Nos. 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, 16-15035

IN THE

United States Court of Appeals for the Ninth Circuit

DOUGLAS O'CONNOR, *et al.*, Plaintiffs-Appellees v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17532, 16-5000 No. C-13-3826 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
ABDUL KADIR MOHAMED, *et al.*, Plaintiffs-Appellees v. UBER TECHNOLOGIES, INC., *et al.*, Defendant-Appellant.	Nos. 15-17533, 16-15035 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, *et al.*, Plaintiffs-Appellees v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17534, 16-5001 No. C-15-262 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

APPELLANT'S AND CROSS-APPELLEE'S REPLY AND RESPONSE BRIEF

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INTRODUCTION

As Plaintiffs' opposition briefs implicitly recognize, the district court's orders are truly unprecedented. Until the district court's decision, no court had ever enjoined a defendant from modifying an optional arbitration provision that predates the litigation at issue. No court had ever invoked Rule 23(d) to enjoin a company from entering into agreements with individuals who are not even putative class members. And no court had ever required an arbitration agreement to include a "push button" opt-out hyperlink that remotely resembles the one the court ordered Uber to employ here. In fact, courts in this Circuit have almost uniformly enforced substantially similar arbitration agreements, even when they contain *no opt-out provision whatsoever*.[1] There is good reason why no court has ever done what the district court did here: the district court's orders flatly violate Rule 23(d), the First Amendment, and the Federal Arbitration Act ("FAA").[2]

The district court attempted to justify this affront to Uber's fundamental rights by arguing that such an unprecedented injunction is necessary to avoid

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[1] *See*, *e.g.*, *Cobarruviaz v. Maplebear, Inc.*, -- F. Supp. 3d ---, 2015 WL 6694112, at *2 (N.D. Cal. Nov. 3, 2015); *Levin v. Caviar, Inc.*, -- F. Supp. 3d ---, 2015 WL 7529649, at *8 (N.D. Cal. Nov. 16, 2015).

[2] Uber files this single brief in response to Plaintiffs' two opening briefs. *See* 9th Cir. Rule 28-4. Plaintiffs' briefs are referred to as the "O'Connor Opp." (No. 15-17532 Dkt. 22) and the "FCRA Opp." (No. 15-7533 Dkt. 21).

arbitration, which, in the district court's view, "adversely affects [drivers'] rights" and "jeopardizes the fairness of [class-action] litigation." ER-804, 868. Arbitration, however, does not eliminate or alter substantive rights; it merely directs disputes to a more efficient forum. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). There is nothing "abusive" or "brazen" about Uber's attempt to contract for arbitration. O'Connor Opp. 1, 2. Uber is simply trying to effectuate a valid and binding agreement to arbitrate disputes with drivers nationwide—a lawful and, indeed, preferred method of dispute resolution. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (describing the "liberal federal policy favoring arbitration"). In fact, Uber has been trying to achieve this legitimate business objective since before any of these cases were even filed. And before rolling out the December 2015 Agreement that is the subject of this appeal, Uber informed the district court of its intentions in an attempt to avoid precisely this dispute. ER-198–199. Yet the district court, for the *fourth* time, enjoined and invalidated Uber's arbitration agreement based on sheer speculation that it might confuse drivers into giving up their "right" to participate in these class actions. Because there is no basis for the district court's unprecedented injunction, this Court should vacate it.

Plaintiffs' opposition briefs confirm that Plaintiffs, too, are driven by an unfounded and unlawful hostility towards arbitration. In their view, arbitration is an evil to be stamped out—a "tactic[]" designed only to "unilaterally limit . . . liability." O'Connor Opp. 1, 3; *see also* FCRA Opp. 2 ("Uber is seeking a forfeiture of drivers' rights"). Plaintiffs, like the district court, ignore the repeated teaching of the U.S. Supreme Court that arbitration provides "efficient, streamlined procedures" for resolving disputes, not a substantive limitation on liability. *Concepcion*, 563 U.S. at 344. Plaintiffs, like the district court, ignore the Supreme Court's repeated admonition that courts must "give due regard . . . to the federal policy favoring arbitration." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 471 (2015) (internal quotations omitted).

The district court's sweeping injunction—the latest in an unprecedented string of anti-arbitration rulings—exceeds its authority under Federal Rule of Civil Procedure 23(d) and violates both the First Amendment and the FAA. In fact, the district court's injunction imposes a twofold infringement on Uber's speech—both a compulsion of speech and a prior restraint. There was no basis for the district court's order, particularly where the December 2015 Agreement contained all of the same notices, warnings, and opt-out mechanisms the district court had previously approved for distribution to *the same* putative class members in *the*

same cases at issue here, and where Uber unilaterally disavowed any intention of enforcing the December 2015 Agreement against members of the certified *O'Connor* class in any manner that would affect their ability to participate in that litigation.

