NOS. 16-285, 16-300 & 16-307

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, Petitioner,
v.
JACOB LEWIS, Respondent.

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
MURPHY OIL USA, INC., ET AL., Respondents.

ERNST & YOUNG LLP, ET AL., Petitioners,
v.
STEPHEN MORRIS, ET AL., Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF NEW YORK TAXI WORKERS ALLIANCE AS AMICUS CURIAE SUPPORTING RESPONDENTS IN NOS. 16-285 & 16-300 AND PETITIONER IN NO. 16-307

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RULE 29: STATEMENT OF INTEREST OF AMICUS CURIAE NEW YORK TAXI WORKERS ALLIANCE

The New York Taxi Workers Alliance (NYTWA)[1] submits this Amicus Curiae brief to vindicate the public interest in promoting compliance with labor law which protects the rights of workers to engage in activities for their mutual aid and protection. NYTWA also seeks to ensure that the decision reached by this Court is in conformity with a body of existing international human rights law which is binding on this country.

The NYTWA was founded in 1998 with the express purpose of seeking to improve the lives of those working in the taxi and for hire vehicle industry. NYTWA has been involved in countless efforts to expand the legal protections for drivers. NYTWA has acted on behalf of its almost 20,000 members in many fora including Court cases and at the Taxi Limousine Commission (TLC) of the City of New York.

The NYTWA will elucidate the problems occasioned by the use of arbitration agreements with class waivers, by citing to a specific example of the abuse of these agreements/waivers by a large corpora-

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[1] No counsel for any party authored this brief in whole or in part. No party, or its counsel, or any entity other than the undersigned amicus and their counsel have made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to the filing of amicus briefs. *See* Rules 37.6, 37.3(a).

tion known as Uber. The example of how Uber has used its arbitration agreement and the class action waiver to frustrate the rights of Uber drivers provides to this Court a perfect example of a corporation which is using these agreements to insulate itself from accountability for misclassifying its hundreds of thousands of drivers as independent contractors. The information below will describe Uber's activities primarily in New York City.

Ever since Uber made its entrance into the New York City market in 2012, there has been a growing demand from persons who now drive for Uber for the services of the NYTWA. From the time Uber entered the New York market and has now developed a major market share, Uber has slashed the fares paid to drivers while increasing the fee paid to Uber, resulting in drivers having to drive many more hours per week than they did at the beginning in order to earn a modest living. At the same time the wages of workers in this market including taxi and other limousine drivers have plummeted in a virtual race to the bottom. Most of the drivers who contact NYTWA want to organize so as to have a voice in setting their pay and working conditions with Uber. However, they have been classified by Uber as independent contractors and therefore do not have rights under the National Labor Relations Act to organize a union.

Uber has both misclassified drivers as independent contractors and requires drivers upon activating its application ("app") to agree to individually arbitrate any claims against Uber. They cannot activate the app unless they click that they have agreed to the terms of the agreement which contains a twenty page

small print contract and which describes Uber drivers as independent contractors as well as a requirement that all disputes between the driver and Uber must be individually arbitrated.

In December 2015, in response to litigation instituted against Uber in California, Uber revised its arbitration agreement and gave drivers the right to "opt-out" of the arbitration obligation within 30 days. The overwhelming number of drivers, however, are not able to read or understand the contract on their phones and despite NYTWA's efforts to advise drivers to opt out, most do not realize the import of what they have signed until it is too late to opt out.

The NYTWA has supported the drivers in filing litigation in 2016, and has filed Unfair Labor Practice (ULP) charges at the NLRB on behalf of these workers. It is evident to NYTWA that Uber has intentionally misclassified its drivers as independent contractors and has intentionally limited the drivers' remedy to individual arbitrations so as to insulate itself from liability for its intentional misclassification. In light of the foregoing, your amicus has a direct interest in the outcome of these cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of this brief is to bring the Court's attention to a major way that corporations such as Uber intend to hide behind Arbitration agreements to ensure that there is no effective way for drivers who

are employees to address the issue of misclassification and to obtain the benefits of labor laws they are currently excluded from by virtue of their misclassification.

