AGGREGATE ACTION — CONSUMER PROTECTION — SEVENTH CIRCUIT DEALS BLOW TO MASS ARBITRATION STRATEGY. — *Wallrich v. Samsung Electronics America, Inc.*, 106 F.4th 609 (7th Cir. 2024).

Mass arbitration[1] has emerged in the last several years as a strategy to make small-dollar claims against corporate defendants viable despite mandatory arbitration clauses and collective action waivers in consumer contracts.[2] But challenges to the strategy are beginning to arrive at appellate courts. Recently, in *Wallrich v. Samsung Electronics America, Inc.*,[3] the Seventh Circuit held that consumers who simultaneously brought thousands of individual arbitration claims against Samsung could not compel Samsung to arbitrate when Samsung refused to pay its share of arbitration filing fees.[4] The panel relied heavily on the procedural rules of the American Arbitration Association (AAA), which allow the AAA to terminate the arbitration if a party does not pay its fees and the other party refuses to advance those fees.[5] *Wallrich* gave arbitration providers the go-ahead to develop increasingly defendant-friendly *procedural* rules as a way to attract corporate clients, functionally authorizing a race to the bottom in arbitration procedure amongst providers. The case highlights the problem with giving arbitration providers virtually unchecked judicial power.[6]

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[1] Mass arbitration is the process by which plaintiffs' counsel coordinates the simultaneous filing of hundreds or thousands of arbitration demands "on behalf of individual claimants . . . against a single defendant, arising out of similar alleged misconduct." J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1289 (2022). This process often results in settlement pressure because of high upfront arbitration filing fees for corporate defendants. *Id.* at 1307. Arbitration filing fees range by provider. *See id.* at 1328–29, 1329 n.241. Prominent arbitration providers in the United States include the American Arbitration Association (AAA), JAMS, and the International Institute for Conflict Prevention & Resolution (CPR). *See id.* at 1288, 1294.

[2] *See id.* at 1303–05, 1315–17, 1323. As Judge Posner wrote: "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." Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004).

[3] 106 F.4th 609 (7th Cir. 2024).

[4] *Id.* at 621–22.

[5] *Id.* at 613–14, 620–22.

[6] *See, e.g.*, Hiro N. Aragaki, *Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice*, 2016 J. DISP. RESOL. 141, 142 n.4 ("[T]here is no meaningful judicial oversight to ensure that arbitrators are applying the law [in securities arbitration]." (quoting Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 140 (2005))) ("[A]rbitrators in most cases are not bound to follow the law, nor are their decisions appealable to a court of law for any but the most egregious of defects." (alteration in original) (quoting Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782 (2002))) ("[U]nlike the outcomes in civil court, arbitrators' rulings are nearly impossible to appeal." (alteration in original) (quoting Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, A "Privatization of the Justice System*," N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/6PC2-J8JT]).

On September 7, 2022, "[p]etitioners filed 50,000 individual arbitration demands before the AAA" against Samsung.[7] The claimants were subject to Samsung's mandatory arbitration clause, which stated that "[a]ll disputes with Samsung arising in any way from these terms shall be resolved exclusively through final and binding arbitration and not by a Court or Jury"[8] and that "[t]he arbitration shall be conducted according to the [AAA] Consumer Arbitration Rules."[9] In their arbitration demands, current and former residents of Illinois[10] claimed that Samsung violated the Illinois Biometric Information Privacy Act,[11] a 2008 law prohibiting companies from collecting, storing, or selling biometric data like facial scans and fingerprints without consumer consent.[12] Specifically, petitioners alleged that Samsung had been violating the Act by collecting information from users' photographs.[13]

Samsung refused to pay its share of filing fees to the AAA.[14] Under AAA rules, arbitration cannot proceed without the payment of fees by both parties.[15] Pursuant to § 4 of the Federal Arbitration Act[16] (FAA) — which allows "[a] party aggrieved by the alleged failure,

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[7] Wallrich v. Samsung Elecs. Am., Inc., 691 F. Supp. 3d 867, 873 (N.D. Ill. 2023). Petitioners were individuals who used Samsung devices and had lived in Illinois. *Id.* at 872.