Plaintiffs suggest that "Uber could easily avoid any restriction on its speech" by ceasing *any* attempts to obtain agreements to arbitrate while there are putative class actions pending against the company. *See* FCRA Opp. 45. That obviously is not an adequate response to Uber's significant First Amendment concerns, nor a reasonable option under the FAA. And through their cross-appeals, Plaintiffs seek to accomplish their anti-arbitration goals by obtaining an even broader injunction than the one the district court issued—one that would prohibit Uber from distributing *any* arbitration agreement to drivers while *any* putative class action is pending against the company. The district court recognized the absurdity of Plaintiffs' position, noting that no court has ever barred "a company . . . from implementing any arbitration agreement, even if the arbitration agreement contains robust notice and opt out provisions." ER-5. In that respect, at least, the district court was correct.

This Court should vacate the district court's unlawful injunction and reject Plaintiffs' flawed request for an even more sweeping remedy.

ARGUMENT

I. Uber's Appeal: This Court Should Vacate The Rule 23(d) Orders

The district court issued its injunction without making any specific findings of injury, in violation of Rule 23(d). Moreover, many of the overbroad corrections the district court ordered are unrelated to any allegations of confusion or abuse. The district court's orders impose unprecedented and unjustified restraints on Uber's communications with drivers who use the Uber app, in violation of the First Amendment. And they evince a clear hostility towards arbitration and preference for class-action litigation, in violation of the FAA. This Court should vacate the district court's unlawful orders.

A. The District Court Failed to Make Specific Findings on a Clear Record

Uber's December 2015 Agreement contained all of the same notices, warnings, and opt-out mechanisms the district court had previously ordered Uber to include in its arbitration agreement. The district court had already found these opt-out mechanisms to be "meaningful," ER-560, "giv[ing] drivers a reasonable means of opting out." ER-533 (quotations and brackets omitted). As the district court put it, "it would be hard to draft a more visually conspicuous opt-out clause even if the Court were to aid in the drafting process, which it actually did." ER-532–533. And up until December 10, 2015, Uber was distributing its arbitration

agreement to drivers—including putative class members in these very cases—without any complaints from Plaintiffs or the district court.

Yet inexplicably, when Uber made a few minor changes to the arbitration agreement in response to the district court's stated concerns and began distributing the new arbitration agreement on December 11, 2015, the district court did an abrupt about-face and found the new agreement to be "potentially" misleading (ER-7)—a conclusion that was based on sheer speculation, not on specific "findings" of "particular abuses," as required by *Gulf Oil v. Bernard*, 452 U.S. 89, 104 (1981). The district court's hypothetical concerns are not enough to justify a Rule 23(d) order imposing a substantial restraint on Uber's speech. *See id.* at 102 ("[T]o the extent that a district court is empowered to restrict certain communications in order to prevent frustration of the policies of Rule 23, it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened.") (citation omitted); *Great Rivers Co-op. of Southeastern Iowa v. Farmland Industries, Inc.*, 59 F.3d 764, 766 (8th Cir. 1995) ("In a class-action lawsuit, a district court may not order restraints on speech under Fed. R. Civ. P. 23(d) except when justified by actual or threatened misconduct of a serious nature. Before entry of such an order, there must be a clear record and specific findings that reflect a weighing of the need for a

limitation and the potential interference with the rights of the parties.") (citations omitted).

Plaintiffs identify four facts they claim satisfy *Gulf Oil*'s specific-finding requirement, but none is sufficient:

1. Plaintiffs point to the district court's statement that drivers who failed to opt out of the prior agreements "may still believe that they are required to arbitrate," and will therefore "pay little heed to the opt out provisions of the new arbitration agreement." FCRA Opp. 37–38; O'Connor Opp. 28. But there is *no evidence*—only rank speculation—that any driver believed he or she was required to arbitrate under prior arbitration agreements and, as a result, ignored the opt out provisions in the December 2015 Agreement. And although Plaintiffs argue that the agreements are "confusing" "on their face" (FCRA Opp. 39), they do not point to any specific language in the agreements suggesting that drivers would be required to arbitrate based on prior agreements, irrespective of whether they opted out of the new arbitration agreement. The district court's conjecture is insufficient to justify the drastic Rule 23(d) order in this case. *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 311–12 (3d Cir. 2005) (vacating "broad and sweeping" Rule 23(d) order that "never specified which portions of the solicitation letters were objectionable").

