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MOBILE-BASED TRANSPORTATION COMPANIES, MANDATORY ARBITRATION, AND THE AMERICANS WITH DISABILITIES ACT

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Uber, Lyft, DoorDash and similar mobile-based transportation network companies (TNCs) have been involved in numerous legal battles in multiple jurisdictions. One contested issue concerns whether TNC drivers are employees or independent contractors. Uber recently lost this battle to some extent in the UK,¹ but won it in California.² Another issue concerns the TNCs' use of mandatory (pre-dispute) arbitration clauses in their standard form service agreements with both drivers and passengers. These arbitration clauses purport to obligate such future plaintiffs to resolve any dispute with the defendant TNC outside of court and, typically, on an individual rather than a class basis. TNCs have had mixed success enforcing arbitration clauses contained in service agreements with their drivers under the Federal

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1. *Uber BV and others v. Aslam and others*, [2021] UKSC 5. The UK Supreme Court decided that Uber drivers are “workers” under English employment law, rather than self-employed independent contractors. The Court stopped short of finding the drivers are “employees”, which would have afforded them more rights. In Canada, the Supreme Court has recently struck down the arbitration clause in Uber’s service agreement with the plaintiff driver, who claimed to be an employee rather than an independent contractor. While the Court did not determine the employment issue, it found the arbitration clause to be unconscionable, leaving Uber to argue the merits of the dispute in the courts rather than in arbitration. *Uber Technologies Inc. v. Heller*, [2020] S.C.R. 16 (Can.).

2. Kate Conger, *Uber and Lyft Drivers in California Will Remain Contractors*, N.Y. TIMES (Nov. 7, 2020), <https://www.nytimes.com/2020/11/04/technology/california-uber-lyft-prop-22.html>.

Arbitration Act (FAA).³ As for passengers, TNCs have been increasingly litigating disability-based discrimination claims brought against them and/or their drivers pursuant to the Americans with Disabilities Act (ADA).⁴ These claims have largely arisen in two situations.

The first situation is where the plaintiffs have not downloaded or used the defendant TNC's mobile application due to the absence of accessible vehicles. These "potential passengers" have brought discrimination claims against the defendant TNC in court for its failure to provide accessible vehicles that they could use. TNCs in such cases have raised two main lines of arguments: an ADA-based argument and an arbitration-based argument. The TNCs' ADA-based argument posits that the plaintiffs do not have standing to bring the discrimination claims under the ADA since they had not in fact used the TNC's mobile application and therefore have not suffered the required "injury" to have standing under the Act. Where the plaintiff potential passengers have been found to have such standing nonetheless, the TNCs have put forward an alternative arbitration-based argument—that the plaintiffs should be bound by the arbitration clause contained in the service agreement, which they did not sign, and that their claims should therefore be referred to arbitration. As the district court for the District of Columbia has noted, accepting this argument would create "a Catch-22: to establish . . . standing to sue [a TNC] for an ADA violation, plaintiffs must download the Uber app, but by doing so, they sign away their right to litigate their claims in court."⁵

The second situation in which disability-based discrimination claims under the ADA have been brought against TNCs is where the plaintiffs downloaded the mobile application, agreed to the terms of service, and used the ride-share services. These plaintiff passengers are then typically obligated to argue their discrimination claims in arbitration in light of the arbitration clause contained in the TNCs service agreement.⁶ Indeed, TNCs seem to prefer arbitration to litigation in court, a preference that some have

3. 9 U.S.C. §§ 1–16. Some federal courts have granted the TNCs' motions to compel arbitration of drivers' claims, while other courts have refused to do so. *Compare* Capriole v. Uber Techs., Inc., 460 F. Supp. 3d 919, 934 (N.D. Cal. 2020) (granting Uber's motion to compel arbitration), *with* Cunningham v. Lyft, Inc., 450 F. Supp. 3d 37, 48 (D. Mass. 2020) (denying Lyft's motion to compel arbitration and stay proceedings pending arbitration).

4. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101.

