Nos. 15-17420, 15-17422

IN THE

United States Court of Appeals for the Ninth Circuit

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17420 No. 3:13-cv-03826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORRIS, and PEDRO SANCHEZ, Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-17422 No. 3:15-cv-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

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INTRODUCTION

Just three months ago, this Court issued a unanimous decision upholding the very arbitration agreements at issue in this appeal. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102 (9th Cir. 2016). In its decision, this Court found that drivers' right to opt out of arbitration foreclosed any argument "that [Uber] coerced [drivers] into waiving [their] right to file a class action" or that the arbitration agreements otherwise violated the National Labor Relations Act ("NLRA"). *Id.* at 1112 n.6. And it reached this conclusion by faithfully adhering to two binding decisions that this Court issued within the past two years—*Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072 (9th Cir. 2014).

Plaintiffs urge this Court to cast aside this governing precedent—*Mohamed*, *Morris*, and *Johnmohammadi*—and invalidate the parties' arbitration agreements anyway. Plaintiffs primarily rely *not* on the arguments they raised below (which this Court rejected in *Mohamed*) but on an administrative decision by the National Labor Relations Board ("NLRB," or "Board") that *predates* *Mohamed* and *Morris*, in which the Board stated that class waivers in arbitration agreements violate the NLRA even if there is an opt-out provision. *See On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), *overruled in* 2016 WL 3685206 (5th Cir. June 6, 2016).

This Court should reject Plaintiffs' new NLRA argument for several reasons. First, Plaintiffs waived their argument by failing to present it to the district court. Second, the NLRA does not apply here because drivers are independent contractors, not Uber's employees; to the extent this fact is contested, it should be decided by an arbitrator. Finally, the Board is entitled to no deference because the text of NLRA, on its face, plainly and unambiguously forecloses the Board's *On Assignment* decision, and also because the Board has no special expertise when it comes to resolving conflicts between the NLRA and the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA"). As this Court has already held, where an individual "freely elect[s] to arbitrate … disputes on an individual basis, without interference," there can be no possible violation of the NLRA. *Johnmohammadi*, 755 F.3d at 1077; *see also Mohamed*, 836 F.3d at 1112 n.6.

Plaintiffs' remaining arguments—that the arbitration agreements are unenforceable because they contain a waiver of representative claims under the Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2699, et seq., and because they are unconscionable—are foreclosed by *Mohamed*, which held that these gateway issues must be resolved by an arbitrator. 836 F.3d at 1108–14.

Accordingly, this Court should reverse the district court and compel arbitration, just as it did in *Mohamed*.

ARGUMENT

I. This Court Should Not Decide The Validity Of The Class Waiver Under The NLRA.

A. Plaintiffs Waived Their Argument That This Court Should Defer To The NLRB's *On Assignment* Decision.

As an initial matter, Plaintiffs waived their new NLRA argument—that this Court should overrule *Mohamed*, *Morris*, and *Johnmohamaddi* because the NLRB's *On Assignment* decision, which held that opt-out provisions cannot save class waivers from invalidity under the NLRA, is deserving of *Chevron* deference. Plaintiffs failed to present that argument to the district court; as such, this Court should not decide it. *See Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) ("[A] party [] can forfeit … [*Chevron*] deference by failing to raise it."); *Albanil v. Coast 2 Coast, Inc.*, 444 F. App'x 788, 796 (5th Oct. 13, 2011) (plaintiffs "did not raise their *Chevron* argument in the district court" and therefore waived it); *CFTC v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) (defendant waived "*Chevron* deference by failing to raise it to the district court").

To be sure, Plaintiffs argued below that class waivers violate the NLRA as a general matter—a proposition this Court already adopted in *Morris*, but which does not resolve this case. FER30–33. Plaintiffs did *not*, however, address the relevance of the opt-out provisions, nor did they argue that *On Assignment* deserves *Chevron* deference or that *Johnmohammadi* should be overruled.

Moreover, the NLRB issued *On Assignment* on August 27, 2015, *before* Plaintiffs opposed Uber's motions to compel arbitration, FER1–34, and *before* oral argument took place regarding those motions. Plaintiffs thus had ample time to raise this argument in briefing or at oral argument—or at *any* point before they filed their Answering Brief in this Court—yet they did not. Therefore, Plaintiffs waived the argument.

B. The NLRA Does Not Apply Because Drivers Are Not Uber's Employees.

This Court also need not address Plaintiffs' argument that the arbitration agreements violate the NLRA because drivers who use the Uber app are independent contractors, not Uber's employees. As such, they are excluded from coverage under the NLRA. *See* 29 U.S.C. § 152(3).

