PEPPERDINE UNIVERSITY

Pepperdine Dispute Resolution Law Journal

Volume 22 | Issue 2 Article 6

6-15-2022

Arbitration and the Right to Have Your Day in Court: Meeting Again at the Turning of the Tide

Lucas Clover Alcolea

Follow this and additional works at: https://digitalcommons.pepperdine.edu/drlj

 Part of the Dispute Resolution and Arbitration Commons, and the Labor and Employment Law Commons

Recommended Citation

Lucas Clover Alcolea, *Arbitration and the Right to Have Your Day in Court: Meeting Again at the Turning of the Tide*, 22 Pepp. Disp. Resol. L.J. 539 (2022)
Available at: https://digitalcommons.pepperdine.edu/drlj/vol22/iss2/6

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Arbitration and the Right to Have Your Day in Court: Meeting Again at the Turning of The Tide

Lucas Clover Alcolea*

I. Introduction

Arbitration has been the darling of the courts for decades now, and its position as the dispute resolution mechanism of choice for big business is generally thought to be unassailable. This view is not just a subjective opinion but is borne out by the data. For example, a 2018 study found that 56.2% of private-sector nonunion employees—60.1 million U.S. workers—were subject to a mandatory employment arbitration process.[1] Consumer arbitration is even more widespread, with a 2019 study finding that there were over 800 million consumer arbitration agreements in force, which is more than two and a half times the population of the U.S. as a whole.[2] The U.S. court's favorable view of arbitration is also beyond doubt with the Supreme Court

* Postdoctoral Associate, Scheinman Institute on Conflict Resolution, Cornell University School of Industrial and Labor Relations. The author would like to thank Alexander Colvin, Kenneth F. Kahn '69 Dean and Martin F. Scheinman '75, 'MS '76 Professor of Conflict Resolution at the ILR School, Cornell University, Harry Katz, Jack Sheinkman Professor of Collective Bargaining, Director, Scheinman Institute, ILR School, Cornell University, and Edwin Baum, Partner, Perkins Coie, for their helpful comments on a draft version of this article. All errors, omissions and opinions expressed in this piece remain the author's.

[1] ALEXANDER J.S. COLVIN, THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS 2, (Econ. Pol'y Inst. ed., 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[2] Imre S. Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019).

Published by Pepperdine Digital Commons, 2022

stating as far back as 1983 that the Federal Arbitration Act (FAA) "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."[3] Since then the Supreme Court has repeatedly struck down any restrictions on arbitration imposed by state legislatures or courts, including requirements that arbitration clauses be specified prominently in a contract,[4] laws or rulings making class-action waivers in most consumer cases unconscionable,[5] laws lodging exclusive jurisdiction about talent agency disputes in an administrative tribunal,[6] laws invalidating non-compete agreements in employment contracts,[7] and rulings holding that arbitration agreements in nursing home contracts could not be enforced with regards to negligence claims.[8]

The Supreme Court has justified its decisions on the basis that "The FAA thus preempts any state rule discriminating on its face against arbitration . . . [and] also displaces any rule that covertly accomplishes the same objective."[9] This is all despite significant criticism from scholars that the FAA is being stretched to a breaking point by the Supreme Court's decisions and applied in situations where it was never designed to be used.[10]

However, as the title of this article suggests, the situation is no longer as clear cut as it used to be. The

[3] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1982).
[4] Dr.'s Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).
[5] AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 351 (2011).
[6] Preston v. Ferrer, 552 U.S. 346 (2008).
[7] Nitro-Lift Techs., LLC v. Howard, 568 U.S. 17 (2012).
[8] Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012).
[9] Kindred Nursing Ctrs. Ltd v. Clark, 137 S. Ct. 1421, 1423 (2017).
[10] *E.g.*, Margaret L. Moses, *Statutory Miconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, FLA. STATE UNIV. L. REV. 99, 99–159; Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RSRV. L. REV. 91, 91–140; Imre S. Szalai, *Directv, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO STATE J. ON DISP. RESOL. 75, 75–110 (2017).

Supreme Court's recent decision in *New Prime Inc. v. Olivera* goes against the grain of its earlier pro-arbitration decisions, and companies are beginning to realize that arbitration may not always be a good thing for them due to the rise of mass arbitration.[11] The result is that some businesses are actually opting for litigation instead of arbitration in their adhesion contracts, so the employment and consumer arbitration landscapes have significantly changed in recent years.[12]

This article aims to explore court decisions which have made arbitration less attractive to businesses—both those which have refused to enforce arbitration clauses and paradoxically and those which have enforced arbitration clauses—as well as to provide an overview of businesses' reactions to those decisions and make some predictions about the future direction of travel. To that end, this article will be divided into three main parts. The first will explore the decision of *New Prime Inc.* as well as the various federal appellate decisions that have applied it. The second will explore the challenges posed by mass arbitration, and the third will discuss examples of several major companies' dissatisfaction with arbitration, or at least with their current arbitration schemes, in recent years.

II. New Prime Inc. v. Oliveira and its Progeny

Although surprisingly little has been written about *New Prime*, it is undoubtedly one of the most important arbitration—and certainly the most important employment arbitration—decision(s) of the last ten years. This is because it represents a return to a more restrained and textual interpretation of the FAA; rather than resorting to congress's "liberal federal policy favoring arbitration agreements," the

[11] New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019).
[12] *E.g.*, *Google, Inc.'s Terms of Service Do Not Provide for Arbitration, Terms of Service*, GOOGLE.COM (Jan. 5, 2022), https://policies.google.com/terms?hl=en-US.

Published by Pepperdine Digital Commons, 2022

justices engaged with the text and its original meaning in minute detail.[13]

New Prime Inc. was an interstate trucking company that employed Dominic Oliveira as a driver; Oliveira was an independent contractor (this is an important point to remember).[14] The contract between New Prime and Oliveira required that any disputes be resolved by arbitration and not litigation.[15] Such a dispute did in fact arise.[16] Oliveira brought a class action claim in federal court, arguing that New Prime did not pay its drivers lawful wages; although the drivers were called "independent contractors," they were in fact employees and entitled to the statutory minimum wage.[17] New Prime sought to have the case removed to arbitration based on the arbitration clause in its contract with Oliveira; however, Oliveira argued that the court had no jurisdiction to order arbitration because section one of the FAA excludes "contracts of employment of . . . workers engaged in foreign or interstate commerce" from the coverage of the Act.[18] Among other things, New Prime counter-argued that "contracts of employment" only refer to employment agreements—not independent contractor agreements—and therefore did not apply to Oliveira.[19] Both the district and appellate courts agreed with Oliveira, and the case made its way to the Supreme Court.[20]

The challenge for the Supreme Court was its previous decision in *Circuit Stores v. Adams*, where the Court had adopted a very narrow approach to section 1 of the FAA and held that "Section 1 exempts from the FAA only

[13] New Prime, Inc., 139 S. Ct. at 548 (Ginsburg, J., concurring) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
[14] *Id*. at 536 (majority opinion).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 538–39.
[19] *Id.* at 541.
[20] *Id.* at 537.

contracts of employment of transportation workers."[21] This is despite the clear language of the provision, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."[22] As noted by the dissent, this effectively rewrites the provision to read: "nothing herein contained shall apply to contracts of employment seamen, railroad employees, or any other class of [transportation] workers engaged in foreign or interstate commerce."[23] The majority justified their decision on the basis of the "ejusdem generis" canon of interpretation, stating that "[u]nder this rule of construction the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."[24] However, it is clear that the real justification for the majority's decision was one of policy, and indeed, this is alluded to by the majority:

> [I]t is true here, just as it was for the parties to the contract at issue in Allied-Bruce, that there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context . . . [a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning

[21] Circuit City Stores v. Adams, 532 U.S. 105, 119 (2001).
[22] *Id.* at 127 (Stevens, J., dissenting).
[23] *Id.* at 128.
[24] *Id.* at 115 (majority opinion).

> commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship . . . .[25]

The majority also ignored clear legislative history and subsequent interpretation, which demonstrated that the FAA was not intended to apply to employment contracts;[26] the majority stated that "we need not assess the legislative history of the exclusion provision . . . '[w]e do not resort to legislative history to cloud a statutory text that is clear.'"[27] The irony, of course, is that while the statute's meaning was clear, just not in the way the majority wished; the decisions of the Supreme Court, both before and since *Circuit City*, have done much to cloud its meaning.

The *New Prime* decision should have been an open and shut case for the Justices. If they adopted their previous purposive interpretation of the FAA, then New Prime would have taken Oliveira to arbitration.[28] However, the Supreme Court opted to eschew the approach adopted in *Circuit City.* The Court began with a broadside against its previous approach to interpreting the FAA by stating that, "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands . . . . We would risk, too, upsetting

---

[25] *Compare id.* at 122–23 (Stevens, J., dissenting), *with id.* at 118–119 (majority opinion).
[26] IMRE S. SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 191–92 (Carolina Acad. Press, 2013); Moses, *supra* note 10, at 105–106, 126, 146–150.
[27] Circuit City Stores v. Adams, 532 U.S. at 119 (quoting Ratzlaf v. U.S., 510 U.S. 135, 147–48 (1994)).
[28] *See id.* at 118–19.

reliance interest in the settled meaning of a statute.'"[29] At this stage one might be tempted to ask "And? That hasn't stopped you before."

The Court continued to contradict its previous approach by stating that no one "suggested any other appropriate reason that might allow us to depart from the original meaning of the statute at hand."[30] The Court then decided that:

> To many lawyerly ears today, the term 'contracts of employment' might call to mind only agreements between employers and employees . . . But this modern intuition isn't easily squared with evidence of the term's meaning at the time of the Act's adoption in 1925. At that time, a 'contract of employment' usually meant nothing more than an agreement to perform work. [31]

The Court continued:

> What's the evidence to support this conclusion? It turns out that in 1925 the term 'contract of employment' wasn't defined in any of the (many) popular or legal dictionaries the parties cite to us. And surely that's a first hint the phrase wasn't then a term of art . . . . It turns out, too, that the dictionaries of the era consistently afforded the word 'employment' a broad construction . . . . All work was treated as employment.[32]

[29] New Prime, Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019).
[30] *Id*.
[31] *Id*.
[32] *Id*. at 539–40.

At this point, it behooves us to consider how far the Court has come from its previous decision in *Circuit City*. In *Circuit City*, the majority effectively said the exact opposite of its decision in *New Prime*, stating that:

> It is argued that we should assess the meaning of the phrase "engaged in commerce" in a different manner here, because the FAA was enacted when congressional authority to regulate under the commerce power was to a large extent confined by our decisions . . . . When the FAA was enacted in 1925, respondent reasons, the phrase 'engaged in commerce' was not a term of art indicating a limited assertion of congressional jurisdiction . . . . Were this mode of interpretation to prevail, we would take into account the scope of the Commerce Clause, as then elaborated by the Court, at the date of the FAA's enactment in order to interpret what the statute means now.[33]

The majority rejected this argument by reasoning that, "A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation."[34] The Supreme Court continued to reject its previous approach in *Circuit City* when New Prime attempted to argue the policy favoring arbitration agreements.[35] The Court flatly rejects that argument and notes that:

> If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we

[33] Circuit City Stores v. Adams, 532 U.S. at 116.
[34] *Id.* at 117.
[35] *See* New Prime, Inc. v. Oliveira, 139 S. Ct. at 543.

> would risk failing to 'tak[e] . . . account of' legislative compromises essential to a law's passage and, in that way, thwart rather than honor 'the effectuation of congressional intent.' By respecting the qualifications of §1 today, we 'respect the limits up to which Congress was prepared' to go when adopting the Arbitration Act.[36]

New Prime could therefore not be a clearer rejection of *Circuit City*'s methodology, even if the latter case is never mentioned in the decision. The question therefore becomes: what changed? Simply put "'statutory originalism' is now the Court's philosophy of interpretation."[37] Or, to paraphrase Justice Kagan, "We are all originalists now."[38] What does this mean for the future of employment arbitration? Some clues can be gleaned from appellate court decisions which apply the ruling in *New Prime*.[39]

In *Waithaka v. Amazon.com, Inc.,* the First Circuit adopted the Supreme Court's originalist approach when deciding whether an Amazon delivery driver who never crossed state lines was engaged in interstate commerce.[40] The Court began its approach to the issue by stating that:

> to determine what it meant to be 'engaged in' interstate commerce in 1925, and thus whether Waithaka and his fellow AmFlex

---

[36] *Id.* at 543 (citations omitted).
[37] Steven B. Katz, *The Supreme Court Embraces Statutory Originalism*, A.B.A. (May 19, 2019), https://www.americanbar.org/groups/litigation/committees/employment-labor-relations/articles/2019/spring2019-supreme-court-embraces-statutory-originalism/.
[38] *Kagan: 'We Are All Originalists'*, BLOG LEGAL TIMES (June 29, 2010), https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html.
[39] *See, e.g.*, Waithaka v. Amazon.com, Inc., 966 F.3d 10 (2020); Rittmann v. Amazon.com, Inc., 971 F.3d 904 (2020); Singh v. Uber Techs., Inc., 939 F.3d 210 (2019).
[40] *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10.

Published by Pepperdine Digital Commons, 2022

> workers fall within the scope of the transportation worker exemption, we consider the interpretation of statutes contemporaneous with the FAA, the sequence of the text of the exemption, the FAA's structure, and the purpose of the exemption and the FAA itself.[41]

After analyzing a variety of statutes, the Court concluded that "these cases show that workers moving goods or people destined for, or coming from, other states—even if the workers were responsible only for an intrastate leg of that interstate journey—were understood to be 'engaged in interstate commerce' in 1925." [42] As in *New Prime,* Amazon's FAA-purpose argument was rejected by the Court which stated:

> We recognize that the FAA was enacted to counter hostility toward arbitration and that, accordingly, we must narrowly construe the statutory exemption from the Act . . . . However, the FAA's pro-arbitration purpose cannot override the original meaning of the statute's text . . . . Moreover, construing the exemption to include workers transporting goods within the flow of interstate commerce advances, rather than undermines, 'Congress'[s] demonstrated concern with transportation workers and their necessary role in the free flow of goods.[43]

The Court also rejected the policy argument that "a decision in Waithaka's favor would introduce uncertainty

[41] *Id.* at 18.
[42] *Id.* at 22.
[43] *Id.* at 24.

about the FAA's coverage and spawn extensive litigation about the scope of the residual clause."[44] The Court stated that:

> the notion that Amazon's proposed standard would create an easily administrable, bright-line rule is illusory. If crossing state lines were the touchstone of the exemption's test, the parties would still engage in discovery to determine how often a class of workers moved interstate and would litigate what portion of a given group of workers must cross state lines and with what frequency to qualify as a class of workers 'engaged in . . . interstate commerce.'[45]

The Court also ironically deployed *Circuit City* against Amazon noting that:

> the line-drawing conundrum that Amazon identifies would not stem from our decision. Rather, it is a product of Circuit City itself. In concluding that the residual clause does not encompass all employment contracts, but only those of transportation workers, the [Supreme] Court left it to the lower courts to assess which workers fall within that category. [46]

The Ninth Circuit reached a similar conclusion in *Rittmann v. Amazon.com, Inc*., which also involved Amazon delivery drivers.[47] The Court stated that:

---

[44] *Id.* at 25.
[45] *Id.*
[46] *Id.*
[47] Rittmann v. Amazon.com, Inc., 971 F.3d 904 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021).

