Nos. 14-16078, 15-17420, 15-17422, 15-17475, 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, 16-15035, 16-15595

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. 14-16078, 15-17420, 15-17532, 16-15000, 16-15595 No. 3:13-cv-03826-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
HAKAN YUCESOY, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17422, 15-17534, 16-15001 No. 3:15-cv-00262-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
ABDUL MOHAMED, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	Nos. 15-17533, 16-15035 No. 3:14-cv-05200-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RICARDO DEL RIO, et al., Plaintiffs-Appellees, v. UBER TECHNOLOGIES, INC., et al., Defendants-Appellants.	No. 15-17475 No. 3:15-cv-03667-EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

APPELLANTS' OPENING BRIEF

JOSHUA S. LIPSHUTZ
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
Facsimile: 415.393.8306

THEODORE J. BOUTROUS, JR.
THEANE D. EVANGELIS
KEVIN J. RING-DOWELL
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Ave.
Los Angeles, CA 90071-3197
Telephone: 213.229.7000
Facsimile: 213.229.7520

Counsel for Defendants-Appellants Uber Technologies, Inc. and Rasier, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

TABLE OF AUTHORITIES *(continued)*

Page(s)

Statutes

INTRODUCTION

This consolidated brief addresses eleven interlocutory appeals arising out of four actions pending before the same district court, in which drivers who use Uber allege that they have been misclassified as independent contractors. The drivers seek to litigate class actions against Uber for the purpose of having themselves and all other drivers declared to be Uber's employees.

Throughout this litigation, the district court has issued a series of anti-arbitration and pro-class-certification orders that have wreaked havoc on Uber's relationships with drivers. The district court began by invalidating, then ordering Uber to rewrite—and then invalidating again—*millions* of arbitration agreements, which require drivers to arbitrate any disputes they may have with Uber on an individual basis. *But see Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016) (finding Uber's arbitration agreements to be valid and enforceable). Then, with the arbitration agreements cast aside, the district court certified a 240,000-person class action in *O'Connor*, ignoring vast differences between absent class members. With each order, the district court has encouraged as many drivers as possible to opt out of arbitration and join the class actions pending against Uber, all the while bending and breaking the requirements of Rule 23, the Federal Arbitration Act ("FAA"), and due process. This Court should reverse these incorrect rulings, decertify the class, and enforce the arbitration agreements.

- First, the district court declared Uber's original arbitration agreement an improper communication with putative class members in the *O'Connor* action, even though Uber issued that agreement before *O'Connor* was even filed. Relying on Rule 23(d), the court ordered Uber to rewrite the arbitration agreement to provide copious, improper warnings about arbitration and to provide existing and prospective drivers with the ability to opt out by email. In forcing Uber to rewrite its agreement, the district court ruled that arbitration would prevent "drivers from … benefitting from [a] class action[]" and would "adversely affect[]" their "substantive rights." 1ER196.

- Next, the court struck down both sets of arbitration agreements in the *O'Connor*, *Yucesoy*, *Mohamed*, and *Del Rio* actions—the original version that Uber wrote and the revised version that the district court took part in rewriting. 9ER1916–85. As this Court later made clear in an appeal arising from the *Mohamed* litigation, the district court's order invalidating the arbitration agreements relied on flawed reasoning and reached the wrong result—the district court should have enforced both agreements "according to [their] terms." *Mohamed*, 848 F.3d at 1209, 1214.

- Having disposed of the arbitration agreements, the district court then certified a class of more than 240,000 drivers in the *O'Connor* litigation, the vast majority of whom had voluntarily agreed to pursue their claims in bilateral

arbitration. The district court's class certification rulings also ignored intractable differences between drivers that render classwide adjudication of drivers' putative employment status impossible, the absence of any viable classwide damages methodology, and the inadequacies of the *O'Connor* named plaintiffs.

- Finally, the district court invoked Rule 23(d) a second time in *O'Connor*, *Yucesoy*, and *Del Rio* to enjoin Uber from enforcing a further revised arbitration agreement, which Uber had entered into with drivers in an attempt to assuage the district court's stated concerns about the earlier arbitration agreements. These orders prohibit Uber from enforcing the latest arbitration agreement until Uber emails drivers a cover letter with a one-click opt-out feature, enabling drivers to opt out before opening or reading the arbitration agreement. 1ER31–32.

