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# Sharing Economy Inequality: How the Adoption of Class Action Waivers in the Sharing Economy Presents A Threat to Racial Discrimination Claims

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# SHARING ECONOMY INEQUALITY: HOW THE ADOPTION OF CLASS ACTION WAIVERS IN THE SHARING ECONOMY PRESENTS A THREAT TO RACIAL DISCRIMINATION CLAIMS

**Abstract:** In recent years, the sharing economy has pervaded the life of the consumer, challenging the regulatory and business status quo. Despite the pluralistic messages of many sharing economy companies, racial discrimination is a growing problem on peer-to-peer networks such as Uber and Airbnb. Victims of discrimination, however, have encountered an even greater opponent: class action waivers in arbitration agreements, which are omnipresent in sharing economy company contracts. Due to the inherent tie between class action and civil rights, racial discrimination claims in the sharing economy are held hostage by individual arbitration agreements. This Note argues that without action by Congress or a regulatory agency, such waivers threaten future civil rights enforcement.

## INTRODUCTION

In March 2015, Gregory Selden, an African-American man, planned a weekend trip to Philadelphia, Pennsylvania.[1] Selden opted to use Airbnb, an online marketplace that connects homeowners with travelers seeking accommodations, to book his lodging.[2] He browsed the listings, found a room listed as "available" for his desired dates, and contacted the host.[3] The host, Paul, responded that despite the information on Airbnb, the room was not vacant on Selden's desired dates.[4] Later that afternoon, Selden continued his search for travel accommodations on Airbnb and noticed something strange: the room he was rejected from earlier was still listed as "available."[5] The odd circumstances surrounding the room's availability, combined with the fact that he included a picture of his face on his Airbnb profile, led Selden to believe that he may

[1] Selden v. Airbnb, Inc., No. 16-cv-00933, 2016 WL 6476934, at *1 (D.D.C. Nov. 1, 2016); Second Amended Complaint at 5, Selden v. Airbnb, No. 1:16-cv-00933-CRC (D.D.C. Nov. 1, 2016). *See generally* Vahuini Vara, *How Airbnb Makes It Hard to Sue for Discrimination*, NEW YORKER (Nov. 3, 2016), http://www.newyorker.com/business/currency/how-airbnb-makes-it-hard-to-sue-for-discrimination [https://perma.cc/A7K6-5UNM] (providing a summary of Gregory Selden's Airbnb lawsuit).

[2] *Selden*, 2016 WL 6476934, at *2; *About Us*, AIRBNB, https://www.airbnb.com/about/about-us [https://perma.cc/8FUX-QLME].

[3] *Selden,* 2016 WL 6476934, at *2.

[4] *Id.*

[5] *Id.*

have been racially discriminated against.[6] To test his hypothesis, he created two imitation accounts with white sounding names and profile pictures of white people.[7] Using the imitation accounts, Selden again contacted Paul and requested the same room for the same dates—Paul immediately accepted the faux requests.[8]

Shortly after his discovery, Selden filed a class-action lawsuit in the U.S. District Court for the District of Columbia against Airbnb on behalf of himself and other African-Americans who had allegedly been discriminated against on Airbnb.[9] He alleged that Airbnb violated Title II of the Civil Rights Act of 1964, the Fair Housing Act of 1968, and 42 U.S.C. § 1981.[10] The district court, however, granted Airbnb's motion to compel arbitration, finding that the court lacked jurisdiction over Selden's substantive claim.[11] The judge explained that the court could not hear the case because Selden agreed to Airbnb's terms of service when he created his account, which included an individual arbitration clause.[12] Thus, not only was Selden precluded from a jury trial, but he was also barred from pursuing a class action claim.[13]

Gregory Selden's failed attempt to bring forth a class-action claim highlights a troubling trend within the sharing economy: individual arbitration clauses found in terms of service agreements have made it nearly impossible to

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[6] *Id.*

[7] *Id.* Selden's first alias account was for a man named "Jesse" and included a profile picture of a white person. Second Amended Complaint, *supra* note 1, at 9. The second account stated the user's name was "Todd" and also included a photograph of a white person. *Id.* at 10.

[8] *Selden,* 2016 WL 6476934, at *2.

[9] *Id.*; Katie Benner, *Airbnb Vows to Fight Racism, but Its Users Can't Sue to Prompt Fairness*, N.Y. TIMES (Jun. 19, 2016), http://www.nytimes.com/2016/06/20/technology/airbnb-vows-to-fight-racism-but-its-users-cant-sue-to-prompt-fairness.html [https://perma.cc/599V-XZT2].

[10] *See* 42 U.S.C. § 1981 (2012) (mandating that discrimination in contracts is unconstitutional); Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)–(b) (defining public accommodation); 42 U.S.C. § 3604 (dictating that discrimination in housing is unconstitutional); *Selden,* 2016 WL 6476934, at *2. First, Selden argued that Airbnb's actions violated Title II of the Civil Rights Act and the Fair Housing Act. Second Amended Complaint, *supra* note 1, at 11–12; *see* 42 U.S.C. § 2000(a). Selden explained that Airbnb, as an inn, hotel, motel or other establishment that provides lodging to transient guests, is a place of public accommodation. Second Amended Complaint, *supra* note 1, at 11–12; *see* 42 U.S.C. § 2000(b) (defining public accommodation). Selden's second cause of action was that Airbnb violated the federal civil rights statute, 42 U.S.C. § 1981, because Airbnb discriminated against Selden in its contract with him. Second Amended Complaint, *supra* note 1, at 12–13. Last, Selden argued that the Airbnb agent was untruthful when disclosing availability about the housing, violating the Fair Housing Act. Second Amended Complaint, *supra* note 1, at 14; *see* 42 U.S.C. § 3604

[11] *Selden,* 2016 WL 6476934, at *8.

[12] *Id.*; *Terms of Service*, AIRBNB, https://www.airbnb.com/terms [https://perma.cc/8QMS-32G5] [hereinafter *Airbnb Terms*] (stating that all disputes must be resolved through arbitration on an individual basis). Further, the district court explained that there was a lack of support for Selden's argument that there is an inherent conflict between racial discrimination claims and arbitration. *Selden,* 2016 WL 6476934, at *7–8.

[13] *Selden,* 2016 WL 6476934, at *8; *Airbnb Terms, supra* note 12.

develop effective racial discrimination claims against powerful companies such as Uber, Airbnb, and Lyft.[14] The sharing economy purportedly creates pluralistic platforms where people can collaborate to buy and sell goods and services; however, racial discrimination has prevented minorities from having a fair opportunity to engage in this market.[15] Lawyers and legal scholars are developing theories on how "marketplace" companies such as Airbnb could be found liable under existing law and are proposing ways in which regulations could be reformed.[16] While such theories are maturing, these efforts may never be addressed by a court due to the widespread adoption of mandatory arbitration clauses in the sharing economy.[17]

Mandatory arbitration clauses, which are often coupled with a class action waiver, present a unique and troubling challenge to racial discrimination due to clashing legal standards.[18] An arbitration clause with a class action waiver re-

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[14] *See Selden,* 2016 WL 6476934, at *6–8 (holding that the plaintiff must arbitrate his discrimination claim); Allison Frankel, *Uber and the Gig Economy's Existential Litigation Threat*, REUTERS (Apr. 16, 2016), http://blogs.reuters.com/alison-frankel/2016/04/06/uber-and-the-gig-economys-existential-litigation-threat/ [https://perma.cc/VZN7-FDN8] (stating that the widespread use of individual arbitration clauses in the sharing economy creates a serious threat to civil litigation).

[15] *See* Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J.: APPLIED ECON., Apr. 2017, at 2 (reporting findings of racial discrimination on Airbnb); Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* 2 (Nat'l Bureau of Econ. Res., Working Paper No. 22776, 2016) (summarizing findings of racial discrimination in Boston and Seattle on Uber); Nancy Leong, *New Economy, Old Biases*, 100 MINN. L. REV. 2153, 2160–63 (2016) (discussing how discrimination has emerged in the sharing economy); Max Nesterak et al., *#AirbnbWhileBlack: How Hidden Bias Shapes the Sharing Economy*, NAT'L PUB. RADIO (Apr. 26, 2016), http://www.npr.org/2016/04/26/475623339/-airbnbwhileblack-how-hidden-bias-shapes-the-sharing-economy [https://perma.cc/5LQM-5Y9J] (sharing anecdotes of African-Americans who have been discriminated against while using Airbnb); Vara, *supra* note 1; Gillian White, *Uber and Lyft Are Failing Black Riders*, THE ATLANTIC (Oct. 31, 2016), https://www.theatlantic.com/business/archive/2016/10/uber-lyft-and-the-false-promise-of-fair-rides/506000/ [https://perma.cc/YS3Y-VBSP] ("Uber, Lyft and other ride-sharing services were supposed to be a more egalitarian transportation option than a traditional cab service . . . . But a new study finds that some of the problems persist.").

[16] *See* Second Amended Complaint, *supra* note 1, at 10–14 (alleging that Airbnb violated Title II, the Fair Housing Act, and 42 U.S.C. § 1981); Aaron Belzer & Nancy Leong, *The New Public Accommodation*, 105 GEO. L.J. 1271, 1302–04 (2017) (discussing Airbnb's status as a public accommodation under the Fair Housing Act); *see infra* note 177 (detailing the different theories proposed by legal scholars).

[17] *See* Benner, *supra* note 9 (stating that class action waivers hinder racial discrimination claims); *see also* Belzer & Leong, *supra* note 16, at 1302–06 (discussing the emerging arguments that sharing economy companies could be held liable under existing law); *infra* note 177 (detailing novel theories regarding Airbnb and civil rights laws).

[18] *See* Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 333–34 (2015) (discussing the values of class action and how arbitration frustrates the class action goals); Joanne Doroshow, *Fact Sheet: Class Actions Are Critical to Remedy Workplace Racial Discrimination*, AM. ASS'N FOR JUST.: FIGHTING FOR JUST. BLOG (Oct. 22, 2014), https://www.justice.org/blog/fact-sheet-class-actions-are-critical-remedy-workplace-racial-discrimination [https://perma.cc/UUK8-

quires that a plaintiff assert his or her claims individually.[19] Racial discrimination cases, however, often require the resources and systemic relief that accompany a class action lawsuit.[20] Thus, attempts to unearth systemic, racial discrimination issues in the sharing economy are held hostage at the hands of arbitration agreements that include class action waivers.[21] As the sharing economy becomes increasingly pervasive in the lives of consumers, cases like Gregory Selden's will only become more common.[22]

This Note examines Airbnb as a case study to explore the setbacks created by the omnipresence of individual arbitration clauses within the sharing economy.[23] Part I of this Note discusses the emergence of the sharing economy, and discrimination in the sharing economy sphere.[24] Part II provides a background of arbitration law and class action waivers, and explores why such clauses are popular in the sharing economy.[25] Part III of this Note shifts to civil rights law and explains the strong tie between civil rights and class action claims.[26] Further, it argues that the waivers in arbitration agreements pose a threat to minorities.[27] Part IV of this Note argues despite the courts' unwillingness to limit class action waivers, Congress should pass legislation with a contrary congressional command to the Federal Arbitration Act (FAA), or a federal agency should promulgate regulations banning class action waivers in the civil rights realm.[28]

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K2K5] (highlighting the importance of class action in racial discrimination cases); *see infra* notes 96–113 and accompanying text (discussing why arbitration and class action waivers are utilized together).

[19] *See Selden,* 2016 WL 6476934, at *8 (requiring that plaintiff Gregory Selden arbitrate his racial discrimination claims); Barnes, *supra* note 18, at 336 (explaining that most arbitration clauses include class action waivers); *Airbnb Terms*, *supra* note 12 ("[Y]ou and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action lawsuit, class-wide arbitration.").

[20] *See infra* notes 132–151 and accompanying text (discussing the inherent tie between class action and racial discrimination claims).

[21] *See Selden,* 2016 WL 6476934, at *8 (granting Airbnb's motion to individually arbitrate the racial discrimination claim); Benner, *supra* note 9; Vara, *supra* note 1.

[22] *See Selden,* 2016 WL 6476934, at *4–5 (discussing how online adhesion contracts with arbitration clauses are generally enforceable); Stephen Miller, *First Principles for Regulating the Sharing Economy*, 53 HARV. J. ON LEGIS. 147, 160 (2016) (stating that the sharing economy is here to stay); Niam Yaraghi & Shamika Ravi, *The Current and Future State of the Sharing Economy,* BROOKINGS INST. (Dec. 29, 2016), https://www.brookings.edu/research/the-current-and-future-state-of-the-sharing-economy/ [https://perma.cc/H3L9-UWKA] (finding that the sharing economy is growing).

[23] *See infra* notes 29–245 and accompanying text.

[24] *See infra* notes 29–63 and accompanying text.

[25] *See infra* notes 64–121 and accompanying text.

[26] *See infra* notes 122–220 and accompanying text.

[27] *See infra* notes 122–220 and accompanying text.

[28] *See infra* notes 221–246 and accompanying text.

## I. THE RISE OF THE SHARING ECONOMY

In the past five years, companies such as Uber, Airbnb, and Lyft have changed the way people approach traveling, lodging, and shopping.[29] These sharing economy companies promote collaborative consumerism and challenge the traditional roles of hotels, taxis, and other rental services.[30] While such platforms have been extremely successful, generating billions of dollars in revenue, they have simultaneously dodged a large amount of legal liability—especially civil rights violations—due to the widespread adoption of individual arbitration clauses.[31]

This Part sets the landscape of this increasingly problematic issue.[32] Section A discusses the rise of the sharing economy, the roots of Airbnb, and the rise of discrimination within this setting.[33] Section B discusses the nascent discrimination within this setting.[34]

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[29] *See* Miller, *supra* note 22, at 156–60 (discussing that the sharing economy is popular because consumers are interested in the products offered by such companies, and it allows consumers to gain value from under-utilized goods "such as the extra bedroom in a house"); Yaraghi & Ravi, *supra* note 22; Aaron Smith, *Shared, Collaborative, and on Demand: The New Digital Economy*, PEW RES. CTR. (May 19, 2016), http://www.pewinternet.org/2016/05/19/the-new-digital-economy/ [https://perma.cc/UE7S-WGY3] (explaining that the sharing economy touches many aspects of people's lives). In a recent study, the Pew Research Center found that 15% of Americans have used a ride hailing application and 11% of Americans have used a home sharing platform. Smith, *supra*. Further, the use of such applications is heavily concentrated among young people; 18–29 year olds are seven times as likely to use ride hauling apps than those over the age of 65. *Id.*

[30] *See* Miller, *supra* note 22, at 151, 166–68 (discussing how certain sharing economy companies challenge traditional zoning laws and other regulations); Yaraghi & Ravi, *supra* note 22, (discussing how the sharing economy presents a regulatory challenge). For example, the sharing economy challenges zoning laws and the notion of the "single use residential zone." Miller, *supra* note 22, at 166–67.

