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# THE FREEDOM TO CONTRACT: EMPLOYMENT ARBITRATION IS FEEDING ON FARM LABORERS

MELODEE WINES*



## I. INTRODUCTION

Agriculture plays an important role in U.S. economy.[1] In addition to providing food and raw materials, agriculture generates employment opportunities for a large portion of the population.[2] In 2021, 2.6 million U.S. jobs were direct on-farm employment, but not all of those 2.6 million jobs were filled by U.S. workers.[3] Rather,

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1. *See generally* Steven Zahniser, *What is Agriculture's Share of the Overall U.S. Economy*?, USDA ECON. RSCH. SERV., www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58270 [perma.cc/AZQ4-MGT9] (Apr. 19, 2024) (stating that in 2023, agriculture, food, and related industries contributed roughly $1.530 trillion to U.S. gross domestic product, which is a 5.6 percent share).

2. *See generally* Kathleen Kassel, *Ag and Food Sectors and the Economy*, USDA ECON. RSCH. SERV., www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/ [perma.cc/8LJB-KRLP] (Apr. 19, 2024) (stating that in 2021 agriculture, food, and related industries provided 10.4 percent of U.S. employment).

3. *Id.* (providing that of the 21.1 million jobs related to agriculture in 2021,

eleven percent of on-farm jobs were filled by foreign agricultural workers who are in the U.S. with a temporary H-2A visa.[4] The H-2A Temporary Agricultural Workers Program allows producers to hire non-immigrant foreign labor for short-term contracts.[5] In return, H-2A workers expect fair working conditions and the ability to earn enough money to return home and support their families.[6] Although H-2A workers help put food on tables around the world, the employment contracts they sign are often breached.[7]

For example, Juan, a father of two from Hidalgo, Mexico, was able to obtain an H-2A visa and begin working on a large tobacco farm in Kentucky.[8] To Juan, this was a great opportunity to provide for his family.[9] It became clear, however, that his employer would not uphold its side of the contract. Juan's contract stated that he would be paid $8.00 an hour, would be provided with livable housing conditions, and that his utilities would be paid.[10] Yet, Juan was only paid $6.00 an hour, his housing was decrepit, and he was left to pay for his utilities.[11]

Juan's story is not unique.[12] Although H-2A workers account for only a small portion of employees in the U.S., their treatment sets a tone for the entirety of vulnerable employees such as those

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direct on-farm employment accounted for 2.6 million); *see generally* Barry Estabrook, *Farmers Can't Find Enough Workers to Harvest Crops—and Fruits and Vegetables Are Literally Rotting in Fields*, EATINGWELL, www.eatingwell.com/article/291645/farmers-cant-find-enough-workers-to-harvest-crops-and-fruits-and-vegetables-are-literally-rotting-in-fields/ [perma.cc/F6AD-SET2] (Dec. 9, 2020) (summarizing the need for the H-2A Guest Worker Program on American farms due to labor shortages occurring across the U.S.).

4. Philip Martin, *A Look at H-2A Growth and Reform in 2021 and 2022*, WILSON CTR. (Jan. 3, 2022), www.wilsoncenter.org/article/look-h-2a-growth-and-reform-2021-and-2022 [perma.cc/R6LU-EKZK] (discussing the increase of H-2A visa workers in the United States over the past two years).

5. *H-2A Temporary Agricultural Program*, U.S. DEP'T OF LABOR, www.dol.gov/agencies/eta/foreign-labor/programs/h-2a [perma.cc/3QQV-XKZZ] (last visited Oct. 5, 2021); *see generally H-2A Guest Worker Fact Sheet*, NAT'L CTR. FOR FARM WORKER HEALTH, www.ncfh.org/h-2a-guest-workers-fact-sheet.html [perma.cc/F9GG-CWD7] (last visited Oct. 5, 2021) (summarizing statistics on the H-2A Guest Worker Program).

6. ETAN NEWMAN, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 28 (2012), www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf [perma.cc/3ELX-D36X].

7. Kassel, *supra* note 2 (stating that in 2021, expenditure on food accounted for 12.4 percent of a U.S. households' spending).

8. NEWMAN, *supra* note 6.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* (sharing multiple H-2A farmworker stories including Chinnawat from Thailand who was promised $8 an hour, but after just a few weeks of working on a farm in North Carolina received no pay).

with lessened education, wealth, and business experience.[13] Ultimately, the treatment of H2-A workers serves as a vehicle for exploring the disproportionate power that employers can hold when contracting with their employees.[14]

Part of this exploitation of power derives from the inclusion of arbitration clauses within employment contracts. Arbitration clauses provide an opportunity for parties to enter a form of alternative dispute resolution where employers and employees can solve disputes through a third-party decision-maker.[15] While arbitration clauses can be used effectively, when such clauses are signed under economic duress, the execution of the clause leads to an unjust barrier to the court system.[16]

The presence of economic duress at the signing of the employment contract in *Martinez-Gonzalez v. Elkhorn Packing Co. LLC* demonstrates the inequitable imbalance between H-2A workers and their employers.[17] In *Martinez-Gonzalez*, the U.S. Court of Appeals for the Ninth Circuit did what it has been historically known to do—i.e., uphold arbitration agreements.[18] *Martinez-Gonzalez* is a contracting victory for employers because it creates a higher bar for employees' ability to reach the elements of economic duress, which in turn, leads to a higher number of arbitration clauses being upheld in favor of the employer.[19]

As this Article will demonstrate, however, that "victory" must have limitations in order to afford more protection to vulnerable

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13. Keith W. Diener, *The Doctrine of Unconscionability: A Judicial Business Ethic*, 8 U. P.R. BUS. L.J. 103, 111 (2016); *see also* Johnson v. Mobil Oil Corp., 415 F. Supp. 264, 268 (E.D. Mich. 1976); *see also H-2A Guest Worker Fact Sheet*, *supra* note 5.

14. *H-2A Guest Worker Fact Sheet*, *supra* note 5.

15. 6 CAL. JUR. 3D ARBITRATION AND AWARD § 29, Westlaw (database updated Aug. 2024); *see Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining alternative dispute resolution as a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation").

16. *See* KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS (2015) files.epi.org/2015/arbitration-epidemic.pdf [perma.cc/B9UF-38VE] (discussing generally the issues that employees face when contracting).

17. *See generally* Martinez-Gonzalez v. Elkhorn Packing Co. LLC, 25 F.4th 613 (9th Cir. 2022) (analyzing the validity of an arbitration agreement between employer and employee).

18. *Id.*; *see generally* 10 No. 11 Quinlan, HR COMPLIANCE LAW BULLETIN art. 2 (2004), Westlaw QNLNHRC (discussing the U.S. Supreme Court's common stance on arbitration).

19. *See* Rich & Whillock, Inc. v. Ashton Dev., Inc., 204 Cal. Rptr. 86, 88-89 (Cal. Ct. App. 1984) (explaining that under California law, economic duress requires the establishment of a "wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure"); *see also* Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405 (N.J. Super. Ct. App. Div. 2000) (holding arbitration agreements invalid when there is the presence of economic duress).

employees. While the freedom to contract in this U.S. capitalist society is of paramount importance to citizens' economic rights, making employment contracts adverse to the working class defeats the fundamental principles upon which employee-employer contracting relationships are built.[20]

This Article will unpack how the U.S. Court of Appeals for the Ninth Circuit erred in its decision in *Martinez-Gonzalez*. Further, this Article will discuss that although the majority and dissent tip the scales in different directions, the case demonstrates the balancing act of power dynamics between the working poor and their employers.[21]

Part II of this Article will cover the historical background of the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA"). Then, it will discuss the concept of economic duress when executing a contract. It will also highlight the history of the H-2A Temporary Agricultural Workers Program. Further, Part II will explain the factors which led to the unsound decision in *Martinez-Gonzalez*. Part III will demonstrate the majority opinion's analysis of the enforceability of the arbitration agreement in the face of economic duress and undue influence. In addition, Part III will discuss Judge Rawlinson's dissenting opinion, as well as supporting arguments made in the U.S. District Court for the Northern District of California, which substantiate Judge Rawlinson's view that the arbitration agreement here should not be enforced due to the presence of economic duress and undue influence. Finally, Part IV will offer the position that the majority in *Martinez-Gonzalez* failed to properly analyze the doctrine of economic duress using the facts of this case. Further, Part IV will conclude that *Martinez-Gonzalez* failed to protect some of society's most vulnerable from coercive contracting practices, which could persuade future courts to follow suit.

## II. BACKGROUND

This section will offer background information on various topics pertinent to the Ninth Circuit's ruling in *Martinez-Gonzalez*. Subsection A will dive into the FAA and the CAA to explain the role of arbitration in the American legal system.[22] Subsection B will

20. *See* Cummings v. Vaughn, 911 S.W.2d 739 (Tenn. Ct. App. 1995); *see also* Arnhold v. Ocean Atl. Woodland Corp., 284 F.3d 693, 705 (7th Cir. 2002) ("Freedom not to contract should be protected as stringently as freedom to contract.'") (quoting Venture Assocs. Corp. v. Zenith Data Sys. Corp., 96 F.3d 275, 281 (7th Cir. 1996) (Cudahy, J. concurring)).

21. *See* Nmsbpcsldhb v. Cnty. of Fresno, 61 Cal Rptr. 3d 425, 428-29 (Cal. Ct. App. 2007) (explaining that under California law, a contract may be rescinded under various grounds, including undue influence and duress (citing CAL. CIV. CODE § 1689)).