Your Amicus also wants to bring to the Court's attention United States treaty obligations as well as customary international law which bear on the legality of these class action waiver clauses and the ability of the court to deprive workers an effective judicial remedy.

Your Amicus has read the briefs submitted by the NLRB, and some of the amici in support of the parties opposing the use of these class action waivers and agrees with the positions espoused therein. This brief does not repeat these arguments.

I. STATUS OF UBER AND OTHER TAXI OR FOR HIRE VEHICLE DRIVERS IN NEW YORK CITY

NYTWA has done an in-depth analysis of whether Uber has intentionally misclassified its drivers. Although the information below is based on drivers in New York City, Uber takes the position throughout the country that its policies are uniform. In New York City, Uber drivers are treated the same way as traditional "Black Car" drivers who have consistently been found to be employees not independent contractors. As noted above, your Amicus filed a ULP on driver misclassification with the NLRB. NYTWA sets forth below facts and arguments in support of their claim that Uber drivers are employees which were originally submitted in support of that ULP. For purposes of brevity exhibits which confirm the

statements will not be included but have been provided to the NLRB.

Drivers in New York City's taxi and for-hire vehicle industry are divided into two main categories: Taxi drivers and for-hire vehicle ("FHV") drivers. Uber's employees all drive vehicles that are affiliated either with one of Uber's twenty-six for-hire vehicle bases, or with another TLC-licensed Black Car base.

New York City taxicab drivers, who either own or lease their vehicles and medallions, can only pick up passengers who hail them for immediate service. While taxi drivers may drive a taxi leased from a fleet, the driver pays for fuel and keeps all fare revenue and tips earned during a shift. Taxi drivers pay the vehicle and medallion owner or a broker a set amount to lease the vehicle, and work is typically divided between a day shift and a night shift, with workers driving up to 12-hour shifts, either from roughly 5 am to 5 pm, or 5 pm to 5 am.

In New York City, Uber operates through the For-Hire Vehicle framework, operating several FHV bases. FHV drivers typically obtain their own car and affiliate that car with a unique FHV base. Unlike taxi drivers, FHV drivers may not pick up passengers who hail them on the street; rather, they are directed to pick up passengers through dispatches from their base. Uber drivers work on a commission system. Uber passengers pay a full fare amount to Uber, which Uber remits as pay to the driver after collecting a fee of 20-28%, depending on the type of service and vehicle used for the trip, and when the driver first signed up to work for Uber.

Aside from its scale and market share, Uber's operations are substantially similar to those of many other New York City black car companies. This is significant because the National Labor Relations Board, U.S. Department of Labor, and the New York State Department of Labor have found New York City black car drivers working in similar circumstances to be employees, not independent contractors.

A. State and Federal Agencies Have Consistently Found Black Car Drivers to Be Employees, Not Independent Contractors

Recently courts and agencies have taken up the question of whether black car drivers and Uber drivers in particular, are employees under state and federal labor and employment laws. Although these cases have involved various statutes and regulations, the courts and agencies considering them have all sought to determine the drivers' employee status by using some variation of the factors found in the common law test employed by the NLRB.

An Administrative Law Judge in the New York Department of Labor, recently ruled that several Uber drivers who filed for unemployment compensation were employees within the meaning of the New York Labor Law. *See*, A.L.J. Case No. 016-19369.

Similarly the California Labor Commission held that a former Uber driver was an employee under California wage and hour laws and was entitled to reimbursement of work expenses, including fuel costs. *Berwick v. Uber Technologies Inc.*, 2015 Cal. Wrk. Comp LEXIS 118 (W.C.A.B. June 3, 2015). The Labor Commission reached this decision after following

California Supreme Court precedent regarding employee status, which follows a test "principally derived" from R.2d Agency § 220. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). The Labor Commission specifically noted that Uber had "all necessary control over the operation as a whole," as it procured clients through its app, assigned jobs to drivers, and that Uber's business simply would not exist without the work performed by its drivers. Although most Uber drivers in California do not drive licensed taxi or livery vehicles, the manner in which they receive dispatches and payment for trips is substantially identical to TLC-licensed Uber drivers' work in New York City.