[31] *See* Martha Nimmer, *The High Cost of Mandatory Arbitration*, 12 CARDOZO J. CONFLICT RESOL. 183, 202 (2011) (noting that arbitration decreases the fear of civil rights litigation); Lorelei Lard, *Sharing Isn't Caring When Small Businesses Skirt Civil Rights Laws*, AM. BAR ASS'N J. (May 1, 2017), http://www.abajournal.com/magazine/article/sharing_services_civil_rights_lawsuits [https://perma.cc/PP6S-YQKE] (noting that arbitration clauses have prevented the issue of racial discrimination in the sharing economy from being tested in court); David Sirota & Christopher Zara, *Airbnb, Forced Arbitration, and an Evolving Privacy Policy That Shares More Than Homes*, INT'L BUS. TIMES (Apr. 6, 2016, 7:48 AM), http://www.ibtimes.com/airbnb-forced-arbitration-evolving-privacy-policy-shares-more-homes-2348752 [https://perma.cc/4KGY-STBH] (highlighting forced arbitration in Uber and Airbnb); Rolfe Winkler & Douglas MacMillan, *The Secret Math of Airbnb's $24 Billion Valuation*, WALL ST. J. (Jun. 17, 2015, 3:15 PM), https://www.wsj.com/articles/the-secret-math-of-airbnbs-24-billion-valuation-1434568517 [https://perma.cc/Q5BV-K5N3] (stating that Airbnb was projected to triple their revenue in three years); *The Sharing Economy*, PRICEWATERHOUSECOOPERS 14 https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf [https://perma.cc/XB22-6UYR (claiming that Uber was valued at $41.2 billion as of February 2015 and that projections show that five sharing economy sectors could generate over $335 billion by the year 2025).

[32] *See infra* notes 35–63 and accompanying text.

[33] *See infra* notes 35–50 and accompanying text.

[34] *See infra* notes 51–63 and accompanying text.

### *A. The Rise of the Sharing Economy and Airbnb in Particular*

Twenty-first century technological developments have created a society connected in ways once unimaginable.[35] In addition to diminishing spatial borders, these developments have facilitated the widespread dissemination of information, creating a new sphere of consumerism.[36] This development is two-fold: first, it creates a platform where people can offer their goods and services, and second, it provides the means for consumers to find people in their communities offering such goods and services.[37] This phenomenon creates a network of peers and has been coined the "sharing economy."[38]

While the idea of the sharing economy appears to be a simple concept, this hybrid market is supported by a number of massive technology companies that have made billions in revenue by creating the platforms where peer-to-peer sharing takes place.[39] The sharing economy has been most successful in the transportation and lodging sector, where companies such as Uber and Airbnb dominate the market.[40] Peer-to-peer sharing, however, is not limited to travel and lodging; sharing economies are formed almost daily in a variety of

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[35] *See* Russell Belk, *You Are What You Access: Sharing and Consumption Online*, 67 J. BUS. & RES. 1595, 1596 (2014) (explaining that the internet has created new ways of sharing goods); Joseph Shuford, Note, *Hotel, Motel, Holiday Inn and Peer-to-Peer Rentals*, 16 N.C. J.L. & TECH. ONLINE 301, 309–10 (2015) (highlighting how technology has shaped the lives of consumers).

[36] *See* Belk, *supra* note 35, at 1596 (defining the new sphere of collaborative consumerism); Shuford, *supra* note 35, at 309–10 (explaining how technological developments have facilitated the buying and selling of goods); Peter Nichol, *How the Sharing Economy Is Shaping the Future Work in Healthcare*, CIO MAG., Jun. 29, 2016 (highlighting the numerous industries where the sharing economy has a presence).

[37] *See* Belk, *supra* note 35, at 1596 (explaining how technology has created collaborative consumerism, where people coordinate buying and selling goods); Shuford, *supra* note 35,at 309 (explaining how technological developments have facilitated the buying and selling of goods).

[38] *See* Shuford, *supra* note 35, at 305–06 (discussing the background of the sharing economy); Yaraghi & Ravi, *supra* note 22 (defining the sharing economy).

[39] *See* Miller, *supra* note 22, at 160–61 (discussing the clout of Airbnb in the hotel industry); Shuford, *supra* note 35, at 309. As of December 2015, Uber was valued at almost $70 billion, surpassing the riches of Ford and General Motors. Liyan Chen, *At $68 Billion Valuation, Uber Will Be Bigger Than GM, Ford, and Honda*, FORBES (Dec. 4, 2015, 11:23 AM), https://www.forbes.com/sites/liyanchen/2015/12/04/at-68-billion-valuation-uber-will-be-bigger-than-gm-ford-and-honda/#20865e7232e3 [https://perma.cc/4CJU-6NLE]. Airbnb is current valued at over $30 billion. David Morris, *Airbnb Valued at $30 Billion in $850 Million Capital Raise,* FORTUNE (Aug. 6, 2016), http://fortune.com/2016/08/06/airbnb-valued-at-30-billion/ [https://perma.cc/W4QT-D3YX].

[40] *See* Miller, *supra* note 22, at 160–61 (discussing the clout of Airbnb in the hotel industry); *Room for More: Business Travelers Embrace the Sharing Economy*, CERTIFY, https://www.certify.com/Infograph-Sharing-Economy-Q2-2015.aspx [https://perma.cc/SH2R-EA5P]. One study found that 79% of rides in San Francisco, 60% of rides in Dallas, and 54% of rides in Los Angeles are through Uber. *Room for More: Business Travelers Embrace the Sharing Economy*, *supra.* The sharing economy is also prominent in sectors such as learning, municipal, goods, health and wellness, space, food, logistics and corporate. Miller, *supra*, at 149, 151.

different sectors.[41] One study projected that by the year 2025, the sharing economy could generate over $335 billion in revenue.[42] As the sharing economy continues to grow in a number of industries, it is likely to become more pervasive in the lives of consumers.[43]

Airbnb, an online marketplace where homeowners rent their residences to customers seeking short-term accommodation, is one of the sharing economy's biggest successes.[44] The company was founded in 2008 by three entrepreneurs, Brian Chesky, Nathan Blecharczyk, and Joe Gebbie, each now with an estimated net worth over $3 billion.[45] What started as a marketplace where people could "crash" on a local's air mattress evolved into a mission to make customers feel at home while traveling anywhere in the world.[46] Specifically, the founders' hopes are to enhance travelers' experiences by adding the personal

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[41] *See* Brian J. Miller, *Telemedicine and the Sharing Economy: The "Uber" for Healthcar*e, 22 AM. J. MANAGED CARE, e420, e421 (2016); Miller, *supra* note 22, at 151 (finding that sharing economy companies emerge almost daily in numerous market sectors); Nichol, *supra* note 36 (discussing the emerging sharing economy sectors). For example, Teledoc is a sharing economy company that provides on demand medical care through telephone and videoconferencing. *About Our Company,* TELEDOC, https://www.teladoc.com/about-our-company/ [https://perma.cc/2XQU-JKQC].

[42] *The Sharing Economy, supra* note 31, at 14. The $335 billion revenue accounts for the top five sharing economy industries: travel, car sharing, finance, staffing, and music and video streaming. *Id.*

[43] *See* Miller, *supra* note 22, at 151 (discussing the growth of the sharing economy); Nichol, *supra* note 36 (discussing the emerging sharing economy sectors); *The Sharing Economy, supra* note 31, at 14 (claiming the revenue of the sharing economy will be $335 billion by 2025).

[44] *About Us, supra* note 2; *Company Overview of Airbnb, Inc.*, BLOOMBERG, http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=115705393 [https://perma.cc/N9PD-WPPG]. The specific process of how one uses Airbnb differs for travelers and hosts. *Earn Money as an Airbnb Host*, AIRBNB, https://www.airbnb.com/host/homes [https://perma.cc/Z2BR-BD9E]; *How Do I Create an Account?*, AIRBNB, https://www.airbnb.com/help/article/221/how-do-i-create-an-account [https://perma.cc/R5H6-RNJ3. If one seeks to become a host, the website offers user-friendly directions on how to list your house or apartment. *Earn Money as an Airbnb Host*, *supra*. This includes inputting personal information as well as details and photos of the listing. *Id.* If one is looking to travel, she must first create a profile with relevant personal information and an optional photo. *How Do I Create an Account?*, *supra.* Once a profile has been created, the traveler need only input the dates and city of travel and the number of travelers, which will lead to a list of available accommodations. AIRBNB, https://airbnb.com [https://perma.cc/GF6D-3GYJ]. If the traveler sees a room or house that he or she likes, there is an option to "contact the host." *Id.* From that point forward, the host has the ability to either accept or reject the listing. *Id. But see What Is Instant Book?*, AIRBNB, https://www.airbnb.com/help/article/523/what-is-instant-book [https://perma.cc/3TCJ-TW9A] (explaining the instant book feature, where guests can book a listing without prior approval from a host).

[45] *See Bloomberg Billionaires Index*, BLOOMBERG, https://www.bloomberg.com/billionaires/profiles/brian-chesky/ [https://perma.cc/C7Q7-W9FF]; *Company Overview of Airbnb, Inc*., *supra* note 44.

[46] *See* Brian Chesky, *Belong Together*, AIRBNB BLOG (July 16, 2014), http://blog.airbnb.com/belong-anywhere/ [https://perma.cc/ZMG4-S7S6] (giving an in depth explanation of Airbnb's current mission of belonging); Derek Thompson, *Airbnb CEO Brian Chesky on Building a Company and Starting a 'Sharing' Revolution*, THE ATLANTIC (Aug. 13, 2013) https://www.theatlantic.com/business/archive/2013/08/airbnb-ceo-brian-chesky-on-building-a-company-and-starting-a-sharing-revolution/278635/ [https://perma.cc/M59Z-H2JL] (stating that Airbnb began as a company that supplied air beds on San Francisco floors).

touch of connecting the guest and host.[47] They explained that it is their mission to foster a feeling of universal humanity and a "desire to feel welcomed, respected, and appreciated for who you are, no matter where you might be."[48] Since Airbnb's humble beginnings in San Francisco, the company now offers spaces in over 34,000 cities in 191 countries.[49] Over the past eight years, Airbnb has accommodated more than one hundred million guests and is currently valued at around twenty five billion dollars, surpassing some of the largest hotel chains in the world.[50]

### *B. Discrimination in the Sharing Economy*

Despite many sharing economy companies' high hopes for global inclusivity, this has not been the reality for their everyday consumers.[51] In particular, Airbnb has been the subject of numerous racial discrimination complaints.[52] Specifically, minority travelers have found it more difficult to secure open accommodation than their non-minority counterparts.[53] For example, Quirtina Crittenden, an African-American woman, explained that there were a number of times when hosts would not accept her request, claiming that someone had just booked the room, or "regulars" were coming into town that weekend and were staying in the requested room.[54] Suspecting discrimination, she changed her profile photo from herself to a cityscape—suddenly she no longer received such excuses from hosts.[55] Quirtina is not alone in her Airbnb troubles.[56] When she went public with her frustrations, a number of other minority

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[47] Chesky, *supra* note 46.

[48] *Id.*

[49] *About Us, supra* note 2.

[50] AIRBNB LAW ENFORCEMENT TRANSPARENCY REPORT, AIRBNB (Sept. 1, 2016), http://transparency.airbnb.com/ [https://perma.cc/2SBY-7ZJD]; Johanna Interian, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L & COMP. L. REV. 129, 133–34 (2016). Airbnb's valuation of $25 billion surpasses Wyndham Worldwide Corporation's $9.4 billion valuation and Hyatt Hotels Corporation's $9.2 billion valuation. Interian, *supra* at 133–34.

[51] *See* Leong, *supra* note 15, at 2160–65 (examining racial discrimination by Uber, Airbnb, and Lyft); Michael Todisco, Note, *Share and Share Alike? Considering Racial Discrimination in the Nascent Room-Sharing Economy*, 67 STAN. L. REV. ONLINE 121, 126–27 (2015), https://www.stanfordlawreview.org/online/share-and-share-alike/ [https://perma.cc/2UJ4-FFBF] (discussing racial discrimination in the sharing economy); Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES, (Jun. 21, 2016), http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html [https://perma.cc/Z8PG-52FR] (highlighting a growing number of racial discrimination claims on Airbnb); Nesterak, *supra* note 15 (conveying the experience of a young black women who was discriminated a number of times while using Airbnb's services).

[52] Glusac, *supra* note 51; Nesterak, *supra* note 15.

[53] Edelman, *supra* note 15, at 10–11; Nesterak, *supra* note 15.

[54] Nesterak, *supra* note 15.

[55] *Id.*

[56] *See* Rahel Gebreyes, *#AirbnbWhileBlack Highlights Discrimination Faced by Travelers*, HUFFINGTON. POST (May 5, 2016), http://www.huffingtonpost.com/entry/airbnbwhileblack-discrimination-

Airbnb users shared their similar experiences.[57] A group at Harvard Business School ("HBS") quantified these experiences and after an intensive study, found that African-American travelers were 16% less likely to be accepted as an Airbnb guest than those travelers with distinctly white names.[58] Thus, the experiences shared on social media as well as the HBS study provide evidence that racial discrimination within the Airbnb community is undoubtedly real.[59]

Studies have found racial discrimination on the Uber platform as well.[60] One report found that in Seattle, African-Americans have up to a 35% increase in waiting time in comparison to whites.[61] Further, the study concluded that in Boston, males with African-American sounding names were more than twice as likely to have their ride cancelled than males with white sounding names.[62] Thus, despite novel technologies and progressive messages, companies in the sharing economy still struggle to combat racial discrimination on their platforms.[63]

## II. ARBITRATION IN THE SHARING ECONOMY

Airbnb's novel home sharing structure challenges the traditional regulatory scheme, especially in the realm of civil rights law.[64] As a result, there has been growing legal scholarship concerning how Airbnb and other sharing

faced-by-black-travelers_us_572a66d6e4b016f37894a5c4 [https://perma.cc/W4AQ-5VXV] (citing anecdotes of racial discrimination on Airbnb); Nesterak, *supra* note 15.