22. *Id.*

discuss the doctrine of economic duress. Next, Subsection C will provide background on H-2A Temporary Agricultural Workers. Finally, Subsection D will briefly overview the facts and events leading up to *Martinez-Gonzalez*.[23]

## *A. Federal and California Arbitration Acts*

An employment contract is an agreement between an employer and an employee that sets the terms and conditions of employment.[24] While the terms of each employment contract vary, a common provision for employers to include in employment contracts is an arbitration clause.[25] As a general concept, arbitration is a form of alternative dispute resolution in which parties solve their legal dispute through an unbiased third-party decision-maker, known as an arbitrator.[26] Arbitration yields a final resolution of the dispute in the form of an arbitration award.[27] On a policy level, arbitration is beneficial because it cuts costs and frees up the court system.[28] These benefits, however, must be weighed against drawbacks, including forcing disadvantaged contracting parties, such as H-2A visa workers, into inequitable situations.[29]

In 1925, Congress enacted the FAA to encourage the use of arbitration to resolve conflicts in any "maritime transaction or a

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23. *Martinez-Gonzalez*, 25 F.4th at 613.

24. *Employee Contracts: Everything You Need to Know*, UPCOUNSEL, www.upcounsel.com/employee-contracts [perma.cc/ECH8-PDPY] (last visited Sept. 13, 2024).

25. *Rescission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition [perma.cc/ML4D-Z35J] (last visited Sept. 13, 2024).

26. Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure As A Second-Best Alternative to Mandatory Arbitration*, 122 YALE L.J. 1560, 1562 (2013); *see Martinez-Gonzalez*, 25 F.4th at 620 (citing Revitch v. DIRECTV, LLC, 977 F.3d 713, 716 (9th Cir. 2020) (noting *Martinez-Gonzalez* is governed by California state law, however it is useful to understand the Federal Arbitration Act ("FAA") and the California Arbitration Act ("CAA")); *see also Alternative Dispute Resolution*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining alternative dispute resolution as a "procedure for settling a dispute by means other than litigation, such as arbitration or mediation.").

27. Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 AM. REV. INTL. ARB. 383, 385 (1999).

28. *See* Tanya M. Marcum & Elizabeth A. Campbell, *The Arbitration Seesaw: Federal Act Preempts General Law Thereby Restricting Judicial Review*, 47 VAL. U.L. REV. 965, 969 (2013) (discussing the economic and social justifications for solving disputes through the use of arbitration).

29. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (Apr. 6, 2018), www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [perma.cc/ZN8Y-LNEU] (discussing how the expanding use of arbitration agreements can bar access to the courts).

contract evidencing a transaction involving commerce."[30] A relatively short statute, the FAA provides the process and procedure for carrying out the arbitration.[31] The FAA applies when the dispute is subject to mandatory federal arbitration or when there is a voluntary arbitration agreement, and the dispute involves federal law.[32] The heart of the statute, Section 2, simply declares that arbitration agreements are generally "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[33] This section of the FAA evidences a national policy favoring the use of arbitration to resolve matters.[34]

The FAA was intended to produce a streamlined, efficient method to resolve commercial disputes between consenting co-equals in a cordial setting.[35] In the reformers' minds, the neutral party arbitrator would be an expert from the same industry who could facilitate or produce a quicker, better-informed result when compared to litigation before a judge or jury with little or no

30. Michael A. Rosenhouse, Annotation, *Construction and Application of Federal Arbitration Act – Supreme Court Cases*, 28 A.L.R. Fed. 2d 1 (2008); 9 U.S.C.A. § 2 (West); *see* 9 U.S.C. § 1 (defining maritime transactions as "charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction"); *see also Commerce*, BLACK'S LAW DICTIONARY (5th ed. 1979) (defining commerce as "intercourse by way of trade and traffic between different peoples or states and the citizens or inhabitants thereof, including not only the purchase, sale, and exchange of commodities, but also the instrumentalities and agencies by which it is promoted and the means and appliances by which it is carried on, and transportation of persons as well as of goods, both by land and by sea.").

31. 9 U.S.C.A. § 2 (West 2012).

32. MARTIN D. CARR ET AL., EXPERT SERIES: CALIFORNIA AFFIRMATIVE DEFENSES § 68:1 (2d ed. 2022).

33. *Id.*; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 is the primary substantive provision of the [FAA].").

34. Matthew P. Bock, *A Few Circuit Citys Back, One Giant Luce Forward: A Review of the Ninth Circuit's Interplay with the National Policy Favoring Arbitration in the Employment Contract Setting*, 41 WILLAMETTE L. REV. 535 (2005); *see Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ."); *see* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("[A] contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable . . . .").

35. *See* Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115 (discussing the history of the Federal Arbitration Act); *see also* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1st ed. 1992) (discussing the events and beliefs that inspired the enactment of the FAA during the 1920s). *See generally* Preston D. Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499 (1995) (discussing the history of the FAA and the U.S. Supreme Court's interpretation).

background in the industry.[36]

In interpreting arbitration agreements, federal courts may apply state law.[37] Like the U.S. federal government, California has well-established policies favoring arbitration as an efficient alternative to litigation.[38] The CAA regulates private arbitration in the state of California. Thus, any arbitration clause that is executed with the choice of California law must comply with the CAA.[39] It is important to note that the FAA supersedes any conflicting state law.[40] State acts, however, such as the CAA, are historically modeled to comply with the FAA.[41] Consistent with traditional choice-of-law principles, the procedural provisions of the FAA do not preempt California procedures in California state court.[42]

As more employers and businesses use arbitration agreements to avoid the judicial system for resolving disputes, the application of the FAA and the CAA to various types of arbitration agreements have been the subject of numerous lawsuits.[43] Today, it is believed that at least fifty-four percent of American workers are bound by

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36. Szalai, *supra* note 35; MACNEIL, *supra* note 35; Wigner, *supra* note 35.

37. *See* Acaley v. Vimeo, Inc., 464 F. Supp. 3d 959, 965 (N.D. Ill. 2020) ("[A] question of whether an agreement to arbitrate has been formed is governed by state law."). *See generally* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) (applying state law to the interpretation of an arbitration agreement).

38. Saika v. Gold, 56 Cal. Rptr. 2d 922 (Cal. Ct. App. 1996); *see* Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 673 P.2d 251, 257 (Cal. 1983) (stating arbitration is a "speedy and relatively inexpensive means of dispute resolution"); *see* Madden v. Kaiser Found. Hosps., 552 P.2d 1178, 1183 (Cal. 1976) *(*stating that arbitration is "common, expeditious, and judicially favored"); *see* Moncharsh v. Heily & Blase*,* 832 P.2d 899, 902 (Cal. 1992) (stating that the Califonia Legislature has expressed a "strong public policy in favor of arbitration . . . .").

39. Richard R. Mainland, *Full Disclosures: Before Vacating an Arbitration Decision Based on the Arbitrator's Lack of Disclosure, Courts Must Weigh the Conflicting Principles of Finality and Fairness*, 34 L.A. LAW. 29, 30 (2011).

40. Robert E. Benson, *Application of the Federal Arbitration Act in State Court Proceedings*, 43 COLO. LAW. 33, 35 (2014) (discussing to what extent the FAA applies to arbitration agreement issues in state court proceedings).

41. *California Arbitration Act & It's Importance*, ADR TIMES (Aug. 7, 2024), www.adrtimes.com/california-arbitration-act-importance-of-arbitration/ [perma.cc/X5F2-9WTD].

42. Swissmex-Rapid S.A. de C.V. v. SP Sys., LLC, 151 Cal. Rptr. 3d 229 (Cal. Ct. App. 2012).

43. *See* Colvin, *supra* note 29 (stating that since the early 200s the use of mandatory arbitration agreements has more than doubled); *see also* Garrido v. Air Liquide Indus. U.S. LP, 194 Cal. Rptr. 3d 297 (Cal. Ct. App. 2015) (discussing the application of the CAA and FAA when former employee brought class action against former employer and that employee was alleging various labor code violations and unfair business practices). *See generally* Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000) (discussing the application of the CAA and FAA when former employees brought wrongful termination action, and employer moved to compel arbitration), *abrogated in party by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

arbitration agreements.[44] Although arbitration is often perceived as a faster and less costly alternative to litigation, some advocates of employee rights contend that mandatory arbitration agreements are one-sided measures that are misused to suppress claims instead of being used as a good-faith method to resolve claims.[45] Further, while arbitration is supposed to be based on the legally-executed contractual agreement of the parties involved, there is evidence that individuals often do not comprehend the significance of arbitration clauses and how these clauses block access to courts.[46]

## *B. The Doctrine of Economic Duress*

Economic duress is an argument that can be raised to invalidate an otherwise validly-formed contract.[47] The goal of economic duress is to "guard against economic exploitation," not to "interfere with the notion of freedom of contract or the desirability of finality of private dispute resolution."[48] Yet, even with that common goal in mind, courts have taken various spins on defining the parameters of the economic duress doctrine.[49]

When the issue of economic duress arises, courts must determine whether there are facts to satisfy the elements of an economic duress claim.[50] Under California law, economic duress

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44. Colvin, *supra* note 29; *Garrido*, 194 Cal. Rptr. 3d 297; *Armendariz*, 6 P.3d 669.

45. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012); *see* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1255 (2009) (stating that the suppression of claims arises in part due to the outsource of the adversarial system from a public sphere to a private sphere).

46. *See* STONE & COLVIN, *supra* note 16 (discussing generally the issues that employees face when contracting); *see CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*, CONSUMER FIN. PROT. BUREAU (Mar. 10, 2015), www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/ [perma.cc/MS9E-D2MM] ("75 percent of consumers surveyed did not know whether they were subject to an arbitration clause . . . and fewer than 7 percent of those covered by arbitration clauses realized that the clauses restricted their ability to sue in court."); s*ee also* Colvin, *supra* note 29 ("It is the employers with the lowest-paid workforces that are most likely to impose mandatory arbitration on their employees."). "This is a concern from a policy perspective because low-paid employees are particularly vulnerable to infringements of their employment rights." *Id.*

47. 9 U.S.C.A. § 2 (stating that contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements).

48. CAL. CIV. CODE § 1689.

49. *See* Juliet P. Kostritsky, *Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide*, 53 ALBANY L. REV. 583, 589 (1989), scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1532&context=faculty_publications [perma.cc/NFP2-LE8N] ("The current law of duress is wholly unsatisfactory.").

