# NOTES

## THE MARKET PARTICIPANT DOCTRINE AND FORCED ARBITRATION

The majority of private sector, nonunion workers and e-commerce transactions are subject to arbitration agreements, which require litigating disputes in private, often confidential, proceedings, rather than in courtrooms.[1] Paired with waivers of the right to bring class actions, arbitration agreements often suppress claims altogether.[2] A series of Supreme Court decisions upholding arbitration of virtually all consumer and employment law claims pursuant to the Federal Arbitration Act[3] (FAA) and fortifying the statute through a sweeping preemption regime have allowed arbitration clauses to flourish.[4]

This Note proposes that states and municipalities seeking to limit the impacts of forced arbitration turn to an alternative route that circumvents preemption altogether: the market participant doctrine. Under the market participant doctrine, when states act pursuant to proprietary rather than regulatory interests — such as when purchasing goods and services on the market — their actions are not subject to preemption absent a clear statement of congressional intent.[5] Limiting the use of forced arbitration against the employees who deliver government services and the people who consume them aligns neatly with states' proprietary interests in ensuring business partners provide safe, efficient, and lawful service delivery. This Note thus renews and builds on calls for experimentation in state procurement initially proposed by the National Consumer Law Center in 2015.[6]

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[1] *See* KATE HAMAJI ET AL., CTR. FOR POPULAR DEMOCRACY & ECON. POL'Y INST., UNCHECKED CORPORATE POWER 10 (2019), https://www.epi.org/publication/unchecked-corporate-power [https://perma.cc/G9MR-WK5A]; ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/AXV8-KSNU]; Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234, 241 n.18 (2019).

[2] *See* 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, 2814–15 (2015); COLVIN, *supra* note 1, at 10.

[3] 9 U.S.C. §§ 1–16.

[4] 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, 99–100 (2006).

[5] *See* Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc., 475 U.S. 282, 289–90 (1986); *cf.* Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980).

[6] *See* DAVID SELIGMAN, NAT'L CONSUMER L. CTR., THE MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 31, 33–38 (rev. ed. 2015), https://www.nclc.org/wp-content/uploads/2022/09/model-state-arb-act-2015.pdf [https://perma.cc/V6LN-V3HA]. Seligman argues that states can and should adopt blanket prohibitions on arbitration in procurement. *Id.* This Note builds on Seligman's work but prioritizes applications that are especially compatible with the doctrine and advocates a more permissive framework in the FAA context than in the National Labor Relations Act context — all with the benefit of interim developments in FAA precedent and the Court's views on preemption.

Part I provides a brief overview of how the Supreme Court's broad interpretation of the FAA has frustrated state efforts against forced arbitration.[7] Part II traces the origins of the market participant exception, from its birth in the dormant commerce clause cases to its application in the National Labor Relations Act[8] (NLRA) context.[9] Though the Court has never considered the doctrine's application to statutes other than the NLRA, circuit courts have applied it to various other federal statutes.

Part III argues that the market participant exception, rooted in general principles of federalism, should also apply to the FAA. Labor scholars might demur, however, that this exception is of limited utility in light of its narrowness in the NLRA context.[10] This Note further argues that, because the FAA does not create a highly centralized regulatory regime like the NLRA does, market action should be defined more broadly under the FAA in order to permit states *greater* flexibility.

Part IV offers two case studies for how states can develop arbitration-limiting procurement requirements appropriately tailored to proprietary needs. First, transportation gig work in state contracts offers an archetype of a public-private partnership in which limiting forced arbitration ensures safe and lawful service delivery. Second, much like private entities that excised arbitration clauses under public pressure during the #MeToo movement, states, too, should be free to prohibit service providers from imposing arbitration against consumers and employees in analogous contexts, such as civil rights claims.

Absent congressional action, few viable pathways remain for states to limit forced arbitration. But states that seek to protect employees and consumers have a potentially powerful tool in the market participant doctrine, with valuable precedent and lessons from its application to other federal statutes. In the face of the Supreme Court's growing skepticism toward broad preemption regimes,[11] the market participant exception to the FAA is emerging as a constitutionally rooted, politically feasible tool that states should experiment with to continue testing the boundaries of the FAA preemption regime.

## I. THE RISE AND RISE OF THE FAA

The FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in

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[7] *See* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 394–95.

[8] 29 U.S.C. §§ 151–169.

[9] *See* Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc. (*Boston Harbor*), 507 U.S. 218, 227–29 (1993).

[10] *See* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1571–74 (2002); Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV 1153, 1168–69 (2011).

[11] *See infra* pp. 1370–71.

equity for the revocation of any contract."[12] In 1925, Congress passed the FAA to ensure enforcement of arbitration agreements between merchants and facilitate efficacious dispute resolution outside of a purportedly crowded court system.[13] Corporate proponents emphasized two key limitations in congressional hearings[14]: first, the Act was intended to apply only in federal courts, not state courts; and second, the Act did not apply to employment contracts.[15] These limitations, however, were not embodied in the text of the statute because Congress did not foresee how dramatically the Commerce Clause would expand post–New Deal.[16]

But in the 1980s, the Court disregarded these limitations and began expanding the FAA well beyond its intended breadth to declare the statute a "liberal federal policy favoring arbitration."[17] Although the statute was intended to apply to "merchant-to-merchant arbitrations, *never* merchant-to-consumer arbitrations,"[18] the Court ignored the FAA's pre–New Deal context and upheld arbitration clauses even in civil rights[19] and employment[20] cases. The Court also ignored congressional intent that the FAA should apply only in federal court — as Justice Thomas has repeatedly criticized in his dissents.[21]

While expanding the FAA's substantive reach, the Court also built an airtight preemption regime. In *Southland Corp. v. Keating*,[22] Chief Justice Burger held that a California law prohibiting franchise agreements from imposing arbitration was preempted because it frustrated the FAA's purpose.[23] The Court then began preempting any state policies that "place arbitration clauses on an unequal 'footing'" with other contract clauses.[24] While Justice Scalia initially criticized *Southland* as an "unauthorized eviction of state-court power,"[25] he later delivered a significant blow to states by upholding waivers of class actions, which

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[12] 9 U.S.C. § 2.

[13] *See* Moses, *supra* note 4, at 102–03.

[14] *See id.* at 105, 112 n.81.

[15] *See id.* at 103, 105.

[16] *See id.* at 106; Cir. City Stores, Inc. v. Adams, 532 U.S. 105, 116–18 (2001) (rejecting an interpretation of the FAA based on its historical context because a "variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation," *id.* at 117).

[17] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[18] Moses, *supra* note 4, at 106 (emphasis added).

[19] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991).

[20] *See Cir. City Stores, Inc.*, 532 U.S. at 109.

[21] *E.g.*, Kindred Nursing Ctrs. L.P. v. Clark, 137 S. Ct. 1421, 1429–30 (2017) (Thomas, J., dissenting).

[22] 465 U.S. 1 (1984).

[23] *Id.* at 15–16. Justices Brennan and Marshall joined the majority in *Southland*, likely reflecting concerns that states wield federalism as a tool to deny federally protected civil rights. *See* David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5, 43.

[24] Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 686 (1996) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995)); *see id.* at 688.

