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> *Do I believe in arbitration? I do. But not in arbitration between the lion and the lamb, in which the lamb is in the morning found inside of the lion. . . . There can be arbitration only between equals.*[1]

Arbitration is a private, out-of-court system whereby an arbitrator decides the rules, weighs the facts and arguments, and makes a binding decision.[2] It has been an alternative method of dispute resolution for centuries.[3] The Federal Arbitration Act (FAA) was enacted in 1925 to counter judicial refusal to enforce arbitration agreements and to place such agreements on the same level as any other contract.[4] Use of arbitration agreements in contracts has increased since the early 1990s,[5] with tens of millions of consumer contracts[6] and more than fifty-five percent of employment contracts containing an arbitration provision today.[7] Most contracts contain arbitration provisions because arbitration is considered a faster, less costly alternative to litigation.[8]

Nevertheless, the incorporation of arbitration provisions into contracts raises concerns because consumers often do not realize what they agreed to in the contract.[9] For instance, when potential customers download a new smartphone application ("app"), a terms of service agreement may pop up and ask them to agree to the terms

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1. *The Labor Question*, Rocky Mountain News (Denver), Feb. 10, 1888, *reprinted in* 2 The Samuel Gompers Papers: The Early Years of the American Federation of Labor, 1887-90, at 87 (Stuart B. Kaufman ed., 1987).

2. The Emp. Rights Advocacy Inst. for Law & Policy, Taking "Forced" Out of Arbitration 2 (2016), http://employeerightsadvocacy.org/wp-content/uploads/2016/06/Taking-Forced-Out-Of-Arbitration_English_Final.pdf.

3. *See generally* Carli N. Conklin, *Introduction: Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective*, 2016 J. Disp. Resol. 1, 1–2 (2016) (providing a brief history of arbitration).

4. Jacob Spencer, Note, *Arbitration, Class Waivers, and Statutory Rights*, 35 Harv. J.L. & Pub. Pol'y 991, 991, 995 (2012) (explaining the background of the FAA).

5. Katherine V. W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration Under the Labor Law*, 61 UCLA L. Rev. Discourse 164, 167 (2013) (explaining changes to a broad interpretation of the FAA and the corresponding effects, including the enforcement of arbitration clauses in a wider range of cases).

6. Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), at 9 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

7. Alexander J.S. Colvin, Econ. Policy Inst., The Growing Use of Mandatory Arbitration: Access to the Courts Is Now Barred for More than 60 Million American Workers 1 (2017), https://www.epi.org/files/pdf/135056.pdf.

8. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011) (holding that the FAA preempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration procedures).

9. *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. Legal Stud. 1, 2–3 (2014) (finding less than one percent of consumers access, read, and understand standard software user agreements, many of which contain arbitration agreements).

or cancel use.[10] A vast majority of us touch "Agree" without reading the terms.[11] A recent experiment involving a fictitious social networking site found that seventy-four percent of users agreed to the terms of service without reading them.[12] During the experiment, people spent an average of just fifty-one seconds reading the agreement, and ninety-eight percent of the users missed the provision requiring they give up their first-born child as payment.[13]

As technology advances, more apps are being developed to help consumers maneuver daily life.[14] With the touch of a few buttons, they have access to services such as food delivery, banking, fitness, and transportation.[15] They can even apply for jobs through apps.[16] Typically, these apps contain terms of service agreements that consumers must accept before being able to continue.[17] In the employment law arena, the increased popularity of arbitration agreements combined with the widespread acceptance of terms of use agreements can diminish employees' rights.[18]

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10. *Id.* This is known as a click-wrap agreement. *Id.* at 12.

11. *See* Thomas J. Maronick, *Do Consumers Read Terms of Service Agreements When Installing Software? A Two-Study Empirical Analysis*, Int'l J. Bus. & Soc. Res., June 2014, at 137, 144 (finding seventy-five percent of participants in a study did not read a terms of service agreement or spent less than one minute reading the provisions).

12. Jonathan A. Obar & Anne Oeldorf-Hirsch, The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services 20 (Sept. 23, 2017) (unpublished working paper) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757465.

13. *Id.* at 12, 17.

14. *See* Sarah Perez, *App Store to Reach 5 Million Apps by 2020, with Games Leading the Way*, TechCrunch (Aug. 10, 2016), https://techcrunch.com/2016/08/10/app-store-to-reach-5-million-apps-by-2020-with-games-leading-the-way/.

15. *See* Eric Walters, *The 50 Essential Android Apps (2016)*, Paste Mag. (May 31, 2016, 3:15 PM), https://www.pastemagazine.com/articles/2016/05/the-50-essential-android-apps-2016.html. The average consumer uses over thirty apps per month on her smartphone. App Annie, Spotlight on Consumer App Usage 6 (2017), http://files.appannie.com.s3.amazonaws.com/reports/1705_Report_Consumer_App_Usage_EN.pdf.