[8] *Id.* at 872 (alteration in original) (quoting Samsung Services Terms and Conditions at 3, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-05506), ECF No. 1-6) (citing Arbitration Agreement ¶ 16, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-05506), ECF No. 1-4; Verified Petition to Compel Arbitration ¶¶ 2–3, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-05506)).

[9] *Id.* (second alteration in original) (quoting Samsung Galaxy A20: Terms & Conditions / Health & Safety Information at 10, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-05506), ECF No. 17-1; Arbitration Agreement ¶ 16, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-05506), ECF No. 1-4).

[10] Nonresidents of Illinois were later removed from the suit. *See infra* note 28.

[11] 740 ILL. COMP. STAT. 14/1 (2008).

[12] Mike Scarcella, *Samsung Asks US Court to Block Mass Arbitration in Privacy Case*, REUTERS (Feb. 15, 2024, 5:13 PM), https://www.reuters.com/legal/litigation/samsung-asks-us-court-block-mass-arbitration-privacy-case-2024-02-15 [https://perma.cc/MS6V-LZYP]; *see Biometric Information Privacy Act (BIPA)*, ACLU OF ILL., https://www.aclu-il.org/en/campaigns/biometric-information-privacy-act-bipa [https://perma.cc/53Q6-T3FL].

[13] Skye Witley & Christopher Brown, *Samsung's Biometric Data Clash Opens New Mass Arbitration Front*, BLOOMBERG L. (Oct. 21, 2022, 5:05 AM), https://news.bloomberglaw.com/privacy-and-data-security/samsungs-biometric-data-clash-opens-new-mass-arbitration-front [https://perma.cc/MC8L-UGWN].

[14] *Wallrich*, 691 F. Supp. 3d at 873. Petitioners paid their fees shortly after filing the arbitration demands. *Id.* Arbitration filing fees for claimants and defendants differ. The AAA's filing fee for consumer claimants ranges from $50 to $200. *See* AM. ARB. ASS'N, CONSUMER ARBITRATION RULES: COSTS OF ARBITRATION 1 (2020), https://www.adr.org/sites/default/files/Consumer_Fee_Schedule_2.pdf [https://perma.cc/6L7C-8GKR]. In contrast, business defendants must pay between $75 and $300 per case in multiple consumer case filings. *Id.* For the first 500 cases, the business must pay $300 per claimant; from cases 501 to 1,500, the business must pay $225; from cases 1,501 to 3,000, the business must pay $150 per case; beyond 3,001, the business must pay $75. *Id.* at 3. This fee scale is part of why Samsung was faced with $4.125 million in AAA filing fees in *Wallrich*. 106 F.4th at 614. Under AAA's rules at the time of the Samsung contract, Samsung was required to pay that amount directly after claimants met their filing requirements. *See* AM. ARB. ASS'N, *supra*, at 2.

[15] *See* AM. ARB. ASS'N, *supra* note 14, at 2.

[16] 9 U.S.C. §§ 1–16.

neglect or refusal of another to arbitrate under a written agreement for arbitration [to] petition any United States district court . . . for an order directing that such arbitration proceed"[17] — claimants filed a petition to compel arbitration to the United States District Court for the Northern District of Illinois.[18]

On October 31, 2022, the AAA determined that "claimants ha[d] . . . met the AAA's administrative filing requirements on each of the 50,000 cases filed."[19] Thus, the AAA stated: "Samsung is now responsible for payment of the initial administrative filing fees totaling $4,125,000.00."[20] Samsung refused to pay the fees, as it remained "[s]keptical of the consumers' litigation tactics and the veracity of their claims."[21] The AAA offered claimants the option of advancing Samsung's $4.125 million fees, but claimants declined.[22] As a result of nonpayment, the AAA terminated the claims of 49,986 petitioners.[23]

On the threshold question of justiciability, Samsung had argued that the district court could not hear the case because it "lack[ed] authority to 'second-guess [the AAA's] determination'" to terminate the arbitration proceedings,[24] because under the FAA, courts can review arbitrators' decisions only for specific reasons.[25] The district court disagreed.[26] In an opinion written by the late Judge Leinenweber,[27] the district court held that the court could hear the dispute to compel arbitration because

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[17] *Id.* § 4.