> Our reading of the statutory text is reinforced by decisions of other circuits and our own that have applied the exemption, as well as decisions that interpret similar statutory language. Most recently, in a nearly identical case involving the AmFlex program, the First Circuit held that AmFlex delivery providers fall within the § 1 exemption. Relying on much of the same reasoning discussed below, pp. 911-15, the First Circuit looked to statutes contemporaneous to the FAA, in particular the Federal Employees Liability Act (FELA) of 1908, to conclude that the meaning of the phrase 'engaged in interstate commerce,' as understood at the time of the FAA's passage, was not limited to those transportation workers who themselves crossed state lines.[48]

As in *Waithaka,* the Court rejected a policy-based argument by Amazon that

> [W]e must narrow the definition of 'engaged in foreign or interstate commerce' to accord with the FAA's statutory context and pro-arbitration purposes . . . . Nothing in Circuit City requires that we rely on the pro-arbitration purpose reflected in § 2 to even further limit the already narrow definition of the phrase 'engaged in commerce.'[49]

[48] *Id.* at 910 (citing Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1st Cir. 2020)).
[49] *Id.* at 914.

Ultimately the Court concluded that "In light of our construction of the statute and consideration of the record, we conclude that AmFlex delivery providers belong to a class of workers engaged in interstate commerce that falls within § 1's exemption."[50]

The ripples of *New Prime* have also extended beyond obvious categories of truck drivers of one kind or another, and questions are now being asked about whether Uber (and other rideshare company) drivers are affected by that decision. In the Third Circuit decision of *Singh v. Uber Technologies, Inc.*, the court held that transportation workers who transport passengers may be exempt from the FAA under section one.[51] The court noted that "a textual approach to the residual clause of § 1 suggests that it extends to both transportation workers who transport goods as well as those who transport passengers."[52] The Court concluded that:

> In the end, we remain unswayed by Uber's attempt to drive us towards its imagined sunset. Consistent with our decisions in Tenney, Greyhound I, and Greyhound II, we hold that the residual clause of § 1 of the FAA may operate to exclude from FAA coverage the contracts of employment of all classes of transportation workers, so long as they are engaged in interstate commerce, or in work so closely related thereto as to be in practical effect part of it.[53]

However, the Court did not reach a final decision "because neither the Complaint nor incorporated documents

[50] *Id.* at 915.
[51] Singh v. Uber Techs., Inc., 939 F.3d 210, 219–20 (3d Cir. 2019).
[52] *Id.* at 222.
[53] *Id.* at 226.

Published by Pepperdine Digital Commons, 2022

suffice to resolve the engaged-in-interstate-commerce inquiry"[54] but rather "remand[ed] this and the remaining issues to the District Court for further proceedings consistent with this opinion."[55] It is unclear what ultimately happened in the case as there are no further reports on it but it appears that it was still ongoing five years later.[56]

The Seventh Circuit's decision in *Saxon v. Southwest Airlines* illustrates just how far some appellate courts are taking the exemption.[57] In that case, a dispute arose between Latrice Saxon, a ramp supervisor responsible for managing and assisting workers loading and unloading airplane cargo for Southwest Airlines, her employer.[58] Saxon then argued that she was a transportation worker covered by the section 1 FAA exemption, whilst Southwest disputed this.[59]

The Court engaged in a textual and historical analysis of the FAA, stating that "[t]o understand the scope of that category [i.e. transportation workers], we explained in *Wallace*, 'our inquiry 'begins with the text.' . . . We interpret the words of that text 'based on their ordinary meaning at the time Congress enacted the statute.'"[60] The Court then highlighted what it called two "textual clue[s],"[61] the first was the phrase 'class of worker' which obligates us to focus on the broader occupation, not the individual worker.'[62] The second "is the two enumerated categories of seamen and railroad employees, which provides a gloss on

[54] *Id.* at 214.
[55] *Id.*
[56] Linda Chiem, *Uber Rips NJ Driver's Bid To Bypass Arbitration In Wage Fight*, LAW 360 (July 26, 2021, 6:55 PM), https://www.law360.com/articles/1406780/uber-rips-nj-driver-s-bid-to-bypass-arbitration-in-wage-fight.
[57] Saxon v. Sw. Airlines Co., 993 F.3d 492 (7th Cir. 2021).
[58] *Id.* at 495.
[59] *Id.* at 494–95.
[60] *Id.* at 495.
[61] *Id.* at 496.
[62] *Id.*

what it means for a class of workers to be 'engaged in commerce.'" [63] The Court noted that "to be exempted under the residual clause of section 1, the ramp supervisors must themselves be engaged in interstate or foreign commerce . . . . [t]his line is not easy to draw."[64] However, ultimately the Court held that "Wherever the line may be . . . . ramp supervisors fall on the transportation worker side of it." [65]

> The Court justified its view on the basis that:
> A central part of their job is the loading and unloading of cargo for planes on interstate and international flights. Although this is officially the role of the ramp agents, Saxon estimates that she and her peers each cover three full ramp-agent shifts per week. Southwest offered no evidence to contradict this estimate. [66]

Southwest argued that the loading and unloading of cargo was not enough to make someone a transportation worker because it was not actual transportation.[67] The Court accepted the premise but rejected the conclusion, that Saxon was not therefore engaged in transportation, stating that:

> Actual transportation is not limited to the precise moment either goods or the people accompanying them cross state lines. Loading and unloading cargo onto a vehicle so that it may be moved interstate, too, is actual transportation and those who performed that work in 1925 were recognized to be engaged in commerce.[68]

---

[63] *Id.*
[64] *Id.* at 497.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 497.
[68] *Id.* at 498.

Published by Pepperdine Digital Commons, 2022

The Court also went on to compare Saxon's role with that of seamen[69] and railroad employees,[70] before holding that all three roles were comparable, in particular at the time the FAA was enacted in 1925.[71] Southwest argued that there was a risk of a "slippery slope—excluding ramp supervisors could eventually lead to excluding ticket and gate agents, security guards, taxi drivers, and airport vendors all on the ground that each supports the work of the airline."[72] The Court rejected this argument noting that:

> Southwest does not suggest transportation workers are limited to those who physically cross state lines and we do not think such a limitation could be supported. The loading of goods into a vehicle travelling to another state or country is the step that both immediately and necessarily precedes the moment the vehicle and goods cross the border. To say that this closely related work is interstate transportation does not necessarily mean that the work of a ticketing or gate agents… or others even further removed from that moment qualify too.[73]

Although one must be sympathetic to the Court, given that it is navigating an interpretative morass of the Supreme Court's making—in reality, it is hard to justify its conclusion. The fact is that some Circuits have held that that transportation of people, not just goods, amounts to interstate commerce, and it is not therefore irrational to argue that, at least, gate agents could qualify for the section 1 exemption as they load passengers onto a plane in the same way that

[69] *Id.* at 499–500.
[70] *Id.* at 500–03.
[71] *Id.* at 502.
[72] *Id.* at 501.
[73] *Id.* at 502.

cargo handlers load cargo onto a plane. Southwest's fear of a slippery slope was not therefore unfounded, and the Court dismissed it a little too easily.