In the Unemployment Insurance context, the New York State Department of Labor and the Appellate Division of the New York Supreme Court, have found black car bases with similar terms of employment as Uber to be employers on several occasions. Although the Department has, at times, found that drivers are independent contractors where they held a franchise or ownership interest in the black car or limousine company, the Department has generally found an employment relationship between drivers and dispatching bases. In *Matter of Khan v. Commissioner of Labor*, 66 A.D.3d 1098 (3d Dep't 2009), lv denied 13 NY3d 717 (2010) the Appellate Division affirmed the Department's finding that a black car base was an employer where it paid its drivers a set commission per fare, dispatched trips to drivers specifying pick-up and drop-off locations, set all fare rates, and handled all billing. In *Matter of Automotive Services v. Commissioner of Labor*, 56 A.D.3d 854 (3d Dep't 2008), a black car base was found to exercise sufficient

control over drivers' work where it paid drivers a percentage commission, provided dispatch information, told drivers to hold signs with the company's name, specified acceptable cars for use with the company, handled the customer complaint process and dictated how long in advance a driver should arrive at a pick-up spot. In *In re B.S.M. Limousines Corp.*, a limousine company was found to be an employer even where its drivers were free to refuse work, and were allowed to compete for business with the employer. 143 A.D.2d 459 (3d Dep't 1988), lv denied 73 N.Y.2d 703 (1988). Numerous other cases have resulted in similar conclusions. *See also*, *Matter of Spectacular Limo Link, Inc. (Commissioner of Labor)*, 21 A.D.3d 1172 (2005); *Matter of Eliraky (Crosslands Transportation, Inc. (Commissioner of Labor)*, 21 A.D.3d 1197 (2005); *In re Claims of De Paiva*, 270 A.D.2d 534 (2000).

B. The NLRB Board Has Consistently Found New York City Black Car Drivers to Be Employees, Not Independent Contractors

The National Labor Relations Board has consistently asserted its jurisdiction over black car companies in New York City. Although New York City taxi fleets used to be classified as employers when they paid drivers on a commission basis and assigned drivers jobs via radio dispatch, when the taxi industry switched to a leasing-based business model, the Board held that fleet taxi drivers were no longer employees under the NLRA. *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300 (2004). Since the Taxi and Limousine Commission first created distinct taxi and FHV sectors, the Board has held that many black car and limo drivers are employees under the NLRA. *See, e.g.*, *Elite*

Limousine Plus, Inc., 324 NLRB 992 (1997). After the taxi sector had switched to leasing, the black car sector retained a dispatch-and-commission system which the Board had long found significant in creating an employment relationship between taxi companies and drivers in New York and in cities that have maintained that structure. *See, e.g.*, *Stamford Taxi*, 332 NLRB 1372, 1373 (2000). The relationship that Uber has structured with its employees, begins by re-creating the commission-and-dispatch system that was used when taxi fleets were found to be employers and that is still used by black car bases.

In *NYC 2 Way Int'l Ltd.*, an NLRB Regional Director found that drivers working for a black car base were employees and not independent contractors, after assessing the Restatement factors, as applied by the Board, and relying on prior Board decisions involving taxicab and limousine companies with similar terms and conditions of employment. 2000 NLRB Reg. Dir. Dec. LEXIS 318 (29-RC-9411, July 31, 2000).

C. The *Brock* Factors:

In *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988) the court set forth various factors for determining employee status.[2] These factors

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[2] Several factors are relevant in determining whether individuals are "employees" or independent contractors for purposes of the FLSA. These factors, derived from *United States v. Silk*, 331 U.S. 704, 91 L.Ed. 1757, 67 S.Ct. 1463 (1947) (Social Security Act), and known as the "economic reality test," include: (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or

for determining employee status have been repeatedly cited. Your amicus sets forth below some evidence of the high degree of control Uber exercises over its drivers as well as other information which militates in the direction of Uber drivers being found to be employees.