[18] Verified Petition to Compel Arbitration, *supra* note 8, ¶ 42.

[19] *Wallrich*, 691 F. Supp. 3d at 874 (quoting Letter from AAA to Parties, *Wallrich*, 691 F. Supp. 3d 867, (No. 22-cv-05506), ECF No. 27-14).

[20] *Id.*

[21] *Wallrich*, 106 F.4th at 614.

[22] *Id.* Claimants would have recovered the advanced funds in the final arbiter award. *Wallrich*, 691 F. Supp. 3d at 873.

[23] *Wallrich*, 691 F. Supp. 3d at 874. Samsung agreed to pay the filing fees for fourteen petitioners who were residents of California. *Id.* If it had not, it would have risked severe monetary penalty due to California Code of Civil Procedure § 1281.99(a), which states that "[t]he court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement." CAL. CIV. PROC. CODE § 1281.99(a) (Deering 2020). The court can additionally order "judgment by default against the drafting party" if that party is in breach. *Id.* § 1281.99(b)(2)(B).

[24] *Wallrich*, 691 F. Supp. 3d at 879 (quoting Respondents' Reply in Further Support of Their Motion to Dismiss Petition to Compel Arbitration at 8–9, *Wallrich*, 691 F. Supp. 3d 867 (No. 22-cv-00506)).

[25] 9 U.S.C. § 10(a). Judges may vacate an arbitration decision only in cases of fraud, corruption, misconduct, or when the arbitrator exceeds her power to make an award. *Id.*

[26] *Wallrich*, 691 F. Supp. 3d at 879.

[27] Judge Leinenweber, appointed to the federal judiciary by President Reagan, passed away on June 11, 2024. Adam Harrington, *Harry Leinenweber, Renowned Chicago Federal Judge, Dies at 87*, CBSNEWS (June 11, 2024, 10:05 PM), https://www.cbsnews.com/chicago/news/harry-leinenweber-renowned-chicago-federal-judge-dies-87 [https://perma.cc/LL6X-2CHH]. The Seventh Circuit opinion on this case was announced on July 1, 2024. *Wallrich*, 106 F.4th at 609.

"no 'final and binding' arbitration ha[d] been had here."[28] The AAA had never reached an actual arbitration *decision*, so the court was not second-guessing the AAA.[29]

Under Seventh Circuit precedent on FAA § 4, the district court could compel arbitration if three elements were present: "(1) an enforceable written agreement to arbitrate, (2) a dispute within the scope of the arbitration agreement, and (3) a refusal to arbitrate."[30] The court determined that these elements were met.[31] A valid agreement existed and was proven, as plaintiffs had produced "a discrete list of named Petitioners" who each owned Samsung devices.[32] The dispute was within the scope of the arbitration agreement between the parties,[33] and "Samsung's refusal to pay the [arbitration filing] fees constitute[d] a breach of its own arbitration agreement."[34] The court rejected Samsung's argument that Petitioners had waived their right to arbitrate because they declined to advance Samsung's filing fees after Samsung refused to pay them, stating that "the fact that Petitioners had the option to pay Samsung's fees does not negate the reality that those fees were deemed Samsung's responsibility by the AAA."[35] The court ordered Samsung to pay the filing fees.[36]