16. *See, e.g.*, Robin Madell, *Job Seekers' Secret Weapon: Mobile Devices, Not the Web*, U.S. News (Feb. 18, 2014, 9:10 AM), https://money.usnews.com/money/blogs/outside-voices-careers/2014/02/18/job-seekers-secret-weapon-mobile-devices-not-the-web (pointing to the emerging role of mobile apps in the hiring process); Kit Eaton, *Looking for a New Job? These Free Apps Can Help*, N. Y. Times, Sept. 1, 2016, at B9, https://www.nytimes.com/2016/09/01/technology/personaltech/looking-for-a-new-job-these-free-apps-can-help.html (describing various apps that can be used to search and apply for jobs).

17. *See* Misty E. Vermaat, Discovering Computers & Microsoft Office 2013, at 156 (Kathleen McMahon ed. 2015) (stating that a terms of service agreement is "the right to use [an] . . . app" and that consumers must accept the terms in a license agreement before using the software"); Bakos, *supra* note 9, at 12–13.

18. *See generally* Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 Brook. L. Rev. 1309 (2015) (explaining that laws protecting employees rely on employees to bring lawsuits to protect their own rights, which has left many workers without access to justice).

For instance, in a recent employment classification case, *Bekele v. Lyft, Inc.*,[19] the plaintiff agreed to the Terms of Service Agreement for the app that he downloaded when applying to become a Lyft driver.[20] Within the agreement was an arbitration provision[21] that waived the right to participate in class actions or to be part of a collective action.[22] The U.S. District Court for the District of Massachusetts held that the plaintiff was bound by the arbitration agreement.[23] This Case Comment contends that the District Court erred in compelling arbitration because the court did not consider whether there was a contrary congressional command in the National Labor Relations Act (NLRA) overriding the FAA. The court also ignored Supreme Court precedent in its interpretation of the NLRA and failed to realize the importance of an employee's right to collective or class action. The *Bekele* decision allows employers to restrict fundamental employee rights through an app's terms of service agreement.

In May 2014, Yilkal Bekele applied to become a driver for Lyft, Inc. (a ride-hailing service app) in Massachusetts.[24] To apply, Bekele had to download the Lyft app, register, and either accept Lyft's Terms of Service Agreement or cancel his registration process.[25] As part of the terms of the agreement that Bekele accepted, he agreed to waive his "right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding."[26] Bekele accepted this agreement, applied to become a driver, and began driving in August 2014.[27] On March 17, 2015, Bekele filed a complaint with the Massachusetts Superior Court on behalf of himself and all other Lyft drivers in the commonwealth.[28] Bekele claimed that Lyft had misclassified the drivers as independent contractors[29] and as a result,

19. 199 F. Supp. 3d 284 (D. Mass. 2016).

20. *Id.* at 289, 291.

21. For the purposes of this Case Comment, the term "arbitration agreement" refers to an arbitration provision within an overarching agreement or contract that was agreed to by the parties in the case.

22. *Bekele*, 199 F. Supp. 3d at 289.

23. *Id.* at 313.

24. *See id.* at 289.

25. *Id.* Usually terms of service agreements can be accepted by a user in two ways: affirmatively clicking to acknowledge agreement to the terms (commonly referred to as a "click-wrap" agreement) or continuing to use the site with an option to click on a link to the terms and service agreement of the website ("browse-wrap" agreement). Allison S. Brehm & Cathy D. Lee, "*Click Here to Accept the Terms of Service*", Comm. Law., Winter 2015, at 4, https://www.americanbar.org/content/dam/aba/publications/communications_lawyer/january2015/CL_Win15_v31n1.authcheckdam.pdf. In this case, the user agreement was a click-wrap agreement where the Terms of Service Agreement popped up and the user had to touch "I Accept" before the user was able to proceed into the app. *Bekele*, 199 F. Supp. 3d at 289.

26. *Bekele*, 199 F. Supp. 3d at 290.

27. *Id.* at 288–89.

28. *Id.* at 291.

29. The Department of Labor, for the purposes of the Fair Labor Standards Act (FLSA), considers an "independent contractor" to be a worker with economic independence who is operating a business of her own. Wage & Hour Div., U.S. Dep't of Labor, Administrator Interpretations Letter–Fair

violated the Massachusetts Wage Act, which defines "employee."[30] He also claimed that Lyft's incorrect classification of drivers as independent contractors, rather than employees, caused the drivers to make expenditures, such as the costs of car ownership, maintenance, and gas, that should have been paid for by an employer.[31]

On April 21, 2015, Lyft removed the action to federal court due to diversity of citizenship, and the suit was heard in the U.S. District Court for the District of Massachusetts.[32] Bekele claimed that: (1) the binding arbitration was invalid, because he did not have reasonable notice of the arbitration agreement; and (2) even if the arbitration agreement was valid, the agreement was unenforceable because it was unconscionable and illegal,[33] as it violated sections 7 and 8 of the NLRA.[34] Lyft moved to compel arbitration, arguing that Bekele had received reasonable notice of the provision and had assented to the terms and conditions.[35] Lyft also alleged that the claims under the Massachusetts Wage Act fell within the scope of the arbitration agreement's language.[36]

Regarding Bekele's first claim, the court found that the agreement was valid and that he received reasonable notice.[37] The *Bekele* court applied Massachusetts law to determine whether the agreement was valid, which requires the court to assess whether the defendant gave a sufficient level of notice and that the plaintiff

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Labor Standards Act No. 2015-1 (2015). Under the FLSA, an "employee" is an "individual employed by an employer." 29 U.S.C. § 203(e)(1) (2012).