2. Plaintiffs argue there is "evidence of actual confusion" in the four-paragraph attorney affidavit submitted in support of their motion. FCRA Opp. 39; *see also* O'Connor Opp. 24. But their conclusory and inadmissible-hearsay declaration (from lead plaintiffs' counsel) makes only a generic statement that drivers were confused, without stating who was confused or what they found confusing. ER-4, ER-286. Remarkably, the attorney declaration purports to be based on two driver declarations (ER-289, ER-314) that say *nothing* about being confused by Uber's December 2015 Agreement, or that the two declarants believed they were required to arbitrate because they previously had not opted out of arbitration. There is simply no evidence to support Plaintiffs' assertions. *Great Rivers*, 59 F.3d at 766 (vacating Rule 23(d) order because district court "neglected to indicate specifically what was misleading and why").[3]

[3] Plaintiffs state that "in exigent circumstances such as these" (without describing them), courts "routinely" rely on such counsel declarations. O'Connor Opp. 26. But the two cases Plaintiffs cite involve egregious circumstances that bear no resemblance to this case. *See Camp v. Alexander*, 300 F.R.D. 617, 618–620 (N.D. Cal. 2014) (invalidating opt-out agreements obtained by employer who stated in letter to employees that failure to opt out could jeopardize the company and their jobs "in these hard economic times," referred to the named plaintiff as motivated by "greed," and emphasized that participation in the class action will impact employees personally, add stress to their lives, and require them to testify in a deposition or in court); *Wright v. Adventures Rolling Cross Country, Inc.*, 2012 WL 2239797, at *5 (N.D. Cal. June 15, 2012) (prohibiting defendants from contacting plaintiffs based on evidence that employer told putative class member employees in multiple emails that class action would drive it "out of business," that

3. Plaintiffs argue that because Uber issued the December 2015 Agreement two days after the district court's order invalidating Uber's prior arbitration agreement, it is inherently improper. FCRA Opp. 39; O'Connor Opp. 26–27, 56–60. That makes no sense. The *reason* for this temporal connection is obvious: Uber attempted to correct the purported errors the district court identified in its order (even though Uber disagrees there was anything wrong with its prior agreement), in order to ensure its arbitration agreement—an integral component of Uber's primary contract with drivers that has been part of Uber's ordinary business operations since before Plaintiffs filed any of these lawsuits—is valid and enforceable. Acting to remedy errors identified by the court is not "gamesmanship" (O'Connor Opp. 56–57)—it is exactly what a company *should* do and what the district court *expected* Uber to do. Indeed, when Uber's counsel informed the district court that Uber intended to roll out an updated arbitration agreement to address the perceived deficiencies identified by the court, the district judge responded, "Certainly, I understand that." ER-198–199.[4]

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joining class actions would result in "tattered reputations and substantial legal bills," and referring to class counsel as "aggressive and possibly unethical").

[4] Plaintiffs repeatedly claim the district court found that Uber's arbitration agreement was "not part of an ordinary business communication" (FCRA Opp. 3; O'Connor Opp. 56–60), but that mischaracterizes the district court's statement that the agreement was "not *purely* an isolated business decision but one which is informed by Uber's litigation strategy" (ER-5) (emphases added). Of course, there

4. Finally, Plaintiffs make much of the fact that the agreement, on its face, does not prohibit enforcement against members of the certified *O'Connor* class. FCRA Opp. 40; O'Connor Opp. 22, 30. This is a red herring. Uber has never attempted to enforce the December 2015 Agreement against these individuals.[5] To the contrary, immediately after rolling out the agreement, Uber unilaterally informed the Court, the media, and Plaintiffs' counsel that it would not do so. ER-81, 201.[6]

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is nothing improper about making business decisions that are informed by events that have taken place in litigation—especially when those decisions are made in direct compliance with a court order. Moreover, *any* arbitration agreement is, at least in part, "informed by [a company's] litigation strategy" in the sense that the very purpose of an arbitration agreement is to avoid litigation and channel conflicts into a less burdensome arbitral forum. *See Concepcion*, 563 U.S. at 351. That does not make arbitration agreements improper; to the contrary, they are favored under federal law. *See DIRECTV, Inc.*, 136 S. Ct. at 471.

[5] As Uber has explained, the arbitrability of the *O'Connor* class members' claims continues to be governed by the 2013 and 2014 Agreements that were in effect at the time of class certification. *See* Opening Br. 10–15. The enforceability of those agreements is the subject of a separate appeal pending before this Court. *See* No. 15-80220.