50. *See* Applied Genetics Int'l, Inc. v. First Affiliated Secs., Inc., 912 F.2d 1238, 1242 (10th Cir. 1990) ("In general the elements of economic duress are:

occurs when: "(1) one party commits a wrongful act; (2) that act is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to agree to an unfavorable contract; and (3) causation exists."[51] In this case, Mr. Martinez-Gonzalez has the burden of proving duress because he is seeking rescission of the arbitration agreement in the employment contract.[52]

Historically, courts have hesitated to set aside agreements, as doing so could harm the notion of the freedom to contract.[53] However, there has been a trend toward recognizing the law's role in "correcting inequitable or unequal exchanges between parties of disproportionate bargaining power."[54] California courts have taken the "equitably based" approach to the economic duress doctrine in order to combat unequal exchanges between contracting parties and lead to an enforcement of minimal standards of business ethics when contracting.[55]

## *C. H-2A Temporary Agricultural Workers*

At the heart of *Martinez-Gonzalez* is an arbitration agreement dispute between an employer and an H-2A Temporary Agricultural Guest Worker.[56] The majority opinion, however, casts a wider scope than purely analyzing arbitration agreement disputes with H-2A workers. Namely, it sets the stage for all vulnerable employees, such as those with lack of education, wealth, or business experience.[57] Although the *Martinez-Gonzalez* majority opinion will affect more than just H-2A works, it is important to understand the H-2A Temporary Agricultural Guest Worker Program, as that provides context to the parties' arguments.

The H-2A program allows U.S. agricultural employers to bring nonimmigrant foreign workers to the U.S. to fill agricultural jobs of

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(1) a wrongful act or improper threat; (2) the absence of a reasonable alternative to entering the agreement; and (3) the lack of free will.").

51. *Martinez-Gonzalez*, 25 F.4th at 621.

52. CAL. CIV. CODE § 1689(b)(1) (stating that the party seeking rescission of the contract bears the burden of proof).

53. *See Rich & Whillock*, 204 Cal. Rptr. at 89-90 ("[C]ourts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final."); *see, e.g.*, Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32 (1st Cir. 2002) (finding no duress); VKK Corp. v. Nat'l Football League, 244 F.3d 114 (2d Cir. 2001) (finding no duress); Pro. Serv. Network, Inc. v. Am. All. Holding Co., 238 F.3d 897 (7th Cir. 2001) (finding no duress); Rissman v. Rissman, 213 F.3d 381 (7th Cir. 2000) (finding no duress); Bennett v. Coors Brewing Co., 189 F.3d 1221 (10th Cir. 1999) (finding no duress).

54. Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Serv. Co., 584 P.2d 15, 21 (Alaska 1978).

55. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J., dissenting) (citing *Rich & Whillock*, 204 Cal. Rptr. at 88-89).

56. *See Martinez-Gonzalez*, 25 F.4th at 613 (providing a synopsis of the case).

57. Diener, *supra* note 13; *see also Johnson*, 415 F. Supp. at 268.

temporary or seasonal nature.[58] The H-2 program traces back to the Bracero guest worker program.[59] The Bracero program was created in 1917 when World War I brought on a labor shortage in the agricultural industry.[60] During this period, the program employed over 70,000 Mexican workers, allowing their temporarily entrance into the U.S. for the purpose of working in cotton and sugar beet fields.[61] While the Bracero program temporarily ended in 1921, the labor shortages in agriculture caused by World War II in 1942 ushered in a new Bracero program.[62] Over the next twenty-two years, despite significant legal protections, the Bracero program became notorious for the rampant abuse of foreign workers.[63] This was due, in large part, to the pattern of poor housing, unpaid wages, and hazardous working conditions.[64] Congress shut down the Bracero program in 1964 but left in place another avenue to import foreign workers: the H-2 program.[65]

The H-2 program's provisions were similar to those in the Bracero program.[66] The Immigration Reform and Control Act ("IRCA") of 1986 separated the H-2 program into two temporary worker programs: H-2A and H-2B.[67] H-2A visas employ workers in the agricultural industry, while H-2B visas employ workers in non-

58. *H-2A Temporary Agricultural Program*, *supra* note 5; *see* NEWMAN, *supra* note 6 (sharing multiple H-2A farmworker stories, including one from David who experienced powerlessness and vulnerability as a bracero in the 1950s working 12-hour days for 50 cents an hour).

59. *H-2A Temporary Agricultural Program*, *supra* note 5; NEWMAN, *supra* note 6.

60. PHILIP MARTIN, IMPORTING POVERTY? IMMIGRATION AND THE CHANGING FACE OF RURAL AMERICA 20-24 (2009).

61. CARR ET AL., *supra* note 32; *see* VERNON M. BRIGGS JR., GUESTWORKER PROGRAMS: LESSONS FROM THE PAST AND WARNINGS FOR THE FUTURE 2 (2004), www.cis.org/sites/cis.org/files/articles/2004/back304.pdf [perma.cc/CX4L-V88V] (stating that the Bracero Program's "biggest year was in 1959 when 439,000 braceros were employed").

62. CARR ET AL., *supra* note 32.

63. Robert Russo, *Collective Struggles: A Comparative Analysis of Unionizing Temporary Foreign Farm Workers in the United States and Canada*, 41 HOUS. J. INT'L L. 5, 24, 25 (2018).

64. *See* Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 131 (2004) (describing how the problems with the Bracero Program resulted in terrible conditions); *see also* Otey M. Scruggs, *Texas and the Bracero Program, 1942-1947*, 32 PAC. HIST. REV. 251, 261 (1963) (describing how the Braceros were subject to extremely low wages and horrible living conditions).

65. NEWMAN, *supra* note 6.

66. *Compare H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers [perma.cc/6X49-TH98] (last visited Oct. 5, 2022) (discussing the H-2A visa program), *with* NEWMAN, *supra* note 6, at 12-13 (discussing the Bracero program).

67. *H-2A Temporary Agricultural Workers*, *supra* note 66.

agricultural industries, such as seafood processing, forestry, landscaping, and construction.[68] The conditions of today's H-2A workers are, in many ways, similar to those of the Bracero program.[69] In effect, this has kept alive the theme of imbalance in power dynamics between employees who lack knowledge of their rights and their employers, which makes these employees particularly susceptible to being victims of legal violations.[70]

The modern-day multi-step process for an H-2A visa takes approximately seventy-five days, and involves multiple federal agencies.[71] First, the employer applies for a domestic job order with the local State Workforce Agency ("SWA").[72] Second, the employer applies for a temporary labor certification with the Department of Labor's Chicago National Processing Center.[73] Third, the Department of Labor's Chicago National Processing Center provides the employer with its final determination.[74] Fourth, the employer completes an H-2A visa petition with U.S. Citizenship and Immigration Services ("USCIS").[75] Fifth, the workers apply for the H-2A visa with the U.S. Department of State, and complete consulate interviews. Finally, approved workers travel to the worksite, arriving on the start date with an arrival and departure record.[76]

In the 2021 fiscal year, the Department of Labor ("DOL") certified over 317,000 agricultural jobs to be filled by H-2A workers.[77] Approximately eighty percent of these certified jobs

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68. Stephen W. Yale-Loehr, *Foreign Farm Workers in the U.S.: The Impact of the Immigration Reform and Control Act of 1986*, 15 N.Y.U. REV. L. & SOC. CHANGE 333, 335 (1988).

69. NEWMAN, *supra* note 6, at 15; Michelle Chen, *How Temporary Work Visas Hurt Migrant Women*, THE NATION (Nov. 9, 2017), www.thenation.com/article/archive/how-temporary-work-visas-hurt-migrant-women/ [perma.cc/7H7F-4VJ9]; Jessica Garrison, Ken Bensinger & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015, 9:47 AM), www.buzzfeednews.com/article/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f [perma.cc/W3VQ-CUHV]; *H-2A Temporary Agricultural Program*, *supra* note 5.

70. *See* Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592 (1982) (analyzing a suit brought by Puerto Rico for declaration that actions of east coast apple growers violated federal laws which preferred domestic laborers over foreign temporary laborers); *see* Va. Agric. Growers Ass'n v. U.S. Dep't of Lab., 756 F.2d 1025, 1028 (4th Cir. 1985) (analyzing the laws governing the hiring of foreign workers).

71. *H-2A Temporary Agricultural Program*, *supra* note 5.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *H-2A Visa Program*, U.S. DEP'T OF AGRIC., www.farmers.gov/working-with-us/h2a-visa-program [perma.cc/X94K-YY93] (last visited Oct. 2, 2022).

77. Martin, *supra* note 4.

resulted in the issuance of H-2A visas.[78] Ninety-three percent of these H-2A visa holders came from Mexico.[79] On average, H-2A workers remain in the U.S. for six months,[80] and account for approximately eleven percent of full-time U.S. agricultural jobs.[81]

Employers are required to reimburse H-2A workers for their travel to and from the worker's home country, provide housing, pay a wage at a rate established by the DOL, provide three meals per day, and provide workers' compensation.[82] As a result, immigrant workers are enticed to take this opportunity, as these factors pose significant benefits and offer higher wages than they would earn in their home country.[83]

In reality, however, H-2A workers are excluded from some standard employment protections.[84] For example, they are excluded from the National Labor Relations Act's ("NLRA") protection for joining a labor union and compelling good-faith collective bargaining.[85] Thus, "[w]hile other workers can rely on statutory and legal protections to shield them from exploitation, … H-2A workers are largely left to depend on the goodwill of their employers."[86]

Predictably, this regulatory structure that severely restricts H-2A workers' bargaining power has led to significant abuses.[87] Within the H-2A program specifically, a study conducted by Centro de los Derechos del Migrante, Inc., a migrant worker advocacy group, found that ninety-four percent of H-2A workers experienced three or more serious legal violations, including "discrimination, sexual harassment, wage theft, and health and safety violations" by their employers, and nearly half experienced five or more.[88]

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78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *H-2A Visa Program*, *supra* note 76.