[25] *Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting). Justice Scalia did note that he "shall not in the future dissent from judgments that rest on *Southland*" but will "stand ready" to overrule it. *Id.*

prohibit claim aggregation in favor of one-on-one arbitration[26] — even when the cost of bringing an individual claim far outweighs the potential recovery.[27] Under the Court's precedent, then, an arbitration agreement may deprive a plaintiff of a remedy altogether, since "[t]he *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."[28]

Empirics belie the Court's claim that arbitration is merely a more "efficient, streamlined" option for dispute resolution.[29] From 2010 to 2012, the Consumer Financial Protection Bureau estimated that consumers only initiated an average of 411 arbitration claims per year, and of these, around 25 claims a year sought $1,000 or less — compared to the more than 30 million Americans eligible for class action relief per year.[30] In employment, arbitration clauses are estimated to have eliminated up to 98 percent of claims altogether.[31] Arbitration, then, is not so much about efficiency as it is about evading accountability.[32] There is no empirical evidence to suggest that arbitration's purported efficiencies have passed cost savings to consumers, either.[33]

Even *if* a plaintiff successfully files for arbitration, disturbing democratic legitimacy concerns remain.[34] Arbitral fora may have limited rules of discovery and evidence, minimal appeals processes, and potentially biased private arbitrators,[35] and the private, confidential setting enables corporations to hide wrongdoing, dodge public accountability, and isolate plaintiffs.[36] Arbitral decisions do not set legal precedent, threatening to signal "the end of law" altogether in consumer protection and employment.[37] The social cost is further compounded through the loss of the expressive, disciplining function of public adjudication.[38]

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[26] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337–38, 351–52 (2011).

[27] Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231, 238–39 (2013). The Court later held the NLRA does not prohibit waivers of class and collective actions in the employment context. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

[28] Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[29] *Concepcion*, 563 U.S. at 344; *cf.* Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting).

[30] CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(A) 11–12, 17 (2015), https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/LV8M-WC8R].

[31] *See* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1305 (2022); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 696, 697 fig.2 (2018).

[32] *See* Resnik, *supra* note 2, at 2812–15 (attributing the claim-suppressive effects of arbitration to various factors including "the minimal oversight of arbitration's fairness and lawfulness," *id.* at 2815).

[33] CFPB, *supra* note 30, at 18.

[34] *See* David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 461, 465–67 (2014) (reviewing MARGARET JANE RADIN, BOILERPLATE (2013)).

[35] *See* Estlund, *supra* note 31, at 699 & n.106.

[36] *Id.* at 680–81.

[37] *See* Gilles, *supra* note 7, at 377.

[38] *See* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3076–83 (2015).

The Court brushes these criticisms aside as "generalized attacks on arbitration" better directed to Congress.[39] Corporations, meanwhile, have taken advantage of this wall of precedent: the share of private-sector, nonunion workers subject to arbitration grew from 2 percent in 1992 to nearly 60 percent in 2018 and is projected to reach 80 percent this year.[40] That arbitration agreements enable corporations to steal wealth with relative impunity[41] is all the more disturbing when juxtaposed with data showing they are more common among low-wage workers, and thus disproportionately target women and African Americans.[42]

State courts and legislatures have tried and failed to limit arbitration clauses by imposing disclosure requirements,[43] permitting workers to reject clauses without fear of job loss,[44] and declaring the pairing of forced arbitration with class waivers unconscionable.[45] Few paths remain: states may use their own finite resources to bring suit,[46] regulate the procedure of arbitral fora,[47] and protect workers outside the FAA's reach.[48] But under the heavy burden of precedent, states have limited power to pass affirmative laws limiting the reach of arbitration. This invites the question: is there a way to circumvent preemption altogether?

## II. THE ORIGINS OF THE MARKET PARTICIPANT EXCEPTION

The market participant exception holds that preemption applies only to state regulatory action — unless Congress manifests a clear intent to preempt state proprietary action.[49] This doctrine first arose in the dormant commerce clause context in an era of limited Commerce Clause power. But even as Congress's powers under the Commerce Clause expanded, the clear statement requirement to preempt state market action has persisted in the Supreme Court's NLRA precedent. Circuit

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[39] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

[40] *See* HAMAJI ET AL., *supra* note 1, at 4; COLVIN, *supra* note 1, at 1–2.

[41] *See* Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL'Y REV. 499, 510–13 (2017); Grace DuBois, *Forced Arbitration Robs Workers of Billions in Wages*, CTR. FOR PROGRESSIVE REFORM (July 20, 2022), https://progressivereform.org/cpr-blog/forced-arbitration-robs-workers-billions-wages [https://perma.cc/D4L6-75ZT].

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

[43] *See* Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681, 683, 688 (1996).

[44] *See* Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 484–85 (9th Cir. 2023). Since 2014, the California legislature has unsuccessfully attempted at least four times to prohibit forced arbitration and failed due to FAA preemption. *See id.* at 478–80; Chamber of Com. of the U.S. v. Becerra, 438 F. Supp. 3d 1078, 1089 (E.D. Cal. 2020), *aff'd sub nom. Bonta*, 62 F.4th 473.

[45] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340, 352 (2011).

[46] *But see* Resnik, *supra* note 2, at 2910 (noting that in matters that gave rise to class actions, two-thirds of government claims *followed* the lead of private class actions, "highlight[ing] the interdependencies between public and private enforcement").

[47] This route is of little use, though, given how few individuals pursue arbitration. The Court has also previously cited this power as reason to broaden the FAA's preemptive reach. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31–32 (1991).

[48] *See infra* notes 111–12 and accompanying text.

[49] *See, e.g.*, Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1079 (9th Cir. 2017).

courts, taking cue from the federalism principles in which the exception is rooted, have applied the doctrine to various other federal statutes.

### *A. Dormant Commerce Clause Roots*

The Supreme Court first articulated the market participant doctrine in a series of dormant commerce clause cases in the 1970s and 1980s. The dormant commerce clause restrains states from enacting economic regulations that discriminate against or burden interstate commerce absent congressional approval.[50] In *Hughes v. Alexandria Scrap Corp.*,[51] the Court considered a Maryland statute that doled out a subsidy to in-state processors for hauling junked cars but made it significantly more difficult for out-of-state processors to access the subsidy.[52] The Court upheld the statute, despite its pro-Maryland tilt, because the state itself had entered the scrap market as "a purchaser, in effect, of a potential article of interstate commerce."[53]

The Court later refined this doctrine to a succinct principle: a state participating in a market, as opposed to regulating it, is free from the Commerce Clause's negative implications because "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[54] Under this exception, the Court upheld a South Dakota policy to sell state-owned cement only to state residents[55] and a Boston requirement that publicly funded construction projects employ a certain share of bona fide city residents.[56]

The market participant exception faced a shaky start. Justices divided sharply over the doctrine's limits.[57] The limits of the Commerce Clause, too, were in flux. On the same day that *Hughes* expanded state power, the Court limited federal power by declaring in *National League of Cities v. Usery*[58] that Congress lacked the power to mandate a minimum wage for state employees engaged in "traditional government functions."[59] *Usery* was overturned only nine years later[60] — but the market participant exception remained.[61]

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[50] *See* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1152 (2023).

[51] 426 U.S. 794 (1976).

[52] *Id.* at 800–02.

[53] *Id.* at 808.

[54] Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 336 (1978)).

[55] *Id.* at 440.