5. Equal Rights Center v. Uber Tech., Inc., 2021 WL 981011, *20 n.7 (D.D.C. 2021).

6. In some cases, courts have refused to compel such plaintiff passengers to arbitrate, for instance where the TNC's terms of service "were not conspicuous enough reasonably to communicate the existence or terms of the agreement," including the arbitration clause. Theodore v. Uber Tech., Inc., 442 F. Supp. 3d 433, 442 (D. Mass. 2020).

criticized as a strategy designed to prevent plaintiffs from vindicating their legal rights. However, a recent arbitration decision rendered against Uber in an ADA discrimination case (*Irving v. Uber*),⁷ discussed below, illustrates that arbitration is able to provide the same legal protection to plaintiffs' rights as a court. Therefore, while there are many good reasons for TNCs to prefer arbitration over litigation, such as speed and arbitrator's expertise,⁸ *Irving v. Uber* demonstrates that a guaranteed win on the merits is not one of them.

In this Essay, I examine the two situations described above in which arbitration issues intersect with discrimination claims made pursuant to the ADA in the TNC-passenger context. In so doing, I do not purport to analyze the merits of the plaintiff passengers' ADA claims, but rather focus on the arbitration aspects of these claims. In Part I, I discuss recent ADA cases brought by potential passengers (those who have not downloaded or used the TNC's services) before the courts, with partial success.⁹ I explain the defendant TNCs' standing argument under the ADA and their alternative arbitration-based argument. In Part II, I turn to ADA cases involving plaintiff passengers. I discuss the *Irving v. Uber* arbitration and suggest that this case provides a rebuttal, albeit anecdotal, to some of the common criticisms of mandatory arbitration in the consumer context. In Part III, I offer brief conclusions.

I. ARBITRATION ISSUES IN ADA CASES AGAINST TNCs

Over the past few years, several cases have been decided by the federal courts involving discrimination claims brought against TNCs pursuant to the ADA. The plaintiffs in these cases have mobility disabilities and generally claim that the defendant TNC "pervasively and systematically"¹⁰ excluded them from its ride-share services by failing to make available wheelchair accessible vehicles. However, these plaintiffs have never actually been

7. Press Release, Peiffer Wolf, Uber to pay \$1.1 Million in record award to blind rideshare passenger (Apr. 1, 2021), <https://www.peifferwolf.com/uber-to-pay-1-1-million-in-record-award-to-blind-rideshare-passenger/>. See also Sean Hollister, *Uber will pay a blind woman \$1.1 million after drivers stranded her 14 times*, THE VERGE (Apr 3, 2021), <https://www.theverge.com/2021/4/3/22365859/uber-blind-woman-win-arbitration-lisa-irving-guide-dog>; Joseph Wilkinson, *Uber to pay \$1.1 million for drivers' discrimination against blind woman*, N.Y. DAILY NEWS (Apr 2, 2021), <https://www.nydailynews.com/news/national/ny-uber-blind-woman-settlement-million-20210403-i47vr6cqqnberflnqrbe5llonm-story.html>.

8. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451-52 (2010).

9. Cases that involve standing to bring ADA claims against TNC but do not engage with arbitration issues are not discussed in this Essay. See, e.g., Crawford v. Uber Tech., Inc., 2018 WL 1116725 (N.D. Cal. 2018); *Equal Rts. Ctr.*, 2021 WL 981011.

10. *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248, 252 (S.D.N.Y. 2018).

passengers of the defendant TNCs. They have not downloaded the relevant TNC's mobile application or agreed to its terms of service. As a result, the defendant TNCs have commonly argued that these plaintiffs do not have standing to bring their claims under the ADA. Alternatively, if the plaintiffs are found to have standing, TNCs have argued that the courts should enforce the arbitration clause contained in their service agreement, which the plaintiffs would have to—but did not in fact—agree to in order to use the TNC's services on the basis of equitable estoppel. I examine each of these arguments in turn.

