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UBER'S ARBITRATION TRICKERY: MOHAMED'S HOLDING, THE NEW ERA OF LIMITING THE SCOPE OF ADMINISTRATIVE PROTECTION AND THE VINDICATION OF RIGHTS DOCTIRNE

KERBY KNISS

I. INTRODUCTION

"Since the late eighteenth century, the Constitution of the United States and the constitutions of several states have guaranteed U.S citizens the right to a jury trial. This fundamental right can only be waived if a party knowingly and voluntarily agree, giving courts every reasonable presumption against waiver."[1] These

1. Meyer v. Kalanick, No. 15-16178, 2016 U.S. Dist. LEXIS 99921, at *1

are the words of Judge Jed Redkoff, of the Southern District of New York. Judge Redkoff held when Uber Technologies ("Uber") could not compel arbitration on an individual pursing collective relief.[2] The Ninth Circuit Court of Appeals ("Ninth Circuit") in *Mohammed v. Uber Tech, Inc.*, however, agreed with Uber, ordering Uber drivers to submit to arbitration. The Ninth Circuit held Uber drivers waived all claims to forego Uber's arbitration agreement for the drivers failed to opt-out of Uber's arbitration agreement.[3] This decision not only changed the landscape in pending Uber litigation, but delivered a devastating blow to drivers seeking redress from administrative agencies.[4] With the exception of Judge Redkoff and California District Court Judge, Ed Chen, both skeptics of "clickwrap" contracts, other courts have ruled similarly to the Ninth Circuit,[5] leading many to believe Uber has finally found a solution to their litigation problems.[6]

(S.D.N.Y. July 29, 2016) (Rakoff, R.) (quoting *Aetna Ins. Co. v. Kennedy to Use of Bogash*, 301 U.S. 389, 393 (1973)).

2. Kat Greene, *Rakolf Slams 'Legal Fiction' In Nixing Uber Arbitration Bid,* LAW 360 (July 29, 2016), www.law360.com/articles/823375/rakoff-slams-legal-fiction-in-nixing-uber-arbitration-bid (quoting Judge Rakoff stating arbitration agreements online as a "legal fiction."). *See* Alison Frankel, *Uber's Arbitration Appeal at the 2nd Circuit is Big Test for Internet Businesses,* REUTERS (November 30, 2016) (stating Uber is taking Judge Rakoff's decision to the 2nd U.S Circuit of Appeals).

3. Daniel Fisher, *Appeals Court Deals Blow to Uber Class Actions, Holding Arbitration Pacts Enforceable,* FORBES (Sept. 7, 2016), www.forbes.com/sites/danielfisher/2016/09/07/appeals-court-deals-blow-to-uber-class-actions-holding-arbitration-pacts-enforceable/#494327e034fa (last visited Mar. 2, 2017) (stating the Ninth Circuit held arbitration agreements where drivers do not opt-out are enforceable). *See* Mohamed v. Uber Tech. Inc., No. 15-16178, No. 15-16181, No. 15-16250, 2016 U.S. App. LEXIS 16413 at *1 (9th Cir. 2016) (holding the District Court exceeded their authority in deciding whether the arbitration agreements were enforceable regarding the California Private Attorney General Act) (hereinafter PAGA).

4. Joel Rosenblatt and Patricia Hurtado, *Uber Gains Leverage Against Drivers with Arbitration Ruling*, BLOOMBERG TECHNOLOGY, (September 7, 2016) ("The ruling gives Uber the upper hand in a hard-fought lawsuit covering 385,000 current and former drivers in California and Massachusetts who sued to be treated as employees rather than independent contractors.").

5. *Meyer,* No. 15-16178, 2016 U.S. Dist. LEXIS 99921 at *7 (stating 'clickwrap (or 'click-through') agreements make a "website users are required to click on an 'I agree' box after being presented with a list of terms and conditions of use."). *See* Mohamed v. Uber Techs., Inc., 109 F. Supp. 3d 1185, 1196 (N.D. Cal 2015) *rev'd* 2016 U.S. App. LEXIS 16413 (9th Cir. 2016) (holding a clickwrap agreement provided adequate notice of contract terms).

6. *See* Bruster v. Uber Techs. Inc., No. 15-CV-2653, 2016 U.S. Dist. LEXIS 67532 at *14-15 (N.D. Ohio May 23, 2016) (granting Uber's motion to compel arbitration because the Uber drivers were bound to the 2014 agreement the drivers had agreed to); Suarez v. Uber Tech., Inc., No. 8:16-cv-166-Y-30MAP, 2016 U.S. Dist. LEXIS 59241 at *1 (M.D. Fla. May 4, 2016) (concluding Uber's arbitration provision was not unconscionable and the drivers improperly brought their claim as collective/class action). *See also* Varon v. Uber Tech., Inc., No. MJG-15-3650, 2016 U.S. Dist. LEXIS 94325 at *1 (D. Md. July 20, 2016)

The Ninth Circuit awarded Uber a big win, yet, litigation continues to ensue, evidencing Uber's failure to fix their litigation woes. In regards to Uber's arbitration agreements, for major concerns exist: (1) whether Uber drivers are aware of the arbitration agreement (2) whether Uber drivers can understand the agreement's language; (3) whether the arbitration agreements limit drivers' rights to administrative agencies' relief; and (4) whether the arbitration agreements violate state labor laws such as the Private Attorneys General Act ("PAGA").

The first problem with Uber's arbitration agreements is drivers either do not understand the arbitration agreement. Or Uber drivers do not know the arbitration agreement exists in the employment contract because no attention is drawn to arbitration agreement nor is the arbitration's procedure clearly stated.[7] This is not only problematic for drivers, but is unjust, for most Uber drivers speak English as a second language, or the drivers do not possess the necessary education to understand Uber's arbitration clause.[8] The Ninth Circuit's opinion reveals how challenging it is to interpret an arbitration agreement. It can be difficult to determine whether the issue in the agreement should be decided by the judge or the arbitrator, because an average person has to interpret the contract.[9] The Ninth Circuit's decision highlights the need for the Federal Arbitration Act ("FAA") to be reformed to ensure the average citizen can adhere to the Act's procedures.

It also highlights why Congress should modify the FAA to

(debating whether the question of arbitrability is for the arbitrator or court); Cullinane v. Uber Techs., Inc., Civil Action No. 14-14750-DPW, 2016 U.S. Dist. LEXIS 88808 at *1 (D. Mas. July 8, 2016) (addressing whether a court can compel arbitration when the driver agreed to the terms of Uber's contract online). *But see* NLRB v. Uber Techs., Inc., No. 16-mc-80057-KAW, 2016 U.S. Dist. LEXIS 145069 at *1 (N.D. Cal. October 19, 2016) (granting the NLRB's application to enforce subpoenas regarding Uber's work practices); Razak v. Uber Tech., Inc., Civil Action No. 16-573, 2016 U.S. LEXIS 1733531, at *1 (E.D. Pa. December 14, 2016) (denying Uber's motion to dismiss to Uber drivers claiming Uber violated the Fair Labor Standards Act (hereinafter FLSA) by withholding earnings).

7. Yanelys Crespo, *Uber v. Regulation: "Ride-Sharing Creates a Legal Gray Area,* 25 U. MIAMI BUS. L. REV. 79, 83 (2016) ("regulation and innovation do not work together in the current regulatory scheme."). *See* Carolyn Said, *Uber Bans Drivers from Class-Action Lawsuit Participation,* SAN FRANCISCO CHRONICLE (December 14, 2015), www.govtech.com/applications/uber-bans-drivers-from-class-action-lawsuit-participation.html (last visited Feb. 8, 2017) (explaining how Uber drivers are not aware of the company's arbitration agreements contained within their employment contract).

8. *Id. (*"Many Uber drivers speak English as second language and would have a lot of trouble reading and deciphering a 21-page PDF") (quoting Harry Campbell, Los Angles driver who writes TheRideshareGuy.com blog).

9. John E Murry & Timothy Murray, *Unconscionability and the Duty to Read in* CORBIN ON CONTRACTS DESK EDITION EMERGING LAW OF UNCONSCIONABILITY, § 29.03, (2017) (discussing all the relevant case law the Ninth Circuit considered in deciding the *Mohammed* decision).

adapt to modern technological contracts, and to prevent companies from abusing their power over those they contract with.[10] Arbitration clauses are often badly drafted and greatly increase the cost of the dispute significantly.[11] This concern coupled with the signor accepting the arbitration agreement on a phone application or small tablet screen inhibits the signor's ability to assent to the arbitration agreement. Mutual assent is a requirement for a contract to be legally enforceable.

Another major concern is an arbitration agreement's ability to preclude a claimant from accessing remedies provided by administrative law.[12] The Ninth Circuit's holding restricts drivers from vindicating their most basic rights;[13] however, several states and federal administrative agencies are pushing back on the Ninth Circuit's opinion. The National Labor Relations Board ("NLRB") fears the opinion will continue to limit the scope of the National Labor Relations Act ("NLRA")[14] by barring administrative agencies from exercising their statutory authority.[15] The Seventh Circuit has responded to this fear, and as a result, took a strong stance against allowing the FAA to interfere with employees right to purse joint action in violation of the NLRA.[16] The Supreme Court is currently addressing this issue, and will issue an opinion during this

10. Catherine V.W. Stone and Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights,* ECON. POLICY INST. 6-10 (2015), www.epi.org/publication/the-arbitration-epidemic/ (last visited Feb. 8th, 2017) (discussing how the U.S. Supreme Court has enabled corporations to compel customers and employees into arbitration, which in effect limits employees and customers' ability to receive redress).

11. Marissa Marinelli and Andrew Choi, *When Pre-Arbitration Requirements Lead to Disputes over Dispute Resolution Clauses*, NEW YORK LAW JOURNAL (March 13, 2017), https://www.law.com/newyorklawjournal/almID/1202780913920/when-prearbitration-requirements-lead-to-disputes-over-dispute-resolution-clauses/?slreturn=20180707104419

12. Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse,* 89 S. CAL. L. REV. 104, 120 (2015) (explaining the significance of the court's holding in *Sonic II*). Sonic-Calabasas A. Inc. v. Moreno*,* 57 Cal 4th 1109, 1133 (2013), *cert denied,* 134 S. Ct. 2724 (2014) (hereinafter *Sonic II*) (holding private arbitration agreements can disallow an employee access to the administrative process, and other state and federal agencies regulating areas in healthcare, worker's compensation, and consumer protection).

13. Stone and Colvin, *supra* note 10 (discussing how forcing litigants into arbitration limit litigants' substantive rights; and limits opportunities to effectively vindicate rights).

14. National Labor Relations Act, 29 U.S.C.S. § 158 (1935) (hereinafter NLRA); Private Attorneys General Act, Labor Code § 2699 (2016) (explaining PAGA's purpose is for employees to enforce labor codes of California).

15. D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012) (hereinafter "*Horton I*"); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2014), *cert granted*, 137 S. Ct. 809 (2017).

16. *Id.*

Comment's publication.

Lastly, the Ninth Circuit's decision did not interpret the language regarding PAGA.[17] The Ninth Circuit did not decide if the language should be severed from the remainder of the arbitration agreement or if the language invalidated the entire arbitration agreement. The California Legislature enacted PAGA to allow an "aggrieved employee to bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations."[18] PAGA's legislative purpose is to protect individuals through the use of state labor law. The legislature intended that employees be their own enforcement agency. Therefore, the legislature granted employees the right to recover from companies.[19] Without the Ninth Circuit's interpretation of PAGA, aggrieved drivers do not know if they have a right to assert a PAGA claim.

The Ninth Circuit's trailblazing precedent has limited complainants' access to courts and other administrative remedies,[20] prompting the following questions: Will courts allow companies to exert their contractual power in order to limit the scope of individuals' constitutional rights to trial? Or, are Judge Chen and Judge Redkoff's holdings the beginning step to promulgate sweeping change? This Comment discusses these issues below.

This Comment begins with a background section that discusses the creation of Uber, the historical application of arbitration clauses, and the application of arbitration clauses contracts, including the use of arbitration clauses in app-based technology agreements.[21] This section also touches on the Ninth Circuit's decision in *Mohamed*, and other Federal Court decisions regarding the enforcement of Uber's arbitration clause.[22]

Next, this Comment provides an analysis section that discusses the Ninth Circuit's decision. The analysis attempts to interpret the arbitration agreement's delegation clause and PAGA waiver, deciphering the Ninth's Circuit's reasoning to enforce

17. Private Attorneys General Act, Labor Code § 2699 (explaining PAGA's purpose is for employees to enforce labor codes of California).

18. Iskanian v. CLS Transp. LA, LLC., 327 P.3d 129, 146 (Cal. 2014) *cert. denied,* 135 S. Ct. 1155 (2015) (quoting Cal. Lab. Code § 2699 subd. (a)).

19. *Iskanian,* 327 P.3d at 147. *See* Arias v. Superior Court, 46 Cal. 4th 969, 985 (2009) (stating the Legislature intended a PAGA action to be binding on the named employee, government agencies, and any aggrieved employee not a party to the proceeding).

20. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *33. Weston, *supra* note 12 at 105 (asking the question if mandatory arbitration agreements displace parties' rights to access administrative agencies).

21. Rebecca Elaine Elliot, Note, *Sharing App or Regulation Hack(ney)? Defining Uber Technologies, Inc.,* 41 IOWA CORP. L. 727, 733 (2016). *See* infra Section II, A (discussing Uber). *See also* UBER TECHNOLOGIES, INC., *www.uber.com* (last visited Oct. 6, 2016) (explaining Uber's creation).

22. *See infra* Section II C, D (analyzing the history of arbitration and how arbitration is delegated to the arbitrator).

arbitration.[23] It then analyzes whether the arbitration agreement was unconscionable, suggesting the Ninth Circuit should have considered relevant case law for online arbitration agreements.[24] The analysis section then discusses the effect the Ninth Circuit's opinion will have on drivers and their ability to vindicate their rights by seeking collective relief from courts and administrative agencies.[25]

Lastly, this Comment explains that reform to Federal Arbitration Act is long overdue.[26] Yet, destroying precedent is not a viable solution because of instability of the current U.S. Supreme Court.[27] Instead, this comment proposes Congress should reform the Federal Arbitration Act and implement reform through the regulation of agencies.[28]

II. UBER ARBITRATION: AN OVERVIEW

A. The Existence of Uber: An App-Based Transportation Company

Uber, since its foundation in 2010, has become a multinational company that makes transportation more convenient through the use of a smartphone app.[29] So what is Uber?"[30] Uber is:

> A location-based app that makes hiring an on-demand private driver…easy. For riders - **Uber** is a convenient, inexpensive and safe taxi service. Hire a private driver to pick you up & take you to your destination with the tap of a button on any smartphone device. A nearby driver often arrives to pick you up within minutes. Not only is this an on-demand car service, but you can even *watch* as your driver is en-route to come pick you up.
>
> For drivers - Uber provides exceptional pay, allows you to be your own boss, and even receive tips. Take on fares whenever you wish (work as much or as little as you desire) while meeting new people in your city from all walks of life.[31]

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23. *See infra* Section III A, B (analyzing why the Ninth Circuit incorrectly ruled in for Uber).

24. *See infra* Section III, C (discussing the unconscionable arbitration agreement and the Ninth Circuit's failure to analyze the different between clickwrap and browsewrap agreements).

25. *See infra* Section III, D (analyzing the vindication of rights doctrine in regard to class actions, PAGA, and the NLRA).

26. 9 U.S.C. §§ 1-14. [Hereinafter "FAA"].

27. *See infra* Section IV (discussing the problems with the FAA).

28. *See infra* Section IV (proposing new solutions to protect drivers in the future).

29. Elliot, *supra* note 21 at 727. *See* Uber, *supra* note 21 (explaining how Uber operates and how user access the app).

30. *So, What is Uber*? UBER ESTIMATES, (2018) www.uberestimate.com/about-uber/.

31. *Id.*

Uber has taken off since 2010 and has "exploded onto the scene, displacing traditional taxi and delivery services around the world."[32]

Once a driver meets Uber's requirements, the driver must then enter into the "Raiser Software Sublicense & Online Services Agreement."[33] To sign the agreement, the driver must log on to the Uber app, sign up as a driver, and click on a hyperlink.[34] When the hyperlink is up on the screen the driver must click "Yes, I agree" and then click "confirm," to begin driving.[35]

If a dispute arises with Uber, a driver can initiate arbitration with a written demand and an arbitrator will be assigned to the dispute.[36] Drivers who do not know Uber's arbitration agreements exist, do not want to be compelled into arbitration or bring a class action suit. Rather, they want to file their complaints in district court or with the National Labor Relations Board.[37] The NLRB, under the NLRA, certifies employees to self-organize and form labor organizations, and enter into collective bargaining agreements with their employers.[38] If the NLRB rules in favor of employees and are successful in bringing a claim against their employers, then the

32. Erin Mitchell, Comment, *Uber's Loophole in the Regulatory System*, 6 HOUSTON LAW REVIEW 75 at *1 (2015) (providing that to become a driver an individual must confirm the following requirements: 1) the individual is twenty-one years old; 2) the individual has one year of driving experience in the U.S and three years of driving experience if under the age of twenty-three; 3) the individual has a valid U.S. driver's license; 4) the individual drives a 4-door vehicle; the individual can show proof of vehicle registration and insurance, and 5) the individual can show a satisfactory driving record and acceptable criminal history).

33. Zawada v. Uber Techs., Inc*.,* No. 16-cv-1134, 2016 U.S. Dist. LEXIS 178582 at *3 (E.D. Mich. Dec. 27, 2016).

34. *Id.*

35. *Id.*

36. UBER TECHNOLOGIES, INC., *U.S. Terms of Use,* www.uber.com/legal/terms/us/ (last visited Feb. 7th, 2017). *See* O'Connor v. Uber Techs. Inc*.,* 82 F. Supp 3d 1133, 1138 (N.D. Cal. 2015) (discussing one of the most litigated issues involving Uber's categorization of their drivers has independent contractors or third-party providers, and not employees). *See generally* Sanchez v. Valencia Holding Co. LLC*.,* 61 Cal 4th 899,922 (2015) (explaining Uber prefers drivers to be excluded from labor laws, so drivers do not benefit from worker's compensation labor laws, and ERISA).

37. *See* NLRB v. Uber Techs. Inc., 2016 U.S. Dist. LEXIS 145069 at *1-2 (N.D. Cal. Oct. 19, 2016) ("Multiple Uber drivers have filed charges against Uber for violations of the NLRA, 29 U.S.C. § § 151, et seq."). *See* Mohamed v. Uber Tech. Inc*.,* 2016 U.S. App. LEXIS 16413 at *1 (arguing Uber's arbitration clause cannot compel arbitration). *See also O'Connor*, 2016 U.S. Dist. LEXIS 116482 at *135 (allowing Plaintiffs class action to be certified to pursue their claim that Uber violated Section 351 of the Labor Code).

38. 29 U.S.C. 159(c)(1)(A). *See* NLRB v. Alt Entm't Inc., 858 F. 3d 392, 415 (6th Cir. 2017) (explaining Section 7 of the NLRA "self-organization, forming labor organizations [and] bargain[ing] collectively through representatives of their own choosing," all activities section 7 expressly protects, are hardly thing that employees just do...").

employer has two options.[39] The employer can either: (1) contest the petition before the NLRB or (2) the employer can bring a claim to courts.[40] The NLRB has taken a strong stance against arbitration, as the NLRA grants employees a right "to self-organization, to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing."[41]

However, when an arbitration provision is in an employment agreement, procedural due process rights can change and employees can be forced into arbitration; as courts have upheld Congress's strong presumption in favor of enforcing arbitration.[42] Thus, in effect, drivers are not allowed to bring any claims to court and drivers are not allowed to ask courts to rule on the delegation clause to determine whether the arbitration agreements are unconscionable.[43]

As of today, the legal system has not adapted to the new "groundbreaking technological innovations."[44] Lawmakers attempting to regulate Uber have endured difficulty in applying the current law to the company's new work practices.[45] States have also failed to effectively regulate the company because of Uber's innovative business operation through their app.[46] European countries, such as Germany, Spain, Italy and France, banned Uber's use because of the complexities in trying to regulate the licensing of drivers.[47] In the United States, both Alaska and Nevada

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39. NLRB 29 C.F.R. 101.30; 29 C.F.R. 102.69(c)(1)(ii).

40. *Id.*

41. *Alt. Entm't, Inc.*, 858 F 3d. 393, 415 (6th Cir. 2017); Eastex, Inc. v. NLRB, 437 U.S. 556, 565-566 (1978) (stating "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining [and] recognized this factor by choosing, as the language of Section 7 makes clear, to protect concerted activities for somewhat broader purpose of 'mutual aid or protections as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'"). *See* Brady v. Nat'l Football 644 F. 3d 661 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more factorable terms or conditions is "concerted activity under Section 7 of the NLRA.").

42. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011) (stating if the NLRA were construed to prohibit collective bargaining and class waivers, the NLRA would "interfere with fundamental attributes of arbitration"); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("holding the FAA cannot harmonize the FAA with the NLRA because the express congressional intent in the FAA favors arbitration.").

43. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *11-19 (9th Cir. 2016); Zawada v. Uber Techs., Inc., No. 16-cv-11334, 2016 U.S. Dist. LEXIS 178582 at *8-28 (E.D. Mich. 2016).

44. Yanelys, *supra* note 7 at 88.

45. *Id.*

46. *See* Rebecca Elaine Elliot, Note, *Sharing App or Regulationa Hack(ney)?: Defining Uber Technologies, Inc.,* 41 IOWA J. CORP L. 727 (Spring 2016) (analyzing Uber's business to bypass regulation).

47. *Id.* at 727 n. 8. *See* Jefferson Graham, *Talking Tech: Taxi Alternatives Are on the Move,* USA TODAY (June 26, 2013), www.usatoday.com/story/tech/columnist/talkingtech/2013/06/26/taxi-alternatives-uber-lyft-sidecar/

banned Uber until Uber agreed to comply with the States' laws.[48]

A company that began as a not-for-profit technological sharing company has blossomed into a company generating more than $15 billion in revenue, and is predicted to be worth more than $335 billion by 2025.[49] The quick growth of Uber has outdated current transportation regulations, for the current laws "were not designed to regulate collaborative relationships, transactions, and organization."[50] Therefore, lawmakers must completely "re-evaluate and re-develop laws"[51] in order to regulate Uber, ensure the safety of Uber's customers and consumers, and provide fair competition to other transportation companies.

B. Arbitration: The Creation

Many facets exist to arbitration clauses and their enforceability. This section discusses the implementation of arbitration.[52] Second, this section discusses arbitrations enforceability and unconscionability.[53] Third, this section discusses class arbitrations. [54] Lastly, this section discusses administrative agencies, and how the FAA conflicts with agencies' labor laws.[55]

2453967 (last visited Mar. 12, 2017) (explaining that taxi drivers are unfairly losing revenue because Uber drivers face less stringent regulation by not having to be licenses with the city the driver operates in and not being subject to traditional fee). *See also* Johana Bhuiyan, *Here Is Where Uber and Lyft Are Facing Regulation Battles in the United States,* BUZZFEED *NEWS* (Dec. 15, 2014), www.buzzfeed.com/johanabhuiyan/here-is-where-uber-and-lyft-are-facing-regulation-battles-in?utm_term=.egYDE0zA0x#.ujX7bnKR4 (last visited Mar. 12. 2017) (stating a comprehensive list of major cities where Uber is facing challenges).

48. Elliot, *supra* note 21 at 747 n. 97-99. *But see* Press Release, Governor Terry McAuliffe, Virginia Reaches Temporary Agreement to Allow Safe, Regulated Operation of Uber and Lyft (Aug. 5, 2014), www.governor.virginia.gov/newsroom/newsarticle?articleId=5726 (last visited Mar. 2, 2017) (stating Uber must apply for a broker transportation broker license, and must comply with tax laws, maintain transparency, conduct extensive background checks document each driver, and have insurance coverage).

49. Molly Cohen & Corey Zehngebot, *What's Old Becomes New: Regulating the Sharing Economy*, 58 BOS. B.J., 34, 35 (2014). *See* John Hawksworth & Robert Vaughan, *The Sharing Economy—Sizing the Revenue Opportunity,* PWC UK BLOGS. (2014) http://pwc.blogs.com/files/sharing-economy-final_0814.pdf (stating the findings of a report conducted by Pricewaterhouse Coopers).

50. Yanelys, *supra* note 7 at 83.

51. *Id.*

52. *See infra* Section II, B (discussing arbitration's implementation into the legal system).

53. *See infra* Section II, B (analyzing the complexities of arbitration).

54. *See infra* Section II, B, iii (describing class arbitration effect on arbitration).

55. *See infra* Section II, B, iv (describing how administrative law conflicts with the FAA).

1. Implementation of Arbitration

Litigation in the past several decades has changed drastically. Today, going to trial is perceived as a failure for all parties involved.[56] Parties no longer want the bad publicity, time commitment, and expense of going to court.[57] As a result, arbitration has become a desired alternative.[58] After the creation of arbitration, courts, were nervous arbitrators would undermine previous precedent and would not enforce arbitration agreements.[59] This fear led Congress to pass the Federal Arbitration Act ("FAA"), an act requiring courts to enforce arbitration agreements and awards.[60]

As the FAA evolved, courts mandated that the FAA preempts most state laws.[61] Also, the FAA "creates federal substantive law requiring the parties to honor arbitration agreements."[62] Arbitration involves "(a) a process to settle disputes between parties; (b) a neutral third party; (c) an opportunity for the parties to be heard; and (d) a final binding decision or award, by the neutral third party after the hearing."[63] The FAA limited judicial review on an arbitrators decisions.[64] Therefore, arbitration agreements are valid, irrevocable, and enforceable unless state-law revokes the arbitration agreement.[65]

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56. Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 EMORY L.J. 1492, 1507 (2016) (stating the change in litigation has led to the creation of Alternative Dispute Resolution).

57. *Id. Contra* In re Checking Account Overdraft Litig.*,* 685 F. 3d 1269, 1282-1283 (11th Cir. 2012) (explaining arbitration costs are expenses and can exceed the fees of a lawyer).

58. *In Re Checking Account Overdraft Litig.,* 685 F. 3d at 1282-1283 (stating arbitration does not play a role in social order because arbitration goes on behind closed doors, it is unseen and unreported to the public, it is not set to one choice of law, and its outcome does not result in written opinions to guide later courts).

59. Michael H. LeRoy & Peter Feuille, *The Revolving Door of Justice: Arbitration Agreements that Expand Court Review of an Award*. 19 OHIO ST. J. ON DISP. RESOL. 861, 865-870 (2004).

60. Freer, *supra* note 56 at 1501.

61. AT&T Mobility LLC v. Concepcion*,* 131 S. Ct. 1740, 1745 (2011) (stating the FAA purpose is to promote arbitration; and "embodies[ies] [the] national policy favoring arbitration…not withstanding any state or substantive procedural policies to the contrary.") (citation omitted).

62. Ford v. Hamilton Inv., 29 F.3d 255, 257 (6th Cir. 1994).

63. Thomas J. Stipannwich, *The Arbitration Penumbra: Arbitration Law and Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 433-43 (2007).

64. 9 U.S.C. §§ 10. *See* Hall Street Assocs. LLC. v. Mattel Inc.*,* 552 U.S, 576, 591 (2008) (citing a court may not overturn an arbitrator's decision because the arbitrator made an error or "a serious error.") (emphasis added).

65. 9 U.S.C. § 2.

2. Arbitrations Enforceability

Congress's push toward arbitration did not come without limitations.[66] Arbitration can be denied when arbitration does not effectively vindicate petitioners' rights.[67] Problematically, Congress, by not specifying the scope of arbitration agreements, left courts little guidance to determine when a judge or arbitrator should decide a dispute.[68] The FAA provides that when an arbitration agreement is unambiguous and summits the parties to arbitration, the agreement must be enforced.[69] An exception to this rule applies if a contract defense is applicable such as fraud, unconscionability, duress, etc., making the arbitration clause unenforceable.[70]

Contracts containing arbitration clauses are considered to be two separate contracts.[71] A principle known as the doctrine of separability.[72] "An arbitration agreement is an independent agreement between the parties, that is separate from the underlying contract."[73] As a result, contract defenses apply to the contracts separately.[74] For example, the Supreme Court in *Prima Paint Corp.*, did not allow the arbitrator to hear the plaintiffs' claim because the Plaintiff alleged the contract containing the arbitration agreement was procured through fraud.[75] Contract defenses including illegality must be heard by a judge rather than an arbitrator.[76] In contrast, if the Plaintiff alleged the defectiveness of

66. Freer, *supra* note 56 at 1501.

67. McMullen v. Meijer Inc.*,* 355 F.3d 485, 490-491 (6th Cir. 2004) (holding the case should be remanded to determine whether the selection of the arbitrator provision in the arbitration could be severed and the remainder of the clause be enforced). *See* Green Tree Fin. Corp. Ala. v. Randolph*,* 531 U.S. 79, 92 (2000) (explaining the most powerful party will control the provider of dispute resolution, which may create a concern of fairness and prevent a party from vindicating their rights).

68. Robinson v. J&K Admin. Mgmt. Servs. Inc.*,* No. 15-10360, 2015 U.S 817 F. 3d 193, 198 (5th. Cir. 2016).

69. Section 2 of the FAA, 9. U.S.C § 2.

70. 9 U.S.C. §§ 2, 3. *See* First Opinions of Chicago, Inc. v. Kaplan*,* 514, U.S. 938, 44-45 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.").

71. David Horton, *Arbitration as Delegation,* 86 N. Y. U. L. REV. 437, 450 (2011).

72. *Id.*

73. U.S. Insulation v. Hilro Constr. Co.*,* 146 Ariz. 250, 253, (Ct. App. 1985). *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,* 388 U.S. 395, 402 (1967) ("…except where the parties otherwise intend—arbitration clauses as a matter of federal law are separable from the contract in which they are imbedded.").

74. Richard C. Reuben, Article, *First Options, Consent to Arbitration and the Demise of Reparability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. REV. 819, 824 (2003).

75. *Prima Paint Corp.*, 388 U.S. at 402.

76. *Id.* at 402 - 407.

just the arbitration clause the claim would have gone to the arbitrator.[77]

Problems arise when parties do not agree that they previously submitted themselves to arbitration.[78] Parties cannot "be required to submit to arbitration any dispute which he has not agreed so to submit."[79] A valid agreement must exist between the parties, and the dispute must fall "within the substantive scope of that agreement," to determine whether the contract submits the parties to arbitration.[80] Therefore, if the arbitration's enforceability is in question, a judge decides if the contract compels arbitration, and an arbitrator has the authority per the contract to decide.[81]

The U.S. Supreme Court in *First Options,* stated parties can defer gateway issues of arbitrability to the arbitrator. However, if parties do not clearly and unmistakably give deference to the arbitrator, the court rules on the issue of whether arbitration is warranted.[82] The Sixth Circuit applied this rule in *Reed Elevator* and *Huffman*. Both courts held that questions arising from an arbitration agreement that do not give deference to either the judge or the arbitrator, should be delegated to the judge.[83] The Third Circuit in *Chesapeake,* took a different approach.[84] The Third

77. *Id.*

78. *Id.* at 943. *See* S.I. Strong, *Does Class Arbitration: "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and A Return to First Principles*, 17 HARV. NEGOTIATION L. REV. 201, 244 (stating consent to an arbitration clause is the most important element in order to determine who has the authority to adjudicate the conflict).

79. Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (quoting AT&T Techs. v. Commc'ns Workers of Am., 475 U.S. 643, 648, (1986)).

80. Zawada v. Uber Techs. Inc., 2016 U.S. Dist. LEXIS 178582 at *7 (E.D. Mich. 2016) (quoting Javitch v. First Union Sec., Inc., 315 F.3d 619, 624 (6th Cir. 2003)). *See* Totten v. Kellogg Brown & Root, LLC*,* 152 Supp 3d. 1243, 1249 (C.D. Cal. Aug 7, 2015) (providing federal substantive law usually governs the enforcement of the arbitration agreement and state substantive law governs the determination if the contracting parties agreed to arbitrate). *Contra* Southland Corporations v. Keating*,* 465 U.S. 1, 33 (1984) ("The general rule prescribed by § 2 of the Federal Arbitration Act is that arbitration clauses in contracts involving interstate transactions are enforceable as a matter of federal law…I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses.") (Scalia, A., dissenting).

81. Green Tree Fin. Corp Ala. v. Randolph*,* 539 U.S. at 451-453 (2000) (plurality opinion). *See* Vonda Mallicoat Laughlin, *Claims of Unconscionability of Contract as Subject to Compulsory Arbitration Clause Contain in Contract,* 22 A.L.R. 6th 49, 2 (2016) (stating courts hold unconscionability should be address by the court if the allegations of unconscionability pertain to the arbitration clause itself while others state all claims of unconscionability should be referred to the arbitrator).

82 First Options of Chicago, Inc. v. Kaplan*,* 514 U.S. 938, 943 (1995).

83. Reed Elevator, Inc. v. Crockett*,* 734 F. 3d 594, 599 (6th Cir. 2013); Huffman v. Hilltop Companies, LLC*,* 747 F.3d 391, 393-394 (6th Cir. 2014).

84. Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*,* 809 F.3d 746, 760-766 (3rd. Cir. 2016) ("The arbitrator shall have the power to rule on his or

Circuit held when there is no clear and unmistakable deference to a court or an arbitrator in the arbitration agreement, arbitrability is decided by the arbitrator.[85]

Overall, the question of arbitrability is "an issue for judicial determination [unless the parties] clearly and unmistakably provide otherwise."[86] A two-step process is used to determine the question of arbitrability.[87] First, the court must ask whether the parties agreed to arbitrate, by asking "whether a valid agreement to arbitrate exists and whether the dispute falls within the agreement."[88] Second, the court must ask whether federal statute or policy renders the claims non-arbitrable.[89] The party seeking to avoid arbitration has "the burden of proving that the claims at issue are unsuitable for arbitration."[90]

In deciding if the arbitration clause should be enforced, it is imperative courts know which contract is being challenged.[91] The U.S. Supreme Court has stated challenges to "the contract as a whole" are different than "challenges of the agreement to arbitrate."[92] Thus, an arbitration agreement can be valid and enforceable even if the underlying contract is invalid and unenforceable.[93] The savings clause makes this situation possible. The savings clause is an arbitration agreement that can be invalidated under the FAA.[94] The saving clause makes an arbitration agreement unenforceable through applicable contract defenses.[95]

a. Unconscionability

Courts do not uphold arbitration agreements if the court deems the agreement unconscionable.[96] State law governs whether the

her jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.") (citation omitted).

85. *Chesapeake Appalachia, LLC*, 809 F.3d at 760-766.

86. *First Options,* 514 U.S. at 943 (internal citations omitted). *See* Gen. Motors Corp. v. Pamela Equities Corp., 146 F.3d 242, 247 (5th Cir. 1998) (stating the question of who decides arbitrability turns upon the parities intent).

87. Dealer v. Computer Servs., Inc. v. Old Colony Motors, 588 F. 3d 884, 886 (5th Cir. 2009).

88. *Id.*

89. *Id.*

90. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

91. Cole v. Pearson Educ., Inc., No. 10 Civ. 7523 (JFK) (RLE) 2011 U.S. Dist. LEXIS 110603 at *13 (S.D.N.Y. 2011).

92. Rent-A-Center, West Inc. v. Jackson, 13- S. Ct. 2772, 2778 (2010).

93. *Id.*

94. 9 U.S.C. § 2 (stating arbitration agreements can be invalidated "upon such grounds as exists at law or in equity for the revocation of any contract.").

95. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011).

96. Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 90 (2000) (holding the existence of large arbitration costs could make an arbitration contract unconscionable if the party cannot vindicate her statutory right).

agreement is unconscionable or enforceable because contracts are state-law principles that do not comport with the text of the FAA.[97] Many states apply standard contract law, which hold contracts must be knowingly entered into by both parties and no party is coerced into the contract.[98] California contract law states a contract can be unconscionable when a party with more power writes the contract in their favor.[99] An unconscionable contract must be both procedurally and substantively unconscionable.[100] Courts use a sliding scale test to determine a contract's unconscionability by analyzing the procedural process of the contract's formation. On one side of the scale, courts consider the circumstances surrounding the contract's adoption and whether the signer had been induced to sign the contract.[101] On the other side of the scale, courts look at the contract's harsh or unreasonable substantive terms.[102] In determining whether the terms of the contract are harsh or unreasonable, courts inquire into the following factors: (1) when the contract was created and in what commercial setting; (2) the contract's purpose; and (3) how the effect the contract and its' provisions affect the parties.[103]

3. Procedural Unconscionability

A contract is procedurally unconscionable if the stronger party during contract formation deprived the weaker party of "meaningful choice such as through the use of 'oppression' or 'surprise.'"[104] Oppression occurs when unequal bargaining power exists and one party has no authority to negotiate the terms in the

97. Doctor's Assocs. v. Casarotto, 517 U.S. 681, 685 (1996) ("states may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exists at law or in equity from the revocation of any contract.") (quoting 9 U.S.C. § 2) (emphasis added).

98. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

99. Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, at 910-12 (2015) (explaining the doctrine of unconscionability has both a procedural effect dealing with the oppression or surprise with unequal bargaining power and a substantive effect dealing with harsh or one-sided results).

100. Armendariz v. Foundation Health Psychare Services, Inc., 24 Cal. 4th 83, 114 (2000) (stating the contract is unconscionable if the contract has a degree of procedurally and substantively unconscionability).

101. *Sanchez*, 489 U.S. at 910 (quoting *Sonic II,* 57 Cal. 4th at 1133).

102. *Id.*

103. *Id.*

104. *Id.* at 909 (emphasis added) (concluding the presence of an opt-out provision forecloses a finding of procedural unconscionability). *See* Arrigo v. Blue Fish Commodities, Inc., 408 Fed. Appz. 480, 481 (2nd Cir. 2011) (stating in employee agreements, provisions forcing an employee to choose between signing the agreement or losing his or her jobs has been deemed to be unconscionable).

contract.[105] Furthermore, a surprise occur in the contract when a stronger party disguises the disputed terms of the contract,[106] resulting in the weaker party being unaware of the contract's language.[107] Therefore, a contract is unconscionable when a party is not aware, the party does not understand the contract's disadvantageous terms or the party felt pressured to not opt-out of the contract.[108] Courts, in considering whether or not a party felt pressured to not opt-out of the arbitration agreement, look at the pressure that the financially weaker party felt and compare the pressure the powerful party to accept the contract.[109] The arbitration agreement, however, is not unconscionable if the opt-clause is conspicuous and grants the party a reasonable opt-out period.[110]

4. Substantive Unconscionability

In order to prove an agreement is substantively unconscionable, the moving party must argue one of the following factors: (1) the contract lacked mutuality; (2) a party has or had the ability to unilaterally modify the terms of the agreement; (3) the provisions in the agreement are so unfair either one of the parties to the arbitration are unable to vindicate their rights in an arbitral forum.[111] In employment contracts, any waiver that is placed in an arbitration agreement the employee must have known such waiver was within the arbitration agreement.[112] Provisions in the arbitration clause are substantively unconscionable if a clause mandates the parties split the cost of arbitration, or the weaker party is required to bear the administrative fees they cannot afford.[113] As a result, the weaker party who cannot afford arbitration is not able to vindicate their rights.[114]

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105. A&M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 487 (1982).

106. *Id.*

107. *Id.*

108. Gentry v. Super. Co., 42 Cal 4th 443, 472 (2007) (holding an opt- out clause may make an arbitration clause unconscionable depending on the time period the parties had to opt-out). *See* Kilgore. v. KeyBank, N.A., 718 F. 3d 1052, 1059 (9th Cir. 2013) (stating the inclusion of an opt-out provision does not make a contract unconscionable if the provision is buried within the contract).

109. *Gentry,* 42 Cal 4th at 472.

110. Circuit City Stores, Inc. v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002) (stating the combination of the arbitration opt-out clause and the formation of the contract together made the arbitration agreement not unconscionable).

111. Amendariz v. Foundation Health Psychare Services, Inc., 24 Cal 4th 83, 103 (2000).

112. *Id.* at 99. (explaining statutory rights explained under the Fair Employment and Housing Act are not waivable because the rights listed in the Act were created for a public purpose).

113. *Italian Colors,* 133 S. Ct. at 2310-11.

114. Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. at 90 (2000) (explaining the effective vindication of rights doctrine does not require a finding

5. Class Arbitrations

Supreme Court Justice, Alito, in *Stolt-Nielsen*, stated class arbitration "changes the nature of arbitration."[115] Class arbitrations resemble judicial class actions but have unique arbitral procedures.[116] Class arbitrations restrict the arbitral class to individuals that are party to the relevant agreement.[117] Parties usually invoke class arbitrations when several individuals seek relief on a representative basis instead of each individual filing separately.[118] Class arbitrations are treated similarly when attempting to determine whether the parties agreed to class arbitration. Courts look to the terms of the parties' agreement.[119] If the agreement is unclear to whether the parties agreed to class arbitration, courts or arbitrators (depending on the jurisdiction) consider a list of factors.[120] The most important factor is whether a class arbitration would affect the parties' remedies.[121]

While class arbitrations appeal to consumers and employees, corporations avoid judicial class actions and class arbitrations.[122] Since the U.S. Supreme Court in *Concepcion* upheld the enforceability of class waivers in arbitration agreements, corporations now insert class waivers into their agreements to disallow any class from being certified.[123] Class waivers, however,

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of procedural unconscionability).