[56] White v. Mass. Council of Constr. Emps., Inc., 460 U.S. 204, 205–06 (1983).

[57] Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 405 (1989); *see* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 101 (1984) (Brennan, J., concurring); *id.* (Powell, J., concurring in part and concurring in the judgment); *id.* at 101–03 (Rehnquist, J., dissenting).

[58] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[59] *Id.* at 852.

[60] *See Garcia*, 469 U.S. at 557.

[61] *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 277 (1988) (recognizing the market participant exception to the dormant commerce clause).

### *B. Shift to Federalism in NLRA Case Law*

Shortly after *Garcia* was decided, the Court made clear that the market participant exception not only survived the overturning of *Usery* but functioned as a general principle that a state does not offend "preemption principles" when acting as a proprietor.[62] In the following twenty years, the Court clarified the hazy line between regulatory and proprietary action as applied to the NLRA.

The NLRA is the only context in which the Court has considered whether the market participant exception applies to affirmative federal legislation. In *Wisconsin Department of Industrial, Labor & Human Relations v. Gould*,[63] a Wisconsin statute prohibited the state from doing business with entities that had violated the NLRA at least three times within five years.[64] Wisconsin argued preemption did not apply because its bill was a proprietary exercise of state spending power, and, referencing the dormant commerce clause cases, "evenhandedness as a matter of federalism . . . requires that states operate as free from federal constraint as a private company."[65] A unanimous Court hinted that market participation *might possibly* escape NLRA preemption, while also cautioning that "government occupies a unique position of power" and cannot be treated exactly the same as a private party.[66] Regardless, the statute at hand could not "plausibly be defended as a legitimate response to state procurement constraints or to local economic needs,"[67] as Wisconsin conceded that it had a regulatory purpose of enforcing labor law — a role strictly reserved for the National Labor Relations Board (NLRB) as "a comprehensive regulat[or] of industrial relations."[68]

The Court definitively confirmed that the market participant principle applies to the NLRA in *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*[69] (*Boston Harbor*), which upheld a Massachusetts procurement requirement that all contractors on Boston's $6.1 billion, ten-year harbor cleanup project sign a labor peace agreement requiring all work be done under a union contract featuring a no-strike clause.[70] The Court emphasized that "pre-emption doctrines apply only to state regulation"[71] — and state proprietary action "with no interest in setting policy" is not

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[62] *See Boston Harbor*, 507 U.S. 218, 231–32 (1993).
[63] 475 U.S. 282 (1986).
[64] *Id.* at 283–84.
[65] Transcript of Oral Argument at 11, *Gould*, 475 U.S. 282 (No. 84-1484).
[66] *Gould*, 475 U.S. at 290; *cf. id.* ("What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what States may do with the Act in place.").
[67] *Id.* at 291.
[68] *Id.* at 288.
[69] 507 U.S. 218, 227 (1993).
[70] *Id.* at 221–22, 229–30.
[71] *Id.* at 227 (emphasis omitted).

regulation at all.[72] As evidence that the bid specification was more proprietary than regulatory, the Court agreed it was tailored to a particular job (albeit a very large one), with an interest in completing the job "quickly and effectively."[73]

On the other hand, the Court rejected that a California statute prohibiting private recipients of state funds from using those funds to encourage or prevent union organizing was proprietary rather than regulatory.[74] The state's argument that it merely sought to promote neutrality with regards to unionization via a narrow use restriction was unavailing.[75] The strict reporting conditions, civil liability for commingling funds, and carve-outs for certain pro-union activities all indicated that the statute reached beyond California's sovereign, proprietary interest to instead impose punitive sanctions — much like the Wisconsin statute in *Gould*.[76]

Put together, the cases impart three lessons for distinguishing regulatory and proprietary action. First, the determination is functional, not formalist: leveraging police power versus spending power or use versus receipt restrictions is irrelevant. Second, states must demonstrate a credible nexus between their actions and a proprietary purpose tailored to issues they face in the relevant market; blanket legislation that applies across markets may be more difficult to defend as proprietary.[77] Third, although the Court does not accept the state's stated purpose at face value, the focus is on *purpose* rather than *motivation*. Put differently, Boston's bid specification may have been motivated by a pro-union tilt, but its stated purpose of labor efficiency survived the Court's scrutiny because its actions were narrowly tailored to that purported purpose.[78] In the nearly forty years since it began applying the market participant exception to the NLRA, the Court has not considered its import to other federal legislation.

### *C. The Doctrine in the Circuit Courts*

Taking cue from the Court's statement that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and

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72 *Id.* at 229.

73 *Id.* at 232; *see also id.* at 230 (noting this exception also promotes "the legislative goals" of an NLRA amendment that specifically permits prehire agreements for the construction industry).

74 Chamber of Com. of the U.S. v. Brown, 554 U.S. 60, 62, 70 (2008).

75 *See id.* at 63.

76 *Id.* at 71–72.

77 *But see* Mich. Bldg. & Constr. Trades Council v. Snyder, 729 F.3d 572, 578 (6th Cir. 2013) ("[P]rivate proprietors can and do act on an across-the-board basis without somehow becoming regulators.").

78 *See* Transcript of Oral Argument at 10, *Boston Harbor,* 507 U.S. 218 (Nos. 91-261 & 91-274). Professor Charles Fried argued on behalf of the state that "[t]he motive inquiry is absolutely unnecessary to such a thing. What's necessary is the purport of the action on its face, and its impact and its scope as it deals with those conditions revealed in the record." *Id.*

where analogous private conduct would be permitted, this Court will not infer such a restriction,"[79] circuit courts have applied the market participant doctrine broadly. The Sixth and Ninth Circuits have definitively held the exception applies to the Employee Retirement Income Security Act of 1974[80] (ERISA), while the Third Circuit has assumed as much without deciding.[81] Circuit courts have also applied the exception to the Telecommunications Act of 1996[82] and the Federal Aviation Administration Authorization Act of 1994,[83] though they have never considered arguments that the exception should shield against FAA preemption.

To determine whether state action is proprietary, circuit courts leverage the two-part framework from *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*.[84] First, the state action must "essentially reflect the [governmental] entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances."[85] Second, the "narrow scope of the challenged action" must "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."[86]

States can offer an array of evidence to respond to these inquiries. On the first prong, states might point to private parties that do, in fact, leverage similar contracting requirements.[87] This is not a strict requirement, though, as courts consider, hypothetically, whether a private entity might invoke similar interests should it enter an analogous private contract.[88] States may also offer expert testimony regarding the proprietary benefits they anticipate such requirements will offer.[89] For example, even in *Boston Harbor*, where the state made only general assertions about convenience and lacked record-specific findings that a labor peace agreement would result in greater efficiency, the Supreme Court

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[79] *Boston Harbor*, 507 U.S. at 231–32. This is not to say that Congress is unable to preempt state proprietary action — but that it needs to be clear when intending to do so. *See, e.g.*, Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding federal law prohibiting states from selling driver's license data).

[80] Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

[81] *See* Allied Constr. Indus. v. City of Cincinnati, 879 F.3d 215, 220 (6th Cir. 2018) (citing Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1023–24 (9th Cir. 2010); Associated Builders & Contractors Inc. N.J. Chapter v. City of Jersey City, 836 F.3d 412, 417 (3d Cir. 2016)).

