

5-15-2017

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Recommended Citation

Neil Eddington, *Uber Hitches a Ride with Arbitration: How Pro-Arbitration Attitudes and Uber Will Prevail in California and the Ninth Circuit*, 17 Pepp. Disp. Resol. L.J. 203 (2017)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol17/iss2/2>

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UBER HITCHES A RIDE WITH ARBITRATION: HOW PRO-ARBITRATION ATTITUDES AND UBER WILL PREVAIL IN CALIFORNIA AND THE NINTH CIRCUIT

Neil Eddington

“By agreeing to arbitrate[,] . . . a party does not forgo . . . substantive rights . . . it only submits to their resolution in an arbitral, rather than a judicial, forum.”¹

The above passage is one of the most oft-cited quotes in arbitration jurisprudence. While it may have held some truth in 1985, that truth is hard to find in today’s arbitration landscape. In 2011 and 2013, the Supreme Court decided two cases, *AT&T Mobility LLC v. Concepcion*² and *American Express Co. v. Italian Colors Restaurant*,³ respectively, “that enshrined the use of class-action bans in contracts.”⁴ While the opinions were sharply divided, “upend[ing] decades of jurisprudence put in place to protect consumers and employees,”⁵ the holdings were consistent with a trend of liberally construing the application of arbitration agreements under the Federal Arbitration Act (“FAA”).⁶ These rulings had the predominant effect of closing the door on consumer and employee class actions, as companies around the country raced to include class-waivers in employment and customer adhesion contracts.⁷

However, adoption of Supreme Court arbitration precedent has been less than uniform. For example, since *Concepcion* and *American Express*, the National Labor Relations Board (“NLRB”) still holds arbitration class-action waivers unenforceable under the National Labor Relations Act (“NLRA”),⁸ the Securities and Exchange Commission (“SEC”) maintains the same

¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

³ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁴ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, available at <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

⁵ Silver-Greenberg & Gebeloff, *supra* note 4.

⁶ 9 U.S.C. §§ 1-16 (2015).

⁷ *Arbitration Clauses in Class Action Waivers*, SMITH, GAMBRELL, & RUSSELL, LLP (Winter 2014), available at http://www.sgmlaw.com/resources/trust_the_leaders/leaders_issues/ttl35/arbitration-clauses-in-class-action-waivers/ (referring to *Concepcion* and *American Express* as the “death knell” to consumer class actions).

⁸ *In re D.R. Horton, Inc.* 357 NLRB No. 184 (2012) *rev’d by* D.R. Horton, Inc. v. N.L.R.B. 737 F.3d 344 (5th Cir. 2013).

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waivers work, contrary to their own policies.⁹ More curiously, though, courts within the Ninth Circuit and California state jurisdictions, continue to strike down class-action waivers seemingly in the face of the *Concepcion* and *American Express* holdings.¹⁰ As tension rises between the anti-arbitration courts of California, the Ninth Circuit, and governmental regulatory bodies and the predominantly pro-arbitration federal courts, what does this mean for arbitration agreements originating underneath these jurisdictions, what can it tell us about where arbitration jurisprudence is headed, and, more specifically, how do the recent decisions in the several litigations involving Uber arbitration agreements illustrate trends?

Part I of this article will introduce Uber and describe how the sharing economy functions.¹¹ This section will explain Uber's current conflict with their drivers regarding arbitration agreements and why the stakes are so high.¹² Part II will explore the FAA—its history, original legislative intent and purpose—in order to provide a baseline from which to contrast its current broad application.¹³ Part III will highlight Supreme Court jurisprudence on arbitration to illustrate how the FAA is now expansively interpreted contrary to its original limited scope.¹⁴ This Part will culminate in an examination of the *Concepcion* and *American Express* majority and dissenting opinions.¹⁵ Part IV will offer an explanation for the Supreme Court's expansive transformation of the FAA.¹⁶ Part V will detail pushback from the NLRB, SEC, Ninth Circuit, and California state courts.¹⁷ Part VI will review several California and Ninth Circuit decisions that suggest pro-arbitration attitudes are trending upwards in those jurisdictions.¹⁸ This Part will also anticipate the

⁹ See generally Claudia H. Allen, *Bylaws Mandating Arbitration of Stockholder Disputes?*, 39 DEL. J. CORP. L. 751 (2015); see also Hal Scott & Leslie Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL'Y 1187 (2013) (discussing the possible enforceability of mandatory individual arbitration clauses in corporate bylaws). Two such provisions were upheld in a Massachusetts court.

¹⁰ See generally Steven G. Pearl, *The Conscience of Arbitration*, LOS ANGELES LAWYER, 37 APR L.A. LAW 34 (2014).

¹¹ See *infra* Part I.

¹² See *infra* Part I.

¹³ See *infra* Part II.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part V.

¹⁸ See *infra* Part VI.

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future of arbitration and where its jurisprudence is headed.¹⁹ Finally, Part VII will bring this analysis out of the theoretical and apply it to the litigation regarding Uber's arbitration agreements.²⁰

PART I: WHAT IS UBER, WHAT ARE ITS DRIVERS DISPUTING, AND WHAT IS THE SHARING ECONOMY?

One of New York City's iconic images is likely familiar: downtown Manhattan, rush hour, and streets gridlocked with a seemingly never-ending bracelet of yellow cabs. Enter Uber.²¹ Since 2011, the chances that a New Yorker hailed a taxi or waited for a yellow cab are slim.²² With the advent of companies like Uber, gone are the days of "upstreaming," standing curbside, and frantically waving down a ride. Today, Uber provides 1,000,000 rides daily and counts 8,000,000 people among its users.²³ With approximately 50,000 new drivers each month and service in 250 cities and counting, Uber is quickly becoming the *de facto* service for navigating the city.²⁴

Uber represents one of the most recognizable companies of the new sharing economy. Along with other companies like Lyft and Airbnb, the sharing economy refers to companies using technology to create peer-to-peer markets that convert goods into services.²⁵ In the sharing economy, companies pair sellers with buyers, "smartphones with GPS let people see where the nearest [buyer/seller] is[,] . . . social networks provide a way to check upon people and build trust[,] and online payment systems handle the billing."²⁶ These companies create an interface between consumer and provider, which lowers transaction costs.²⁷

¹⁹ See *infra* Part VI.

²⁰ See *infra* Part VII.

²¹ UBER, <https://www.uber.com> (last visited Nov. 8, 2016).

²² Ellen Huet, *Uber Says It's Doing 1 Million Rides Per Day, 140 Million In Last Year*, FORBES, Dec. 7, 2014, <http://www.forbes.com/sites/ellenhuet/2014/12/17/uber-says-its-doing-1-million-rides-per-day-140-million-in-last-year/>.

²³ Huet, *supra* note 22.

²⁴ *Id.*

²⁵ *The rise of the sharing economy*, THE ECONOMIST (Mar. 9, 2013), available at <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

²⁶ *The rise of the sharing economy*, *supra* note 25.

²⁷ Hamish McRae, *Facebook, Airbnb, Uber, and the unstoppable rise of the content non-generators*, THE INDEPENDENT (May 5, 2015), available at <http://www.independent.co.uk/news/business/comment/hamish-mcrae/facebook-airbnb-uber-and-the-unstoppable-rise-of-the-content-non-generators-10227207.html> ("The world's largest taxi firm,

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The viability of sharing economy businesses relies on spreading the supply costs of traditional businesses to the providers that they hire – for Uber, this means their drivers.²⁸ As it stands, drivers are classified as independent contractors, thus, avoiding the costs associated with employee classification such as insurance, overtime pay, and expense reimbursement for costs like gas, for example.²⁹ Recently, Uber drivers, tired of this model, brought a class-suit in California state and federal court to challenge this distinction.³⁰ When Uber moved to compel individual arbitration pursuant to the arbitration agreements drivers must sign, the drivers challenged the validity of the arbitration agreements.³¹

PART II: WHAT IS THE HISTORY OF THE FAA AND WHAT KIND OF LEGISLATION WAS IT ORIGINALLY INTENDED TO BE?

The substance of arbitration—of seeking extra-judicial means to dispute resolution—finds its origin long before the FAA provided the definite form we find familiar today.³² Prior to the FAA, parties seeking dispute resolution within such a mechanism often ran into a substantial obstacle: the unwillingness of courts to enforce the arbitration agreements.³³ For example, in its early jurisprudence, the Supreme Court held “that at any time prior to the arbitrator’s final adjudication a party to an arbitration agreement could freely revoke its submission on the rationale that each party had a right to know all of the facts of the dispute” before such agreement could be validly agreed to.³⁴ Eventually, anti-arbitration attitudes relaxed for two primary

Uber, owns no cars. . . . The world’s most valuable retailer, Alibaba, carries no inventory. And the world’s largest accommodation provider, Airbnb, owns no property.”).

²⁸ Tracey Lien, *Uber and Lyft drivers’ class-action lawsuits will go to jury trials*, LOS ANGELES TIMES (Oct. 27, 2015), available at <http://www.latimes.com/business/technology/la-fi-tm-uber-lyft-class-action-2015-03-12-story.html>.

²⁹ Lien, *supra* note 28.

³⁰ *Id.*

³¹ *Id.*

³² James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 746-48 (2009).

³³ Berger & Sun, *supra* note 32, at 746-47 (“Early Supreme Court decisions affirmed the well-settled English policy that ‘parties cannot by contract oust the ordinary courts of their jurisdiction’ . . . [because] . . . [t]he regular administration of justice might be greatly impeded . . . by [agreements to arbitrate disputes].”).