[6] Plaintiffs argue that Uber "backtracked" on its representation that it would not enforce the December 2015 agreement against members of the certified *O'Connor* class. FCRA Opp. 21; O'Connor Opp. 30. Not so. Uber merely argued that if the district court was going to require *more* changes to the arbitration agreement—a *new* version including *additional* notices and warnings and *another* opt-out mechanism to be rolled out under court supervision—then that *new* court-approved agreement should apply to everyone, including *O'Connor* class members. *See* O'CONNOR-SER-3 n.1.

Plaintiffs nevertheless speculate that there was "confusion among class members" because individuals who were *not* subject to the December 2015 arbitration agreement (i.e., members of the *O'Connor* class) would think they *were* subject to the arbitration agreement. O'Connor Opp. 29–32; FCRA Opp. 40. But even if there were evidence to support Plaintiffs' conjecture (which there is not), this supposed confusion would merely have led drivers to opt out of arbitration unnecessarily—hardly a problem in need of court intervention, and in any event the *opposite* of the alleged problem the district court purported to be remedying. ER-4 (expressing concern about "the ability of drivers to opt out").[7]

[7] Plaintiffs' cited cases are entirely inapposite. *See Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 353 (6th Cir. 2009) (extending opt-out period in class action because attorney who did not represent any party in the lawsuit sent post-certification letters to class members soliciting them to opt out by stating "people who opt out always get a much higher settlement," and falsely guaranteeing that individuals would be his clients regardless of whether they remained in the class or opted out); *Slavkov v. Fast Water Heater Partners I, LP*, 2015 WL 6674575, at *4–7 (N.D. Cal. Nov. 2, 2015) (invalidating agreements offering payment in exchange for release of all claims that could be perceived as prohibiting interaction with class counsel, but even then, refusing to restrain defendants from speaking with putative class members); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 602 (2d Cir. 1986) (court held two hearings before determining that both parties had engaged in improper communications with putative class members, and offering parties opportunity to request additional findings before restricting future communications).

B. The Injunction Is Not Carefully Drawn or Narrowly Tailored

Even if the district court had made sufficient findings to invoke Rule 23(d), its orders still would be unlawful because they are not "carefully drawn" to limit Uber's speech "as little as possible," and should be vacated on this basis as well. *Gulf Oil*, 452 U.S. at 102.

First, the district court failed to consider the impact of the orders on Uber's First Amendment rights. Opening Br. at 29–31. Plaintiffs likewise brush aside Uber's First Amendment rights in their opposition briefs. But compelling Uber to send revised contracts and corrective notices to millions of drivers nationwide "is a form of enforced speech, which is rarely, if ever, appropriate" in a Rule 23(d) order. *Great Rivers*, 59 F.3d at 766 (citing *Pacific Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 9–10 (1986)). Plaintiffs' dismissive response is that Uber can "easily avoid such compelled speech" by ceasing *any* attempts to obtain agreements to arbitrate while there are putative class actions pending against the company. FCRA Opp. 45. But that does not solve the First Amendment problem—it demonstrates it. As the Supreme Court has explained, one of the principal reasons that compelled speech violates the First Amendment is that it chills the speaker from speaking in the first place, exactly as Plaintiffs are proposing. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651

(1985) ("unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech"). Plaintiffs' argument also ignores the Supreme Court's mandate that any regulations of speech imposed under Rule 23(d) must be "the narrowest possible relief." *Gulf Oil*, 452 U.S. at 102. Compelling Uber to cease sending *any* arbitration agreements to *any* drivers nationwide for an indefinite period of time is hardly a narrow requirement.

With respect to the prior restraint that the district court imposed on Uber—whereby Uber is prohibited from sending out any future arbitration agreements without prior court approval—that is "presumptively invalid" under the First Amendment. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2008). Indeed, when other courts have imposed similar prior restraints under Rule 23(d), they "have done so because the parties engaged in serious abuses," such as intimidating putative class members or distributing intentionally deceptive communications. *Austen v. Catterton Partners V, LP*, 831 F. Supp. 2d 559, 568 (D. Conn. 2011). The district court here did not make any finding of "serious abuses" that would justify its prior restraint. *See A.J. by L.B. v. Kierst*, 56 F.3d 849, 857 (8th Cir. 1995) (vacating Rule 23(d) order because "the

district court made no discernible effort to weigh [defendant's] interest . . . against the potential interference with the class members' rights").[8]