The Seventh Circuit reversed.[37] Writing for a unanimous panel, Judge Kirsch[38] held that the petitioners had *not* met the burden of establishing that an arbitration agreement existed between them and Samsung,[39] and even if they had met that evidentiary burden, the district court was not authorized to order Samsung to pay the arbitration filing fees because "[t]he arbitration agreement allegedly entered into between Samsung and the consumers delegated threshold arbitration fee disputes to the AAA," not the court.[40] The court noted that if the consumers had really wanted to arbitrate the merits of their claims, they could have simply advanced Samsung's $4.125 million in fees.[41] The court determined that "Samsung and the consumers proceeded through arbitration

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[28] *Wallrich*, 691 F. Supp. 3d at 879. The court found proper subject matter jurisdiction and venue, except as to the California claimants and 14,334 claimants who had not listed claimant cities in the Northern District of Illinois. *Id.* at 874, 876, 878. Those individuals' claims were dismissed. *Id.* at 879.

[29] *Id.* at 879.

[30] *Id.* at 875 (quoting Scheurer v. Fromm Fam. Foods LLC, 863 F.3d 748, 752 (7th Cir. 2017)).

[31] *See id.* at 881, 883.

[32] *Id.* at 880–81.

[33] *Id.* at 881.

[34] *Id.* at 881–82.

[35] *Id.* at 882.

[36] *Id.* at 885.

[37] *Wallrich*, 106 F.4th at 622.

[38] Judge Kirsch was joined by Chief Judge Sykes and Judge Easterbrook. *Id.* at 613.

[39] *Id.* at 618.

[40] *Id.* at 620.

[41] *See id.* ("If the consumers had advanced the fees, Samsung would have arbitrated the merits of the consumers' claims. However, the consumers declined.").

in the manner provided for in their agreement," which was "all that was required."[42] Because Samsung refused to pay its filing fees and the AAA terminated the proceeding for nonpayment, the arbitration "had been had" and could not be second-guessed by a court.[43]

The court principally relied on the rules of the AAA to justify its decision in favor of Samsung. "[T]he AAA 'has the discretion to apply or not to apply' any of its rules, including rules that cover administrative fees," it wrote.[44] The court specifically pointed to the AAA's Supplementary Rules for Multiple Case Filings, which state that "[i]f administrative fees, arbitrator compensation, and/or expenses have not been paid in full, the AAA may notify the parties in order that one party may advance the required payment"[45] and that "the AAA may suspend or terminate [the] proceedings" if the other party does not advance the fees of the nonpaying party.[46] The parties were bound by these rules because they had contractually "bargained for the AAA's discretion over the payment of administrative filing fees, including the consequences that would stem from a party's refusal to pay those fees."[47] In the consumer contract, the parties had delegated administrative and procedural authority to the AAA, and the AAA had dismissed the case.[48] The district court, in compelling arbitration, had overstepped its authority.[49]

The Seventh Circuit determined that "the consumers' arbitration was complete"[50] because the AAA used its rules to terminate the arbitration and "open[] the door for the parties to pursue their claims in federal court."[51] Therefore, the district court "did not have the authority to flout the parties' agreement and disturb the AAA's judgment."[52] The court did not, however, cite the AAA rule on which it relied in determining that an arbitration had occurred in full simply because the proceeding had been terminated.[53] In fact, the AAA rules suggest that no arbitration was had in this circumstance. Under the subheading "Filing a Case and Initial AAA Administrative Steps," Rule 1(d) of the AAA Consumer Rules states that "[s]hould the AAA *decline* to administer *an*

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[42] *Id.*

[43] *Id.* at 622 (quoting Pre-Paid Legal Servs., Inc. v. Cahill, 786 F.3d 1287, 1294 (10th Cir. 2015)).

[44] *Id.* at 613 (quoting AM. ARB. ASS'N, CONSUMER ARBITRATION RULES 6 (2014), https://adr.org/sites/default/files/Consumer-Rules-Web_0.pdf [https://perma.cc/B9YC-KKHJ]).