The bigger issue in all FAA section 1 cases is that the phrase "transportation worker," which was glossed onto the plain text of the FAA, is being asked to do heavy lifting which it cannot possibly do. Courts, having been forced into applying the FAA in situations where it was never designed to apply, and arguably does not work, are now released from a "mental block" of sorts due to the *New Prime* decision and are therefore using the section 1 exemption as a silver bullet to deal with the problem of the FAA's overapplication.[74] However, this just exacerbates the problem of the FAA being interpreted contrary to its plain meaning and legislative history except that this time it is in an anti, rather than a pro-arbitration way. The correct solution would be to reverse the decision of the Supreme Court in *Circuit Stores* holding that the FAA's Section 1 exemption applied only to "transportation workers" and instead hold that it applies to all workers engaged in interstate and foreign commerce. Unfortunately, this is unlikely, as it is inherently improbable that the Supreme Court will overrule over 20 years of precedent given the chaos it likely fears doing so might cause. However, one can fairly ask: what causes more chaos? Overruling 20 years of precedent or continuing the current interpretative morass for another 20 years? The Court may well answer this question shortly as it has granted the petition of certiorari filed by Southwest Airlines[75] in *Saxon v Southwest* and we may therefore have a clear indication of how far (or not) the Supreme Court has come from viewing arbitration as the *Summum Bonum*.

It must also be admitted that some courts have been able to avoid the worst of the interpretative morass, by interpreting the section 1 exemption in a much more

[74] New Prime, Inc. v. Oliveira, 139 S. Ct. 532 (2019).
[75] Saxon v. Sw. Airlines Co., 993 F.3d 492 (7th Cir. 2021).

Published by Pepperdine Digital Commons, 2022

restrained fashion. However, such decisions do not address the issue of the FAA's overapplication or the problem of applying a judicial gloss on a text which is clearly contrary to the plain wording of that text. For example, the Ninth Circuit in *Capriole v Uber Techs., Inc.*[76] rejected the argument that Uber drivers were exempt from the FAA. The Court held that "Uber drivers, as a class, 'are not engaged in interstate commerce' because their work 'predominantly entails intrastate trips,' even though some Uber drivers undoubtedly cross state lines in the course of their work and rideshare companies do contract with airports 'to allow Uber drivers . . . to pick up arriving passengers.'"[77] The Court went on to note that:

> As almost any user of Uber's product would attest, Uber trips are often short and local, and they only infrequently involve either crossing state lines or a trip to a transportation hub, as the evidence demonstrates. And "someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work."[78]

The Ninth Circuit distinguished the case at hand from its earlier decision in *Rittman* by saying that:

> Uber stalwartly objects to any notion that interstate transportation is intrinsic to its service, and Plaintiffs have proffered no evidence undermining Uber's position. Moreover, even when transporting passengers to and from transportation hubs

[76] Capriole v Uber Techs., Inc., 7 F.4th 857, (9th Cir. 2021).
[77] *Id.* at 864.
[78] *Id.*

> as part of a larger foreign or interstate trip, Uber drivers are unaffiliated, independent participants in the passenger's overall trip, rather than an integral part of a single, unbroken stream of interstate commerce like AmFlex workers.[79]

The Ninth Circuit is not alone in its rejection of the section 1 exemption to the gig economy, for example, the Seventh Circuit in the case of *Wallace v. Grubhub Holdings, Inc.*[80] rejected the argument that Grubhub takeaway delivery drivers fell within said exemption. The Court noted that "Whether easy or hard … the inquiry is always focused on the worker's active engagement in the enterprise of moving goods across interstate lines. That is the inquiry that Circuit City demands."[81] This view clashes with that of the Third Circuit which stated that transportation of persons, not just goods, qualified as interstate commerce, but it is worth noting that the case at hand concerned goods (namely food) and not people. The plaintiff in *Grubhub* made the ambitious argument that:

> [T]hey carry goods that have moved across state and even national lines. A package of potato chips, for instance, may travel across several states before landing in a meal prepared by a local restaurant and delivered by a Grubhub driver; likewise, a piece of dessert chocolate may have traveled all the way from Switzerland. The plaintiffs insist that delivering such goods brings their contracts with Grubhub within § 1 of the FAA.[82]

[79] *Id.* at 866.
[80] Wallace v Grubhub Holdings, Inc., 970 F.3d 798 (7th Cir. 2020).
[81] *Id.* at 802.
[82] *Id.*

Published by Pepperdine Digital Commons, 2022

The Court rejected this argument stating, logically enough, that "the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders. Put differently, a class of workers must themselves be 'engaged in the channels of foreign or interstate commerce.'" [83] The Court therefore concluded that:

> Section 1 of the FAA carves out a narrow exception to the obligation of federal courts to enforce arbitration agreements. To show that they fall within this exception, the plaintiffs had to demonstrate that the interstate movement of goods is a central part of the job description of the class of workers to which they belong. They did not even try to do that, so both district courts were right to conclude that the plaintiffs' contracts with Grubhub do not fall within § 1 of the FAA.[84]

It would seem, therefore, that whilst the ripples of *New Prime* reach beyond traditional truck drivers, they probably do not reach as far as rideshare drivers or rideshare delivery drivers. It is also unclear how *New Prime* might affect consumer arbitrations. Although the history of the FAA arguably doesn't support the existence of consumer arbitration,[85] consumers, unlike employees, cannot point to any provision in the FAA that excludes them from its scope. Consequently, even with a new, more restrained approach to arbitration, it is unlikely that the Supreme Court will reverse decades of precedent and rewrite the entire consumer dispute resolution system by striking down or limiting consumer arbitration. On the other hand, as will be seen below, the

[83] *Id.*
[84] *Id.* at 803.
[85] Szalai, *supra* note 26, at 192–98.

Court had no problem doing so for the class arbitration system. Therefore, one cannot entirely exclude the possibility either. As will be seen below, the most that can be said is that the possibility of pro-consumer arbitration regulations being preempted might be significantly reduced in the post *New Prime* landscape. In any event, the era of *blasé* or ritual incantations of "the liberal federal policy favoring arbitration agreements" when interpreting the FAA appears to be over. In the future the text and history of the FAA will be key in its interpretation, this is as it always should have been.

III. Don't Make Me Arbitrate, Please

This section addresses recent situations where businesses don't want to arbitrate but have to. It will not come as a surprise that this section, and the cases it discusses, are rich with poetic justice. Before discussing the relevant cases, it is important to analyze the context behind them, namely the Supreme Court's stymying of class arbitration.

Class arbitration is effectively what it sounds like: it involves the "import [of] elements of U.S.-style class actions into the arbitral context, resolving anywhere from dozens to hundreds of thousands of individual claims in a single representative proceeding."[86] It began in the 1980s and remained a niche form of dispute resolution until the 2003 Supreme Court decision of *Green Tree Financial Corporation v. Bazzle* [87] where a plurality held that arbitrators and not the courts should decide whether class arbitration was permitted by an arbitration clause.[88] This opened the floodgates to class arbitration and companies

[86] S. I. Strong, *Resolving Mass Legal Disputes through Class Arbitration: The United States and Canada Compared*, 37 N.C. J. INT'L L. 921–980, 934 (2011).
[87] Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2011).
[88] Gary Born & Claudio Salas, *United States Supreme Court and Class Arbitration: A Tragedy of Errors, The Symposium* 2012 J. DISP. RESOL. 22–48, 41–42 (2012).

Published by Pepperdine Digital Commons, 2022

subsequently took measures to avoid it,[89] likely for many of the same reasons that businesses seek to avoid class action litigation.

However, the Supreme Court subsequently disavowed its earlier approach (although in fairness, it must be said that *Green Tree* was merely a plurality and not a majority decision) and effectively killed class arbitration by holding that courts could decide whether class arbitration was permitted and that silent arbitration clauses did not permit class arbitration.[90] Subsequent decisions further eroded the possibility of class arbitration.

First, it was held that class arbitration was barred not only in the case of silent arbitration clauses, but also when arbitration clauses are ambiguous.[91] Then, it was held that the FAA preempted a California rule that made class arbitration waivers unconscionable.[92] The consequence of these decisions is that class arbitration is effectively dead or at the very, least severely restricted.[93] However, Americans and American plaintiff lawyers cannot be stopped so easily, which has led to the creation of "mass arbitration."