³⁴ *Id.* at 747. Amongst other issues, enforcing arbitral awards also required many common law procedural steps often making disputes far simpler to just litigate. *Id.*

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reasons: first, a growing American economy demanded efficient resolution to commercial disputes; second, well-developed contract law doctrines based on the respective parties' intent to abide by their agreement terms led courts to begin upholding arbitration agreements evidencing clear intentions of both parties to be bound by the arbitral decision.³⁵ By 1924, with several states enacting their own arbitration statutes, Congress heard arguments for a federal arbitration statute.³⁶ After the last testimony was heard, Congress passed the FAA with no dissenting votes.³⁷

While the formation of the FAA is important, its original, intended purpose is essential to understanding how askew its modern-day construction is.³⁸ As senators, representatives, lawyers, and businessmen provided testimonies and reports in support of arbitration, their arguments touted arbitration as a less expensive alternative to litigation,³⁹ as expeditious relative to litigation,⁴⁰ as a means to ease civil court dockets by disposing commercial disputes,⁴¹ and as beneficial to consumers.⁴²

The key takeaway is the narrow scope of arbitration imagined by those involved in its construction—"every witness, every Senator, and every Representative discussed one issue and one issue only: arbitration of contract disputes between merchants."⁴³ In fact, the deliberately limited scope of the

³⁵ *Id.* at 748. However, the inevitability of arbitration was by no means a foregone conclusion. *Id.* at 749-52. As late as 1915, one New York district court judge wrote, American "courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled . . . by statute." U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1010-11 (S.D.N.Y. 1915).

³⁶ Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 302-03 (2015).

³⁷ Leslie, *supra* note 36, at 304-05 (noting the unanimous vote is "not surprising; nobody spoke or wrote in opposition to the legislation."); see also Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 110 (2006).

³⁸ Leslie, *supra* note 36, at 300.

³⁹ *Id.* at 302.

⁴⁰ *Id.* at 303.

⁴¹ *Id.*

⁴² *Id.* at 304. Supporters billed arbitration as pro-consumer, "but not because consumers would be in arbitration themselves." *Id.* Instead, consumers would find benefit in three ways: cheaper arbitration costs would mean creating a cheaper cost of goods for consumers; faster dispute resolution would preserve perishable food products and prevent waste; consumers would pay less in taxes to support busy state courthouses. *Id.*

⁴³ Leslie, *supra* note 36, at 305; see also Moses, *supra* note 37, at 106 ("The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, *never merchant-to-consumer arbitrations*. All of the examples given . . . were cases between merchants.") (emphasis added); *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms.*

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legislation was essential in persuading Congress.⁴⁴ Julius Cohen, the original drafter of the FAA, testified that the bill would also not apply to adhesion contracts (i.e., “take it or leave it”) because it “was simply not the intent of the legislation, which was specifically aimed at voluntary resolution of disputes between merchants.”⁴⁵ By the end of the congressional hearing, the FAA passed as “a bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength . . . [and] only apply when . . . agreed to by the parties . . . [and] to disputes involving facts and simple questions of law, not statutory or constitutional issues.”⁴⁶ The FAA, as enacted in 1924, is a far cry from the legislation it is today.⁴⁷ Due to Supreme Court jurisprudence, the FAA has been transformed into an expansive dispute resolution mechanism.

PART III: HOW DID THE SUPREME COURT TRANSFORM THE FAA, AND WHAT DOES IT NOW HOLD REGARDING THE ENFORCEABILITY OF CLASS-ACTION WAIVERS IN MANDATORY ARBITRATION AGREEMENTS?

Despite its humble beginnings, the FAA now acts as a legislative monolith: preempting state law, allowing for arbitral adjudication of statutory claims, and barring class-action disputes.⁴⁸ The Supreme Court did not reach this interpretation overnight. Though for many years it held closely to the narrow interpretation Congress demanded, the Court transformed the FAA over a period stretching the last fifty years and created the juggernaut it is now.⁴⁹

Though passed with the assurance of a limited application, the Supreme Court began rapidly expanding the FAA in 1967 with *Prima Paint Corp. v. Flood & Conklin Manufacturing*.⁵⁰ Up until *Prima Paint*, “the FAA was

on the Judiciary, 68th Cong. 38-39 (1924) (noting that an arbitration agreement is basically a *business contract*) (emphasis added).

⁴⁴ Leslie, *supra* note 36, at 307. For example, the legislation’s supporters did not believe arbitration “would apply to any workers at all.” Moses, *supra* note 37, at 106.

⁴⁵ Moses, *supra* note 37, at 107.

⁴⁶ *Id.* at 111-12.

⁴⁷ See *Concepcion*, 563 U.S. at 1749.

⁴⁸ See *infra* Part III, notes 32-89.

⁴⁹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-05 (1967).

⁵⁰ *Id.* at 403-05 (1967) (concluding the FAA is an exercise of congressional commerce power and governs in diversity suits).

generally thought not to apply in state courts.”⁵¹ Several years later, the Court expanded the FAA to preempt state law in *Southland Corp. v. Keating*.⁵² The Court was only beginning.⁵³

Through the 1970s and 1980s, the Court’s expansion swept through the arbitrability of statutory causes of action with little resistance. Though the Supreme Court previously held statutory claims to be non-arbitrable in *Wilko v. Swan*⁵⁴ and *Bernhardt v. Polygraphic Co. of America*,⁵⁵ this quickly changed. In *Wilko*, the Court recognized “the advantages that . . . arbitration may provide for the solution of commercial controversies”⁵⁶ in reasoning a security buyer who “waives his right to sue in courts, . . . gives up more than would a participant in other business transactions . . . [and] thus surrenders one of the advantages the [Securities] Act gives him.”⁵⁷ The Court, too, questioned an arbitrator’s ability to adjudicate a statutory claim such as this with limited review;⁵⁸ it also worried about arbitration’s effectiveness in a securities transaction where a buyer is disadvantaged from the outset, even without an arbitration agreement.⁵⁹

In a stunning about-face, the Court began distancing itself from the holding in *Wilko* by expanding the FAA’s scope to adjudicate statutory

⁵¹ Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1427 (2008). Until this point, the Supreme Court had not even definitely established the FAA applied in federal courts in diversity cases. *Id.*

⁵² *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (reasoning Congress did not intend for different arbitral outcomes based on forum).

⁵³ Bruhl, *supra* note 51, at 1429 (“The metamorphosis was not instantaneous, but it is fair to say that the major stages of growth occurred in the 1980s.”) (emphasis added).

⁵⁴ 346 U.S. 427, 438 (1953). *Wilko* involved an investor who sued a brokerage firm under the Securities Act of 1933 alleging it fraudulently induced his purchase of stock. *Id.* at 428-29. His purchase agreement included an arbitration agreement, which he argued was void under Section 14 of the Securities Act declaring, in part, to “void an[y] stipulation waiving compliance with any provision of the Securities Act.” *Id.* at 432, 434.

⁵⁵ 350 U.S. 198, 200-01 (1956) (holding and easily dismissing the idea that an employment contract between a Vermont citizen and a New York corporation was a contract evidencing a transaction involving commerce for purposes of the FAA).

⁵⁶ *Wilko*, 346 U.S. at 438.

⁵⁷ *Id.* at 435.

⁵⁸ *Id.* at 435-36 (“This case requires subjective findings on the purpose and knowledge of an alleged violator of the Act. They must be not only determined but applied by the arbitrators without judicial instruction on the law. . . . [and] may be made without explanation of their reasons.”); *see also Wilko*, 346 U.S. at 437 (“The [FAA] contains no provision for judicial determination of legal issues . . . the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness.”).

⁵⁹ *Id.* at 435 (“It is . . . reasonable for Congress to put buyers of securities . . . on a different basis from other purchasers.”).

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claims.⁶⁰ In a dispute between international corporations, the Court held enforceable an arbitration agreement because of the certainty it gave to choice of law questions.⁶¹ Several years later, the Court again upheld an arbitration agreement in an international dispute; however, this time for an antitrust claim.⁶² From here, the floodgates opened, and in rapid succession, the Court paved the way for the arbitrability of all types of statutory claims.⁶³ In 1995, the Court even held the FAA extended to the limits of the Commerce Clause.⁶⁴ With all of this, though, the Supreme Court's pro-arbitration stance still continues to grow.

The most recent and significant blow to the FAA's proper interpretation comes from a series of cases greatly reducing the weight of the Savings Clause.⁶⁵ The Savings Clause permits a court to strike down an arbitration agreement upon such grounds that any other contract could be invalidated— in

⁶⁰ *Id.* at 435, 438.

⁶¹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974) (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

⁶² *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

⁶³ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (allowing arbitration for ADEA claims).

⁶⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281-82 (1995). Analyzing this issue requires a more appropriate forum, however, suffice it to say the logical gymnastics surrounding this application are perplexing, at best. Section 2 of the FAA defines commerce to mean interstate and international commerce. 9 U.S.C. § 2 (2012). However, “at the time of the FAA’s enactment, the scope of federal regulatory power was much narrower,” so it is easy to see how Congress never intended such a wide application, given how broadly the Commerce Power is interpreted today. Bruhl, *supra* note 51, at 1428. Further, under § 1 of the FAA, commerce *expressly excludes employment contracts*. See 9 U.S.C. § 1 (2012). This is where the Court’s jurisprudence begins to befuddle. In *Circuit City Stores, Inc. v. Adams*, the Court held the phrase “any other class of workers engaged in foreign or interstate commerce” had to be read in light of the same provision’s earlier reference to seamen and railroad workers, such that the entire exemption applied only to “transportation workers.” 532 U.S. 105, 109 (2001). As Professor Bruhl writes, “[i]n other words, despite reference to ‘commerce’ in both sections [1 and 2 of the FAA], the scope of the FAA sweeps broadly in section 2, but the employment exception in section 1 is narrow.” Bruhl, *supra* note 51, at 1431; see *Gonzales v. Raich*, 545 U.S. 1 (2005) (establishing the outer bounds of the Commerce Clause).