A. *Standing*

In order to have standing under the ADA, courts have generally required that a plaintiff show, among other things, an “injury in fact.”¹¹ At the same time, courts must take a “broad view” of standing because “complaints by private persons are the primary method of obtaining compliance with the Act.”¹² Therefore, to demonstrate the required injury in a claim under the ADA, an individual with a disability is not required to “engage in a futile gesture if such person has *actual notice* that a person or organization covered by this subchapter does not intend to comply with its provisions.”¹³ Courts have held that “actual notice”—also referred to as “actual knowledge”—generally requires the plaintiff to personally experience the alleged accessibility issue¹⁴ but can also be satisfied by showing that the plaintiff was deterred from using a service because of alleged ADA noncompliance.¹⁵

This requirement of “actual notice” or “actual knowledge” by the plaintiff in order to show an injury is at the heart of TNCs' argument that plaintiff potential passengers have no standing to bring their claims under the ADA. These plaintiffs, the TNCs argue, did not in fact use or attempt to use the ride-share services they complain of. Therefore, they cannot show “actual knowledge” in order to establish an injury for the purpose of standing to bring a claim under the ADA. The federal Court of Appeals for the Ninth Circuit,¹⁶ a federal District Court in New York,¹⁷ and a federal District Court

11. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

12. *Fiedler v. Ocean Prop., Ltd.*, 683 F. Supp. 2d 57, 65 (D. Me. 2010) (*quoting* *Trafficante v. Metro. Life Ins., Co.*, 409 U.S. 205, 209, 93 S.Ct. 364, 34 L. Ed. 2d 415 (1972)).

13. 42 U.S.C. § 12188(a)(1) (emphasis added).

14. *See, e.g.,* *Perdum v. Forest City Ratner Cos.*, 174 F. Supp. 3d 706, 715 (E.D.N.Y. 2016).

15. *See, e.g.,* *C.R. Educ. and Enf't Ctr. v. Hosp. Prop. Tr.*, 867 F.3d 1093, 1098 (9th Cir. 2017).

16. *Namissnak v. Uber Tech., Inc.*, 971 F.3d 1088 (9th Cir. 2020).

17. *Lowell v. Lyft, Inc.*, 352 F. Supp. 3d 248 (S.D. N.Y. 2018).

in Pennsylvania,¹⁸ have all rejected this argument. In the context of access to transportation through a digital application, these courts have found that the plaintiff potential passengers were deterred from using the defendant TNCs' mobile application and should not be required to engage in the "futile gesture" of downloading the application, request a ride, and be refused. The courts have further found that the plaintiffs already had plausible "actual knowledge" that the relevant TNC did not offer sufficient accessible transportation for those with mobility disabilities. Therefore, the plaintiffs in these cases were found to have standing to bring claims under the ADA against TNCs.

In contrast, the federal Court of Appeals for the Seventh Circuit has decided a similar case differently.¹⁹ The plaintiff had not downloaded Uber's mobile application. Rather, she concluded from secondhand accounts and a screenshot of the application that, although Uber did use wheelchair accessible vehicles where the plaintiff lived, she could not rely on the service for regular and efficient use. The Court found that the plaintiff did not have standing to bring a discrimination claim under the ADA since her complaint lacked any allegation of an "individualized" or "personalized" experience with Uber.²⁰ Moreover, the Court found that it was "too attenuated to conclude that the mere act of downloading Uber's app and opening an account—without more—would subject her to harm from discrimination."²¹ Interestingly, the Court noted that the reason the plaintiff had not downloaded Uber's mobile application and gained this personalized experience with the use of its services likely came from a concern that, had she downloaded the application, ordered the wheelchair accessible vehicle, and then sought to bring the lawsuit, Uber "would seek to compel arbitration, as reportedly required by its customer service agreement."²² Ineed, as I will discuss in the next Part, this is commonly the case with plaintiff passengers who have actually .used the TNC's ride-share services

18. *O'Hanlon v. Uber Tech., Inc.*, 2019 WL 5895425 (W.D. Penn. 2019). The decision of the district court with regard to the applicability of the arbitration clause to the plaintiffs, discussed below, has been affirmed by the Court of Appeals for the Third Circuit. The Third Circuit found that it did not have jurisdiction to review the district court's finding on standing. *O'Hanlon v. Uber Tech., Inc.*, 2021 WL 1011201 (3rd Cir. 2021).

19. *Access Living of Metropolitan Chicago v. Uber Tech.*, 958 F.3d 604 (7th Cir. 2020).

20. *Id.* at 614.

21. *Id.* at 615.

22. *Id.* at 614.