[57] *See* Gebreyes, *supra* note 56; Nesterak, *supra* note 15.

[58] Edelman, *supra* note 15, at 2. In their study, the researchers sent 6400 messages between July 7, 2015 and July 30, 2015. *Id*. at 9–10. Some messages were sent from profiles with distinctive white names, whereas other messages were sent from profiles with distinctively African-American names. *Id.* at 9. The study found that those with distinctively African-American names were accepted 42% of the time, while those with distinctively white sounding names were accepted 50% of the time. *Id.* at 10–11.

[59] *See id.* (finding that people with white sounding names are more likely to be accepted on Airbnb); Nesterak, *supra* note 15 (discussing anecdotes of racial discrimination on Airbnb); Vara, *supra* note 1 (discussing the discrimination Gregory Selden faced on Airbnb).

[60] *See* Ge, *supra*, note 15, at 2 (discussing racial discrimination on Uber); *see also* Edelman, *supra* note 15, at 2 (finding racial discrimination on Airbnb).

[61] Ge, *supra* note 15, at 2.

[62] *Id.* at 16. Specifically, the study concluded that males with African-American sounding names are cancelled on 11.2% of the time, while white males are cancelled on 4.5% of the time. *See id.* at 2.

[63] *See* Leong, *supra* note 15, at 2061–63 (discussing how racial discrimination occurs on sharing economy platforms); Ge, *supra*, note 15, at 2 (finding racial discrimination on Uber); Edelman, *supra* note 15, at 2 (finding racial discrimination on Airbnb); *see also* Chesky, *supra* note 46 (discussing Airbnb's mantra of belonging anywhere).

[64] *See* Belzer & Leong, *supra* note 16, at 1302–06 (stating that current laws may not be sufficient to address racial discrimination in the sharing economy); Hamish McRae, *Facebook, Airbnb, Uber, and the Unstoppable Rise of the Content Non-Generators*, INDEPENDENT (May 5, 2015, 1:11 PM), http://www.independent.co.uk/news/business/comment/hamish-mcrae/facebook-airbnb-uber-and-the-unstoppable-rise-of-the-content-non-generators-10227207.html [https://perma.cc/BE7Y-DZNF] ("The world's largest taxi firm, Uber, owns no cars. . . . [a]nd the world's largest accommodation provider, Airbnb, owns no property.").

economy businesses can be held accountable for racial discrimination.[65] Any efforts to create sharing economy liability for civil rights, however, are seriously undermined by class action waivers due to the strong tie between civil rights claims and class action cases.[66]

Before delving into class action waivers and racial discrimination, it is important to understand arbitration's legal foundation and broader consequences.[67] The omnipresence of arbitration clauses within the sharing economy has numerous implications for employees, independent contractors, and consumers.[68] Section A of this Part discusses the history of arbitration law.[69] Section B discusses the implications of class action.[70] Section C explains the rise of class action waivers.[71] Section D discusses the prominence of class action waivers in the sharing economy due to the contractual relationship between the user and company.[72]

### *A. The Dominance of Arbitration*

Although codified nearly a century ago, arbitration remains a controversial topic with implications for all parties bound by the agreements.[73] In 1925, Con-

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[65] *See* Second Amended Complaint, *supra* note 1, at 5 (alleging that Airbnb violated Title II of the Civil Rights Act, the Fair Housing Act, and 42 U.S.C. § 1981); Naomi Schoenbaum, *Gender and the Sharing Economy*, (Geo. Wash. L. School Pub. L. Res. Paper No. 53, 2016) (explaining that personalization of services creates a risk of discrimination due to the focus on the seller or buyer's identity); Belzer & Leong, *supra* note 16, at 1302–04 (discussing ways in which sharing economy companies can be found liable under existing law); *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 2000(a)–(e) (2012) (dictating civil rights statutes in federal law).

[66] *See* Selden v. Airbnb, No. 1:16-cv-00933-CRC, 2016 WL 6476934, at *8 (D.D.C. Nov. 1, 2016) (demonstrating how a racial discrimination case was sent to individual arbitration due to a class action waiver); Brief for NAACP Legal Defense & Education Fund, Inc., as Amicus Curiae Supporting Respondents at 2–3, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893) (explaining that class actions are able to effectively address civil rights claims, whereas individual claims are limited in potency) [hereinafter Brief for NAACP]; Benner, *supra* note 9 (discussing how class action waivers affects racial discrimination claims).

[67] *See infra* notes 73–121 and accompanying text.

[68] *See infra* notes 73–121 and accompanying text.

[69] *See infra* notes 73–83 and accompanying text.

[70] *See infra* notes 84–94 and accompanying text.

[71] *See infra* notes 96–112 and accompanying text.

[72] *See infra* notes 113–121 and accompanying text.

[73] *See* 9 U.S.C. §§ 1–16 (2012); Barnes, *supra* note 18 at 336 (discussing how consumers file less claims and recover less when bound by an arbitration agreement with a company); Miles Farmer, Note, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352–60 (2012) (highlighting that arbitration is beneficial for its speed and accessibility, but can be harmful when parties have unequal bargaining power); Caitlin Toto, Comment, *Third Circuit Confirms the Class Arbitration "Clear and Unmistakable Standard," in* Chesapeake L.L.C v. Scout Petroleum L.L.C*., Dealing Blow to Consumers and Employees*, 58 B.C. L. REV. E. SUPP. 163, 166 (2017), http://lawdigitalcommons.bc.edu/bclr/vol58/iss6/13 (stating that arbitration is longstanding but controversial); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-

gress passed the FAA, a statute that allows parties to resolve legal disputes through arbitration by placing the arbitration agreements on the same footing as other contracts.[74] By adding an arbitration clause in a contract, parties are able to sidestep the judicial system and independently resolve disputes.[75] While arbitration is lauded as a faster way to resolve legal disputes, critics highlight due process defects that accompany the system.[76] Specifically, arbitration limits appellate review and precludes a jury trial, two vital judicial mechanisms that bolster legitimacy and the parties' legal rights.[77] Further, arbitrators are not bound by precedent and are therefore able to craft a solution they believe to be most equi-

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deck-of-justice.html?_r=0 [https://perma.cc/B3EL-HEZ8] (detailing how many consumers and employees find themselves unable to redress claims against companies because they are precluded from class arbitration). *Compare Concepcion*, 563 U.S. at 339 (interpreting the Federal Arbitration Act ("FAA") broadly), *with id.* at 359 (Breyer, J., dissenting) (outlining/describing/explaining a narrow interpretation of the FAA).

[74] *See* 9 U.S.C. §§ 1–16 (stating that arbitration agreements are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract"); *Concepcion*, 563 U.S. at 336 (reciting 9 U.S.C. § 2).

[75] *See* 9 U.S.C. § 2 (stating that arbitration agreements are equal to contracts); Steelworkers v. Am. Mfg. Co. 363 U.S. 564, 567–68 (1959) (explaining the limited function of the courts when parties have agreed to arbitrate). Once parties have entered into a contract containing an arbitration clause, the courts can only determine questions of arbitrability. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (1982) (discussing the distinction between questions of arbitrability and questions of procedure). Questions of arbitrability include questions of the agreement's scope, whether the arbitration agreement violates law or equity, or where a party asserts a federal statutory claim and Congress has demonstrated a clear intent that the statutory claim not be arbitrated. *Id.* All other matters, such as questions of procedure, are to be decided by the arbitrator. *Id.* at 84; *see* Martin Saunders, *Class Arbitration—Who Decides?* NAT'L L. REV. (Sep. 2, 2014), http://www.natlawreview.com/article/class-arbitration-who-decides [https://perma.cc/7RRM-39X3] (discussing the dispute of "who decides" in class action availability).

[76] *See* U.S CONST. amend. V; Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 148 (1997) (explaining the generally accepted arbitration rule that there shall be no review of alleged errors of fact or law); Jean Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration*, 72 TUL. L. REV. 1, 81 (1997) (stating that binding arbitration raises due process concerns) [hereinafter Sternlight, *Supreme Court's Preferences*]; Farmer, *supra* note 73, at 2355–60 (discussing the drawbacks of mandatory arbitration). Arbitration is lauded as a faster dispute resolution system because the discovery process is limited, rights of appeal are limited, and the decisions do not require a detailed finding of fact. Dwight Golann, *Developments in Consumer Financial Services Litigation*, 43 BUS. LAW. 1081, 1091 (1988).

[77] *See* Smit, *supra* note 76, at 148 (stating that arbitral awards are rarely reviewed); Jean Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F.L. REV. 17, 20–21 (2003) (stating that arbitration precludes a jury trial) [hereinafter Sternlight, *The Rise and Spread of Mandatory Arbitration*]; Farmer, *supra* note 73, at 2358–60 (noting that there is little appellate review in arbitration, which may be favorable to the drafting party).

table.[78] Thus, while the process is streamlined, it also eliminates many safeguards provided for by the judicial system.[79]

These impediments are further aggravated by the "repeat player effect."[80] Many scholars argue that parties frequently appearing before arbitrate panels, such as large corporations, fare better than their opponents, who are often individual consumers and employees.[81] One popular explanation for this phenomenon is that arbitrators are implicitly biased towards the party that hired them, because it is more likely that the party will hire the arbitrator for future proceedings.[82] Despite the risks delineated above, companies continue to implement arbitration agreements in their contracts.[83]

### *B. Class Action and Arbitration*

Arbitration's tension with certain judicial policies is especially evident with regards to class action, a federal procedure that allows large numbers of plaintiffs to join similar claims.[84] While class action dates back to early English law, it was not until the 1960s that the process took hold in the American legal sys-

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[78] *See* W. Mark C. Weidemaier, *Arbitration and the Individual Critique*, 49 ARIZ. L. REV. 69, 95–96 (2007) (discussing how arbitrators have more flexibility than the courts when coming to a decision).

[79] *See* Barnes, *supra* note 18, at 329 (stating that binding arbitration is preempting people from their day in court); Sternlight, *The Rise and Spread of Mandatory Arbitration*, *supra* note 77, at 20–21 (explaining arbitration precludes a jury trial); Weidemaier, *supra* note 78, at 95–96 (explaining that arbitrators have more flexibility to craft a solution they believe the be equitable).

[80] *See, e.g.*, Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y 189, 208, 220 (1997) (finding a repeat player affect); Christopher Drahozal & Samantha Zynontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 857–58 (2010) (discussing that arbitrators have an incentive to have a bias towards a repeat player); THE ARBITRATION DEBATE TRAP, PUB. CITIZEN 24–25 (2008) (stating that there is support behind the conclusion that arbitrators favor business parties because businesses are often repeat players); Farmer, *supra* note 73, at 2355–58 (citing the existence of data evidencing a repeat player bias).

[81] *See* Bingham, *supra* note 80, at 208, 220 (finding there is a repeat player effect in employment arbitrations); Drahozal & Zynontz, *supra* note 80, at 857–58 (discussing the incentive towards deciding cases in favor of repeat players); THE ARBITRATION DEBATE TRAP, *supra* note 80, at 24–25 (discussing the repeat player affect).

[82] Drahozal & Zynontz, *supra* note 80, at 857–58; THE ARBITRATION DEBATE TRAP, *supra* note 80, at 24–25.

[83] *See* Barnes, *supra* note 18, at 336 (discussing how arbitration clauses are prevalent in a wide range of industries); Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts*, CONSUMER REP. (Sep. 29, 2015), http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts [https://perma.cc/AGH4-8ND7] (highlighting that arbitration contracts are hidden within many popular companies' consumer contracts). This is likely because the risks delineated above affect consumers and employees more than they affect companies. *See* Barnes, *supra* note 18, at 335–36 (stating that arbitration is harmful for consumers because it strips away certain judicial protection).

[84] *See Concepcion*, 563 U.S. at 344 (explaining that "requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

tem.[85] Since the 1966 amendments to the Federal Rules of Civil Procedure ("FRCP") made class action available to larger groups of people, the procedure has been utilized to narrow the power gap between individuals and large corporate entities.[86]

Rule 23 of the FRCP allows an individual to pursue a claim on behalf of an entire class if all members suffered similar harm from the same defendant.[87] In addition to providing judicial efficiency, class action strengthens the rights of individuals vis-à-vis corporations.[88] It does so by emboldening individuals who are unwilling or unable to vindicate their legal rights on an individual basis.[89] Because the harm is spread among a large group of people, an individual may not feel the urge to initiate a lawsuit over marginal harm and others may not even realize that they were harmed.[90] Thus, grouping the claims together enables more

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[85] Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999) (stating that class action dates back to early English law); Katie Melnick, *Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticism*, 22 ST. JOHN'S J.L. COMM. 755, 755–56 (2008) (explaining the history of class action).

[86] *See* Melnick, *supra* note 85, at 755 (discussing the 1966 amendment to Rule 23); Edward Sherman, *Complex Litigation: Plagued by Concerns Over Federalism, Jurisdiction & Fairness*, 37 AKRON L. REV. 589, 590–91 (2004) (discussing how class action has been important in bringing institutional reform). Before the 1966 amendments, class action claims were limited to violations of joint rights or specific property rights. Sherman, *supra* at 590. Two important changes, however, expanded this standard. *Id.* at 591. First, the Rule 23(b)(2) class action was introduced, allowing for declaratory or injunctive relief when the "party opposing the class has acted or refused to act on grounds generally applicable to the class." FED. R. CIV. P. 23(b)(2). This was especially applicable in the civil rights context, and allowed for class action lawsuits against hotels, restaurants and other public accommodations. *See* Sherman, *supra* at 590–91 (explaining that the amendments to Rule 23 were paramount in enforcing civil rights). Second, 23(b)(3) class action was enacted, which has been deemed a "catch all" provision. FED. R. C. P. 23(b)(3); Sherman, *supra* at 591. Both amendments have been vital in enforcing civil rights as well as enhancing standards in prisons, mental hospitals and welfare departments. *See* Sherman, *supra* at 590–91 (discussing the public policy implications of class action lawsuits).

[87] FED. R. CIV. P. 23(a). Specifically, the party must meet the prerequisites of Rule 23(a), which states that first, the class must be so numerous that joinder of all members is impracticable; second, there is a question of law or fact common to the class; third, the claims or defenses of the representative party is typical of the claims of the defendant of the class; and fourth, that the lead plaintiff will fairly and adequately protect the interests of the class. *Id.*

[88] *See* Barnes, *supra* note 18, at 338 (noting that consumers gain more financial recovery from companies through class actions than through individual arbitrations); Melnick, *supra* note 85, at 787–89 (discussing that individuals may not have an incentive to bring claims without class action); Sherman, *supra* note 86 at 590–91.