Mass arbitration occurs when a firm simultaneously files thousands of separate arbitrations for clients in the same situation against the same business.[94] For example, Amazon recently faced 75,000 claims by Amazon Echo users alleging

---

[89] *Id.* at 31.
[90] *Id.* at 33–35.
[91] Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2009); *cf.* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1412–19 (2019).
[92] AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 343 (2011).
[93] Maureen A. Weston, *The Death of Class Arbitration after Concepcion*, 60 U. KAN. L. REV. 767–794 (2012); Joanna Niworowski, *Lamps Plus, Inc. v. Varela: Dark Times Ahead for Class Arbitrations*, 75 U. MIAMI L. REV. 257–300 (2020); Born, *supra* note 88.
[94] *Proliferation of Mass Arbitration: Ballooning Costs and Emerging Tactics*, QUINN, EMANUEL, URQUHART, & SULLIVAN, LLP (Dec. 2, 2021), https://www.jdsupra.com/legalnews/lead-article-proliferation-of-mass-7129882/#:~:text=Mass%20arbitration%20occurs%20when%20hundreds,on%20a%20common%20legal%20theory.

Amazon violated their privacy,[95] while Doordash received 2,250 similar claims in one day.[96] This practice has been spearheaded by Keller Lenkner LLC which initiated both actions,[97] and in many respects poses a much more serious problem for businesses than class arbitration. This is because companies need to pay their share of the filing fee in each and every claim filed against them, and also must pay the lion's share of the fee in some cases too.[98] It goes without saying that the cost of paying these fees for several thousand cases is significant, for example Uber was recently ordered to pay approximately $107 million in filing fees relating to over 31,000 arbitrations,[99] whilst in another recent case Doordash was ordered to pay $9.5 million in fees in relation to just over 5,000 arbitrations.[100]

Notwithstanding the above, companies who now say "Don't make me arbitrate, please" can refuse to pay and

---

[95] Mitchell Clark, *Amazon Did The Math and Would Actually Prefer Getting Sued*, THE VERGE (Jun. 1, 2021), https://www.theverge.com/2021/6/1/22463550/amazon-lawsuit-arbitration-terms-of-service-update-alexa.

[96] Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, THE N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html.

[97] *Amazon Faced 75,000 Arbitration Demands. Now it Says—Fine, Sue Us*, KELLER LENKNER, LLC (June 1, 2021) [hereinafter *Amazon Faced*], https://www.kellerlenkner.com/wall-street-journal-amazon-faced-75000-arbitration-demands-now-it-says-fine-sue-us/; *DoorDash Must Arbitrate Misclassification Suit, Couriers Say*, KELLER LENKNER, LLC (Dec. 2, 2019), https://www.kellerlenkner.com/doordash-must-arbitrate-misclassification-suit-couriers-say/.

[98] ARTICLE XI: PAYMENT FOR SERVICES, DOORDASH, https://help.doordash.com/dashers/s/ica-us?language=en_US (last visited Feb. 28, 2022).

[99] *Uber Technologies Inc v American Arbitration Association Inc*, 2022 Supreme Court of the State of New York, Appellate Division, First Judicial Department.

[100] "DoorDash Ordered to Pay $9.5M to Arbitrate 5,000 Labor Disputes", (11 February 2020), online: *Keller Lenkner LLC* <https://www.kellerlenkner.com/doordash-ordered-to-pay-9-5m-to-arbitrate-5000-labor-disputes/>.

benefit from the asymmetries of employment arbitration. Since arbitration institutions will not administer a case unless both sides pay their share of the fee, and since consumers cannot afford to pay the arbitration fees of the business they are suing, a business can block arbitration simply by refusing to pay.[101] Unfortunately for companies, the FAA, unlike many other arbitration statutes, allows courts to order parties to arbitrate.[102] In consequence, courts can compel a party to arbitrate and pay the fees of arbitration whether they want to or not.

This is exactly what happened in the case of *Abernathy v Doordash*,[103] where over 6,000 individuals filed claims against DoorDash which required the company to pay over $12 million in administrative fees to the American Arbitration Association (AAA).[104] DoorDash refused to pay the fees alleging, "deficiencies with the claimants' filings," and the AAA refused to administer the arbitration and closed DoorDash's file.[105] The Plaintiffs asked the court to compel DoorDash to pay their share of the fees and the court granted this request, with the caveat that:

> If it turns out that Keller Lenkner has overstated its authority, or for any procedural reason, petitioners have not perfected their right to arbitrate, this order imposes on Keller Lenkner a requirement to fully reimburse DoorDash for all arbitration fees and attorney's fees and expenses incurred by Doordash in defending the arbitration, and the arbitrator

[101] For an example *see* Mcclenon v. Postmates Inc., 473 F. Supp. 3d 803, 806–08 (2020).
[102] *See* 9 U.S.C. § 4 (1954).
[103] Terrell Abernathy, et al., Petitioners, v. Doordash, Inc., Respondent. Christine Boyd, et al., Petitioners, v. Doordash, Inc., Respondent., 2020 WL 974352 (N.D. Cal. Feb. 10, 2020).
[104] *Id.*
[105] *Id.* at 2.

shall so award them.[106] The judge also sharply criticized the behavior of Doordash stating that:

> For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights… The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.[107]

[106] Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1066 (N.D. Cal. 2020).
[107] *Id.* at 1067–68.

In many respects, the case is a testament to the ingenuity of the plaintiffs' bar who have managed to successfully navigate a system that is very much stacked against them. Although the tactics used by the plaintiffs in *Abernathy* are innovative, it is hard to see how they can be faulted from a legal perspective, since they are not class arbitration claims but rather individual arbitration claims and all the procedural rules of the AAA have presumably been complied with by the plaintiffs. If they were not, the AAA would not accept the case or would be otherwise empowered to penalize or respond to the lack of compliance. Moreover, as noted by the NY Supreme Court's Appellate division in *Uber Technologies v American Arbitration Association,*[108] "*it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision."*[109] In other words, you've made your bed so now you have to lie in it. It is therefore unlikely that the procedure is subject to attack whether on the grounds of preemption or otherwise. The irony of course is that if employment arbitration was not possible, or if Doordash drivers were excluded from the scope of the FAA under section 1, the entire process would collapse. For the first time, businesses have a real incentive to attack broad interpretations of the FAA and, in many respects, they are reaping the bitter fruits of decades of the Supreme Court's pro-arbitration jurisprudence.

The situation for businesses in California has become even more problematic since the *Abernathy* decision because of the decision in *Postmates Inc. v. 10,356 Individuals,* which required Postmates to engage in over

[108] Uber Technologies Inc v American Arbitration Association Inc, *supra* note 99.
[109] *Id*. at 6.