Plaintiffs, anticipating this argument in their Answering Brief, contend that this Court should simply "assume that [drivers] are employees" where they have alleged as much, "or at least where they have made a colorable showing on this point," noting that the "NLRB essentially makes this presumption when it exercises jurisdiction over cases where workers allege that they have been misclassified as independent contractors." Answering Brief at 30 & n.30. Plaintiffs, however, fail to mention that circuit courts across the country "have repeatedly taken the Board to task for exceeding its proper powers by

characterizing independent contractors as employees" in the manner Plaintiffs propose here. *N. Am. Van Lines, Inc. v. NLRB*, 869 F.2d 596, 598 (D.C. Cir. 1989); *see also, e.g.*, *Assoc. Gen. Contractors of Cal. v. NLRB*, 564 F.2d 271, 279 (9th Cir. 1977); *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 381–83 (D.C. Cir. 1983) (collecting cases) ("[W]e admonish the Board to halt its apparently *willful* defiance of long established, controlling judicial precedent in independent contractor cases"). Moreover, Plaintiffs have not provided this Court with any legal authority—and Uber is aware of no such authority—supporting Plaintiffs' unfounded contention that *courts* may simply "assume" employment status.

Nor, in any event, have Plaintiffs made a "colorable showing" that drivers are, in fact, Uber's employees. Plaintiffs have pointed to no evidence in the appellate record, for example, tending to demonstrate that drivers are employees under the NLRA.[1] By contrast, Uber has submitted the parties' service

[1] Plaintiffs imply that they have made a "colorable showing" that they are employees under the NLRA because the district court denied Uber's motion for summary judgment of Plaintiffs' state law claims and a state agency found one driver to be an employee under state law. Answering Brief at 30–31. Notably, however, "[a] denial of summary judgment is not a decision on the merits; it is simply a decision that a material issue of fact exists …." *In re Myers*, 50 F. App'x 892, 893 (9th Cir. 2002). Moreover, Uber has appealed the lone administrative decision referenced by Plaintiffs, *Uber Techs., Inc. v. Berwick*, No. CGC15546378 (S.F. Superior Ct.), and many other administrative agencies have found that drivers are independent contractors—including the same agency that issued the decision in *Berwick*. *See, e.g.*, *Alatraqchi v. Uber Techs., Inc.*, No. 11-42020 CT (Cal. Labor Comm. Aug. 1, 2012).

agreements, which expressly state that "the relationship between the parties … is solely that of independent contractors," and that the "[a]greement is not an employment agreement, nor does it create an employment relationship, between [Uber] and [drivers]." 2ER151; 3ER454. Moreover, the agreement states that Uber "does not, and shall not be deemed to, direct or control [drivers] … in connection with [their] provision of Transportation Services," 2ER143; 3ER445; to the contrary, drivers retain "complete discretion to provide services or otherwise engage in other business or employment activities," 2ER143.

Because drivers who use the Uber app are independent contractors, not employees, this Court should hold that the NLRA does not apply to the parties' arbitration agreements. To the extent there is a factual dispute regarding whether drivers are employees or independent contractors, most of the arbitration agreements under review here (the 2014 arbitration agreements) require an *arbitrator* to resolve this threshold question of arbitrability. *See* 4ER620–23.[2] Indeed, those delegation provisions—which this Court recently found to be valid and "enforce[able] according to [their] terms," *Mohamed*, 836 F.3d at 1114—

[2] Plaintiffs argue that it would violate *Morris* for an arbitrator to determine a driver's putative employment status because "that is the very subject of the underlying litigation." Answering Brief at 29–30. But Plaintiffs have proffered no authority supporting their claim that a threshold issue bearing on the enforceability of an arbitration agreement cannot be arbitrated.

expressly delegate the validity of the class waiver itself to the arbitrator, meaning that an arbitrator—*not* a court—must decide whether the class waiver in the 2014 arbitration agreements violates the NLRA. *See* 4ER620–23; *Lee v. Uber Techs., Inc.*, ___ F. Supp. 3d ___, 2016 WL 5417215, at *6 (N.D. Ill. Sept. 21, 2016) (granting Uber's motion to compel arbitration and delegating to an arbitrator the question of whether the class waiver in the arbitration agreement violates the NLRA, "just like any other question of … enforceability").[3]

II. The Class Waiver Does Not Violate The NLRA Because Drivers Have A Meaningful Right To Opt Out Of Arbitration.

Even if this Court were to reach the NLRA argument, it would have to follow binding precedent holding that the voluntary class waiver at issue in this case does not violate the NLRA.

In *Johnmohammadi*, this Court held that an employer that promulgates and enforces a class waiver in an arbitration agreement does *not* violate Section 8 of the NLRA—that is, the employer does *not* "interfere, with, restrain, or coerce employees in the exercise of [their] rights," 29 U.S.C. § 158(a)(1)—if the agreement contains an opt-out, because an individual presented with such an agreement may exercise her opt-out right and "pursue [her] class action in court." 755 F.3d at 1075–77. As this Court explained, an individual who "freely elect[s]

[3] By contrast, the 2013 arbitration agreements permit courts to determine the enforceability of the class waiver. *Mohamed*, 836 F.3d at 1108, 1110.

to arbitrate employment-related disputes on an individual basis … cannot claim that enforcement of that agreement violates … the NLRA." *Id.* at 1077. Because the agreements at issue here contain non-illusory opt-outs, *Johnmohammadi* squarely applies and compels a reversal of the district court's orders. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014) ("[I]t is well settled that we are bound by our prior decisions.") (citation omitted). Indeed, *Mohamed* reached this exact conclusion with respect to these exact arbitration agreements, which is also binding on this Court. *Mohamed*, 836 F.3d at 1112 n.6 (holding that, even if the plaintiffs had not waived their NLRA argument, "there [is] 'no basis for concluding that [Uber] coerced [Plaintiffs] into waiving [their] right to file a class action' in violation of the NLRA") (citation omitted).