[89] *See* Melnick, *supra* note 85, at 787–89. *But see* Wade Lambert, *Class Action Suit Is a Target for Criticism from All Sides,* WALL ST. J. (Apr. 19, 1996, 10:03am) https://www.wsj.com/articles/SB829877425363143500 [https://perma.cc/MSZ9-4N3Y] (discussing negative views of class action, such as it being a method that facilitates lawyers bringing frivolous lawsuits and being rewarded with a big settling fee).

[90] *See* Brief for NAACP, *supra* note 66, at 15–16 (stating that the Supreme Court "has repeatedly recognized the importance of class actions in providing legal redress for inequities that may be too time and resource intensive to realistically challenge through isolated individual claims"); Melnick, *supra* note 85, at 787–89 (discussing incentive gaps regarding class action).

people to vindicate their rights against large corporate defendants.[91] In addition, the process provides incentives for lawyers to wage legal battles.[92] One person's thirty-dollar overcharge, for example, would not draw many lawyers' attentions.[93] On the other hand, it would likely be worth a legal team's time if the harm, and thus the potential recovery, were multiplied over thousands of people.[94]

### *C. Class Action Waivers in Arbitration Agreements*

As discussed, class action allows individuals to aggregate resources and attempt to equalize the playing field, creating a potentially costly liability to companies.[95] Thus, businesses are generally fearful of class action and its potential financial and reputational ramifications.[96] Before the prominence of the class action waiver, companies had little choice but to internalize this cost by litigating or settling the claims.[97] The rise of arbitration, however, has allowed many businesses to avoid the procedure altogether.[98]

While the FRCP explicitly provides that a party can bring a claim through class action, there is no equivalent rule in arbitration proceedings.[99] Arbitration,

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[91] *See* Brief for NAACP, *supra* note 66, at 15–16 (explaining that individuals may not have a financial incentive to bring a case alone); Melnick, *supra* note 85, at 787–89 (discussing incentive gaps regarding class action).

[92] *See* Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (highlighting how class action is a vital tool in small recovery claims); Barnes, *supra* note 18, at 333 (stating that no lawyer or client would take a case where the legal fees are much greater than the potential reward).

[93] *See Amchen Prods. Inc*., 521 U.S at 617 (quoting *Mace*, 109 F.3d at 344) (explaining that lawyers may not have an incentive to take a case where the claims are small); Barnes, *supra* note 18, at 333.

[94] *See Amchen Prods. Inc*., 521 U.S at 617 (quoting *Mace*, 109 F.3d at 344). *But see* Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau 4–6 (Dec. 11, 2013), http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrown-chamberletter.pdf [https://perma.cc/P22U-N9SR] (noting that class action has marginal benefits for consumers).

[95] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7. J. EMPIRICAL LEGAL STUD. 811, 811–12 (2010) (stating that businesses fear class action).

[96] Barnes, *supra* note 18 at 336; Fitzpatrick, *supra* note 96 at 811–12 (noting that between 2008 and 2012, over thirty-four million consumers were granted relief from class actions, totaling over $2.7 billion in rewards).

[97] *See* Brief for NAACP, *supra* note 66, at 8–9 (discussing recent class action settlements with large companies); Barnes, *supra* note 18 at 338 (noting $2.7 billion paid to consumers between 2008 and 2012).

[98] *See* Barnes, *supra* note 18 at 329; Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 125–26 (2002) (arguing that barriers to class action deprive plaintiff's statutory rights) [hereinafter Sternlight, *Will the Class Action Survive?*].

[99] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (finding that parties were not compelled to submit to class arbitration because there was nothing within the contract mentioning class action). There have been unsuccessful arguments that Rule 81(a)(3), now amended as Rule 81(b)(6), allows parties to incorporate Rule 23. *See* Deiulemar Compagnia di Navigazione A.p.A v. M/V Allegra, 198 F.3d 473, 482–83 (4th Cir. 1999) (holding 81(a)(3) does not incorporate Rule 23); Champ v. Siegel Trading Co., 55 F.3d 269, 275–77 (7th Cir. 1995) (finding that Rule

in contrast, is a creature of contract and any terms of the proceeding must be delineated or referred to in the clause itself.[100] Thus, the availability of class action is not a guaranteed procedure, but rather depends on the language of the arbitration clause.[101]

To further aggravate the differences between class action in federal courts and arbitration, there is often uneven bargaining power in mandatory arbitration contracts.[102] Most arbitration agreements are drafted exclusively by the business and then presented to the consumer or employee as an adhesion contract.[103] Thus, the consumer or employee has little or no power over the terms of the agreement before signing.[104]

The combination of companies drafting arbitration agreements with the distaste and fear businesses have of class action has led to the rise of class action waivers found in everyday contracts.[105] A class action waiver is specific language within an arbitration clause that precludes parties from joining together to fight

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81(a)(3) does not allow an incorporation of Rule 23). *See generally* FED. R. CIV. P. 23, 81(a)(3) (allowing parties to fill in procedural gaps left open by the FAA). Courts have held that the FAA does not leave a procedural gap regarding class action. *Champ*, 55 F.3d at 275–77.

[100] *See* John Townsend, *Drafting Arbitration Clauses: Avoiding the 7 Deadly Sins,* DISP. RESOL. J., Feb.–Apr. 2003, at 3 (highlighting the importance of specifying details within arbitration clauses).

[101] *See Stolt-Nielson*, 559 U.S. at 687 (finding that companies cannot be compelled to arbitrate in a class when the agreement is silent on the mater); Toto, *supra* note 73, at 170.

[102] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 3.2 at 4 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [https://perma.cc/86TM-AHPH] (finding that less than 7% of people who had pre-dispute clauses in credit card agreements knew that they could not sue the company in court); Barnes, *supra* note 18 at 336; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1037 (1996) (arguing that employees are rarely in a position to negotiate the terms of an arbitration agreement).

[103] *See* Barnes, *supra* note 18, at 336 (discussing the lack of bargaining power consumers have in arbitration agreements); Stone, *supra* note 102, at 1037 (discussing that employees have little to no bargaining power). An adhesion contract is a contract that is drafted by one party and presented to the other party as take it or leave it. *See* Barnes, *supra* note 18, at 329 (defining adhesion contracts).

[104] *See* Barnes, *supra* note 18, at 336 (finding consumers lack bargaining power vis-à-vis corporations); Stone, *supra* note 102, at 1037 (explaining that employees are often presented their employment contracts as take it or leave it).

[105] *See* Barnes, *supra* note 18, at 336 (stating that companies often include class action waivers in their mandatory arbitration clauses); Theodore Eisenberg & Gregory Miller, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 884 (2008) (highlighting the omnipresence of class action waivers in consumer arbitration agreements). *See generally* Joseph Fay et al., *Class Action Waivers in Arbitration Provisions, in* A PRACTITIONER'S GUIDE TO CLASS ACTIONS 575 (Marcy Hogan Greer ed., 2010) (providing a general summary of class action waivers in arbitration agreements). One empirical report, which studied 100 prominent American companies, found that every consumer contract with an arbitration clause also contained a class action waiver. Eisenberg & Miller *supra* at 884. *But see* Brian Fitzpatrick, *The End of Class Action?*, 57 ARIZ. L. REV. 161, 191–92 (2015) (stating that class action waivers are not as prominent as reported).

their claims as a collective group.[106] Such waivers are usually within lengthy contracts and surrounded by complex legal jargon.[107] Consequently, many people do not realize what rights they have signed away when agreeing to these consumer contracts.[108]

Attempts to scale back the waivers in arbitration agreements have been unsuccessful.[109] The Supreme Court has interpreted the FAA very broadly and therefore class action waivers found in arbitration agreements are generally enforceable.[110] Additionally, state attempts to scale back the use of class action waivers were struck down in a series of Supreme Court cases holding that the FAA preempts state law.[111] Thus, class action waivers are generally enforceable, despite the uneven bargaining concerns detailed above.[112]

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[106] *See* Brief for NAACP, *supra* note 66, at 2 (discussing class action bans); Benner, *supra* note 9 (defining class action waiver).

[107] *See Airbnb Terms*, *supra* note 12 (demonstrating a class action waiver within a long contract); *Lyft Terms of Service,* LYFT, https://www.lyft.com/terms [https://perma.cc/SJR9-3MUN] (same); *Terms of Service,* UBER, https://www.uber.com/legal/terms/us [https://perma.cc/7HZK-ZZ8F] [hereinafter *Uber Terms*] (same).

[108] *See* CONSUMER FIN. PROT. BUREAU, *supra* note 102, § 3.2 at 8 (citing a study where 87% of respondents, who had previously been in at least one arbitration agreement, said they had never entered a consumer contract with an arbitration clause); Jeff Sovern et al., *Whimsy Little Contracts with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements* 50 n.173 (St. John's Legal Studies Research Paper No. 14-0009, 2014); Silver-Greenberg & Gebeloff, *supra* note 73 (stating that class action waivers are within employment and consumer contracts). For example, one study found that only 12% of consumers understood they had signed a class action waiver, despite the waiver appearing twice and in bold in the contract. Sovern, *supra* at 50 n.173.

[109] *See Concepcion*, 563 U.S. at 343–44 (holding that the FAA preempts California's state law deeming class action waivers unconscionable); Jill Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration,* 81 BROOK. L. REV. 111, 124–25 (2015) (highlighting three of Justice Scalia's opinions where he broadly interpreted the FAA, thus inhibiting the ability to challenge arbitration agreements).

[110] *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (holding that an arbitration clause is enforceable despite the fact the cost of arbitration is higher than the amount an individual would recover); *Concepcion*, 563 U.S. at 344 (finding that California common law banning class action waivers was preempted by the FAA); *Stolt-Nielsen*, 559 U.S. at 684 (finding that class arbitration cannot be imposed on parties unless there is a contractual basis); Gross, *supra* note 109, at 124–25 (highlighting three of Justice Scalia's opinions where he broadly interpreted the FAA, inhibiting the ability to challenge arbitration agreements). *But see* Morris v. Ernst & Young, LLP, 834 F.3d 975, 983–84 (9th Cir. 2016) *cert. granted*, 85 U.S.L.W. (U.S. Jan. 13, 2017) (No. 16-300) (finding that a class action waiver is unenforceable because it violated § 7 of the National Labor Relations Act).

[111] *See* Kindred Nursing Ctrs. Ltd, P'ship v. Clark, 137 S. Ct. 1421, 1428 (2017) (holding that the Kentucky Supreme Court's clear-statement rule, which was used to invalidate an arbitration agreement, is preempted by the FAA); *Concepcion*, 563 U.S. at 352 (holding that the FAA preempts California's state law deeming class action waivers in adhesion contracts are unconscionable); Gross, *supra* note 109, at 124–25 (discussing case law upholding binding arbitration and class action waivers).

[112] *See Kindred Nursing Ctrs Ltd. P'ship*, 137 S. Ct. at 1428 (upholding a binding arbitration agreement, stating that Kentucky common law is preempted by the FAA); *Selden*, 2016 WL 6476934, at *6–8 (finding that the class action waiver in Airbnb's arbitration agreement was enforceable be-

### *D. Individual Arbitration in the Sharing Economy*

Because arbitration is a creature of contract, class action waivers can only exist where there is a contractual relationship between parties.[113] The sharing economy is primarily based in contract and therefore the waivers are omnipresent in company contracts.[114] For example, unlike when one hails a taxicab, calling an Uber car requires that one has already agreed to a user agreement and thus an individual arbitration clause.[115] As a result, sharing economy companies have the opportunity to draft mandatory individual arbitration clauses.[116]

Like many sharing economy companies, Airbnb and its users have a contractual relationship.[117] That is, one must become an Airbnb "user" and agree to terms of service before booking a room.[118] The company's terms of service are customary in the sharing economy, stating that any dispute shall be settled in binding arbitration.[119] The contract posits that all users acknowledge that they are waiving their right to consolidate claims in any class action lawsuit.[120] Thus,

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cause Selden was notified that he was entering such an agreement with the company through its Terms of Services). *But see Morris*, 834 F.3d at 983–84 (finding class action waivers unenforceable in an employment contract because it violated § 7 of the National Labor Relations Act).

[113] *See* Myriam Gilles & Gary Friedman, *Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 639–40 (2012) (stating that class action waivers require the parties to have a contractual relationship); Nimmer, *supra* note 31 at 202 (stating arbitration is a creature of contract).

[114] *See* Gilles & Friedman, *supra* note 113, at 639–40 (discussing the limitations of class action waivers); Malthe Mikkel Munkoe, *Regulating the European Sharing Economy State of Play and Challenges*, 52 INTERECONOMICS, 38, 43–44 (2017) (highlighting the contractual relationships in the sharing economy).

[115] *See Uber Terms, supra* note 107 (stating that all disputes must be adjudicated through arbitration on an individual basis).

[116] *See Airbnb Terms*, *supra* note 12 (mandating that all disputes be submitted through bilateral arbitration); *Lyft Terms of Service, supra* note 107 (same); *Uber Terms*, *supra* note 107 (same).

[117] *See Airbnb Terms*, *supra* note 12. To become a user on Airbnb one must sign the user agreement, which contains an arbitration clause. *Id*.

[118] *See What Are the Requirements to Book on Airbnb?*, AIRBNB, https://www.airbnb.com/help/article/1170/what-are-the-requirements-to-book-on-airbnb [https://perma.cc/7BMK-MQ93] (stating that anyone who wants to book on Airbnb must share certain information).

[119] *Id.* The clause states in relevant part:

> If you reside in the United States, you and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site, Application or Collective Content (collectively, "Disputes") will be settled by binding arbitration, except that each party retains the right to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation or violation of a party's copyrights, trademarks, trade secrets, patents, or other intellectual property rights.