[82] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.); *see* Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 420 (2d Cir. 2002).

[83] Pub. L. No. 103-305, § 601(c), 108 Stat. 1569, 1606–07 (current version at 44 U.S.C. § 14501(c)); *see* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 697 (5th Cir. 1999).

[84] 180 F.3d 686; *see, e.g.*, Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1080 (9th Cir. 2017); *Allied Constr.*, 879 F.3d at 220–21.

[85] *Cardinal Towing*, 180 F.3d at 693.

[86] *Id.*

[87] *See, e.g.*, Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1047 (9th Cir. 2007).

[88] *See, e.g.*, Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 421 (2d Cir. 2002).

[89] *See, e.g.*, *Allied Constr.*, 879 F.3d at 222.

nonetheless upheld the requirement.[90] And states need not get a "good deal" out of the particular procurement requirement, as this would unduly "impose economic rationality on state contracting decisions."[91]

The *Cardinal Towing* test is applied with varying rigor. The Sixth Circuit, for example, found a Cincinnati ordinance preferencing "contractors who provide health care and retirement benefits" was proprietary because such contractors may be "less likely to experience significant employee turnover, improving the stability and overall quality of a project."[92] A court taking a harder look might have found this connection between benefits and project quality as somewhat tenuous. In the Sixth and Ninth Circuits, satisfying *either* prong of *Cardinal Towing* is sufficient, whereas the Fifth Circuit examines both prongs.[93] And other circuits may recite the *Cardinal Towing* test as more of a general principle without explicitly considering whether each individual prong has been satisfied.[94]

If the state is found to be acting as a market participant, then the court turns to the broader legal question of legislative intent: Did Congress intend that the federal statute at issue preempt state proprietary action, looking to statutory text and purpose?[95] Circuit courts have found that express statutory provisions claiming to preempt "[s]tate laws" that "hav[e] the effect of law" do not apply to proprietary action — since such action by definition lacks the force of law.[96]

A particularly pertinent example of the market participant exception arose in a case concerning the Clean Air Act[97] — and it is also the closest the Supreme Court has come to acknowledging the doctrine's application outside the NLRA. A California agency mandated that vehicle fleet operators comply with certain stringent emissions requirements, and diesel-fueled engine manufacturers challenged the rules as preempted by the Clean Air Act.[98] The Supreme Court rejected the state's argument that the rules were outside the statute's scope altogether — but writing for an 8–1 Court, Justice Scalia cautioned that this did not necessarily mean the state regulations were "pre-empted *in toto*"[99]:

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[90] *See* Transcript of Oral Argument, *supra* note 78, at 39; *Boston Harbor*, 507 U.S. 218, 233 (1993).

[91] Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1027 (9th Cir. 2010).

[92] *Allied Constr.*, 879 F.3d at 222.

[93] *Compare Johnson*, 623 F.3d at 1024, *and Allied Constr.*, 879 F.3d at 221, *with* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999). The Ninth Circuit interprets the first prong as showing the "action is proprietary" and the second prong as showing "the action is *not* regulatory" — and it "see[s] no reason to require a state to show both." *Johnson*, 623 F.3d at 1024.

[94] *See, e.g.*, Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 419–20 (2d Cir. 2002).

[95] *See id.* at 420.

[96] *See* Associated Gen. Contractors v. Metro. Water Dist. of S. Cal., 159 F.3d 1178, 1182 (9th Cir. 1998); *Cardinal Towing*, 180 F.3d at 691.

[97] 42 U.S.C. §§ 7401–7671q; *see* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1044 (9th Cir. 2007).

[98] *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 249–51 (2004).

[99] *Id.* at 258.

the district court was to consider arguments not presented, including "whether some of the Fleet Rules (or some applications of them) can be characterized as internal state purchase decisions (and, if so, whether a different standard for preemption applies)."[100]

On remand, California argued its actions were not subject to preemption under the market participant exception — and the Ninth Circuit agreed, insofar as applied to "the procurement behavior of state and local government entities."[101] Even after the Supreme Court clarified the Clean Air Act's wide preemptive scope, California, like UPS and FedEx — both of which the court analogized to as private entities taking measures to reduce pollution — could set purchasing requirements, circumventing preemption.[102]

## III. Applying the Market Participant Doctrine to the FAA

The market participant exception is a general interpretive principle of federalism and should apply evenly to the FAA, as the statutory language and purpose of the FAA establish that Congress did not intend to preempt state market action. This Note further argues that the protective breadth of the market participant exception is *broader* than that of the NLRA; put differently, a wider range of action should be considered proprietary pursuant to the FAA compared to the NLRA.

### *A. No Congressional Intent to Preempt Proprietary Action*

Since preemption applies only to regulatory action, when examining a federal statute, we begin with the presumption that state proprietary action is *not* subject to preemption; "[o]nly if a statute evinces an intent to preempt such proprietary actions by a state or local government is the presumption overcome and the action preempted."[103] Examining the text, legislative purpose, and precedent surrounding the FAA makes clear that Congress manifested no such intent — and accordingly, state proprietary action is not preempted.

The text of the statute states only that a contractual agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[104] Some circuit courts have found the market participant exception persists even to federal statutes bearing express preemption provisions,[105] and

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[100] *Id.* at 259.

[101] *Engine Mfrs.*, 498 F.3d at 1039.

[102] *Id.* at 1047.

[103] Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1079 (9th Cir. 2017). *But see* City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155, 178–79 (4th Cir. 2002) (requiring evidence of explicit or implied proprietary exception).

[104] 9 U.S.C. § 2.

[105] *See supra* note 96 and accompanying text.

the case for the FAA is even stronger: the statute contains no express preemption provision, "nor does it reflect a congressional intent to occupy the entire field of arbitration."[106] As explained in Part I, the legislative history of the statute, too, makes clear that the FAA was not intended to preempt state law at all and was intended to apply only in federal court, with a particular focus on diversity actions.[107]

It would be problematic for the Supreme Court to now begin taking seriously the FAA's text and legislative history, given that for forty years the Court has essentially ignored this evidence to establish a broad preemption regime. Nonetheless, even the broad FAA preemption regime is not unlimited. For example, the Court in 2022 looked to the FAA's exclusion of "employment of seamen, railroad employees, or any other . . . workers engaged in foreign or interstate commerce" to find that certain airport workers who load cargo are outside the statute's reach.[108] Thus, the Court is willing to limit the FAA to its text, to the extent the conclusions do not conflict with the existing line of precedent.

No such conflict arises from applying the market participant exception to the FAA: even if the FAA is interpreted as having a broad preemption regime, that does not mean that the statute preempts action that is not "state law" at all. Indeed, the Court similarly faced a long-established, notably broad preemption regime under the NLRA when it considered arguments under the market participant exception in *Gould* and *Boston Harbor*.[109] The Court has never considered the FAA's application to state procurement decisions or other actions that could be construed as public-private interactions in the market. Moreover, Justices Thomas, Gorsuch, and Kavanaugh have expressed skepticism over broad implied preemption regimes.[110]

Cynics might point out that the Court's supposed trend of limiting implied preemption based on textualism never seems to apply to the FAA in a manner that favors workers and consumers.[111] And the

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[106] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989).