Plaintiffs, however, urge this Court to ignore its binding precedents and become the first and only circuit court to follow *On Assignment*, 362 NLRB No. 189, a decision in which a divided panel of the NLRB held that an employer violates the NLRA by enforcing a purely voluntary class waiver. Answering Brief at 14–24. This Court should reject *On Assignment* on the merits, both because it contradicts the plain language of the NLRA and because it contravenes the FAA (which the NLRB has no special expertise in interpreting, thereby precluding any deference to the Board).

A. The Court Should Follow *Johnmohammadi* Because It Is Based On The NLRA's Plain And Unambiguous Language.

This Court should reject Plaintiffs' contention that Uber has violated the NLRA because, as this Court already held in *Johnmohammadi*, the NLRA's text plainly and unambiguously forecloses Plaintiffs' argument. Thus, under *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the NLRB was powerless to overturn *Johnmohammadi.*

As the Supreme Court explained in *Brand X*, "[a] court's prior judicial construction of a statute trumps an agency construction … if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982; *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841–44 (2012) (plurality). Circuit courts, including this one, have applied this principle time and time again. *See, e.g.*, *Irigoyen-Briones v. Holder*, 644 F.3d 943, 949 (9th Cir. 2011) ("There is no ambiguous statute that would entitle the agency to deference under *Brand X* and *Chevron*.").

This Court should apply that principle once again here. In *Johnmohammadi*, this Court "*quickly dismiss[ed]* any notion" that the defendant—who, like Uber, sought to enforce a class waiver in an agreement with an opt-out—"coerced [plaintiff] into waiving her right to file a class action." 755 F.3d at 1075 (emphasis

added). Because the opt-out gave plaintiff the "option of participating" in bilateral arbitration, "[t]here [was] *no basis* for concluding that [defendant] coerced [plaintiff] into waiving her right to file a class action." *Id.* (emphasis added). Nor was "there *any basis* for concluding that [defendant] interfered with or restrained [plaintiff] in the exercise of her right to file a class action." *Id.* (emphasis added). Thus, this Court held that there can be no NLRA violation if a "[defendant] merely offer[s] [plaintiff] a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration, in which case she would be limited to pursuing her claims on an individual basis." *Id.* at 1076.

Notably, *Johnmohammadi* did not resort to statutory interpretation techniques—for example, examining legislative history or analogous statutes—that might otherwise suggest that this Court viewed the NLRA as ambiguous as applied to situations like this one. *See In re HP Inkjet Printer Litig.,* 716 F.3d 1173, 1180 (9th Cir. 2013) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.") (citation omitted); *cf. Tides v. The Boeing Co.*, 644 F.3d 809, 814 (9th Cir. 2011). To the contrary, this Court's singular focus on the statutory text of the NLRA's Section 8—which renders unlawful only conduct which "interfere[s] with, restrain[s], or coerce[s]" one's rights, 29 U.S.C.

158(a)(1)—confirms "there is 'no gap for the agency to fill' and thus 'no room for agency discretion.'" *Home Concrete*, 132 S. Ct. at 1843 (citation omitted).

Tellingly, this Court has reaffirmed *Johnmohammadi* on two occasions since the NLRB issued *On Assignment*. It did so first in *Morris*, following briefing from the parties (and the NLRB, participating as *amicus curiae*) regarding *On Assignment*. 834 F.3d at 983 n.4 ("[T]here was no § 8 violation in *Johnmohammadi* … because the employee there could have opted out"); No. 13-16599, Dkt. 37 at 1 (notifying the court of *On Assignment*); No. 13-16599, Dkt. 52 at 10–11 n.6 (discussing the interplay between *On Assignment* and *Johnmohammadi*).[4] And this Court reaffirmed *Johnmohammadi* a second time just three months ago, in *Mohamed*, while analyzing the same arbitration agreements at issue here. 836 F.3d at 1112 n.6.

This Court's repeated reaffirmation of *Johnmohammadi—after* the NLRB issued *On Assignment*, with full knowledge of that decision, and while analyzing the same agreements under review here—is dispositive. Accordingly, this Court

[4] In *Morris*, a divided panel of this Court also held that class waivers contained within *mandatory* employment-related arbitration agreements violate the NLRA. *See Morris*, 834 F.3d at 981–90. Uber respectfully submits that this holding was erroneous for the reasons stated in Judge Ikuta's dissenting opinion. *Id.* at 990–98 (Ikuta, J., dissenting). *Morris* is the subject of a pending petition for writ of certiorari. *See* No. 16-300.

should reverse the district court's orders denying Uber's motions to compel arbitration and reject Plaintiffs' request to upend this Court's settled precedents.