115. Stolt-Nielsen S.A. v. Animal Feeds Int'l Cor*p.*, 130 S. Ct. 1758, 1775 (2010) (quoting Alito, J.,) (holding consolidated parties could bring their suit as a class action to be heard in arbitration). *See* Strong, *supra* note 78 at 247 (2012) (discussing the unique attributes of class arbitration).

116. *Id.* at 207.

117. *See* American Arbitration Association, *Supplementary Rules for Class Arbitrations* (effective Oct 8. 2003), available at www.adr.org/sp.asp?id=21963. *See* Fed R. Civ P. 23 (citing the rule applicable to class actions).

118. *Stolt-Nielsen S.A.,* 130 S. Ct. 1757, 1775 (2010) (stating a large amount in dispute cannot change the nature of the arbitration).

119. *Id.* at 1773-1774.

120. Gary Born, *International Commercial Arbitration*, 1746, 2084 (2009) *See* Julian S.M. Lew et al., *Comparative International Commercial Arbitration,* 16-18 (2003) (stating arbitrators rely on three principles when an agreement is silent to class arbitration: (1) the principle of good faith; (2) the principle of effective interpretation; (3) and the principle of interpretation contra proferentem (meaning "against the offeror"). The arbitrator should not rely on on the principle for strict interpretation).

121. *See, e.g.*, In re Am. Express Merchs. Litig.*,* 634 F. 3d 187, 199 (2d Cir. 2011) (holding a class waiver which disallowing plaintiffs from pursuing class arbitration to be unenforceable).

122. Carideo v. Deli., Inc.*,* 706 F. Sup 2d 1122, 1127 (W.D. Wash. 2010). *See* Strong, *supra* note 78 at 225 (stating the "subjective intent of one party cannot control the interpretation of the contract.").

123. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. at 1751 (2011) (stating class arbitration can be inconsistent with the FAA). *Contra* Discovery Bank v. Superior Court*,* 113 P.3d 1100, 1108 (2005) (holding class waivers in arbitration agreements were unenforceable). *See* Mitsubishi Motors Corp v. Soler Chrysler-

are only enforceable if it can be evidenced that both parties demonstrated an intent to agree with the class waiver. Therefore, the parties' consent to the class waivers must be explicit.[124] A court may find consent to be implicit based on the rule of law.[125] The U.S. Supreme Court has not clearly indicated whether the interpretation of class waivers and class arbitration should be a question for the arbitrator or for the judge.[126]

Another factor affecting class arbitration are opt-out clauses.[127] Opt-out clauses allow parties to choose whether or not they wish to participate in the arbitration.[128] Courts have questioned the conscionability of opt-out clauses.[129] Most courts argue opt-out clauses must have the following factors: opt-out clauses must not be ambiguous, nor hidden in the contract, and must allow a reasonable amount of time to exercise the opt-out option.[130]

6. Class Arbitration and Agency Law Conflict with the FAA

Class arbitrations become more convoluted when a certified class brings a claim pursuant to a state or federal labor law.[131] This

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Plymouth, Inc.*,* 473 U.S. 614, 625-26 (1985) (explained by Justice Scalia when characterizing his argument for construing the "enforcement of arbitration agreements according to the terms so as to facilitate streamlined proceedings."). *See Concepcion*, 131 S. Ct. at 1748 (quoting Scalia, J.) (contrasting, however, Justice Breyer stating there is nothing in the FAA nor is there any precedent to support reading the statute.). *See also* Strong, *supra* note 78 at 227 (explaining a number of state courts have dismissed class waivers despite the Supreme Court's ruling leading several legislators to propose amendments to the FAA).

124. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1768 (stating that when parties have not "reached any [explicit agreement on the issue of class arbitration, the arbitrators' proper task [is] to identify the rule of law that governs in that situation.") (citation omitted).

125. *Id.*

126. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2067 (2013). *See* Opalinski v. Robert Half Interional, Inc., 761 F.3d 326, 331 (3rd Cir. 326) (holding the question of arbitrability is for judicial determination). *Contra* Emplrs Ins. Co. v. Century Indem. Co.*,* 443 F. 3d 573, 681 (7th Cir. 2006) (stating in two different cases the question of consolidating arbitration is not a question of arbitrability but is a procedural issue for the arbitrator to decide). *Accord Discovery Bank,* 113 P. 3d at 1117 (stating an arbitrator should decide whether or not an arbitration agreement prohibits class action relief).

127. Strong, *supra* note 78 at 223 (stating "the niceties of the opt-in/opt-out process mean that those unnamed parties to class arbitrations who choose to participate in the proceedings can be said to have effectively ratified the choice of arbitrators.").

128. *Id.*

129. Cullinane v. Uber Techs. Inc., 2016 U.S. Dist. LEXIS 89540 at *6 (D. Mas. July 20, 2016).

130. Meyer v. Kalanick, 2016 U.S. Dist. LEXIS 99921 at *22 (S.D.N.Y. 2016).

131. Weston, *supra* note 12 at 104 (discussing how strict enforcement of arbitration clauses can limit parties' access to administrative remedies they usually would be entitled too). *See* Lisa B Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration,* 67 LAW & CONTEMP. PROS. 221, 221 (2004) (stating arbitration is no longer presumably voluntary for

section will discuss the FAA disputed preemption over the National Labor Relations Board ("NLRB"), which is the governing body over the National Labor Relations Act ("NLRA") and PAGA labor claims.[132] The FAA and administrative agencies at the federal, state, and local level have all been empowered by congressional statutes to implement rules and procedures.[133] The NLRA have the duty of "managing, implementing and enforcing federal policy."[134] State and local agencies and regulations "address matters of local concern, including labor and employment, education, law enforcement, public health, agriculture, processional licensure, transportation, public assistance, commerce and revenue."[135] An example of a state labor regulation is PAGA. The state in a PAGA action uses labor codes to protect aggrieved employees against employers.[136]

a. NLRA

The NLRB was created by and operates under the NLRA. Section 7 § 157 of the National Labor Relations Act provides, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[137] The second section, 8(a) of the NLRA, 29 U.S.C. § 158(a) states: "It shall be unfair labor practice for an employer… to interfere with, restrain or coerce employees in the exercise of the right guaranteed in section 157."[138] Congress articulated in the NLRA that it is the policy of the United States to encourage collective bargaining agreements and protect workers' freedom to associate.[139] Therefore, under the NLRA, contracts

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it has now become forced or imposed by the stronger party onto the weaker).

132. *See infra* Section II, iv, a, b, c (discussing arbitrations effect on the EEOC, NLRA, and PAGA).

133. Weston, *supra* note 12 at 114. *See* 29 U.S.C. §§ 206-207 (approved 9/30/16) (establishing a national minimum hourly wage, standard for overtime pay, child labor laws, and recordkeeping). *See* 29 U.S.C. § 216(b). *Accord* National Labor Relations Act., 49 Stat 449 (1935) (explaining the Act's purpose is too aid and protect the lowest paid employees who lack bargaining power to secure rights themselves). *See generally* 42 U.S.C. § 2000 (2012).

134. Weston, *supra* note 12 at 114.

135. *Id. See* Cal. State Bd. Of Optometry v. FTC*,* 910 F. 2d 976,979-80 (S.C. Cir 1990) (explaining the Tenth Amendments limits to Congress ability to override state sovereignty).

136. Weston, *supra* note 12 at 123.

137. Section 7, National Labor Relations Act, 29 U.S.C.S. § 157. *See Lewis,* 823 F. 3d at 1154 (stating the plain language of the NLRA does not reveal Congress's intent to exclude class representative, and collective legal proceedings from NLRA protection).

138. Section 8(a), National Labor Relations Act, 29 U.S.C.S. § 158(a).

139. Section 7, National Labor Relations Act, 29 U.S.C.S. § 157.

rescinding employees' rights is unenforceable because the purpose of the NLRA is to "improve terms and conditions of employment" by using administrative and judicial forums.[140] However, problems arise when the NLRA conflicts with the FAA.

The FAA provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction…shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[141] This is known as the Saving Clause of the FAA.[142] Thus, it has been interpreted that the FAA should preempt the NLRA because of Congress's express intent to motivate the use of arbitration.[143]

The NLRB in *Horton I* favored the NLRA over the FAA, stating federal labor laws cannot be restricted.[144] Thus, employers cannot prevent employees from filing "joining, class or collective claims addressing the wages, hours or other working conditions against employer in any forum arbitral or judicial."[145] The Fifth Circuit reversed *Horton I* in *Horton II*, by diminishing the NLRB's authority to enforce and interpret the NLRA.[146] The Fifth Circuit stated "even explicit procedure for collective action will not override the FAA."[147] Even if the petitioners brought claims to the NLRB and then to court, any language in the employment agreement that requires employees to bring their claims to arbitration for relief must be adhered too.[148] The Fifth Circuit gave Chevron deference to the NLRB and their ruling in *Horton I*.[149] The Fifth Circuit held

140. Eastex Inc. v. NLRB, 437 U.S. 556, 565-566 (1978); *See* NLRB v. Jones Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (stating that Congress enacted the NLRA because of their knowledge an employee would be helpless when dealing with an employer without a union that would give laborers opportunity).

141. 9 U.S.C. §§ 1 *et seq*.

142. 9 U.S.C. § 2; *See* Iskanian v. CLS Transp. LA., LLC, 327 P. 3d 129 (Cal. 2014); CompuCredit Corp v. Greenwood, 565 U.S. 95 (2012) (stating that the FAA prevails unless another statute contains congressional intent to the contrary or it falls within the saving clause).

143. Morton v. Mancari, 417 U.S. 535, 551 (1974).

144. *Horton I*, 357 N.L.R.B. No. 184 at *1 (Jan. 3, 2012) *rev'd D.R. Horton II,* 757 F. 3d 344 (holding the arbitration agreement violated employee's right that are protected under the NLRA).

145. *Id.*

146. Weston, *supra* note 12 at 128.

147. *D.R. Horton II,* 757 F.3d 344, 360 (5th Cir. 2013) (stating arbitration agreements cannot be unenforceable because of the parties unequal bargaining power). *Contra* Murphy Oil USA Inc., and Hobson, 361 NLRB No. 72 (N.L.R.B Oct. 28, 2014) (holding the same conclusion as *Horton I,* which stated arbitration agreements containing class and collective action waivers violate the NLRA).

148. *D.R. Horton II,* 757 F.3d at 360.

149. Chevron U.S.A. Inc. v. Nat Res. Def. Council, Inc., 467 U.S. 837, 847 n.9 (1984) (holding that courts can give deference to administrative agencies holdings when setting judicial precedent).

that an arbitration agreement that disallows an employee from filing a lawsuit could be a potential violation of the NLRA.[150] However, the Court ultimately chose to favor the FAA's broad jurisdiction over federal labor law.[151]

Other federal circuit courts including the Ninth, Eighth, and Second Circuits, have also rejected the Board's decision by following the Fifth Circuit's lead in *Horton II* by upholding class waivers in arbitration agreements.[152] These circuits have held that the NLRA has no language within its' four corners to evidence Congress clearly intended to allow the NLRA to preempt arbitration and permit employees to file class proceedings.[153] These circuits have stated that the FAA unlike the NLRA has an expressed congressional intent that the FAA should preempt administrative law in all circumstances.[154] Since the Supreme Court's 2011 decision in *AT&T v. Conception*, the above mentioned circuits have ruled in favor of FAA preemption where the Supreme Court held that Congress intended the FAA to favor arbitration and its ability to further judicial economy and expedite the resolution of legal claims.[155]

The Supreme Court in *Conception* revealed that the FAA allows employers to restrict employees from pursuing class proceedings to avoid arbitration.[156] Other Supreme Court cases have ruled similarly.[157] In *Moses H. Cone Mm'l Hosp. v. Mercury Constr. Corp*., the Court stated the FAA's purpose is to "place an arbitration agreement upon the same footing as other contracts and to overrule the judiciary's longstanding refusal to enforce agreements to arbitration.[158] Furthermore, *CompuCredit Corp.* states that an "arbitration" provision in a "contract evidencing a transaction involving commerce shall be valid, irrevocable and

150. *D.R. Horton II,* 757 F.3d at 360 (referring to *D.R. Horton I,* 357 N.L.R.B. 2277 (2012)).

151. *Id.*

152. Weston, *supra* note 12 at 128. *See* Richards v. Ernst & Young, LLP*,* 734 F.3d 871, 874 (9th Cir. 2013) (stating the Board's decision in *Horton I* conflicts with the explicit pronouncements of the Supreme Court's policy to enforce the FAA); Cellular Sales of Mo., LLC v. NLRB, 824 F.3d 772, 776 (8th Cir. 2013) (holding the arbitration agreement does not violate the NLRA); Johnmohammadi v. Bloomingdale's, Inc., 755 F.3d 1072 (9th Cir. 2014); Paulsen ex rel. NLRB v. Remington Lodging & Hospitality, LLC 773 F.3d 462 (2nd Cir. 2014); NLRB v. Alt. Entm't Inc., No. 16-1385, 2017 WL 2297620 at *18 (6th Cir. 2017) (stating that the savings clause saves inferior status like state law or federal common law; it does not save "other federal statutes enacted by the same sovereign.").

153. *Id.*

154. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

155. *Id.* (citing 9 U.S.C. § 2).

156. *Id.*

157. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1983); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985); *CompuCredit Corp*., 565 U.S. at 98; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

158. *Id.* at 24.

enforceable."[159] As a result, according to these cases, the FAA has a broad scope that can trump employees' rights under the NLRA in bringing class proceedings.[160]

The Seventh Circuit took a unanimous stance against the other federal circuits.[161] The case involved a healthcare software company, Epic Systems, and an employee, Jacob Lewis. During his employment, Lewis received an email containing an arbitration agreement.[162] The arbitration agreement asked employees to review the terms and acknowledge the acceptance of the agreement by clicking two buttons.[163] Epic presented employees no option to decline the agreement if they wished to remain employed.[164] Thus, Lewis accepted the agreement.[165] However, allegedly, and unbeknownst to him, he had agreed to bring all wage-and-hour claims through arbitration; in effect, Lewis waived all future rights to participate "in or receive money or any other relief from class, collective, or representative proceeding." The agreement also included a clause revealing that if the "Waiver of Class and Collective Claims" was deemed unenforceable, "any claim brought on a class, collective, or representative action must be filed in a court of competent jurisdiction," and if they continued to work for Epic without signing the agreement, Epic would presume they had accepted.[166] In 2015, Lewis sued Epic in federal court on behalf of a class of other employees in violation of the employees' right to engage in "concerted activities" under section 7 of the NLRA. Epic moved to dismiss the complaint, asserting that Lewis waived his right to bring any claim in court as a participant of a class action.[167]

After losing at the district court, Lewis appealed to the Seventh Circuit.[168] The Seventh Circuit unanimously agreed with Lewis and NLRB's holding in *Horton I*.[169] The Seventh Circuit held that "employees shall have the right…to engage in concerted activities

159. *CompuCredit Corp*., 565 U.S. at 98.

160. *Id. See Mitsubishi Motors Corp*., 473 U.S. at 614; *Dea*n, 470 U.S. at 213; *Mercury Constr.Corp*., 460 U.S. at 1.

161. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2014) rev'd 584 U.S. ____ (2018); *See* Thomas Cavenagh, *SCOTUS Tackles Arbitration Issue…Again*, LAWREVIEW. JMLS (April 18th 2018) https://lawreview.jmls.edu/scotus-tackles-arbitration-issue-again/.

162. *Lewis*, 823 F. 3d at 1151.

163. Brief for Respondent at 2, *Epic Systems Corporation v. Jacob Lewis* (No. 16285) (August 2017).

164. *Id*. at 3.

165. *Id.*

166. *Lewis*, 823 F. 3d at 1151.

167. Brief for Respondent at 3, *Epic Systems Corporation v. Jacob Lewis* (No. 16285) (August 2017).

168. *Id.*

169. Lewis v. Epic Sys. Corp., 823 F. 3d at 1152 (7th Cir. 2014) (citing to *Horton I* that the NLRB "form its earliest days," held that "employer-imposed, individual agreements that purport to restrict Section 7 rights" are unenforceable." 357 N.L.R.B. No. 184 at *5, 357 N.L.R.B. 2277 at 2280 (2012)).

for the purpose of…mutual aid or protraction," and that Section 8 enforces Section 7 of the NLRA "unconditionally by deeming that it shall be an unfair labor practice for an employer…to interfere with, restrain, or coerce employees in the right guaranteed in Section 7."[170] The Seventh Circuit also held that contracts "stipulat[ing]…the renunciation by the employees of rights guaranteed by the [NLRA]" are unlawful and may be declared to be unenforceable by the Board."[171] The Seventh Circuit criticized the Fifth Circuit in *Horton II* for failing to recognize that the Supreme Court has previously explained that Section 7's protections cover employees' "seek[ing] to improve working conditions through administrative and judicial forums."[172]

While the Seventh Circuit in *Epic Systems* has ruled that Section 7 and Section 8 in the NLRA can supersede an arbitration clause,[173] the U.S. Supreme Court took a different position on this issue.[174] In oral arguments, both Justice Kagen and Ginsberg favored upholding the NLRA over the FAA, while Chief Justice Roberts had a great concern that ruling in favor of the NLRA could disrupt millions of current employment agreements currently in effect.[175] The holding came down in favor of the FAA and employers.[176]

> The majority held that the Federal Arbitration Act's policy favoring enforcement of arbitration agreements trumps Section 7 of the National Labor Relations Act, which confers on employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In contrast, Justice Ruth Bader Ginsburg's dissent argued that the rights conferred by Section 7 take precedence over the FAA and prohibit enforcement of agreements calling for one-on-one arbitration of employment disputes…The linchpin of her dissent was her contention that filing wage-and-hour claims on a class or collective basis is among the employee "concerted activities" protected by Section 7 of the NLRA.[177]

Those in favor of the majority's holding argue that Ginsberg's "contention is not plausible, given that collective actions of that sort were unknown when the NLRA was adopted."[178] While the

170. *Id.* (citing to 29 U.S.C. § 157).

171. *Id.* (citing to Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 365 (1940)).

172. Brief for Respondent at 10, *Epic Systems Corporation v. Jacob Lewis* (No. 16285) (August 2017) (citing to Eastex, Inc. v. NLRB, 437 U.S. 556, 565-566 (1978).

173. Cavenagh, *supra* note 161.

174. Weston, *supra* note 12 at 128.

175. Epic Systems Corp. v. Lewis, No. 16-285, 138 S. Ct. 1612 (2018).

176. Richard Samp, *Symposium: Justice Ginsburg's Anachronistic Dissent in Epic Systems Runs Afoul of the Rules Enabling Act*, SCTOUSBLOG.COM (May 2, 2018).

177. *Id.*

178. *Id.*

definition of protected "concerted activities" can be expanded over time, the adoption of federal procedural rules should be not be used a vehicle for expanding substantive rights.[179] Thus, for Ginsberg's dissent to be applicable, Congress must conclude that employees' right to engage in "concerted activities" should include class-action rights and preempt the FAA.[180]

b. PAGA

State labor claims also have been in dispute with the FAA.[181] The California Supreme Court in *Iskanian* held the FAA does not preempt PAGA when employees seek representative action.[182] *Iskanian* stated the FAA applies to private disputes; and if the arbitration agreement expresses no clear and manifest intent to preempt state labor laws, then a state can exert their broad police powers.[183] The Ninth Circuit in *Sakkab,* ruling similarly, stated the FAA preempts class action waivers but not PAGA claims.[184] The Ninth Circuit explained that, because class actions are brought on behalf of private citizens and PAGA claims are brought on behalf of the state, PAGA claims cannot be preempted by the FAA.[185] To determine if the FAA preempts state laws, courts examines what the burden on the arbitrator would be to apply state labor law procedures, and if the basic attributes of arbitration would be undermined. If the courts determine there is a high burden on the arbitrator and the attributes of arbitration are not disrupted, the court will apply the state labor statute and not the FAA.[186] However, "when parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws" in all judicial and administrative forums.[187] The "carve out" of PAGA claims remains debated, and the U.S. Supreme Court has not ruled on the issue.[188] Advocates of PAGA, believe that if the FAA did preempt Labor claims, preemption would "disable one of the primary mechanisms

179. *Id.*

180. *Id.*

181. *Id.*

182. Iskanian v. CLS Transp. LA, LLC, 327 P.3d at 133 (Cal. 2014) (holding employees may seek recovery for a large group under PAGA and not be forced into arbitration). *Contra* Sakkab v. Luxottica Retail N. Am., Inc., No. 13-55184, 2015 U.S. App. LEXIS 17071, at *3 (9th Cir. 28, 2015) (holding PAGA waivers do not conflict with the FAA, and can be heard in arbitration).