30. *Bekele*, 199 F. Supp. 3d at 291. See also § 148B of the Massachusetts Wage Act, stating that

> an individual performing any service, except as authorized under this chapter, shall be considered an employee under those chapters unless: (1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and (2) the service is performed outside the usual course of the business of the employer; and (3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

Mass. Gen. Laws ch. 149, § 148B (2016).

31. *Bekele*, 199 F. Supp. 3d at 289.

32. *Id.* at 288, 291. During the motion hearing, both parties agreed to convert Lyft's motion to dismiss into a motion for partial summary judgment on the arbitrability of the issue. *Id.* at 292.

33. Unconscionability and illegality are two doctrines of contract law that may render a contract voidable or unenforceable. 1 Richard A. Lord, Williston on Contracts § 1:21 (4th ed.), Westlaw (database updated May 2017). A court may find unconscionability when the contract is one-sided, unfair, or oppressive. 8 Richard A. Lord, Williston on Contracts § 18.1 (4th ed.), Westlaw (database updated May 2017). A court may find illegality when the contract violates existing law or public policy. 17A Am. Jur. 2d *Contracts* § 297, Westlaw (database updated Nov. 2017).

34. *Bekele*, 199 F. Supp. 3d at 293–94, 304. The FAA provides for the enforcement of valid written arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012).

35. *Bekele*, 199 F. Supp. 3d at 293.

36. *Id.*

37. *Id.* at 298.

manifested assent to its terms.[38] Notice may be sufficient when "under the totality of the circumstances, the employer's communication would have provided a reasonably prudent employee notice of the waiver [of the right to proceed in a judicial forum]."[39] The court reasoned that Massachusetts courts have routinely concluded that click-wrap agreements provide users with reasonable communication of an agreement's terms, and the courts need not assess whether "plaintiffs had *actual* notice of the terms of the agreement, [but whether] plaintiffs had *reasonable* notice."[40] The *Bekele* court concluded that reasonable notice was provided because Lyft's arbitration agreement was "displayed on the user's screen with prominent bold headings" and, unlike an arbitration agreement in another case,[41] had the entire Terms of Service Agreement on the screen.[42] Finding that there was reasonable notice, the *Bekele* court then assessed whether Bekele had expressly manifested assent to the terms and conditions of the agreement.[43] The *Bekele* court concluded that there was little question that Bekele had manifested assent to the Terms of Service Agreement because he had pressed the "I Accept" button at the bottom of the agreement.[44]

The court next examined whether the arbitration agreement was unenforceable under the FAA because it was substantively or procedurally unconscionable, and found that it was neither.[45] The court also examined whether the arbitration agreement's class action waiver was illegal because it violated a substantive protected right under the NLRA; the court held that the right to bring a class action suit was

38. *Id.* at 295.

39. *Id.* (alteration in original) (quoting Ellerbee v. Gamestop, Inc. 604 F. Supp. 2d 349, 354 (D. Mass. 2009)).

40. *Id.* at 295–96 (quoting Cullinane v. Uber Techs., Inc., No. 14-14750-DPW, 2016 WL 3751652, at *20 (D. Mass., July 11, 2016).

41. The *Bekele* court cited *Cullinane v. Uber Techs., Inc.*, in which the court assessed whether Uber's Terms of Service agreement provided sufficient notice of its arbitration agreement. 2016 WL 3751652, at *6. The Uber agreement stated that "[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy" and included a link to view the policy in its entirety. *Id.* at *3, *7. The arbitration agreement was on the last few pages of the policy. *Id.* The *Cullinane* court found that the registration phrase put a reasonable user on notice of the terms of the agreement and that a reasonable user who cared to pursue the issue would have inquiry notice of the terms of the arbitration agreement. *Id.* at *7. Therefore, the *Cullinane* court concluded that Uber provided sufficient notice. *Id.*; *Bekele*, 199 F. Supp. 3d at 296.

42. *Bekele*, 199 F. Supp. 3d at 296–97.

43. *Id.* at 297.

44. Courts have viewed such affirmative conduct as meeting the requirement of manifestation of assent. *Id.* at 297–98 (citing *Cullinane*, 2016 WL 3751652, at *6).