⁶⁵ The Savings Clause allows arbitration clauses to be invalidated by generally applicable contract defenses, like fraud, duress, or unconscionability, but not by defenses that apply only to arbitrate or that derive their meaning from the fact that an agreement to arbitrate is at issue. Agreements to arbitrate are “valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.” 9 U.S.C. § 2 (2012) (emphasis added).

practice, this means fraud, duress, and, most effectively, unconscionability.⁶⁶ However, two controversial decisions created the foundation for the diminished state in which the Savings Clause currently sits. As mentioned previously, the seminal Supreme Court cases concerning class waivers in mandatory arbitration agreements are *Concepcion* and *American Express*.⁶⁷ In upholding such class waivers, the Supreme Court set dangerous precedent as to how all encompassing an arbitration agreement may be.

The Court heard *Concepcion* in 2011, which challenged a California state rule disallowing arbitration agreements containing class-action waivers.⁶⁸ The dispute arose when the Concepcion family saw an advertisement offering free phones if they signed with AT&T as their cellular service provider.⁶⁹ The family followed the instructions from the advertisement and signed the service agreement, which included a mandatory arbitration clause requiring the parties bring any disputes in their “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”⁷⁰ When Concepcion received his first bill, he noticed a thirty-dollar charge for sales tax on the “free” phones.⁷¹ Concepcion then filed suit in District Court.⁷² In response, AT&T moved to compel arbitration.⁷³ Pursuant to the existing *Discover Bank* rule, the District Court held AT&T’s arbitration provision unconscionable for failing to show “that bilateral arbitration adequately substituted for the deterrent effects of class actions.”⁷⁴ AT&T appealed to the Ninth Circuit, who affirmed the District Court’s ruling, holding the *Discover Bank* rule “placed arbitration agreements with class action waivers on the exact same footing as” barring “class action

⁶⁶ Bruhl, *supra* note 51, at 1426. *Specht v. Netscape Communications* is one such example. 306 F.3d 17 (2d Cir. 2002). Here, the Second Circuit held no arbitration agreement existed where the agreement itself lacked mutual assent. *Id.*

⁶⁷ Silver-Greenberg & Gebeloff, *supra* note 4.

⁶⁸ The California rule was the *Discover Bank* rule, which made most collective-action waivers in consumer contracts unconscionable. *Concepcion*, 563 U.S. at 338. [W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individual small sums of money, then . . . such waivers are unconscionable under California law and should not be enforced.

Discover Bank v. Superior Court, 113 P.3d 1100, 1110, 162-63 (Cal. 2005).

⁶⁹ *Concepcion*, 563 U.S. at 337.

⁷⁰ *Id.* at 336.

⁷¹ *Id.* at 337.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 338.

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litigation outside the context of arbitration.”⁷⁵ In 2011, the Supreme Court granted certiorari and a divided 5-4 Court reversed the lower courts, holding the class action waiver contained in AT&T’s service agreement as enforceable under the FAA.⁷⁶

In its opinion, the majority and dissent most crucially disagreed on the purpose of the FAA.⁷⁷ The majority argued that the Act is designed to promote arbitration and its principal advantage – informality.⁷⁸ The majority, too, found the potential for high risk for defendants in class arbitration troubling.⁷⁹ Then, focusing on the Savings Clause,⁸⁰ contained within § 2 of the FAA, the Court held the *Discover Bank* rule to unfairly discriminate against arbitration.⁸¹

A sharp dissent, on the other hand, argued that the primary goal of the FAA is to secure enforcement of agreements to arbitrate, not to ensure the procedural advantages of arbitration.⁸² It first argued the *Discover Bank* rule would not be an obstacle by increasing the complexity of arbitration procedures.⁸³ But more importantly, it noted the general applicability of unconscionability rendered the discussion of the merits of class proceedings

⁷⁵ *Id.* at 334, 352.

⁷⁶ *Id.* at 351-52.

⁷⁷ *Id.* at 365.

⁷⁸ *Id.* at 344 (“Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”). The majority argued that class arbitration is “slower, more costly, and more likely to generate procedural morass than final judgment.” *Id.* at 348. The Court cited empirical evidence showing the average consumer arbitration resulted in a disposition on the merits within six months, whereas, of 283 class arbitrations in the last year, 121 remained active, and not a single one resulted in a final award on the merits. *Id.* at 348-49.

⁷⁹ *Id.* at 350. Here, the Court reasoned that the informal nature of arbitration makes it more likely mistakes will happen and that, part of the agreement to arbitrate, includes an acceptance of this risk because the impact is limited to individual disputes. *Id.* If a full class is brought to arbitrate, the risk of error becomes unacceptable and defendants will feel “pressured into settling questionable claims.” *Id.* This, coupled with the fact that vacating an arbitration award is extremely difficult, renders the risk of class arbitration too high. *Id.*

⁸⁰ 9 U.S.C. § 2 (2012); see *supra* note 48, 49.

⁸¹ *Id.* at 341-43. The Court began by noting that it had previously “noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist ‘at law or in equity for the revocation of any contract.’” *Id.* at 341. The Court reasoned that even though the *Discover Bank* unconscionability rule is a generally applicable contract defense, in practice, the rule would be used to discriminate against arbitration. *Id.* at 342.

⁸² *Id.* at 359 (Breyer, J., dissenting).

⁸³ *Id.* at 362 (Breyer, J., dissenting). Here the dissent cited the American Arbitration Association’s findings that class arbitration is a “fair, balanced, and efficient means of resolving class disputes.” *Id.* It also cited evidence that class arbitration takes less time than class litigation. *Id.* at 363.

unnecessary.⁸⁴ The dissent then disputed the premise that corporations should not be subject to the high-stakes resulting from allowing class arbitration.⁸⁵ Finally, the dissent showed no meaningful precedent existed to form the majority's opinion.⁸⁶

After hearing *Concepcion*, the Supreme Court granted certiorari two years later to another case concerning class waivers in mandatory arbitration agreements, *American Express Co. v. Italian Colors Restaurant*.⁸⁷ In another divided opinion, the Court held that a contractual waiver of class arbitration was enforceable under the FAA even if the plaintiff's cost of individually arbitrating its claim exceeded the potential recovery.⁸⁸ In the case, the restaurant Italian Colors accepted payment from American Express cards used by a large share of its customers.⁸⁹ Pursuant to acceptance, Italian Colors signed a mandatory arbitration clause specifically disallowing class arbitration claims.⁹⁰ Italian Colors claimed American Express abused its monopoly power to charge fees 30% higher than those charged by competing credit cards; Italian Colors brought claims under the Sherman Act and Clayton Act for violation of federal antitrust law.⁹¹ Italian Colors argued the class arbitration waiver should be held unenforceable because the cost of pursuing individual arbitration greatly exceeded the maximum recovery.⁹² Because of this, Italian Colors said the class arbitration waiver barred *effective vindication*

⁸⁴ *Id.* at 365 (Breyer, J., dissenting). "Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contract provision, the merits of class proceedings should not factor into our decision." *Id.* The Court then posed a hypothetical to illustrate the concept, asking "[i]f California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?" *Id.*

⁸⁵ *Id.* at 363 (Breyer, J., dissenting) (citing examples of corporations willing to subject high-stakes disputes to arbitration).

⁸⁶ *Id.* at 366 (Breyer, J., dissenting) ("We have decided dozens of cases about [the FAA's] requirements. We have reached results that authorize complex arbitration procedures.").

⁸⁷ *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

⁸⁸ *Am. Express*, 133 S. Ct. at 2307, 2309.

⁸⁹ *Id.* at 2308.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* Italian Colors provided evidence that, at a minimum, it would cost them \$1 million to secure the necessary expert analysis for their case. *Id.* Their maximum recovery, assuming the dispute resolved in their favor, was \$12,850 or \$38,549 when trebled. *Id.*

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because no economic incentive existed to pursue their antitrust claims individually in arbitration.⁹³

The majority began its analysis by establishing that the Court must enforce arbitration agreements according to their terms even if the claims “allege a violation of a federal statute, unless the FAA’s mandate had been ‘overridden by a contrary congressional command.’”⁹⁴ The majority held that no such command existed.⁹⁵ The Court then explained how Italian Colors’ argument that the class waiver barred effective vindication of their claims was inapplicable in this context.⁹⁶ Finally, in disagreement with the lower court, the majority held that their previous opinion in *Concepcion* resolved this case.⁹⁷

Justice Kagan was defiant in dissent, characterizing the majority opinion as quite sinister.⁹⁸ Justice Kagan agreed with Italian Colors that the class

⁹³ *Id.* at 2310. Effective vindication is a principle allowing arbitration agreements to be invalidated on public policy grounds if they operate as a prospective waiver of a party’s right to pursue statutory remedies. *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

⁹⁴ *Am. Express*, 133 S. Ct. at 2309.

⁹⁵ *Id.* at 2309. The Court explained that antitrust laws do not guarantee a procedural path to the vindication of every claim. *Id.* That said, Congress had made efforts to open said paths, citing treble damages as an example. *Id.* However, “no legislation pursues its purposes at all costs.” The Court then pointed to the text of the Sherman Act and Clayton Act, showing they made no mention of class actions. *Id.* (“[These acts were] enacted decades before the advent of Federal Rule of Civil Procedure 23, which was ‘designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’”).