183. *Iskanian,* 327 P.3d at 133.

184. *Sakkab,* No. 13-55184, 2015 U.S. App. LEXIS 17071 at *3.

185. *Id.*

186. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. at 1748-53 (2011) (explaining the rule in *Discover Bank* preempted the FAA because the state law would require "arbitrators to apply rigorous, time consuming, and formal procedures.") (citation omitted).

187. Weston, *supra* note 12 (citing *Preston v. Ferrer,* 552 U.S. 346, 359 (2008)).

188. Weston, *supra* note 12 at 123.

for enforcing the Labor Codes."[189]

III. UBER LITIGATION: MOHAMED V. UBER TECHS., INC.

The Ninth Circuit has set a strong precedent in upholding an arbitration clause disallowing Uber drivers from pursuing collective relief.[190] Later, this comment will analyze the Ninth Circuit's decision in great detail; for now, a brief background on the case will be provided.[191] Then, this section will discuss other Uber cases and whether or not they ruled similarly to the Ninth Circuit. To begin, the facts in *Mohamed v. Uber Techs. Inc.*, are provided for a background:[192]

> Plaintiff Abdul Mohamed began driving for Uber's black car service in Boston in 2012, and for Uber X around October 2014… Like all Uber drivers, Mohamed used a smartphone to access the Uber application while driving, which enabled him to pick up customers. In late July 2013, Mohamed was required to agree to two new contracts with Uber (the "Software License and Online Services Agreement" and the "Driver Addendum"; jointly, the "2013 Agreement") before he was allowed to sign in to the application. The 2013 Agreement provided that it was governed by California law. It included an arbitration provision requiring Uber drivers to submit to arbitration to resolve most disputes with the company. It also included a provision requiring drivers to waive their right to bring disputes as a class action, a collective action, or a private attorney general representative action. Drivers could opt out of arbitration by delivering notice of their intent to opt out to Uber within 30 days either in person or by overnight delivery service. Mohamed accepted the agreements and did not opt out.
>
> Nearly a year later, in June 2014, Uber released an updated version of the Software License and Online Services Agreement and the Driver Addendum (jointly, the "2014 Agreement"). The 2014 Agreement also provided that it was governed by California law. It included an updated arbitration provision with an easier opt-out procedure that enabled drivers to opt out via e-mail as well as in person or by delivery service. It also included a provision requiring all disputes with the company "to be resolved only by an arbitrator through final and binding arbitration on an individual basis only, and not by way of court or jury trial, or by way of class, collective, or representative action." Mohamed accepted these agreements and did

189. Hernandez v. DMSI Staffing LLC., No. C-14-1531 EMC, 2015 U.S. Dist. LEXIS 12824, *27 (N.D. Cal. Feb 3, 2015) (quoting Chin, J., concurring) (stating Congress did not manifest clear intent the FAA should trump California's police powers).

190. Mohamed v. Uber Techs., Inc., No. 15-16178, 15-16181, 15-16250, 2016 U.S. App. LEXIS 16413 at *5 (2015).

191. *See infra* Section III, A (analyzing why the Ninth Circuit incorrectly ruled in favor of Uber).

192. *See infra* Section II, V, a (comparing other courts' decisions to the Ninth Circuits).

> not opt out…
>
> In late October 2014, shortly after he began driving for Uber x, Mohamed's access to the app was cut off due to negative information on his consumer credit report, effectively terminating his ability to drive for Uber. Plaintiff-Appellant Ronald Gillette began driving for Uber in the San Francisco Bay Area in March 2013. Like Mohamed, he was required to agree to the 2013 Agreement before signing into the Uber application in late July 2013.
>
> Also like Mohamed, he did not opt out. In April 2014, Gillette's access to the app was cut off because of negative information on his consumer credit report. This effectively terminated his relationship with Uber. On November 24, 2014, Mohamed filed a class action in the Northern District of California against Uber, Rasier, and Hirease, an independent company that conducted background checks…Two days later, on November 26, 2014, Gillette filed a separate lawsuit against Uber, also in the Northern District of California. Gillette alleged that …Uber had misclassified him and other employees as independent contractors in violation of California's PAGA statute. Uber moved to compel arbitration in both lawsuits, arguing that Gillette was bound by the arbitration provision in the 2013 Agreement and Mohamed by the arbitration provision in the 2014 Agreement. The district court denied both motions, *Mohamed*, 109 F. Supp. 3d at 1190, and Uber now appeals.[193]

Furthermore, in the Northern District of California, Judge Chen held that the delegation clause in the agreement did not provide that the drivers had clear and unmistakable intent to waive their right to have a court determine arbitrability questions."[194] Judge Chen deemed the arbitration clause unconscionable because drivers would have to pay "exorbitant fees just to arbitrate arbitrability; fees which drivers would not need to pay to litigate arbitrability in court."[195] Judge Chen also held that the PAGA claims were viable because states have an interest in protecting the drivers.[196]

On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded the case.[197] The Ninth Circuit held the District Court "improperly assumed the authority to decide whether the

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193. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *5-8.

194. *Id.* at 125 (Chen E.,) quoted in *Mohamed,* 2015 U.S. Dist. LEXIS 75299 at *19 (emphasis added).

195. *Id.* (determining the drivers' acceptance of the arbitration clause through the app made the clickwrap agreement unconscionable).

196. *See* Weston, *supra* note 12 at 125 (discussing Judge Chen's decision in Mohamed).

197. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *33. *See* Joel Rosenblatt & Edvard Petterson, *Uber Wants Court Stamp on Arbitration Win as Message to Drivers*, BLOOMBERG LAW (Jan. 23, 2017) www.bloomberg.com/news/articles/2017-01-23/uber-wants-court-stamp-on-arbitration-win-as-message-to-drivers (stating the 9th Circuit's decision gives Uber a win in a lawsuit covering 385,000 drivers in California and Massachusetts claiming to be employees and not independent contractors).

arbitration agreements were enforceable," as questions of arbitrability should be delegated to the arbitrator except in claims arising under PAGA.[198] The Ninth Circuit also stated the delegation provision was not unconscionable and the class waiver in the arbitration agreement did not hinder the parties from vindicating their rights.[199] Finally, the Ninth Circuit held all disputes involving PAGA under 2014 Agreement should go to the arbitrator, and all disputes under jurisdiction of the 2013 Agreement should go to the court.[200]

1. Uber Litigation: Are Other Courts Following the Ninth Circuit's Lead?

Recently, Uber's arbitration agreements has butted heads with the NLRB leaving courts the question as to whether their arbitration agreements violate the NLRA.[201] The drivers argue that Uber's arbitration agreements are unlawful because of the board's decision in *Horton I*.[202] The NLRB in December 2015 sought the subpoenas to determine "how Uber screens, hires, disciplines, and terminates drivers, and how much control the company has over their day-to-day work."[203] The NLRB also issued the subpoenas, but Uber did not comply because of other pending litigation.[204] A U.S. Magistrate Judge, Sallie Kim in San Francisco, however, held that *Mohamed* and other subsequent litigation has no impact on the NLRB's authority to investigate complaints.[205]

While Uber's feat with the NLRB may not be over in the future, the Ninth Circuit has set a strong precedent that the "delegation provision properly delegated questions of arbitrability to the arbitrator."[206] Courts within the Seventh Circuit's

198. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *12.

199. *Id.* at 15-22.

200. *Id.* at 23-26 (stating the PAGA waiver in the 2013 Agreement "is several from the remainder of the arbitration agreement.") (citation omitted).

201. Daniel Wiessner, *Judge Says Appeals by Uber Drivers Do Not Impact NLRB Prob.,* REUTERS LEGAL (Dec. 16, 2016), www.reuters.com/article/labor-uber-idUSL1N1EB0EE (last visited Mar. 12, 2017).

202. *Id.*

203. *Id.*

204. *See* NLRB v. Uber Techs. Inc., 2016 LEXIS 111052, at *1 (stating the NLRB has the right to gain information from Uber to determine if drivers are protected under the NLRA).

205. Wiessner, *supra* note 201.

206. Zawada v. Uber Techs. Inc., 2016 U.S. Dist. LEXIS 178582 at *13 (E.D. Mich. Dec. 2016) (citing *Congdon v. Uber Techs., Inc.,* , 2016 U.S. Dist. LEXIS 170138 at *4, (N.D. Cal. Dec. 8, 2016)); Micheletti v. Uber Techs., Inc., No. 15-1001 (RCL), 2016 U.S. Dist. LEXIS 137318 at *1 (W.D. Tex. 2016); Lee v. Uber Techs., No. 15 C 11756, 2016 U.S. Dist. LEXIS 140171 at *1 (N.D. Ill. 2016); Bruster v. Uber Tech., Inc., No. 15-cv-2653, 2016 U.S. Dist. LEXIS 67523 at *1 (N.D. Ohio 2016); Suarez v. Uber Tech., Inc., No. 8:16-cv-166-T-30MAP, 2016 U.S. Dist. LEXIS 59241 at *1 (M.D. Fla. 2016); Varon v. Uber Tech., Inc., No. MJG-15-3650, 2016 U.S. Dist. LEXIS 58421 at *1 (D. Md. 2016); Sena v. Uber

jurisdiction have also followed Uber's lead in upholding all authority should be delegated to the arbitrator; however, the courts have not outright ruled against drivers bringing a collective action.[207] Instead, the U.S. District Court in *Gunn* stated "the question of enforceability of the collective action waiver must be resolved by the arbitrator."[208] In contrast, since the Ninth Circuit's ruling, few courts have held that Uber's arbitration agreement did "not clearly and specifically indicate the parties' intent to have the arbitrator decide if class-action claims are authorized."[209]

Judge Rakoff and Judge John E. Stelle, United States District Court Judges for the Middle District of Florida, have ruled favorably with Judge Chen in the Northern District of California.[210] Judge Rakoff in *Meyer*, held Uber's arbitration clause unconscionable because consumers to the agreement had no realistic power to negotiate or contest the clause.[211] Judge Rakoff explained Uber has used two types of user agreements: browsewrap agreements and clickwrap agreements.[212] In furtherance, clickwrap or "click-through" agreements require a website users to click "on an 'I agree' box after being presented with a list of terms and conditions of use; while browsewrap agreements are agreements "where the website's terms and condition of use are generally posted on the website via a hyperlink at the bottom of the screen."[213] Also, browsewrap is different than clickwrap because "a browsewrap agreement does not require the user to manifest assent to the terms and conditions expressly…a party instead gives his assent simply

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Tech. Inc., No. CV-15-02418, 2016 U.S. Dist. LEXIS 47141 at*1(D. Ariz. 2016) (ruling similarly to the Ninth Circuit).

207. *Lee,* 2016 U.S. Dist. LEXIS 140171 at *1 (N.D. Ill. Sep. 2016). *See* Gunn v. Uber Techs., Inc.*,* No. 1:16-cv-01668-SEB-MJD, 2017 U.S. Dist. LEXIS 11393 at *10 (S.D. Ind. Jan. 2017) (granting Uber's motion to compel arbitration but staying the proceedings until the arbitrator decides the question of the collective action waiver).

208. *Gunn*, 2017 U.S. Dist. LEXIS 11393. at *10.

209. Marc v. Uber Techs., Inc., No. 16-cv-579-FtM-99MRM, 2016 U.S. Dist. LEXIS 171942 at *7 (M.D. Fla. Dec. 2016).

210. Meyer v. Kalanick, No. 15 Civ. 9796, 2016 U.S. Dist. LEXIS 99921 at *1 (2016) vacated and remanded *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 2017 U.S. App. LEXIS 15497 (2d Cir. N.Y., Aug. 17, 2017).

211. *Id.* at 7-8; *see* Alison Frankel, *Judge Rakoff's Soapbox: On Uber, Arbitration and Fair Play*, REUTERS (Aug. 1, 2016), www.blogs.reuters.com/alison-frankel/2016/08/01/judge-rakoffs-soapbox-on-uber-arbitration-and-fair-play/ (last visited Mar. 12, 2017) (explaining why U.S. District Judge Jed Rakoff denied Uber's motion to "dismiss allegations that Kalanick is the orchestrator of a vast price-fixing conspiracy involving hundreds and thousands of Uber drivers.") (citation omitted).

212. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *16-20 *See* Nguyen v. Barnes & Noble Inc.*,* 763 F. 3d 1171, 1177 (9th Cir. 2014) (stating in a click wrap agreement the signor must have actual knowledge of the terms of the agreement).

213. *Nguyen,* 763 F. 3d at 1176.

by using the website."[214]

Judge Rakoff, in *Meyer*, explained that browsewrap agreements have been abandoned because the agreements do not provide adequate awareness to the party assenting to the contract; yet clickwarp agreements are enforceable even when the agreement disallows class arbitration. [215] Judge Rakoff held in *Meyer*, that Uber's contract is analogous to browsewrap agreements or "sign-in wrap" contracts, which make the contracts unconscionable.[216]

Judge Rakoff takes a strong position against both browswrap and clickwrap agreements. He explains that one's right to a jury is a fundamental right guaranteed by the constitution.[217]

> This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts' indulging every reasonable presumption against waiver'. But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy 'terms and conditions' that the consumer had no realistic power to negotiate or contest and often were not even aware of.[218]

In contrast, Uber's lawyers in a brief to the Second Circuit stated that Judge Rakoff's opinion formed an "erroneous conclusion" by concluding plaintiff did not assent to the arbitration provisions, and the district court's opinion is "out of step" with the overwhelming weight of authority enforcing electronic agreements.[219] Judge Rakoff stayed the antitrust class action until the Second Circuit interprets the arbitration clause and decides whether complainants are compelled to redress their claims in arbitration.[220] On appeal, both parties addressed the question of whether courts, in the new world of app-based technology, should take a new outlook on what assent to contract entails. Ultimately, the Second Circuit vacated Judge Rakoff's holding.[221] The Second Circuit held that "Uber App provided reasonably conspicuous notice of the Terms of Service as a matter of California law, and plaintiff's assent to arbitration was unambiguous in light of the objectively reasonable notice of the terms."[222] The court remanded to the

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214. *Id.* (citing *Hines v. Overstock.com, Inc.,* 668 F. Supp. 2d 362, 366-67 (E.D.N.Y. 2009)) (citation and quotation marks omitted) (alteration in original).

215. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *20-23.

216. *Id.* at 34-35.

217. Frankel, *supra* note 211 at *1(discussing Judge Rakoff's opinion in *Meyer).*

218. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *1 (quoting Rakoff, J.S.).

219. *See* Frankel, *supra* note 211 at 2 (quoting Uber's lawyers in Uber's brief to the Second Circuit).

220. *Meyer*, 2016 U.S. Dist. LEXIS 114844 at *1.

221. Meyer v. Uber Techs., Inc., 868 F.3d 66 (2nd Cir. 2017).

222. Daniel W. Staples, *Uber Wins Appeal on Embedded Terms of Service Link*, COURTHOUSE NEWS SERVICE (August 18, 2017) (explaining the Second Circuit's decision in *Meyer*).

district court to consider whether defendants have waived their rights to arbitration and for any further proceedings."[223]

III. ANALYZING THE APPLICATION OF PRECEDENT AND ADDRESSING ARBITRABILITY TO THE 9TH CIRCUIT'S OPINION IN *MOHAMMED V. UBER TECHNOLOGIES*.

First, this section analyzes why the delegation clause in Uber's arbitration agreement is ambiguous,[224] and demonstrates why the arbitration agreement is unclear as to whether PAGA claims will be heard in front of a judge or arbitrator.[225] Second, this section demonstrates that if the PAGA waiver is found to be unenforceable, the waiver should not be severed from the arbitration agreement, because the entire arbitration agreement should be become invalid.[226] Third, it argues why Uber's arbitration agreement is unconscionable.[227] Fourth, it explains why Uber's disallowance of class actions, PAGA claims, and administrative labor claims is a violation of the vindication of rights doctrine.[228]

A. The Delegation Clause: Who Decides the Judge or the Arbitrator?

The U.S. Supreme Court in *Southland Corp.,* held the FAA preempted a California statute prohibiting arbitration clauses. Since that decision companies have seized the opportunity to embed contract restrictions into arbitration clauses.[229] As a result, drafters of arbitration clauses have a found a new way "to strip judges of their traditional role as bulwarks against overreaching arbitration clauses."[230] Uber has followed this trend by placing specific language within their arbitration clauses to protect their company from litigating class, collective actions, and representative actions in court.[231] While Uber drivers have pushed back against these arbitration clauses, no success has surmounted.[232] Courts have followed the trend to rule in favor of companies to compel all

223. *Id.*

224. *Infra* Section III, A.

225. *Infra* Section III, B.

226. *Infra* Section III, B.

227. *Infra* Section III, C.

228. *Infra* Section III, D.

229. Southland Corp. v. Keating, 465. U.S. 1, 10-11 (1984) (explaining the FAA favors a liberal federal policy favoring arbitration agreements). *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277 at 456 (stating Companies have capitalized on the federal policy favoring arbitration agreements).

230. *Southland Corp.*, 465 U.S. at 468.

231. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *15 (9th Cir. 2016).

232. *See supra* note 6 (listing cases where drivers have sued Uber).

disputes into arbitration.[233]

The Ninth Circuit stated in the 2013 arbitration clause, "the delegation provisions clearly and unmistakably delegate the question of arbitrability to the arbitrator for all claims *except challenges to the class, collective, and representative actions waiver* in the 2013 agreement."[234] The Court stated that pursuant to the U.S. Supreme Court in *Rent-A-Center*, the agreement must be enforced according to its' terms, granting the arbitrator determination of "arbitrability as to all claims except those specially exempted."[235] The Court contends a presumption exists in arbitration agreements that courts will decide questions of arbitrability.[236] The 2013 arbitration agreement states:

> Except as it otherwise provides, this Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial.[237]
>
> Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision.[238]

The Ninth Circuit stated the 2014 Agreement avoided the delegation problem by specifically requiring all questions of arbitrability to go to the arbitrator because the agreements provides, "all such matters shall be decided by an arbitrator and not by a court or judge."[239] The Ninth Circuit interpreted the venue provisions the same as the provision states "any disputes, actions, claims, or causes of action arising out of or in connection with this Agreement or the Uber Service Software," (the 2013 and 2014 Agreement[s]) "shall be subject to the exclusive jurisdiction of the state and federal courts located in the City and County of San Francisco."[240] The Ninth Circuit explained the venue provision's purpose was to "identify the venue of any other claims that are not

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233. *Id.*

234. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *15. *See* Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1072 (9th Cir. 2013) (stating "in issue is for judicial determination unless the parties clearly and unmistakably provide otherwise.") (citation omitted).

235. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *15; Rent-A-Center West Inc., v. Jackson, 130 S. Ct. at 2778 (2010).

236. *Oracle Am.,* 724 F.3d at 1072.

237. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *9 n. 3.

238. *Id.*

239. *Id.* at *10 (comparing the language here to that at issue in *Momot v Mastro,* which held the language clearly and unmistakably indicated the intent for the arbitrator to decide threshold questions of arbitrability). Momot v. Mastro, 652 F. 3d 982, 988 (9th Cir. 2011).

240. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *13.

covered by the arbitration agreement."[241]

First, it must be addressed if the 2013 and 2014 Agreements clearly and unmistakably delegate the question of arbitrability to the arbitrator.[242] Then, it must be determined whether there is a contract delegating the issue of arbitrability to the arbitrator to decide if the contract is enforceable. In analyzing the 2013 and 2014 Agreements, it is ambiguous as to whether the drivers clearly and unmistakably delegated the contract to the arbitrator as often the signors to these types of employment contracts do not read the fine printed terms.[243]

Recently courts have taken the approach to not consider whether the contract had been read and entered into on a smart phone app.[244] Courts presume mutual assent is present.[245] However, by that presumption courts neglect to consider basic contract principles as to whether both parties assented to the contract. Courts along with the Ninth Circuit should recognize whether the parties assented by writing, orally, or by conduct.[246] Also, courts in determining mutual assent, must investigate if the drafter of the contract made the adverse party aware of the contract terms, and if the adverse party assented to the contract.[247] If the parties agreed or consented to arbitrate, the arbitration agreement cannot be ruled unconscionable.[248] As a result, parties must make their intent to delegate to the judge or the arbitrator unmistakably clear in the arbitration agreement to avoid making a mutual mistake.[249]

Here, the Ninth Circuit held this same rule stating that the parties clearly delegated all issues to the arbitrator.[250] Yet, the Ninth Circuit does not recognize arbitration agreements as

241. *Id.* at *14.