B. The NLRB's Interpretation Of The NLRA Is Unreasonable.

Even if this Court were to conclude that the NLRA is ambiguous as applied to arbitration agreements with opt-out provisions, the Court should reaffirm *Johnmohammadi* because *On Assignment* is an unreasonable interpretation of the NLRA. *See NLRB v. Health Care & Ret. Corp of Am.*, 511 U.S. 571, 576 (1994) (declining to apply NLRB rule that was not "rational and consistent" with the NLRA); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539–41 (1992) (rejecting Board's interpretation of the NLRA); *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202–04 (1986) (same).

In *On Assignment*, the NLRB concluded that arbitration agreements containing class waivers *always* violate the NLRA—even if they have an opt-out—for two reasons: (1) according to the NLRB, agreements with opt-outs are still "mandatory" because signatories must "affirmatively act" and "reveal their sentiments concerning Section 7 activity" when they opt out; and (2) in the NLRB's view, individuals can *never* prospectively waive their ability to participate in a class action, even if they do so without coercion. 362 NLRB No. 189, at 1–7; NLRB Amicus at 10–19. Simply put, *On Assignment* is not a reasonable

interpretation of the NLRA because it both violates the FAA and plainly misinterprets the text of the NLRA.

1. *On Assignment* Is Unreasonable Because It Violates The FAA.

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (citations omitted). This includes the enforcement of arbitral terms "specify[ing] with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2303, 2309 (2013) (quotations marks, brackets, and citations omitted); *see also Concepcion*, 563 U.S. at 336.

The FAA's requirement that arbitration agreements be enforced "according to their terms" applies with full force to arbitration agreements that contain class waivers. In *Italian Colors*, for example, the Supreme Court held that the FAA prohibits courts from "invalidat[ing] arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." 133 S.Ct. at 2308 (quotation marks omitted). Similarly, in *Concepcion*, the Court held that the FAA preempted a rule that "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable." 563 U.S. at 339. And in *Gilmer v.*

Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Court enforced an agreement requiring arbitration of Age Discrimination in Employment Act claims, rejecting plaintiffs' argument that the agreement was invalid because it prevented his case from "go[ing] forward as a class action." *Id.* at 32.

Under the FAA, such agreements are not only enforceable, but desirable. "In bilateral arbitration, parties forego the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Concepcion*, 563 U.S. at 348. By contrast, "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.*

On Assignment impermissibly prevents employees from realizing *any* of these benefits by categorically prohibiting employees from accepting voluntary arbitration agreements with class waivers. It likewise ignores the Supreme Court's admonition that employees, like all other persons, may enter into and be bound by FAA-compliant arbitration agreements. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009) ("Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."). In short, the NLRB's "single-minded[]" focus on

effectuating the NLRA's supposed goals "ignore[s] other and equally important Congressional objectives" embodied by the FAA, *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942)—specifically, the enforcement of purely voluntary "agreements to arbitrate … according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010).

"[W]here the policies of the [NLRA] conflict with another federal statute, the Board cannot ignore the other statute" and instead must interpret the NLRA "insofar as possible, in a manner that minimizes the impact of [the Board's] actions on the policies of the other statute." *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003). For this very reason, Member Johnson explained in his dissenting opinion in *On Assignment* that "a proper accommodation of the NLRA and the FAA would require [a] finding that … a [voluntary class] waiver does not violate the [NLRA]," rather than invalidating countless voluntary arbitration agreements. 362 NLRB No. 189, at 16 (Member Johnson, dissenting). The Board's *On Assignment* rule does not even remotely begin to engage in this accommodation of competing federal interests.

The Board, for its part, addressed these issues only passingly in *On Assignment*, suggesting that there is "no conflict" between the FAA and the *On Assignment* rule and referring back to two prior Board decisions (*D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72

(2014)), both of which the Fifth Circuit later overturned on appeal (*see D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2012), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2013)). *On Assignment*, 362 NLRB No. 189, at 7. In those prior Board decisions, the NLRB found no conflict between the FAA and the NLRB's *D.R. Horton* rule, a rule that prohibits the *mandatory* imposition of *compulsory* arbitration agreements with class waivers. *D.R. Horton*, 357 NLRB No. 184, at 7–12; *Murphy Oil*, No. 361 NLRB No. 72, at 5–11, 15–16. According to *On Assignment*, "[w]hether [arbitration] agreements are imposed on employees by employers, or whether employees are free to reject them, makes no difference … to any required accommodation between the NLRA and the FAA." *Id.*

The Board, however, "has no special competence or experience in interpreting the Federal Arbitration Act." *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013) (citations omitted). Therefore, this Court "do[es] not owe deference to [the Board's] interpretation" of the FAA, which "it is not charged with administering," nor does this Court owe deference when the Board attempts to "resolve[] a conflict between its statute" and the FAA. *Assoc. of Civilian Technicians v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000).