*Id.*

[120] *Id.* Concerning class action, the clause states in relevant part:

> You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action law-

through its arbitration clause, Airbnb is able to effectively shield itself from the courtroom and class action disputes.[121]

## III. Class Action Waivers Present a Serious Threat to Racial Discrimination Claims

Class action is a vital way in which individuals can bring a fair legal fight against a corporation that has done widespread harm.[122] While class action waivers have widespread effects on consumers and employers generally, the waivers distinctly threaten civil rights due to the tie between class action and racial discrimination cases.[123] Section A of this Part discusses the connection between the fight for racial equality and class action.[124] Section B of this Part explains that class action waivers within the sharing economy endanger the future protection of civil rights.[125] Section C confronts potential counterarguments that self-regulation and government enforcement are sufficient to enforce civil rights in the sharing economy.[126]

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> suit, class-wide arbitration, private attorney-general action, or any other representative proceeding. Further, unless both you and Airbnb otherwise agree in writing, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding. If this specific paragraph is held unenforceable, then the entirety of this "Dispute Resolution" section will be deemed void. Except as provided in the preceding sentence, this "Dispute Resolution" section will survive any termination of these Terms.

*Id.*

[121] *See Selden*, 2016 WL 6476934, at *8 (finding that Selden must take his claim through arbitration rather than through the court); *Airbnb Terms*, *supra* note 12 (presenting an arbitration clause with a class action waiver).

[122] *See* Barnes, *supra* note 18, at 340 (explaining that consumers lose a number of rights when they unknowingly sign an arbitration clause); Emily Canis, *One "Like" Away: Mandatory Arbitration for Consumers*, 26 Geo. Mason U. Civ. Rts. L.J. 127, 128–30 (2015) (explaining that many consumers do not know that they are signing arbitration agreements, waiving vital rights away); Sternlight, *The Rise and Spread of Mandatory Arbitration*, *supra* note 77, at 20–21 (highlighting that consumers often sign away their right to a jury trial without knowing). *But see* Amanda James, *Because Arbitration Can Be Beneficial, It Should Never Have to Be Mandatory*, 62 Loy. L. Rev. 531, 532–41 (2016) (arguing that arbitration is beneficial to the consumer because it is less time consuming and costly than litigation).

[123] *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding, as result of a class action, that segregation in public schools is unconstitutional); *Selden*, 2016 WL 6476934, at *8; Brief for NAACP, *supra* note 66, at 2 (stating that class action waivers undermine courts' ability to enforce civil rights); Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, Ariz. L. Rev. 575, 577 (1997) (discussing the historical tie between class action and civil rights enforcement).

[124] *See infra* notes 127–172 and accompanying text.

[125] *See infra* notes 173–194 and accompanying text.

[126] *See infra* notes 195–220 and accompanying text.

### *A. The Importance of Class Action in Racial Discrimination Cases*

The Civil Rights Act allows aggrieved parties to bring forth private causes of action for discrimination in areas such as employment, housing, and public accommodation.[127] Due to the difficulty of proving a racial discrimination case and the scope of available remedies, class action has played a vital role in privately enforcing civil rights.[128]

Subsection 1 discusses the importance of class action in civil rights cases for practical and financial reasons.[129] Subsection 2 discusses the importance of class-wide rewards.[130] Subsection 3 discusses the deterrent theory of class action.[131]

#### 1. Difficulty in Identifying and Proving Racial Discrimination Claims Renders Class Action Necessary

While the Civil Rights Act is impressive in scope, proving that an individual has been discriminated under the statute is no easy task.[132] First, identifying discrimination is difficult because the discrimination may be covert.[133] Second, plaintiffs must meet the high legal standards imposed by courts.[134] Class action is therefore an essential way in which individuals are able to enforce civil rights guaranteed to them by the statute.[135]

The preliminary task of identifying discrimination is arduous.[136] Unlike other legal causes of action, discrimination is often latent and thus difficult to

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[127] *See* 42 U.S.C. §§ 2000a-3, 2000e-5, 3601-19; Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmty Project, Inc., 135 S. Ct. 2507, 2518–19 (2015) (bringing a private cause of action against discriminatory housing practices); Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (bringing a private cause of action against discriminatory employment practices); Daniel v. Paul, 395 U.S. 298, 300 (1969) (bringing a private cause of action under Title II of the Civil Rights Act).

[128] *See Daniel*, 395 U.S. at 300, 307–08 (holding that a public swimming club's refusal to accept African-Americans violated Title II of the Civil Rights Act); Newman v. Piggie Park Enter. Inc., 390 U.S. 400, 400–01 (1967) (affirming the United States Court of Appeals for the Fourth Circuit decision that a restaurant's refusal to serve African-Americans violated Title II of the Civil Rights Act); NAACP Brief, *supra* note 66, at 5–6 (stating that class actions have been an important way to address discrimination); Katherine Lamm, *Work in Progress: Civil Rights Class Actions After* Walmart v. Dukes, 50 HARV. C.R.-C.L. REV. 153, 157 (2015) (explaining class actions' importance in enforcing civil rights). Most notably, the Supreme Court's iconic decision to outlaw segregation in public schools stemmed from a class action lawsuit. *See Brown*, 347 U.S at 483.

[129] *See infra* notes 132–151 and accompanying text.

[130] *See infra* notes 152–160 and accompanying text.

[131] *See infra* notes 161–172 and accompanying text.

[132] *See infra* notes 136–151 and accompanying text.

[133] *See infra* notes 136–151 and accompanying text.

[134] *See infra* notes 136–151 and accompanying text.

[135] *See infra* notes 136–151 and accompanying text.

[136] Olatunde Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1356–57 (2012) (discussing the difficulties in identifying discrimination in employment and housing cases); Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 222 (2012) (highlighting the difficulty of identifying discrimination due to sociological reasons).

pinpoint.[137] Consequently, determining whether one's rejection from a job or from affordable housing was due to discrimination, rather than a benign reason, is difficult to prove.[138] Class action, however, alleviates the burden of individually identifying discrimination by allowing a plaintiff to show that discrimination has occurred on a large scale.[139] An employer or landlord has little defense when hundreds of minority applicants are rejected rather than one.[140]

Class action is also essential when attempting to meet the courts' onerous legal standards.[141] For example, with Fair Housing Act claims, plaintiffs are often trying to prove a disparate treatment; that is, that the policies of an adverse party have resulted in a disproportionately adverse effect on minorities.[142] In the realm of Title VII employment claims, plaintiffs are often demonstrating a pattern or practice of discrimination.[143] These legal standards may require showing the experiences of hundreds or thousands of people.[144]

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[137] *See* AM. PSYCHOLOGY ASS'N, DUAL PATHWAYS TO A BETTER AM. 14 (2012) (discussing how discrimination may be the result of unconscious prejudices); Devah Pager & Hana Shepard, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 200 (2008). The formation of prejudices may be subconscious, making it difficult to identify. AM. PSYCHOLOG. ASS'N, *supra* at 14; Pager & Shepard, *supra* at 200. Further, it is easy to mask discriminatory actions as something else. *See* Pager & Shepard, *supra* at 200. For example, an employer could argue that an applicant was not rejected for his race, but rather another reason, such as grades, personality, or skill set. *See id.*

[138] *See* AM. PSYCHOLOGY ASS'N, *supra* note 137, at 14 (discussing the prevalence of hidden prejudices); Johnson, *supra* note 136, at 1356–57 (stating that housing discrimination is difficult to identify); Pager & Shepard, *supra* note 137, at 200 (highlighting racial stereotyping made by employers).

[139] *See Griggs*, 401 U.S. at 427–28 (demonstrating a race based employment class action where the court discussed hiring practices on a macro level); Johnson, *supra* note 136, at 1356–57.

[140] *See Griggs*, 401 U.S. at 427–28 (discussing the hiring practices of a company in a class action lawsuit); Johnson, *supra* note 136, at 1356–57.

[141] *See Inclusive Cmty Project, Inc.*, 135 S. Ct. at 2525 (requiring a showing of disparate impact); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336, 339–40 (1977) (quoting 110 CONG. REC. 14,270 (1964) (statement of Sen. Humphrey) (stating that finding a pattern or practice requires showing that an occurrence is not an isolated act); Brief for NAACP, *supra* note 66, at 19 (stating that, without an intensive discovery process, which is more likely in a class action case than an individual case, a plaintiff will have a difficult time proving a pattern or practice).

[142] *Inclusive Cmty Project,* 135 S. Ct. at 2525. In 2015, the U.S. Supreme Court upheld the disparate impact test under the Fair Housing Act, but with limitations. *Id.* at 2523, 2525. The Court explained that, although proof of intentional discrimination was not needed to meet such a burden, a plaintiff must show more than a racial imbalance. *Id.* at 2523. Although proving a racial imbalance is less burdensome than showing intentional discrimination, proving such a burden individually is still more onerous than through a class action. *See id.*

[143] *See* Christine Tsang, Comment, *Uncovering Systemic Discrimination: Allowing Individual Challenges to a "Pattern or Practice,"* 32 YALE L. & POL'Y REV. 319, 320 (2013) (stating that plaintiffs seeking relief under Title VII often argue a pattern or practice of discrimination). A pattern or practice of discrimination, also known as systemic disparate treatment, is discrimination that "repeated, routine, or of a generalized practice" rather than an isolated incident. *Teamsters*, 431 U.S. at 336 n. 16 (quoting 110 CONG. REC. 14,270).

[144] *See Teamsters*, 431 U.S. at 339–40 n.20 (finding that racial statistics are often necessary to reveal latent discrimination); Babrocky v. Jewel Food Co., 773 F.2d 857, 866–67 n.6 (7th Cir. 1985)

Because civil rights cases often attempt to evidence discrimination on a macro scale, an individual will have more difficulty meeting such standards than a class.[145] Class action is thus an essential avenue of redress for practical and financial reasons.[146] Practically, it is unlikely that an individual would be able to show such large scale discrimination on his or her own.[147] Proving such discrimination likely requires evidence from a number of people across wide strata.[148] Further, meeting the legal standards requires enormous resources.[149] The discovery process is burdensome thus leading to hefty legal fees.[150] Therefore, it is unlikely an individual will have sufficient capital to finance a discrimination case.[151]

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(discussing that pattern or practice cases naturally involve claims of an entire group of people, rather than a few individuals); Brief for NAACP, *supra* note 66, at 16 (stating that individuals will often not realize the discrimination they faced was part of a larger pattern or practice); BARBARA LINDERMAN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1322 n.95 (2d ed. 1983) (discussing that pattern or practice lawsuits require the claims of a class of people).

[145] *See Babrocky*, 773 F.2d at 866–67 n.6 (explaining that pattern or practices naturally involves a group of people); Brief for NAACP, *supra* note 66, at 19 (stating that "without broad discovery of company-wide statistical and other data that class action facilitate, it is difficult for civil rights plaintiffs to prove a pervasive pattern and practice of discrimination"). The practical reasons for pattern or practice discrimination are aggravated by the fact that there is no consensus whether an individual claimant can utilize the pattern or practice method of proof. *See Tsang*, *supra* note 143, at 126 (discussing the law regarding non-class private individuals bringing forth pattern and practice suits). *Compare* Celestine v. Petroleos de Venez. SA, 266 F.3d 343, 356 (5th Cir. 2001) (finding the district court did not err by not applying the *Teamsters* framework to a non-class case), Lowery v. Circuit City Stores, 158 F.3d 742, 760–61 (4th Cir. 1998) (vacated on other grounds 527 U.S. 1031) (finding that non-class plaintiffs are not entitled to pattern and practice framework), *and* Gilty v. Vill. Of Oak Park, 919 F.2d 1247, 1252 (7th Cir. 1990) (finding pattern and practice framework unavailable to non-class plaintiffs), *with* Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979) (finding that an individual claimant can establish a prima facie case evidencing a pattern or practice of discrimination in certain circumstances) *and* Karp v. CIGNA Healthcare, Inc., 882 F. Supp. 2d 199, 213 (D. Mass. 2012) (same).

[146] *See Babrocky*, 773 F.2d at 866–67 (discussing that pattern or practice cases naturally involve claims of an entire group of people, rather than a few individuals); Brief for NAACP, *supra* note 66, at 19 (explaining that a large number of documents is needed to uncover systemic discrimination); Sharon M. Dietrich & Noah Zatz, *A Practical Legal Services Approach to Addressing Racial Discrimination in Employment,* J. POVERTY L. & POL., May–June 2012, at 3 (stating that racial discrimination cases are time-consuming and expensive).

[147] *See* Brief for NAACP, *supra* note 66, at 19 (discussing that discovery costs make it difficult for an individual plaintiff to uncover systemic discrimination); SCHLEI & GROSSMAN, *supra* note 144, at 1322.

[148] *See Teamsters*, 431 U.S. at 339–40 n.20 (finding that racial statistics are often necessary to reveal hidden discrimination); Brief for NAACP, *supra* note 66, at 19; SCHLEI & GROSSMAN, *supra* note 144, at 1322.

[149] *See* Brief for NAACP, *supra* note 66, at 19; Dietrich & Zatz, *supra* note 146, at 39 (stating that racial discrimination cases are expensive).

[150] *See* Brief for NAACP, *supra* note 66, at 19; Dietrich & Zatz, *supra* note 146, at 39 (discussing how racial discrimination claims are expensive).

[151] *See* Brief for NAACP, *supra* note 66, at 19; Dietrich & Zatz, *supra* note 146, at 39.

2. Limiting Plaintiffs, Limiting Rewards

Successful class action lawsuits have led to resolutions that redress systemic racial discrimination.[152] For example, courts have mandated injunctions ordering company-wide reform.[153] Additionally, class action cases are often the impetus for companies to alter practices, as businesses want to limit future liability and curb negative press.[154] In fact, such lawsuits have engendered workplace reform at numerous Fortune 500 companies such as Coca-Cola, FedEx, and Xerox.[155]

Requiring a party to individually arbitrate has implications for the type and scope of redress that a court will mandate.[156] The systemic relief detailed above is often not a consequence of individual litigation.[157] Courts have explained that class remedies are improper in the absence of class claims, and further a company may not feel the same sense of urgency to reform workplace policies.[158] Obtaining class-wide relief is therefore an essential way to effec-

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[152] *See* Brief for NAACP, *supra* note 66, at 20–21; Tristan Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 673 (2003) (explaining that class actions are often widely publicized, creating pressure for organizational reform); Sherman, *supra* note 86, at 590 (explaining how class actions have led to institutional reform).