242. *Rent-A-Center*, 561 U.S. at 69-70 (stating "parties can agree to arbitrate gateway questions of arbitrability, such as whether parties have agreed to arbitrate or whether their agreement cover a particular controversy"). *See* Brief of Respondent-Appellee at 8, *J&K Admin. V. Robinson*, No. 16-95 (September 21, 2016) (explaining the significant language contained in the delegation clause determines whether the issue should be decided by the arbitrator or the judge).

243. *See Rent-A-Center*, 581 F. 3d at 917. *See generally D.R. Horton, Inc.*, 357 N.L.R.B. 2277 at 467. *But see* Awuah v. Coverall N. Am., Inc.*,* 554 F. 3d 7, 12-13 (1st Cir. 2009) (stating the courts must consider fairness when analyzing delegation clauses).

244. Meyer v. Kalanick*,* 2016 U.S. Dist. LEXIS 99921 at *18 (S.D.N.Y. 2016).

245. *Id.*

246. Binder v. Aetna Life Ins. Co.*,* 89 Cal. Rptr, 2d 540, 551 (Cal. App. 1999).

247. Restatement (Second) of Contracts § 19(2) (1981).

248. Cullinane v. Uber Techs. Inc., 2016, U.S. Dist. 88808 at *10 (D. Mas. July 2016).

249. Aimian v. Yahoo., Inc.*,* 83 Mass. App. Ct. 565, 573-574 (2013) (stating in online contract analysis is the same around the country, contracts will be adhered too as long as they have been reasonably entered into).

250. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *11 (9th Cir. 2016).

contracts.[251] The Ninth Circuit did not address if drivers manifested consent to the arbitration agreement to summit their claims to the arbitrator.[252] The California District Court in *Commercial Factors Corp.*, argues:

> Clarity and conspicuousness of arbitration terms are important in securing informed assent. If the party wishes to bind in writing another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto.[253]

The language of the 2013 Agreement and its delegation clause does not meet the clear and ambiguous standard.[254] The agreement's language is vague and generalized, and does not directly state whether the issue of arbitrability should go to the arbitrator. The Ninth Circuit prematurely infers the parties intended for all disputes to go to the arbitrator.[255] In contrast, the 2014 Agreement is clearer than the 2013 Agreement.[256] The 2014 Agreement states "all such matters shall be decided by an Arbitrator and not by a court or judge."[257]

The plain language in the 2013 and 2014 Agreements appear to delegate the issue of arbitrability to the arbitrator; yet, ambiguity arises within the delegation clause when coupled with the language contained in the agreements venue clauses. The clauses reveal that state and federal courts in San Francisco will have "exclusive jurisdiction" over "any disputes, actions, claims or causes of action arising out of or in connection with this agreement."[258] The Ninth Circuit, when interpreting the 2013 and 2014 clauses, did not believe the venue provision created ambiguity in the arbitration

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251. Specht v. Netscape Communs. Corp., 306 F. 3d 17, 29 (2d. 2002) (citing to Windsor Mills, Inc. v. Collins & Aikman Corp., 101 Cal. Rptr. 350, 351 (Cal. Ct. App. 1972)).

252. *Specht*, 306 F. 3d at 29 ("In California, a party's intent to contract is judged objectively, by the party's outward manifestation of consent.") (citing Cedars Sinai Med. Ctr. v. Mid-West Nat'l Life Ins. Co., 118 F. Supp. 2d 1002, 1008 (C.D. Cal. 2000)).

253. Commercial Factors Corp. v. Kurtzman Bros, 280 P.2d 146, 147-48 (Cal. Dist. Ct. App. 1955) (internal quotation marks omitted).

254. Appellee's Joint Response Brief, *supra* note 254 at 72, *Mohamed v. Uber Tech; Gillette v. Uber Tech., Mohamed v. Hirease,* No. 15-16178, 15-16181, 15-16250 (9th Cir. Jan. 11, 2016).

255. Appellant's Joint Opening Brief, at 36, *Mohamed v. Uber Tech; Gillette v. Uber Tech., Mohamed v. Hirease,* No. 15-16178, 15-16181, 15-16250 (9th Cir. Oct. 21, 2015) (citing the district court stating, "Plaintiffs do not appear to contend that the language of the delegation clauses itself is ambiguous and such an argument would be a tough sell.") (quoting Chen E.) (citation omitted).

256. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *9 n. 3 (9th Cir. 2016).

257. *Id.*

258. Appellee's Joint Response Brief, *supra* note 254 at 73 (citing the venue provision contained within the 2013 agreement).

agreement.[259] The Ninth Circuit stated the purpose of the venue selection clause was to inform the parties of the proper venue to bring suit when attempting to enforce the arbitration agreement.[260] The Ninth Circuit contended the venue clause made the parties aware all complaints should be filed in San Francisco when bringing a claim.[261] However, the language of the venue clause is not clear why the drivers should file in San Francisco if their claims are already delegated to arbitration.[262] This question creates ambiguity in the contract.

First, the language in the 2013 and 2014 Agreements stipulate state and federal courts in San Francisco have "exclusive jurisdiction" over "any disputes, actions, claims of causes of action."[263] The language in the delegation clause in the 2013 and 2014 Agreement contradicts the language in the venue provision.[264] This contradiction creates a discrepancy in the contract as to whether the parties intended the arbitration provision to be decided by the court or the arbitrator if all complaints should be filed in San Francisco.[265] This discrepancy is problematic because in order to delegate all issues to the arbitrator there must be "clear, consistent and unambiguous" language in the agreement.[266] Therefore, "where one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision" conflicts with the provision and could be unenforceable, the contract then is not a clear and unmistakable delegation to the arbitrator.[267] If the parties were providing a venue clause for the purpose of enforcing an arbitration award, the drafter of the

259. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *9. *See* Appellee's Joint Response Brief, *supra* note 254 at 73 (citing the venue provision contained within the 2013 agreement).

260. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *13.

261. *Id.*

262. *Id.* at *9.

263. *Id.*

264. *Id. See* Appellee's Joint Response Brief, *supra* note 254 at 73 (citing the venue provision contained within the 2013 agreement; explaining both the 2013 and 2014 agreement "state that "any" disputes, which would include those regarding arbitrability, shall be heard in court, which contradicts the later arbitration clauses, stating that "without limitation," "disputes arising out of or relating to interpretation or application of this Arbitration Provision" shall be subject to arbitration.").

265. *Id.*

266. Rent-A-Center West, Inc., v. Jackson, 561 U.S. at 69 (2010).

267. Ajamian v. CantorCO2, LP., 203 Cal. App. 4th 771, 787 (2012) (holding "[W]here one contractual provision indicates that the enforceability of an arbitration provision is to be decided by the arbitrator, but another provision indicates that the court might also find provision in the contract unenforceable, there is no clear and unmistakable delegation of authority to the arbitrator.") (citation omitted). *See Rent-A-Center,* 561 U.S. at 69 n. 1 (explaining the delegation of arbitrability must be "clear, consistent and unambiguous" so no questions arise of who should decide the issue of arbitrability). *See generally* First Opinions of Chicago, Inc., v. Kaplan, 514 U.S. at 944 (1995).

agreements should have made that intent specific.

Second, both the 2013 and 2014 Agreements give courts the authority to strike-out invalid or unenforceable language, while still capable of enforcing the remaining contract.[268] Third, the 2013 Agreement grants only a court to rule on the unenforceability or unconscionability of the PAGA waiver, not an arbitrator.[269] These provisions create ambiguity in the arbitration agreements' delegation clauses, as the 2013 Agreement also gives the court "exclusive jurisdiction" to rule on "any claims.[270] Ambiguity arises because the court has jurisdiction to strike invalid and unenforceable language in the contract, but also allows a court to rule on the PAGA waiver as conflicting to who has the authority.[271] As a result, it is unclear as to whether the parties' inferred intent was to actually delegate all issues to the arbitrator.[272]

Although the Ninth Circuit doesn't analyze the specific words of the venue provision, it infers Uber was the venue provision in the arbitration agreement as a guide to where the agreement will be enforced.[273] The Ninth Circuit in *Momot* explained that any language delegating authority to the arbitrator, or to the court can be proved by the parties' intent.[274] The Ninth Circuit stated both the 2013 and 2014 Agreements delegated authority to the arbitrators to decide issues relating to "enforceability, revocability, or validity of the Arbitration provision or any portion of the Arbitration Provision… and the agreements also indicate the parties' intent for the parties to decide the threshold question of arbitrability."[275] The Ninth Circuit relies on this language to affirm their reasoning that the parties' intended to delegate all issues to the arbitrator.[276]

Case law conflict with the Ninth Circuit's contractual interpretation.[277] A judge may not determine the enforceability of an arbitration clause, unless the moving party argues the entire

268. Appellant's Joint Opening Brief, *supra* note 255 at 36 (citing language of the 2013 and 2014 agreement that state: "If any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provision shall be enforced.").

269. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *9 (9th Cir. 2016).

270. *Id.*

271. *Rent-A-Center,* 561 U.S. at 69 n. 1.

272. *Id.* at *9-15. *See generally* Appellant's Joint Opening Brief, *supra* note 255 at 76.

273. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *13.

274. Momot v. Mastro, 652 F. 3d 982, 988 (9th Cir. 2011) (explaining Justice Stevens dissenting opinion in *Rent-A-Center*).

275. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *12.

276. *Id.*

277. *See Rent-A-Center,* 130 S. Ct. at 2779 (explaining the determination of the validity of a delegation clause is separate from the entirety of the arbitration agreement).

arbitration agreement is unfair.[278] Thus, the parties must challenge the entire arbitration agreement in order to challenge the validity of the delegation clause.[279] An arbitrator decides the validity of the delegation clause.[280] Any doubts concerning the scope of arbitrable issues, or the existence and validity of the arbitration clause is decided by the arbitrator.[281] The purpose of this rule is to not allow an arbitration to rule on his own jurisdiction.[282]

Here, the drivers questioned the validity of the entire arbitration agreement and not the validity of the specific delegation clause.[283] The Ninth Circuit inferred the purpose of the venue provision was to allow the parties to dispute the delegation of the arbitration.[284] However, when looking at the specific language of the venue provision it is ambiguous as to whether the parties intended the provision for this purpose.[285] If the parties wanted to delegate the authority to an arbitrator to decide issues relating to "enforceability, revocability or validity" of the arbitration agreement, the parties would not need a venue provision. The venue provision would serve no use because both the validity of the arbitration agreement and the validity of the delegation clause would be given to the arbitrator to decide.[286] If the parties included the venue provision to serve as a delegation clause for parties who seek to argue validity in court, the parties should have explicitly labeled the clause as such or by making the language of the clause bold and unambiguous.[287]

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278. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 at 467.

279. *Rent-A-Center,* 130 S. Ct. at 2780.

280. *Id.*

281. Mitsubishi Motors Corp v. Soler Chysler-Plymouth Inc.,473 U.S. 614, 626 (1985).

282. *Id. See* Awuah v. Coverall N. Am. Inc., 554 F. 3d at 10-11 (1st Cir. 2009) (stating once an arbitration clause is broad enough to encompass the issues in dispute and the parties can be said to have intended to agree to arbitration then the court must compel arbitration).

283. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *14 (9th Cir. 2016).

284. *Id.* at *9. *See* Appellee's Joint Response Brief, *supra* note 254 at 73 (citing the venue provision contained within the 2013 agreement) (explaining both the 2013 and 2014 agreement "state that "any" disputes, which would include those regarding arbitrability, shall be heard in court, which contradicts the later arbitration clauses, stating that "without limitation," "disputes arising out of or relating to interpretation or application of this Arbitration Provision" shall be subject to arbitration.").

285. *Id.* at *13.

286. *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 at 467. *See* Rent-A-Center West, Inc., v. Jackson, 130 S. Ct. at 2777-2778 (2010) (explaining how delegation clauses involve the separability doctrine in determining if the parties are arguing the fairness of the delegation clause or the entire arbitration agreement).

287. *See Horton*, at 482-486 (explaining how private parties through the use of arbitration class are able to make their own procedural rule-making to protect their own interests).

It does not appear the drafter of the 2013 and 2014 Agreements intended the venue provision to be a delegation clause. Instead, the Ninth Circuit interprets the delegation clause in the 2013 Agreement to be the following: "this Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial."[288] The Ninth Circuit cites the delegation clause in the 2014 Agreement to be the following: "all such matters shall be decided by an Arbitrator and not by a court or judge as the delegation clause."[289] The two provisions in the 2013 and 2014 Agreements do not clearly designate this language as the delegation clause.[290]

Conclusively, the Ninth Circuit in deciphering the intent of the parties in delegating the question of arbitrability to the arbitrator, did not "measure assent by an objective standard."[291] The Ninth Circuit did not take into account what the drivers, said, wrote, or did and the transactional context in which the driver accepted Uber's arbitration agreement.[292] Uber should not assume that their drivers, as lay persons, know the effect an arbitration agreement has in resolving a dispute.[293] When applying an objective viewpoint, as a reasonable prudent driver under the circumstances, it is evident a driver would not know an arbitration clause existed nor would a driver know the meaning of the contractual language contained within an arbitration clause.[294]

When observing the arbitration clause in its entirety, it is clear that previous case law regarding the delegation of arbitrability is complex and many caveats exist. Therefore, arguably these drivers have no intent in delegating the issue of arbitrability to the arbitrator. No intent exists because it is unlikely that these drivers understand the contractual language stated in the 2013 and 2014 Agreements.[295] Many Uber drivers have stated they did not read the

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288. *Mohamed*, 2016 U.S. App. LEXIS 16413 at *9 n. 3.

289. *Id.*

290. First Opinions of Chicago, Inc. v. Kaplan*,* 514 U.S. 938, at 944 (1995). *See Baker,* 159 Cal. App. 4th at 859 (holding a delegation clause to not be "clear and unmistakable" when the contract both contained a delegation clause to delegate issues of arbitrability to an arbitrator and a delegation clause for severances to be determined by an arbitrator or a court) (emphasis added).

291. Specht v. Netscape Communs. Corp., 306 F. 3d at 29 (2d. 2002).

292. *Id.*

293. *Id.* at 33 (holding a reasonable and prudent person would not be on notice of the existence of SmartDownload License when the terms were on multiple scrollable screens).

294. Judith Resnik*, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2804 (2015) (explaining most individuals are unaware an arbitration agreement exists in the contract).

295. *See* Christopher McKinney, *Mandatory Arbitration: How American Employers Opt Out of the Justice System*, TEXAS EMPLOYMENT LAW BLOG (last updated May 20, 2015), www.texasemploymentlawblog.com/main/2015/05/articles/hr-management/mandatory-arbitration-american-employers-attempt-

terms of the agreement before accepting and do not understand the "amount of legalese" contained within the agreement.[296] While it is true that "a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing it"[297] an exception applies when the written terms are not called to the attention of the recipient and are not understood.[298] In application to the circumstances in *Mohamed*, no reasonable person without prior knowledge of law could interpret the language of the 2013 and 2014 Agreements. No person could reasonably understand that all issues arising under the Agreements are subject to arbitration because the language is not clear and convincing. Thus, the Ninth Circuit enforced arbitration agreements on drivers without their knowledge and without mutual assent.

B. The PAGA Waiver's Delegation, Severability and Enforceability.

The Ninth Circuit held that when the drivers accepted the 2013 and 2014 Agreements, they waived any right to bring class, collective and representative action, including PAGA claims either in court or arbitration.[299] However, the language in the 2013 Agreement made an exception to this language stating:

> Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver, Collective Action Waiver or Private Attorney General Waiver is invalid, unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.[300]

The 2013 Agreement also states:

> There will be no right or authority for any dispute to be brought, heard, or arbitrated as a private attorney general representative action. The Private Attorney General Waiver shall not be severable from this Arbitration Provision in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable.[301]

The 2014 Agreement cannot be invalidated because the language clearly designates all waivers to be decided by the

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to-opt-out-of-employment-law-protections-for-workers (last visited February 8, 2017) (explaining that "approximately two-thirds of those who have had an arbitration agreement enforced against them cannot remember seeing anything about forced arbitration in their Terms of Employment.").

296. Said, *supra* note 7.

297. *Marin Storage & Trucking*, 107 Cal. Rptr. 2d 645, 651 (2001).

298. *Id.*

299. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *10 (9th Cir. 2016).

300. *Id.* at 11. (stating the district court incorrectly held the delegation clause in the 2013 and 2014 agreements as no clear and unenforceable).

301. Appellee's Joint Response Brief, *supra* note 254 at 14.

arbitrator.[302] Thus, the language of the 2014 Agreement disallows any challenges to the enforceability and severability of PAGA waiver.[303] In contrast, any PAGA claims arising from the 2013 Agreement is for the determination of the district court and not the arbitrator.[304] The 2013 Agreement denotes before the arbitration agreement in Section 14.1: "if any provision of the Agreement is held to be invalid or unenforceable, such provision shall be struck and the remaining provision shall be enforced to the fullest extent of law."[305] Section 14.3(ix) of the agreement reads: "[e]xcept as stated in subsection v, above in the event any portion of this Arbitration Provision is deemed unenforceable, the remainder of this Arbitration Provision will be enforceable."[306]

The Ninth Circuit argued in the 2013 Agreement the PAGA waiver could be severed from the remainder of the agreement, but did not invalidate the entire agreement.[307] The Ninth Circuit ruled in accordance with *Iskanian*. In *Iskanian* the California Supreme Court held an employment agreement compelling PAGA's protection is enforceable because the FAA does not preempt PAGA.[308] As a result, if employees fail to execute their option to opt-out of the arbitration clause, employees still cannot be forced to waive their labor claims under PAGA.[309] As a PAGA claim and an FAA claim are two separate issues, the Ninth Circuit stated the PAGA waiver if found unenforceable and cannot invalidate the remainder of the arbitration agreement.[310] PAGA claims must be adjudicated in court and the arbitration clause must be adjudicated by the arbitrator.[311]

The plain language of the contract reads that if the PAGA waiver is deemed to be unenforceable, unconscionable, void or voidable as determined by the court, then the waivers shall not be severable from the arbitration agreement.[312] Thus, this poorly-

302. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *21.

303. *Id.*

304. *Id.* at 20 (explaining the district court wrongly concluded the PAGA waiver unenforceability invalidates the remainder of the arbitration agreement).

305. Mohamed v. Uber Technologies, 109 F. Supp. 3d 1185, 1225 (N.D. Cal. 2015). (citing the ambiguous language in the 2013 agreement).

306. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *23 (9th Cir. 2016) (holding the PAGA waiver does not invalidate the arbitration provision and should not be severed).

307. *Id.* at *21 (stating while the PAGA waiver under California law was invalid, it was not severable from the remainder of the 2013 agreement).

308. Iskanian v. CLS Transp. LA, LLC, 327 P. 3d at 129 (Cal. 2014) (stating public policy does not allow employees to not be able to bring a PAGA action because policy favors giving employees a choice whether or not to bring a PAGA action).

309. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *21.

310. *Id.* at *23.

311. *Id.*

312. *Id.* at *14 (citing the language of the 2013 arbitration agreement).

worded provision is confusing and begs the question of whether the waiver is not severable because it is unenforceable, or the waiver is not severable because the entire agreement is now enforceable due to the unenforceable PAGA waiver. Judge Chen, when analyzing this statute took the latter. He stated, "the plain language of the contract requires invalidation of the entire arbitration provision because the PAGA waiver expressly forbids severance."[313] Judge Chen in his holding ignored the arbitration's saving clause. Also, Judge Chen hinted that Section 14.3 (ix) is in contradiction with this last sentence, creating an ambiguity in the contract.[314] In contract interpretation, when the "general and particular provision are inconsistent, 'the particular and specific provision is paramount to the general provision."[315] Therefore, the specific non-severability clause in the arbitration agreement can be guiding in determining PAGA's severability. However, the Ninth Circuit took the opinion that the contract provision only stated it is not severable from the agreement because it is unenforceable, the provision does not state that this unenforceability renders the rest of the agreement unenforceable.

Next, if the PAGA provision is held to be unenforceable, it should invalidate the entire arbitration provision. Here the plain language of the contract calls for invalidation. The arbitration agreement states "the Private Attorney General Waiver shall not be severable from this Arbitration Provision in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable."[316] The 2013 arbitration agreement gives the court jurisdiction over PAGA claims.[317] Therefore, the court has the ability to render the entire arbitration agreement invalid because the PAGA claim is not severable.[318] The Ninth Circuit disregards the language of the agreement by asserting that PAGA's enforceability does not invalidate the entire arbitration

313. Mohamed v. Uber Technologies*,* 109 F. Supp. 3d at 1225 (N.D. Cal. 2015) (explaining Uber's 2013 contract is ambiguous and therefore must be interpreted against the drafter). *See* Badie v. Bank of Am.*,* 67 Cal App. 4th 779, 798 (1998) (explaining in California ambiguities in contract are resolved against the drafter).

