2018/01/the-tricks-biglaw-firms-use-when-selling-lobbying-services [https://perma.cc/AXK9-SREM].

160 *See, e.g.,* sources cited *supra* note 10.

Though worker centers lack formal legal status, some scholars have argued they enjoy NLRA section 7 collective-action protections.[161] But, there are important limitations and considerations: First, independent contractors do not enjoy section 7 rights. Second, defendants are likely to argue that mass-organizing platforms should be subject to the same legal limitations in the NLRA that are placed on unions.

While section 7 of the NLRA protects employees "engag[ing] in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[162] it excludes independent contractors.[163] Whether gig workers are considered independent contractors under the Act has varied by administration, and NLRB General Counsel Jennifer Abruzzo has expressed interest in returning to a more worker-favorable definition.[164] Regardless, "worker organizations composed entirely of independent contractors" have organized successfully.[165] Additionally, workers bringing employment suits are frequently protected by statutory antiretaliation provisions.[166]

More concerning, however, are allegations that the NLRA limits mass-organizing platforms. Defendants have accused worker centers of constituting "labor organizations" under the NLRA, which would limit direct actions like picketing and secondary boycotts and open platforms to unfair labor practice charges and member lawsuits.[167] Although these threats have not yet seriously materialized, as recently as 2019, the U.S. Chamber of Commerce encouraged defendants to challenge the status of worker centers under the NLRA.[168] Mass-organizing coalitions, therefore, must avoid the typical activities that define a labor organization, such as acting as the exclusive representative of the workers.[169] However, engaging primarily in litigation and litigation-related organizing is unlikely to compromise the mass-organizing coalition's status under the NLRA; indeed, this strategy has permitted the ROC to avoid "labor organization" status thus far.[170]

Nondisclosure or confidentiality agreements in arbitration clauses or settlements are another significant but as-yet-untested legal obstacle to

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161 *See* Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 241 (2009).

162 29 U.S.C. § 157.

163 *Id.* § 152.

164 *See* Atlanta Opera, Inc., 371 N.L.R.B. No. 45, 45 (Dec. 27, 2021) (inviting briefs regarding the independent-contractor standard).

165 Naduris-Weissman, *supra* note 161, at 258 n.96 (referencing the New York Taxi Workers Alliance).

166 *See* Sachs, *supra* note 76, at 2708–09.

167 *See* Naduris-Weissman, *supra* note 161, at 261–69.

168 EMP. POL'Y DIV., U.S. CHAMBER OF COM., THE STATUS OF WORKER CENTERS AS LABOR ORGANIZATIONS UNDER THE NATIONAL LABOR RELATIONS ACT 20 (2019), https://www.uschamber.com/assets/archived/images/epd_worker_centers_report_april_2019.pdf [https://perma.cc/D2GH-4K79].

169 *See id.* at 12.

170 *See* Naduris-Weissman, *supra* note 161, at 322–23.

mass organizing.[171] Regardless of enforcement, these agreements have a chilling effect on coworkers' discussions of legal rights; even on Reddit threads regarding mass arbitrations, drivers chastise one another for publicizing settlements, and several posters appear to have deleted comments, perhaps from fear of becoming ineligible.[172] Whether these communication bans violate the NLRA remains an open legal question, and one that may fluctuate with political alignment in the executive branch: Abruzzo has expressed interest in prohibiting confidentiality provisions in separation agreements.[173] Of course, the same exclusions and considerations for independent contractors still apply given that these protections are pursuant to the NLRA.

Conclusion

Mass organizing seeks to realize partnerships that have been historically uncommon and to bring together ideas that have been traditionally dichotomous. The strategy aims to continue the innovation of mass arbitration and realize its true potential, guided by the belief that plaintiff-side attorneys must think outside traditional paths.

Worker power and rights enforcement are having a moment. Congress is finally interested in legislative efforts to end arbitration in employment,[174] the NLRB is seeking to fulfill President Biden's promise of being the most pro-union President ever,[175] and major wins by organizers at Amazon and Starbucks[176] may signal the renaissance of the labor movement. Plaintiff-side attorneys have the opportunity to carve out a role for themselves in this movement of collective enforcement by pushing mass arbitration into mass organizing. It won't be an easy process, but absent organizing, procedural barriers will continue to multiply and hinder rights enforcement.

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171 *See* Glover, *supra* note 5, at 1338.

172 *See, e.g.,* u/steezefabreeze, REDDIT: R/POSTMATES (June 8, 2021, 5:19 PM), https://www.reddit.com/r/postmates/comments/nvipoq/hey_all_ive_received_and_email_from_keller [https://perma.cc/M4W7-6SZ9]; u/Missqtoyou, Comment to u/steezefabreeze, *supra* (June 15, 2021, 3:39 PM), https://www.reddit.com/r/postmates/comments/nvipoq/comment/h1vuxbe [https://perma.cc/C9ME-F82U].

173 *See* NLRB Gen. Couns. Mem. GC 21-04, at 2 (Aug. 12, 2021).

174 *See supra* note 81 and accompanying text.

175 *See* Timothy Noah, *Jennifer Abruzzo Has Become One of the Quiet Heroes of the Biden Administration*, NEW REPUBLIC (Apr. 20, 2022), https://newrepublic.com/article/166143/jennifer-abruzzo-nlrb-quiet-hero-biden-administration [https://perma.cc/2GB9-M39R].

176 *See* John Logan, *Amazon, Starbucks and the Sparking of a New American Union Movement*, THE CONVERSATION (Apr. 4, 2022, 8:29 AM), https://theconversation.com/amazon-starbucks-and-the-sparking-of-a-new-american-union-movement-180293 [https://perma.cc/FSH4-8JYY].