83. *See* NEWMAN, *supra* note 6, at 15 (discussing the treatment and experience of H-2A Temporary Agricultural Workers in the U.S. since the split of the program).

84. Martin*, supra* note 4.

85. 29 U.S.C. § 152(3).

86. Motion for Leave to File *Amicus Curiea* Brief of Farmworker Justice Supporting Plaintiffs-Appellees, Martinez-Gonzalez v. Elkhorn Packing Co., 25 F.4th 613 (9th Cir. 2022) (No. 19-17311).

87. *See generally* NEWMAN, *supra* note 6 (summarizing the general treatment, legal violations, and experiences that H-2A Visa Temporary Agricultural Workers have endured).

88. *See* Daniel Costa, *New Survey and Report Reveals Mistreatment of H-2A Farmworkers is Common*, ECON. POL'Y INST. (April 15, 2020, 2:30 PM), www.epi.org/blog/new-survey-and-report-reveals-mistreatment-of-h-2a-farmworkers-is-common-the-coronavirus-puts-them-further-at-risk/ [perma.cc/96FB-RD3P] (summarizing statistics surrounding the H-2A Temporary Agricultural Visa Program in the United States).

### *D. The Story of the Arbitration Clause Between Mr. Martinez-Gonzalez and Elkhorn Packing Company*

Elkhorn Packing Company is a farm labor contractor in Salinas, California that provides labor contracts for D'Arrigo Brothers, a California-based lettuce farm.[89] In 2015, Dario Martinez-Gonzalez ("Mr. Martinez-Gonzalez") was recruited in Mexico by Elkhorn to work in fields operated by D'Arrigo in California.[90]

Mr. Martinez-Gonzalez is an agricultural worker from Mexicali, Mexico.[91] The job with Elkhorn was a great opportunity for Mr. Martinez-Gonzalez because it paid five times more than he was earning in Mexico.[92] Increased pay was a great help to Mr. Martinez-Gonzalez, who is responsible for supporting his wife, mother, stepfather, and mother-in-law.[93] A hard worker, Mr. Martinez-Gonzalez had been working agricultural jobs in Mexico since he was six.[94] Importantly, his limited education made opportunities, such as the Elkhorn job, hard for Mr. Martinez-Gonzalez to come by because he only has an eighth-grade education.[95]

Elkhorn assisted Mr. Martinez-Gonzalez in obtaining an H-2A temporary agricultural worker visa.[96] In 2016, after obtaining his visa, Mr. Martinez-Gonzalez boarded a bus provided by Elkhorn.[97] Just twelve hours into what he thought was his bright new beginning, he arrived in Monterey County, California.[98] At 1:00 AM, Mr. Martinez-Gonzalez was assigned to a hotel room and within just a few hours boarded a bus to start working in the D'Arrigo Brother's lettuce fields.[99] While on the bus, Crispin Bermudez, an Elkhorn supervisor, urged workers to put effort into their work.[100] He emphasized that they were privileged to be there, it was a good opportunity, and he stated that those who did not want to work hard could go back to Mexico.[101] H-2A workers at Elkhorn were under the

89. Martinez-Gonzalez v. Elkhorn Packing Co., No. 18-cv-05226-EMC, 2019 WL 13119015, at *1 (N.D. Cal. Mar. 11, 2019).

90. *Id.*

91. *Id.*; *see also Mexicali*, BRITANNICA, www.britannica.com/place/Mexicali [perma.cc/Q4NQ-JQ6U] (last visited Sept. 1, 2024).

92. Martinez-Gonzalez v. Elkhorn Packing Co., LLC, No. 18-cv-05226-EMC, 2019 WL 5556593, at *9 (N.D. Cal. Oct. 29, 2019).

93. *Id.*

94. *Id.* at *2.

95. *Id.*

96. *Id.* at *3.

97. *Id.* at *7.

98. *Id.*

99. *Id.* at *3; *see H-2A Temporary Agricultural Program*, *supra* note 5 (stating that employers must provide transportation to and from the workers' living quarters and the employer's worksite).

100. *Martinez-Gonzalez*, 2019 WL 13119015, at *1.

101. *Martinez-Gonzalez*, 2019 WL 5556593, at *2.

impression that their visas did not permit them to work for any employer besides Elkhorn while in the U.S.[102]

On April 11, 2016, a few days after Mr. Martinez-Gonzalez began working in the lettuce fields, Elkhorn held what executives for the company described as an orientation for incoming employees.[103] Unlike a typical orientation that occurs before starting a position, however, the orientation took place at the end of the workday, around 4:00 PM. While the timing was odd, the location was stranger: a hotel parking lot.[104] In the parking lot, there were approximately 150 workers standing in line for at least forty minutes to sign their employment agreements.[105] Once they finally arrived at the front of the line, an Elkhorn representative told them where to sign, urging employees to hurry.[106]

Buried within the employment package was an arbitration agreement that required employees to resolve all disputes with Elkhorn by arbitration.[107] The arbitration agreement was written in Spanish, which is Mr. Martinez-Gonzalez's native language.[108] Exhausted after a day of manual labor, and unaware of the potential implications, Mr. Martinez-Gonzalez signed the agreement without reading it.[109] In relevant part, the agreements provided:

> The Company [Elkhorn] and I [Mr. Martinez-Gonzalez] agree that all claims, disputes, and controversies arising out of, relating to or in any way associated with my employment by the Company or the termination of that employment shall be submitted to final and binding arbitration pursuant to the terms of this agreement…I HAVE READ THE FOREGOING ARBITRATION AGREEMENT AND UNDERSTAND ITS TERMS INCLUDING ITS WAIVER OF MY RIGHT TO A TRIAL IN A COURT OF LAW. I ACKNOWLEDGE THAT I HAVE BEEN GIVEN TIME TO REVIEW THIS AGREEMENT, TO GO OVER IT WITH AN ATTORNEY OF MY CHOICE AND THAT I HAVE THE RIGHT TO WITHDRAW FROM THIS AGREEMENT BY WRITTEN NOTICE TO THE COMPANY WITHIN 7 DAYS OF MY SIGNATURE.[110]

Elkhorn representatives did not explain the contents of the arbitration agreement to Mr. Martinez-Gonzalez, did not give him a copy of the agreement, and did not inform him he could consult an attorney before signing it.[111] Mr. Martinez-Gonzalez also did not ask for a copy of the agreement, attorney consultation, nor time to read

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102. *Martinez-Gonzalez*, 2019 WL 13119015, at *2.
103. *Martinez-Gonzalez*, 2019 WL 5556593, at *9.
104. *Id.*
105. *Id.* at *4.
106. *Id.*
107. *Martinez-Gonzalez*, 25 F.4th at 619.
108. *Id.*
109. *Id.*
110. *Martinez-Gonzalez*, 2019 WL 13119015, at *2.
111. *Martinez-Gonzalez*, 2019 WL 5556593, at *5.

the agreement.[112] Elkhorn also never expressly told Martinez-Gonzalez that he had to sign the agreement to keep working for the company.[113] Further, Elkhorn claimed that the arbitration agreement was optional.[114] Notably, no employee refused to sign the arbitration agreement or otherwise opted out of it in 2016 or 2017.[115]

Mr. Martinez-Gonzalez argued he was not given an opportunity to fully review the employment package before he signed the documents.[116] Thus, he was wholly unaware of any arbitration provision. Further, he asserted that before the 2016 season, while still in Mexico, he filled out an application to work for Elkhorn that did not mention arbitration.[117] It was not until he arrived in California to begin work that he was "given the arbitration agreement ... in a stack of paperwork I was told to sign."[118] Moreover, he "was not given a chance to review the document or show it to anyone else" and was "not told that the arbitration agreement, or any of the other forms, were optional." [119]

After the orientation, Mr. Martinez-Gonzalez went to work for Elkhorn as a seasonal laborer with his H-2A visa during the 2016 lettuce harvesting season.[120] For the 2017 season, Martinez-Gonzalez again harvested lettuce for Elkhorn in California.[121] He also signed an arbitration agreement for the 2017 season on March 28, 2017, under similar circumstances.[122] Due to the contractual violations becoming so severe, however, Mr. Martinez-Gonzalez did not finish the 2017 season.[123]

## *E. Procedural History of the Case*

On July 20, 2018, Mr. Martinez-Gonzalez filed a complaint in the Superior Court of California. The complaint alleged that Defendants Elkhorn Co. and D'Arrigo Bros. Co. of California (collectively, "Elkhorn") violated several labor laws, including failing to appropriately pay, provide adequate meals, and provide rest breaks, as well as breaching their duty of care by providing food that was unsafe to eat.[124] On August 26, 2018, Elkhorn removed the case to the U.S. District Court for the Northern District of California

112. *Martinez-Gonzalez*, 25 F.4th at 619.
113. *Id.*
114. *Martinez-Gonzalez,* 2019 WL 13119015, at *2; *Martinez-Gonzalez*, 2019 WL 5556593, at *5.
115. *Martinez-Gonzalez*, 2019 WL 5556593, at *2.
116. *Martinez-Gonzalez,* 2019 WL 13119015, at *2.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Martinez-Gonzalez*, 25 F.4th at 619.
121. *Id.*
122. *Martinez-Gonzalez*, 2019 WL 13119015, at *2.
123. *Martinez-Gonzalez*, 25 F.4th at 620.
124. *Martinez-Gonzalez*, 2019 WL 13119015, at *1.

based on diversity jurisdiction.[125]

On September 28, 2018, Elkhorn moved to compel arbitration based on two Spanish-language arbitration agreements between Elkhorn and Mr. Martinez-Gonzalez.[126] One arbitration agreement was signed on April 11, 2016, and the other on March 28, 2017.[127] In response, Mr. Martinez-Gonzalez argued that the arbitration agreements should not be enforced because of economic duress and undue influence.[128]

On March 11, 2019, the District Court deferred ruling on the motion to compel arbitration pending a trial.[129] The court found that Mr. Martinez-Gonzalez raised a question of fact as to whether "the making of the arbitration agreement[s]" at issue was influenced by economic duress and undue influence.[130] On October 29, 2019, after a two-day bench trial, the Northern District of California held that the arbitration agreement was the both a product of economic duress and undue influence."[131] As a result, the Northern District of California concluded the agreement was "neither valid nor enforceable."[132] Thus, the court denied Elkhorn's motion to compel arbitration.[133]

When determining the facts at trial, the Northern District of California noted that in assessing the credibility of the witnesses at trial, "Plaintiff's witnesses [were] more credible than the testimony of Defendants' witnesses[, as] Defendants' witnesses were inconsistent with each other and with the record, and in several instances offered answers that strained credulity."[134] Elkhorn appealed to the U.S. Court of Appeals for the Ninth Circuit.[135]

On November 3, 2021, the Ninth Circuit reversed and remanded the district court's decision, reasoning that Mr. Martinez-Gonzalez "ha[d] not shown that he signed the arbitration agreements under economic duress or undue influence."[136] Then, on February 14, 2022, the Ninth Circuit amended its opinion and denied the appellee's petition for panel rehearing and rehearing en

125. *Id.*; 28 U.S.C § 1332 (explaining diversity jurisdiction requires diversity of citizenship between the parties and an amount in controversy exceeding $75,000).