10,000 individual arbitrations.[110] In that case, Postmates refused to pay its portion of the fees and the AAA refused to administer the case closing its files, resulting in the plaintiffs petitioning the court to compel arbitration.[111] *Postmates* is of interest not just because it provides another example of an *Abernathy* deluge of employment claims, but because it interprets a novel recent amendment to the California Code of Civil Procedure as a result of the passing of Senate Bill No 707 (SB-707).[112]

The provisions in SB-707 apply in employment and consumer arbitrations where the drafting party is required to pay certain fees or costs before the arbitration can proceed, that is to say they apply to virtually all employment and consumer arbitrations. In such cases, if the required fees are not paid within 30 days of the due date "*the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2*".[113] The consequence of this is that the employee or consumer has the option to withdraw the claim from arbitration and go to court, or compel arbitration "*in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration*".[114] Similar provisions apply if the drafting party refuses to pay fees during an ongoing arbitration although the consumer can also:

> (3) Petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay under the arbitration agreement or the rules of the arbitration company [or] (4) Pay the drafting party's

[110] Postmates Inc. v. 10,356 Individuals, 2021 U.S. Dist. LEXIS 28554 (C.D. Cal. Jan. 19, 2021).
[111] *Id.* at *5–6.
[112] S.B. 707, 2019 (Cal. 2019).
[113] CAL. CIV. PROC. CODE § 128.97.
[114] *Id.*

Published by Pepperdine Digital Commons, 2022

> fees and proceed with the arbitration proceeding. As part of the award, the employee or consumer shall recover all arbitration fees paid on behalf of the drafting party without regard to any findings on the merits in the underlying arbitration.[115]

These provisions go beyond the FAA in allowing California courts not just to compel arbitration but also compensating consumers or employees for the refusal of the drafting party (that is to say the business) to proceed with an arbitration. By effectively requiring businesses to either willingly arbitrate their claims or be forced into arbitration by a consumer or employee and pay all their fees, the provisions significantly reduce the attractiveness of arbitration for businesses. This is because they can no longer game the system. Moreover, it would appear that the provisions can be invoked not just by consumers but also by arbitration institutions and thus the provisions very much put businesses on the defensive.[116] However, there is a risk that the provisions might be held to be preempted by the FAA and this is exactly the argument Postmates made before the court in the case at hand. The Court rejected this argument by noting that unlike previous cases where the Supreme Court had held a state provision regulating arbitration was preempted:

> [R]ather than render arbitration agreements invalid or unenforceable, SB 707 encourages arbitration by changing the remedies available to parties when drafting parties delay the process and refuse to pay the required fees… Therefore, SB 707 is

[115] CAL. CIV. PROC. CODE § 128.98.
[116] Uber Technologies Inc v American Arbitration Association Inc, *supra* note 99 at 3.

> pro-arbitration because it makes arbitration more effective and efficient. Instead of nullifying arbitration agreements, the law ensures a speedy resolution under their terms by preventing parties such as Postmates from holding hostage employees' or consumers' validly arbitrable claims.[117]

However, one might (and indeed Postmates did) point out that the law renders arbitration agreements unenforceable if a drafting party fails to pay due fees for over thirty days and thus is preempted.[118] The Court rejected that submission by noting that the provision did not automatically render arbitration provisions invalid but rather merely offered non-drafting parties a choice as to whether to proceed with arbitration or not.[119] It also noted that "SB 707 encourages their prompt enforcement by expanding the remedies available to parties seeking to enforce their rights through arbitration in an efficient manner."[120] Finally, the Court referred to many examples where provisions singled out arbitration, for example, by providing for specific performance of arbitration agreements, and noted that these were not preempted as they encouraged arbitration.[121] It is unclear whether this argument is sound given the Supreme Court's ruling that the FAA prohibits any rule that covertly discriminates against arbitration and one could argue that certain portions of SB 707 do just that.[122] Moreover, the specific performance argument is unconvincing considering that the FAA itself provides for specific performance of

[117] Postmates Inc. v. 10,356 Individuals, 2021 U.S. Dist. LEXIS 28554 at *21 (C.D. Cal. Jan. 19, 2021).
[118] *See id.*, at *12.
[119] *Id.*
[120] *Id.*
[121] *Id.* at 12–13.
[122] Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S.Ct. 1421 (2017).

arbitration agreements in section 4.[123] On the other hand, in the post *New Prime* world, it is possible that the Supreme Court might take a less expansive view on preemption and refuse to strike down SB 707.

In considering whether the Supreme Court is likely to eventually uphold or strike down the provisions of SB 707, it is useful to look at a similar, recent California Employment law regulation; Assembly Bill 51 (AB 51), as well as *Chamber of Commerce v. Bonta*[124] which partially validated and partially invalidated the regulation. AB 51 was enacted to ensure "that individuals are not retaliated against for refusing to consent to the waiver of . . . rights and procedures [established in the California Fair Employment and Housing Act] and to ensure that any contract relating to those rights and procedures be entered into as a matter of voluntary consent, not coercion."[125] The Bill sets out civil and criminal penalties for violation of its provisions, but also provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."[126]

The legislation was challenged by the Chamber of Commerce as preempted under the FAA, which claim was upheld by the district court, and the matter therefore came before the Ninth Circuit of Appeals.[127] The key issues were two provisions of section three of AB 51 which provide that employees could not be required to waive employment law rights, including rights to pursue civil actions or the right to access particular forums, in order to be employed or receive employment benefits, nor could employers retaliate, terminate or threaten employees because they refused to

[123] FAA § 4.
[124] Chamber of Commerce v. Bonta, 13 F.4th 766 (9th Cir. 2021); CAL. ASSEMB. B. 51 (2019).
[125] CAL. ASSEMB. B. 51 (2019).
[126] *Id.*; *cf.* CAL. LAB. CODE § 433 (1937); *see also* Bonta, 13 F.4th 766.
[127] Bonta, 13 F.4th 766.

waive said rights.[128] The District Court in *Chamber of Com. v. Bonta* held that these provisions were preempted because they "embod[ied] . . . a legal rule hinging on the primary characteristic of an arbitration agreement, and placing arbitration agreements in a class apart from any contract."[129] However, the Ninth Circuit rejected this view on the following basis:

> [Section] 432.6 does not make invalid or unenforceable any agreement to arbitrate, even if such agreement is consummated in violation of the statute. Rather, while mandating that employer-employee arbitration agreements be consensual, it specifically provides that '[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act.'[130]

The issue is that the provision is, deliberately, drafted in an inelegant manner. In effect, what it means is that (a) an employer cannot force a worker to agree to an arbitration agreement as a condition of employment or certain benefits, nor can they retaliate against him for refusing to agree to arbitration, but (b) arbitration agreements enforceable under the FAA are not affected by the provision. As arbitration agreements under the FAA must be consensual, the two sections, which seem to conflict, do not actually contradict each other.[131] If an arbitration agreement was reached consensually, then it will fall into the

[128] CAL. LAB. CODE § 3(a)–(b).
[129] Bonta, 13 F.4th, at 776 (quoting Chamber of Com. v. Becerra, 438 F. Supp. 3d 1078, 1098 (E.D. Cal. 2020)).
[130] *Id.* (quoting CAL. LAB. CODE § 432.6(f)).
[131] *Compare* CAL. LAB. CODE § 433 (1937), *with* CAL. ASSEMB. B. 51 (2019).

scope of (b).[132] This argument is somewhat legalistic, even though the majority dismisses these concerns by stating that:

> [o]f course, nothing in § 2 grants an employer the right to force arbitration agreements on unwilling employees. The only 'federally protected right' conferred by the FAA is the right to have consensual agreements to arbitrate enforced according to their terms. Because nothing in § 432.6 interferes with this right, it does not stand as an obstacle to the purposes and objectives of the FAA.[133]

However, the majority did hold that the enforcement mechanism for this section was preempted by the FAA stating that "*Section § 432.6 is not preempted by the FAA because it is solely concerned with pre-agreement employer behavior, but the accompanying enforcement mechanisms that sanction employers for violating § 432.6 necessarily include punishing employers for entering into an agreement to arbitrate.*"[134] The Ninth Circuit concluded, logically enough, that just as a state cannot prohibit arbitration of certain type of claims "*it also may not impose civil or criminal sanctions on individuals or entities for the act of executing an arbitration agreement"* [135] and in consequence the enforcement provisions of AB 51 were preempted "*to the extent that they apply to executed arbitration agreements covered by the FAA*".[136]

One might be tempted to say that the result of the Ninth Circuit's decision is that AB 51 is effectively irrelevant because its enforcement provisions are preempted, however this is not actually the case. The Ninth Circuit