1. There Is Significant Evidence That Uber Drivers Are Employees of Uber Not Independent Contractors

Uber maintains constant and active control over how its drivers perform their work. While independent contractor New York City taxi drivers find all of their passengers on their own, Uber assigns jobs to drivers who are in the vicinity of potential passengers who have requested a trip from Uber. When a driver receives a trip request, he/she must respond to it quickly. Although not explicitly "directed" to accept all trips, if a driver remains logged in and does not accept 90% of trip requests, the Uber contract implies that it may take negative action against his/her account, and he/she will not qualify for minimum pay guarantees. Uber tells drivers that "you should accept a least 80% of trip requests to retain your account status." Drivers who do not accept 90% of trips will lose their ability to maintain "VIP" status. Drivers who do not accept two trip requests in a row, will be locked out of the Uber app for ten minutes. Uber also determines what type of car a driver must have to drive in the different categories of Uber's service. Uber routinely

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duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

directs drivers to various dealerships with which it does business to finance cars.

2. Uber Also Directs the Driver's Work

Uber directs its employees to work in specific areas, by tying their compensation their presence in specific zones, namely areas in Manhattan and nearby Brooklyn neighborhoods. Despite assurances in the contract that Uber does not get involved in the provision of transportation services by its drivers, Uber exercises significant direct and indirect control over the routes taken by its drivers. While the contract requires drivers to accept responsibility for the effectiveness and efficiency of Uber rides, Uber will unilaterally decide what route a driver should take or, after the fact, should have taken. Uber will reduce a driver's pay accordingly, without first consulting the driver, or even examining the surrounding traffic conditions.

3. Customer Service & Employee Discipline

As time went by and Uber began being sued for misclassification, directions to drivers were referred to as "tips" and "suggestions." Regardless of how such suggestions may be framed for drivers, they create a legitimate expectation of worker behavior among Uber's customer base. When these expectations are not met, drivers will receive negative reviews from passengers, which are often the sole basis for employee discipline, including suspension or termination imposed *by Uber*. Uber tells its passengers that "After every trip, you rate the driver and provide feedback about your ride . . . We use your feedback to help drivers improve the Uber experience they deliver." Uber's driver handbook tells drivers that "You're likely to be deactivated" if

their ratings fall below 4.5 stars. When a passenger makes a complaint about a specific driver, this information is submitted to Uber through the app or in an e-mail; the driver does not *see* the complaint and drivers do not know which customers have given them which ratings. Customers may not communicate their feedback directly to drivers. At the end of a payment period, Uber e-mails each driver a summary of their week's performance, telling them their average rating for the week, the number of five-star ratings received, and suggestions for improvement. Uber notifies drivers when they received negative feedback.

Uber also controls the type of work and access to jobs that drivers receive through a system of rewards based on passenger ratings. Drivers who, after a certain amount of time driving for Uber receive high ratings effectively receive promotions, as they become eligible for more categories of trips. Based on passenger-provided positive rankings, Uber rewards drivers by upgrading their status to allow drivers more opportunities to pick up passengers and to pick up more lucrative classes of passengers; these opportunities are not available to drivers with lower ratings.

Drivers who achieve higher ratings are automatically classified as "UberVIP" drivers. Drivers who achieve this status will be eligible for trips with Uber Passengers who select UberVIP service, knowing that they will be driven by a top-rated Uber driver. The passenger rating system rewards drivers who follow Uber's customer service expectations by providing them with more fares than non-VIP drivers would receive. On the other hand, drivers who receive low ratings will be deactivated from the app temporarily

or permanently. Deactivated drivers must take an Uber-mandated re-training course before Uber will reactivate their accounts and continue to dispatch jobs to them.

4. Fare Payments

As with customer complaints, payments may not be made directly to the drivers, but are processed through the Uber app, with Uber taking its commission before remitting the remainder to the driver.