[107] *See* Moses, *supra* note 4, at 112, 116; *cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[108] *See* Sw. Airlines Co. v. Saxon, 142 S. Ct. 1783, 1787, 1793 (2022) (quoting 9 U.S.C. § 1).

[109] *See* Archibald Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 277–79 (1980) (noting *Garmon* and *Machinists* preemption were in play by 1980). *Gould* and *Boston Harbor* were decided after both of these cases, in 1986 and 1993, respectively.

[110] Justice Gorsuch, joined by Justices Thomas and Kavanaugh, has stated that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law"; instead, "a litigant must point specifically to 'a constitutional text or a federal statute' that [displaces] or conflicts with state law." Va. Uranium, Inc. v. Warren, 139 S. Ct. 1894, 1901 (2019) (quoting P.R. Dep't of Consumer Affs. v. ISLA Petroleum Corp., 485 U.S. 495, 503 (1988)). Even more recently, Justices Thomas and Gorsuch have expressed annoyance with the NLRA's broad preemption regime. *See* Benjamin Sachs, Glacier *and Justice Thomas' Preemption Breadcrumbs*, ONLABOR (June 2, 2023), https://onlabor.org/glacier-and-justice-thomas-labor-preemption-breadcrumbs [https://perma.cc/6PHV-XZZ4].

[111] *Cf.* Ernest A. Young, "*The Ordinary Diet of the Law*"*: The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 307 (2012) (noting the Roberts Court selectively invoked the presumption against preemption in the 2010 Term and ignored it in *Concepcion*).

Court's conservative politics might lead to asymmetric application of this distaste for preemption. But this may present one of the rare occasions in which liberal and conservative Justices alike can agree on a textual interpretation of the FAA that raises no conflict with precedent.[112] In any case, these recent discussions highlight the timeliness of state and local attempts to leverage the market participant exception against the FAA's preemptive reach.

The market participant exception also aligns with the Court's general admonition that agreeing to arbitration — and the concomitant choice *not* to agree to arbitration — is "a matter of consent."[113] Critics might protest that private entities contract directly with workers and consumers, whereas state procurement decisions are externally imposed onto the contracting parties. First, private corporations *do* exercise control over the consumer and employee relationships of their third-party contractors.[114] And second, this criticism is orthogonal to the very principle underlying the exception: that when a state acts as a market participant, it steps into the shoes of a private actor. "Given the volume of, and obvious need for, interaction between the government and the private sector," states must be able to set the parameters of third-party consumer and employee relationships.[115] Under the FAA, private parties may decide whether to impose arbitration agreements against their vendors or other service providers; states, too, should be free to structure their conduct in the marketplace as they wish.

### *B. The Case for a Broader Exception*

Congressional intent proves that the market participant exception should apply to the FAA — but how broad should that exception be? Labor scholars have pointed out that the exception for proprietary state action is fairly limited in the NLRA context, in part because of concerns that the "proprietary exception, taken to a logical extreme, would swallow the entire preemption regime."[116] Individual judges, too, may vary in the narrowness of tailoring to proprietary interests.[117] This Note

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[112] For example, *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, was an 8–0 decision, written by Justice Thomas, with a pro-plaintiff holding. *See id.* at 1787.

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

[114] *See, e.g.*, Megan Rose Dickey, *Google Ends Forced Arbitration for Employees*, TECHCRUNCH (Feb. 21, 2019, 4:12 PM), https://techcrunch.com/2019/02/21/google-ends-forced-arbitration-for-employees [https://perma.cc/GGB9-UXZB] ("For the contractors Google works with directly, it will remove mandatory arbitration from their contracts. The caveat, however, is that it won't require outside firms that employ contractors to do the same. Still, Google says it will notify suppliers so that they can see if that approach would work for them.").

[115] *See* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 692 (5th Cir. 1999).

[116] Sachs, *supra* note 10, at 1168 n.70; *see also* Estlund, *supra* note 10, at 1573–74.

[117] *Compare* Metro. Milwaukee Ass'n of Com. v. Milwaukee County, 431 F.3d 277, 280 (7th Cir. 2005) (finding state's labor peace agreement requirement was not in "good-faith" because other "sticks or carrots" were available as "effective measures to avoid stoppages"), *with* N. Ill. Chapter

argues that since the exception, much like preemption, hinges on congressional intent, determining its breadth also requires a statute-specific analysis. And, inferring from the Supreme Court's reasoning of the preemptive reach of the NLRA, the FAA should actually have a *broader* exception for state proprietary action. In other words, some state action that might not qualify as proprietary in the NLRA context should be considered proprietary in the FAA context.

This argument is ambitious, but not without precedent. As discussed in Part II, when facing a market participant exception claim, circuit courts frequently first determine whether the state action even qualifies as proprietary before considering whether the exception applies to the statute at hand. Judges likely prefer this approach because by first determining whether the action qualifies as proprietary, the court can avoid unnecessarily interpreting a federal statute and instead hook its proprietary-versus-regulatory logic onto the Supreme Court's NLRA precedent. But this standardized approach, in which the acceptable universe of what constitutes proprietary action is defined with respect to Supreme Court precedent in NLRA cases, is arguably backward: just as preemption itself is a statute-specific analysis, the scope of what constitutes permissible proprietary action should also vary by statute.

It might be intuitive to think state action should objectively and factually be differentiable as either proprietary or regulatory, but the scope of these categories inherently requires reflecting on statutory text and purpose to understand whether the state action at issue is sufficiently narrow or has a legitimate purpose. This logic is seen in the NLRA cases themselves. The Supreme Court's tightly circumscribed approach to scrutinizing state proprietary action in the labor context reflects the highly federally controlled nature of the American private labor regime. When it first confronted the question of the market participant exception in *Gould*, the Court emphasized that the NLRA, which not only cemented the rights of workers to engage in collective action but also created the NLRB, "was designed in large part to 'entrus[t] administration of the labor policy for the Nation to a centralized administrative agency.'"[118] Thus, Wisconsin's "three-strikes" rule prohibiting habitual NLRA violators from doing business with the state was invalid *because* the federal regime already created both a substantive and procedural

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of Associated Builders & Contractors, Inc. v. Lavin, 431 F.3d 1004, 1007 (7th Cir. 2006) (declining to take a hard look at motive because "[f]ederal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment"). Business interests, following *Milwaukee County*, might argue that states have less restrictive means of achieving safety and transparency goals.

[118] Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc., 475 U.S. 282, 290 (1986) (alteration in original) (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 (1959)). Federal enforcement of labor law is so enshrined that it receives an "unusual" preemption analysis in which "the NLRA preempts state law even when the two only *arguably* conflict." Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 143 S. Ct. 1404, 1410–11 (2023) (citing *Garmon*, 359 U.S. at 245).

regime to punish NLRA violators.[119] The breadth of the NLRA, then, informed whether the Court was willing to accept that the state's action was proprietary. Even in the Court's most recent market participant exception decision, the analysis of whether California's statute was proprietary in scope was intertwined with a close reading of the NLRA's protections of employer speech.[120] In other words, as in typical preemption analyses, the federal statute must inform the analysis of whether the action is proprietary.