126. *Martinez-Gonzalez*, 2019 WL 13119015, at *1.

127. *Id.* at *2.

128. *Id.* at *4.

129. *Id.* at *1.

130. *Id.* at *8.

131. *Martinez-Gonzalez*, 2019 WL 5556593, at *11, *rev'd and remanded*, 17 F.4th 875 (9th Cir. 2021), *opinion amended and superseded on denial of reh'g*, 25 F.4th 613 (9th Cir. 2022), *and rev'd and remanded*, 25 F.4th 613 (9th Cir. 2022).

132. *Id.*

133. *Id.*

134. *Martinez-Gonzalez*, 2019 WL 5556593, at *2.

135. *Martinez-Gonzalez*, 17 F.4th 875, *opinion amended and superseded on denial of reh'g*, 25 F.4th 613.

136. *Martinez-Gonzalez*, 17 F.4th at 890.

banc.[137]

Judge Rawlinson, alone, issued a dissent from the majority.[138] In stark contrast to the majority approach, Judge Rawlinson carefully analyzed all of the factual findings of the district court.[139] As this Article will further demonstrate, this broad angled approach permitted a conclusion that better protected Mr. Martinez-Gonzalez, and that has the potential to protect other vulnerable contracting parties down the line.

## III. CASE ANALYSIS

On February 14, 2022, the U.S. Ninth Circuit Court of Appeals, issued its decision, with Judge Bumatay writing for the majority and Judge Rawlinson writing a vigorous dissent.[140] Here, Part III will deconstruct and analyze Judge Bumatay's majority opinion and the arguments that allowed him to reach his conclusion. The discussion of the majority opinion will begin with the court's analysis of the doctrine of economic duress. It will then discuss the doctrine of undue influence. Part III will also analyze Judge Rawlinson's dissenting opinion, which critiqued the majority for its apparent ignorance of the district court's factual findings.[141]

In writing for the court's majority, Judge Bumatay held that: (1) the arbitration agreements signed by Mr. Martinez-Gonzalez were not invalid under the doctrine of economic duress; and (2) the arbitration agreements signed by Mr. Martinez-Gonzalez were not invalid under the doctrine of undue influence.[142]

Judge Bumatay began the majority opinion by discussing arbitration agreements.[143] He explained that the FAA "provides that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[144] Judge Bumatay then zoned in on

137. *Martinez-Gonzalez*, 25 F.4th at 618.

138. *Id.* at 629 (Rawlinson, J., dissenting).

139. *Id.*

140. *Martinez-Gonzalez*, 25 F.4th at 613.

141. *Id.* at 629 (Rawlinson, J., dissenting) (discussing the majorities disregard for the factual findings of the district court and their abuse of the clear error standard of review).

142. *Id.*; *see* Desert Outdoor Advert. v. Sup. Ct., 127 Cal. Rptr. 3d 158, 163 (Cal. Ct. App. 2011) (providing that California "courts will indulge every intendment to give effect to arbitration clauses"); *see also Acaley*, 464 F. Supp. 3d at 965 (stating that "a question of whether an agreement to arbitrate has been formed is governed by state law"). *See generally Volt Info. Scis.*, 489 U.S. 468 (applying state law to the interpretation of an arbitration agreement).

143. *Martinez-Gonzalez*, 25 F.4th at 620.

144. *See id.* (quoting 9 U.S.C. § 2); *see* CAL. CIV. CODE § 1689(b)(1) (stating generally that under California law, "[a] party to a contract may rescind the contract . . . [i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the

the core focus of the case—i.e., determining the validity of an arbitration agreement. In order to determine the validity of the arbitration agreement, Judge Bumatay noted that state contract law would apply in the analysis of concluding if "generally applicable contract defenses, such as fraud, duress, or unconscionability" apply to invalidate the arbitration agreement.[145]

## *A. The Majority's Analysis of Economic Duress*

The court started off its analysis by addressing the traditional use of the doctrine of economic duress and its role in invalidating otherwise valid contractual agreements.[146] Judge Bumatay noted that economic duress does not preclude "[s]imple hard bargaining."[147] Rather, it is "designed to preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value."[148] Further, Judge Bumatay emphasized that the defense of economic duress should be used as a "last resort."[149] Next, the court dove into what constitutes economic duress for purposes of contract rescission.[150] Judge Bumatay identified the following three essential elements that occur when a party commits economic duress: (1) a wrongful act; (2) a lack of reasonable alternatives; and (3) causation.[151]

The court began by defining the first element of economic duress, a "wrongful act."[152] Judge Bumatay stated that wrongful

party as to whom he rescinds, or of any other party to the contract jointly interested with such party."). *See generally* Robert E. Benson, *Application of the Federal Arbitration Act in State Court Proceedings*, 43 COLO. LAW. 33 (2014) (discussing to what extent the FAA applies to arbitration agreement issues in state court proceedings); *see Southland Corp.*, 465 U.S. at 10 (stating that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable").

145. *Martinez-Gonzalez*, 25 F.4th at 620 (quoting Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1268 (9th Cir. 2006)); In re Cheryl E., 207 Cal. Rptr. 728, 737 (Cal. Ct. App. 1984).

146. *Martinez-Gonzalez*, 25 F.4th at 620.

147. *Id.*

148. *Id.* (internal quotations omitted).

149. *Id.* (quoting *Rich & Whillock*, 204 Cal. Rptr. at 89-90); *see* Grace M. Giesel*, A Realistic Proposal for the Contract Duress Doctrine,* 107 W. VA. L. REV. 443, 463–64 (2005) (noting that, in the eighty-eight published cases nationwide on economic duress between 1996 and 2003, only nine were decided in favor of the claim). The party seeking rescission bears the burden of proving economic duress. Saheli v. White Mem. Med. Ctr., 230 Cal. Rptr. 3d 258, 269-70 (Cal. Ct. App. 2018).

150. *Martinez-Gonzalez*, 25 F.4th at 621.

151. *Id.*

152. *See generally* Lanigan v. City of L.A., 132 Cal. Rptr. 3d 156 (Cal. Ct. App. 2011) (discussing that economic duress cannot be established when an officer signed a settlement agreement because of fear of losing his job and livelihood, when his termination was "not a certainty").

acts do not need to be "unlawful or tortious," but rather, wrongful acts are actions that "make a mockery of freedom of contract and undermine the proper functioning of our economic system."[153] Further, he noted "wrongful acts require more than hard bargaining or tough business tactics."[154] In order to be a wrongful act for the purpose of economic duress, the action taken must have been for a "coercive purpose" or "in bad faith."[155]

After setting out the history, the court moved on to the facts of the case in order to analyze whether the facts constitute a "wrongful act."[156] First, the court focused on the argument of whether Elkhorn committed a wrongful act by asking Mr. Martinez-Gonzalez to sign the arbitration agreement after he had made the journey from Mexico to California.[157] This fact failed to meet the wrongful act standard for the following reasons: (1) Elkhorn's actions were not unlawful or tortious; (2) Elkhorn did not make a false claim, a bad-faith threat, or a refusal to repay its debt; (3) Elkhorn did not make an impermissible threat; and (4) even though the timing of the orientation was unideal, it could not be concluded that Elkhorn had a "coercive purpose" or acted "in bad faith" in asking Mr. Martinez-Gonzalez to sign the agreement when he arrived in California.[158]

In further justification of his analysis, Judge Bumatay pointed to the district court's opinion.[159] The district court acknowledged that the orientation's location was practical, as it gathered hundreds of farm workers in a "single, unified orientation."[160] Judge Bumatay used the district court's observation to conclude that "construing the signing of the arbitration agreements here as a wrongful act would place courts in charge of determining business necessities and would encumber . . . the freedom of contract."[161]

Next, Judge Bumatay analyzed the second element in an economic duress claim: a lack of a reasonable alternative.[162] The

153. *Martinez-Gonzalez*, 25 F.4th at 621 (citing *Rich & Whillock*, 204 Cal. Rptr. at 89-90) (internal quotations omitted).

154. *Id*. (citing *Rich & Whillock*, 204 Cal. Rptr. at 89-90).

155. *Id*. (quoting Hester v. Pub. Storage, 263 Cal. Rptr. 3d 299, 308 (Cal. Ct. App. 2020)).

156. *See* Philippine Exp. & Foreign Loan Guarantee Corp. v. Chuidian, 267 Cal. Rptr. 457, 466 (Cal. Ct. App. 1990) (discussing that California courts have also adopted the Restatement of Contracts' definition of wrongful acts); *see* RESTATEMENT (SECOND) OF CONTS. § 176 (AM. L. INST. 1981)) (stating impermissible threats include bad faith threatened use of civil process; threats which are a breach of the duty of good faith and fair dealing under a contract with the recipient; threats which would harm the recipient without significantly benefitting the party making the threat; or threats where "what is threatened is otherwise a use of power for illegitimate ends").