B. Equitable Estoppel

As noted above, the defendant TNCs have put forward an alternative argument in these cases once standing was established, which is rooted in arbitration rather than the ADA. They argued that the plaintiff potential passengers were bound by the arbitration clause in the TNCs' service agreement, despite not having signed it. According to the TNCs, plaintiffs should be equitably estopped from denying the application of this arbitration clause either on the basis of "direct benefits" or "intertwined claims."

Equitable estoppel on the basis of "direct benefits" may be used to compel a non-signatory to arbitrate where the non-signatory has benefited directly²³ from the contract or indirectly by "exploit[ing] the contractual relation of parties to an agreement" without assuming the contract itself.²⁴ Equitable estoppel on the basis of "intertwined claims" may be used to compel a non-signatory to arbitrate where the non-signatory has put forward claims that are "dependent upon or inextricably intertwined with the obligations imposed by the contract containing the arbitration clause,"²⁵ for instance when it relies on the terms of that contract in asserting its claims. Under both "direct benefits" and "intertwined claims," a non-signatory is estopped from denying the applicability of an arbitration clause since it has in some way "embraced the contract despite [its] nonsignatory status but then, during litigation, attempt[s] to repudiate the arbitration clause in the contract."²⁶

Similar to the defendant TNCs' standing argument, these equitable estoppel arguments have also been rejected in the cases discussed above. The plaintiff potential passenger, the District Court in New York found, had not received any benefit from the defendant TNC's service agreement. Indeed, the fact that she could not receive the benefit of the TNC's ride-share services was the reason for her discrimination action.²⁷ The District Court in Pennsylvania has also rejected the defendant TNC's assertions that the plaintiffs had "embraced" its service agreement by making claims under the ADA, or that they "stand in the shoes" of passengers who have accepted the TNCs' terms of the service, including the arbitration clause.²⁸ The Ninth

23. *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 770 F.3d 349, 353 (9th Cir. 1999).

24. *Boroditskiy v. European Specialties LLC*, 314 F. Supp. 3d 487, 495 (S.D.N.Y. 2018).

25. *JSM Tuscany, LLC v. Superior Ct.*, 123 Cal. Rptr. 3d 429, 445 (Cal. Ct. App. 2011).

26. *Ouadani v. TF Final Mile LLC*, 876 F.3d 31, 38 (1st Cir. 2017).

27. *Lowell*, 352 F.Supp. 3d at 260 ("[i]t seems supremely unjust to hold individuals to an arbitration clause buried in the verbiage of a terms of service of agreement for a service that they did not sign up for, particularly when those individuals have not received any benefits from the agreement, direct or indirect.").

28. *O'Hanlon*, 2019 WL 5895425, at *6.

Circuit has similarly rejected the defendant TNC's argument that equitable estoppel should be applied on the basis of "intertwined claims." The Court found that the plaintiff potential passengers did not allege any claim that was founded in or even tangentially related to a "violation of any duty, obligation, term or condition" imposed by the TNC service agreement.²⁹ Rather, the Court held, plaintiffs' claims arose from the ADA alone. Since the TNCs' equitable estoppel arguments in these cases have all been rejected, the plaintiffs' discrimination claims have proceeded to be determined by the courts rather than in arbitration.

These decisions contribute to the growing body of jurisprudence concerning the use of arbitration by TNCs in standard-form contracts,³⁰ and shed light on the implications of such use in discrimination cases. They are particularly helpful in elucidating the circumstances in which it may be justified to apply equitable estoppel in cases involving non-signatories to arbitration agreements.³¹ Since arbitration is founded on the principle of consent,³² it generally cannot be forced by or against a party who did not agree to it. Nonetheless, applying equitable estoppel to compel arbitration may be justified, for instance, where the non-signatory has benefited from the contract. The rationale is that a non-signatory should be estopped from relying on its lack of signature to preclude the enforcement of an arbitration clause when it has asserted that other beneficial provisions of the same contract do apply to it.³³ Applying equitable estoppel to compel arbitration by or against a non-signatory may also be justified where the issues to be resolved in the dispute are intertwined with the contract containing the arbitration clause. The rationale is that a party "cannot have it both ways. (It) cannot rely on the contract when it works to its advantage, and repudiate it when it works to (its) disadvantage."³⁴

29. *Namismak*, 971 F.3d at 1095 (quoting *Goldman v. KPMG, LLP*, 92 Cal. Rptr. 3d 534, 551 (Cal. Ct. App. 2009)).