45. *Id.* at 300, 303. The court applied Massachusetts common law to determine whether the contract was unconscionable. *Id.* at 300. Under Massachusetts common law, "a plaintiff must show that . . . the terms are oppressive to one party" (substantive unconscionability) and "the circumstances surrounding the formation of the contract show that the aggrieved party [has] no meaningful choice and was subject to unfair surprise" (procedural unconscionability). *Id.* at 299. The court found that Bekele did not meet the burden demonstrating that the contract was unconscionable. *Id.* at 303. Further details concerning these unconscionability judgments will not be addressed, as this Case Comment does not challenge the unconscionability of the agreement.

not a substantive right, but rather a procedural vehicle by which an employee may seek to enforce substantive rights.[46] After an analysis of the current circuit split over the issue,[47] the court reasoned that an "employee's ability to bring a class action, either in court or arbitration,"[48] was not a substantive right because class actions were not protected under section 7 of the NLRA.[49]

The court applied the principle of statutory construction known as *ejusdem generis*, by which a court interprets a general phrase or "catchall" at the end of a list of specific people or things to cover only people or things of a similar class or character as those already enumerated.[50] The *Bekele* court found that within section 7 of the NLRA, that general phrase was "other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[51] The court examined the specific rights enumerated: "the right to self-organization, to form, join, or assist labor organizations," and the right "to bargain collectively through representatives of [the employees'] own choosing."[52] The court then concluded that the specific enumerated rights included only collective employee actions such as picketing and organizing boycotts—not bringing class actions.[53]

Because the court concluded that the right to bring a class action was not covered within the general phrase in section 7 of the NLRA, class actions were classified as a procedural, not substantive, right, making the arbitration agreement irrevocable.[54] Finding that the contract was enforceable, the court granted Lyft's motion to compel arbitration and dismissed Bekele's complaint.[55]

46. *Id.* at 309–13. A substantive right is "a right that can be protected or enforced by law," whereas a procedural right is "a right that derives from legal or administrative procedure," a right that helps to protect or enforce a substantive right. *Right*, Black's Law Dictionary (10th ed. 2014).

47. Until 2016, most federal courts held that class action waivers in arbitration agreements did not violate the NLRA. *Bekele,* 199 F. Supp. 3d at 304; *see* Morris v. Ernst & Young, LLC, 834 F.3d 975 (9th Cir. 2016); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016). In *Lewis*, the Seventh Circuit held that class actions are covered under section 7 of the NLRA, and thus the class action waiver in the disputed arbitration agreement was illegal and unenforceable. 823 F.3d at 1160–61. In *Morris*, the Ninth Circuit also held that class action waivers violate the NLRA and are unenforceable. 834 F.3d at 987–90.

48. *Bekele,* 199 F. Supp. 3d at 310.

49. *Id.* at 311–12. Section 7 provides that: "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (2012).

50. *Bekele*, 199 F. Supp. 3d at 310. "Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it." Cleveland v. United States, 329 U.S. 14, 18 (1946). "*[E]jusdem generis* cannot be employed to 'obscure and defeat the intent and purpose of Congress' or 'render general words meaningless.'" Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 163 (2012) (quoting United States v. Alpers, 338 U.S. 680, 682 (1950)).

51. *Bekele*, 199 F. Supp. 3d at 310.

52. *Id.*

53. *Id.*

54. *Id.* at 311–13.

55. *Id.* at 313–14.

This Case Comment contends that the court erred in compelling arbitration. First, the court unduly ignored whether the NLRA presented a contrary congressional command overriding arbitration agreement enforcement. Second, had the court followed Supreme Court precedent in its interpretation of section 7 of the NLRA, it would have found that the catchall includes the right to bring class actions. Lastly, the court's decision to uphold the class action waiver in the arbitration provision set a dangerous precedent for the vindication of employees' rights.

The *Bekele* court failed to consider an exception to the enforcement of arbitration agreements: a contrary congressional command.[56] Three Supreme Court decisions, *AT&T Mobility LLC v. Concepcion*,[57] *CompuCredit Corp. v. Greenwood*,[58] and *American Express Co. v. Italian Colors Restaurant*,[59] articulated the legal tests for exceptions to arbitration agreement enforcement: (1) when a ground exists at law or in equity for the revocation of any contract;[60] (2) when there is an overriding congressional command;[61] and (3) when an arbitration provision eliminates a party's substantive right to pursue a statutory remedy.[62] The *Bekele* court thought that the only exception relevant to the case was the first exception.[63]

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56. A contrary congressional command is a demonstration of congressional intent that precludes enforcement of the statute in question. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226–27 (1987).

57. 563 U.S. 333 (2011) (examining whether a California law prohibiting arbitration fell within the exception when a ground exists at law or in equity for the revocation of a contract).

58. 565 U.S. 95 (2012) (examining whether the CRO Act presented an overriding congressional command barring enforceability of an arbitration agreement).

59. 133 S. Ct. 2304 (2013) (examining whether a class action waiver in an arbitration agreement effectively eliminated the party's right to pursue statutory remedies under antitrust laws).

60. *Concepcion*, 563 U.S. at 343 (holding that a state law ground to revoke the agreement was not applicable because it was contrary to the congressionally created objective of the FAA). This is the primary exception to the FAA, known as the "savings clause." *See* David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 Geo. L.J. 1217, 1219 (2013) (describing the savings clause as the "centerpiece" of FAA preemption). The FAA provides that arbitration agreements are equal to other contracts and requires the enforcement of arbitration agreements "save upon grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2 (2012).

61. *CompuCredit*, 565 U.S. at 98 (holding that a violation of a federal statute does not invalidate an agreement to arbitrate unless it has been overridden by a contrary congressional command).

62. *Italian Colors Rest.*, 133 S. Ct. at 2309–10 (stating that in addition to the two other established exceptions, an arbitration agreement is invalid if it prevents the effective vindication of a right).

63. Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 309 (D. Mass. 2016). The *Bekele* court first mentioned that a validly formed arbitration agreement must be enforced unless one of two exceptions applies: If there is any ground that would make a contract unenforceable or if the FAA is precluded by another federal statute's contrary command. *Id.* at 292–93. The court later stated that the Supreme Court has recognized three exceptions to the enforceability of arbitration agreements under the FAA. *Id.* at 309. The *Bekele* court cited two Supreme Court cases in the first explanation of the exceptions to the enforceability of the FAA that addressed individual exception claims, *id.* at 292–93 (citing *Concepcion,* 563 U.S. at 339 and *CompuCredit*, 565 U.S. at 98), whereas the case citation in the second explanation mentioned the three recognized exceptions. *Id.* at 309 (citing *Italian Colors Rest.*, 133 S. Ct. at 2309–10). Therefore, the second explanation is correct in asserting that there are three recognized exceptions.

However, the *Bekele* court should have examined whether there was a contrary congressional command because the NLRA is a federal law regulating employee rights that were at issue in the case.[64] The Supreme Court has previously examined a contrary federal law when considering the enforceability of an arbitration agreement.[65] For example, in *CompuCredit*, the Supreme Court examined whether the Credit Repair Organizations Act (the "CRO Act") was a contrary congressional command that rendered an arbitration agreement unenforceable because the CRO Act regulated credit organizations and established consumer rights.[66]

In *CompuCredit*, the plaintiffs signed a credit card agreement with an arbitration provision in the belief that the card had a certain credit limit and could be used to rebuild poor credit.[67] The plaintiffs filed suit for alleged violations of the CRO Act.[68] When CompuCredit moved to compel arbitration, the plaintiffs opposed the motion because the CRO Act contained a non-waiver provision stating that "[a]ny waiver by any consumer of any protection provided . . . shall be treated as void."[69] The Supreme Court concluded that the CRO Act created the right to receive a disclosure statement from the credit repair organization, but not the right to bring an action in a court of law.[70] The Court reasoned that the non-waiver provision was not a contrary congressional command overriding the FAA because when Congress enacted the CRO Act in 1996, arbitration clauses in consumer contracts were quite common, and if Congress meant to prohibit arbitration, it would have done so with clarity.[71] *CompuCredit* clearly articulated that a contrary congressional command is one of the exceptions to the enforcement of arbitration agreements.[72]

Similarly, in *American Express Co.*, the Court articulated the rule for the enforceability of credit card arbitration agreements.[73] The Court considered whether an overriding congressional command existed in the antitrust laws.[74] It held that the class action waiver was enforceable because there was no contrary congressional command overriding the FAA.[75] The Court reasoned that the antitrust laws did not

64. This Case Comment asserts that the NLRA is a contrary congressional command. The plaintiff in the *Bekele* case asserted that the class action waiver violated the NLRA and the arbitration agreement was unenforceable because it was illegal.

65. *CompuCredit*, 565 U.S. at 99–104; Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238–42 (1987).

66. 565 U.S. at 98.

67. *Id.* at 97.

68. *Id.*

69. *Id.* at 97–99.

70. *Id.* at 99.

71. *Id.* at 103.

72. *See id.* at 101, 103.

73. 133 S. Ct. 2304 (2013).

74. *Id.* at 2309.

75. *Id.*

evince an intention to preclude a class action waiver because the antitrust laws made no mention of class action.[76] Unlike the *Bekele* court, the Court then continued its analysis by considering another exception to arbitration agreement enforcement.[77] As demonstrated in *Italian Colors*, the *Bekele* court was not limited to consideration of one exception to the enforcement of arbitration agreements and should have considered whether the NLRA was a contrary congressional command.[78]

CompuCredit and *Italian Colors* articulated the legal test to determine when a contrary congressional command exists.[79] Unlike the Supreme Court in *CompuCredit* and *Italian Colors*, however, the *Bekele* court did not consider whether a contrary congressional command existed because it relied on a Fifth Circuit decision[80] that found there was no explicit contrary congressional command in the NLRA based on the precedent of *CompuCredit*.[81] Nor did the *Bekele* court consider the contrary congressional command exception, because it concluded that Supreme Court precedent favored arbitration even when there were class action waivers in the agreements,[82] and did not find the case at hand distinguishable from *Italian Colors* or *CompuCredit*.[83]

This Case Comment contends that the NLRA is a contrary congressional command from which it can be inferred that Congress intended to protect "collective activities," such as class actions. A contrary congressional command is " 'deducible from [the statute's] text or legislative history,' or . . . an inherent conflict between arbitration and the statute's underlying purpose."[84] While the NLRA does not explicitly prohibit individual arbitration, the NLRA's text, history, and underlying

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76. *Id.*

77. After the contrary congressional command analysis, the Court analyzed whether respondents satisfied a judge-made exception of the FAA, which invalidates agreements that "prevent the 'effective vindication' of a federal statutory right." *Id.* at 2310.

78. *See id.* at 2309–10.

79. *See* Shelley McGill & Ann Marie Tracey, *The Next Chapter: Revisiting the Policy in Favor of Arbitration in the Context of Effective Vindication of Statutory Claims*, 31 Ariz. J. Int'l & Comp. L. 547, 549, 559–60 (2014).