[153] *See* Abdallah v. Coca-Cola Co., 133 F. Supp. 2d 1364, 1370 (N.D. Ga. 2001) (granting injunctive relief that mandated numerous workplace reforms); Greenberg, *supra* note 123, at 577 (noting the ties between class action and institutional reform in prisons, schools, and employment) Sherman, *supra* note 86, at 590 (highlighting the connection between class actions and institutional reform). For example, a class action against Coca-Cola resulted in injunctive relief mandating workplace change. *Abdallah*, 133 F. Supp. 2d at 1370–71. The court ordered Coca-Cola to adopt an annual diversity training, ensure that the career advancement program included a diverse pool of candidates, and hire an industrial psychologist to study the company's human resource practices. *Id.*

[154] *See* Green, *supra*, note 152, at 673; (explaining that class actions are often widely publicized, creating pressure for organizational reform); Sherman, *supra* note 86, at 590 (finding a connection between class actions and institutional reform).

[155] *See* Warren v. Xerox Corp., No. 1:01-cv-2909, 2008 WL 4371367, at *1–2 (E.D.N.Y. Sep. 19, 2008) (approving a settlement offer that included $12 million dollars for the creation of a task force to ensure diversity at the company); Satchell v. FedEx Corp., No. 3:030-cv-02659, 2007 WL 2343904, at *1 (N.D. Cal. Aug. 14, 2007) (discussing a $15 million dollar class action settlement); *Abdallah* , 133 F. Supp. 2d at 1370 (granting injunctive relief that mandated numerous workplace reforms, such as annual diversity trainings); Brief for NAACP, *supra* note 66, at 8–9; *Fortune 500*, FORTUNE, http://beta.fortune.com/fortune500/ [https://perma.cc/BF26-BL9F] (listing Coca-Cola, FedEx, and Xerox as Fortune 500 companies).

[156] *See* Brief for NAACP, *supra* note 66, at 20 (explaining that class actions can lead to wide-scale relief); Green, *supra*, note 152, at 673 (explaining that class actions are often widely publicized, creating pressure for organizational reform).

[157] *See* Califano v. Yamasaki, 442 U.S. 682, 702 (1979) (stating there is a connection between relief and the "extent of the violation established"); *Lowery*, 158 F.3d at 766–67 (finding that non-class plaintiffs were limited to individualized injunctive relief rather than a class-wide remedy); Green, *supra*, note 152, at 678 (stating that courts are often unwilling to grant class-wide relief to remedy individual discrimination decisions).

[158] *See Yamasaki*, 442 U.S. at 702 (stating that the extent of the violation controls the scope of the injunctive relief); Sharpe v. Cureton, 319 F.3d 259, 273 (6th Cir. 2003) ("[Although] district courts are not categorically prohibited from granting injunctive relief benefiting an entire class in an individ-

tively address entrenched discriminatory practices.[159] Consequently, inhibiting class action, and thus the scale of relief, undermines an important tool used to redress systemic racial discrimination issues.[160]

### 3. The Policy Goal of Deterrence

In addition to the purposes listed above, class action serves a number of policy goals regarding the public good and racial discrimination.[161] The most important of these goals is the deterrence theory.[162]

The deterrent theory posits that companies are disincentivized from illegal conduct when class action is a possibility due to the high cost of such lawsuits.[163] In other words, companies are more motivated to ensure lawful practices rather than remain exposed to a class action lawsuit that could potentially result in a multi-million dollar lawsuit and negative publicity.[164]

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ual suit, such board relief is rarely justified . . . ."); Brown v. Trs. of Bos. Univ., 891 F.2d 337, 361 (1st Cir. 1989) (stating that class-wide relief is ordinarily not appropriate where there is only an individual claimant); Green, *supra*, note 152, at 673 (discussing that companies face pressure to reform after a class action).

[159] *See* Brief for NAACP, *supra* note 66, at 8–9 (discussing how class actions have led to workplace reform); Green, *supra*, note 152 at 679 (stating that class action is an important way to create institutional change).

[160] *See* Brief for NAACP, *supra* note 66, at 8–9 (explaining how class actions have led to organizational change in the workplace); Green, *supra*, note 152 at 679 (stating that class action is an important way to create institutional change).

[161] *See* Byrd v. Aaron's Inc., 748 F.3d 154, 175 (3d Cir. 2015) (quoting Hughes v. Kore of Indiana Enterprise, Inc., 731 F.3d 672, 677 (7th Cir. 2013)) (stating that aggregating claims deters companies from wrongdoing); Harry Kalven Jr. & Maurice Rosenfeld, *The Contemporary Function of Class Suit*, 8 U. CHI. L. REV. 684, 686, 688 (1941) (providing a base theory for deterrence).

[162] *See* Patrick Luff, *Bad Bargains: The Mistake of Allowing Cost-Benefit Analyses in Class Action Certification Decisions,* 41 U. MEM. L. REV. 65, 75 (2010) (explaining that class action acts as a deterrent on many levels); Nimmer, *supra* note 31, at 209 (stating that class action is important for deterrence from civil rights infringement); Sternlight, *Will the Class Action Survive?*, *supra* note 98, at 80 (finding deterrence an important class action policy).

[163] Kalvan & Rosenfield, *supra* note 161, at 686, 688 (detailing the deterrent theory); Luff, *supra* note 162, at 75–76; Sternlight, *Will the Class Action Survive?*, *supra* note 98, at 80. The deterrent theory was formally announced in 1948 by Harry Kalven Jr. & Maurice Rosenfeld. *Supra* note 161, at 686.

[164] *See* Arbitration Agreements, 81 Fed. Reg. 32,830, 32,862–63 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) (finding that companies are more likely to comply with the law if class action is an available course of action); Green, *supra* note 152, at 673 (highlighting the negative publicity that accompanies class action lawsuits). For example, when a company knows its employees could ban together to form a class action lawsuit, it may be extra cautious to make sure any racial discrimination complaints are dealt with swiftly. *See* Arbitration Agreements*,* 81 Fed. Reg. at 32, 862–63; Green, *supra* note 152 at 673. This could include introducing safeguards and reporting methods to assure that any problems are addressed early on, as such internal methods could prevent a costly future class action lawsuit. *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63; Green, *supra* note 152 at 673. Thus, the threat of class action keeps companies on their toes and provides a financial incentive to follow the law. *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63 (discussing that class actions acts as an incentive to comply with the law).

When claims are aggregated, plaintiffs' attorneys have more resources to investigate the potential wrongdoing, likely enhancing the quality of such claims.[165] The higher the quality of claims, combined with the higher stakes of the case, means that the opposing party has a considerable amount to lose.[166] Thus the availability of class action to plaintiffs is a large legal liability for defendants, who are often corporations.[167]

Conversely, the absence of class action hampers, if not eliminates, such an incentive.[168] Companies do not have the same sense of urgency to comply with the law, since individual lawsuits and arbitrations often do not pose the same financial threat.[169] For example, when class action is a possibility, a company may take steps to implement an internal discrimination reporting system, as this may be financially preferable to defending a class action lawsuit.[170] Without class action, however, the implementation of the same system may seem like an administrative burden in comparison to individual lawsuits or arbitrations.[171] In sum, class action serves the policy goal of deterring illegal behavior, thus serving an important public good in regards to racial discrimination.[172]

### *B. Class Action Waivers in Arbitration Agreements Hinder Racial Discrimination Claims*

The arguments discussed above—that class action waivers are on the rise in the sharing economy, and class action is essential to civil rights claims—dovetail, and lead to the conclusion that class action waivers in the sharing economy present a two-fold threat to racial discrimination claims.[173] First, class action waivers in arbitration agreements prevent emerging theories of sharing economy liability from developing due to the procedural differences in arbitra-

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[165] *See* Brandon Garrett, *Aggregation and Constitutional Rights,* 88 NOTRE DAME L. REV. 593, 613–14 (2012) (stating that aggregating claims allows for a higher quality of adjudication); Luff, *supra* note 162, at 76 (finding that aggregating claims increases the claims' quality).

[166] *See* Garrett, *supra* note 165, at 613–14 (stating that aggregating claims allows for a higher quality of adjudication); Luff, *supra* note 162, at 76 (finding that aggregating claims increases the claims' quality).

[167] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63 (finding that companies are more likely to comply with the law if class action is an available course of action).

[168] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63; Kalvan & Rosenfield, *supra* note 161, at 686 (finding that when people have to enforce rights individually, rather than in a class, there is little deterrence); Luff, *supra* note 162, at 76 (discussing the various ways class action creates deterrence).

[169] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63; Kalvan & Rosenfield, *supra* note 161, at 686; Luff, *supra* note 162, at 76 (explaining that class action creates a deterrence effect).

[170] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63; Luff, *supra* note 162, at 76.

[171] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63; Luff, *supra* note 162, at 76.

[172] *See* Arbitration Agreements*,* 81 Fed. Reg. at 32,862–63 (discussing that the presence of class action incentivizes companies to follow the law); *supra* notes 162–172 and accompanying text.

[173] *See supra* notes 113–172 and accompanying text; *infra* notes 177–195 and accompanying text.

tion.[174] Second, even if the law is reformed so that sharing economy companies can be found liable under the Civil Rights Act or another law, class action waivers prevent discriminated parties from obtaining proper redress.[175]

### 1. Class Action Waivers in Arbitration Agreements Barricade Court Doors

Legal scholars and lawyers are crafting creative ways to solve the sharing economy's liability dilemma.[176] For example, Gregory Selden's team argued that Airbnb should be a Title II Public Accommodation and should have to comply with the Fair Housing Act of 1968 and 42 U.S.C. § 1981.[177] While these arguments are innovative, the barrier presented by class action waivers must be simultaneously addressed.[178]

Most notably, individual arbitration hinders civil rights enforcement due to the absence of binding precedent and the "repeat player affect."[179] First, individuals fighting for systemic change are disadvantaged because arbitrators rarely base their decisions in precedent.[180] Thus, if a panel of arbiters concluded that

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[174] *See infra* notes 177–186 and accompanying text.

[175] *See infra* notes 187–194 and accompanying text.

[176] *See infra note* 177 and accompanying text.

[177] *See* Second Amended Complaint, *supra* note 1, at 11–15. Title II of the Civil Rights Act states that no public accommodation shall discriminate on the basis of race, color, sex, or national origin. *See* 42 U.S.C. § 2000a. Per the statute, public accommodations include inns, hotels, motels, or any "other establishment which provides lodging to transient guests." *Id.* § 2000a(b). Although Airbnb is technically not a hotel, there is an emerging argument that it should be considered so under the statute because it is replacing the hotel industry. *See id.*; Belzer & Leong, *supra* note 16, at 1296–99. In that case, the entire company would be liable. *See* 42 U.S.C. § 2000a(b); Belzer & Leong, *supra* note 16, at 1296–99. There is also the argument that Title II should apply to the individual Airbnb user. *See* 42 U.S.C. § 2000a(b); Belzer & Leong, *supra* note 16, at 1296–99. Although Title II contains a carve-out for establishments with less than five rooms for rent, many Airbnb users rent out numerous locations. *See* 42 U.S.C. § 2000a(b); Belzer & Leong, *supra* note 16, at 1296–99. In that case, Airbnb could be found liable if the individuals are agents of Airbnb. *See* RESTATEMENT (THIRD) OF AGENCY § 7.03 (AM. LAW. INST. 2006) (discussing the liability of principals); Belzer & Leong, *supra* note 16, at 1296–99, 1311 (discussing how Airbnb could be vicariously liable for the acts of its hosts). There is also an argument that the Fair Housing Act ("FHA") should apply to Airbnb. Belzer & Leong, *supra* note 16, at 1304–06. Todisco, *supra* note 51, at 126–27 (2015). The FHA prohibits discrimination in the buying or renting of dwellings, as well as in advertising. 42 U.S.C. § 3604 (2012). Although there is an exemption for single-family homes, the exemption does not apply when the owner uses a real estate broker. *See id*. § 3603. Airbnb, which closely resembles a real estate broker, could potentially defeat the exemption. *See id*. § 3604; Singleton v. Gendason, 545 F.2d 1224, 1227 (9th Cir. 1976) (finding that a company who organized a list of available housing from landlords and then sold the list to people who were searching for housing was in the "business of rental dwellings" and thus liable under the FHA); Belzer & Leong, *supra* note 16, at 1304–06; *see also* Agnieszka A. McPeak, 49 CONN. L. REV. 171, 215–17 (2016) (discussing tort law in the sharing economy using vicarious liability and enterprise liability).

[178] *See infra* notes 179–186 and accompanying text.

[179] *See infra* notes 180–186 and accompanying text.

[180] Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, FORDHAM L. REV. 761, 785 (2002) (explaining that a decision by arbiters does not create precedent for future arbiters or judges); Weidemaier, *supra* note 78, at 95–96 (finding that arbiters have more flexi-

Airbnb is a public accommodation, the decision would not have a lasting impact; in subsequent arbitration, the panel would not be bound by another panel's decision.[181] Because decisions only bind the parties in the arbitration agreement, it would be very difficult to build a novel legal theory for future proceedings.[182]

Furthermore, although arbiters chosen by companies are purportedly neutral, there is evidence of a "repeat player" effect.[183] As explained, the "repeat player effect" is the phenomenon that parties who are more likely to return to arbitration will fare better in the present proceeding.[184] A company like Airbnb is a repeat player because it is likely to be arbitrating claims with multiple consumers.[185] Thus, a company like Airbnb has a considerable advantage in halting innovative case law at the expense of individuals bringing racial discrimination claims.[186]

### 2. Class Action Waivers Hinder Development of Claims

Even if new regulations are promulgated to find Airbnb and other sharing economy companies liable for discrimination in the course of their services, class action waivers in arbitration agreements threaten the potency of such claims.[187] As detailed above, class action is vital to systemic change in the realm of racial equality.[188] The procedure continues to be important for a number of reasons, such as the large amount of resources needed to argue a racial discrimination case, the class-wide relief that accompanies group claims, and the deterrence effect.[189] By precluding claimants from joining together in racial discrimination claims, companies like Airbnb not only shield themselves from a large

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bility than judges when coming to a solution). Arbiters will at times cite past arbitration decisions and this has led to the argument that maybe there is precedent in arbitration. Knapp, *supra* at 785. Although arbiters are free to cite a past decision, they still are not bound to follow precedent in the way that a court is bound. *See id.* Thus, there is no precedent in the proper sense. *See id.*

[181] *See* Knapp, *supra* note 180, at 785 (discussing the lack of precedent in arbitration).

[182] *See id.*; Weidemaier, *supra* note 78, at 95–96 (discussing arbitrator's flexibility vis-à-vis that of a judge).