In any event, *On Assignment*'s cursory references to *D.R. Horton* and *Murphy Oil* are plainly insufficient. In those decisions, the Board went to great lengths explaining why, in its view, a rule prohibiting the *mandatory* imposition of

compulsory class waivers does not conflict with the FAA. *See D.R. Horton*, 357 NLRB No. 184, at 17 ("Our holding rests not on any conflict between any agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively … and the NLRA."). Those decisions do not address, or purport to address, the circumstances at issue here, where class waivers are contained within purely voluntary agreements that individuals can freely accept or reject.

In fact, *Morris* itself recognized the crucial distinction between *voluntary* arbitration agreements with class waivers and *mandatory* arbitration agreements with class waivers. Despite finding no conflict between the FAA and the Board's *D.R. Horton* rule, *Morris* nevertheless *reaffirmed* *Johnmohammadi*, thereby suggesting that, in this Court's view, *Johnmohammadi* embodies the appropriate accommodation between the NLRA and the FAA—not the Board's *On Assignment* rule, which single-mindedly "trench[es] upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

2. *On Assignment* Is Unreasonable Because It Misinterprets The NLRA.

On Assignment is also undeserving of deference because the Board's interpretation of the NLRA is unreasonable—even without reference to the FAA.

a. The Board's Finding That Arbitration Agreements With Opt-Outs Are Still "Mandatory" Is Unreasonable.

In *On Assignment*, the Board concluded that arbitration agreements with opt-out rights are still "mandatory" because signatories—in order to opt out—purportedly must "take affirmative steps" and "reveal their sentiments" regarding class actions. 362 NLRB No. 189, at 3–7; Answering Brief at 18–24. Accordingly, such agreements supposedly fall within the Board's *D.R. Horton* decision, which prohibits the imposition of *mandatory* class waivers as a condition of employment. *On Assignment*, 362 NLRB No. 189, at 3–7.

The Board's findings regarding the voluntary nature of contracts containing opt-out mechanisms, however, are entitled to no *Chevron* deference because the NLRB has no special expertise in opt-outs or contract formation issues. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202–03 (1991) ("[T]he Board is neither the sole nor the primary source of authority in such matters."). Rather, "courts are … the principal sources of contract interpretation" and formation. *Id.* And courts, unlike the NLRB, have roundly concluded that agreements with opt-out mechanisms are voluntary. *See Johnmohammadi*, 755 F.3d at 1075–76 ("If she wanted to retain [her] right, nothing stopped her from opting out."); *Mohamed*, 836 F.3d at 1112; *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999).

The NLRB is also plainly wrong that an opt-out procedure "interferes" with one's ability to engage in a class action simply because an individual must "take affirmative steps" to opt out. *On Assignment*, 362 NLRB No. 189, at 4; Answering Brief at 19–20. As Member Johnson explained in *On Assignment*, affirmative compliance with reasonable "deadlines [is] part and parcel of administrative procedure under the NLRA as well as judicial procedure under the Federal Rules of Civil Procedure and their state equivalents." 362 NLRB No. 189, at 12 (Member Johnson, dissenting).[5] If the NLRB's findings were correct—that a contract provision requiring an individual to "take any steps," no matter how *de minimis*, violates the NLRA—the Board's authority over employment contracts would have "no boundary." *Id*. Clearly, Congress did not anticipate such an unprecedented expansion of the Board's authority.

Also incorrect is the NLRB's suggestion that an arbitration agreement with an opt-out mechanism forces a signatory to "make an observable choice that demonstrates [her] support for or rejection of" collective action and "pressures" signatories. *Id.* at 5, 13; Answering Brief at 21–23. Contrary to the NLRB's position, the act of opting out of arbitration reveals *nothing* about an individual's

[5] For example, plaintiffs take affirmative steps to "opt in" to collective actions under the Fair Labor Standards Act, 29 U.S.C. § 216(b), and yet no one would plausibly argue that these procedures contravene the NLRA.

views regarding class actions. An individual might opt out of arbitration for any number of reasons that have nothing to do with her view of class actions, such as a desire to have her claims heard by a jury, or dissatisfaction with the particular confidentiality, discovery, or remedial provisions of the arbitration agreement.