80. D.R. Horton, Inc. v. Nat'l Labor Relations Bd., 737 F.3d 344, 362 (5th Cir. 2013) ("The NLRA should not be understood to contain a congressional command overriding application of the FAA.").

81. Bekele v. Lyft, Inc., 199 F. Supp. 3d 284, 305 (D. Mass. Aug. 9, 2016) (quoting *D.R. Horton*, 737 F.3d at 361). In *D.R. Horton*, the Fifth Circuit overturned an NLRB decision finding that class action waivers in employment agreements violated the NLRA. 737 F.3d at 362. The Fifth Circuit hinted that an implicit congressional command could potentially be found in the NLRA, but the court ultimately examined the NLRA for an explicit command based on *CompuCredit*. *Id.* at 360 (citing CompuCredit Corp. v. Greenwood, 565 U.S. 95, 100–01 (2012)).

82. *Italian Colors Rest.*, 133 S. Ct. at 2315; *CompuCredit*, 565 U.S. at 98; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345–46 (2011); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 224 (1987).

83. *Bekele*, 199 F. Supp. 3d at 312.

84. *McMahon*, 482 U.S. at 227 (alteration in original) (citation omitted) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

purpose communicate an overriding federal policy favoring employees' right to act collectively to improve the terms and conditions of their employment.[85] Congress first enacted the NLRA during the Great Depression[86] to address the inequality in bargaining power between employees and employers that led to unprecedented strikes and "industrial unrest."[87] Congress wanted to codify the right for employees to bargain collectively and to self-organize to improve employment terms and conditions.[88] As such, section 7 of the NLRA protects the right of employees to "form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[89] To ensure the NLRA's enforcement, Congress added section 8(a)(1) to prevent employers from interfering with employees' rights guaranteed under section 7[90] and section 10 to empower the NLRB to prevent any person from engaging in any unfair labor practice.[91] Collective litigation or arbitration is when a group of employees join together to bring employment-related claims to dispute workplace terms or conditions, the very type of activity protected under section 7.[92] Participation in collective, or class action, litigation or arbitration therefore qualifies as a concerted activity for the purpose of mutual aid or protection under section 7 of the NLRA, thereby creating a contrary congressional command.[93]

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85. *See* James A. Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Law Making*, 39 Indus. & Lab. Rel. Rev. 710 (1985) (describing the underlying purpose of the NLRA); Nicole Wredberg, Note, *Subverting Workers' Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 Hastings L.J. 881, 882–86 (2016) (discussing the text, history, and underlying purpose of the NLRA).

86. Wredberg, *supra* note 85, at 882.

87. 29 U.S.C. § 151 (2012) (finding the denial of the right of employees to organize and accept the procedure of collective bargaining led "to strikes and other forms of industrial strife"); Gross, *supra* note 85, at 10; Wredberg, *supra* note 85 at 882.

88. 29 U.S.C. § 151.

89. 29 U.S.C. § 157 (2012).

90. 29 U.S.C. § 158(a)(1) (2012). Section 8(a)(1) states that it is an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." *Id.*

91. 29 U.S.C. § 160 (2012) ("The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice . . . affecting commerce.").

92. *See* Stone, *supra* note 5, at 176–77 (citing D.R. Horton Inc., 357 N.L.R.B. 2277, 2279 (2012)); *see also* Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. Rev. 1067, 1071 (1980) (quoting Zechariah Chafee's "the multitude" theory).

93. *See* Morris v. Ernst & Young, LLP, 834 F.3d 975, 982 (9th Cir. 2016) (finding pursuit of a concerted work-related legal claim clearly falls within the wording of section 7); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1152 (7th Cir. 2016) (finding courts and the NLRB have held that collective or class action suits constitute "concerted activity"); Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011) (finding a lawsuit filed in good faith by a group of employees is "concerted activity"); Altex Ready Mixed Concrete Corp. v. Nat'l Labor Relations Bd., 542 F.2d 295, 297 (5th Cir. 1976) (finding that generally, filing by employees of a labor-related civil action is protected activity under section 7); *D.R. Horton*, 357 N.L.R.B. at 2278 (holding concerted legal action addressing wages, hours, or working

The legislative history of the NLRA also potentially indicates a congressional position against arbitration.[94] Most persuasively, the Senate Committee on Education and Labor Report concerning the NLRA discussed the American attitude toward arbitration at the time the NLRA's enactment.[95] Senator David Walsh (D-Mass.) clarified that the act did not establish "any form of compulsory arbitration" and that "compulsory arbitration has not received the sanction of the American people."[96]