Second, the corrective measures the district court ordered are not narrowly tailored to the court's stated concerns. For example, the court's requirement that Uber include a "push button" hyperlink that generates a pre-drafted opt-out email *before* the drivers even read the arbitration provision (ER-9) bears no relationship to the court's speculation that drivers might be confused about *whether* to opt out. Indeed, the court had *already* found Uber's previous opt-out mechanisms "reasonable," and held that they provided drivers "a meaningful opportunity to opt-out of the arbitration provision." ER-532–533, ER-560. No court has *ever*

[8] Plaintiffs cite a number of cases they claim support the district court's prior restraint order. *See* O'Connor Opp. 32. Those cases, however, involved conduct targeted specifically at the putative class members and aimed at pressuring them to release substantive rights—far afield from the lawful arbitration agreements Uber sent to all drivers nationwide in an attempt to remedy the issues identified by the court. *See*, *e.g.*, *Belt v. Emcare, Inc.*, 299 F. Supp. 2d 664, 666–67 (E.D. Tex. 2003) (FLSA defendant mailed a letter to potential class members "suggest[ing] the suit could endanger potential class members' job stability," and misrepresenting "the amount of damages available to the absent class members"); *Buck v. Republic Services, Inc.*, 2013 WL 2321784, *2 (E.D. Mo. May 28, 2013) (defendant sent a letter to potential class members "with an offer of lodging and expenses" that "failed to inform the potential class members that they would still have other litigation rights regardless [of] whether they accepted the offer"); *Recinos-Recinos v. Express Forestry*, Inc., 2006 WL 197030, *6–8 (E.D. La. Jan. 24, 2006) (defendant's agent spoke in person with potential class members to "discuss[] the subject [of] pending collective and putative class action litigation and to present [Defendant's] view" the day before defendant allegedly initiated a campaign "to threaten, intimidate and coerce" potential class members).

required opting out of arbitration to be available through the type of hyperlink functionality the district court ordered here, and Plaintiffs point to no such case.[9]

Moreover, Plaintiffs fail to explain how the hyperlink remedies any confusion regarding *whether* drivers should opt out of the December 2015 Agreement, or how the hyperlink "enhance[s] the chances that drivers would actually read and understand" the arbitration agreement. O'Connor Opp. 34 n.26. Even if some form of hyperlink were warranted (which it is not), there are far more narrowly tailored options. For example, Uber suggested including in the cover letter a hyperlink that would link the reader directly to the opt-out portion of the arbitration provision, thereby allowing the reader to review the section that explains the costs and benefits of opting out and make an informed decision. UBER-SER-8–10. But the district court rejected Uber's suggestion. ER-10.

[9] Indeed, courts routinely enforce similar arbitration agreements, even when they contain *no opt-out provision whatsoever*. *See*, *e.g.*, *Cobarruviaz*, 2015 WL 6694112, at *2 (enforcing arbitration agreement in putative class action involving proposed class of grocery delivery drivers even though "Plaintiffs had no opportunity to opt-out of the arbitration clause, and . . . agreeing to the arbitration clause was a mandatory requirement for Plaintiffs to perform work for Instacart"); *Caviar, Inc.*, 2015 WL 7529649 at *8 (compelling arbitration in putative class action involving proposed class of food delivery couriers even though couriers were required to sign the agreement as a condition of driving for the delivery service); *Zenelaj v. Handybook Inc.*, 3:14-cv-05449-THE, ECF 26 (N.D. Cal. Mar. 3, 2015); *see also Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1284 (9th Cir. 2006) (arbitration agreement presented "on a take-it-or-leave-it basis" amounted to only minimal evidence of procedural unconscionability).

In addition, the court ordered Uber to send corrective notices to *prospective* drivers (ER-10), over Uber's objection that there is nothing to "correct" as to those individuals—they never received the purportedly "confusing" December 2015 Agreement, or any other arbitration agreement, in the first place. Plaintiffs provide no sufficient explanation as to why this requirement is necessary or logical. It is merely another indicium that the district court's orders are not "carefully drawn" to regulate Uber's speech "as little as possible." *Gulf Oil*, 452 U.S. at 102.