⁹⁶ *Id.* at 2311. Here, the Court took a very narrow interpretation of the effective vindication doctrine, essentially arguing that so long as a possible path to pursue vindication of claims existed, the practical consequences of such pursuit did not even merit consideration. *Id.* The majority wrote that the class action waiver merely limits arbitration to the two contracting parties, without precluding it; the waiver no more eliminated each party’s right to pursue a statutory remedy than did federal law before its adoption of the class action for legal relief. *Id.* (“The individual suit was considered adequate to assure ‘effective vindication’ of a federal right before adoption of class-action procedures did not suddenly become ‘ineffective vindication’ upon their adoption.”).

⁹⁷ *Id.* at 2312 (“We specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”).

⁹⁸ *Id.* at 2313 (Kagan, J., dissenting). Justice Kagan wrote:

The owner of a small restaurant . . . thinks that American Express . . . has used its monopoly power to . . . impose a variety of procedural bars that would make pursuit of the antitrust claim a fool’s errand. . . . The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. . . . And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.

Id.

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waiver barred effective vindication of their antitrust claims.⁹⁹ To illustrate her point, Justice Kagan offered a hypothetical to show that if a class action waiver were framed as an exculpatory clause, it would be held unenforceable.¹⁰⁰ Justice Kagan continued, arguing courts will not enforce a prospective waiver of the right to gain redress for an antitrust injury, for, without the rule, a company could use their monopoly power to protect their monopoly power – much like American Express was doing in the present case.¹⁰¹ Justice Kagan then explained that the majority construed the effective vindication doctrine far too narrowly in the face of Supreme Court precedent.¹⁰² Two cases were of exceptional relevance – the aforementioned *Mitsubishi Motors* case, from which the effective vindication doctrine was derived, and *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). *Mitsubishi Motors* held the effective vindication to operate far more broadly than the majority suggested it did.¹⁰³ The *Green Tree* case further developed the effective vindication principle in the context of prohibitive cost, as applicable in *American Express*.¹⁰⁴ Having shown that effective vindication

⁹⁹ *Id.* (Kagan, J., dissenting). Kagan wrote that court precedent is clear that an arbitration clause may not thwart federal law, irrespective of exactly how it does so. *Id.*

¹⁰⁰ *Id.* (Kagan, J., dissenting) (We would refuse to enforce an exculpatory clause insulating a company from antitrust liability – say, ‘Merchants may bring no Sherman Act claims’ – even if that clause were contained in an arbitration agreement.”).

¹⁰¹ *Id.* at 2313-14 (Kagan, J., dissenting).

¹⁰² *Id.* at 2313-14 (Kagan, J., dissenting). Supreme Court jurisprudence shows “an arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, *however it achieves the results.*” *Id.* By agreeing to arbitrate claims under federal law, “a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Id.*

¹⁰³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 637-38 (1985). In *Mitsubishi Motors*, the Court wrote:

An arbitration clause will be enforced only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum . . . if an arbitration provision ‘operated . . . as a prospective waiver of a party’s right to pursue statutory remedies’ we emphasized, we would condemn it. . . . Such a clause should be ‘set aside’ if ‘proceedings in the contractual forum will be so gravely difficult’ that the claimant ‘will for all practical purposes be deprived of his day in court.’” *Id.*

¹⁰⁴ *Green Tree Financial Corp. v. Randolph*, 531 U.S. 92 (2000) (holding that the effective vindication principle applies when an agreement thwarts federal law by making arbitration prohibitively expensive). “Where . . . a party asserting a federal right seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” *Id.* Later in her dissent, Justice Kagan wrote that *Mitsubishi* and *Green Tree* in conjunction create the principle that when an arbitration agreement prevents the effective vindication of federal rights, a party has the right to go to court. *Am. Express*, 133 S. Ct. at 2317 (Kagan, J., dissenting) (noting “prevents” can manifest in many ways to capture all the ways a clever drafter might devise).

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should apply in the present case, Justice Kagan discussed how the effective vindication doctrine furthered the purposes not just of other federal laws, but also of the FAA itself.¹⁰⁵ Finally, Justice Kagan brought into question the idea that the majority was simply furthering Congress' intent when it passed the FAA.¹⁰⁶

As seen in the *Concepcion* and *American Express* holdings, the Supreme Court clearly believes that class action waivers in arbitration agreements will and should be upheld. These opinions continue the trend of pro-arbitration, favoring the perceived policy goals of the FAA at the expense of its spirit, practical usage, and own Savings Clause.

PART IV: WHAT ARE EXPLANATIONS FOR THE SUPREME COURT'S PRO-ARBITRATION STANCE?

The FAA's scope now extends to and preempts state law that is conflicting with it.¹⁰⁷ The FAA now applies to adhesion contracts – the exact “take it or leave it” contracts Julius Cohen assured Congress arbitration would not extend to.¹⁰⁸ The Supreme Court expanded the FAA to serve as a suitable remedy for statutory claims, again in direct opposition to the testimony

¹⁰⁵ *Am. Express*, 133 S. Ct. at 2315 (Kagan, J., dissenting) (“What the FAA prefers to litigation is arbitration, not *de facto* immunity. . . . [E]ffective-vindication . . . ensure[s] that arbitration remains a real, not faux, method of dispute resolution.”). Justice Kagan reasoned that arbitration is a streamlined method of dispute resolution, not a foolproof way of killing claims as she alleged American Express did by including a class waiver rendering arbitration prohibitively expensive. *Id.*

¹⁰⁶ *Id.* (Kagan, J., dissenting). “So down one road: More arbitration, better enforcement of federal statutes. And down the other: Less arbitration, poorer enforcement of federal statutes. Which would you prefer? Or still more aptly: which do you think Congress would?” *Id.*

¹⁰⁷ *Compare* *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (holding the FAA applies to states because Congress would not have wanted differing outcomes regarding the validity of arbitration in similar cases based on a state-federal forum dichotomy and holding that state courts cannot apply state statutes to invalidate arbitration agreements) *with* *Southland*, 465 U.S. at 36 (O'Connor, J., dissenting) (stating the holding in *Southland* was an “exercise in judicial revisionism” that was “unfaithful to congressional intent.”); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding the FAA preempts conflicting state law).

¹⁰⁸ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991) (The Court held arbitration applicable to adhesion contracts in an employment context.). Four years later, the Court extended arbitration to adhesion contracts in a customer context. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that section 2 of the FAA making enforceable a written arbitration provision in “a contract *evidencing* a transaction *involving* commerce” should be read broadly to extend the FAA's reach to the limits of the Commerce Clause.). *See* *Moses*, *supra* note 37, at 107.

necessary to ensure it passed Congress in 1925.¹⁰⁹ Further, the FAA today eliminates the requirement of consent to arbitration and removes the right to a jury trial from citizens without their knowledge or consent.¹¹⁰ Clearly, the FAA looks and operates in a markedly different fashion from the legislation it was intended to be.

The driving rationales behind the expansive interpretations of the FAA are twofold: first, is the perception Congress intended for a “liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,”¹¹¹ and second, is a rigid adherence to compelling enforcement of arbitration agreements “according to their terms” or “as written.”¹¹²

As to the liberal policy favoring arbitration, legal academics have struggled to determine where the Court found such a decree. In *Moses H. Cone*, a hospital sued a construction company in state court; in response, the construction company moved to compel arbitration pursuant to Section 4 of the FAA.¹¹³ When the district court stayed the suit pending resolution of the state court action, the federal court of appeals ordered the district court to compel arbitration.¹¹⁴ The Supreme Court considered whether the federal action be stayed out of deference to the parallel litigation in state court.¹¹⁵ Here, the Court responded negatively, holding “stay of the federal suit had thwarted Congress’ clear intent ‘to move parties . . . into arbitration *as quickly and easily as possible*. . . . The stay thus frustrated the statutory policy of *rapid and unobstructed enforcement of arbitration agreements*.”¹¹⁶ As Professor Moses highlights, “the Court . . . emphasized, without citing any authority, that there is a strong federal policy favoring arbitration. . . . [When] [i]n fact, however, *nothing* in the legislative history suggests a strong federal policy favoring arbitration.”¹¹⁷ As is clear, the Court’s jurisprudence takes great

¹⁰⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (holding that no merit existed to the claim that where the arbitration clause at issue failed to mention the relevant statutes at issue, it could not be read to contemplate arbitration of such claims).

¹¹⁰ See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 721, 729-30 (2001).

¹¹¹ *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹¹² Leslie, *supra* note 36, at 312.

¹¹³ *Moses H. Cone*, 460 U.S. at 4; 9 U.S.C. § 4.

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 14-15.

¹¹⁶ *Id.* at 123 (quoting *Moses H. Cone*, 460 U.S. at 22-23) (emphasis added).

¹¹⁷ Moses continues:

The 1925 Congress never indicated in the slightest way that arbitration was to be favored over judicial resolution of disputes. It simply made arbitration of commercial and maritime agreements enforceable

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liberty in revamping and interpreting the legislative intent with regards to the scope and application of the FAA.

The second principle used by the Court to justify augmenting the FAA's purpose lies in the adherence upholding arbitration agreements "according to their terms" oftentimes much to the detriment of the Savings Clause.¹¹⁸ The Supreme Court embraces this principle in its modern arbitration jurisprudence, as Professor Leslie notes, "the Court has claimed in over a dozen opinions that Congress intended arbitration clauses to be enforced 'as written' or 'according to their terms.'"¹¹⁹ In the Court's view, this line of reasoning allows arbitration agreements that contain objectionable terms to be enforced, where if these were contracts other than arbitration agreements they would not be; it is the parties' objective intent doctrine underscoring contract formation taken to an absolute extreme.¹²⁰

Further explanation comes from the historical context in which the Court expanded the FAA. Professor Bruhl attempts to explain how "the massive expansion of the FAA . . . happened fairly quickly and without any legislative amendment of the relevant provisions of the FAA itself."¹²¹ He cites pressure

in federal court because, until 1925, such agreements had essentially been revocable at will by the parties. *At no point did anyone argue that arbitration was overall a superior method of resolving disputes.* Rather, Congress was persuaded that where merchants were concerned, arbitration provided a less expensive option that should be made available to those who voluntarily agreed to this alternative. . . . [T]here appears to be no basis for Justice Brennan to state that "[s]ection 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements" and that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

Moses, *supra* note 37, at 123 (emphasis added); *see also* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274 (1995) (re-characterizing the original Congressional testimony provided by Julius Cohen and other witnesses as proposing the FAA for contracts arising in interstate commerce and failing to mention that such interstate commerce referred to that between merchants and not between merchants and their customers).