30. See, e.g., Jill I. Gross, *The Uberization of Arbitration Clauses*, 9 *ARB. L. REV.* 43 (2017); Tamar Meshel, *Mobile-Based Transportation Employment Disputes: Corporate Chutzpa and the Potential Resurrection of Class Arbitration*, *CHICAGO L. REV. ONLINE* (June 5, 2020), <https://lawreviewblog.uchicago.edu/2020/06/05/corporate-chutzpa-meshel/>.

31. See generally, e.g., Tamar Meshel, *Of International Commercial Arbitration, Non-signatories, and American Federalism: The Case for a Federal Equitable Estoppel Rule*, 56 *STAN. J. INT'L L.* 123 (2020).

32. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1648 (2020) (Sotomayor, J., concurring).

33. *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000).

34. *Hughes Masonry Co., Inc. v. Greater Clark Cty. Sch. Bldg. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (quoting *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966)).

In other circumstances, however, equitable estoppel may be an improper basis for compelling arbitration by or against a non-signatory. For instance, where the non-signatory has neither benefited from the contract containing the arbitration clause nor is advancing claims in reliance on that contract. Indeed, a good example is provided in the cases discussed above, involving ADA claims brought against TNCs by potential passengers. Refusing to compel arbitration in such situations would not “disregard equity” or “contravene the purposes” of the FAA, in contrast to situations where enforcement of an arbitration clause on the grounds of equitable estoppel is truly called for.³⁵ Rather, applying a measured approach to equitable estoppel in non-signatory arbitration cases and resorting to it only in appropriate cases would reinforce the doctrine and ensure that it is applied in line with the “FAA’s inherent consent restriction.”³⁶

II. *IRVING V. UBER*: ARBITRATION IN THE CONSUMER CONTEXT

In 2018, Ms. Lisa Irving—a legally blind passenger—commenced an arbitration with the American Arbitration Association (AAA) against Uber. Ms. Irving claimed that Uber had violated the ADA as a result of its drivers’ repeated refusal to provide her appropriate transportation or harassment on the grounds of her blindness and/or seeing eye dog.³⁷ The central bone of contention between the parties was the status of Uber’s drivers as employees or independent contractors, which both viewed as determinative of Uber’s liability.

However, the arbitrator found that this distinction between employees and independent contractors “is not primarily decisive because of overriding federal policy regarding ADA compliance.”³⁸ After conducting an evidentiary hearings and receiving detailed post-hearing opening and reply briefs from the parties, the arbitrator ruled that Uber is liable for the incidents complained of under “independent federal grounds” as well as “due to Uber’s contractual supervision over its drivers and for its failure to prevent discrimination by properly training its workers.”³⁹ In reaching these conclusions, the arbitrator examined the interpretation of the ADA in the case law as well as by the Department of Justice and the Department of

35. *Int’l Paper Co.*, 206 F.3d at 418 (quoting *Avila Grp., Inc. v. Norma J. of California*, 426 F. Supp. 537, 542 (S.D.N.Y. 1977)).

36. *GE Energy Power Conversion*, 140 S.Ct. 1637, 1649 (2020) (Sotomayor, J., concurring).

37. References in this Part to the factual background of the case, the procedural history of the arbitration, the arbitrator’s findings, and the outcome of the arbitration are based on the March 2021 merits arbitration award. *Lisa Irving v. Uber Technologies, Inc.*, AAA Case No. 01-18-0002-7614 (2021) [hereinafter *Merits Arbitration Award*].

38. *Merits Arbitration Award*, at 3.

39. *Id.* at 3-4.

Transportation. The arbitrator noted the non-delegable nature of duties arising under the ADA and found that these duties applied directly to Uber and by extension to its drivers. This conclusion, the arbitrator found, was further corroborated by—although not dependent upon—his finding that the drivers had an “employment relationship” with Uber given Uber’s control over them.⁴⁰ Examining Uber’s conduct, the arbitrator further found that Uber was aware of the discriminatory conduct of some of its drivers but failed to properly investigate, discipline, or train them.