These rulings violate the FAA and Rule 23, and they evidence the very "hostility to arbitration agreements" that the Supreme Court has denounced, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), by failing to "'give due regard … to the federal policy favoring arbitration,'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 471 (2015). By repeating the errors condemned in *Concepcion* and *Imburgia*, declining to enforce the parties' arbitration agreements, and certifying an improper class, the district court stripped Uber of its due process rights and violated the FAA, Rule 23, the Rules Enabling Act, and the First Amendment. This Court should reverse.

STATEMENT OF JURISDICTION

The district court has jurisdiction over *O'Connor*, *Yucesoy*, and *Mohamed* under 28 U.S.C. § 1332(d)(2) because the class or putative class in each action consists of more than 100 members, including one or more members with diverse citizenship, and each matter in controversy exceeds $5 million exclusive of interest and costs. Additionally, the district court has jurisdiction over *Mohamed* and *Del Rio* under 28 U.S.C. § 1331, because the *Mohamed* plaintiffs assert claims under 15 U.S.C. § 1681 and the *Del Rio* plaintiffs assert a claim under 29 U.S.C. § 201.

This Court has jurisdiction to hear Appeal Nos. 15-17420, 15-17422, and 15-17475 (the "Enforceability Appeals")—appeals that arise out of the *O'Connor*, *Yucesoy*, and *Del Rio* actions—under 9 U.S.C. § 16(a)(1)(C), because the district court denied Uber's motions to compel arbitration in *O'Connor* on December 9 and 10, 2015, 1ER71, 1ER55, in *Yucesoy* on December 9 and 22, 2015, 1ER103, 1ER49, and in *Del Rio* on December 16, 2015, 1ER50. Uber timely appealed in *O'Connor* on December 9 and 10, 2015, 4ER793, 4ER790, in *Yucesoy* on December 9 and 23, 2015, 4ER795, 3ER534, and in *Del Rio* on December 17, 2015, 3ER546.

This Court has jurisdiction to hear Appeal No. 14-16078 (the "2013 Rule 23(d) Appeal")—an appeal that arises out of the *O'Connor* action—under 28 U.S.C. §§ 1291 and 1292(a)(1), as well as the collateral order doctrine, because

the district court enjoined Uber on December 6, 2013, 1ER188, and denied reconsideration on May 2, 2014, 1ER172, and Uber timely appealed on June 2, 2014, 9ER2138. *Cobell v. Kempthorne*, 455 F.3d 317, 322–23 (D.C. Cir. 2006); *In re Coley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008).

This Court has jurisdiction to hear Appeal Nos. 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, and 16-15035 (the "2015 Rule 23(d) Appeals")—appeals that arise out of the *O'Connor*, *Yucesoy*, and *Mohamed* actions—under 28 U.S.C. §§ 1291 and 1292(a)(1), as well as the collateral order doctrine, because the district court issued injunctions on December 23, 2015, 1ER25, 1ER33, 1ER41, and January 19, 2016, 1ER1, 1ER9, 1ER17, and Uber timely appealed on December 28, 2015 and January 19, 2016, 3ER525, 2ER471, 3ER528, 2ER474, 3ER531, 2ER477. *Cobell*, 455 F.3d at 322–23; *Coley Press*, 518 F.3d at 1025.

This Court has jurisdiction to hear Appeal No. 16-15595 (the "Rule 23(f) Appeal")—an appeal that arises out of the *O'Connor* action—under 28 U.S.C. § 1292(e) and Rule 23(f). On December 23, 2015, Uber timely petitioned for permission to appeal, No. 15-80220, Dkt. 1, which this Court granted on April 5, 2016, *id.*, Dkt. 9.

STATEMENT OF ISSUES

1. The Enforceability Appeals (*O'Connor*, *Yucesoy*, *Del Rio*): Whether the district court erred by denying enforcement of the 2013 and 2014 arbitration agreements, which contain valid class waivers and enforceable delegation clauses, *see Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016), requiring an arbitrator—not a court—to resolve questions of arbitrability.

2. The 2013 Rule 23(d) Appeal (*O'Connor*) and the 2015 Rule 23(d) Appeals (*O'Connor*, *Yucesoy*, *Mohamed*): Whether the district court exceeded its authority under Rule 23(d) and the FAA, and violated the First Amendment, by imposing prior restraints on Uber's speech, compelling Uber to engage in undesired speech, and enjoining Uber from enforcing valid arbitration agreements, based on impermissible findings regarding the supposed advantages of class litigation compared to bilateral arbitration.