¹¹⁸ *See* Leslie, *supra* note 36, at 298; 9 U.S.C.A. § 2 (West 2015).

¹¹⁹ *Id.*; *see, e.g., Italian Colors*, 133 S. Ct. at 2309; *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 655, 669 (2012); *Concepcion*, 131 S. Ct. at 1754; *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 n.8 (2010); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 593 (2008); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 87 (2002) (Thomas, J., concurring) ("[C]ourts must enforce private agreements to arbitrate just as they would ordinary contracts: *in accordance with their terms.*") (emphasis added); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947 (1995).

¹²⁰ Leslie, *supra* note 36, at 266, 298, 312.

¹²¹ Bruhl, *supra* note 51, at 1432.

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from business interests and the Court's desire to curb a perceived litigation explosion.¹²² However, no matter the reason, the plain fact exists that the FAA is more powerful than its intended purpose.

PART V: HOW HAVE THE NINTH CIRCUIT, CALIFORNIA STATE COURTS, AND SEVERAL GOVERNMENTAL REGULATORY AGENCIES RESPONDED IN THE WAKE OF *CONCEPCION* AND *AMERICAN EXPRESS*?

Despite the Supreme Court's clear stance on the enforceability of class waivers in mandatory arbitration agreements, the NLRB, Ninth Circuit, and California state courts still issue opinions holding otherwise. The NLRB, through the NLRA, has consistently held that class action waivers, as a condition of employment, are unenforceable.¹²³ The NLRB has found "that the NLRA is *sui generis* among employment statutes and" that it "guarantees employees a substantive right to engage in concerted activity," which includes "class and collective action litigation."¹²⁴ The NLRB also contends the NLRA has no conflict with the FAA for two reasons: the NLRA is within the Savings Clause; and "the NLRA constitutes a 'contrary congressional command' sufficient to override the FAA's strong federal policy favoring arbitration" as required by the Supreme Court in *American Express*.¹²⁵

The seminal NLRB case regarding this issue is *In re D.R. Horton, Inc.*¹²⁶ In the case, D.R. Horton, a home builder with operations across more than twenty states, required employees to sign a "Mutual Arbitration Agreement" that provided employee's "will not have the authority to consolidate the claims of other employees . . . [or] fashion a proceeding as a class or collective action."¹²⁷ The NLRB looked to Section 7 of the NLRA, and held it precluded the class waiver contained within the agreement.¹²⁸

¹²² *Id.* at 1429 ("[T]he Court's view [was] that litigation had become excessive and needed to be curtailed. In 1976, Chief Justice Burger promoted and spoke at the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the chief message . . . was that the 'litigation explosion would' . . . 'be controlled.'").

¹²³ Jonathan C. Fritts, *National Labor Relations Board (NLRB) Reaffirms 2012 D.R. Horton Decision*, THE NATIONAL LAW REVIEW (Nov. 6, 2014), <http://www.natlawreview.com/article/national-labor-relations-board-nlr-reaffirms-2012-d-r-horton-decision>.

¹²⁴ Fritts, *supra* note 123.

¹²⁵ *Id.*

¹²⁶ *In re D.R. Horton, Inc.* 357 NLRB No. 184 (2012) *rev'd by D.R. Horton, Inc. v. N.L.R.B.* 737 F.3d 344 (5th Cir. 2013).

¹²⁷ *Id.* at 1.

¹²⁸ *Id.* at 2. Section 7 reads in part "[e]mployees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through reps of their own choosing, and to engage

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Importantly, the NLRA held class action out as a “substantive right to engage in specified forms of associational activity.”¹²⁹ The NLRA reconciled the decision with the rule from *Concepcion*, distinguishing them by both type of agreement and scope of people affected.¹³⁰ On appeal, however, the Fifth Circuit reversed the decision.¹³¹ Under *Concepcion*, the Circuit Court held that disallowing class action waivers in employment contracts was not neutral to arbitration.¹³² Like *Concepcion*, the Court held that the rule would undermine the attributes of informality.¹³³ Still, the NLRB maintains its position, and many commentators expect the issue to come before the Supreme Court in the near future.¹³⁴

Despite the overwhelming appearance of adherence to the *Concepcion* and *American Express* rules, the circuit courts beneath the Supreme Court have demonstrated some willingness to invalidate arbitration

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” 29 U.S.C. § 157 (2015); The Court, too, noted that it is well settled that “mutual aid or protection” includes employee efforts to “improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978).

¹²⁹ *Id.*; Weiss Attorneys at Law, *Arbitration Agreements Preventing Employees from Joining Together to Pursue Employment Claims Violate Federal Labor Law*, WEISS ATTORNEYS AT LAW, (Jan. 10, 2012), <http://www.weisslawstl.com/2012/01/10/arbitration-agreements-preventing-employees-from-joining-together-to-pursue-employment-claims-violate-federal-labor-law>. See 29 U.S.C. § 157 (2015). This is consistent with Supreme Court jurisprudence on the legislation. “It is well settled that ‘mutual aid or protection’ includes employees’ efforts to ‘improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.’” The Supreme Court specifically said Section 7 “protects employees from retaliation by their employer when they seek to improve working conditions through resort to administrative and judicial forums.” *Eastex*, 437 U.S. at 565-66. “The same is equally true of resort to arbitration.” *In re D.R. Horton, Inc.* at *2.; It is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” in Section 7. 29 U.S.C. § 158(a)(1) (LexisNexis, Lexis Advance through PL 114-244, approved 10/14/16).

¹³⁰ *Id.* at 15. The NLRB argued *Concepcion* applied to customer adhesion contracts, whereas its decision would affect employment contracts. *Id.* Related and important to this distinction are the difference in scale of the two types. *Id.* The average number of employees at an employer is twenty, compared with the thousands and thousands of customers that can make a class in a customer adhesion contract challenge. *Id.* The employment classes are far more akin to the individual arbitration proceedings along the dimensions of speed, cost, risk, and informality. *Id.*

¹³¹ *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013).

¹³² *Id.* at 359.

¹³³ *Id.*

¹³⁴ *Id.*

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agreements.¹³⁵ Nowhere is this more pronounced than the Ninth Circuit. In 2013, the Ninth Circuit heard *Chavarria v. Ralphs Grocery Co.* where it voided an arbitration agreement it found both procedurally and substantively unconscionable.¹³⁶ In its opinion, the Court made a point of illustrating how the agreement's requirement "that the arbitrator must, at the outset of the arbitration proceedings, apportion the arbitrator's fees between Ralphs and the employee regardless of the merits of the claim" was substantively unconscionable.¹³⁷ The Ninth Circuit held that the *Concepcion* decision "cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration."¹³⁸ Further, it held *American Express* did not bar a court from considering the costs that may be imposed by virtue of the arbitration agreement at issue.¹³⁹

The NLRB and Ninth Circuit are not alone in striking down class action waivers in mandatory arbitration agreements, as the California state courts have used the malleability of unconscionability to avoid enforcement.¹⁴⁰ A

¹³⁵ See *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012) (holding invalid illusory arbitration agreements).

¹³⁶ The arbitration policy created a system for selecting the arbitrator that "invariably [chose] one of the three candidates nominated by the party that did not demand arbitration." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 920 (9th Cir. 2013). It also permitted Ralphs to unilaterally modify the policy without notice to the employee. *Id.* The Court explained "where . . . the employee is facing an employer with 'overwhelming bargaining power' who 'drafted the contract and presented it to [the employee] on a take-it-or-leave-it basis,' the clause is procedurally unconscionable." *Id.* at 922-23 (quoting *Nagrampa v. Mailcoups, Inc.* 469 F.3d 1257, 1284).

¹³⁷ *Chavarria*, 733 F.3d at 923 ("This provision [is] a model of how employers can draft fee provisions to price almost any employee out of the dispute resolution process."). It is an important indicator of a major federal court implicitly recognizing the ways a clever drafter may devise a way to bar effective vindication to a claim even after the *American Express* decision. *Id.*

¹³⁸ *Chavarria*, 733 F.3d at 927.

¹³⁹ *Id.* at 926.

¹⁴⁰ California courts have gained some notoriety for their hostility towards arbitration agreements in the employment and consumer contexts. One ABA article wrote:

Since . . . *Concepcion* . . . many have wondered how the California Court of Appeal – a court (in)famous for its hostility to enforcing employment and consumer arbitration agreements – may attempt to limit the reach of this arbitration-friendly decision. Perhaps unsurprisingly, since the issuance of *Concepcion*, the California Court of Appeal has continued to strike down numerous arbitration agreements, and it has done so largely based on the unconscionability doctrine.