C. The Injunction Regulates Communications with Prospective Drivers Who Are Not Putative Class Members

The district court's orders also exceed Rule 23(d) because they regulate Uber's speech with members of the public who are not yet, and may never be, drivers (and therefore are not yet, and may never be, putative class members in these cases). *See In re Currency Conversion Antitrust Litig.*, 361 F. Supp. 2d 237, 258 (S.D.N.Y. 2005) ("there is no basis for restricting a defendant from communicating with persons who are not putative class members"). Plaintiffs claim that *In re Currency Conversion* "presented a different situation" because the agreements upheld in that case predated the filing of the litigation. FCRA Opp. 44. But the court's decision did not turn on the *timing* of the agreements, as Plaintiffs suggest. Rather, the court found the arbitration agreements enforceable because it had "no basis for restricting a defendant from communicating with

persons who [were] not putative class members" and thus "had no rights in the litigation." 361 F. Supp. at 258. Thus, contrary to Plaintiffs' argument, *In re Currency Conversion* speaks directly to the issue here—whether the district court had authority to restrict Uber's communications with individuals who are not putative class members—and supports the conclusion that the district court exceeded its authority under Rule 23(d).

D. The Orders Improperly Discourage Arbitration in Violation of the FAA

Finally, the Court should vacate the orders because they seek to discourage drivers from agreeing to arbitrate their claims with Uber, including claims that have nothing to do with the pending lawsuits. Most egregiously, the corrective cover letter the district court ordered would provide a one-click opt-out hyperlink that would generate a pre-drafted opt-out email *before* the driver has even had a chance to open or read the arbitration agreement. Opening Br. 34–37. This requirement privileges the class-action mechanism and disfavors arbitration in violation of the FAA and Supreme Court precedent establishing a "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

Plaintiffs argue that "[n]o reasonable driver" would elect arbitration over a class action. FCRA Opp. 23. But Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights." *American Express Co. v.*

Italian Colors Restaurant, 133 S. Ct. 2304, 2309–10 (2013). It is not for class counsel to decide whether drivers should arbitrate their claims, and no court should presume that any individual driver (let alone *every* driver) would elect participation in a class action over arbitration. *Cf. Concepcion*, 563 U.S. at 344 (arbitration provides "efficient, streamlined procedures tailored to the type of dispute"); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1441 (9th Cir. 1984) (although class "counsel might want class members to participate in the litigation as named plaintiffs," "some class members might profit more from remaining inactive or opting out" of the class altogether).

* * *

The district court exceeded its authority under Rule 23(d) and violated both the First Amendment and the FAA. This Court should vacate its unlawful orders.

II. This Court Should Reject Plaintiffs' Cross-Appeal

Through their cross-appeals, Plaintiffs ask this Court to issue an even *broader* injunction than the one imposed by the district court, barring Uber from issuing *any* arbitration agreements to *anyone* while *any* putative class action is pending against the company. *See* O'Connor Opp. 44 ("a company such as Uber [should not be] permitted to distribute new arbitration agreements while a class case is pending"). But Plaintiffs cannot point to a single case in which a court has

taken such drastic measures, let alone where a court of appeals has held it was an *abuse of discretion* for a district court *not* to issue such a sweeping injunction.[10] As the district court correctly held, "[s]uch a broad remedy would conflict with the directive of *Gulf Oil Co.* that any limitation on communications be 'carefully drawn.'" ER-5. This Court should reject Plaintiffs' cross-appeals.

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[10] Plaintiffs cite a wide variety of cases in an attempt to support their argument, but these cases are entirely inapposite. *See*, *e.g.*, *Kleiner v. First Nat'l Bank of Atl.*, 751 F.2d 1193, 1202–03 (11th Cir. 1985) (limiting communications with class members after defendant bank embarked on a secret "telephone campaign" to coercively solicit members of the already certified class to opt out of class action *while the presiding judge was on vacation*, including by hiring hundreds of loan officers to contact class members "many of whom were dependent on the Bank for future financing"); *In re Currency Conversion Antitrust Litig.*, 361 F. Supp. 2d 237, 254 (S.D.N.Y. 2005) (refusing to enforce arbitration agreement instituted *after* action was filed because it did not advise credit cardholders that class action litigation was pending); *Guifi Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 512–13 (N.D. Cal. Sept. 29, 2010) (invalidating opt-out forms obtained during one-on-one meetings with managers during work hours where employer refused to provide copies of the forms to workers to take with them or to provide a translation in the workers' primary language); *Domingo*, 727 F.2d at 1441 (reversing order restricting communications imposed under Rule 23(d) because district court made "no specific findings" "before the restrictions were imposed that would justify them"); *Piekarski v. Amedisys Illinois, LLC*, 4 F. Supp. 3d 952 (N.D. Ill. 2013) (invalidating arbitration agreements drafted for the first time after court stayed action pending FLSA conditional certification); *Cnty. of Santa Clara v. Astra USA Inc.*, 2010 WL 2724512, at *6 (N.D. Cal. July 8, 2010) (requiring corrective action where defendant sent checks to putative class members with a letter explaining that acceptance of funds constituted a release of all future claims, but misrepresented value of those claims); *Balasanyan v. Nordstrom, Inc.*, 2012 WL 760566, at *3 (S.D. Cal. Mar. 8, 2012) (invalidating arbitration agreement containing no opt-out clause); *see also supra* nn. 3, 7, 8; *infra* n. 12.