Unlike the NLRA, the FAA reflects no such "interrelated federal scheme of law, remedy, and administration";[121] there is no individual federal agency responsible for regulating arbitration, little federal regulation of the details of carrying out arbitration, and no punitive regime for managing violations.[122] Even under the Court's expansive statements that the FAA embodies a "liberal federal policy favoring arbitration" and that arbitration agreements need to be "on an equal footing with other contracts,"[123] ultimately, the FAA simply provides that for certain workers, arbitration agreements must be enforced if parties have agreed to them — absent invalidation by generally applicable principles such as unconscionability, fraud, or duress.[124] Compared to the NLRA, and the commensurate congressional intent to ensure the labor regime is under tight federal control, no such intent is found under the FAA. A broader range of state action, then, should be "proprietary" through the lens of the FAA, commensurate with congressional intent.

While the entire proposition that the market participant exception should apply to the FAA is untested, this particular argument about the doctrine's breadth is all the more unconventional, since most circuit courts have taken rote, one-size-fits-all approaches to defining what constitutes proprietary action.[125] But the Ninth Circuit has explicitly recognized the unwarranted rigidity of this approach: "Due regard for congressional intent . . . might require [a court] to employ a definition of protected state 'proprietary action' different from the two definitions adopted . . . for purposes of preemption under the NLRA."[126] There may also be concerns that the doctrine, if too expansive, might overly restrict congressional power by imposing a clear statement rule on an unsuspecting Congress.[127] Still, this Note encourages states and local

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[119] *Gould*, 475 U.S. at 288 n.5, 290.

[120] *See* Chamber of Com. of the U.S. v. Brown, 554 U.S. 60, 67–69, 73–74 (2008).

[121] *Gould*, 475 U.S. at 290 (quoting *Garmon*, 359 U.S. at 243).

[122] *See id.* at 286; *supra* p. 1361.

[123] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[124] *Id.*

[125] *See supra* p. 1367.

[126] Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1045 (9th Cir. 2007).

[127] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 407 (2010); *see also id.* at 414 (arguing that at least some clear statement rules impose a "clarity tax" on Congress).

governments to raise this theory (which is rooted in statutory interpretation, as preemption arguments familiarly are) as a manner of testing the limits of the exception in the context of arbitration.

## IV. STATES' PROPRIETARY INTERESTS IN PROHIBITING FORCED ARBITRATION

This Part suggests legitimate proprietary interests that a state may invoke in limiting business partners from mandating arbitration against both the public who consume the services that these businesses provide on behalf of the government and the employees responsible for delivering them. First, this Part illustrates through a case study of transportation gig work — which has proliferated in public-private partnerships — how safety and transparency can be legitimate proprietary interests. Second, this Part considers proprietary interests that may arise across industries in limiting arbitration in civil rights claims to drive uptake of government services — just as private actors have with arbitration in sexual harassment.

### A. *Transportation Gig Work*

As part of the inquiry into whether a particular state action is proprietary rather than regulatory under *Cardinal Towing*, courts look to the scope of the action, including if the action is tailored to a specific market or project.[128] Thus, states seeking to limit the impacts of forced arbitration might begin by targeting specific public-private partnerships that involve fraught relationships with workers and consumers. This Note suggests looking to public-private partnerships within the gig work transportation industry — notorious for skirting regulation.[129]

Transportation network companies[130] like Uber and Lyft have proliferated in government contracts, with services ranging from providing transportation services for traveling government employees[131] to adopting traditional state functions as subsidized public transit services for the general public.[132] In cities across the United States, such

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[128] *See, e.g.*, Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1023–24 (9th Cir. 2010) (citing Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999)).

[129] *See Developments in the Law — Consumer Protection for Gig Work?*, 136 HARV. L. REV. 1585, 1632 (2023).

[130] *See, e.g.*, TEX. A&M TRANSP. INST., TRANSPORTATION NETWORK COMPANY (TNC) LEGISLATION, https://policy.tti.tamu.edu/technology/tnc-legislation [https://perma.cc/AJ3N-Z5HP].

[131] Andrew J. Hawkins, *Uber and Lyft Just Scored a Huge Federal Transportation Contract*, THE VERGE (Nov. 23, 2020, 5:17 PM), https://www.theverge.com/2020/11/23/21611553/uber-lyft-gsa-government-contract-amount [https://perma.cc/S4T8-4ZB7].

[132] *See, e.g.*, Brandon Pho, *Orange County's Outsourcing of Public Transit to Lyft Nearly Left Residents Stranded*, VOICE OF OC (Dec. 8, 2020), https://voiceofoc.org/2020/08/orange-countys-outsourcing-of-public-transit-to-lyft-nearly-left-residents-stranded [https://perma.cc/BZ3J-R5N2]; Jake Offenhartz, *MTA Plan to Subsidize Late-Night Uber Rides Gets One Star from Transit Advocates*, GOTHAMIST (Feb. 4, 2020), https://gothamist.com/news/mta-plan-subsidize-late-night-uber-lyft [https://perma.cc/96U9-YYVQ].

"transportation-as-a-service" programs may entail private "first/last-mile" service providers to fill gaps in existing public transportation infrastructure, supplemental services following route reductions, or services reserved for certain groups of citizens, such as the elderly.[133] Public-private transportation partnerships may be prevalent even in locales that have long rallied against tactics gig work companies have used to skirt regulation.[134]

Transportation network companies have also entered the school and youth transit industry. In the face of national bus driver shortages,[135] the gig work company HopSkipDrive partnered with schools, including public schools, to offer a service through a mobile phone application connecting "CareDrivers" paid per ride with parents arranging transportation for children as young as six years old to access school or after-school care.[136] Rather than taking rides on demand, CareDrivers can also choose to do specific routes every day as part of a "RideSeries"; in other words, some local governments have outsourced school bus services to gig work companies.[137] In certain cities, HopSkipDrive also provides rides to particularly "vulnerable children," including those in the foster care system and students with disabilities.[138]

Outsourcing of public services to third-party providers has been shown to have negative socioeconomic impacts in pursuit of elusive efficiency gains.[139] Combining outsourcing with forced arbitration only magnifies these concerns. HopSkipDrive, Lyft, and Uber impose mandatory arbitration and class action waivers against consumers and

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133 *See* MALLORY LIVINGSTON SHURNA & JOSEPH P. SCHWIETERMAN, 21 KEY TAKEAWAYS FROM PARTNERSHIPS BETWEEN PUBLIC TRANSIT PROVIDERS & TRANSPORTATION NETWORK COMPANIES IN THE UNITED STATES 4 (2020), https://las.depaul.edu/centers-and-institutes/chaddick-institute-for-metropolitan-development/research-and-publications/Documents/21Takeaways-Final.pdf [https://perma.cc/8VCA-DY2Z].

134 *See, e.g.*, Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot Measure*, N.Y. TIMES (June 14, 2022), https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html [https://perma.cc/8Q9F-PAT7].

135 *See* Ali Rogin & Shoshana Dubnow, *Families Scramble to Find Rides as School Districts Face Bus Driver Shortage*, PBS NEWSHOUR (Sept. 4, 2023, 6:45 PM), https://www.pbs.org/newshour/show/families-scramble-to-find-rides-as-school-districts-face-bus-driver-shortage [https://perma.cc/8UYS-6GSE].

136 *See* Karen Sampson, *Driving with HopSkipDrive: A Safe Gig Economy Option*, HOPSKIPDRIVE, https://www.hopskipdrive.com/blog/driving-with-hopskipdrive-a-safe-gig-economy-option [https://perma.cc/KTP8-EAJH]; *Our District Partners*, HOPSKIPDRIVE, https://www.hopskipdrive.com/districts [https://perma.cc/PD26-3PD9].

