WSJ | OPINION
OPINION | REVIEW & OUTLOOK

Silicon Valley's Supreme Salvation

Why Uber and Google should hope that Brett Kavanaugh is confirmed.

By The Editorial Board
Sept. 26, 2018 7:25 p.m. ET

Silicon Valley companies lean left, but they should empathize with Judge Brett Kavanaugh over liberal drive-bys. Uber is a case in point, and a Ninth Circuit Court of Appeals ruling on Tuesday underscores the importance of a conservative Supreme Court majority as a safeguard against regulatory and litigation depredations.

Plaintiff attorneys led by Boston-based Shannon Liss-Riordan have been ganging up to loot "gig economy" start-ups with class actions for misclassifying workers as independent contractors, which are exempt from state and federal labor laws. Uber has been sued for failing to compensate drivers for expenses and provide benefits, among other things.

Most Uber drivers sign contracts agreeing to arbitrate claims individually, but federal Judge Edward Chen has repeatedly refused to enforce these agreements and allowed class actions to proceed. After the Ninth Circuit overruled Judge Chen in 2016, Ms. Liss-Riordan ran another class action up the flagpole.

In her latest pleading, the Boston attorney contended that Uber's arbitration agreements should be invalidated because they included class-action waivers that violate the National Labor Relations Act. But as a Ninth Circuit panel on Tuesday declared, the Supreme Court "rejected Plaintiffs' argument in *Epic Systems Corp. v. Lewis* (2018)."

Unions and trial lawyers argued that the NLRA's protection of workers' right to organize and bargain collectively extended to class actions. But a 5-4 Supreme Court majority found no such right in the law and reaffirmed the Federal Arbitration Act. The four liberal Justices would have invalidated employment agreements that have class-action bans.

PHOTO: SETH WENIG/ASSOCIATED PRESS

Uber lucked out with a conservative three-judge panel because the liberal Ninth Circuit frequently flouts Supreme Court precedent and attempts to rewrite law. For instance, this spring the appellate court ruled en banc that employers may not use workers' salary history to justify paying women less than men.

This ruling conflicts with several other circuit courts that have held that prior salary may be considered among

multiple factors in setting pay, so the case could be headed to the Supreme Court. One interested party may be Google, which was slapped with a class action in January for discriminating against women by using prior compensation to set starting pay.

The class action cites a Labor Department complaint last year against Google that found "systemic compensation disparities against women pretty much across the entire workforce." Google has denied the charges, and plaintiffs' earlier lawsuit failed to overcome the high hurdle set by the Supreme Court in *Wal-Mart v. Dukes* (2011) requiring parties in class actions to demonstrate a commonality in "questions of law or fact."

Because of their deep pockets, tech businesses are increasingly targeted by plaintiff attorneys and aggressive regulators. The Equal Employment Opportunity Commission is investigating IBM for age discrimination, and last week Ms. Liss-Riordan filed a class action against the company for "systematically laying off older employees in order to build a younger workforce."

In June the Supreme Court agreed to hear a class action that accuses Apple of monopolizing the market for apps and inflating prices by charging developers a commission on each purchase. The Trump Justice Department has sided with Apple, and the case has far-reaching implications for other online retailers including Amazon, eBay and StubHub.

A conservative Court majority is the best protection businesses have against such shakedowns, and we wouldn't be surprised if some in Silicon Valley are secretly hoping that Judge Kavanaugh is confirmed.

Appeared in the September 27, 2018, print edition.