Plaintiffs contend the district court "had grounds" to issue the sweeping injunction they seek. O'Connor Opp. 55. That is wrong, for all the reasons set forth above (*supra* Argument I). But it is also irrelevant; whether the district court *could have* issued a broader injunction is not the question before this Court. Rather, the question is whether the district court abused its discretion by not doing so. *See United States v. Tercero*, 640 F.2d 190, 197 (9th Cir. 1980) ("the test is not what this [C]ourt would have done under the same circumstances"). The answer to that question is plainly no.

Plaintiffs argue that the broad injunction they seek is necessary for three reasons. *First*, Plaintiffs argue that Uber's arbitration agreements are merely a "litigation tactic" designed to obtain "unknowing waivers" from putative class members, thereby frustrating the operation of Rule 23. FCRA Opp. 28; O'Connor Opp. 56. According to Plaintiffs, the arbitration provision was "buried" in Uber's licensing agreement. FCRA Opp. 6, 10, 17; O'Connor Opp. 11. But the December 2015 Agreement was saturated with notices and warnings regarding the arbitration provision—all of which were previously required and approved by the district court—including a bolded, capitalized, and over-sized message on the first page of the agreement advising drivers of the arbitration provision and their opportunity to opt out, and a bolded message in the arbitration agreement itself

providing the same information. As the district court described, "it would be hard to draft a more visually conspicuous opt-out clause even if the Court were to aid in the drafting process, which it actually did." ER-532–533. Indeed, by the time of the emergency injunction hearing, only one week after Uber rolled out the December 2015 Agreement, *thousands* of drivers had opted out of arbitration. *See* Opening Br. 18–19.[11]

Second, Plaintiffs argue that the district court should not allow "Uber to continue disseminating [any] agreements to putative class members" because the December 2015 Agreement followed a series of earlier arbitration agreements and because Uber distributed it only two days after the district court found the prior agreement to be unenforceable. O'Connor Opp. 20, 57–60; FCRA Opp. 39. But to the extent this series of events poses a problem at all (which it does not), it is a problem of Plaintiffs' (and the district court's) own making. As discussed above (*supra* Argument I), Uber has been trying to reach an enforceable arbitration agreement with drivers nationwide, as part of the routine licensing agreement that

[11] Plaintiffs speculate that the drivers who opted out were "likely aided by class counsel." FCRA Opp. 9; O'Connor Opp. 43. But again, Plaintiffs present no evidence to support this conjecture. Moreover, to the extent drivers consulted class counsel to discuss the opt-out provision, that would be evidence that the notices and warnings—which, by court order, instructed drivers to contact class counsel if they had questions and provided class counsel's contact information (ER-102)—were performing their intended function.

forms a core part of Uber's business, since before Plaintiffs filed any of these cases. Uber believes its very first arbitration agreement—the 2013 Agreement—was valid and enforceable, but Plaintiffs urged the district court to strike it down, and the district court did just that. Every arbitration agreement that Uber has issued since then has been a legitimate attempt to abide by the district court's orders and correct the purported deficiencies the court identified in the prior agreement. There is nothing improper or abusive about Uber trying to improve its agreements in response to court orders; indeed, under the logic of the district court's various orders (with which Uber disagrees), the changes have only made Uber's agreements *more* favorable to drivers, and *less* misleading and coercive. *See* Manual for Complex Litigation (Fourth) § 21.12 at 249 (2004) ("Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification, but may not give false, misleading, or intimidating information, conceal material information, or attempt to influence the decision about whether to request exclusion from a class certified under Rule 23(b)(3).").[12]

[12] Plaintiffs further contend that the December 2015 Agreement was misleading because it purportedly contained an inaccurate "description of the instant case." FCRA Opp. 35. But the language in the December 2015 Agreement is the precise language the district court had previously required after several rounds of editing.