[45] *Id.* at 613 (quoting AM. ARB. ASS'N, SUPPLEMENTARY RULES FOR MULTIPLE CASE FILINGS 9 (2021), https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf [https://perma.cc/72FM-ETAB]).

[46] *Id.* at 613–14 (alteration in original) (quoting AM. ARB. ASS'N, *supra* note 45, at 9).

[47] *Id.* at 620.

[48] *Id.*

[49] *See id.*

[50] *Id.* at 622

[51] *Id.* at 613.

[52] *Id.* at 620.

[53] *Id.* at 622. Judge Kirsch cited to precedent from a different circuit court. *See id.* (citing Noble Cap. Fund Mgmt., LLC v. US Cap. Glob. Inv. Mgmt., LLC, 31 F.4th 333, 336 (5th Cir. 2022)).

arbitration, either party may choose to submit its dispute to the appropriate court for resolution."[54] This rule suggests that if the AAA dismisses the case at the filing stage and refers it to federal court, *it has declined to administer the arbitration*. But in contrast to the district court — which determined that it could compel arbitration because no "'final and binding' arbitration [was] had"[55] — the Seventh Circuit determined that an arbitration *was* had.

In defending its decision, the panel cited sister circuit decisions involving termination of arbitration proceedings due to failure to pay.[56] In such cases, defendant businesses "did not have the *means* to pay their [arbitration] fees."[57] Other circuits have stated that relieving indigent defendants from paying arbitration fees did "not mean that parties may refuse to arbitrate by *choosing* not to pay for arbitration."[58] Nonetheless, the Seventh Circuit panel saw "no reason to make [a] distinction" between refusal to pay for arbitration by choice and refusal to pay for arbitration out of necessity, noting that "nothing in the statute treats parties differently based on financial status."[59]

The hands-off approach adopted by the Seventh Circuit incentivizes a race to the bottom amongst arbitration providers. Arbitration providers are private entities that compete with one another for corporate clients.[60] Clients, of course, are incentivized to seek providers that have the most defendant-friendly rules.[61] The *Wallrich* decision allows defendants to use procedural rules — like termination for nonpayment of fees and the definition of what constitutes an "arbitration" — to subvert mandatory arbitration clauses when doing so advantages them. As a result of this decision, there will be pressure on arbitration providers to further relax standards for defendants so as to compete with other providers. Not only does *Wallrich* give arbitration providers permission to allow *any* amount of process to constitute a complete "arbitration," it also signals that courts — at least in the Seventh Circuit — will not intervene to require that defendants adhere to baseline procedural expectations in arbitration.

Arbitration providers are players in the "market for business disputes and the market for justice."[62] These providers have responded to

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54 AM. ARB. ASS'N, *supra* note 44, at 10 (emphasis added).

55 Wallrich v. Samsung Elecs. Am., Inc., 691 F. Supp. 3d 867, 879 (N.D. Ill. 2023) (quoting Samsung Services Terms and Conditions, *supra* note 8, at 3).

56 *Wallrich*, 106 F.4th at 620–21 (citing Dealer Comput. Servs., Inc. v. Old Colony Motors, Inc., 588 F.3d 884, 888 (5th Cir. 2009); Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010, 1012 (9th Cir. 2004)).

57 *Id.* at 621 (emphasis added).

58 *Id.* (quoting Tillman v. Tillman, 825 F.3d 1069, 1075 (9th Cir. 2016)).

59 *Id.*

60 *See* Glover, *supra* note 1, at 1370–72.