[183] *See* Bingham, *supra* note 80, at 220 (discussing the repeat player effect in the employment context); Drahozal & Zynontz, *supra* note 80, at 857–58 (stating that the repeat player effect is prominent); THE ARBITRATION DEBATE TRAP, *supra* note 80, at 24–25 (discussing the existence of the repeat player effect).

[184] *See* Bingham, *supra* note 80, at 220; Drahozal & Zynontz, *supra* note 80, at 857–58; THE ARBITRATION DEBATE TRAP, *supra* note 80, at 24–25.

[185] *See* Bingham, *supra* note 80, at 220.

[186] *See id*. Drahozal & Zynontz, *supra* note 80, at 857–58; THE ARBITRATION DEBATE TRAP, *supra* note 80, at 24–25.

[187] *See infra* notes 188–194 and accompanying text.

[188] *See* Brief for NAACP, *supra* note 66, at 2 (noting that class action waivers undermine civil rights enforcement); Greenberg, *supra* note 123, at 577; *supra* notes 132–172 and accompanying text.

[189] *See* Brief for NAACP, *supra* note 66, at 19 (discussing the ample discovery process that accompanies civil rights cases); Luff, *supra* note 162, at 76 (discussing class action's connection to deterring illegal conduct); *supra* notes 132–172 and accompanying text.

amount of liability, but also hinder systemic change needed in the sharing economy.[190]

Gregory Selden's team formulated a novel civil rights argument, but the resources of class action are needed to thoroughly investigate the claim and meet the onerous legal standards that the courts impose.[191] For example, the third count of his complaint, which alleged a violation of the Fair Housing Act, likely required showing a disparate impact.[192] As discussed, meeting this burden is difficult to do individually for practical and financial reasons.[193] Further, even if Selden was successful in proving his case, his rewards would be unsatisfying: it is unlikely a court would grant the wide-scale relief he is truly fighting for.[194]

### *C. Responding to Theories of Self-Regulation and Government Enforcement*

Despite these concerns, there are arguments that the class action waiver is not as worrisome as scholars claim.[195] This section will first address the argument that the self-regulation of sharing economy companies is enough to combat racial discrimination and will then explore the argument that government enforcement is sufficient to litigate racial discrimination claims.[196]

#### 1. Self-Regulation Is Not Enough

In the wake of the negative publicity regarding racial discrimination on its site, Airbnb did not eliminate its class action waiver.[197] Rather, the company responded by enacting a number of reforms meant to quell discrimination by its

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[190] *See infra* notes 191–194 and accompanying text.

[191] *See* Tex. Dep't of Hous. & Cmty Affairs v. Inclusive Cmty Project, Inc., 135 S. Ct. 2507, 2523 (2015) (requiring that a claimant prove more than a racial imbalance); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 336 (1977) (quoting 110 CONG. REC. 14270 (statement of Sen. Humphrey)) (explaining the pattern or practice standard); Brief for NAACP, *supra* note 66, at 19 (explaining that the resources of a class action are needed for a thorough discovery in a racial discrimination case).

[192] Second Amended Complaint, *supra* note 1, at, at 13–14; *see Inclusive Cmty. Project*, 135 S. Ct. at 2523 (holding that disparate impact requires showing less than intent, but more than a racial imbalance). It has not been clearly decided in the Supreme Court or lower courts whether a plaintiff could demonstrate disparate impact, rather than systemic disparate treatment in a Title II public accommodation case. *See* Hardie v. Nat'l Collegiate Athletic Ass'n, 97 F. Supp. 3d 1163, 1165 (2015) (stating that there is a dearth of case law discussing disparate impact under Title II).

[193] *See* Brief for NAACP, *supra* note 66, at 2; *supra* notes 132–151 and accompanying text.

[194] *See Yamasaki,* 442 U.S. at 702 (stating that the extent of the violation controls the scope of the injunctive relief); *Cureton*, 319 F.3d at 273; *Trs. of Bos. Univ.*, 891 F.2d at 361 (stating that class-wide relief is ordinarily not appropriate where there is only an individual claimant).

[195] *See infra* notes 197–220 and accompanying text.

[196] *See infra* notes 197–220 and accompanying text.

[197] *See Airbnb Terms*, *supra* note 12 (demonstrating a class action waiver); Ben Edelman, *Response to Airbnb's Report on Discrimination*, (Sept. 19, 2016), http://www.benedelman.org/news/091916-1.html [https://perma.cc/33AY-5FU5] (Sept. 19, 2016) (explaining that Airbnb's report in response to discrimination was silent regarding the matter of class action waivers).

users.[198] For example, Airbnb drafted a "community commitment" statement mandating that everyone treat each other equally.[199] The company also introduced Instant Book, which allows certain listings to be booked without the approval of the host.[200] In other words, the company regulated itself to solve discrimination issues on its site.[201]

One argument raised by business advocates is that the most effective way to protect consumer interests, such as inhibiting discrimination, is the type of self-regulation exemplified by Airbnb.[202] These scholars explain that self-regulation allows for flexible solutions and permits the companies to remain competitive.[203] Although self-regulation should be applauded and is an important factor in reducing discrimination, it cannot be the sole answer to fighting racial prejudice in the sharing economy.[204] Self-regulation may allow companies to enact creative

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[198] LAURA MURPHY, AIRBNB'S WORK TO FIGHT DISCRIMINATION AND BUILD INCLUSION 10–12 (2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf [https://perma.cc/X9BS-RWDN] (detailing the reforms Airbnb introduced in light of the discrimination claims); *The Airbnb Community Commitment*, AIRBNB, http://blog.airbnb.com/the-airbnb-community-commitment/ [https://perma.cc/9AAJ-AVH7]. Airbnb hired Laura Murphy, former head of the American Civil Liberties Union, to lead an effort to minimize discrimination on its site. *See* MURPHY, *supra* at 3 (stating that she was asked to write the Airbnb report on discrimination).

[199] *The Airbnb Community Commitment*, *supra* note 198. Specifically, the Airbnb Community Commitment states, "I agree to treat everyone in the Airbnb community—regardless of their race, religion, national origin, ethnicity, disability, sex, gender identity, sexual orientation, or age—with respect, and without judgment or bias." *Id*.

[200] MURPHY, *supra* note 198 at 10; *What Is Instant Book?*, *supra* note 44. A host, however, is the actor who initiates Instant Book on a listing. *What Is Instant Book?*, *supra* note 44. Thus, Instant Book's praise is overstated, as hosts are not required to turn it on for a listing and can still discriminate. *See* MURPHY, *supra* note 198, at 22 (applauding Instant Book as reducing bias); *What Is Instant Book?*, *supra* note 45 (explaining how Instant Book is applied).

[201] *See* MURPHY, *supra* note 198, at 10–12 (discussing the changes Airbnb planned it initiate); *see also* Jodi Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L. J. 633, 666–68 (2012) (defining self regulation as actions taken by private firms to monitor their own activities). In addition to initiatives set by companies, self-regulation can also include regulation by the citizen-beneficiaries of companies. Short, *supra* at 668 (discussing different definitions of self-regulation).

[202] *See* Harvey Pitt & Karl Groskaufmanis, *Minimizing Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L. J. 1559, 1561 (1990) (stating that self-regulation is preferable to government regulation which is a disruption to corporations); Varun Sundararajan, *Why the Government Doesn't Need to Regulate the Sharing Economy*, WIRED (Oct. 22, 2012, 1:45PM), https://www.wired.com/2012/10/from-airbnb-to-coursera-why-the-government-shouldnt-regulate-the-sharing-economy/ [https://perma.cc/7JQL-TDQ6] (identifying reputation and monitoring systems as a sufficient substitute for centralized regulation); Susan Taplinger, *The Plain Facts: Why Self-Regulations Works Better Than Government Regulations*, DATA & MARKETING ASS'N (May 9, 2014), https://thedma.org/blog/advocacy/the-plain-facts-why-self-regulation-works-better-than-government-regulation/ [https://perma.cc/U9VL-5XVC] (explaining that self-regulation promotes innovation and is in the best interest of markets and consumers).

[203] *See* Pitt & Groskaifmanis, *supra* note 202, at 1561; Sundararajan, *supra* note 202; Taplinger, *supra* note 202.

[204] *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION 145–47 (2010) (explaining that self-regulation requires oversight).

and flexible solutions; however, there are a number of disadvantages that prove outside enforcement is necessary.[205] For example, self-regulation often leads to under enforcement.[206] Further, self-regulation ebbs and flows with certain factors, such as global competition and societal wishes.[207] Thus, as the sharing economy grows and more companies become involved, it cannot be assumed that all companies will implement organizational changes when necessary.[208]

In sum, while self-regulation is an important piece of the puzzle, it needs to be coupled with outside enforcement.[209] In the case of Airbnb, its self-implemented changes are not sufficient to stop racial discrimination.[210] In the sharing economy more generally, self-regulation cannot be counted on as it may not be in every company's best interest.[211] The outside check of a class-action claim remains necessary to enforce civil rights.[212]

### 2. Government Enforcement Is Insufficient

In addition to the calls for self-regulation, it has also been argued that that private enforcement of civil rights claims is unnecessary due to existing government enforcement.[213] The basis of this argument is that government offices and agencies, such as the Equal Employment Opportunity Commission, can equally substitute private class actions.[214] Thus, companies will still be deterred from wrongdoing even in the absence of private class actions.[215]

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[205] *See id.* at 146–47 (explaining that public enforcement and private litigation is necessary to enforce workplace rights).

[206] *See id.* at 158 (discussing that under enforcement is a serious problem in self-regulatory schemes).

[207] *See* Bryant Cannon & Hanna Chunt, *A Framework for Designing Co-Regulation Models Well-Adapted to Technology-Facilitated Sharing Economies*, 31 SANTA CLARA HIGH TECH. L. J. 23, 39–40 (2014) (finding that sharing economy companies may lack incentives to protect consumers); Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127, 148–49 (2009) (explaining that enforced self-regulation may lead to dangerous results for regulated groups and interest groups affected by such regulations).

[208] *See* Cannon & Chunt, *supra* note 207 at 39–40; Krawiec, *supra* note 207 at 248.

[209] *See* ESTLUND, *supra* note 204, at 145–47 (discussing the existence of an enforcement gap in self-regulatory schemes in the employment realm); Cannon & Chunt, *supra* note 207 at 39–40 (finding that sharing economy companies do not always have an incentives to protect consumers).

[210] *See* Cannon & Chunt, *supra* note 207 at 39–40 (finding that sharing economy companies may lack incentives to protect consumers); Krawiec, *supra* note 208, at 248–49 (discussing that self-regulated entities may ultimately act in their own interet); *What Is Instant Book?*, *supra* note 44 (demonstrating that the host is the actor who initiates instant book).

[211] *See* Cannon & Chunt, *supra* note 207 at 39–40; Krawiec, *supra* note 207 at 248–49.

[212] *See* Cannon & Chunt, *supra* note 207 at 39–40.

[213] *See* Discover Bank v. Superior Ct., 113 P.3d 1100, 1122 (Cal. 2005) (using the government's power to enforce rights as a reason for why class action waivers should not be found unconscionable).

[214] *Id.* The Equal Employment Opportunity Commission (EEOC), which was founded in the wake of the Civil Rights era, has jurisdiction to enforce Title VII racial discrimination claims. *See* 3 U.S.C. § 454 (2012) (stating that the EEOC shall have jurisdiction over Title VII claims). Further, under Title II, the Department of Justice often brings forth cases of racial discrimination in public accommodations. 42

This argument flounders because the government does not have the resources to be the sole disciplinarian of civil rights compliance.[216] While government prosecution of civil rights is a vital aspect of enforcement, it can only prosecute a small percentage of the racial discrimination complaints that they are faced with.[217] For example, the Equal Employment Opportunity Commission litigates less than one percent of the charges filed each year.[218] Similarly, the Department of Justice prosecutes an extremely small percentage of employment discrimination cases filed with their office.[219] Thus, the government is not an effective substitute for private class action lawsuits.[220]

## IV. LOOKING FORWARD: WAYS TO LIMIT THE CLASS ACTION WAIVER

While it is important that scholars and lawyers continue to build sharing economy liability theories, class action waivers must be dethroned if racial discrimination claims are to triumph against sharing economy companies.[221] Recent Supreme Court decisions upholding class action waivers demonstrate

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U.S.C. § 2000a-6(a) (stating that the Attorney General shall have power to enforce Title II when they believe an actor has engaged in a pattern or practice od discrimination). There are a number of other government agencies that have power the to litigate civil rights claims. THE LACK OF ACCESS TO COURTS AND EFFECTIVE REMEDIES TO ENFORCE CIVIL RIGHTS VIOLATIONS IN THE UNITED STATES OF AMERICA, NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS 19 (2007) [hereinafter LACK OF ACCESS]. For example, the Department of Transportation, Department of Health and Human Services, and Environmental Protection Agency have respective Offices of Civil Rights. *Id.*

[215] *See Discover Bank*, 113 P.3d at 1122 (stating that the federal and states' authority to enforce rights as a reason for why class action waivers should not be found unconscionable).

[216] *See* EEOC v. Waffle House Inc., 534 U.S. 279, 290 n.7 (1997); Brief for NAACP, *supra* note 66, at 21–23 (discussing the shortfall of resources the government faces when enforcing civil rights); LACK OF ACCESS, *supra* note 214, at 15–19 (explaining that governments entities have not been effective in enforcing civil rights due to a lack of resources). The Supreme Court in *Waffle House* conceded that certain government agencies, such as the EEOC, are not able to effectively enforce employment discrimination cases. *See* 534 U.S. at 290 n.7 (citing EEOC statistics that in 2000, the commission received 79,896 complaints but only filed 291 lawsuits).

[217] Brief for NAACP, *supra* note 66, at 21–23; LACK OF ACCESS, *supra* note 214, at 15–19.

[218] *See Waffle House Inc.,* 534 U.S. at 290 n. 7 (stating that the EEOC filed 291 lawsuits, even though it received 79, 896 charges of employment discrimination); Brief for NAACP, *supra* note 66, at 21–23 (noting that government cannot sufficiently enforce civil rights on its own).

[219] Brief for NAACP, *supra* note 66, at 22. In addition to the EEOC and the Department of Justice, many other government agencies lack the proper resources. *See* LACK OF ACCESS, *supra* note 214, at 15–19. For example, the Office of Civil Rights for the Department of Transportation, the Environmental Protection Agency, and the Department of Health and Human Services have notable shortcomings in enforcing civil rights. *See id.* These problems include a growing complaint backlog, inability to collect sufficient data, and staffing shortfalls. *See id.*; Brietta R. Clark, *Hospital Flight from Minority Communities: How Our Existing Civil Rights Framework Fosters Racial Inequality in Healthcare*, 9 DEPAUL J. HEALTH CARE L. 1023, 1058 (2006) (discussing the shortcomings of government enforcement in Title VI healthcare discrimination claims).