Nor is there any reason to believe that a single driver in *this* case felt "subtle pressure" not to opt out. Answering Brief at 21. Plaintiffs certainly did not, given that many of them did, in fact, opt out. 2ER189–191, 4ER488. And Uber advised *all* drivers that "[a]rbitration [was] not a mandatory condition of [their] contractual relationship," "[i]f [drivers] [did] not want to be subject to [the] Arbitration Provision, [they] may opt out," and drivers "will not be subject to retaliation" if they "opt-out of coverage under [the] Arbitration Provision." 2ER247–48, 264, 284, 301. As this Court stated in *Mohamed*, "the contract[s] bound Uber to accept opt-outs from those drivers who followed the [opt-out] procedure," "[t]here were some drivers who did opt out and whose opt-outs Uber recognized," and the "promise [of an opt-out right] was not illusory." 836 F.3d at 1111.

b. The Board's Alternate Holding That The NLRA Prohibits Employees From Voluntarily Accepting Class Waivers Is Unreasonable.

The Board also found, in the alternative, that class waivers in arbitration agreements violate the NLRA irrespective of "whether [those] agreement[s] [are] imposed or entered into voluntarily." *On Assignment*, 362 NLRB No. 189, at 7. In

other words, according to the NLRB, the NLRA categorically prohibits employees from deciding for themselves whether to accept class waivers. *Id*. This finding is unreasonable and therefore cannot warrant a reversal of *Johnmohammadi*.

In 1947, Congress, "[c]oncerned that [the NLRA] had pushed the labor relations balance too far in favor of unions," enacted the Taft-Hartley Act, 61 Stat. 136, which amended the NLRA in "several key respects." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008). Crucially, it amended Section 7 to guarantee that employees not only have the right "to engage in [] concerted activities," but also "'the right ***to refrain*** from any or all' § 7 activities." *Id.* (citing 29 U.S.C. § 157) (emphasis added). If this "right to refrain" from Section 7 activity is to have any meaning at all, it must—at minimum—guarantee employees a right to choose for themselves whether to accept a class waiver. The *On Assignment* rule, however, "operates in reverse—not to *protect* employees' right to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right to *choose* whether to be covered by agreement to litigate non-NLRA claims on an individual basis." *Bloomingdales, Inc.*, 363 NLRB No. 172, at 8 n.9 (2016) (Member Miscimarra, dissenting).[6]

[6] The NLRB suggests that the right "to refrain" can be exercised only "at the time a dispute arises." NLRB Amicus at 15–17. But the Board provides no reasoned basis as to why an individual cannot make an informed decision about whether to agree to a class waiver *before* a particular dispute arises.

As discussed above, *see supra* Part I, *On Assignment* also misconstrues the plain text of Section 8. Indeed, this Court "quickly dismiss[ed]" any notion that one can "interfere with, restrain, or coerce" another individual's rights by allowing her to decide for herself whether to arbitrate on an individual basis. *Johnmohammadi*, 755 F.3d at 1075. It should do the same here.

The NLRB's categorical prohibition against class waivers contravenes a third provision of the NLRA as well—Section 9(a)—which guarantees every "individual employee" the right "at any time" to "have [her] grievances adjusted." 29 U.S.C. § 159(a). This provision, especially when read in context with Section 7, confirms that an employee may elect, "at any time," to resolve disputes on an "individual" basis by agreeing to arbitrate individually. *Id.*[7]

Notwithstanding *all* of these statutory provisions, Plaintiffs and the NLRB contend that the *On Assignment* rule is consistent with certain judicial decisions interpreting Section 8. NLRB Amicus at 11; Answering Brief at 18–19. That, however, is an insufficient basis on which to request *Chevron* deference. Indeed,

[7] Notably, an original version of the bill that became the NLRA only permitted employees to "present grievances to their employer[s] through representatives of their own choosing," but the requirement that grievances be presented "through representatives of their own choosing" was stripped out of the bill that was codified into law. S. 1958, 74th Cong. § 9(a) (1935); H.R. 7937, 74th Cong. § 9(a) (1935); *see also Murphy Oil*, 361 NLRB No. 72, at 30–33 (Member Miscimarra, dissenting) (discussing Section 9(a)).

courts "are not obligated to defer to an agency's interpretation of [judicial] … precedent under *Chevron* or any other principle." *NLRB v. USPS*, 660 F.3d 65, 68 (1st Cir. 2011) (citations omitted).

In any event, Plaintiffs and the NLRB are mistaken: the decisions on which they rely are inapposite, as each one arose in the unique context of an employer offering perks to employees in order to convince them to "trade away" their rights and prevent unionization. *See Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 354, 360–61 (1940) (finding NLRA violation where employer tried to "eliminate the Union" by offering increased wages and benefits in exchange for individual contracts); *NLRB v. Bratten Pontiac Corp.*, 406 F.2d 349, 350–51 (4th Cir. 1969) (employer violated NLRA by granting "increases in employment benefits to induce [salesmen] to defect from [a] union"); *NLRB v. Stone*, 125 F.2d 752, 754 (7th Cir. 1942) (finding NLRA violation where employer refused to bargain with union, made "forcible argument[s] against Unions," and promised "that wages were to be increased and vacations given with pay" if employees signed individual contracts).