157. *Martinez-Gonzalez*, 25 F.4th at 621.

158. *Id.*

161. *Id.*

160. *Id.*; *see Martinez-Gonzalez*, 2019 WL 5556593, at *3.

161. *Id.*

162. *See* 6 CAL. JUR. 3D CONTRACTS § 131, Westlaw (database updated Aug.

court stated that "[a] reasonable alternative is one that 'a reasonably prudent person would follow to avoid a coerced agreement."[163] Judge Bumatay then provided examples of what is not a reasonable alternative, including being "forced into bankruptcy, financial ruin, or selling one's home."[164] The court then contrasted the previous examples with the need for a job, which does not fall under the purview of economic duress, because if it did, Judge Bumatay reasoned, economic duress would apply to "almost any case."[165]

In an effort to strengthen his position, Judge Bumatay challenged the district court's findings that Martinez-Gonzalez's financial situation gave him a lack of reasonable alternatives.[166] Judge Bumatay pointed out that the district court relied on the mistaken belief that Martinez-Gonzalez thought his work visa only allowed him to work for Elkhorn.[167] Rebutting the district court's analysis, the court notes that "Martinez-Gonzalez could have simply asked whether signing the arbitration agreements was necessary for him to keep his job."[168] The court also stressed that (1) the agreements did not say they were mandatory, and (2) no one at Elkhorn told Martinez-Gonzalez that refusing to sign the agreements was a cause for termination.[169] It was purely Mr. Martinez-Gonzalez's "assumption" that the agreements were mandatory, and that a "reasonably prudent person" would not just assume an agreement is mandatory without asking. [170]

Furthering his reasonable alternative analysis, Judge Bumatay noted that Mr. Martinez-Gonzalez also had the option to revoke the agreement within ten days of signing.[171] The court relied on California law, which provides that if a party had the option to revoke an agreement but failed to do so, economic duress cannot be

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2024) ("[U]nder California law, courts employ an objective test to determine whether a reasonable alternative was available.").

163. *Martinez-Gonzalez*, 25 F.4th at 623.

164. *Id.*; *see Rich & Whillock*, 204 Cal. Rptr. at 88 (noting that subcontractor believed the threat was "blackmail" and "sign[ed] it only because [it] had to in order to survive"); *see also* Brown v. Wells Fargo Bank, N.A., 85 Cal. Rptr. 3d 817, 834 (Cal. Ct. App. 2008) ("[I]t is not reasonable to fail to read a contract.") (emphasis omitted); *see also Rich & Whillock*, 204 Cal. Rptr. at 90 (holding that economic duress does not apply when "conventional alternatives and remedies" are still available).

165. *Martinez-Gonzalez*, 25 F.4th at 623 (citing Perez v Uline, 68 Cal. Rptr. 3d 872, 876 (Cal. Ct. App. 2007)).

166. *Id.*; *Martinez-Gonzalez*, 2019 WL 5556593, at *3; *see* Brandt v. Verizon Commc'ns, Inc., No. 18-CV-07575-VKD, 2019 WL 4082562, at *5 (N.D. Cal. Aug. 29, 2019) (finding no reasonable alternative exists "when the only other alternative is . . . financial ruin."). "Courts employ an objective test to determine if 'reasonable alternatives' exist." *Id.*

167. *Martinez-Gonzalez*, 25 F.4th at 623.

168. *Id.*

169. *Id.*

170. *Id.* (citing *Martinez-Gonzalez*, 2019 WL 5556593, at *6).

171. *Id.* at 624.

met.[172] Although the district court pointed out that Mr. Martinez-Gonzalez was unaware of the revocation provision, Judge Bumatay countered that argument, reasoning that in California, "a party's failure to read a contract . . . before signing it[,] is no defense to the contract's enforcement."[173]

As to the final element of economic duress, i.e., causation, the court did not provide an analysis. Ultimately, the analysis of wrongful act and a lack of reasonable alternatives led Judge Bumatay to the conclusion that there was no economic duress, and thus the arbitration agreements between Mr. Martinez-Gonzalez and Elkhorn were valid.[174]

## *B. The Majority's Analysis of Undue Influence*

Next, the court's analysis addressed the doctrine of undue influence. In order to lay out the structure of undue influence, the court first relied on California Civil Code Section 1575, which provides three scenarios in which undue influence can result.[175] The court then simplified these scenarios to state that undue influence is "the use of excessive pressure to persuade one vulnerable to such pressure."[176] The court thereby laid out a two-element balancing test, requiring (1) undue susceptibility in the servient person, and (2) excessive pressure by the dominating person.[177]

Turning to the undue susceptibility element, Judge Bumatay defined susceptibility as the lessened capacity of a party to contract freely.[178] Noting that the susceptibility does not have to be

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172. *Id.*; *see also Lanigan*, 132 Cal. Rptr. 3d at 167-68.

173. *Martinez-Gonzalez*, 25 F.4th at 625 (citing *Desert Outdoor Advert.*, 127 Cal. Rptr. at 162-63); *see also Brown*, 85 Cal. Rptr. 3d at 833 (explaining that there can be no reasonable reliance where the plaintiff, dealing at arm's length, "had a reasonable opportunity to discover the true terms of the contract" but simply failed to read the contract before signing it).

174. *Martinez-Gonzalez*, 25 F.4th at 619 n.1 (noting the district court credited Martinez-Gonzalez's testimony that he received no explanation of the agreement, although Elkhorn disputes this).

175. *Id*. at 625; *see* CAL. CIV. CODE § 1575 (stating that undue influence can result "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or. 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.").

176. *Martinez-Gonzalez*, 25 F.4th at 625 (citing Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 540 (Cal. Ct. App. 1966)); *see also* Das v. Bank of Am., N.A., 112 Cal. Rptr 3d 439, 453 (Cal. Ct. App. 2010) (stating undue influence requires one party to "t[ake] some advantage of the mental weakness or incapacity of the other party"); *see Odorizzi*, 54 Cal. Rptr. at 541 (stating "[w]hether a person of subnormal capacities has been subjected to ordinary force or a person of normal capacities subjected to extraordinary force, the match is equally out of balance.").

177. *Martinez-Gonzalez*, 25 F.4th at 625.

178. *Id.* at 626.

"wholesale mental incapacitation," but rather, can be "a lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors."[179]

As to the facts, Judge Bumatay reasoned that there was no factual support of a finding that Mr. Martinez-Gonzalez "was especially vulnerable to pressure."[180] To support his reasoning, Judge Bumatay pointed to Mr. Martinez-Gonzalez's education, ability to both read and write Spanish, and capacity to act as the provider for his family.[181] The court also noted that while Mr. Martinez-Gonzalez's background was modest, he could not have been all that reliant on Elkhorn, considering he voluntarily quit his position with Elkhorn in 2017.[182]

For the element of excessive pressure, the court pointed to seven factors, which it described as such:

> (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys.[183]

In weighing these factors, the court noted that "although excessive pressure 'usually involves several' of these factors, 'there are no fixed definitions or inflexible formulas.'"[184]

Judge Bumatay used the factual findings from the district court of the unusual time, unusual place, lack of time to consult an attorney, pressure to sign the agreements, and statements from supervisors to determine if excessive pressure was present at the signing of the employment contract.[185] The court distinguished the

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; *see* CrossTalk Prods., Inc. v. Jacobson, 76 Cal. Rptr. 2d 615, 623 (Cal. Ct. App. 1998) ("Whether the party asserting economic duress had a reasonable alternative is determined by examining whether a reasonably prudent person would follow the alternative course, or whether a reasonably prudent person might submit.").

183. *Martinez*-Gonzalez, 25 F.4th at 626-27 (citing *Odorizzi*, 54 Cal. Rptr. at 541); *see* Kelly v. Provident Life & Accident Ins., 245 F. App'x 637, 639 (9th Cir. 2007) (noting that not all of the *Odorizzi* factors need to be present in order for undue influence to occur).

184. *Martinez-Gonzalez*, 25 F.4th at 627 (citing Keithley v. Civ. Serv. Bd., 89 Cal. Rptr. 809, 812 (Cal. Ct. App. 1970)).

185. *Id.* (stating excessive pressure can be shown by "(1) the unusual time and place of the orientation—both because it was held after Martinez-Gonzalez traveled to the United States and because it occurred in a hotel parking lot with no chairs; (2) the lack of time to read the agreement in advance or consult an attorney; (3) the pressure to sign the agreements quickly after a long day's work; and (4) statements from Elkhorn supervisors exhorting workers to follow the company's rules.").

facts of this case from those in *Odorizzi*, the case from which the seven factors of excessive pressure arose.[186]

Specifically, Judge Bumatay points to three examples of oppressive actions from *Odorizzi*: (1) "[a]pproaching a pregnant woman about her late husband's estate four days after he was shot to death, while she was still in shock;" (2) "[s]eeking the release of claims from a patient who was confined to a cast in a hospital, hysterical, and in significant pain;" and (3) "[a]rriving at a person's home at 1 a.m. unannounced and insisting on the signing of a document immediately or letting a real estate transaction fall apart."[187]

First, focusing on the place and timing, the court reasoned that while a parking lot may not be a common place to sign a document, the nature of Elkhorn's business made the workers' hotel parking lot a practical location.[188] Further, the court noted that while Mr. Martinez-Gonzalez did state he was "tired and hungry when he signed the agreements," that did not amount to "oppressive" conditions.[189]

Next, the court looked at the lack of time to consult with attorneys and read the agreements.[190] Here, the court reasoned that Mr. Martinez-Gonzalez could have consulted an attorney and read the agreement because there was no evidence Elkhorn did anything to stop him from doing so.[191] Then, Judge Bumatay addressed the instructions from Elkhorn management to sign the instructions quickly.[192] To analyze this point, Judge Bumatay highlighted that in *Odorizzi* excessive pressure was present when the party was told the "entire real estate transaction 'would fall through if she did not sign then and there.'"[193] In contrast, here, "Elkhorn urged the workers to hurry in signing the paperwork, not out of some bad-faith pressure tactic, but to accommodate other employees also waiting to complete the forms."[194]

Finally, Judge Bumatay turned to the general statements made by Elkhorn management to Mr. Martinez-Gonzalez during his first day on the job.[195] The statements indicated to Mr. Martinez-

186. *See Odorizzi*, 54 Cal. Rptr. at 540-41.