Uber drivers are not their own "bosses". Uber, is in the business of providing transportation services in which the driver works. Despite Uber's attempts to assert that it is in the technology business, and not the transportation business, it is clear that Uber operates in New York as a car service company. In terms of entrepreneurial opportunity this factor examines not only whether workers are free to pursue other business opportunities, but also whether a driver's gain or loss may vary depending to his or her entrepreneurial efforts. Given the reliance on Uber generated rides through the app the worker is dependent on Uber for his/her rides and thus whatever entrepreneurial efforts they may want to use, do not affect their gain or loss.[3]

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[3] It is true that Uber drivers do not have a fixed amount of hours they have to work. nonetheless given the fact that Uber has slashed the base fares it pays to drivers, since it became almost a monopoly in the New York City area, most drivers have to work longer hours just to make up for the lost income they used to get when the fares were higher.

II. LITIGATION AGAINST UBER WILL NOT BE DISPOSITIVE ON THE ISSUE OF MISCLASSIFICATION BECAUSE OF THE CLASS ACTION WAIVER IN THE ARBITRATION AGREEMENT

As noted above, drivers have no choice but to accept the contract in order to activate the Uber App. The Contract comes up when a driver first logs on. Drivers complain that they cannot read the contract on their phones before accepting it. The contract is very sophisticated and requires a high degree of English proficiency. While the Court in the California case required Uber to change the arbitration agreement in December 2015, and to use larger type to inform the driver of the arbitration clause, it does not tell the driver a time limit by which to opt-out of the agreement. Your amicus has been informed by Uber that only 18,000 drivers nationally have opted out of the agreement while several hundred thousand Uber drivers have not.

As noted above there is a strong possibility that at trial Uber drivers will be found to be employees by the Court in our litigation. However the effect of that litigation will be limited. Based on Uber's arbitration clause even if the plaintiffs in the New York Uber litigation are found to be employees the only persons who will benefit from this ruling are those persons who opted out of Uber's arbitration provision and opted into the FLSA case.

Uber has informed NYTWA through its filings at the NLRB that there are over 58,000 Uber drivers in New York City alone. Assuming the New York plaintiffs are successful in their litigation it is logical that all of the drivers will want to challenge their status as

independent contractors so as to gain the benefits of employee status.

A. How Much Time Will It Take to Arbitrate All of the Drivers Individual Claims?

Assuming all 58,000 drivers just in New York City seek to arbitrate their disputes individually, and assuming enough arbitrators could be found to do one arbitration a day every business day until all 58,000 are arbitrated, it would take approximately two hundred and twenty three years to arbitrate every claim! Even if one quarter of the drivers wanted to arbitrate their cases, using the same rate, it would take over 55 years to determine employee status! In the meantime, none of these workers have the right to seek to have an organized independent voice in their workplace.

B. Other Anomalous Results of the Court Upholding These Class Action Waivers

What would happen if during this process of arbitration, half the arbitrators found the drivers to be independent contractors and half found them to be employees? Could this happen if they all worked for the same employer under the same set of policies? This could happen if different arbitrators and lawyers did not prepare their cases or applied the factors different ways that your amicus would call pro-employer. Could this mean that half of the drivers could form a union, but the other half whose arbitrators ruled against them will have no protection under Section 7 of the National Labor Relations Act and not be allowed to unionize? Such an anomalous result exposes the real purpose behind employers seeking

protection of the Federal Arbitration Act. It is not a way to cheaply and efficiently resolve disputes, it is a way to protect themselves from any accountability for flaunting their obligations under the law to properly classify their workers as employees.

Rather than being an act to facilitate resolution of disputes, the FAA and the class action waiver becomes a sword against employees who want to exercise their rights to organize for mutual aid and protection.

As stated at the outset, your Amicus does not believe it is even a close question as to whether Uber drivers are employees. The effect of upholding the arbitration provision and the class action waiver however would insulate Uber from the effects of its wrongdoing in misclassifying these workers in the first instance for a long time. By doing so, this Court would unwittingly be complicit with this wrongdoing by implicitly allowing other employers to do what Uber has done and take their chances with misclassifying workers so as to deprive them of their rights for as long as possible ensuring they have no effective remedies under laws passed to protect them.

III. Compliance with United States Obligations Under Our Treaties Requires an Interpretation of United States Law Consistent with Providing an Effective Remedy to Workers Like Those Represented and Supported by Your Amicus

International law is part of United States law and must be faithfully executed by the President and enforced by U.S. courts when consistent with the U.S.