314. Appellee's Joint Response Brief, *supra* note 254 at 15.

315. Prouty v. Gores Tech. Group, 121 Cal. App. 4th 1225, 1235 (2005) (citing Cal Civ. Code §3534).

316. *Mohamed,* 109 F. Supp. 3d at 1225 (stating why the PAGA claim is not severable and could invalidate the entire arbitration agreement).

317. *Id.*

318. *See* Chalk v. T-Mobile USA, Inc*.,* 560, F. 3d 1087, 1098 (9th Cir. 2009) (stating when the arbitration agreement includes a provision not allowing severance courts should invalidate the entire arbitration agreement). *See also Italian Colors,* 133 S. Ct. at 3209 (quoting) Dean Witter Reynolds Inc. v. Byrd*,* 470 U.S. 213, 221 (1985) (discussing how arbitration agreements should be enforced according to their terms).

agreement.[319] The contract language expressly forbids severance.[320] As a result, PAGA's enforceability effects the entire arbitration provision.[321]

However, in contrast, courts do not like to disrupt the parties' intent by drafting their own contractual provisions.[322] Thus, the Ninth Circuit attempted to follow precedent and interpret to the best of their ability what the parties' intent was without invalidating Uber's entire employment agreement that remained binding on hundreds of drivers.[323] The Ninth Circuit instead interpreted that the PAGA waiver was not severable because the waiver was already not enforceable.[324] Therefore, the waiver did not have an effect on the rest of the employment agreement.[325] Ultimately, Uber's 2013 and 2014 contracts regarding PAGA's enforceability should be example to all counsel of how not to draft an employment agreement containing a FAA provision and a provision regarding state labor claims. A drafter needs to be clear about what provisions are severable and what provisions subject labor disputes to arbitration or litigation.

C. Unconscionability of the Arbitration Agreements

The Ninth Circuit held the 2013 and 2014 arbitration agreements were not illusory nor procedurally or substantively unconscionable because the degree of unfairness in the agreements did not shock the conscience of the court.[326] The Ninth Circuit held an arbitration agreement cannot be considered an adhesive agreement if the drafter of the contract presents any opportunity to opt-out of it.[327] The Court stated as long as the person signs the contract, the unfamiliarity of the language cannot be complained of later.[328] The Court did not address the agreements being substantively unconscionable because the agreements lacked

319. Shroyer v. New Cingular Wireless Servs., Inc., 498 F. 3d 976, 986-87 (9th Cir. 2007) (holding an entire arbitration clause can be void if the arbitration clause contains an unconscionable clause).

320. *Mohamed,* 109 F. Supp. 3d at 1225 (stating the language of the contract specifically declares "The Private Attorney General Waiver shall not be severable from this Arbitration Provision.") (citation omitted).

321. *Id.*

322. Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364, 370-372 (1984).

323. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *23-34 (9th Cir. 2016).

324. *Id.*

325. *Id.*

326. *Sonic II*, 311 P. 3d at 291 (stating unconscionable contracts need to be substantially more unfair than a bad bargain). *See* Rent-A-Center West, Inc., v. Jackson, 561 U.S. at 73 (2010) (holding only arguments regarding the delegation provision can be considered in an unconscionable challenge).

327. Kilgore v. KeyBank Nat. Ass'n, 718 F. 3d 1198, 1199 (9th Cir. 2002).

328. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *19.

procedurally unconscionable elements.[329]

The Ninth Circuit applied two very broad rules regarding unconscionability. The Court did not refer too many factors that are routinely considered by courts in determining procedural unconscionability, such as the surrounding circumstances occurring when the parties assented to the contract and the oppressive and/or surprising language within the agreements.[330] A high burden exists to prove a contract is oppressive because most contracts are drafted by the party with superior bargaining power.[331] Also, no matter how one-sided a contract is, as stated previously, a court does not want to disrupt the parties' intent nor their confidence of freely entering into contracts.[332]

Courts consider a contract to be unconscionable when the contract drafter's age, literacy, sophistication, intelligence and/or experiences are superior to those of the non-drafter's, or when attributes or circumstances are present that limit an individual's "reasonable opportunity to understand the terms of the contract, or the drafter of the contract sealed material terms in the maze of the fine print."[333] Other factors courts weigh in determining if the contract is unconscionable are: whether the contract contains mutual obligations; whether the contract is one-sided and one party is faced with more consequences than the other; and whether the risks between the parties are fair. Here, drivers have stated that many of these factors are present in Uber's employment contract.[334]

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329. *Id.* at *18.

330. Chavarria v. Ralphs Grocery Co., 773 F. 3d 916, 922 (9th Cir. 2012) (quoting *A & M Produce,* 186 Cal. Rptr. at 122) ("Oppression addresses the weaker party's absence of choice and unequal bargaining power that results in no real negation…Surprise involves the extent to which the contract clearly discloses its terms as well as the reasonable expectation of the weaker party.").

331. Armendariz v. Foundation Health Psychare Services, Inc., 24 Cal 4th at 113 (2000) (stating pre-employment arbitration contracts usually involve economic pressure exerted by employers and few will refuse a job because of an arbitration agreement).

332. Gentry v. Superior Court, 42 Cal 4th 443, 469 (2007) (courts presume contracts have been negotiated by two parties of equal bargaining power).

333. Willy E. Rice, *Unconscionable Judicial Disdain for unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015,* 25 B.U. PUB. INT. L.J. 143, 147 (2016).

334. *Id.*

> A fairly recent national study suggested that fourteen percent of the U.S. population is "literally illiterate." They cannot read or write. Also, large numbers of adults are "functionally illiterate." They cannot read or write well enough to deal with everyday requirements. More troubling, among employed adults, 40% are functionally illiterate. And, among adult consumers, "low literacy" is widespread. Numerous low-literate consumers cannot read simple label instructions or understand simple arithmetic or price differentials.

Uber drivers are accepting employment contracts that are drafted by sophisticated lawyers who draft the employment contracts to protect their client, the employer. Lawyers have a duty to protect their clients; but here, this protection comes at the expense of the drivers who do not have an opportunity to dispute the terms of the agreement. As revealed previously, many drivers have stated they do not understand the contractual language stated in the 2013 and 2014 Agreements, and do not read the agreement because they do not understand the legalese in the agreement.[335] As a result, drivers do not read the important provisions that are buried in the fine print of the agreement.[336] Most drivers sign the arbitration agreement through their phone, tablets or computers, where the print is small, the provision is not highlighted, and is not explained.[337] As a result, drivers do not consider the ramifications of signing the agreement, especially in an employment context.[338]

It can be inferred that many Uber drivers do not understand the opt-out provisions within the 2013 and 2014 Agreements. The FAA states that parties are not required to arbitrate if one side did not agree to do so.[339] One Uber driver specifically attests that he did not fully understand the opt-out provision in the contract.[340] He felt if he did opt-out he would not be allowed to drive for Uber.[341] The driver stated he interpreted the agreement as an "it's my way or the highway proposition."[342] This same viewpoint has been similarly held by other drivers fearing if they had chosen to opt-out, Uber

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> Additionally, and even more troubling, 20% of employed adults are financially illiterate. Among consumers, financial illiteracy has increased steadily in the wake of more complex financial services and instruments. As of this writing, between 28% and 50% of American consumers are financially illiterate. *Id.*

335. *See* Christopher McKinney, *Mandatory Arbitration: How American Employers Opt Out of the Justice System*, TEXAS EMPLOYMENT LAW BLOG (last updated May 20, 2015), www.texasemploymentlawblog.com/main/2015/05/articles/hr-management/mandatory-arbitration-american-employers-attempt-to-opt-out-of-employment-law-protections-for-workers (last visited February 8, 2017) (explaining that "approximately two-thirds of those who have had an arbitration agreement enforced against them cannot remember seeing anything about forced arbitration in their Terms of Employment.").

336. *See* Abdul Mohammed v. Uber Techs., Inc., 237 F. Supp. 3d. 719, 731 (N.D.E.D 2017) (explaining what a clickwrap agreement is); 2-8 Computer Contracts § 8.02 (2017) (stating that clickwrap agreements "requires a user to affirmatively click a box on the website acknowledging awareness of and requiring a physical manifestation of assent, a user is said to be put on inquiry notice of the terms assented too.").

337. *Id.*

338. Stone and Colvin, *supra* note 10 (stating many arbitration clauses are "buried in fine print or incorporated by reference to an obscure and inaccessible source.").

339. 9 U.S.C. § 2 *cited in Schnabel,* 697, F.3d at 118.

340. Said, *supra* note 7.

341. *Id.*

342. *Id.* (quoting Uber driver).

would retaliate against them.[343] These statements evidence two points. First, Uber drivers did not understand the contractual language and the purpose of the opt-out clause in the arbitration agreement. Second, Uber drivers felt they could not opt-out of the contract without being subjected to retaliation.

The contract offered by Uber, however, appears not to be a take-it or leave-it contract entirely, because in the 2014 Agreement Uber does contain an opt-out provision.[344] However, like most arbitration agreements, it can be presumed most drivers did not know of the existence of the arbitration agreement within the Uber's driving contract.[345] Today, almost every contract contains an arbitration clause.[346] Yet an employment contract is different, as it also entails the employers' assurance that labor laws are followed.[347] Thus, an employee must be aware of what rights they are signing away when accepting the terms of the employment contract, for an individual's employment with a company not only gives them a job but provides for the employee's livelihood, well-being, family, retirement, and most importantly their means to survival.[348]

Here, the agreements contain a degree of unconscionability, which is usually contained within all employment contracts.[349] Courts rarely find provisions in a contract to be a surprise because they assume every signor to a contract reads the document in its entirety.[350] Case law consistently states the signors inability to recall the existence of an arbitration agreement does make the arbitration agreement unconscionable.[351] It has been established

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343. *Id.*

344. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *5 (9th Cir. 2016).

345. Stone and Colvin, *supra* note 10.

346. *Id.*

347. Miriam A. Cherry, *Working For Virtually Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1080 (2014) (explaining technology and its impact on employment discrimination laws).

348. *Id.* ("The challenges associated with reconciling virtual work with traditional labor and employment law doctrines are numerous"). *See* Willy E. Rice, Article, *Unconscionable Judicial Disdain for unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analyses of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800-2015,* 25 B.U. PUB. INT. L.J. 143, 147 (2016) (More importantly, when compared to more powerful and sophisticated employers, merchants and lenders, functionally and financially illiterate employees and consumers are disproportionately more likely to be unsophisticated or "legally unsophisticated.").

349. *See Id.* (explaining why Individuals are an "inferior status" to employers in employment agreements).

350. Commercial Factors Corp. v. Kurtzman Bros., 280 P.2d at 47-48 (Cal. Dist. Ct. App. 1955).

351. Blau v. AT&T Mobility, C-11-00541-CRB, 2012 U.S. Dist. LEXIS 217, at *4-5. *See Bekele,* 2016 U.S. Dist. LEXIS 104921 at *25 (stating in regards to

that one who signs a written agreement is bound by its terms whether or not he understands the language of it.[352] A clickwrap agreement entered into by clicking "I agree" only presents a minimal amount of unconscionability.[353] Courts assume by hitting "I agree" the reader has reasonable notice of the terms of the agreement and read it through its entirety.[354] The language of the arbitration clause also does not have to be in the heading, nor does it have to be capitalized or bolded although from a practice standpoint it is highly suggested.[355] However, a limited amount of courts hold that a copy of the arbitration rules must be included in the agreement. Rules also can be accessed through the use of a hyperlink which helps the contract from being procedurally unconscionable.[356] This hyperlink to the terms of the arbitration cannot be tucked away in an obscure corner on the app or website.[357]

Since online agreements existence, courts have debated whether browsewrap and clickwrap agreements allow for a "mutual manifestation of assent."[358] Today, in our technological world, basic contract principles get overlooked by courts.[359] The validity of the contract as to whether the parties have knowledge of the terms within the four corners of the document is never investigated.[360] Scholars of law believe these types of contracts are contracts of adhesion because a party cannot actually assent to an offer unless

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procedural conscionability, Lyft did not have an obligation to highlight the arbitration clause in the contract).

352. Awuah v. Coverall N. Am., Inc.*,* 703 F. 3d 36, 44 (1st. Cir. 2009). *Cited in Lowen v. Lyft., Inc.,* No. 15-cv-01159-EDL, 2015 U.S. Dist. LEXIS 123131 at *19 (N.D. Cal Sept. 15, 2015) (explaining a reasonable user who cared to pursue the issues in the Agreement would read the agreement in its entirety whether even if it appears on the 8th or 9th page of the agreement).

353. Hodsdon v. DirectTV, LLC*,* No. C. 12-02827 JSW, 2012 U.S. Dist. LEXIS 160638 at 5* (N.D. Cal. Nov. 8, 2012) (stating all contracts contain some element of adhesion). *See* Cullinane v. Uber Techs. Inc.*,* 2016 U.S. Dist. LEXIS 89540, at *6 (D. Mas. July 2016) (stating clickwrap agreements as long as they aren't browsewrap agreements usually provide signors with reasonably terms).

354. *Awuah*, 703 F. 3d at 44 (1st Cir. 2009).

355. *Cullinane,* 2016 U.S. Dist. 89540 at *6 (explaining the "Terms of Service & Privacy Policy" appeared in bold white letters as the "done button" did that user clicked to register). *But see* Meyer v. Kalanick*,* 2016 U.S. Dist. LEXIS 99921 at *7 (S.D.N.Y. 2016).

356. Haisha Corp v. Sprint Solutions Inc.*,* No. 14CV2773 FPC MDD, 2015 U.S. LEXIS 5579 at *8 (S.D. Cal. Jan. 15, 2015) ("based on federal caselaw and state law rules of contract interpretation, incorporation by reference of the arbitration rules is sufficient to excuse attachment of the arbitration rules as long as the rules are easily accessible and plaintiff has the means and capacity to retrieve them.").

357. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *7.

358. Specht v. Netscape Communs. Corp*,* 306 F.3d 17, 29 (2d. 2002) (stating mutual assent as the "touchstone" of a binding contract).

359. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997).

360. *Id. See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983) (explaining the seven conditions valid contracts of adhesion typically meet).

that party knows of the offer's existence.[361]

In Uber's arbitration agreements, it is rare drivers know of the existence of the arbitration agreement and understand it.[362] Specifically, a driver, who graduated from UC Berkeley, stated he did not understand the arbitration in it is entirety, nor did he care to understand the terms of the agreement because of its complex language.[363] The driver stated "Of course, I do not have a lot of interest in reading a 10-point type on a cell phone I didn't want to have to use a magnifying glass."[364] This driver's statement demonstrates that even a college educated man did not understand the convoluted language of the arbitration agreement. The statement also evidences the opt-out provision was not as visible as Uber claims it to be. Thus, hinting a degree of unconscionability in the arbitration agreement.

In *Meyer,* the court considered whether the plaintiff had "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms."[365] The plaintiff in *Meyer,* unlike the plaintiffs in *Mohamed,* did not have to click on the "I Agree" icon in the contract.[366] Also, unlike in *Cullinane,* where the contract language had been clearly delineated, the contracting language here was small and obscure.[367] As a result, the court found the plaintiff in *Meyer* did not have reasonable conspicuous notice of Uber's agreement, because it cannot be assumed that the "reasonable (non-lawyer) smartphone

361. Schnabel v. Trilegiant Corp., 697 F.3d 110, 121 (2d Cir. 2012). *See Judith Resnik, supra* note 259 at 2804 (stating "although hundreds of millions of customers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.").

362. Christopher McKinney, *Mandatory Arbitration: How American Employers Opt Out of the Justice System*, Texas Employment Law Blog (last updated May 20, 2015), www.texasemploymentlawblog.com/main/2015/05/articles/hr-management/mandatory-arbitration-american-employers-attempt-to-opt-out-of-employment-law-protections-for-workers (last visited February 8, 2017).

363. Said, *supra* note 7.

364. *Id.* (quoting Uber driver).

365. *Id.* at *21 (quoting *Specht,* 306 F. 3d at 35).

366. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *28 (stating "I agree" is a feature courts have repeatedly made note of in declining to find a legal contract). *Contra* Mohamed v. Uber Technologies, 109 F. Supp. 3d at 1197 (N.D. Cal. 2015) ("Gillette, like other Uber drivers, used a smartphone to access the Uber application while working as an Uber driver.") *See* Nguyen v. Barnes & Noble, 763 F. 3d 1171, 1176 (9th Cir. 2014) ("an individual may still be said to have assented to an electronic agreement if 'a reasonably prudent person user' would have been put on 'inquiry notice of the terms of the contract.").

367. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *28. *See* Cullinane v. Uber Techs. Inc., 2016 U.S. Dist. 89540 at *6 (D. Mas. July 2016) ("Clickwrap' agreements are more readily enforceable, since they "permit courts to infer that the user was at least on inquiry notice of the terms of the agreement, and has outwardly manifesting consent by clicking a box.") (citation omitted).

user is aware of the likely contents of "Terms of Service," especially when placed directly alongside "Private Policy."[368]

The Seventh Circuit in *Sgouros*, ruled similarly, stating a court cannot presume that a person who clicks on a box on a computer screen has notice of all contents on the agreement. For example, the user in order to read all the terms of the contract must scroll all the way through the link.[369] The Eastern District of New York in *Berkson,* explained the hyperlink to the "Terms of Service & Privacy Policy" was not prominently displayed on Uber's registration screen because the design, location, and small font of the terms is not obvious to the available user.[370] The *Berkson* court also stated if the agreement or website does not prompt a party to review the terms and conditions, then it does not give reasonable notice of the terms and conditions.[371]

These cases demonstrate the importance of the placement of an arbitration clause and the clauses bolded language in order to provide the reader with reasonable notice. This gives the reader an opportunity to read the terms before pushing the "I agree" button.[372] Online agreements have created a new problem in ensuring the "integrity and credibility" of electronic bargaining.[373] As proven by the opinion in *Mohamed,* courts have been reluctant to recognize current case law even though previous precedent inadequately addresses the current issues in the new age of contracts.[374] Arguably, however, if a signor of the contract is relinquishing a right to jury, the signor needs to be made aware of an arbitration clause because without awareness the contract lacks a manifestation of mutual assent, a basic principle in contract

368. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *31-32.

369. Sgouros v. TransUnion Corp., 817 F. 3d 1029, 1035 (7th Cir. 2016).

370. Berkson v. Gogo LLC., 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015) (stating the terms and use location within the contract must be reasonably placed, so a signor would be aware of its location) *See* Long v. Provide Commerce, Inc., 245 Cal. App. 4th 855, 126 (Cal. Ct. App. 2016) (explaining the checkout flow should be laid out in an order to make the signor aware of express acceptance of the contracting party's rules and regulations).

371. Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009), *aff'd,* 380 F. App'x 22 (2d Cir. 2010).

372. *Meyer,* 2016 U.S. Dist. LEXIS 99921 at *34 (stating "There is a real risk here that Uber's registration screen 'made joining Uber fast and simple and made it appear-falsely-that being a [user] imposed virtually no burden on the consumer besides payment") (quoting *Schnabel v. Tirlegiant Corp.,* 697 F. 3d, 110, 127-28) (2d Cir. 2012).

373. *See* Specht v. Netscape Communs. Corp., 306 F. 3d at 30 (2d. 2002) (finding the plaintiffs did not assent to an agreement containing a mandatory arbitration clause because plaintiffs did not have adequate notice).

374. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *16 (9th Cir. 2016). *See* Nguyen v. Barnes & Noble Inc., 763 F.3d at 1175 (9th Cir. 2014) (citing "while new commerce on the internet has exposed courts to many new situations, it has not fundamentally changes the principles of contract.") (*quoting* Register.com, Inc. v. Verio, Inc., 356 F. 3d 393, 403 (2d Cir. 2004). (stating contracts need mutual manifestation of assent).

formation.[375]

Next, while the Ninth Circuit did not address substantive unconscionability, the court did address the fee splitting provision in the contract.[376] Initially, the 2013 and 2014 Agreements required drivers to split the cost of arbitration with Uber. The drivers argued this provision precluded them from effectively vindicating their rights.[377] The court stated Uber's recent commitment to pay the full costs of arbitration, thus, rending the vindication of rights doctrine not applicable.[378] Today, drivers no longer have an argument regarding the exceedingly high price to arbitrate.[379]

The 2013 and 2014 Agreements state only Uber can modify the terms of the contract. Therefore, if modifications are made without Uber drivers' consent, the contract creates a degree of unconscionability because only Uber possesses the unilateral power to modify contractual terms.[380] It is determined the contract is substantively unconscionable when the employee is not able to negotiate the terms of her contract.[381] A counter argument, however, is that if a unilateral modification provision imposes a covenant of good faith and fair dealing, the contract is not unconscionable.[382] The Ninth Circuit in *Mohamed* declared Uber's opt-out provision gave drivers an opportunity to decide whether or not he wants to be subject to arbitration, thus eliminating a degree of unconscionability.[383]

375. *See* Schnabel v. Trilegiant Corp., 697, F.3d at 119 (2d. 2012) (explaining electronic contracts are usually not read by consumers, and as a result, consumers are clicking away their contractual rights).

376. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *16.

377. *Italian Colors Rest.,* 133 S. Ct. at 2010 (explaining the effective vindication of rights doctrine: "a means to invalidate, on public policy grounds arbitration agreements that "operate…as a prospective waiver of a party's right to pursue statutory remedies.") (internally quoting *Mitsubishi Motors Corp v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614, 637 n. 19 *1985).

378. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *19.

379. *Id.* (stating the costs of arbitration in this may case may exceed $7,000 per day).

380. Appellee's Joint Response Brief, *supra* note 254 at 53 (revealing the language of both Agreements citing "Uber reserves the right to modify the terms and conditions of this Agreement at any time, effective upon publishing an updated version of this agreement at http://www.uber.com or on the software.") (citation omitted).

381. Ingle v. Circuit City Stores, Inc., 328 F. 3d 1165, 1179 (9th Cir. 2003).

382. Ashbey v. Archstone Prop Mgmt., Inc., No. 12-55912, 2015 U.S. LEXIS 7985 at *1 (9th Cir. May 12, 2015) (explaining in an unpublished and nonprecedent case an implied covenant of good faith and fair dealing eliminates any unconscionability).

383. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *19.

D. The Disallowance of Class Actions, PAGA Waivers, and NLRA Claims Effect On the Vindication of Rights Doctrine.

This section first analyzes the Ninth Circuit's decision to allow Uber to ban class actions, PAGA claims, and administrative labor claims such as claims made pursuant to the NLRA. Second, it looks at precedent regarding these three claims.[384] It then argues that if Uber disallows these claims from being heard it is a violation of the vindication of rights doctrine.[385]

Uber's use of waivers in their arbitration agreements, arguably have disallowed drivers from seeking their constitutional rights and statutory remedies by requiring drivers to seek small claims through arbitration.[386] The Ninth Circuit does not fully address this issue in their opinion. The court in a footnote states the option for drivers to opt-out of the agreement does not require drivers "to accept a class-action waiver as a condition of employment," and thus, "no basis for concluding that [Uber] coerced [Plaintiffs into waiving their] right to file a class action in violation of the NLRA."[387]

The Supreme Court ruled on this question and issued an opinion on May 21, 2018.[388] The Supreme Court in a five-to-four decision held the following: "Congress has instructed in the arbitration act that arbitration agreements providing for individualized proceedings must be enforced, and therein the Arbitration Act's saving clause nor the NLRA suggest otherwise."[389]

The Supreme Court in Lewis, stayed on trend with their previous holdings in the last two decades, by maintaining that the FAA's strong preemptive force cannot be overwritten without congressional intent.[390] Collective-bargaining, since the Supreme Court's decisions in *Conception*, has been greatly restricted.[391] Most courts have upheld the usage of class action waivers in arbitration

384. *Infra* Section D, i, ii, & iii.

385. *Id.*

386. *See* Sanchez v. Valencia Holding Co. LLC, 61 Cal. 4th at 922 (2015) (requiring self-help remedies to be carved out of the agreement).

387. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *18 (quoting *Johnmohammadi v. Bloomingdale's Inc.,* 755 F. 3d 1072, 1075 (9th Cir. 2014)).

388. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2014) *rev'd* Lewis v. Epic Sys. Corp., No. 16-285, 584 U.S. *2 (2018).

389. *Id. See* Garrett Epps, *An Epic Supreme Court Decision on Employment*, THE ATLANTIC (May 22, 2018), www.theatlantic.com/politics/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963/ (revealing the "5-4 ruling in Epic Systems Corp. v. Lewis could weaken work place protections and the justices on both sides knew it.").

390. *Id.*

391. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. at 1740 (2011).

agreements as being conscionable.[392] As the late Justice Scalia stated in *Italian Colors,* courts must rigorously enforce arbitration agreements according to their terms.[393] Congress has explicitly stated that the FAA preemption overcomes any labor statute allowing for class proceedings to be brought.[394] However, an exception exists when the effective vindication of rights doctrine applies, and an arbitration clause can be invalidated on "public policy" grounds because a party does not have a right to pursue a statutory remedy.[395]

Therefore, it is of no surprise that Uber, like many other companies, are well aware that courts have ruled favorably in upholding class waivers.[396] For this reason, Uber purposely put waivers in both the 2013 and 2014 Agreements.[397] These requirements present degrees of substantive unconscionability. According to the contracts, Uber requires all drivers to waive their right to bring class, collective and representative actions including PAGA claims either in court or in arbitration.[398] The 2013 Agreement carved representative actions from being under the jurisdiction of the arbitrator and instead gave this jurisdiction to the court.[399] In contrast, the 2014 Agreement waives all representative actions from being brought.

As stated previously in *O'Connor,* only 269 drivers out of a class of 160,000 opted out of the 2014 Agreement, meaning only .0017% used the opt-out option.[400] Therefore, 159,731 drivers will have to

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392. *Id.* ("requiring the availability of class wide arbitration infers with fundamental attributes of arbitration and thus a scheme inconsistent with the FAA") (quoting Scalia, A., majority). *But see* Discover Bank v. Superior Court, 36 Cal 4th at 162-163 (2005) (holding class action waivers to be unenforceable under California law).

393. *Italian Colors Rest,* 133 S. Ct. at 2309 (citing *Dean Witter Reynolds Inc. v. Bryd,* 470 U.S. 213, 221 (1985)).

394. *Horton II*, 737 F.3d 344, 358 (5th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 295-296, 297 n.8 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013); *See* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012) ("[The FAA] requires courts to enforce agreements to arbitrate according to their terms[,] * * * even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." (quotation marks omitted)).

395. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. at 637 (1985) (stating the exception's purpose is to prevent a waiver from allowing a party to pursue statutory remedies).

396. *Concepcion*, 131 S. Ct. at 1740.

397. *See* Strong, *supra* note 78 at 269 ("Experience in the judicial realm suggests that corporate respondents find representative actions both risky and expensive, and that business interest are therefore included to do everything possible to minimize or eliminate class relief in all possible forms.").

398. Mohamed v. Uber Tech. Inc., 2016 U.S. App. LEXIS 16413 at *11 (9th Cir. 2016).

399. *Id*.

400. Appellee's Joint Response Brief, *supra* note 254 at 8. *See* O'Connor v. Uber Techs. Inc., No. 1303826-KAW, 2016 U.S. Dist. LEXIS 110281 at *22 (N.D. Cal. 2015) (citing the numbers of drivers who opted out of the arbitration

arbitrate their claim individually in arbitration unless they signed the 2013 Agreement. Statistics reveal, by not allowing their drivers to bring a class action, Uber is depriving their employees from receiving a remedy and vindicating their rights. Specifically, in the 2014 Agreement, Uber drivers are not allowed to bring a class action in any forum.[401]

1. Class Action Waivers

Class action waivers are a recent trend, and have only been used in the last four decades.[402] Businesses today use them in most of their contracts to limit the scale of consumer and employment disputes.[403] Previously, a class action waiver in an arbitration clause was unconscionable if the contract contained adhesion involving a small amount of damages, and the party with the superior bargaining power cheated people out of individually small sums of money.[404] This all changed in *Concepcion,* when the Supreme Court explained class waivers are enforceable in arbitration clauses.[405] All courts have explained arbitrators could violate parties' procedural rights if the arbitrators were inexperienced in dealing with the difficulties of class procedures.[406] Courts also believe it is hard for arbitrators to impose a procedure consistent with the parties' express or implied intent in the arbitration agreement.[407]

However, the nature of class actions allow individuals to vindicate their rights where, if the claimants had to bring the claim individually, they would not be inclined to do so.[408] Individuals, who normally would not be inclined to bring a claim, do because the individuals feels more comfortable as there is strength and security in numbers.[409] Justice Breyer has stated class proceedings are an

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agreement).

401. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *11.

402. Strong, *supra* note 78 at 201-03 (stating the holding in *Stolt-Nielsen,* changed the nature of class proceedings.). *See* Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. at 1758 (2010) (holding that the arbitration clause allowed class arbitrations).

403. Strong, *supra* note 78 at 208 n. 30 (citing "37 % of all class arbitrations administered by the AAA involved consumer actions, 37 % involved employment actions, 7 % involved franchising, 7 % involved healthcare, 3% involved financial services, and 11% involved other business-to-business concerns).

404. *Discover Bank*, 112 P. 3d at 1108-1109.

405. *Concepcion,* 131 S. Ct. at 1751.

406. Strong, *supra* note 78 at 221.

407. *Id.* at 235.

408. *Id.* at 221. *See* Lewis v. Epic Sys. Corp., No. 16-285, 584 U.S. (2018) (R. Ginsberg) (Dissent) (highlighting the issue that employees are more inclined to vindicate their rights if allowed to file with their peers).

409. In re Am. Express Merchs' Litig., 634 F. 3d at 1999 (2d Cir. 2011) (holding a class waiver precludes plaintiffs from vindicating their rights and is therefore unenforceable in an arbitration agreement).

efficient way for thousands of people to bring identical claims and get vindication for them.[410] Class arbitrations and proceedings are a fair and efficient method to adjudicate controversy by allowing greater enforcement and vindication.[411] Class arbitration allow for a wide range of substantive claims to be heard.[412] Businesses, however, dislike class relief because it eliminates businesses control on litigation by creating potential risks, expenses, and bad publicity.[413]

The Ninth Circuit failed in their opinion to effectively argue the vindication of rights doctrine.[414] The Ninth Circuit makes no mention of *Gentry,* a landmark decision regarding the vindication of rights doctrine.[415] *Gentry* stated, a class action waiver may be unenforceable in the following circumstances:

> [W]hen it is alleged that an employer has systematically denied overtime pay to a class employees and a class action is requested notwithstanding an arbitration agreement that contains a class action waiver, the trial court must consider these factors … the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of class members' right to overtime pay through individual arbitration.[416]

In addition to those factors courts should also consider whether:

> A class arbitration is likely significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and [whether] the disallowance of the class action will likely lead to less comprehensive enforcement of [labor or employment] laws for the employees alleged to be affected by the employer's violations.[417]

The Ninth Circuit here did not evaluate any of these factors,

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410. *Concepcion,* 131 S. Ct. at 1759 (Breyer J., Dissenting). *See* Strong, *supra* note 78 at 266 (quoting *International Commercial Arbitration*, 1746, 2084 (2009) ("Class actions and class arbitration are "a neutral adjudicatory procedure that afford parties an opportunity to be heard.") (internally cited).

411. Iskanian v. CLS Transp. LA, LLC*,* 59 Cal. 4th at 327 (Cal. 2014). *But s*ee Gentry v. Super. Co.*,* 42 Cal 4th at 443 (2007) (concluding class action waivers in employment arbitration agreements are invalid in certain circumstances).

412. Strong, *supra* note 78 at 226.

413. *Id.*

414. Mohamed v. Uber Tech. Inc.*,* 2016 U.S. App. LEXIS 16413 at *19 (9th Cir. 2016).

415. *Gentry,* 42 Cal 4th at 443 (regarding an employment contract containing a class action waiver that disallowed the Plaintiffs from vindicating their claims against the Defendant employer).

416. *Id.* at 463-464 (listing the factors for Courts consider when a "de facto waiver would impermissibly interfere with employees' ability to vindicate unwaivable rights.").

417. *Id.* at 463.

but if they had, the Court arguably would have reached another result. If the Ninth Circuit would have reached their conclusion based on the precedent in *Gentry,* the rights of all signatories would no longer be severally suppressed by businesses' use of waivers in arbitration agreements.

2. PAGA Waiver

Regarding the PAGA claim, the Ninth Circuit remanded the issue of PAGA's enforceability down to the lower court.[418] The California District Court, found the PAGA clause unenforceable. The nature of PAGA and the claims that arise under its protection must proceed as a representative claim and should not be heard individually.[419] Individuals cannot bring a PAGA claim on their own behalf.[420] The California's legislature when enacting PAGA wanted to empower employees to enforce the Labor Code as their own representative because of Agencies' limited resources.[421] Case law clearly indicates "pre-dispute agreements that waive PAGA claims are unenforceable under California law."[422] Waivers not allowing PAGA claims to be heard violate "both the rule against enforcing agreements exculpating a party for violations of the law (Cal Civ. Code § 1668), as well as the rule that a law established for a public reason may not be contravened by private agreement (Cal Civ. Code § 3513)."[423] An aggrieved employee's action under PAGA is analogous to the government bringing a claim against the employer themselves. Because PAGA's purpose is to seek statutory penalties of Labor Code violations for all employees, it must be filed as a representative action because a judgment binds non-party aggrieved employees.[424]

PAGA claims can be heard in court or in arbitration but they cannot be outright waived.[425] A "law established for a public reason

418. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *23.

419. Williams v. Super. Ct.*,* 237 Cal. App. 4th 642, 645 (2015) (explaining PAGA claims "must be brought in a representative capacity," and "cannot be split into arbitrable individual claims and non arbitrable representative claims.").

420. Brown v. Ralphs Grocery Co.*,* 197 Cal. App. 4th 489, 503 (2011).

421. Private Attorneys General Act, Labor Code § 2699*, subdivision (a). See Armendariz,* 24 Cal 4th at 103 (stating legislator enacted PAGA for a public purpose, and waiving PAGA rights would be against the legislator's interest in enforcing labor laws).

422. Sakkab v. Luxottica Retail N. Am. Inc., 803 F. 3d at 430 (9th Cir. 2015) (explaining the court in *Iskanian* authorized PAGA waivers to be unenforceable if they made the parties seek relief individually). *See Iskanian,* 59 Cal. 4th 348, 382-83 (2014).

423. *Id.*

424. People v. Pacific Land Research Co, 20 Cal. 3d 10, 17 (1977) cited in *Iskanian,* 803 F. 3d at 381.

425. *Sakkab,* 803 F. 3d at 434.

cannot be contravened by a private agreement."[426] The FAA also does not preempt California's prohibition against PAGA waivers because of the saving clause in the FAA which allows state labor laws to be enforced over the FAA.[427] The savings clause within the FAA "forecloses arbitration upon such grounds that exist at law or in equity for the revocation of any contract and illegality is one of the grounds."[428] The California legislature enacted PAGA to enforce employees' rights.[429] A PAGA waiver is outside the FAA's coverage because a PAGA dispute is not a contract dispute.[430] Instead, "a PAGA claim is a dispute between an employer and the state, which alleges directly or through its agents that the employer has violated the Labor Codes."[431] Therefore, it would be against public policy and previous precedent to not allow drivers to continue their claims under PAGA.[432]

3. NLRA

The Ninth Circuit states the drivers waived their argument regarding Uber's violation of the National Labor Relations Act ("NLRA").[433] The Ninth Circuit revealed, had Uber not waived this argument, the arbitration agreement still did not violate the NLRA because Uber drivers were not required to accept the arbitration clause.[434] However, the NLRA allows a broad protection to "full freedom of association" that includes the right for employees to pursue joint legal action. Thus, drivers when pursuing claims against their employer are allowed "mutual aid or protection," especially when drivers seek to jointly vindicate rights gained through legislation or bargaining.

The NLRB for the past seventy years has consistently

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426. Armendariz v. Foundation Health Psychare Services, Inc., 24 Cal 4th at 100 (2000).

427. CarMax Auto Superstores Cal., LLC v. Areso, 136 S.Ct. 689, 2015 WL 5005244 (Dec. 14, 2015). *See generally* Appellee's Joint Response Brief, *supra* note 254 at 26.

428. Brief for Respondent In Opposition, at 12 *Epic Systems Corporation v. Jacob Lewis*, (No. 160285) (November 14, 2016).

429. Private Attorneys General Act, Labor Code § 2968.

430. Iskanian v. CLS Transp. LA, LLC, 59 Cal. 4th 327, 386 (2015).

431. *Id.* at 386-387 (stating when a party seeks civil penalties, and law enforcement mechanism the party brings the suit with is designed to protect the public and not private parties the mechanism should be allowed).

432. In re Marriage of Fell, 55 Cal App. 4th 1058, 1065 (1997).

433. *Mohamed,* 2016 U.S. App. LEXIS 16413 at *18 n. 6. *See* Johnmohammadi, 755 F. 3d 1072, 1077 (9th Cir. 2014) (holding an opt out clause within an arbitration agreement does not coerce an employee to waive their NLRA claim, so the arbitration clause does not violate Section 8 of the NLRA). *But see* NLRB v. Stone, 125 F. 3d 752, 756 (7th Cir. 1942) (holding an arbitration agreement that made an employee bargain individually violated the NLRA whether or not the employer coerced the employee into signing it).

434. *Id.*

interpreted the NLRA as a mechanism to protect joint legal action regardless if the petitioners brought the claim in arbitration or to courts.[435] The Act's underlying purpose is to "eliminate the causes of certain substantial obstructions to the free flow of commerce … by protecting the exercise by workers of full freedom of association … for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[436] Furthermore, the Court in *City Disposal* revealed Congress enacted Section 7 to lessen the employees fear of retaliation by allowing employees to share the burden of costs to band together against the employer.[437] Therefore, the Act reveals Congress's intent "to create an equality in bargaining power between the employee and the employer throughout the entire process."[438] As a result, Courts have given great deference to the NLRB's interpretation of the NLRA.[439] Other courts hold that use of class action procedures is not a substantive right, but instead it is a procedural right. [440] Thus, the NLRA does override the application of the FAA. For example, the Supreme Court in *Gilmer* held, that no language in the NLRA or its legislative history allows the NLRA to preempt the FAA and make an arbitration clause unenforceable.[441] Previously, the Ninth Circuit in *Richards* similarly rejected a plaintiff's attempt to argue the unenforceability of an arbitration clause containing a collection action waiver of NLRA claims. In *Lewis*, the Seventh Circuit addressed whether Section 7 of the NLRA qualifies as a contrary congressional command to overcome the FAA's presumption that

435. Spandsco Oil & Royalty Co., 42 N.L.R.B. 942, 948-949 (1942) (finding that employers were protected under the newly enacted NLRA). *See also* 127 Rest. Corp., 331 N.L.R.B. 269, 275 (2000) ("[T]he filing of a civil action by employees is protected activity unless done with malice or in bad faith."); 52nd St. Hotel Assocs., 321 N.L.R.B. 624, 633 (1996) ("48 … employees … join[ing] together to seek legal redress for their wage claims [are] engaged in protected, concerted activity under Section 7."); *cited from* Brief for Respondent at 16, *Epic Systems Corporation v. Jacob Lewis* (No. 16285) (August 2017).

436. *City Disposal*, 465 U.S. at 835.

437. *Id.* ("to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").

438. *Id.* at 829 (quoting *Eastex*, 437 U.S. at 568) (noting also that the NLRB's interpretations of ambiguous provisions of the NLRA are entitled to "considerable deference").

439. *Id.*

440. *Horton II,* 737 F. 3d at 356-60. *See* Anchhem Prods., Inc. v. Windsor*,* 521 U.S. 591, 612-613 (explaining the use of class action procedures is not a substantive right). *See also* Deposit Guar. Nat'l Bank v. Roper*,* 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

441. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 26 (1991) (stating the NLRA in its' language and through the Act's legislative history cannot be understood to override the application of the FAA). *See* Sutherland v. Ersnt & Young, LLP, 726 F. 3d at 297 (2d Cir. 2013) (stating both *Concepcion and Gilmer* uphold that waivers of collection action claims are permissible).

these agreements should be enforced according to their terms.[442]

In analyzing the NLRA, Section 7 of the Act provides that employees have the right to self-organize and bargain collectively through representatives of their own choosing.[443] Section 8 enforces this right by stating an employer could not "interfere with, restrain or coerce employees in the exercise of their rights."[444] Courts have invalidated arbitration provisions that conflict with these statutory rights.[445]

The Fifth Circuit applied Section 8 of the NLRA in *Horton II*. The Fifth Circuit held if an arbitration clause contained language that would lead employees to reasonably believe they could not file unfair labor practices claims with the Board, the arbitration agreement would violate Section 8(a)(1) and (4) of the NLRA.[446] In *Horton II*, it identified two separate reasons why a collective-action waiver might not be enforceable under the FAA—"(1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's 'saving clause' and (2) application of the FAA may be precluded by another statute's contrary congressional command."[447]

In 2015, the Fifth Circuit again in *Murphy Oil*, held a class-action waiver violated the NLRA.[448] Similarly, the Seventh Circuit in *Lewis,* held an arbitration agreement violated Sections 7 and 8 of the NLRA when the provision precluded employees from seeking class, collective, or representative remedies to wage-and-hour disputes.[449] The Seventh Circuit stated "filing a collective or class action suit constituted concerted activity under Section 7."[450] Therefore, even when an employee acts alone, he may "engage in concerted activities where she intends to induce group activity or acts as a representative of at least one other employee."[451]

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442. Richards v. Ernst & Young LLP*,* 734 F.3d 871, 873-74 (9th Cir. 2013) (stating other Courts should not analyze the NLRB's decision in D.R Horton as conflicting with the policies underlying the FAA).