Noting that “Uber has not provided facts or arguments based in law to refute the discrimination by its drivers[,]”⁴¹ the arbitrator proceeded to award Ms. Irving damages for 14 instances in which she had been discriminated against by Uber’s drivers, some in amounts higher than the statutory minimum under California law.⁴² These instances included several incidents in which Ms. Irving was denied rides and was “stranded by the Uber drivers” or suffered discriminatory remarks made directly at her while she was in the vehicle.⁴³ The arbitrator also awarded Ms. Irving damages for the “significant emotional distress” she had suffered after face-to-face interactions with drivers on several occasions, noting that she was “humiliated,” late for work, and left in a dark and dangerous area at a late hour.⁴⁴ The arbitrator further awarded Ms. Irving damages for the “additional emotional distress and significant inconvenience” she had suffered from several occasions in which she was denied rides by drivers who “brought her to tears” and left her in the rain.⁴⁵ Finally, the arbitrator awarded Ms. Irving damages for incidents that involved “verbally abusive drivers,” with respect to which he found that

40. *Id.* at 7. While this finding was not the basis for the arbitrator’s decision, it is noteworthy given the multi-jurisdictional battle that TNCs have been fighting against the classification of their drivers as employees, referred to above. The status of drivers as employees or independent contractors is one of the main substantive issues that TNCs have been attempting to refer to arbitration pursuant to the FAA rather than resolve in the courts. However, whether this issue is to be resolved in arbitration does not depend on TNC drivers being employees or independent contractors. Rather, the application of the FAA to TNC drivers depends on whether they are “transportation workers” who are “engaged in interstate commerce” within the meaning of § 1 of the FAA and therefore exempt from the FAA. In this regard, *see, e.g.,* Tamar Meshel, *If Apps Be the Food of the Future, Arbitrate On!: Mobile-Based Ride-Sharing, Transportation Workers, and Interstate Commerce*, 15 VA. L. & BUS. REV. 1 (2020). A Writ for Certiorari is currently pending before the Supreme Court on this question. *See* *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020).

41. *Merits Arbitration Award*, at 15.

42. CAL. CIV. CODE § 52(a). The minimum amount is \$4,000 per incident.

43. *Merits Arbitration Award*, at 16.

44. *Id.* at 16-17.

45. *Id.* at 17-18.

Ms. Irving feared for her safety . . . [The driver] yelled at her to get out of his car at least fifteen times, at one point pulling over to demand she get out in a dangerous area, making her feel helpless by his intimidation and threats. [The driver] grabbed Ms. Irving's phone and refused to return it, and then filed a police report against her. Ms. Irving was physically upset during the hearing while testifying about this incident.⁴⁶

Throughout his findings on damages, the arbitrator referenced case law and damages awards granted in similar cases. The total amount awarded to Ms. Irving in damages was \$324,000, plus approximately \$800,000 to cover her legal costs.⁴⁷

While this arbitration is admittedly anecdotal,⁴⁸ it contributes to refuting some common criticisms of consumer arbitration in the TNC context and more broadly. First, the significance of the decision is not so much in the amount of damages awarded to Ms. Irving, but rather in the simple fact that the consumer—not the corporate “repeat-player”—prevailed.⁴⁹ This case therefore illustrates that, to the extent that TNCs and other corporate parties perceive mandatory arbitration in a standard form consumer contract as a method by which they could evade liability,⁵⁰ this perception does not necessarily reflect the reality of consumer arbitration. Moreover, while consumer arbitration has been criticized for being confidential and taking place behind closed doors,⁵¹ research has found that arbitrators, as in the *Irving v. Uber* case, tend to give detailed reasons, engage in substantial legal analysis, and make extensive use of precedent, mostly of published judicial

46. *Id.* at 21.

47. *Id.* at 22.

48. I conducted a search of AAA Consumer Arbitration Awards but did not find any other award involving a TNC and the ADA. It is not my intention to draw general conclusions from this single example. My goal is merely to use this case as an illustration that arbitration is not necessarily disadvantageous to consumers in this context.

49. The so-called “repeat player effect” is the alleged tendency of arbitrators to favor corporate parties that are more likely to repeatedly use arbitration. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 190-91 (1997).