3. The Rule 23(f) Appeal (*O'Connor*): Whether the district court erred in granting class certification in *O'Connor*, where: (1) most drivers agreed to resolve their claims in bilateral arbitration, (2) individualized inquiries are needed to determine each driver's putative employment status, (3) plaintiffs improperly split drivers' expense claims and seek a remedy opposed by countless other drivers; and (4) plaintiffs failed to proffer a viable classwide damages methodology for their gratuities claim.

STATEMENT OF THE CASE

I. The Uber Application And 2013 Arbitration Agreement

Uber Technologies, Inc. ("Uber") developed a smartphone application that permits riders to arrange trips with independent transportation providers ("drivers"). 7ER1385. The relationships between Uber and drivers are governed by a licensing agreement, which Uber updates on occasion.[1] 7ER1386.

On July 23, 2013—before plaintiffs filed *any* of the actions in this consolidated appeal—Uber issued an updated licensing agreement containing an arbitration agreement (the "2013 Arbitration Agreement"). 7ER1387, 7ER1429–43. The 2013 Arbitration Agreement has a delegation clause requiring an arbitrator to resolve most arbitrability questions, and contains class, collective, and representative action waivers. 7ER1439–43. It allows drivers to opt out of arbitration by delivering a signed, dated opt-out notice to Uber within 30 days of acceptance, by hand delivery or overnight mail. 7ER1442.

II. The 2013 Rule 23(d) Orders And 2014 Arbitration Agreement

On August 16, 2013, two drivers filed *O'Connor*, alleging that Uber misclassified drivers as independent contractors and, consequently, violated

[1] Drivers who use the uberX product contract with Uber's subsidiary, Rasier, LLC ("Rasier"), and accept a service agreement materially similar to the licensing agreement. 4ER938. References to Uber and the licensing agreement shall also mean Rasier and the Rasier service agreement, respectively.

California's gratuities and expense reimbursement laws. 10ER2191. Five days after filing suit, the *O'Connor* plaintiffs filed a Rule 23(d) motion, asking the court to: (1) declare the 2013 Arbitration Agreement unconscionable; or, alternatively, (2) require Uber to notify drivers about *O'Connor* and afford drivers a renewed opt-out opportunity. 10ER2172.

The district court granted plaintiffs' alternative request (the "2013 Rule 23(d) Orders"). 1ER188, 1ER172, 9ER2143. In its orders, the district court held that the 2013 Arbitration Agreement threatened to "adversely affect[] drivers' rights" by preventing them from "benefitting from [the] class action[.]" 1ER196. Accordingly, the court ordered Uber to: (1) give "clear notice" of the Arbitration Agreement, (2) bold the Agreement's opt-out clauses; (3) provide additional opt-out mechanisms (via email and U.S. mail); and (4) furnish drivers the contact information for the *O'Connor* plaintiffs' counsel. 1ER198, 9ER2146–48. The court even redlined Uber's agreement itself. 9ER2143, 9ER2149, 9ER2151, 9ER2153, 9ER2093, 9ER2094, 9ER2096, 9ER2113, 9ER2117, 9ER2119. It also prohibited Uber from distributing or enforcing *any* Arbitration Agreement until Uber complied with these requirements. 1ER199, 1ER187.

On June 21, 2014, Uber issued an updated licensing agreement with an Arbitration Agreement that satisfied the district court's requirements (the "2014 Arbitration Agreement"). 7ER1389, 7ER1511–27, 7ER1534–50. All drivers

received a renewed opt-out opportunity, which hundreds of drivers invoked. 7ER1526–27, 9ER1987.[2]

III. The *Mohamed* Order Denying Uber's Motions To Compel Arbitration

In November 2014, two former drivers filed putative nationwide class claims against Uber alleging that Uber violated state and federal background check laws (the *Mohamed* litigation). 9ER2075, 9ER2058. Uber moved to compel arbitration under both the 2013 and 2014 Arbitration Agreements, which the district court denied. 9ER1916–85. In its order, the court held that it—not the arbitrator—had authority to evaluate the enforceability of the 2013 and 2014 Arbitration Agreements, and that both Agreements were unconscionable. 9ER1916–85.