61 *See id.*

62 Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 LAW & SOC. INQUIRY 285, 308 (1996).

market incentives spurred by the new legal tactic of mass arbitration.[63] Although arbitration providers are both not-for-profit and for-profit organizations, they compete with one another for corporate clients.[64] JAMS is a for-profit corporation[65] that grosses around $200 million per year;[66] the AAA is a nonprofit and has an annual revenue of around $150 million.[67] Unlike the court system, which is funded by taxpayers, arbitration providers must rely on steady business with corporations to keep the lights on.[68]

The *Wallrich* decision occurred in the broader context of ongoing efforts by corporations to minimize exposure to mass arbitration. Many companies have recently decided to switch arbitration providers due to mass arbitration risk.[69] In addition to larger players like AAA and JAMS, smaller arbitration boutiques have emerged as even more defendant-friendly alternatives.[70] Ticketmaster, for instance, decided to switch to a provider founded in 2020 called New Era ADR.[71] New Era's mission was to provide a "critical prophylactic measure for [a] client's mass arbitration risk."[72] DoorDash switched from AAA to the International Institute for Conflict Prevention & Resolution (CPR) in 2019 because it was "dissatisfied with the AAA's due process protocol requirements and [its] requirements for . . . filing fees."[73] When DoorDash reached out to CPR because it was dissatisfied with AAA, CPR viewed DoorDash's request for new mass arbitration protocols "as a

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[63] *See* Glover, *supra* note 1, at 1362–63.

[64] *See, e.g.*, Neal Koch, *How Mediation Firm JAMS Became the Dominant Player in the LA Market*, L.A. BUS. J. (July 5, 2020), https://labusinessjournal.com/services/law-legal-attorneys/how-mediation-firm-jams-became-dominant-player [https://perma.cc/UV4Q-6Z2D].

[65] Robert B. Davidson & Matthew Rushton, *JAMS*, GLOB. ARB. REV. (July 25, 2019), https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2020/article/jams [https://perma.cc/R8JX-463R].

[66] Koch, *supra* note 64.

[67] *American Arbitration Association Inc*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/130429745 [https://perma.cc/9EAL-E8YU].

[68] *See* Knapp, *supra* note 6, at 781.

[69] *See* Glover, *supra* note 1, at 1370. Some companies have opted to remove arbitration agreements from their consumer contracts altogether. *See, e.g.*, 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/6PEX-SZYA].

[70] *See* Glover, *supra* note 1, at 1371–72 ("Market pressure may lead smaller outfits to develop defendant-friendly protocols, but defendants are free to forum shop so long as everything seems 'fair and impartial.'" (footnote omitted) (quoting McGrath v. DoorDash, Inc., No. 19-cv-05279, 2020 WL 6526129, at *9 (N.D. Cal. Nov. 5, 2020))).

[71] Heckman v. Live Nation Ent., Inc., 120 F.4th 670, 677 (9th Cir. 2024).

[72] *Id.* (quoting Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939, 962 (C.D. Cal. 2023)).

[73] Glover, *supra* note 1, at 1370 (alterations in original) (quoting Declaration of Aaron Zigler in Support of Petitioners' Reply in Support of Amended Motion to Compel Arbitration ¶¶ 11–12, Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. 19-cv-07545), ECF No. 180-3).

lucrative business opportunity."[74] As in any other industry, arbitration providers must solicit customers.

In an effort to retain and attract corporate clients, many arbitration providers have recently released rule updates regarding mass arbitration. The introduction to the AAA Mass Arbitration Supplementary Rules updated in January 2024 states that the Rules are "intended to provide parties and their representatives with an efficient and economical path toward the resolution of multiple individual disputes."[75] These updated rules apply when there are twenty-five or more claims filed with coordinated representation and drastically reduce the fees defendants face.[76] Similarly, the JAMS mass arbitration update in May 2024 noted that "[t]he filing of dozens, hundreds or even thousands of individual claims may create administrative burden and onerous fees, as well as delay and potential unfairness to all Parties, all of which may impair the integrity of the Arbitration process."[77] Such rule updates are thinly concealed attempts to decrease the threat of mass arbitration for corporate clients.

The competition between arbitration providers creates a race-to-the-bottom dynamic that will result in lower standards for procedure across the industry.[78] With the looming threat of mass arbitration, why would corporations *not* choose the provider that is least hospitable to mass arbitration, so long as the provider can avoid scrutiny by being facially neutral?