For this very reason, this Court has rejected the analogy that Plaintiffs and the NLRB have tried to draw to those cases. Unlike the agreements in *National Licorice*, *Bratten*, and *Stone*, all of which were aimed at "curtailing [] employees' freedom of choice," the offer of a voluntary arbitration agreement with a class waiver does *not* "imping[e] upon … [one's] 'freedom of choice' in deciding

whether to waive or retain [the] right to participate in class action." *Johnmohammadi*, 755 F.3d at 1076. As such, those decisions are inapplicable. *Id.* (finding that an offer to arbitrate is not "of such a character that it would tend to interfere with [one's] freedom of choice about whether to forego future participation in class actions").

Plaintiffs and the NLRB also try to analogize this case to *J.I. Case Co. v. NLRB*, 321 U.S. 332, 333–34 (1944), where an employer entered into individual contracts with most of its employees and, after the certification of a union, refused to bargain with the union. Answering Brief at 18 n.21; NLRB Amicus at 11–12. In that case, the employer violated the NLRA by refusing to bargain because the terms of any collectively bargained contract would supersede the individual contracts. *J.I. Case*, 321 U.S. at 338–39.

As this Court has explained, however, *J.I. Case* "does not support the broad proposition" that "an employee may never waive the right to participate in class litigation by negotiating an individual contract with her employer." *Johnmohammadi*, 755 F.3d at 1076. To the contrary, *J.I. Case* "stressed that nothing prevents an employee from making an individual contract with her employer, 'provided it is not inconsistent with a collective agreement or does not amount to or result from or is not part of an unfair labor practice.'" *Id.* at 1077 (citation omitted). Here, as in *Johnmohammadi*, drivers were "not covered by a

collective bargaining agreement, and … [their] decision to enter into an arbitration agreement [did not] amount[] to or result[] from an unfair labor practice." *Id.*

* * *

On Assignment contravenes the Congressional goals embodied by the FAA, ignores the plain text of Sections 7, 8, and 9(a) of the NLRA, and finds no support in the cases on which that decision purports to rely. Moreover, this Court has repudiated the flawed rationale underpinning *On Assignment* on three separate occasions, most thoroughly in *Johnmohammadi* and most recently in *Mohamed*. For all of these reasons, this Court should decline Plaintiffs' invitation to adopt *On Assignment* and, as it did in *Mohamed*, conclude that the parties' arbitration agreements do not violate the NLRA.

C. The Arbitration Agreements Provided Drivers A Meaningful Opportunity To Opt Out.

Plaintiffs—but not the NLRB[8]—also suggest that the Court should nullify the arbitration agreements because they supposedly do not provide "drivers a meaningful opportunity to opt out …." Answering Brief at 24–29. However, nothing in *Johnmohammadi* suggests that the relevant legal standard is whether an individual possesses a "meaningful opportunity to opt out of [arbitration]," as

[8] The NLRB "does not agree with the drivers' attempts to distinguish *Johnmohammadi* by arguing that the agreement at issue there was less burdensome than Uber's." NLRB Amicus at 19 n.6.

Plaintiffs claim, *id.* at 24; rather, *Johnmohammadi* requires the Court to ask whether "[drivers] had the right to opt out of the arbitration agreement …." *Johnmohammadi*, 755 F.2d at 1077. Because the drivers here did have such a right, the arbitration agreements here are enforceable under *Johnmohammadi.*

In any event, Plaintiffs' characterizations regarding the opt-out provisions here could not be farther from the truth. As this Court held in *Mohamed*, the 2014 arbitration agreements were "not adhesive" and "not procedurally unconscionable" because they "gave drivers an opportunity to opt out of arbitration altogether." 836 F.3d at 1111–12. In fact, even the district court acknowledged that the opt-out provision in the 2014 arbitration agreement was "highly conspicuous" and enabled "drivers to obtain all of the benefits of the contracts, while avoiding any potential burdens of arbitration." *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1231 (N.D. Cal. 2015). Like the 2014 agreement, the opt-out provision in the 2013 agreement was set forth in a clearly labeled section with an underlined heading, "Your Right to Opt Out Of Arbitration," and it emphasized the opt-out deadline in boldface. 2ER157, 179, 247, 284, 301; 3ER461, 477, 430; 4ER521, 558, 575, 622, 644; 5ER804, 827, 881, 912; *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc). And, as Plaintiffs themselves concede, hundreds of

drivers chose to opt out of arbitration altogether. Answering Brief at 27.[9] On this basis, this Court expressly rejected the notion that the opt-out provisions here are "illusory." *Mohamed*, 836 F.3d at 1111–12.

For all of these reasons, this Court should reject Plaintiffs' claim that the opt-out provisions are not "meaningful" enough to satisfy *Johnmohammadi*.

III. The Arbitration Agreements Are Enforceable Notwithstanding The Representative PAGA Waiver.

In the alternative, Plaintiffs contend that the arbitration agreements are unenforceable because they contain a waiver of representative PAGA claims. Plaintiffs' argument, however, is foreclosed by *Mohamed*, in which this Court considered—and rejected—the *exact* arguments Plaintiffs assert here while analyzing the *exact* agreements at issue here. Indeed, even Plaintiffs admit that this Court has squarely rejected their arguments. Answering Brief at 35 n.37 ("*Mohamed* ultimately found Uber's PAGA waiver to be severable.").