Damon Thayer, *If You Thought Concepcion Would Stop California Courts From Invalidating Arbitration Agreements, Think Again*, ABA YOUNG LAWYERS DIVISION, available at http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/if_you_thought_concepcion_would_stop_california_courts_from_invalidating_arbitration_agreements_think_again.html (last visited January 23, 2016); see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the*

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case providing a good example of this is *Iskanian v. CLS Transportation Los Angeles*.¹⁴¹ In *Iskanian*, Iskanian filed suit alleging his employer failed to pay for overtime, meal breaks, business expense reimbursements, or pay wages in a timely manner.¹⁴² He brought his action under the Labor Code Private Attorney General Act (“PAGA”).¹⁴³ The Court examined the statute and held a class waiver would impermissibly frustrate its objectives.¹⁴⁴ The Court then found the statute did not conflict with the FAA because they dealt with different types of disputes.¹⁴⁵ This case is interesting because it seems to contradict Supreme Court precedent ruling the terms of an arbitration agreement usurp applicable state law.¹⁴⁶

California again threw out arbitration agreements on the basis of unconscionability¹⁴⁷ in *Samaniego v. Empire Today, LLC*¹⁴⁸ and *Mayers v. Volt Management Corp.*¹⁴⁹ In *Samaniego*, two employees were provided non-

Federal Arbitration Act, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186-87 (2004).

¹⁴¹ *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014).

¹⁴² *Id.* at 361

¹⁴³ *Id.* at 359. The Private Attorney General Act authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee. See CAL. LAB. CODE § 2699 (WEST 2004).

¹⁴⁴ Civil Code § 3513 providing that “a law established for a public reason cannot be contravened by a private agreement” is violated if one cannot bring a representative Private Attorney General Act claim.

A single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code. That plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA, even if individual claim has collateral estoppel claims.

Id. at 384.

¹⁴⁵ Where the FAA aims to ensure an efficient forum for the resolution of private disputes, claims under the PAGA are a dispute between an employer and the state Labor and Workforce Development Agency. *Id.*

¹⁴⁶ See *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (reasoning the FAA does not intend for differing arbitrability outcomes based on the forum).

¹⁴⁷ California’s unconscionability law requires showings of procedural and substantive unconscionability. Procedural unconscionability requires oppression or surprise. Oppression exists where a contract involves a lack of negotiation and meaningful choice; surprise exists the unconscionable provision is hidden within a prolix printed form. Substantive unconscionability is found where a contract reallocates risks in an objectively unreasonable or unexpected manner. *Samaniego v. Empire Today, LLC*, 140 Cal. Rptr. 3d 492, 502 (Cal. App. 2012).

¹⁴⁸ *Id.*

¹⁴⁹ *Mayers v. Volt Mgmt. Corp.*, 203 Cal. App. 4th 1194 (2012).

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negotiable arbitration agreements as conditions of employment.¹⁵⁰ The two men did not understand English but were given agreements composed of lengthy, single-spaced textual blocks of legalese with no separate header from which to distinguish it from the rest of the document.¹⁵¹ The employer failed to provide governing arbitration rules, as well.¹⁵² The court found the agreement procedurally unconscionable for the above reasons.¹⁵³ The court found the agreement substantively unconscionable for shortening the limitations period for a claim, making the arbitration obligation one-sided, and requiring employee payment of the employer's attorneys' fees.¹⁵⁴

On the other hand, *Mayers* and its final adjudication in *Sanchez v. Valencia Holding Company*,¹⁵⁵ demonstrates a recent trend in California, in the wake of *Concepcion* and *American Express*, of enforcing arbitration agreements which previously might have been overturned.¹⁵⁶ Though the California Court of Appeal held the employment arbitration agreement *Mayers* signed as unconscionable,¹⁵⁷ the Supreme Court of California later reversed the decision in *Sanchez*.¹⁵⁸ It held that although a contract of adhesion can be found procedurally unconscionable even without a showing of non-negotiability, a provision subjecting the appealing party responsibility for filing fees and other arbitration costs was not unconscionable absent any showing that cost of appellate arbitration filing fees was unaffordable.¹⁵⁹

More recently, the California Supreme Court decided *Baltazar v. Forever 21*, holding an arbitration agreement within an employment contract was not unconscionable.¹⁶⁰ Though the terms of the arbitration agreement were not

¹⁵⁰ *Samaniego*, 140 Cal. Rptr. 3d at 495.

¹⁵¹ *Id.*

¹⁵² *Id.* at 495-96.

¹⁵³ *Id.* at 499.

¹⁵⁴ *Id.* at 500.

¹⁵⁵ *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899 (Cal. 2015).

¹⁵⁶ See also *Tiri v. Lucky Chances, Inc.*, 226 Cal. App. 4th 231 (Cal. 2014) (adopting the rule from *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (permitting a delegation clause within an arbitration agreement to California state law)).

¹⁵⁷ Similar to *Samaniego*, the Court disapproved of the absence of and provision for exact arbitration rules; the Court also held unconscionable a provision allowing award of attorneys' fees to the prevailing party because it exposed the employee to a higher risk of pursuing a claim than if he had simply sued in court. *Mayers v. Volt Mgmt. Corp.*, 203 Cal. App. 4th 1194, 1197 (2012).

¹⁵⁸ *Sanchez*, 61 Cal. 4th at 920.

¹⁵⁹ *Id.*

¹⁶⁰ 62 Cal. 4th 1237 (2016).

very controversial,¹⁶¹ the holding is still significant because of the higher scrutiny employment agreements are given in evaluating unconscionability.¹⁶²

California's insistence on permissible unconscionability standards raises the question of how long such a strategy can be successful. Generally, unconscionability is considered a weak contract defense, yet, it is widely used in challenging arbitration agreements.¹⁶³ Some commentators believe it is a strategic choice by courts seeking to lower the risk of reversal.¹⁶⁴ While it is effective now, it might just be a matter of time before arbitration advocates provide an effective rebuttal to the unconscionability argument.

PART VI: WHERE IS ARBITRATION JURISPRUDENCE HEADING?

With the state of arbitration jurisprudence seemingly divided between pro-arbitration federal courts and state courts favoring narrow interpretations of the FAA, it is difficult to anticipate where arbitration law is heading. That said, several factors contribute to the belief that pro-arbitration attitudes may continue to proliferate: first, the recent decision in *DIRECTV v. Imburgia* seems to only reaffirm the Court's position on arbitration;¹⁶⁵ and second, even with its pervasive applications to employment and consumer contracts, one large void in arbitration jurisprudence exists for expansion – corporate bylaws mandating arbitration for shareholder disputes; third, California and the Ninth Circuit have both shown signs of adopting pro-arbitration attitudes.¹⁶⁶ However, two counterpoints remain. The death of Justice Antonin Scalia means an incoming Justice may provide a swing vote for a Court strongly

¹⁶¹ The agreement provided a non-exhaustive list of arbitrable claims and also contained a confidentiality provision. *See Baltazar*, 62 Cal. 4th at 1241-42.

¹⁶² *See Armendariz v. Foundation Health Psychcare Services, Inc.* 24 Cal.4th 83, 114 (2000) (holding courts must be “particularly attuned” to the danger of unconscionability in the employment setting where “economic pressure exerted by employers on all but the most sought-after employees may be particularly acute”).

¹⁶³ Bruhl, *supra* note 51, at 1442 (“It is well known that unconscionability is generally a loser of an argument.”). Unconscionability challenges appear in 15-20% of all cases involving arbitration. Bruhl, *supra* note 51, at 1441.

¹⁶⁴ Professor Bruhl argues lower courts realize they can manipulate the grounds of decision to advance their preferred outcomes and raise the costs of reviewing. Bruhl, *supra* note 51, at 1422. He argues unconscionability is effective for a few reasons: it carries a low policy impact so is unlikely to garner extra attention, low technical and expressive ease of review, and, thus, a low risk of reversal. *Id.* at 1442, 1448.

¹⁶⁵ *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 436 (2015).

¹⁶⁶ *See generally supra* Part V.

divided in *Concepcion* and *American Express*. Further, perception from legal scholars and the public seem to be at a low-point and may provide pressure necessary to persuade judicial restraint as to the FAA.

The Court's recent opinion in *Imburgia* signals both an affirmation of existing arbitration jurisprudence and an overt frustration with lower courts unwilling to enforce it. The facts are familiar to other cases like it: DIRECTV and Imburgia entered into a service agreement containing a mandatory arbitration agreement with a class waiver stipulating "if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision 'is unenforceable.'"¹⁶⁷ While a California Court of Appeal held "the law of California would find the class action waiver unenforceable" even after the Court's holding in *Concepcion*, the Supreme Court reversed.¹⁶⁸ While the holding may come as little surprise, the majority's foreboding tone coupled with its explicit point that the "conclusion . . . falls well within the confines of (and goes no further than) present well-established law" raises the reasonable inference that the Court stands firmly behind its pro-arbitration interpretations.¹⁶⁹ The fallout from this opinion was made even more clear when the Court removed *MHN Government Services, Inc. v. Zaborowski* from its calendar.¹⁷⁰ Commentators speculate the "vigor" of the *Imburgia* opinion caused the parties to settle and withdraw from the Court's docket.¹⁷¹ *Imburgia* offers little hope to the consumers and employees who bear the brunt of the harm from broad applications of the FAA.

Even more troubling for opponents of arbitration is the issue of mandatory arbitration agreements with class waivers in corporate bylaws – an area that

¹⁶⁷ *Imburgia*, 136 S. Ct at 466.

¹⁶⁸ *Id.* at 467 (quoting *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (2014)).

¹⁶⁹ *Id.* at 471 (emphasis added). One passage demonstrating frustration with lower courts is:

No one denies that lower courts must follow this Court's holding in *Concepcion*. The fact that *Concepcion* was a closely divided case, resulting in a decision from which four Justices dissented, has no bearing on that undisputed obligation. Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of agreement with its content or a refusal to recognize the superior authority of its source." . . . The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.

Id. at 468 (quoting *Howlett v. Rose*, 496 U.S. 356, 371 (1990)).