Arbitration providers respond to pressure from competitors.[79] Because "corporate repeat players are free to take their arbitration business elsewhere if they are dissatisfied," arbitration providers "have a financial

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[74] *Id.* at 1371. The United States District Court for the Northern District of California found no issue with this interaction between DoorDash and CPR. *See McGrath*, 2020 WL 6526129, at *10.

[75] AM. ARB. ASS'N, MASS ARBITRATION SUPPLEMENTARY RULES 3 (2024), https://www.adr.org/sites/default/files/Mass_Arbitration_Supplementary_Rules.pdf [https://perma.cc/PZE4-3FPZ].

[76] The new rules charge corporate defendants a flat initiation fee of $8,125 when they are faced with mass arbitration claims. *See 2024 Sees Newly Enacted AAA and JAMS Mass Arbitration Rules*, DUANE MORRIS (July 1, 2024), https://duanemorris.com/alerts/2024_sees_newly_enacted_aaa_jams_arbitration_rules_0724.html [https://perma.cc/3TQJ-TQV8]. The defendant must then pay reduced per-claim fees; for up to 500 claims, the defendant is responsible for $325 per claim. *Id.* For claims 501–1,000, the defendant must pay $250 per claim. *Id.*

[77] *Mass Arbitration Procedures and Guidelines*, JAMS (May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures [https://perma.cc/3J6Z-BZQG].

[78] In the corporate governance context, a race to the bottom is when states "adopt regulations that are *more permissive* than the regulations in force in other states" so as to "appeal to the corporations and corporate executives that make decisions about where to locate business." William Magnuson, *The Race to the Middle*, 95 NOTRE DAME L. REV. 1183, 1185 (2020).

[79] AMIT SERU, STAN. INST. FOR ECON. POL'Y RSCH., TIPPING THE SCALES: BALANCING CONSUMER ARBITRATION CASES 5 (2023), https://drive.google.com/file/d/1koZ61poyVuEmnQyYKTePQzYxbVGKvH93/view [https://perma.cc/EH9B-92UQ] ("Because arbitrators compete to be selected by the informed party . . . the whole pool of arbitrators becomes more industry friendly in equilibrium.").

incentive to appeal to large-volume repeat users."[80] Providers such as JAMS use marketing tactics "to persuade large companies to specify in . . . contracts with suppliers of goods and services, as well as employment agreements, that disputes would be resolved through the company's arbitration services."[81] Although arbitration providers profit from mass arbitration due to filing fees and hourly rates,[82] they are cognizant of corporations' strong desire to avoid mass arbitration.[83] Retaining *some* of a corporation's business — for standard individual arbitrations — may therefore be preferable to losing *all* of a corporation's business to a different, more defendant-friendly provider.

The *Wallrich* decision is particularly concerning given the court's interpretation of what constitutes an "arbitration" under AAA rules. As discussed above, despite evidence to the contrary in the AAA Consumer Rules, the Seventh Circuit determined that, because the AAA had dismissed for nonpayment of initial filing fees, an arbitration had occurred in full; thus, under the FAA, a court could not disturb the AAA's decision. The implication of this rationale is that arbitration providers are free to allow *any* amount of process to constitute an "arbitration." If the AAA or one of its competitors were to adopt a technical definition of "arbitration" that mirrored that of the Seventh Circuit, courts would almost *never* be able to compel arbitration under § 4 of the FAA because doing so would disturb the judgment of the arbitrator. In this way, *Wallrich* makes arbitration providers the proverbial judge, jury, and executioner. Arbitration providers are subject to no oversight when they write their procedural rules,[84] and *Wallrich* illustrates they are subject to no oversight in how they implement them.