187. *Martinez-Gonzalez*, 25 F.4th at 627.

188. *Id.*

189. *Id.*

190. *Id.*; *see* Robison v. City of Manteca, 92 Cal. Rptr. 2d 748, 753 (Cal. Ct. App. 2000) (holding that circumstances did not "approach[ ] undue influence" when nothing prevented a party from taking the time to read the agreement or consult an attorney); *see Martinez-Gonzalez*, 2019 WL 5556593, at *6 ("The supervisors who were present and assisting in the collection of signatures in both 2016 and 2017 urged employees to hurry so that the people behind them in line could also sign the documents.").

191. *Martinez-Gonzalez*, 25 F.4th at 628.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

Gonzalez that he should work hard, follow company rules, and if not, he would be free to return to Mexico.[196] Again, Judge Bumatay did not view these facts as oppressive.[197] Ultimately, Judge Bumatay concluded that the doctrine of undue influence was not met because neither undue susceptibility nor excessive pressure appeared at the time of the signing of the agreement.[198]

## *C. The Dissent of Judge Rawlinson*

Judge Rawlinson penned a dissent that accused the majority of wrongfully disregarding the facts found by the district court.[199] He began his dissent by discussing the applicable standard of review, clear error.[200] In a review for clear error, Judge Rawlinson noted that the district court's factual findings are given a substantial amount of consideration.[201] Judge Rawlinson then provided a summary of facts found by the district court.[202] Further, he reasoned that the factual findings of the district court "cannot be clearly erroneous" because they are supported by the record at trial.[203]

Judge Rawlinson went on, briefly summarizing the district court's holding that the "Arbitration Agreements were unenforceable because they were the product of economic duress and undue influence."[204] He then expressed his dismay with the majority opinion, and his accord with the district court's conclusion.[205] In support of his dismay, Judge Rawlinson wrote a two-prong analysis.[206] He first dove into an analysis of the doctrine of economic duress, and then into an analysis of the doctrine of undue influence.[207] This Article's focus is on Judge Rawlinson's articulation of the economic duress element; as such, Section III.C will only focus on the first prong.

Judge Rawlinson's economic duress argument started with a discussion of the wrongful act element.[208] In setting the wrongful act standard, he noted, as the majority did, that a wrongful act need not be a "tort or crime," but rather, a "wrongful act which is

196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 629 (Rawlinson, J., dissenting).
200. *Id.*
201. *Id.*
202. *Id.* at 629-30 (Rawlinson, J., dissenting) (citing *Martinez-Gonzalez*, 2019 WL 5556593, at *2-7).
203. *Id.* at 630; *see* United States v. Bontemps, 977 F.3d 909, 917 (9th Cir. 2020) (explaining that factual findings by a district court are not clearly erroneous unless "illogical, implausible, or without support in the record").
204. *Martinez-Gonzalez*, 25 F.4th at 630 (Rawlinson, J., dissenting) (citing *Martinez-Gonzalez*, 2019 WL 5556593, at *8-11).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*

sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure."[209] He then discusses California's "equitably based" approach to economic duress due to disproportionate bargaining powers.[210] Judge Rawlinson reasoned that Elkhorn did act with coercive purpose because the entire environment created by Elkhorn in the hotel parking lot was coercive.[211]

Next, Judge Rawlinson moved on to the reasonable alternative element.[212] Determining whether a reasonable alternative existed, requires answering "whether a reasonably prudent person would follow the alternative course, or whether a reasonably prudent person might submit."[213] In analyzing this element, Judge Rawlinson pointed to the district court's factual inquiry, focusing on the fact that Mr. Martinez-Gonzalez was a migrant worker with "significant financial obligations."[214] Furthermore, Judge Rawlinson criticized the majority for over-simplifying the factual findings made by the district court.[215] Specifically, Judge Rawlinson took issue with the majority's narrow focus on when the agreements were signed, and the majority's lack of emphasis on Mr. Martinez-Gonzalez's economic position, dependence on Elkhorn, belief that he could only work for Elkhorn with his H-2A visa, lack of explanation as to the agreement, and lack of being provided with a copy of the agreement.[216] Judge Rawlinson noted that the "majority impermissibly conflicts with the detailed factual findings made by the district court."[217] Ultimately, the dissent reasoned that a simple application of the law to these facts reveals that economic duress was present, thereby rendering the arbitration agreement invalid.

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209. *Id.* (citing *Rich & Whillock*, 204 Cal. Rptr. at 89).

210. *Id.*

211. *Id.* at 631 (Rawlinson, J., dissenting).

212. *Id.* at 633-34; *see CrossTalk*, 76 Cal. Rptr. at 623 ("Clearly, this inquiry is a factual one."); *accord In re* Estate of Bennett, 78 Cal. Rptr. 3d 435, 441-42 (Cal. Ct. App. 2008); *see also* Doe v. Morrison & Foerster LLP, No. 18-cv-02542-JSC, 2019 WL 11806485, at *4 (N.D. Cal. May 1, 2019); Synnex Corp. v. Wattles, No. 11-cv-01496-YGR, 2012 WL 5524953, at *5 (N.D. Cal. Nov. 14, 2012) ("Whether a party acted under duress is normally a question of fact. . . .") (citation omitted); Porsandeh v. Prudential Prop. & Cas. Ins. Co., No. CV-02-5343-EFS (SHx), 2004 WL 5642440, at *6 (C.D. Cal. Apr. 28, 2004) ("Economic duress is a question for the jury.") (citation omitted).

213. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J., dissenting) (citing *CrossTalk*, 76 Cal. Rptr. 2d at 622-23) (internal quotations omitted).

214. *Id.*; *see* NEWMAN, *supra* note 6, at 15 (discussing the treatment and experience of H-2A Temporary Agricultural Workers in the U.S. since the split of the program).

215. *Martinez-Gonzalez*, 25 F.4th at 632 (Rawlinson, J., dissenting).

216. *Id.*

217. *Id.*; *see* Allen v. Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002) (directing "special deference" to factual findings made by the trial court).

## IV. PERSONAL ANALYSIS

Part IV will first explain where the Ninth Circuit erred in upholding the arbitration clause in *Martinez-Gonzalez*. Next, it will discuss why the dissenting opinion offers a more persuasive analysis than that of the majority. Finally, this section will conclude that the issue with the Ninth Circuit's opinion lies in its disregard of the factual findings of the district court, thereby preventing any opportunity for justice.[218] Ultimately, Part IV makes it clear that the only way to protect vulnerable contracting parties from economic duress is to take a holistic approach to the facts as applied to the law. Such an approach would not only have helped Mr. Martinez-Gonzalez, but would also have set a course that protects vulnerable contracting parties in the future.

### *A. The Ninth Circuit Wrongly Decided the Issue of Economic Duress Which Resulted in an Unjust Upholding of the Arbitration Agreement*

Through a simplified approach to the wrongful act element and the overlooking of key factual findings in its analysis of the reasonable alternative element of economic duress, the Ninth Circuit in *Martinez-Gonzalez* unjustly upheld the arbitration agreement.

Under California law, economic duress requires the establishment of a "wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure."[219] The first element of economic duress, wrongful act, involves actions for a coercive purpose.[220] The next element, reasonable alternative, involves an alternative "that a reasonably prudent person would follow to avoid a coerced agreement."[221]

When making the determination of whether economic duress is present, California courts take an "equitably based" approach.[222] This equitable approach is supported by a long-established contracting policy that "inequitable or unequal exchanges between parties of disproportionate bargaining power" run afoul to the

218. *See* U.S. Fid. & Guar. Co. v. Keck, 171 P.2d 731, 732 (Cal. Ct. App. 1946) ("[M]odern enlightened jurisprudence which regards the substance as more important than mere form and will not permit a mere technicality to defeat substantial justice.").

219. *Rich & Whillock*, 204 Cal. Rptr. at 89.

220. *Hester*, 263 Cal. Rptr. 3d at 308.

221. *Martinez-Gonzalez*, 25 F.4th at 623 (quotation omitted) (citation omitted).

222. *Burke v. Gould*, 38 P. 733, 734 (Cal. 1894), *superseded by statute*, Cal. Civ. Code § 1569, *as recognized in In re* Marriage of Balcof, 47 Cal. Rptr. 3d 183, 193 (Cal. Ct. App. 2006).

freedom to contract.[223] In order to determine if parties are of disproportionate bargaining power, a strong factual analysis of each party's position at the point of contracting is paramount in order to ensure the protection of employees.

When analyzing the wrongful act element of economic duress, a strong factual analysis was conducted at the district court level. The district court created a detailed record of Mr. Martinez-Gonzalez's educational, social, and economic background.[224] Yet, the majority condensed these factual findings to paint a picture of its own. The majority contended that Elkhorn did not commit a wrongful act.[225] When coming to this conclusion, the majority oversimplified the issue by only looking at one thing: the journey of Mr. Martinez-Gonzalez from Mexico to California.[226]

The majority's use of a narrow-lens approach is problematic because as will be described, determining whether a wrongful act was committed requires a holistic approach. A holistic approach refers to a careful consideration of the entire environment surrounding the contracting process, both in the pre-contractual and post-contractual context. Using a holistic approach, courts can examine the complex relationship of parties within their shared environment, as well as their individual positions of social and economic vulnerability. Here, a holistic approach would have better-determined whether the wrongful act element was met when signing the arbitration agreement, as it would have offered further insight and context clues in order to determine whether a coercive purpose was present at the time of signing.