Nevertheless, the opinions differ on the standard for a contrary congressional command because courts now follow the clear congressional command standard set forth in *CompuCredit*.[97] A careful reading of *CompuCredit* indicates that the clear congressional command standard for arbitration agreement enforcement applies only to legislation enacted after the widespread use of arbitration agreements.[98] The Supreme Court reasoned that at the time of the CRO Act's enactment, "arbitration clauses in [consumer] contracts . . . were no rarity" and if Congress had wanted to prohibit arbitration, then it would have "done so with . . . clarity."[99] In addition, as Justice Ruth Bader Ginsburg stated in her dissent, the two statutes the Court cited as exemplary preclusion of arbitration agreements were drafted and enacted after a number of Supreme Court cases that compelled arbitration.[100] Following this reasoning, Congress would not have been on notice to write an explicit command precluding arbitration before the rise in arbitration agreements in the 1990s.[101] The clear congressional command standard should only be applied to statutes enacted when Congress was aware that arbitration agreements were common practice. The NLRA was enacted in 1935 and last amended in 1959, much earlier than the spread of arbitration agreements in the 1990s.[102] Therefore, the *Bekele* court's reliance on the Fifth Circuit's analysis was misplaced, and it erred in failing to consider that the

conditions is protected under section 7). To be clear, this Case Comment contends that the NLRA is a contrary congressional command, not a basis for the illegality of the class action waiver.

94. S. Rep. No. 74-573, at 8 (1935), *reprinted in* Statutes and Congressional Reports Pertaining to the National Labor Relations Board 76 (1945).

95. *Id.*

96. *Id.* at 2–3, 8.

97. Courts have interpreted *CompuCredit* as requiring a finding of an explicit congressional intention against arbitration to find a contrary congressional command. Walthour v. Chiplo Windshield Repair LLC, 745 F.3d 1326, 1331–32 (11th Cir. 2014); D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360–61 (5th Cir. 2013); Morvant v. P.F. Chang's China Bistro, Inc., 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012).

98. Recent Case, *Arbitration and Class Actions—National Labor Relations Act—District Court Enforces Class Action Waiver in Employment Arbitration Agreement.*—Morvant v. P.F. Chang's China Bistro, Inc., *No. 11-CV-05405 YGR, 2012 WL 1604851 (N.D. Cal. May 7, 2012)*, 126 Harv. L. Rev. 1122, 1127 (2013) ("*CompuCredit* adds a threshold inquiry before reaching this test: If Congress had intended to bar application of the FAA in the given context, would it have done so in explicit terms?").

99. CompuCredit Corp. v. Greenwood, 565 U.S. 95, 103 (2012).

100. *Id.* at 116 (Ginsburg, J. dissenting).

101. Recent Case, *supra* note 98, at 1126.

102. William N. Cooke, W.E. Upjohn Inst. for Emp't Research, Union Organizing and Public Policy 1, 19 (1985).

clear congressional command standard was limited to legislation enacted after the rise of arbitration agreements in the 1990s.[103]

The *Bekele* court further erred in its narrow interpretation of the catchall in section 7 because it did not follow Supreme Court and First Circuit precedent.[104] The Supreme Court has interpreted the catchall in section 7 to have two parts for interpretation: "other concerted activity" and "mutual aid or protection."[105] For instance, in *Eastex, Inc. v. National Labor Relations Board*, the Court broadly interpreted "mutual aid or protection" to protect employees when "they seek to improve terms and conditions of employment or otherwise improve their lot . . . through channels outside the immediate employee-employer relationship."[106] The Court also reasoned that the "mutual aid or protection" shields employees from retaliation when they seek to improve work terms or working conditions through administrative and judicial forums.[107]

In *National Labor Relations Board v. City Disposal Systems, Inc.*, the Supreme Court found that the NLRB's broad interpretation of "concerted activity" was reasonable because there was no indication that Congress wanted to limit "concerted activity" to "situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."[108] The Court further reasoned that it did not seem as though Congress intended to have the protection withdrawn when a single employee acted alone to participate in the collective process.[109] Finally, the First Circuit[110] has recognized that "the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by [section] 7, unless the employees acted in bad faith."[111] The District Court of Massachusetts followed the First Circuit's interpretation in its memorandum decision, *Tigges v. AM Pizza, Inc.*, concluding that "the very essence of labor right[s] under the . . . National Labor Relations Act is collective action" and therefore a substantive federal right.[112]

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103. *See* Recent Case, *supra* note 98, at 1127.

104. The second argument of this Case Comment switches to a critique of the analysis conducted by the *Bekele* court within the construction of unenforceability on the grounds that the contract was illegal, rather than the congressional command exception.

105. Eastex, Inc. v. Nat'l Labor Relations Bd., 437 U.S. 556, 564 (1978); Wredberg, *supra* note 85, at 894–95.

106. 437 U.S. at 565.

107. *Id.* at 565–66.

108. 465 U.S. 822, 831, 835 (1984).

109. *Id.* at 835.

110. The First Circuit is the court that hears appeals from federal district courts in Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island, which means that the *Bekele* court is bound by the decisions of the First Circuit. *About the Court*, U.S. Ct. Appeals for First Cir., http://www.ca1.uscourts.gov/about-court (last visited Apr. 1, 2018).

111. Leviton Mfg. Co., Inc. v. Nat'l Labor Relations Bd., 486 F.2d 686, 689 (1st Cir. 1973).

112. *See* No. 16-10136-WGY, 2016 WL 4076829, at *13–14 (D. Mass. July 29, 2016) (alteration in original) (quoting Status Conference Transcript at 4, Reeves v. PMLRA Pizza, Inc., No. 16-10474-WGY (D. Mass. May 23, 2016)).