Of course, the Seventh Circuit is not reflective of all jurisdictions. Some courts have expressly limited the ability of corporate defendants to forum shop among arbitration providers. In *Abernathy v. DoorDash, Inc.*,[85] the Northern District of California responded almost gleefully as it rejected defendants' arguments.[86] "[I]n irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied

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[80] DREW LIEBERT ET AL., CAL. STATE ASSEMBLY JUDICIARY COMM., ARBITRATION IN CONSUMER DISPUTES: A FOCUS ON THE PROVIDERS 7 (2002), https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/0202%20ArbitrationProvidersbackground.pdf [https://perma.cc/SJ6S-R5JU].

[81] Koch, *supra* note 64.

[82] *See* AM. ARB. ASS'N, *supra* note 14, at 3–5.

[83] *See, e.g.*, *supra* notes 75–77 and accompanying text.

[84] "[C]reating the Arbitration Rules is nothing like court rulemaking. For one, providers do not even disclose how they decide to change their codes or what they do to vet these revisions. Thus, the manner of making the Arbitration Rules is as much of a black box as arbitration itself." David Horton, *The Arbitration Rules: Procedural Rulemaking by Arbitration Providers*, 105 MINN. L. REV. 619, 645 (2020); *see also id.* at 625 (defining "Arbitration Rules" as "private versions of federal and state rules of civil procedure" that are created and used by individual arbitration providers).

[85] 438 F. Supp. 3d 1062 (N.D. Cal. 2020).

[86] *See id.* at 1067–68.

to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed," the court said at the end of its opinion.[87] Another court recently rejected the *Wallrich* reasoning, emphasizing that § 4 of the FAA *requires* courts to compel arbitration in such situations.[88] And, in October 2024, the Ninth Circuit held in *Heckman v. Live Nation Entertainment, Inc.*[89] that Ticketmaster's New Era ADR arbitration agreement was unconscionable.[90] While *Heckman* limits corporations' ability to forum shop among arbitration providers based on procedural rules, *Wallrich* is a bright spot for corporations, and a powerful one at that. The stage is being set for a certiorari-worthy case.

What is "ultimately at stake" in disputes concerning arbitration procedure "are the rules of the game for business and the legitimate authority to decide business disputes."[91] The emerging circuit split presents different theories on the extent to which courts will serve as backstops for unfair arbitration procedure. *Wallrich* fits into the federal judiciary's trajectory toward a narrowed scope of civil rights and remedies for consumers against corporate defendants, particularly under the Roberts Court.[92] After all, mass arbitration itself is a direct result of decreased access to the courtroom.[93]

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87 *Id.* at 1068.

88 *See* Brooks v. WarnerMedia Direct, LLC, No. 23 CIV. 11030, 2024 WL 3330305, at *6–7 (S.D.N.Y. July 8, 2024). The *Brooks* court differentiated *Wallrich* from its case, saying that while in *Wallrich* the AAA "terminated the proceedings, opening the door for the consumers to pursue their claims in district court," in the case at bar, the arbitration provider said that the arbitration could move forward if the court compelled an arbitration. *Id.* at *7 (quoting *Wallrich*, 106 F.4th at 620).

89 120 F.4th 670 (9th Cir. 2024).

90 *Id.* at 690 (citing Discover Bank v. Superior Ct., 113 P.3d 1100, 1110 (Cal. 2005)).

91 Dezalay & Garth, *supra* note 62, at 308.

92 As Professors Stephen Burbank and Sean Farhang write: "[T]he judiciary enjoys a privileged position to use procedure for the purposes of [rights] retrenchment." STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT, at xvii (2017). The "counterrevolution" against rights occurred "in the wake of an outpouring of rights-creating legislation from Democratic Congresses in the 1960s and 1970s." *Id.* at 3. The conservative legal movement responded by undertaking "efforts to diminish opportunities and incentives for private enforcement" of rights, which was largely successful in the judiciary, where federal law has become "unfriendly, if not hostile, toward enforcement of rights through private lawsuits." *Id.*

93 *See Developments in the Law — Labor and Employment*, 136 HARV. L. REV. 1587, 1652, 1654–58 (2023).