In deciding the wrongful act element, the dissent provides a convincing analysis that Elkhorn did create a "coercive environment aimed at robbing Martinez-Gonzalez of the ability to say no to arbitration."[227] An environment includes the surroundings in which a person operates.[228] Thus, a coercive environment cannot be limited in analysis to one factor, e.g., the journey from Mexico to California. Rather, to determine what constitutes a "coercive environment," courts must look to the totality of circumstances surrounding the signing of an arbitration agreement.

Here, as the district court found, Mr. Martinez-Gonzalez faced challenging economic circumstances. He was dependent on Elkhorn for housing and transportation.[229] He reasonably believed that he could only work for Elkhorn on the H-2A visa. He was directed to

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223. *Rich & Whillock*, 204 Cal. Rptr. at 89.

224. *See Martinez-Gonzalez*, 2019 WL 13119015, at *2.

225. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J, dissenting).

226. *See id.* at 632 (focusing on whether Elkhorn "committed a wrongful act by asking [Martinez-Gonzalez] to sign the arbitration agreement after [Martinez-Gonzalez] made the journey from Mexico to California").

227. *Id.* at 633.

228. *Environment*, OXFORD DICTIONARY (10th ed. 2014) (the surroundings or conditions in which a person, animal, or plant lives or operates).

229. NEWMAN, *supra* note 6.

sign the arbitration agreements without being allowed to read them and with "no explanation" of them.[230] Additionally, he was never provided with a copy of the arbitration agreements.[231]

This set of facts reveals more than the mere signing of a contract after a long day of business travel. The facts establish a case of complete reliability, where Elkhorn used its position to exploit the clear power imbalance between parties. While "hard bargaining" is a large part of contracting, that was not the case here.[232] Hard bargaining requires both parties to have bargaining chips to give and to take.[233] Here, however, Mr. Martinez Gonzalez had no bargaining chips at all. Thus, as the dissent properly concluded, there was a coercive purpose, and the wrongful act element of economic duress was met.

The majority also overlooked key factual findings in its analysis of the reasonable alternative element. In finding that a reasonable alternative existed, the majority pointed to the following three findings: (1) "[n]o one at Elkhorn told Martinez-Gonzalez that refusing to sign the agreements was a cause for termination," (2) Mr. Martinez-Gonzalez did not ask if the arbitration agreements were mandatory, and he could have asked to review the documents; and (3) "the arbitration agreements expressly allowed Martinez-Gonzalez to revoke the contract within ten days."[234] While the majority's analysis is not incorrect to limit itself to these facts alone, as the dissent points out, the majority ignores "the rest of the story."[235]

First, turning to the majority's point, i.e., that "[n]o one at Elkhorn told Martinez-Gonzalez that refusing to sign the agreements was a cause for termination," the district court's findings of fact revealed just the opposite.[236] An Elkhorn

230. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J., dissenting).

231. *Martinez-Gonzalez*, 2019 WL 5556593, at *5.

232. *See generally* Viacom Int'l, Inc. v. Icahn, 946 F.2d 998 (2d Cir. 1991) (discussing a case in which the alleged extortion victim received something of value, and, thereby, relief from the threat of a corporate takeover). The district court surveyed existing case law in which the victim received something of value in exchange for his property and found that in these circumstances "some acts constitute extortion and others are found to be 'hard bargaining.'" Viacom Int'l, Inc. v. Icahn, 747 F. Supp. 205, 213 (S.D.N.Y. 1990). The court drew the following distinction between the two: in a "hard bargaining" scenario the alleged victim has no pre-existing right to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant, but in an extortion scenario the alleged victim has a preexisting entitlement to pursue his business interests free of the fear he is quelling by receiving value in return for transferring property to the defendant. *Id.*

233. *See* Cades Schutte LLP, *'Hard Bargaining' with ILWU is Tough Luck for Del Monte*, 11 No. 6 Haw. Emp. L. Letter 1 (stating "'hard bargaining' is legal so long as a party's position is reasonable and doesn't appear to be intended to force the end of negotiations.").

234. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J., dissenting).

235. *Id.*

236. *See Martinez-Gonzalez*, 2019 WL 5556593, at *6 (stating that the

representative "testified that the Arbitration Agreements were NOT voluntary," that the "documents were REQUIRED for the employees to begin working," and that "he would look for any worker [who] did not sign all the documents."[237] Using this information provided at trial, the district court "did not credit the testimony of Elkhorn supervisors that the Arbitration Agreements were not mandatory and that no employee would be terminated for refusing to sign them."[238]

Turning to the majority's second point, i.e., that Mr. Martinez-Gonzalez did not ask if the arbitration agreements were mandatory, and that he could have asked to review the documents, the district court found he had "no real opportunity" to do so because he was rushed through the signing process.[239] Mr. Martinez-Gonzalez was not merely rushed through the signing process, as evidenced by his co-worker's testimony that when he did ask questions regarding the documents he was prompted to sign, he was told that they concerned "insurance."[240] While this was not complete deception, it was a broad omission by Elkhorn, that was misleading to its employees.[241] The documents signed in the hotel parking lot contained multiple provisions not limited to insurance matters, including the arbitration agreement, about which employees were not informed.[242]

In regard to the majority's final point, i.e., that "the arbitration agreements expressly allowed Martinez-Gonzalez to revoke the contract within ten days,"[243] the district court found that there was no way that Martinez-Gonzalez could have known about the revocation provision in the arbitration agreements, as he was not given time to read the arbitration agreements, they were not explained to him, and he was never provided with copies of the agreements.[244] Thus, there was not a reasonable alternative.

As a result of the majority's sparse use of the facts, they reached a holding that Mr. Martinez-Gonzalez was not subject to economic duress.[245] Based upon an analysis of this limited set of

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documents were required to begin and continue working for Elkhorn).

237. *Id.*

238. *Martinez-Gonzalez*, 25 F.4th at 634.

239. *Martinez-Gonzalez*, 2019 WL 5556593, at *4 (stating "that the orientation meetings provided no real opportunity to review the new-hire documents").

240. *Id.* at *6 (stating that "Elkhorn employees told him that the documents he was signing were for 'seguro,' meaning 'insurance' or 'social security'").

241. *Id.*

242. *Id.*

243. *Martinez-Gonzalez*, 25 F.4th at 624.

244. *Martinez-Gonzalez*, 2019 WL 5556593, at *7 ("Plaintiff lacked sufficient knowledge of the contents of the Arbitration Agreement to either (1) understand that he had signed such an Agreement, or (2) become informed of the window within which (and the method by which) he would have be able to withdraw, had he so desired.").

245. *Martinez-Gonzalez*, 25 F.4th at 631 (Rawlinson, J., dissenting).

facts, the reasoning as applied to California law was not flawed; however, the narrowed approach itself was flawed. Issues of economic duress between two contracting parties of disproportionate bargaining power should require more than a surface-level approach to the facts. A holistic approach must be taken in order to protect the freedom of contracting.

## *B. A Holistic Approach to Economic Duress Will Curb a Dangerous Precedent*

Applying a holistic approach to determining whether economic duress is present will serve to curb the dangerous path set by the majority in *Martinez-Gonzalez*. Providing more protection for vulnerable contracting parties, a holistic approach ultimately upholds the core principles of contracting. While the majority's ultimate holding was not erroneous, the rationale behind it, which consisted of a narrow factual analysis, was problematic. Namely, it set too high of a bar to the defense of economic duress, which will have negative effects on weaker contracting parties down the line.

While the purpose of the economic duress doctrine is to enforce "certain minimal standards of business ethics" in the marketplace, the American capitalistic society's freedom to contract does not mean, nor seek, total equality for both parties to a contract.[246] In fact, the freedom to contract allows for, and in some instances encourages, hard bargaining contract tactics. Despite capitalism thriving on the right to contract freely, however, this right to contract freely does not outweigh key contracting principles, such as contracting in good faith. In fact, contracting in good faith bolsters individuals' right to contract freely, as all parties acting in good faith results in more equitable contracts and avoids disproportionate exchanges. Such exchanges have the potential to blemish the freedom of contract and undermine the proper functioning of the economic system in the U.S. The economic duress doctrine serves to correct such aberrations to the freedom-to-contract system. The economic duress doctrine is of no use when an incomplete analysis is used to draw rash conclusions; it is essential for a holistic factual analysis to accompany.

In order to protect against economic exploitation, California courts have taken an "equitably based" approach in order "to preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value."[247] Using this approach, modern jurisprudence has increasingly recognized "the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and [courts have had] a greater

246. Centric Corp. v. Morrison–Knudsen Co., 731 P.2d 411, 413 (Okla. 1986).

247. Sheehan v. Atlanta Int'l Ins. Co., 812 F.2d 465, 469 (9th Cir. 1987) (quotation omitted) (citation omitted).

willingness to not enforce agreements which were entered into under coercive circumstances."[248] Following the trend of protecting parties from unequal exchanges, a holistic vision of the economic actor will better allow courts to protect against economic exploitation.

Using this framework will better-address the impact that economic duress seeks to avoid.[249] Correcting unequal exchanges requires more than one piece of the puzzle; instead, courts must link together all the pieces of a party's background in order to paint an entirely accurate picture.

## V. CONCLUSION

Applying a narrow approach to an economic duress analysis harms more than just H-2A workers. The impact of the Ninth Circuit's holding in *Martinez-Gonzalez* sets a low bar for an entire class of vulnerable employees.[250] Further, the court's opinion sheds light upon the disproportionate power that employers hold when subjecting employees to arbitration. While arbitration may seem like a straightforward area of the law, the interpretations of the events surrounding the agreement have significant implications in protecting weaker contracting parties. Mr. Martinez-Gonzalez is not the first employee who has signed an arbitration agreement under economic duress, and he certainly will not be the last. Thus, in the future, courts need to use a holistic approach in analyzing the possibility of economic duress to ensure that the impact of their decision supports modern contract jurisprudence in the United States.

248. *Rich & Whillock*, 204 Cal. Rptr. at 89.
249. *Id.*
250. Diener, *supra* note 13.