443. National Labor Relations Act, 29 U.S.C.S. § 157. *See* Lewis v. Epic Sys. Corp., 823 F. 3d at 1154 (7th Cir. 2014) (stating the plain language of the NLRA does not reveal Congress's intent to exclude class representative, and collective legal proceedings from NLRA protection).

444. National Labor Relations Act, 29 U.S.C.S. § 158.

445. McCasktill v. SCI Mgmt Corp.*,* 285 F. 3d 623, 626 (7th Cir. 2002). *See* Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*,* 473 U.S. at 637 (1985) (stating arbitration agreements that act as a "prospective waiver of a party's right to pursue statutory remedies" are not enforceable).

446. *Horton II,* 737 F. 3d at 359.

447. Brief for Respondent In Opposition, at 12-13 *Epic Systems Corporation v. Jacob Lewis*, (No. 160285) (November 14, 2016) (citing to *Horton II* 737 F. 3d 344, 358 (5th Cir. 2013) (internal citation omitted).

448. Murphy Oil USA, Inc. v. NLRB*,* 808 F. 3d 1013, 1018 (5th Cir. 2015).

449. *Lewis,* 823 F. 3d at 1154. *See* Eastex v. NLRB*,* 437 U.S. 556, 566 (1978). (stating under Section 7 of the NLRA "other concerted activities have long been held to include "resort to administrative and judicial forums.").

450. *Lewis,* 823 F. 3d at 1152.

451. *Id.* (recognizing that before the NLRA "a single employee was helpless

These two cases were consolidated after the Supreme Court granted both of Respondents' writ of certiorari.[452] Some Supreme Court precedent does favor the Seventh Circuit's ruling. The Supreme Court in *Prima Paint Corp*, recognized that the FAA was designed "to make arbitration agreements as enforceable as other contracts, but not more so."[453] Thus, the FAA does not preempt generally applicable contract defenses, nor does the FAA allow specific terms in the arbitration agreement regarding employees core federal statutory rights to be nullified.[454]

Furthermore, in *Eastex*, the Supreme Court held, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining [and] recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat *broader* purpose of 'mutual aid or protection' as well as for the *narrower* purposes of 'self-organization' and 'collective bargaining.'"[455] Although, it is true, the Court in *Eastex* did not specifically "address the question of what may constitute 'concerted' activities" when employees sought to improve their working conditions through judicial and administrative forums, the Court did address that the NLRA's purpose would be disregarded if employees were not protected.[456] The courts stated if the employees were not protected it "would leave employees open to retaliation for much legitimate activity [and] could frustrate the policy of the Act to protect the right of workers to act together to better their working conditions."[457]

Here the Ninth Circuit does not state any of this case law nor do they evaluate Section 7 and 8 of the NLRA. Here, the effect of Uber's opt-out provision could contradict the Sections. Seemingly, the enforceability of a waiver provision depends on whether an opt-out provision exists, which allows employees to bring a NLRA claim. The NLRA purposely allows employees to file collective actions because it falls under the broad definition of a "concerted activity" under the Act.[458] Disallowing employees the right to self-organize, form, join, or assist labor organizations and to bargain collectively

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in dealing with an employer," and "that union was essential to give laborers opportunities to deal on equality with their employers.").

452. Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 19th, 2017) www.scotusblog.com/2017/07/court-releases-october-calendar/ (stating petition for a writ of certiorari in Nos. 16-300 and 16-307 is granted).

453. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967).

454. *Id.*

455. *Eastex,* 437 U.S. at 565 (emphasis added).

456. *Id.* (quotations omitted) (citing to 29 U.S.C. 151).

457. *Id.*

458. *Id.* at 1153 (stating while the NLRA did not define "concerted activities," collective bargaining and other legal proceedings like it, fit well within the ordinary meaning of the term).

goes against the intent for which the NLRA was created.[459]

However, this argument may no longer be applicable after the Supreme Court's holding in *Lewis*.[460] While Lewis was a plurality opinion, Justice Gorsuch delivered a strong decision in favor of the FAA and employers.[461] The issue in front of the court was "should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[462] Justice Gorsuch wrote that, as a matter of law, there is a clear answer that the FAA preempts the NLRA; however, as a matter of policy, the questions are more convoluted.[463] He continued with the following holding:

> In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings. Nor can we agree with the employees' suggestion that the National Labor Relations Act (NLRA) offers a conflicting command. It is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another. And abiding that duty here leads to an unmistakable conclusion. The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful.[464]

The dissent by Justice Ginsberg took a strong stance against the FAA and its ability to inhibit employees' from receiving protection under the NLRA.[465] Justice Ginsberg stated that answer to the question of allowing the FAA to trump the NLRA and employees' ability to engage in "concerted activities" for their "mutual aid or protection," should be a resounding "NO." Ginsberg continued by stating:

> The Court today subordinates employee-protective labor legislation

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459. *Id.* at 1154.

460. Lewis v. Epic Sys. Corp., No. 16-285, 584 U.S. (2018).

461. *Id.* at *2.

462. *Id. See* Epps, *supra* note 389 (quoting that "Gorsuch accused Ginsburg, author of the dissent, and the other three moderate liberals—Breyer, Sotomayor, and Kagan—of improperly consulting their own policy preferences, refusing to harmonize two easily reconcilable federal statutes, and illicitly smuggling extra-legal commentary—legislative history—into judicial decisions.")

463. *Id.*

464. *Id.* (quoting Justice Gorsuch).

465. *Id.* at *1 (Ginsburg J., dissenting).

> to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees "to band together in confronting an employer…In stark contrast to today's decision,[16] the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played acritical role in enforcing prohibitions against work place discrimination based on race, sex, and other protected characteristics…Recognizing employees' right to engage in collective employment litigation and shielding that right from employer blockage are firmly rooted in the NLRA's design.[466]

Justice Ginsberg argues that the majority's conception that the NLRA does not contain Congress's express intent within the NLRA is faulty, for Congress intended when enacting the NLRA, to "protec[t] the exercise by workers of full freedom of association," thereby remedying "[t]he inequality of bargaining power workers faced," and when ("[I]n enacting §7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.").[467] Justice Ginsberg explained that the majority's decision is an "empathetic direction" to enforce arbitration agreements and prohibit collective-litigation prohibitions even though "[n]othing in the FAA or this Court's case law, however, requires subordination of the NLRA's protections." Justice Ginsberg concluded explaining the devastating affect the decision will have on the justice system ability to protect employees against abuse.[468]

> In stark contrast to today's decision, the Court has repeatedly recognized the centrality of group action to the effective enforcement of antidiscrimination statutes. With Court approbation, concerted legal actions have played acritical role in enforcing prohibitions against work place discrimination based on race, sex, and other protected characteristics. In this context, the Court has comprehended that government entities charged with enforcing antidiscrimination statutes are unlikely to be funded at levels that could even begin to compensate for a significant drop-off in private enforcement efforts.[469]

As a result, as discussed previously employees will be less likely to file against the employer if they must bring the claim individually, as class actions and collective bargaining attempts

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466. *Id.* at *1, 2.

467. *Id.* at *9 (citing *City Disposal*, 465 U.S. at 835); *see*, *e.g.,* Eastex, Inc. v. NLRB, 437 U. S. 556, 567 (1978) (the Act's policy is "to protect the right of workers to act together to better their working conditions" (internal quotation marks omitted)).

468. Lewis v. Epic Sys. Corp., 584 U.S. at *28 (2018).

469. *Id.*

brings employee comfort in numbers.[470] Thus, employees, like the Uber drivers in *Mohammed* have less of an opportunity to seek the appropriate redress to vindicate their rights.[471]

IV. PROPOSAL

First, employers and their attorneys must be conscious of the language within the arbitration agreement. Poorly drafted arbitration agreements contain the following problematic factors: 1) the language is contradictory to the type of dispute mechanism to be used (litigation or arbitration); 2) the language does not provide specifies with regard to the manner in which an arbitration should be conducted; 3) the language opens the door to multiple parallel proceedings; and 4) the language provides for no timetable or deadline of when arbitration must be filed.[472] Well-drafted arbitration agreements, however, include the following factors: 1) clear choice-of-law clause; 2) the subject-matter that the arbitration agreement pertains too; 3) the number and method of selecting arbitrators; 4) where the arbitration will occur; 5) who will pay for the arbitration agreement and in what currency will the arbitration be paid for; and 6) if the arbitration restricts a class actions being heard.[473]

Furthermore, if the parties want the dispute to go to court the language in the agreement should be bolded, in all caps, and specifically state "all claims arising out of this agreement are subject to a court of competent jurisdiction in…" and include the forum and choice of law that the agreement will be subject too. This language removes ambiguity from the agreement and reduces confusion amongst the parties. Thus, if the drafter of arbitration agreements and employment contracts use clear and specific language, the severe headache of interpreting the language in the future is immensely reduced.[474]

Next, when micro-analyzing the implications of the Ninth Circuit's opinion in *Mohamed,* it is clear courts have struggled to adjudicate Uber claims because the claims do not fall under the existing regulatory framework.[475] Thus far, Uber has been able to ignore certain regulations because the company claims to be a technology platform.[476] Uber believes this label does no subject

470. Mohamed v. Uber Techs., Inc., No. 15-16178, No. 15-16181, No-15-16250, 2016 U.S. App. LEXIS 16413 *21.

471. Marinelli, *supra* note 11.

472. *Id.*

473. *Id.* (referring to LCIA.org and ADR.org practice tips).

474. *Id.*

475. Lisa Rayle et al., *App-Based, On-Demand Rider Services: Comparing Taxi and Ridesourcing Trips and Uber Characteristics in San Francisco*, UCTC Working Paper No. 8, at 3 (2014).

476. Mitchell, *supra* note 32 at n. 6-9.

them to standard transportation regulations and employment laws.[477] However, while Uber needs better regulation, Congress's failure to regulate Uber is not the greatest concern arising out of the decision in *Mohamed* nor is it a discussion for this Comment.

On a macro scale, the Ninth Circuit's decision interposes a bigger issue: the problematic trend of courts mandating arbitration. These mandates force employees to forego their constitutional and statutory rights. This problem calls for immediate reform of the FAA. The statute is outdated and has developed into a scheme that primarily serves the needs of employers, who possess more bargaining power, without protecting the needs of employees.[478] The system needs to change to not only reflect societal changes in technology but also to take into account the interest of employees. A change to the system will undoubtedly be difficult and implicate current jurisprudence favoring FAA preemption. It is clear from the vast number of circuit splits, and close 5-4 Supreme Court decisions in *Concepcion*, and recently in *Lewis*, that courts remain uncertain about interpreting the FAA overly-broad.[479]

Immediate reform is also necessary because under the current system, drivers are not able to effectively vindicate their rights. Forcing drivers to waive their right to representative relief and federal statutory rights is a due process violation and a violation of employees' constitutional right to have their claim be decided by a judge or jury.[480] Uber's label of drivers as independent contractors should not affect drivers' ability to seek the appropriate redress the law entitles them to.[481] No matter what label drivers receive every

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477. *Id.* at *1 ("Uber attempts to avoid liability from these claims by claiming to be a technology platform, rather than a transportation company, because they connect people who need rides with independent contractors who can provide them.").

478. Weston, *supra* note 12 at 137 (citing "the U.S. Supreme Court has, arguably incorrectly, interpreted the FAA to apply to ordinary employment to preempt state administrative procedures, and a practical matter to make impossible the enforcement of access to class relief necessary to vindicate even federal statutory rights.").

479. Catherine L. Fisk, *Collective Actions and Joinder of Parties in Arbitration: Implications of DR Horton and Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 175, 179 (2014) ("The Fifth Circuit majority's assumption, like the Supreme Court majority's in Concepcion, that individual determination of claims is better suited to arbitration is simply wrong in many cases."). *See* Southland Corp. v. Keating, 465 U.S. at 24 (1984) (O'Connor, J., dissenting) (arguing that the majority's interpretation of 9 U.S.C. § 2 is "unquestionably wrong.").

480. Strong, *supra* note 78 at 269. *See* Meyer v. Kalanick, 2016 U.S. Dist. LEXIS at *1 ("Since the Late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary with the courts.") (Rakoff, R.).

481. Dara Kerr, *UK Court Rules Uber Drivers Employees, Not Contractors,* C NET (October 28, 2016), www.cnet.com/news/uber-uk-court-ruling-drivers-

time they turn on their Uber app to drive, they perform a service, and doing so puts them at risk for liability. A risk which most Uber drivers are not aware they are subject too. Giving corporations the power to protect their own business interest by eliminating class relief is not only unfair to employees but it is unjust. In considering what corporate interests are, it is quite alarming that courts are choosing those interests over a larger societal interest in protecting the weaker party.[482]

Regarding class arbitrations, courts should consider that by disallowing class arbitrations, they are discouraging employees from bringing suit. Justice Breyer stated in the *Concepcion* dissent that class arbitrations are "more efficient than thousands of spate proceedings for identical claims."[483] Since *Concepcion,* Justice Scalia had been the biggest proponent of allowing class action waivers in arbitration clauses as well as a major advocate for businesses.[484]

Now Justice Gorsuch has taken over Justice Scalia's role, as an advocate for businesses and a critic of administrative agencies as demonstrated in Lewis, where the Supreme Court again narrowed the protection for employees' rights.[485] This Comment proposes that Congress must enact an alternative regulatory scheme to reform the FAA. A proposal that also has been accepted by Justice Ginsberg who stated that she personally will push Congress to consider enacting legislation to resolve the dispute between the FAA and labor related statutes.[486] By adding an amendment to the

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employees-not-contractors/ (last visited February 9, 2017) (analyzing while drivers want to be independent, drivers should still be protected by employment laws). *See* Dan Levine, *Uber Drivers Remain Independent Contractors as Lawsuit Settled*, TECHNOLOGY NEWS (April 22, 2016), www.reuters.com/article/us-uber-tech-drivers-settlement-idUSKCN0XJ07H (last visited February 9, 2017) (stating that while Judge Chen held Uber drivers are ultimately independent contractors, drivers are still deserving of just compensation).

482. *See* Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S Ct. at 1783 (2010) (Ginsburg J. dissenting) (stating "when adjudication is costly and individual claims are no more than modest in size class proceedings may be "the thing" i.e., without them, potential claimants will have little if any incentive to seek vindication of their rights.") (emphasis added). *See also* Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (CA7 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

483. AT&T Mobility, LLC v. Concepcion, 131 S. Ct at 1759 (2011) (Breyer, J. dissenting). *See* Strong, *supra* note 78 at 236 ("In a judicial multiparty proceeding, benefits accrue to both parties (by resolving the dispute at a single time in a single forum and court itself (by reducing the burden on judicial resources.").

484. Judy Greenwald, *Scalia's Death Limits Chances for Pro-Business Ruling*, BUS. INS. (February 28, 2016, 12:00 AM), www.business insurance.com/article/20160228/AUDIO/160229860.

485. Marinelli, *supra* note 11.

486. Staples, *supra* note 222.

FAA, the federal policy favoring arbitration could remain intact while providing clarity on how the FAA should be interpreted with other labor statutes.[487] Also, a change could be made to pre-dispute arbitration to clarify if claimants should file with an arbitrator or with a court. The FAA could specify whether claims are subject to FAA procedures, or administrative law procedures, regarding the NLRA and state labor regulations like PAGA.

First, in regard to pre-dispute arbitration, a uniform procedure needs to be defined in determining arbitrability. Currently, pre-dispute arbitration is convoluted and confusing as to whether the contracting language designates a judge or arbitrator to decide the agreement's arbitrability. The FAA should state a clear procedure as to who decides arbitrability, so courts no longer have the burden of deciding the parties' contractual intentions. The FAA should specifically state what contract language parties must use if they want their claims to be delegated to the arbitrator or judge. The FAA should also require the parties to declare whether the issue of arbitrability is to be decided by the judge or arbitrator. As a result, the parties would maintain contracting power but their contracts would be properly worded to avoid any disputed ambiguity. If this approach is unsuccessful the FAA could prohibit the enforcement of pre-dispute arbitration contracts in consumer, civil rights, antitrust, and employment contracts cases.

Second, arbitration can conflict with federal and state statutory rights. As a result, parties can be "denied important protections of our justice system, which include administrative remedies and the ability to utilize class or group actions to affordably obtain counsel less likely to take small claims or complicated antitrust cases on an individual basis."[488] Congress should recognize that the broad interpretation of the FAA has violated these statutory rights, and limit the FAA's ability to preempt administrative remedies.[489] Congress could also protect substantive rights that are protected by administrative procedures by creating a new regulatory agency. This agency could have independent authority to rectify statutory violations.[490] In order for an agency to be effective, however, the FAA must disallow arbitral class waivers that prevent these claims from being adjudicated.

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487. *Id.*

488. Weston, *supra* note 12 at 137 ("Attempts to change the scope of mandatory pre-dispute arbitration have met limited success. The proposed Arbitration Fairness Act of 2013, versions of which have been introduced since 2007, seeks to prohibit enforcement of pre-dispute arbitration contracts in consumer, civil rights, antitrust and employment matters."). Arbitration Fairness Act of 2013 S.878 113th Cong. § 402 (a) (2013).

489. *See* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1334-40 (2015) (discussing the burden employees face in obtaining legal representation in arbitration).

490. Weston, *supra* note 12 at 140.

Third, the FAA should be amended to require employers to give better notice to their employees that a mandatory arbitration clause exists within the contract. Employees should receive brief analysis of what arbitration is and the effect an arbitration agreement can have on the employees' rights. Also, in order to ensure all arbitration clauses are not unconscionable, the FAA should require all arbitration agreements contain opt-out clauses. That way an employees' right to trial is not taken away and the employee is given the discretion to choose whether or not he wants to litigate his claims in arbitration. To avoid unconscionable contracts, employers should be required to tell their employees what will occur if the employees choose not to opt-out of the arbitration clause. This process will ensure that the employees are made aware of their rights and are not contracting against his will.

Last, if Congress does not want to create a federal agency, it could attempt to delegate the authority to the states. The claims would first be heard by the state regulatory board.[491] The regulatory board would hear all claims involving federal and statutory rights. The board would then decide what venue is proper for the claim to be adjudicated. However, this proposal is likely unrealistic because it exceeds the scope of the state's police power. Consequently, while the federal government can condition the reception of money with requests to act, ultimately the federal government cannot force the states to do anything. Asking the states to enact a law that would cost the state money would not sit well with states' government. The proposal also may be expensive for certain states to implement. The best plan is for Congress to encourage the states to aid by awarding grant money or tax incentives.

Until the FAA is reformed, administrative agencies have a duty to make employees more aware of their workplace rights and the administrative remedies that are available.[492] Federal and state agencies should raise awareness about the consequences of pre-dispute arbitration contracts by using simple marketing strategies. These strategies include providing notice to employees on the agencies' websites, requiring human resource departments to hold mandatory informational sessions, and by posting information on the agencies' social media. Current employees need better education of what their statutory rights are. Employees need to be expressly informed that mandated arbitration does not prohibit employees from filing complaints with state or federal regulatory agencies.[493] If employees were more informed of their rights, it would lead to more employees receiving deserved redress, and a

491. William A. Herbert and Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?* 54 U. LOUISVILLE L. REV 381, 434 (2016).

492. Weston, *supra* note 12 at 140.

493. *See Id.* (stating practical education to employees could provide awareness to mandatory arbitration and administrative access).

greater push for reform of the unfair system.

V. CONCLUSION

As technology continues to evolve and society continues to change, Congress can no longer stubbornly refuse to reform the FAA and allow courts to continue to wrestle with the issues the outdated FAA has caused. The FAA and its preemptive force has created a significant policy concern for employees. If Courts continue to allow companies to use the FAA as a means of protection, employees will continue to be precluded from vindicating their rights and receiving protection from administrative agencies. The current trend to allow class action, collective action, and representation claims to be waived, unfairly alters the scheme of justice needed to uphold our system. If the FAA remains unchanged, it will continue to violate due process, and the principles of federalism. Most importantly it will continue to violate the fundamental principle of the United States government: the separation of powers.

The proposed changes to the FAA would allow for the implementation of actual and meaningful reform to all arbitration contracts. Congressional intervention is required because the courts refuse to come to a uniform decision. Further, states lack the police power to override a federal statute and do not have the means to regulate multinational and international companies' employment contracts. Therefore, it is up to Congress to change the system and uphold the pillars of fairness and justice in the U.S. legal system.