As this Court correctly explained in *Mohamed*, the "PAGA waiver [in the 2013 arbitration agreement] does *not* invalidate the remainder of the arbitration provision in the 2013 Agreement …." 836 F.3d at 1114 (emphasis added). Notably, that PAGA waiver is subject to two express severability provisions. *Id.*

[9] Plaintiffs find meaning in the fact that "most drivers" did not opt out. Answering Brief at 28. That means nothing, of course, except that most drivers chose the "speedy resolution that arbitration in general and bilateral arbitration in particular [is] meant to secure." *Italian Colors*, 133 S. Ct. at 2312.

(discussing Sections 14.3(i) and 14.3(ix)). And, as Uber explained in its Opening Brief, case law from this Court and other courts severing PAGA waivers, California's preference to sever or restrict terms, and the federal and state policies favoring arbitration *all* point in favor of severance. *See* Opening Brief at 30–40. Thus, this Court properly concluded that severance of the PAGA waiver in the 2013 arbitration agreement was warranted. *Mohamed*, 836 F.3d at 1114. With respect to the 2014 arbitration agreement, *Mohamed* also rejected an invitation to invalidate that agreement based on the PAGA waiver, finding that the 2014 arbitration agreement's clear and unmistakable delegation clause reserves this threshold question of arbitrability for an arbitrator. *Id.* at 1112–13.

Here, Plaintiffs have offered no argument that this Court did not already consider and reject in *Mohamed*.[10] Nor do Plaintiffs argue that there have been any intervening developments that might give this Court reason to reconsider *Mohamed*, which it issued just three months ago. Accordingly, this Court is "bound by [its] prior decision[]" in *Mohamed*, and must reject Plaintiffs' recycled arguments regarding the import of the PAGA waiver. *Gomez*, 768 F.3d at 875.

[10] The *Mohamed* plaintiffs—like Plaintiffs here—argued that the PAGA waiver supposedly was subject to a "non-severability provision," could not be severed without a "fundamental re-writing" of the agreement, and was "inextricably intertwined" with the agreement. *Mohamed*, No. 15-16178, Dkt. 44 at 14–24; Dkt. 76 at 11–21; *see also* Answering Brief at 35. This Court rejected all of those arguments. *See Mohamed*, 836 F.3d at 1112–14.

IV. The Conscionability Of The Arbitration Agreements Is A Question Reserved For The Arbitrator.

For precisely the same reason, this Court should reject Plaintiffs' argument that the arbitration agreements are unconscionable, *see* Answering Brief at 39–48, and hold that an arbitrator—not a Court—must resolve threshold questions pertaining to the enforceability of the arbitration agreements.

Indeed, the plaintiffs in *Mohamed* proffered the very same arguments Plaintiffs raise on appeal here, arguing that the Court should find both the 2013 and 2014 arbitration agreements unconscionable because they purportedly are "adhesion contracts" containing "surprise" and "unfair" terms. *Mohamed*, No. 15-16178, Dkt. 44 at 29–55; *see also* Answering Brief at 39–48. This Court did not adopt a single one of the *Mohamed* plaintiffs' arguments. Instead, the Court held that "[t]he delegation provisions [in the agreements] clearly and unmistakably delegate[] the question of arbitrability to the arbitrator …." *Mohamed*, 853 F.3d at 1110. As such, Plaintiffs' unconscionability arguments—the same arguments the *Mohamed* plaintiffs presented to this Court earlier this year—must be "adjudicated in the first instance by an arbitrator and not in court." *Id.* at 1108.

Plaintiffs, for their part, do not try to explain why the outcome here should be any different than it was in *Mohamed*, instead repeating the *Mohamed* plaintiffs' claim that the delegation clauses in the agreements are "ambiguous." Answering

Brief at 33–34 n.35. This Court rejected this argument once. *Mohamed*, 836 F.3d at 1109 (finding the supposed ambiguity "artificial"). And it should do so again, as circuit precedent requires. *See Gomez*, 768 F.3d at 875.

If, however, the Court reaches the enforceability of the arbitration agreements, the Court should hold that the parties' agreements are valid for the reasons set forth in Uber's Opening Brief, *see* Opening Brief at 40–54.

CONCLUSION

For all of these reasons, Uber respectfully requests that the Court reverse the district court's order denying Uber's motions to compel arbitration.

Dated: December 5, 2016

Respectfully submitted,

s/ Theodore J. Boutrous, Jr.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(e) and the type-volume limitation of Circuit Court Rule 32-1(b) because it contains 6,980 words, excluding the parts of the brief exempted pursuant to Circuit Rule 32-1(c).

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface using Microsoft Word 2010.

Dated: December 5, 2016

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 5, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 5, 2016

s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.