50. *See, e.g.*, Shauhin A. Talesh & Peter C. Alter, *The Devil is in the Details: How Arbitration System Design and Training Facilitate and Inhibit Repeat-player Advantages in Private and State-run Arbitration Hearings*, 42(4) LAW & POL'Y 315, 317 (2020) (finding that “managerial values influence the arbitration process and provide a pathway for subtle repeat-player advantages in actual hearings.”).

51. *See, e.g.*, Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 681 (2018) (“To the extent that firms do impose obligations on their employees (and customers) to arbitrate rather than litigate future legal disputes, they can often draw a heavy veil of secrecy around allegations of misconduct and their resolution.”); Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEORGETOWN L.J. 855, 861 (2020) (“[F]ully protecting rights against discrimination requires making authoritative and public institutions available to protect them . . .”).

opinions.⁵² Finally, the alternative avenue that Ms. Irving would have to pursue had Uber's service agreement not contained an arbitration clause must be considered. This alternative avenue would be court litigation, which would likely be longer and more expensive.⁵³

The *Irving v. Uber* arbitration is merely one real-world example, but it serves as a reminder of what passengers could gain from arbitration against TNCs, if done right.⁵⁴ This is not to suggest that arbitration is a panacea for all disputes in all sectors and in all circumstances. There may well be situations where the arbitral process is abused by the parties, the arbitral institution, or the arbitrator.⁵⁵ But as against such "parades of horrors,"⁵⁶ the *Irving v. Uber* arbitration demonstrates what empirical studies⁵⁷ have long shown—that not all mandatory consumer arbitrations are necessarily "unfair."⁵⁸

III. CONCLUSION

Courts retain a gatekeeping function in the context of arbitration and ultimately determine whether an arbitration agreement, even one that is "mandatory," should be enforced. The intersection of ADA discrimination claims and arbitration in the TNC context is no different. Federal courts have consistently found that the non-signatory status of plaintiff potential passengers with respect to TNCs' service agreements does not negate their

52. W. C. Mark Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1095 (2012).

53. Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 470.

54. See, e.g., Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U. KAN. L. REV. 985, 991 (2012) (proposing "a public rating system assessing the fairness of arbitration programs associated with contracts for consumer goods or services or individual employment contracts what we call an 'Arbitration Fairness Index.'").

55. See, e.g., Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law* (Dec. 23, 2020), at 14, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3754604 (providing examples of arbitration clauses that "purport to cover an unlimited range of future disputes in which the stronger party might be involved, even if they have nothing to do with, and could not be contemplated at the time of, the original contract where the arbitration mandate appears," or that "declare that the arbitrator must defer to the very action being challenged in arbitration—thus creating what is known as 'the firm always wins' clause.").

56. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 (2009).

57. See, e.g., Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843 (2010)

58. Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695, 771 (2001).

standing to bring claims under the ADA, but does negate the imposition of the arbitration clause contained in these service agreements on them. While arbitration agreements are enforceable as any other contract, including on such grounds as equitable estoppel, arbitration is fundamentally rooted in consent. It should therefore be compelled by or against non-signatories only where it is just and appropriate to do so. The courts' consistent refusal to compel plaintiff potential passengers to submit their claims against TNCs to arbitration therefore reinforces it as a valid and legitimate dispute resolution mechanism in this context.

Where TNCs' service terms are accepted by passengers and arbitration is enforced as a result, this should not be viewed as a necessarily unfair or anti-consumer practice. As the *Irving v. Uber* case demonstrates, albeit anecdotally, arbitration can produce as "fair" an outcome, from the consumer's perspective, as a court can. There may well be situations where other dispute resolution mechanisms, such as litigation or mediation, will prove more suitable or better reflect the parties' intentions. Determinations of which mechanism is most appropriate should be made on the basis of the parties' relationship, their undertakings and overall interests, and how each process is designed in context.⁵⁹ As the recent experience of ADA claims against TNCs—brought both before courts and arbitrators—illustrates, what ought to be avoided is a wholesale indictment of arbitration as an inadequate mechanism as a matter of principle in the TNC context.

59. See Jill I. Gross, *Arbitration Archetypes for Enhancing Access to Justice*, 68 *Fordham L. Rev.* 2319, 2324 (2020) (proposing a framework to assess "whether a particular form of arbitration enhances disputants' access to justice relative to litigation.").