137 Sampson, *supra* note 136.

138 Erica Meltzer, *A Rideshare Company Is Transporting Colorado At-Risk Students. Whose Rules Should Apply?*, CHALKBEAT COLO. (Apr. 11, 2022, 5:45 AM), https://co.chalkbeat.org/2022/4/11/23019436/hop-skip-drive-bus-driver-shortage-student-transportation [https://perma.cc/BRC4-KQ72].

139 *See* DAPHNE T. GREENWOOD, COLO. CTR. FOR POL'Y STUD., THE DECISION TO CONTRACT OUT, at i (2014), https://inthepublicinterest.org/wp-content/uploads/contracts.broaderimpacts.greenwood.march-2014.REVISED-AND-FINAL-2.pdf [https://perma.cc/N6CR-HY8F].

drivers.[140] The transportation services that these companies provide on behalf of the government, including to young children, seniors, and individuals with disabilities, are likely to give rise to disputes regarding the safety of both the riders as well as the drivers.[141] As explained in Part I, there is overwhelming evidence that the claim-suppressive effects of arbitration allow businesses to avoid accountability for legal wrongdoing — particularly low-value, high-volume theft from workers and consumers;[142] confidential fora, moreover, shield defendants from public scrutiny and class waivers isolate plaintiffs.[143] It is not difficult to envision how claim suppression in transportation service delivery may raise concerns among the public who consume these services. Parents would likely hesitate to entrust their children to a service provider that is insulated from the consequences of legal misdeeds, whether those be failing to pay drivers legally owed wages or sharing children's private information. This is doubly disturbing when even the information regarding other alleged legal violations, perhaps pursued by other parents who share similar concerns, is suppressed from the public due to forced arbitration clauses.

States may fairly prohibit these private partners from imposing mandatory arbitration based on proprietary interests in safety and transparency. By limiting arbitration in public transportation, a state can ensure that consumers and drivers have access to information regarding the risks of using the services and that citizens can then hold the government and the companies accountable when these services may be endangering riders, exploiting workers, or otherwise violating the law. These proprietary interests fit neatly under *Cardinal Towing*, as there is a direct connection between limiting arbitration and driving uptake of government services.[144] By focusing on issues particular to this industry, the narrow tailoring, too, would point to a proprietary rather than regulatory interest.[145] Importantly, the government's interest in efficient procurement of needed goods and services "does not necessarily mean

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[140] *See Terms of Use*, HOPSKIPDRIVE (Feb. 22, 2023), https://www.hopskipdrive.com/terms-of-use [https://perma.cc/Z9MN-XSWB]; *U.S. Terms of Use*, UBER (Jan. 29, 2024), https://www.uber.com/legal/en/document/?name=general-terms-of-use [https://perma.cc/35YG-VVLP]; *Terms of Service*, LYFT (Jan. 22, 2024), https://www.lyft.com/terms [https://perma.cc/G7DU-5R6R].

[141] Rideshare drivers and passengers have long raised safety concerns. *See, e.g.*, Bailey Schulz, *Lyft Drivers, Passengers File Lawsuits Claiming Company Failed to Protect Them from Assault*, USA TODAY (Aug. 31, 2022, 6:14 PM), https://www.usatoday.com/story/money/2022/08/31/lyft-lawsuit-drivers-passengers-assault/7951280001 [https://perma.cc/Y2HS-EEDS]. HopSkipDrive boasts that its platform is safer for drivers than other transportation network companies. *See* Sampson, *supra* note 136.

[142] *See supra* notes 29–33 and accompanying text.

[143] *See supra* notes 34–38 and accompanying text.

[144] *See supra* notes 92–94 and accompanying text.

[145] *See* Cardinal Towing & Auto Repair, Inc. v. City of Bedford, 180 F.3d 686, 693 (5th Cir. 1999); *see also* Airline Serv. Providers Ass'n v. L.A. World Airports, 873 F.3d 1074, 1080 (9th Cir. 2017) (citing *Cardinal Towing*, 180 F.3d at 693); Allied Constr. Indus. v. City of Cincinnati, 879 F.3d 215, 220–21 (6th Cir. 2018) (citing *Cardinal Towing*, 180 F.3d at 693).

'cheap' procurement, but rather 'procurement that serves the state's purposes.'"[146] And to reiterate, there is no economic rationality requirement.[147] Gig work in outsourced public transportation services, then, provides an ideal test case for states and municipalities.

### *B. Antidiscrimination as a Proprietary Interest*

Whereas the previous section examined a particular industry, this section steps back to consider proprietary concerns that may exist *across* markets and proposes that states may tailor procurement practices to address substantively concerning applications of arbitration to antidiscrimination and other civil rights claims. Like private businesses, states have an interest in limiting arbitration in this arena to avoid public backlash, ensure legal compliance, and drive uptake of government services.

It is helpful to reiterate that the principle behind the market participant exception is that local and state government should be able to make decisions in the market, free of preemption, just as private actors can.[148] And indeed, one way states can justify their actions as proprietary is by pointing to analogous measures that private companies are taking.[149] Thus, when considering what legitimate proprietary interests a state may invoke in the context of limiting private partners from forcing arbitration, it is helpful to understand why businesses, looking across different markets, might choose not to use arbitration clauses.[150]

In recent years, some corporations have publicly opposed forced arbitration. Many did so after the #MeToo movement, which laid bare the silencing, isolating, and claim-suppressive effects of confidential, forced arbitration in workplace sexual harassment and misconduct claims.[151] "Secret settlements," often facilitated through arbitration and other alternative dispute resolution processes, silence individuals who experience sexual harassment and assault in the workplace and allow perpetrators to avoid public scrutiny.[152] The silencing effects of arbitration and other confidential dispute resolution mechanisms caused public blowback against an impressive array of institutions, including the U.S.

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146 Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1025 (9th Cir. 2010) (quoting Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 498 F.3d 1031, 1046 (9th Cir. 2007)).

147 *See supra* note 91 and accompanying text. The dearth of evidence that arbitration agreements lower consumer costs further undermines any argument that a state acts against economic interests by limiting forced arbitration.

148 *See Cardinal Towing*, 180 F.3d at 692.

149 *See supra* note 103 and accompanying text.

150 *See Cardinal Towing*, 180 F.3d at 693.

151 *See, e.g.*, Emma Bowman, *Gretchen Carlson Praises Bill that Ends Forced Arbitration in Sexual Assault Cases*, NPR (Feb. 13, 2022, 12:46 PM), https://www.npr.org/2022/02/12/1080420139/gretchen-carlson-forced-arbitration-bill [https://perma.cc/D2SX-K25S].

152 *See* Maureen A. Weston, *Buying Secrecy: Non-disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 509–13.