¹⁷⁰ Ronald Mann, *February Argument Calendar Loses Arbitration Case to Settlement*, SCOTUSBLOG (Jan. 7, 2016, 6:06 PM), <http://www.scotusblog.com/2016/01/february-argument-calendar-loses-arbitration-case-to-settlement/>. *Zaborowski* came from the Ninth Circuit and was largely concerned with the severability of unconscionable provisions of an arbitration agreement. *Id.* After *Imburgia*, it appeared clear the dissent from the Ninth Circuit would prevail in the Supreme Court. *Id.*

¹⁷¹ Mann, *supra* note 170.

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until recently was largely untapped for corporate strategists looking to insulate themselves from litigation and class proceedings. There is very little case law on the subject, and even less as it pertains to public companies – this cuts both ways: it means few companies have attempted to implement such provisions; however, it also implies fertile ground with which to expand arbitration policy.¹⁷²

Relevant authorities offer conflicting outlooks on this practice. As the leading state of incorporation, Delaware's statutory language is instructive, if indirect; plain-text interpretation seems to allow implementing arbitration agreements in one of three ways: the corporation's articles of incorporation; the corporation's bylaws, either as an initial bylaw or a subsequent amendment; or negotiated between the corporation and shareholders on an individual basis.¹⁷³ Though extremely limited, three cases – two in state trial court and one in federal district court – involving the Commonwealth Real Estate Investment Trust ("REIT") show a public company successfully defending inclusion of mandatory arbitration provisions with a class ban in its bylaws.¹⁷⁴

Still, more evidence suggests a practice of mandatory arbitration clauses within corporate bylaws faces some significant obstacles. For one, this practice conflicts with SEC policy. The SEC believes such agreements work against the public policy interests underlying federal securities laws and

¹⁷² See Allen, *supra* note 9, at 778 ("As of December 2014, there were only three known opinions addressing the validity and enforceability of a mandatory arbitration bylaw adopted by a public company."); cf. Silver-Greenberg & Gebeloff, *supra* note 4 ("More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit companies and retailers . . .").

¹⁷³ DEL. CODE ANN. tit. 8, § 102(b)(1) (West 2015) (authorizing amendment and inclusion in the articles of incorporation); DEL. CODE ANN. tit. 8, § 109(a)-(b) (West 2015) (authorizing implementation through corporation bylaws); see Garry D. Hartlieb, *Enforceability of Mandatory Arbitration Clauses for Shareholder-Corporation Disputes*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 132, 133-34 (2014).

¹⁷⁴ *Corvex Management LP v. Commonwealth REIT*, 2013 Md. Cir. Ct. LEXIS 3, at *27 (Md. Cir. Ct. 2013) (holding bylaws containing the arbitration provision provided shareholders actual and constructive knowledge as to its existence); *Katz v. Commonwealth REIT No. 24-C-13-001299* (Md. Cir. Ct. Balt. City, Feb. 19, 2014); *Delaware County Employees Retirement Fund v. Portnoy*, 2014 WL 1271528 (D. Mass. 2014) (refusing to invalidate a mandatory shareholder arbitration clause in the bylaws of the Commonwealth REIT under the principle of res judicata, though finding it would not be held unenforceable if ruled on the merits); see also Alison Frankel, *Shareholders Beware: Federal Judge OKs Corporate Arbitration Clause*, REUTERS, (Mar. 27, 2014), <http://blogs.reuters.com/alison-frankel/2014/03/27/shareholders-beware-federal-judge-oks-corporate-arbitration-clause/>.

violate Section 14 and Section 29 of the Securities Exchange Act of 1934.¹⁷⁵ An oft-cited example is the Carlyle Group, LP which included an arbitration provision in its S-1 filing for an initial public offering, but withdrew it in response to SEC pressure.¹⁷⁶ Another impediment to this practice is the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).¹⁷⁷ Enacted in response to the subprime mortgage crisis, Dodd-Frank includes several provisions limiting, or providing authority to limit, mandatory pre-dispute arbitration.¹⁷⁸ The path to embedding mandatory arbitration clauses with class bans within corporate bylaws is not completely clear, but remains a logical continuation of pro-arbitration policies.¹⁷⁹

¹⁷⁵ Section 29(a) relates to waiver provisions and reads, “[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or any rule of regulation thereunder, or of any rule of a self-regulatory organization, shall be void.” 15 U.S.C. § 78cc (2015); see also 15 U.S.C. § 77c (2015). Thomas Riesenberger, at the time the Assistant General Counsel of the SEC, believed mandatory pre-dispute arbitration of shareholder claims “would be contrary to the public interest to require investors . . . to waive access to a judicial forum . . . where such a waiver is made through a corporate charter rather than through an individual investor’s decision.” Hartlieb, *supra* note 173, at 158 (quoting Thomas L. Riesenberger, *Arbitration and Corporate Governance: A Reply to Carl Schneider*, INSIGHTS (Aug. 1990)); Allen, *supra* note 9, at 775-76 (The “SEC disfavors mandatory arbitration, as evidenced by its policy against accelerating the registration statements of companies which such provisions in their organizing documents.”).

¹⁷⁶ Hartlieb, *supra* note 173, at 157 (“Although the [SEC] has not issued formal opinions or decisions prohibiting arbitration bylaws, it has still been able to exert pressure in guiding corporations away from including the terms.”); The SEC also provided relief under the anti-waiver provision in Section 29(a) of the Exchange Act when Pfizer Inc.’s shareholders proposed a bylaw requiring arbitration of stockholder disputes with specific parameters. The SEC stated, “there appears to be some basis for [the] view that implementation of the proposal would cause the company to violate the federal securities laws.” Gannett Co., Inc., SEC No-Action Letter, 2011 WL 6859124 (Feb. 22, 2012). See also Allen, *supra* note 9, at 779.

¹⁷⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁷⁸ See Allen, *supra* note 9, at 775 n.129; see also Hartlieb, *supra* note 173, at 160 (describing how Dodd-Frank permits the SEC to “prohibit, or impose condition or limitation on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute.” (quoting *Can Companies Force Arbitration on Shareholders?*, SLINDE NELSON STANFORD, <http://www.slindenelson.com/Articles/Can-Companies-Force-Arbitration-on-Shareholders.shtml> (last visited Nov. 6, 2016) (quoting 15 U.S.C. § 78o(b)(3))). But see *Shearson/American Express, Inc. v. McMahon*, 428 U.S. 220 (1987) (holding non-arbitrability does not extend to claims under the SEC).

¹⁷⁹ Compare Hartlieb, *supra* note 173, at 161 (“Established corporations will not desire risk the legal and reputational costs associated with being first if doing so will result in [SEC] sanctions. Until a corporation chooses to invest the financial resources . . . , this question will remain open.”) with Frankel, *supra* note 174 (“[T]he [SEC] . . . might not be able to stop a corporation that chose to fight all the way to the Supreme Court.”).

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Further, California's recent decisions in *Sanchez* and *Baltazar* and Governor Brown's veto of legislation, which would have made arbitration agreements in all employment contracts unenforceable, signal that California is adopting a pro-arbitration outlook. Assembly Bill No. 465 would have prohibited employers from requiring employees sign arbitration agreements as a condition of employment.¹⁸⁰ Though passed in the California Legislature, Governor Brown vetoed the bill, stating "a blanket ban on mandatory arbitration agreements is a far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act."¹⁸¹ The governor's actions, specifically his rationale for doing so, strongly indicates California is prepared to depart from its anti-arbitration past.

On the flip side, some hope exists for restraint in the arbitration context. A large unknown for arbitration jurisprudence lies in the Supreme Court's future make-up. Though, historically, the Court is considered strongly pro-arbitration, the *Concepcion* and *American Express* decisions were harshly divided.¹⁸² Justice Scalia penned the majority opinions in both decisions.¹⁸³ The Justice who is confirmed in his place may end up providing the vote necessary to reign in the Court's expansive interpretation of the FAA and provide some relief to consumers and employees who are disadvantaged by it.¹⁸⁴

Besides speculating the arbitration preferences of the next Supreme Court Justice, there is some possible weight to the notion that perception of arbitration is so low that pressure to reform may be in order. Empirical studies

¹⁸⁰ Michael Campbell, California Employees Exhale Relief, *Governor Vetoes Ban on Employment Arbitration Agreement*, SHEPPARDMULIN: LAB. & EMP. Blog (Oct. 16, 2015), <http://www.laboremploymentlawblog.com/2015/10/articles/arbitration-agreements/employers-exhale-relief-governor-vetoes-ban-on-employment-arbitration-agreements/>.

¹⁸¹ Campbell, *supra* note 180.

¹⁸² See *supra* Part III.

¹⁸³ *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 335 (2011); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

¹⁸⁴ Current Supreme Court nominee, Neil Gorsuch, however, is likely not the person to bring about such change. See Edith Roberts, *Judge Gorsuch's arbitration jurisprudence*, SCOTUSBLOG (Mar. 6, 2017), available at <http://www.scotusblog.com/2017/03/judge-gorsuchs-arbitration-jurisprudence/>. For example, in a 2016 dissent, Gorsuch would have compelled arbitration because of "the federal policy favoring arbitration embodied in the FAA." *Ragab v. Howard*, 841 F.3d 1134, 1141 (10th Cir. 2016) (Gorsuch, N., dissenting). Gorsuch has also authored opinions suggesting he will limit the discretion of the NLRB to invalidate class-action waivers in arbitration agreements, should the issue come before the Supreme Court. See Edith Roberts, *Judge Gorsuch's arbitration jurisprudence*, SCOTUSBLOG (Mar. 6, 2017), available at <http://www.scotusblog.com/2017/03/judge-gorsuchs-arbitration-jurisprudence/>.

show that, for example, when investors go to securities arbitration, they exhibit low levels of faith in the impartiality of arbitrators, belief that the process itself is fair, and satisfaction with the outcome, especially relative to the companies they oppose.¹⁸⁵ They are also likely to believe arbitration does not compare favorably to litigation.¹⁸⁶ A study from the Consumer Financial Protection Bureau finds that arbitration disproportionately favors business over consumers in outcome success rates and award amounts.¹⁸⁷ It seems various media outlets have taken notice to the current trends too.¹⁸⁸ Negative public perception along with pressure from anti-arbitration courts may provide the impetus to curb the tide of arbitration.