[132] *Id.*
[133] Bonta, 13 F.4th, at 779–80.
[134] *Id.* at 28.
[135] *Id.* at 28–29.
[136] *Id.*

carefully worded its ruling so that it only applied to arbitration agreements covered by the FAA, consequently, if an employee can prove that the arbitration clause was not consensual, and is therefore void, it would not fall within the scope of the FAA and an employer could be liable for the enforcement measures provided in AB 51. This issue is in fact alluded to by the majority when it states that:

> Irrespective of AB 51's enforcement mechanisms, an employee may attempt to void an arbitration agreement that he was compelled to enter as a condition of employment on the basis that it was not voluntary. If a court were to find that such a lack of voluntariness is a generally applicable contract defense that does not specifically target agreements to arbitrate, the arbitration agreement may be voided in accordance with saving clause jurisprudence.[137]

Although from a strictly legal point of view the majority is likely correct, it is difficult to fault the dissent's view that this is a "too-clever-by-half workaround"[138] which "under Supreme Court precedent… is entirely preempted by the FAA."[139] That is not to say that the author agrees with current Supreme Court precedent, he clearly does not, but it is to say that the regulation, despite its clumsy wording and the majority's magnanimous interpretation of it, simply doesn't do enough to disguise its anti-arbitration animus. It is also clear that the regulation discourages arbitration because employers will be concerned that if a court finds an arbitration invalid, and therefore outside the scope of the FAA, they may be subject to significant civil or criminal

[137] *Id.* at 25.
[138] *Id.* at 36.
[139] *Id.*

Published by Pepperdine Digital Commons, 2022

penalties. In consequence, they may decide to take the safer option and simply litigate any disputes. This result clearly cuts against the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" [140] and thus it is hard to see how the enforcement provisions wouldn't be entirely preempted under existing Supreme Court precedent.

In any event, the consequence of the majority's decision in *Bonta* is that attempts to invalidate SB 707 are likely to be given short shrift by the California courts and the Ninth Circuit of Appeals. This is particularly the case because SB 707 arguably encourages parties to abide by their arbitration agreements by providing that where the drafter fails to do so, the other side can either escape arbitration altogether or proceed to arbitration on more favorable terms. Any successful attempt to challenge SB 707 would therefore likely have to go all the way to the Supreme Court and this may not happen for some years. However, provisions like SB 707 and AB 51 will certainly reach the Supreme Court at some stage and whatever ruling the apex court makes in any such case will tell us just how far, or not, the Supreme Court has come regarding its approach to interpreting the FAA.

IV. I Don't Like Arbitration Anymore

Companies have reacted in different ways to the changing arbitration landscape, whether this is because of new rulings or because of public pressure, with some opting to reform arbitration rather than abandon it entirely. This is the case with regards to DoorDash, which opted to change its arbitration provider from the AAA to the International Institute for Conflict Prevention and Resolution (CPR).[141]

[140] *Id.* at 14 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
[141] Alison Frankel, *The Problem with Outsourcing Justice to Mass Arbitration Services*, REUTERS (Feb. 27, 2020), https://www.reuters.com/article/legal-us-otc-mass-arbi-lawsuits-idINKCN20M00Z.

DoorDash arguably entered into negotiations with CPR to create new rules that would benefit DoorDash by not requiring it to pay the high levels of case-initiation fees that the AAA required.[142] These changes would be significant because "[a] company facing mass arbitration under the CPR protocol might face hundreds of thousands of dollars in fees, but the same employer could be on the hook for millions under JAMS and AAA rules."[143] In many respects, this may be a good development for consumers or employees who genuinely want their respective cases to go to arbitration and are not simply using arbitration as a tactic to pressure the other side into settlement. This is because businesses are arguably more likely to agree to arbitration in such circumstances rather than to drag their feet and resist arbitration because of high costs. However, it is worth noting that the process by which CPR developed the mass-arbitration protocol raises questions about the organization's independence and impartiality.[144] Although the situation is not the same as the National Arbitration Forum (NAF) scandal of the 2000s,[145] where said arbitral institution had a financial interest in companies arbitrating before it, it is far from ideal that only Doordash and not the plaintiffs had any input into the development of the mass-arbitration protocol.[146] Moreover, it is a matter of public record that the

---

[142] *See id.*
[143] *Id.*
[144] *See* Abernathy, *supra* note 106, at 1067.
[145] *See generally* "Minnesota AG sues National Arbitration Forum", online: *Minneapolis / St Paul Business Journal* <https://www.bizjournals.com/twincities/stories/2009/07/13/daily23.html>; "National Arbitration Forum's Wall of Secrecy Crumbling", online: *CL&P Blog* <https://pubcit.typepad.com/clpblog/2006/10/national_arbitr.html>; The Associated Press, "Firm Agrees to End Role in Arbitrating Card Debt", *The New York Times* (20 July 2009), online: <https://www.nytimes.com/2009/07/20/business/20credit.html>.
[146] *See generally* F. Paul Bland, Jr., *Arbitration or "Arbitrary": The Misuse of Arbitration to Collect Consumer Debts: Testimony to the Subcommittee on Domestic Policy of the U.S. House of Representatives' Committee on Oversight and Government Reform*, PUB. JUST. (July 22, 2009),

Published by Pepperdine Digital Commons, 2022

protocol was developed in response to concerns raised by Doordash's counsel and repeatedly revised before final publication.[147] In this situation, plaintiffs unsatisfied with the CPR mass-arbitration protocol but forced into it anyway could challenge the arbitral procedure on grounds of bias or unconscionability.[148]

On the other hand, some companies have opted to simply abandon arbitration as regards certain types of disputes. This is the case with Amazon and consumer disputes: after receiving 75,000 requests from Amazon Echo users, the company has opted to abandon consumer arbitration altogether. [149] The old conditions of use read as follows:

> **Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court**, except that you may assert claims in small claims court if your claims qualify. The Federal Arbitration Act and federal arbitration law apply to this agreement.
>
> **There is no judge or jury in arbitration, and court review of an arbitration award is limited. However, an**

---

https://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit2.pdf.
[147] *See* Abernathy, *supra* note 106, at 1067.
[148] *See* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ (describing unconscionability as one possible challenge to mandatory arbitration clauses, though largely circumscribed by various U.S. Supreme Court decisions; similarly describing arbitrator bias as a means of invalidating mandatory arbitration clauses under the Federal Arbitration Act (FAA), though it has been interpreted "exceptionally narrowly").
[149] Clark, *supra* note 95; *Amazon Faced*, *supra* note 97.

arbitrator can award on an individual basis the same damages and relief as a court (including injunctive and declaratory relief or statutory damages) and must follow the terms of these Conditions of Use as a court would.

To begin an arbitration proceeding, you must send a letter requesting arbitration and describing your claim to our registered agent Corporation Service Company, 300 Deschutes Way SW, Suite 304, Tumwater, WA 98501. The arbitration will be conducted by the American Arbitration Association (AAA) under its rules, including the AAA's Supplementary Procedures for Consumer-Related Disputes. The AAA's rules are available at www.adr.org or by calling 1-800-778-7879. Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules. We will reimburse those fees for claims totaling less than $10,000 unless the arbitrator determines the claims are frivolous. Likewise, Amazon will not seek attorneys' fees and costs in arbitration unless the arbitrator determines the claims are frivolous. You may choose to have the arbitration conducted by telephone, based on written submissions, or in person in the county where you live or at another mutually agreed location.

We each agree that any dispute resolution proceedings will be conducted only on an individual basis and not in a class, consolidated or representative action. If for

> any reason a claim proceeds in court rather than in arbitration we each waive any right to a jury trial. We also both agree that you or we may bring suit in court to enjoin infringement or other misuse of intellectual property rights.[150]

The new conditions of use are significantly shorter and reads: "*Any dispute or claim relating in any way to your use of any Amazon Service will be adjudicated in the state or Federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts. We each waive any right to a jury trial*".[151] Although Amazon is just one company, the policy change is significant because of Amazon's dominant rule in the e-commerce marketplace—for example, almost half of all e-commerce sales happened on Amazon in 2018[152] and that figure has likely only grown with time. As a result, the number of consumer arbitration agreements is likely to be significantly lower than the over 800 million discussed by Szalai in his 2018 article.[153] That said, Amazon has not abandoned employment arbitration and is clearly still attempting to pursue cases in that field, as discussed above.