Olympic gymnastics team, the National Football League, Fox News, and Uber.[153]

Corporate actors across markets, including Facebook, Airbnb, eBay, Google, Wells Fargo, and private law firms, faced public protest[154] and ultimately changed their arbitration policies. The scope of these changes varied: Facebook removed forced arbitration only of sexual harassment and misconduct claims rather than all claims;[155] Google eliminated arbitration of all kinds of claims but only with respect to its own employees and not to the many independent contractors employed by outside firms;[156] and Amazon eliminated arbitration for *all* customer disputes.[157] Years after many corporations had already taken action, Congress prohibited forced arbitration of certain sexual assault claims.[158]

Looking to this broad public movement to eliminate forced arbitration in sexual assault and harassment, states may — like private actors — seek to limit forced arbitration as well. A state might invoke proprietary interests in avoiding public blowback and increasing the service provider's compliance with the law due to increased transparency, which again intersects with a state's ultimate "private interest" in ensuring appropriate uptake of good-quality services. Where a private actor during #MeToo likely took into account the tradeoff between money spent in litigation and short-term profit losses from public pressure and boycotts, a state should fairly be able to invoke such analogous interests as public consumption of government services as well.

A court might be particularly skeptical of a proprietary interest worded as "legal compliance" whereas it may be more open to quality service delivery as a propriety interest. After all, in *Gould*, the Supreme Court established that a state has no proprietary interest in ensuring

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153 *See id.* at 523–27.

154 *See* Didi Martinez, *Facebook, Airbnb and eBay Join Google in Ending Forced Arbitration for Sexual Harassment Claims*, NBC NEWS (Nov. 12, 2018, 6:18 PM), https://www.nbcnews.com/tech/tech-news/facebook-airbnb-ebay-join-google-ending-forced-arbitration-sexual-harassment-n935451 [https://perma.cc/3V9K-RWTR] (Facebook, Airbnb, eBay, Google); Imani Moise, *Wells Fargo Ends Forced Arbitration for Sexual Harassment Claims*, REUTERS (Feb. 12, 2020, 2:47 PM), https://www.reuters.com/article/us-wells-fargo-harassment/wells-fargo-ends-forced-arbitration-for-sexual-harassment-claims-idUSKBN2062J4 [https://perma.cc/3KJV-ZE9H] (Wells Fargo); *Coercive Contracts & the Legal Profession*, PEOPLE'S PARITY PROJECT, https://peoplesparity.org/firms [https://perma.cc/5L7D-59KE] (private law firms).

155 Martinez, *supra* note 154.

156 *See* Dickey, *supra* note 114.

157 *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] (noting, though, that this change was also driven by a fear of mass arbitration). For more on mass arbitration, see *Developments in the Law — The Enforcement Opportunity: From Mass Arbitration to Mass Organizing*, 136 HARV. L. REV. 1585, 1657–58 (2023).

158 Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (codified at 9 U.S.C. §§ 401–402); *see also* David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 YALE L.J.F. 1, 1–2 (2022).

that the businesses with which it transacts follow labor laws.[159] But this does not necessarily mean that states can *never* claim a proprietary interest in ensuring business partners abide by certain laws under the market participant doctrine. Indeed, private actors' removal of arbitration agreements under pressure from #MeToo was in part due to concerns about increasing their own employees' fidelity to the law. In other words, by forcing claims from a private, confidential forum to a courtroom, sunlight became a disinfectant against sexual harassment. The removal of arbitration agreements was not an end in itself, but a tool to reduce the prevalence of sexual harassment and to stop shielding the identity of those perpetrating sexual assault — making the workplace safer and more legally compliant, and in turn, the employer more appealing to current and potential employees and consumers. Thus, ensuring a business partner abides by the law is by no means only a "regulatory" interest that the state can hold, but a legitimate proprietary interest for market actors.

Given that interests in legal compliance exist across markets, a court may also struggle to find limiting principles. One way a state might achieve this narrowing and overcome judicial skepticism is by limiting arbitration only in certain types of claims — such as civil rights and antidiscrimination suits. The use of forced arbitration in such suits is likely to invoke the most concerns from the public and be most susceptible to comparisons to the #MeToo movement to eliminate arbitration agreements. Indeed, a similar movement to prohibit forced arbitration in racial discrimination claims has been growing in recent months.[160] Despite the racial justice protests that continued throughout the pandemic, as of yet, "no major employer has said it would stop using mandatory arbitration pacts to keep workplace racial bias accusations out of court."[161] But it is reasonable that a state acting in the market may, reacting to waves of public backlash, require certain business practices of its partners.

## Conclusion

For local governments seeking the next frontier in the fight against forced arbitration of worker and consumer claims, the market participant doctrine offers a path that is at once novel to the FAA yet rooted in general principles of statutory interpretation and federalism, and replete with decades of learnings from the NLRA and other federal statutes. And while this Note encourages starting small, higher-value

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[159] *See* Wis. Dep't of Indus., Lab. & Hum. Rels. v. Gould Inc., 475 U.S. 282, 289 (1986).

[160] *See* Khorri Atkinson, *Ending Forced Arbitration of Race Claims Is New Diversity Focus*, BLOOMBERG L. (June 6, 2023, 9:15 AM), https://news.bloomberglaw.com/daily-labor-report/ending-forced-arbitration-of-race-claims-is-new-diversity-focus [https://perma.cc/3C2V-77A2] (noting the introduction of a bill in Congress to end forced arbitration of race discrimination claims).

[161] *Id.*

contracts, like those in public infrastructure projects, also benefit from improved labor conditions and reduced turnover.[162] Though the market participant doctrine is not a panacea to the deleterious impacts of forced arbitration, it offers significant opportunity as state and local government spending exceeds $3.5 trillion annually.[163] That said, the doctrine has limits; states must point to anticipated benefits or commensurate private action to demonstrate narrow tailoring to a proprietary interest — even as purity of motivation is not necessary.

Criticism of this doctrine, driven by fear of its potential breadth, might be redirected to target its surrounding context: the doctrine exists because of public sector reliance on outsourcing. Paired with this dependence is a commensurate reduction of full-time public sector jobs, which are associated with a higher caliber of wages, benefits, and union protections.[164] Absent a more robust public sector, it is reasonable to expect, then, that governments bear a proprietary interest in the labor practices of these critical private sector partners. Moreover, at a time when corporate power governs citizens as much as states do, and consumer-constituents force businesses to make commitments to the public that transcend short-term profit motives, "notions of what constitutes rational market behavior are changing, and cannot be divorced from public policy goals."[165] A doctrine that validates government action by looking to private sector action might appear concerning — but this Note proposes that the market participant doctrine has the flexibility to adapt and grow as corporate power grows.

The line between proprietary and regulatory action is perhaps even thinner than it was nearly forty years ago when the Supreme Court first drew the distinction under the NLRA — but circuit courts have continued to make the market participant exception workable across several federal statutes. States and local governments should continue to experiment against forced arbitration by exploring the market participant doctrine as a way around the Supreme Court's wall of precedent.

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[162] *See supra* note 92 and accompanying text.

[163] *State and Local Expenditures*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures [https://perma.cc/6M6B-5PHE].

[164] *See* Sergio Fernandez et al., *Employment, Privatization, and Managerial Choice: Does Contracting Out Reduce Public Sector Employment?*, 26 J. POL'Y ANALYSIS & MGMT. 57, 59–61, 71–73 (2006); *Union Members Summary*, U.S. BUREAU LAB. STAT. (Jan. 19, 2023, 10:00 AM), https://www.bls.gov/news.release/union2.nr0.htm [https://perma.cc/EF5P-3RJZ].

[165] Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 863 (2010).