Given the established interpretations of section 7, the *Bekele* court should have looked to precedent rather than the *ejusdem generis* canon of construction.[113] Had the *Bekele* court followed *City Disposal Systems* and *Eastex,* the entire section 7 catchall would have been interpreted as combined employee activity that seeks to improve terms and conditions of employment through administrative and judicial forums.[114] As a result, it would have found that the class action waiver violates the NLRA, which renders the waiver illegal and unenforceable, and therefore, should have dismissed the motion to compel arbitration.

The *Bekele* court's decision to uphold the class action waiver in the arbitration provision set a dangerous precedent for the vindication of employees' rights and undermines the purpose of the NLRA. As mentioned before, Congress enacted the NLRA because employees were usually in an unequal position when they tried to negotiate with or challenge an employer.[115] Section 7 of the NLRA gives employees the right to join together in their efforts to improve terms or conditions of their employment.[116] Class and collective actions are mechanisms for individuals to pool their resources to be able to afford to litigate or arbitrate a claim, or to aggregate similar small claims into a larger one.[117] As part of a group, an individual may perceive that the risk of retaliation is minimized or that a claim may be more successful with more claimants than just herself.[118] In addition, class or collective actions against an employer may lead to more effective relief than an individual claim. For example, a court can issue injunctive relief such as mandatory training of supervisory personnel and employees.[119] However, the *Bekele* court upheld the class

113. *See generally* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 Geo. L.J. 1863 (2008) (arguing stare decisis effect would result in consistent and reliable statutory interpretation). Stare decisis is the doctrine of precedent, which requires courts to follow earlier judicial decisions when the similar issues arise. *Stare Decisis*, Black's Law Dictionary (10th ed. 2014).

114. Morris v. Ernst & Young, LLP, 834 F.3d 975, 982 (9th Cir. 2016) (finding pursuit of a concerted work-related legal claim clearly falls within the wording of section 7); Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1152 (7th Cir. 2016) (finding courts and the NLRB have held that collective or class action suits constitute "concerted activity"); Brady v. Nat'l Football League, 644 F.3d 661, 673 (8th Cir. 2011) (finding a lawsuit filed in good faith by a group of employees is "concerted activity"); Altex Ready Mixed Concrete Corp. v. Nat'l Labor Relations Bd., 542 F.2d 295, 297 (5th Cir. 1976) (finding filing by employees of a labor-related civil action is protected activity under section 7); *Leviton Mfg. Co*, 486 F.2d at 689 (finding a lawsuit filed in good faith by a group of employees is "concerted activity"); D.R. Horton Inc., 357 N.L.R.B. 2277, 2279 (2012) (holding concerted legal action addressing wages, hours, or working conditions is protected under section 7).

115. *See* sources cited *supra* note 87.

116. *See* 29 U.S.C. § 157 (2012).

117. Michael D. Schwartz, *A Substantive Right to Class Proceedings: The False Conflict Between the FAA and NLRA*, 81 Fordham L. Rev. 2945, 2950–51 (2013) (discussing the purpose of class action); Yeazell, *supra* note 93, at 1071.

118. Sternlight, supra note 18, at 1350 (citing Ruffin v. Great Dane Trailers, 969 F.2d 989, 991, 993 (11th Cir. 1992) (upholding an injunction issued by the trial court requiring an employer to "take active steps to reduce and eliminate the racial joking and slurs and episodes")).

119. *Id.*

action waiver in the employment context, thereby removing employees' access to these tools and undermining the NLRA's protections that sought to put employees on an equal footing with their employers.

The approval of class action waivers in arbitration provisions of employment contracts solidifies employees' inequality.[120] The *Bekele* court's decision to uphold the class action waiver in the arbitration provision set a dangerous precedent for the vindication of employees' rights and undermines the purpose of the NLRA. The court unduly ignored the possible existence of a contrary congressional command in the NLRA overriding the FAA's mandate to enforce arbitration agreements. The court also failed to follow Supreme Court and First Circuit precedent in its interpretation of the NLRA. Finally, it failed to protect the employee rights established in the NLRA. If courts continue to enforce arbitration provisions limiting employees to bringing their claims individually, then employees will be forced to stand on unequal footing when vindicating their rights to be free from discrimination, earn a fair wage, enjoy fair working conditions, and more.[121]

120. Craig Becker, *Labor Law—The Law of a Balanced Society: A Reply to Professor Epstein*, 41 Cap. U. L. Rev. 35, 44–45 (2013); Stone, *supra* note 5, at 166; Wredberg *supra* note 85, at 886–89.

121. Sternlight, *supra* note 18, at 1309 (arguing that arbitration agreements prevent workers from bringing individual or class claims and obtaining access to justice); *see also* James R. Montgomery, Note, *"Horton and the Who": Determining Who Is Affected by the Emerging Statutory Battle Between the FAA and Federal Labor Law*, 2014 J. Disp. Resol. 363, 374–78 (2014) (arguing the Fifth Circuit decision in *D.R. Horton* could mean that wronged employees will never have their claims vindicated).