[220] *See* Brief for NAACP, *supra* note 66, at 21–23; LACK OF ACCESS, *supra* note 214, at 15–19 (discussing the shortfall of resources the government faces when enforcing civil rights).

[221] *See* Lard, *supra* note 31; *see also* Belzer & Leong, *supra* note 16, at 1296–99, 1304–06 (discussing ways to find Airbnb liable under current law).

that the solution may not start with the courts.[222] Rather, other bodies of government need to work together to limit the waiver in the civil rights context.[223] Section A explains that Congress should amend or create a law with a "contrary congressional command" to the FAA.[224] Section B examines how an agency could promulgate regulations prohibiting binding arbitration and class action waivers in certain types of contracts.[225]

### *A. Enacting a Law With a "Contrary Congressional Command"*

While the Supreme Court has held that the FAA preempts state law and overrides many federal laws, there is opportunity for Congress to enact legislation that would counter the broad statute.[226] Specifically, Congress could and should pass or amend a civil rights law evidencing a clear congressional command against arbitration or class action waivers.[227]

If a federal statute is to override the FAA, it must raise a contrary congressional command against arbitration.[228] In order to prove that a statute contains such authority, the party opposing arbitration must show intent from the statute's text, history, or purposes.[229] Currently, courts state that there is no contrary congressional command in civil rights enforcement cases.[230]

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[222] *See* Fitzpatrick, *supra* note 105, at 187 (discussing the difficulties in finding solutions to the class action waiver dilemma); *see also* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2034, 2309 (2013) (holding that an arbitration clause is enforceable despite the fact the cost of arbitration is higher than the amount an individual would recover); AT&T Mobility v. Concepcion, 563 U.S. 333, 344 (2011) (finding that California common law banning class action waivers was preempted by the FAA); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) (finding that class arbitration cannot be imposed on parties unless there is a contractual basis).

[223] *See Italian Colors*, 133 S. Ct. at 2309; *Concepcion*, 563 U.S. at 344; *Stolt-Nielsen*, 559 U.S. at 684.

[224] *See infra* notes 226–235 and accompanying text.

[225] *See infra* notes 236–246 and accompanying text.

[226] *See Concepcion*, 563 U.S. at 344 (finding that the FAA preempts California law); Fitzpatrick, *supra* note 105, at 188 (detailing how a federal law could override the FAA).

[227] *See Italian Colors*, 133 S. Ct. at 2309 (discussing contrary congressional command); Jean Sternlight, *Compelling Arbitration of Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 KAN. L. REV. 273, 323 (1999) (discussing how arbitrating claims is inconsistent with the Civil Rights Act of 1866) [hereinafter Sternlight, *Intended*].

[228] *See Italian Colors*, 133 S. Ct. at 2309 (stating that no contrary congressional command was found to override the FAA); CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (explaining that a contrary congressional command is needed to override the FAA). For example, in *Italian Colors,* the Supreme Court found that no such "contrary command" existed to override the FAA. 133 S. Ct. at 2309. Respondents argued that arbitrating claims individually would run contrary to antitrust laws because doing so was financially impractical. *Id.* The court, however, found that there was no guarantee in antitrust law that there be an affordable path to litigation. *See id*. Further, the Court explained that there was no reference to class action in the Sherman Antitrust Act and Clayton Act *Id.*

[229] *See* Shearson/Am. Express v. McMahon, 482 U.S. 220, 227 (1998) (explaining how to provide contrary congressional intent). For example, in *McMahon*, Respondent argued that § 29(a) of § 27 of the Exchange Act evidenced such intent, as §29 voids the waiver of "any provision" under the Exchange Act. 428 U.S. at 228. The Supreme Court did not agree, finding that the "any provision" lan-

Due to the strong tie between civil rights and class action, however, such a command could exist if a civil rights law were enacted referencing collective action, or if the Civil Rights Act were amended to include an anti-arbitration provision.[231] The statute would need to be narrowly tailored to the civil rights context, but encompass sharing economy companies: the broader the statute, the less likely the courts are to find the necessary contrary command needed to override the purpose of the FAA.[232] One example of a contrary congressional command is the 2015 amendment proposal to the Serviceman Civil Relief Act ("SCRA") limiting arbitration.[233] In a bipartisan effort, Senator Lindsey Graham and Senator Jack Reed hoped to limit arbitration agreements by giving service members the opportunity to opt out of such clauses in connection with the SCRA.[234] While the SCRA was not ultimately amended, the proposal's explicit language against arbitration provides an example of congressional intent that would evidence a contrary congressional command to arbitration.[235]

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guage did not extend to statutory duties, but rather only substantive obligations under the Act. *Id.* Thus, no intent existed. *Id.*

[230] *See* Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (holding that Title VII claims can be subjected to arbitration).

[231] *See* Brief for NAACP, *supra* note 66, at 2; Sternlight, *Intended*, *supra* note 227, at 323 (describing how compelling claims to arbitration is inconsistent with the purpose of the Civil Rights Act of 1866). Further, no "contrary congressional command" has been found in 42 U.S.C. § 1981 discrimination claims either. *See* Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 520 (11th Cir. 1994) (upholding a district court decision that a 42 U.S.C § 1981 claim can be arbitrated); Sternlight, *Intended*, *supra* note 227, at 276–78 (discussing the courts' allowance of 42 U.S.C § 1981 claims to enter arbitration).

[232] *See* Fitzpatrick, *supra* note 105, at 185 (explaining how certain scholars believed the California common law was invalidated because it was too broad); Jerrett Yan, Note, *A Lunatic's Guide to Suing for $30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After* AT&T v. Concepcion, 32 BERKELEY J. EMP. & LAB. L. 551, 559 (2011) (arguing that the California law's breadth was the main reason it was preempted by the Supreme Court).

[233] *See* H.R. 4161, 114th Cong. (1st Sess. 2015) (detailing Congressional text that evidences a command against arbitration).

[234] *See id.*; Jessica Silver-Greenberg & Michael Corkery, *Bipartisan Bill Would Protect Service Members' Rights to Avoid Arbitration*, N.Y. TIMES (Nov. 20, 2015), https://www.nytimes.com/2015/11/21/business/dealbook/bipartisan-bill-would-protect-service-members-right-to-go-to-court.html [https://perma.cc/SFR8-24SE]. Specifically, the bill was to "require the consent of parties to contracts for the use of arbitration . . . and to preserve the rights of servicemens to bring class actions under such act." H.R. 4161. The SCRA allows active duty service members to terminate real estate and auto leases when deployed, and requires that lenders reduce interest rates on loans by 6%. 50 U.S.C. §§ 3901–4043; Silver-Greenberg & Corkery, *supra*. The financial institutions, however, often violate the statute. Silver-Greenberg & Corkery, *supra*. When service members sue for redress, they are often compelled to arbitrate because of the mandatory arbitration agreements in the institutions' contracts. *Id.* The proposed amendment was a response to the outcry against mandatory arbitration in this context. *Id.*

[235] *See CompuCredit Corp.*, 565 U.S. at 98, 100–01 (discussing contrary congressional command); *H.R. 4161 (114th): SCRA Rights Protection Act of 2015*, GOVTRACK https://www.govtrack.us/congress/bills/114/hr4161 [https://perma.cc/S9V2-UG3X].

### *B. Agency Regulations to Limit the Class Action Waiver*

In addition to Congress enacting or amending a law with a contrary congressional command, a federal agency could promulgate regulations prohibiting binding arbitration and class action waivers in civil rights cases.[236] There have been attempts to ban the class action waiver or binding arbitration in a few contexts.[237] In November 2016, the Center for Medicare and Medicaid ("CMS") implemented regulations prohibiting binding arbitration in Long-Term Care ("LTC") facilities.[238] In May 2016, the Consumer Finance Protection Bureau ("CFPB") proposed regulations banning binding, individual arbitration in certain consumer contracts.[239] These regulations have not been successfully implemented: the CMS proposed to amend its regulation after the Supreme Court upheld a LTC facility arbitration agreement.[240] The CFPB filed its new rule on July 10, 2017, but the regulation's fate remains uncertain as many lawmakers have vowed to repeal.[241] Despite the ambivalence of out-

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[236] *See* 42 C.F.R. § 483.70(n)(1) (2016) (prohibiting pre-dispute binding arbitration in long-term care facilities); Arbitration Agreements, 81 Fed. Reg. at 32,830–31 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

[237] *See* 42 C.F.R. § 483.70(n)(1); Arbitration Agreements, 81 Fed. Reg. at 32,831–32 (proposing regulations that would ban arbitration agreements in certain consumer contracts).

[238] *See* 42 C.F.R. § 483.70(n)(1); Fisher Phillips, *Nursing Home Arbitration Agreements: A Changing Landscape*, LEXOLOGY (Feb. 1, 2017), http://www.lexology.com/library/detail.aspx?g=2d06aa6b-2862-45d9-8bed-032b08118f40 [https://perma.cc/BME5-L2RK]. The regulation, in relevant part, states: "[a] facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the Long Term Care ("LTC") facility." 42 C.F.R. § 483.70(n)(1).

[239] *See* Arbitration Agreements, 81 Fed. Reg. at 32,831–32. In particular, the rule would ban binding arbitration in consumer agreements for checking and savings accounts, credit cards, student loans, and other types of consumer loans. *Id.*

[240] *See* Proposed Rules, 82 Fed. Reg. 26,649, 26,651 (June 8, 2017) (to be codified at 42 C.F.R. pt. 483); *see also* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1428 (2017) (holding that the Kentucky Supreme Court's clear-statement rule, which was used to invalidate an arbitration agreement, is preempted by the FAA). The Center for Medicare and Medicaid stopped enforcing the initial regulation after a district court judge halted the regulation with an injunction. *See* 42 C.F.R. § 483.70(n)(1) (prohibiting pre-dispute binding arbitration in nursing home agreements); Am. Health Care Ass'n v. Burwell, 217 F.Supp.3d 921, 946 (N.D. Miss. 2016); Letter from Director, Survey and Certification Group, to State Survey Agency Directors (Dec. 9, 2016) https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-12.pdf [https://perma.cc/L4W9-NKSF] (stating that the agency will not enforce the arbitration regulation in light of the court injunction). After the Supreme Court upheld binding arbitration in *Kindred Nursing Centers,* the agency stepped back from the original regulation and proposed revisions. *See* Proposed Rules, 82 Fed. Reg. at 26,651. If enacted, the revised regulations would not prohibit binding arbitration. *See id.* Rather, the regulations would require LTC facilities to be transparent about arbitration. *See id.* Specifically, "the agreement must be explained to the resident. . . in a form and manner that he or she understands" and "the resident acknowledges that he or she understands the agreement." *Id.*

[241] *See* Arbitration Agreements, 81 Fed. Reg. at 32,831–32; Ramona L. Lampley, *The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change*, AM. BAR ASS'N: BUS. L. TODAY, https://www.americanbar.org/publications/blt/2017/05/07_lampley.html [https://perma.cc/

comes, agency action is powerful first step towards limiting binding arbitration and class action waivers.[242]

In regards to Airbnb and racial discrimination, the United States Department of Housing and Urban Development ("HUD") could be the proper agency to propose such regulations if the company's actions were to fall under Fair Housing Act.[243] Since its inception in 1965, HUD has been an important force in enforcing fair housing laws and combatting discrimination.[244] Just as the CFPB is designated to protect consumers, HUD's role is to protect equal and fair housing.[245] HUD regulations could look similar to those proposed by the CMS or the CFPB, and prohibit class action waivers in contracts concerning the buying, renting, or advertising of a dwelling.[246]

## CONCLUSION

The sharing economy continues to grow in numerous sectors, and is becoming increasingly pervasive in the consumer's daily life. Despite sharing economy's progressive messages and novel technologies, racial discrimination is still a pressing issue. Current laws and regulations do not go far enough to redress these types of claims due to the novel structure of sharing economy companies, and class action waivers present in consumer contracts. While efforts to adapt regulations and introduce novel legal theory should be applauded, the conversation must simultaneously address class action waivers.

Due to the necessary contractual relationship in the sharing economy, class action waivers are popular and prominent in sharing economy company contracts. These waivers are especially detrimental to racial discrimination claims because of the inherent tie between civil rights and class action. Thus,

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6RN2-BL8K] (speculating why the CFPB has not published the proposed rule). The House of Representatives voted to repeal the rule on July 25, 2017, using the Congressional Review Act. *See* 5 U.S.C.§ 801 (2016); Yuka Hayashi, *House Votes to Repeal CFPB's Arbitration Rule*, WALL ST. J. (July 25, 2017, 5:24pm) https://www.wsj.com/articles/house-votes-to-repeal-cfpbs-arbitration-rule-1501017889 [https://perma.cc/SMN5-AW7T]. The repeal now moves to the Senate, where fifty-one votes will be needed to finalize the repeal. *See Hayashi*, *supra*.

[242] *See* 42 C.F.R. § 483.70(n)(1); Arbitration Agreements, 81 Fed. Reg. at 32,831–32.

[243] *See* 42 U.S.C. § 3531 (2016) (discussing the purpose of establishing the Department of Housing and Urban Development ("HUD")); *Mission,* HOUSING & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/about/mission [https://perma.cc/CU66-9PAK] (stating that the mission of HUD is to eliminate housing discrimination). In regards to employment, the EEOC would likely be a proper agency to promulgate regulations regarding class action waivers and employment. *See* 3 U.S.C. § 454. The EEOC is charged with enforcing Title VII of the Civil Rights Act. *See id.*

[244] *See* 42 U.S.C. § 3531 (discussing the purpose of establishing HUD); *Mission, supra* note 243.

[245] *See* 12 U.S.C. § 5518 (delegating to CFPB the power to create regulations restricting arbitration agreements in certain instances); 42 U.S.C. § 3531 (stating the purpose of HUD).

[246] *See* Arbitration Agreements, 81 Fed. Reg. at 32,830–31 (discussing the proposed CFPB regulations); *Mission*, *supra* note 243 (discussing HUD's mission).

change must be initiated to limit class action waiver, so that statutes such as the Civil Rights Act can continue to protect the rights of all.

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