Constitution and legislation adopted by Congress. The United States is a party to, and therefore bound by, several international human rights treaties whose provisions would require this Court to interpret our laws consistently with these international agreements.

A. International Treaties and Customary International Law Are Relevant to the Interpretation of the Statutes Applicable in This Case

Under the Supremacy Clause of the Constitution, "treaties made . . . under the authority of the United States, shall be the supreme law of the land."[4] Although the Constitution does not require legislation prior to treaties taking legal effect, the Supreme Court long ago invented a rule requiring implementing legislation before U.S. courts can enforce treaties that are deemed "non-self-executing."[5] All major human rights treaties to which the United States is a party have been interpreted by the Senate or the courts as non-self-executing.[6] Therefore, the treaty provisions themselves are not directly enforceable in U.S. courts except to the extent they are already reflected in the Constitution or existing legislation, or unless Congress has adopted implementing legislation.

Although the international human rights treaties referred to here are not directly enforceable in U.S.

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[4] U.S. Const. Art. VI, cl. 2.

[5] *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

[6] *See, e.g.*, 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights); Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification (1990), at II(2) (Convention Against Torture).

courts *qua* treaties, they nonetheless contain rules binding on U.S. courts. In those cases in which Congress has not enacted implementing legislation, the U.S. government has uniformly taken the position that the U.S. Constitution and legislation already put the United States in compliance with the human rights treaties to which it is a party.[7] Consequently, the legislation applicable in this case and discussed below should be interpreted in a manner consistent with U.S. obligations under human rights treaties that it has ratified. This conclusion comports with a core principle of statutory construction announced by the Supreme Court in *Murray v. The Schooner Charming Betsy*: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[8] "The law of nations" was the term used at the time to refer not only to international treaties to which the United States is a party, but to customary international law (which was the rule at issue in *The Charming Betsy*). That doctrine has been consistently and recently reaffirmed by the Supreme Court,[9] and in *Filartiga v. Pena-Irala*, the U.S. Court of Appeals for the Second Circuit reaffirmed that the fact that a treaty is not self-executing does

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[7] *See, e.g.*, U.N. Doc. CAT/C/28/Add.5, ¶¶ 58-60 ("Where domestic law already makes adequate provision for the requirements of the treaty and is sufficient to enable the United States to meet its international obligations, the United States does not generally believe it necessary to adopt implementing legislation.").

[8] 6 U.S. (2 Cranch) 64, 118 (1804); *accord Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

[9] *See, e.g.*, *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 542 U.S. 155, 164 (2004).

not imply that the rule it establishes does not control the outcome of a case, if the rule is embodied in customary international law.[10]

Customary international law is directly enforceable in U.S. courts without implementing legislation.[11] In *The Paquete Habana*, the Supreme Court held that customary international law "is part of our law" and directly enforceable in courts when no conflicting treaty, legislative act, or judicial decision controls. [12] As will be discussed, each of the human rights treaty rules applicable in this case have also become customary international law.[13]

B. Applicable Treaties and Customary International Law

The United States has been bound by the International Covenant on Civil and Political Rights ("ICCPR") since U.S. ratification of the treaty in 1992.[14] Article 2 of the CCPR states in relevant part:

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[10] 630 F.2d 876, 881-85 (2d Cir. 1980).

[11] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3).

[12] 175 U.S. 677, 700 (1900).

[13] These human rights treaties did not appear out of nowhere. Millions of people died in two world wars before there was an agreement to form the United Nations and with it the Universal Declaration of Human Rights (UDHR). The UDHR from which the ICCPR was developed proclaimed a bright connection between peace and realization of human rights.

[14] 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992).

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[. . .]