Another example of a business that has abandoned the use of arbitration is Google. In 2019, as a result of the #metoo movement (specifically a campaign by the 'Googlers for Ending Forced Arbitration' pressure group),[154] among other things, Google decided to abandon the use of

[150] *Help: Conditions of* Use, AMAZON.COM (Mar. 14, 2019), https://web.archive.org/web/20190314000301/https://www.amazon.com/gp/help/customer/display.html?ie=UTF8&nodeId=508088&ref_=footer_cou (emphasis added).
[151] *Id.*
[152] Szalai, *supra* note 2, at 240.
[153] *Id.*
[154] *End Forced Arbitration*, GOOGLERS FOR ENDING FORCED ARBITRATION, https://sites.google.com/view/endforcedarbitration (last visited Mar. 15, 2022).

arbitration for its employees.[155] However, this decision did not affect contractors who make up a majority of individuals working for Google and it is therefore important not to overstate the importance of its decision.[156] It is also important to note that Google has arguably always had a less extreme preference for arbitration than other companies given that it does not seem to have ever included arbitration in its terms of service, instead opting for litigation in Santa Clara or in earlier versions simply referring to a "court of competent jurisdiction."[157] This, and the circumstances of Google's move away from arbitration due to the #metoo movement, means that Amazon rather than Google probably represents a better example of an about face regarding arbitration.[158]

V. Arbitration and the Right to Have Your Day in Court: Meeting Again at the Turning of the Tide

It is clear from the above that there has been a turning of the tide both in courts' interpretations of arbitration agreements and in companies' usage of arbitration.[159] What is less clear is just how far the tide will turn; are we going from a perigee to an apogee or merely

[155] Alexia Fernández Campbell, *Google Will Allow Employees to Sue the Company. Here's Why That Matters*, VOX (Feb 22, 2019), https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees.
[156] *See* End Forced Arbitration, *Google promises end to mandatory arbitration for all full-time employees by March 21, 2019*, MEDIUM (Feb. 21 2019), https://endforcedarbitration.medium.com/google-promised-end-to-mandatory-arbitration-for-all-full-time-employees-by-march-21-2019-1f5295ab1e9d.
[157] *Updates: Terms of Service*, GOOGLE, https://policies.google.com/terms/archive?hl=en-US, (last updated Jan. 5, 2022).
[158] *See* Rakeen Mabud, *Google Put an End to Force Arbitration and Why That's so Important*, FORBES (Feb. 26, 2019, 6:00 AM), https://www.forbes.com/sites/rakeenmabud/2019/02/26/worker-organizing-results-in-big-change-at-google/?sh=2bc0e3b74399.
[159] *See* Postmates Inc. v. 10,356 Individuals, 28554 LEXIS 1, 1–37 (U.S. Dist. Jan. 2021); *see also End Forced Arbitration*, *supra* note 154.

something in between? Or will the Supreme Court change its mind again and reverse the reversal in arbitration's fortunes? As the saying goes "Only a fool would make predictions—especially about the future;"[160] that said, it is possible to make some general observations with the caveat that one is not trying to play the fool.

Firstly, despite the reversal's arbitration has suffered in the employment and consumer fields, it is highly unlikely that companies will turn their backs on it altogether or that the courts will abandon their pro-arbitration approach. However, it is possible that companies' enthusiasm for arbitration will wane as the effects of decisions such as *New Prime* and *Abernathy* wind their way through the arbitral ecosystem. It is also likely that the courts will now adopt a more nuanced approach to interpreting both the FAA and arbitration clauses in situations that involve employees and consumers.

Secondly, to the extent that companies do not abandon arbitration in the employment and consumer sphere, it is likely that more and more mass arbitration claims will be filed by pioneering law firms such as Kelly Lenkner.[161] The other side of that coin is that companies will inevitably begin redrafting their arbitration agreements and seeking tailored arbitration rules which can handle the strain of responding to thousands or even tens of thousands of individual arbitration claims at once. This has the potential of nullifying the initial victory achieved by creating mass arbitration, as the rules might impose conditions which deter the filing of mass arbitration: For example, by requiring consumers or employees to pay a higher proportion of the fees.[162] It is unlikely that state legislatures, or at least the California legislature, would be willing to tolerate

[160] Attributed to Samuel Goldwyn.
[161] *Amazon Faced*, *supra* note 97.
[162] *See* Dave Rochelson, *Is This the End of Mandatory Arbitration?*, 36 ANTITRUST 63, 63–64 (2021).

conditions which significantly disincentivized employees or consumers from filing arbitration claims and further legislative reform to tackle such developments is therefore likely.[163] The issue with this is the Supreme Court's preemption doctrine and it is therefore fairly likely that any such regulations or developments will end up coming before the apex court in the near future.[164]

Thirdly, it is likely that the Supreme Court will hear several important cases concerning consumer and employee arbitration in the post *New Prime* world due to the can of worms opened by that case.[165] Currently, the Court is deciding the case of *Saxon v Southwest Airlines Co* where it must determine whether baggage handlers employed by airlines fall within the 'transportation workers' exemption.[166] Unless the issue is addressed in that case it is likely that, in the near future, the Court will also have to decide whether rideshare and gig economy delivery drivers come within the scope of the FAA's section 1 exemption.[167] Another issue that will likely have to be addressed sooner or later is whether the FAA preempts laws such as California's SB 707,[168] indeed the Supreme Court is currently deciding, in the case of *Viking River Cruises Inc v Angie Moriana,*[169] whether a Californian law that allows individuals to raise

[163] *What are the California Rules Regarding Mandatory Arbitration Agreements, and How do They Differ From Federal Law?*, SHRM (Feb. 3, 2020), https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californiamanadatoryarbitration.aspx.
[164] Ryan A. Glasgow & Timothy Kim, *U.S. Supreme Court Will Address Circuit Split on Arbitration Waiver*, 11 NATIONAL L. REV. 349, 349–50 (2021).
[165] Imre S. Szalai, *The Supreme Court's Landmark Decision in New Prime Inc. v. Oliveira: A Panoptic View of America's Civil Justice System and Arbitration*, 68 EMORY L.J. 1059, 1082 (2019).
[166] *See* Saxon v. Southwest Airlines Co., *supra* note 57.
[167] *See* Wallace v. Grubhub Holdings, Inc., 970 F.3d 798, 800 (7th Cir. 2020).
[168] Lauren Berg, *Postmates Calls Calif. Arbitration Law Unconstitutional*, LAW 360 (Oct. 6, 2021, 4:39 PM), https://www.law360.com/articles/1317341/postmates-calls-calif-arbitration-law-unconstitutional.
[169] Viking Cruises Inc. v. Moriana, 142 S. Ct. 734, 211 L. Ed. 2d 421 (2021).

representative employment claims as private attorney's-general, notwithstanding a valid arbitration clause, is preempted by the FAA.[170] The Court's decision in that case may well lay out its approach to all such laws and provide clues as to whether it is charting a less policy-oriented, and more originalist, approach to FAA preemption.

In conclusion, the message of this article is: Watch this space. Members of the US arbitration ecosystem, whether they be willing members such as businesses or unwilling members such as employees and consumers, have very much been on a wild ride in the last few decades and the recent decisions, new legislation, and changing behavior by all involved means that this is only going to continue in the future.

[170] "Viking River Cruises, Inc. v. Moriana", online: *Oyez* <https://www.oyez.org/cases/2021/20-1573>.