Third, Plaintiffs contend that the December 2015 Agreement was coercive because drivers who opted out of arbitration would fear they were "antagonizing" Uber. FCRA Opp. 35. But, again, there is absolutely no evidence of this. Plaintiffs rely on a series of inapposite cases where arbitration agreements were invalidated because they were imposed on members of a conditionally certified class as an express, mandatory condition of continued employment. O'Connor Opp. 57–58.[13] Here, although drivers were required to accept the revised licensing

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If Uber had changed this language, it likely would have been deemed to be in violation of the earlier court order.

[13] *See Billingsley v. Citi Trends, Inc.*, 560 F. App'x 914, 919, 922 (11th Cir. 2014) (affirming decision to set aside employer's retroactive arbitration agreements targeting *only* members of the putative FLSA action because agreeing to arbitration was "a condition of continued employment" and employees "would be fired if they did not assent to the arbitration agreement," based on specific testimony that employees "felt intimidated by human resources representative" and explaining that courts have especially broad authority under FLSA due to their opt-in nature); *Espinoza v. Galardi S. Enters., Inc.*, 2015 WL 9592535, at *5 (S.D. Fla. Dec. 31, 2015) (setting aside arbitration agreements based on "clear" evidence that agreeing to arbitrate was a "condition of continued employment" pursuant to "broad and considerable" discretion courts have in FLSA cases); *Williams v. Securitas Sec. Servs. USA, Inc.*, 2011 WL 2713741, at *2–3 (E.D. Pa. July 13, 2011) (invalidating adhesive arbitration "agreements" in FLSA action where employees were not required to agree in order to become effective; rather employees were "deemed to have consented" and merely needed to sign the agreement to "acknowledge receipt" of it); *Zamboni v. Pepe W. 48th St. LLC*, 2013 WL 978935, at *1 (S.D.N.Y. Mar. 12, 2013) (extending opt-in period in FLSA action where evidentiary hearing revealed that employer intimidated employees to sign opt-out agreements without reading them during in-person meetings); *Jimenez v. Menzies Aviation, Inc.*, 2015 WL 4914727, at *(N.D. Cal. Aug. 17, 2015) (refusing to enforce arbitration agreement implemented after action was filed that was an

agreement in order to continue using the Uber app, they were *not* required to agree to arbitrate—they had a "meaningful" and "non-illusory" opt-out opportunity, as the district court found. ER-560. Thousands of drivers exercised that option without any coercion or intimidation. Opening Br. 13.

Finally, Plaintiffs contend that arbitration agreements containing class-action waivers are impermissible because, in Plaintiffs' view, they effectively turn "opt-out" class actions into "opt-in" class actions. FCRA Opp. 42, 48–49. There is, of course, no actual requirement to "opt in." Plaintiffs are referring to the need for drivers to opt *out* of arbitration and the class-action waiver in order to participate in class-action litigation. In any event, the Supreme Court and this Court have repeatedly enforced arbitration agreements containing class-action waivers as consistent with the FAA and due process. *See*, *e.g.*, *Italian Colors Rest.*, 133 S. Ct. at 2309 ("Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights"); *Concepcion*, 563 U.S. at 339; *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013) ("Section 2 of

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express condition of employment with no opt-out opportunity, but even then declining to restrict communications with new employees who were not class members); *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 749 (9th Cir. 2010), *judgment vacated on other grounds*, 132 S. Ct. 74 (2011) (affirming invalidation of opt outs obtained using "threats to employees' jobs, termination of an employee supporting the litigation, the posting of signs urging individuals not to tear the company apart").

the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, is the law of California and every other state").[14]

CONCLUSION

For the reasons set forth above and in Uber's Opening Brief, Uber respectfully requests that this Court (i) allow Uber to enforce the December 2015 Agreement as written vis-à-vis current and prospective drivers, excluding the *O'Connor* class members, (ii) lift the prior restraint requiring Uber to obtain district court approval before sending future arbitration agreements to drivers, and (iii) at a minimum, remove the district court's requirements that Uber send "corrective" notices to *prospective* drivers and include a "push-button" hyperlink out-out function. This Court should also reject Plaintiffs' request for an unprecedented anti-arbitration injunction that sweeps even more broadly than the district court's injunction.

[14] Plaintiffs again cite a variety of inapposite cases that hold Rule 23 prohibits "opt-in" classes or pre-certification "mandatory class-member questionnaires," but none of those cases equate an arbitration agreement (let alone an arbitration agreement with "reasonable" and "meaningful" opt-out mechanisms) to an opt-in class action. FCRA Br. 45–50.

Dated: March 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Court Rule 32-1 because it contains 4,622 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: March 31, 2016

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 31, 2016.

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

Dated: March 31, 2016 /s/ Theodore J. Boutrous, Jr.