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.[15]

Article 22 of the ICCPR states:

1. Everyone shall have the right to freedom of association with others, including the right to

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[15] International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter "CCPR"] (emphasis added).

form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

C. The Right to Freedom of Association and to Form and Join Trade Unions to Protect Ones Interests is Customary International Law

The United States has not ratified ILO convention 87 on Freedom of Association. The main reason the United States gives for non-ratification is that our laws already provide protection for workers to exercise their rights to freedom of association including the right to form and join trade unions to protect their

interests. The National Labor Relations Act protects these rights as part of a workers right to work together for mutual aid and protection. But freedom of association and to form unions has been recognized as customary international law. *See Estate of Rodriguez v. Drummond*, 256 F.Supp.2d 1250 (N.D. Ala. 2003). Furthermore in 1998, the International Labor Conference (ILC) of the ILO adopted the Declaration of Fundamental Principles and Rights at Work (FPRW). This Declaration identifies four "core" categories of rights set out in eight conventions which are considered fundamental. These include the rights to freedom of association and collective bargaining in Conventions Nos. 87 and 98. The Declaration is based on the acceptance by all ILO member states of the content of the ILO Constitution arising out of membership in the Organization. It records that

> "all Member States, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership of the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions . . . ."

Declarations of the ILC, the highest body of the ILO, stand out because they are issued so infrequently and "always with the aim of expressing or reiterating the Organization's fundamental principles. Conference declarations are, therefore, of a very solemn nature. Thus, even though Declarations are not open for ratification, they may be perceived as an expression

of customary international law or of *jus cogens*, *i.e.* peremptory norms of international law."

As customary international law or *jus cogens*, the rights to freedom of association and collective bargaining are binding on all States (and therefore indirectly on all employers in those states) regardless of ratification of the Conventions and those rights are directly enforceable in our Courts.

D. For This Court to Uphold Class Action Waivers of Arbitration Agreements Especially as They Are Used in the Misclassification Context Is Contrary to Our Obligations Under These Treaties and the Court's Obligations to Interpret Our Law Consistent with Our International Obligations or to Apply Customary International Law

As noted above Article 22 of the ICCPR does not allow restrictions to be placed on the right of freedom of association and the right to form trade unions, unless such restrictions are which are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. Subsection 3 of Article 22 does not permit a court to apply the law in such a manner as to prejudice, the guarantees provided for in Convention 87. The class action waivers in arbitration clauses, such as in the Uber contract, because they act as restrictions on the right of freedom of association as they prevent these workers who are misclassified from effectively challenging their status, thereby not allowing them to band together for mutual aid and protection or to

form and join trade unions, violate their rights as stated in Article 22 of the ICCPR.

Class action waivers do not meet the necessity test of Article 22's bases for restrictions. Trade unions promote democracy, and play an important role in a democratic society. There is no national security reason to restrict the rights of the workers represented by your amicus to have access to the Courts to test their independent contractor status or enforce their rights collectively under existing labor law. Restrictions on the right of freedom of association represented by these class action waivers are not necessary for the protection of public health or morals or do they prejudice the rights and freedoms of others, other than perhaps to prejudice the desires of employers like Uber to exploit their workforce and deprive them of any meaningful remedy, but that is not the type of freedom or right the ICCPR contemplated. Thus, by not being an allowable restriction, the class action waivers violate the rights of workers such as those represented by your amicus to freedom of association and would represent an interpretation which would prejudice their rights under the ILO Convention 87.

Therefore, if this Court were to interpret the NLRA in such a manner as to uphold these class action waivers in arbitration clauses, the interpretation would not only violate the rights of workers under the NLRA, it would be an interpretation of an act of Congress that violated our obligations under a ratified treaty, customary law and the rights of workers to have an effective judicial remedy. It would be an interpretation which would violate the principles of statutory construction enunciated by this Court at

the very beginning of its existence in the *Charming Betsy* case.

CONCLUSION

As the example of Uber shows, there is a perverted interpretation of the FAA that is being urged on this Court by employers whose cases are being considered. This perversion seeks not to use arbitration as a way to efficiently resolve disputes, but as a way to prevent workers from exercising the substantive rights they fought to obtain. It is apparent employers want to use these modern day "yellow dog" contracts to stifle worker organization for mutual aid and protection and in the process give themselves immunity for their own violations of law. This is not the kind of result this Court should condone. Your amicus, therefore, urges this Court to reverse the decision of the Fifth Circuit and affirm the decisions of the Seventh and Ninth Circuits.

Respectfully submitted,

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