Finally, the Ninth Circuit's holding in *Morris v. Ernst & Young* shows a willingness, on the federal level, to still limit arbitrations application. In *Morris*, the Ninth Circuit held, an employment agreement, which funneled all disputes to individual arbitration, ran at odds with the NLRA.¹⁸⁹ The Court, taking after the NLRB's holding in *Horton*, found the FAA could not trump the NLRA where it violated the NLRA's statutory right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection" and "join together to pursue workplace grievances, including litigation."¹⁹⁰ The case has been petitioned to the U.S. Supreme Court for next year.¹⁹¹

PART VII: HOW DO THESE TRENDS AFFECT THE SEVERAL ONGOING UBER LITIGATIONS?

For Uber and its drivers, the dispute is real and now. The procedure of the several litigations, along with some recent outcomes provide further

¹⁸⁵ Jill I. Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349, 385-87 (2008).

¹⁸⁶ Gross & Black, *supra* note 185, at 387.

¹⁸⁷ Jessica Silver-Greenberg & Michael Corkery, *Efforts to Rein In Arbitration Come under Well-Financed Attack*, N.Y. TIMES (Nov. 15, 2015), available at <http://www.nytimes.com/2015/11/16/business/dealbook/efforts-to-rein-in-arbitration-come-under-well-financed-attack.html>.

¹⁸⁸ See generally Silver-Greenberg & Gebeloff, *supra* note 4; see also Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), available at <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>; see also Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), available at <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

¹⁸⁹ *Morris*, 834 F.3d at 980.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

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example that pro-arbitration attitudes are here to stay. Though the Ninth Circuit recently granted Uber a victory in upholding its arbitration agreements, several other actions still exist.¹⁹² The strategic argument the drivers have and will continue to use is unconscionability – it is undoubtedly their best chance at convincing a reviewing court that the arbitration agreements are unenforceable, which will allow them to maintain their class against Uber.¹⁹³ *Sanchez v. Valencia Holding Company* discusses and slightly reformulates California unconscionability rules – barring new case law, this is the prevailing definition.¹⁹⁴ The *Sanchez* court found procedural unconscionability due to the adhesive nature of the contract, yet ruled against a finding of substantive unconscionability, drawing on factors including provision of some limited appeal and the type of contract (customer versus employment contract).¹⁹⁵ In ruling Uber's 2013 and 2014 arbitration agreements unconscionable, the Northern District Court of California first held the clauses to be procedurally unconscionable as adhesion contracts

¹⁹² The Ninth Circuit enforced the arbitration agreement for several reasons: one, the delegation clause was clear and unmistakable; two, the delegation was not unconscionable because the drivers had the ability to opt out; three, the drivers were not prevented from effectively vindicating their rights in arbitration because Uber agreed to committed to paying the full costs of the arbitration. *Mohamed v. Uber Technologies, Inc.*, No. 12-16178 (9th Cir. Sept. 7, 2016).

¹⁹³ See Bruhl, *supra* note 51, at 1443 (“Unconscionability’s allure is not limited to the fact it remains available. Another of its virtues is that it provides at least the opportunity for furtive manipulation and evasion of review, making it a move that is hard to counter directly.”); see also Hartlieb, *supra* note 176, at 161 (“...California and the Ninth Circuit have stringent understandings of unconscionability.”). But cf. Bruhl, *supra* note 51, at 1443 (explaining that unconscionability may be a desirable short-term option, yet, in the long-run, “pro-arbitration courts will try to respond to the . . . tools being used to limit arbitration . . . arbitration jurisprudence is not at rest but is still evolving.”).

¹⁹⁴ *Sanchez* builds on the unconscionability rules described by the *Samaniego* court and detailed *supra* note 123. Unconscionability requires both procedural and substantive unconscionability, though not necessarily to the same degree – rather, they operate on a sliding scale where an excess of one can compensate for a lack of the other. *Sanchez v. Valencia Holding Company*, 61 Cal. 4th 899, 910 (2015). Unconscionability is generally concerned with terms unreasonably favorable to the more powerful party. *Id.* at 910. That said, a contract is not substantively unconscionable when it merely gives one side a greater benefit; unconscionability requires one-sided terms that are “overly harsh,” “unduly oppressive,” or “unreasonably favorable.” *Id.* at 910. Evaluating unconscionability “is highly dependent on context . . . [and] often requires inquiry into the ‘commercial setting, purpose, and effect’ of the contract.” *Id.* at 911. Finally, the court reiterates that under *Concepcion*, unconscionability must be applied similarly to arbitration and non-arbitration agreements. *Id.* at 912. See e.g., *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064 (2003) (holding unconscionable a \$50,000 threshold for an arbitration appeal that decidedly favored defendants in employment contract disputes).

¹⁹⁵ *Sanchez*, 61 Cal. 4th at 916.

despite the existence of opt-out provisions.¹⁹⁶ The Court found substantive unconscionability in both agreements where they created a fee-splitting arrangement imposing “hefty fees” even to arbitrate “the gateway question of arbitrability.”¹⁹⁷

In light of *Sanchez*, the challenged 2013 and 2014 agreements would likely be upheld as unconscionable. As to procedural unconscionability, the 2013 and 2014 agreements are adhesion contracts, which *Sanchez* tells us is sufficient for a finding of some procedural unconscionability. Murkier, though, is the relation between the two disputes as they relate to substantive unconscionability. That said, it is reasonable to infer the *Sanchez* court would find the 2013 and 2014 agreements substantively unconscionable because: they are employment contracts – a context requiring more protection than a sales contract; Uber lacks the limited appeals existing in *Sanchez*; and the fee-shifting arrangement is one posited as unenforceable by previous California and United States Supreme Court holdings.¹⁹⁸ Though, despite its apparent conformity to existing California law, this analysis may become irrelevant, contingent on its applicability to the ongoing litigation, as Uber unveiled an even further revised arbitration agreement at the end of 2015.

Since the District Court ruling, Uber re-issued a new arbitration clause “excluding anyone who signs it from participating in current or future class-action lawsuits.”¹⁹⁹ The new agreement contains several critical modifications, none more important in overcoming an unconscionability attack than the change made to the claimant’s responsibility to pay

¹⁹⁶ The Court determined the 2013 Agreement’s opt-out clause was “buried in the agreement,” “extremely onerous,” and “largely illusory” because the clause was buried in the contract, printed on the penultimate page in small and densely packed text, and required hand-delivery to Uber’s office in San Francisco. *Mohamed v. Uber Technologies*, 109 F. Supp. 3d 1185, 1205 (N.D. Cal. 2015) (quoting *O’Connor v. Uber Technologies*, 2013 WL 6407583 at *6 (2013)). The 2014 agreement created a “meaningful right to opt-out” but remained procedurally unconscionable under *Gentry v. Superior Court*, 42 Cal. 4th 443, 471 (2007) (holding an identical opt-out provision procedurally unconscionable under California state law because “it is not clear that someone in Gentry’s position would have felt free to opt out.”); see *Mohamed*, F. Supp. 3d at 1216 (“[T]he Court cannot conclude that the 2014 delegation clauses are without procedural unconscionability . . . Mohamed’s ability to opt-out of the delegation clause was not sufficiently meaningful to eliminate *all* oppression from the contract.”).

¹⁹⁷ *Mohamed*, F. Supp. 3d at 1208, 1216.

¹⁹⁸ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (holding “administrative fees attached to arbitration that are so high as to make access to the forum impracticable” may well be enforceable (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000))); see also *Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83, 110 (2000).

¹⁹⁹ Tracey Lien, *Uber tries to limit size in class-action lawsuit with new driver contract*, LOS ANGELES TIMES (Dec. 11, 2015), available at <http://www.latimes.com/business/technology/la-fi-tn-uber-arbitration-opt-out-20151211-story.html>.

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administrative and filing fees.²⁰⁰ Uber's new agreement provides, a claimant's responsibility for these fees will be paid by Uber "if your claim for damages does not exceed \$75,000."²⁰¹ Though this still presents some barriers and costs to arbitrability, the damages threshold is so high as to not effectively bar many suits; under California case law, it will likely survive a test for substantive unconscionability.²⁰² The legal weight this new agreement is afforded remains to be seen, but a week after Uber released it, Judge Edward Chen, expressed doubt that "he can bar Uber Inc. from enforcing [its new] arbitration agreement," especially in light of the United States Supreme Court's holding in *Imburgia*.²⁰³ Given how far the pro-arbitration pendulum has swung, barring drastic political change or groundbreaking interpretations of the FAA, it is difficult to see how Uber drivers – and in the greater picture, employees and consumers as a whole – will be able to effectively find relief in a world so permeated with arbitration.

²⁰⁰ *Legal – Terms and Conditions*, UBER, (last updated Nov. 21, 2016), <https://www.uber.com/legal/usa/terms>.

²⁰¹ LIEN, *supra* note 199.

²⁰² *Cf. supra* p. 35.

²⁰³ Beth Winegarner, *Uber's New Arbitration Agreement Likely To Live, Judge Says*, LAW360, (Dec. 17, 2015), <http://www.law360.com/articles/739431/uber-s-new-arbitration-agreement-likely-to-live-judge-says>.