IV. The *O'Connor* Class Certification Proceedings

In April 2015, the *O'Connor* plaintiffs sought class certification of their two claims. 9ER1992. In an effort to establish predominance for their expense claim, plaintiffs disclaimed any intention of seeking certification for drivers' actual out-of-pocket expenses, and instead sought certification only for a narrow subset of expenses encapsulated within the Internal Revenue Service's mileage reimbursement formula ("IRS formula"). 5ER1232–33, 4ER1037, 1ER130–31.

---

[2] Uber revised its licensing agreement again in November 2014 and April 2015. 5ER1046, 7ER1552, 7ER1600. The Arbitration Agreements in those agreements are materially identical to the 2014 Arbitration Agreement; therefore, they shall also be referred to as the 2014 Arbitration Agreement.

In opposition, Uber submitted more than 400 declarations from drivers explaining that they (unlike the *O'Connor* plaintiffs) view themselves as and wish to remain independent contractors. *See, e.g.*, 6ER1349–52 ("[E]ven if Uber wanted to make me an employee, I would not want to be one."); 6ER1263–65 ("I wouldn't be interested if I had to be [an] employee. I'd shake Uber's hand and say you guys are great, but I'm not on board."). Drivers also described various expenses they incur while driving that are *not* subsumed within the IRS formula, including bridge tolls, passenger amenities, and auto improvements. *See infra* Part II(C)(2)(b).

On September 1, 2015, the district court granted class certification, in part. 1ER104–71. The court rejected plaintiffs' efforts to certify a "mega-class" of all California drivers due to "tremendous (and likely material) variance" regarding drivers' putative employment classification. 1ER144–48. The court further found that individualized inquiries predominate for drivers subject to the 2014 Arbitration Agreement because (the court believed) enforceability of that Agreement depended on each "driver's economic circumstances." 1ER163–67. Finally, the court declined to certify an expense class, finding that plaintiffs' waiver of drivers' expenses raised "questions" about plaintiffs' adequacy. 1ER129–32.

Nevertheless, the court certified a gratuities class consisting of drivers who (1) signed up with and were paid directly by Uber or a subsidiary, and (2) were not bound by the 2014 Arbitration Agreement. 1ER170. The court found that, within this group, common questions predominated regarding drivers' putative employment classification. 1ER32–59. The court also found that plaintiffs' gratuities claim damages were amenable to class adjudication because a jury could use its "common experience" to determine what an "average customer" might leave as a gratuity for a ride, and apply that amount to every ride during the class period. 1ER159–63. This class included drivers who accepted the 2013 Arbitration Agreement, which the court believed was unconscionable for *all* drivers. 1ER163–67.

After supplemental briefing, the district court reversed its decision excluding drivers who were subject to the 2014 Arbitration Agreement. 1ER79–94. In its revised analysis, the court found that the 2014 Arbitration Agreement contained an unenforceable and non-severable waiver of representative claims under the Private Attorneys' General Act ("PAGA"), which rendered the Agreement invalid for all drivers. 1ER79–94. The court also reversed its decision denying certification for plaintiffs' expense claim, finding that plaintiffs were adequate because they provided "some evidence" suggesting that IRS formula expenses constituted a "majority" of drivers' expenses. 1ER94–101. This "evidence" consisted of six

driver declarations that, according to the court, "lack[ed] statistical significance." 1ER97–98.

V. The District Court's Subsequent Orders Denying Arbitration

Based on its orders invalidating the Arbitration Agreements, the district court denied several motions to compel arbitration that Uber filed regarding the *O'Connor* absent class members, 1ER55, and the named plaintiffs in two other putative class actions, *Del Rio* and *Yucesoy*, 1ER50, 1ER103, 1ER49.

VI. The December 2015 Rule 23(d) Orders

After the district court invalidated the 2013 and 2014 Arbitration Agreements, Uber issued an updated Arbitration Agreement (the "December 2015 Arbitration Agreement") that was identical to the 2014 Arbitration Agreement—containing the same warnings and opt-out clauses the district court previously required, *supra* Part II—except it revised or eliminated the provisions the district court believed were invalid. 3ER565–66, 3ER578, 3ER602, 3ER624. Uber informed the district court it would not enforce this Agreement vis-à-vis the *O'Connor* class members—the certified claims would continue to be governed by the 2013 and 2014 Arbitration Agreements, the enforceability of which was on appeal before this Court. 3ER694–96.

On December 11 and 15, 2015, the *O'Connor*, *Yucesoy*, and *Mohamed* plaintiffs filed Rule 23(d) motions seeking to enjoin enforcement of the December

2015 Arbitration Agreement, which the district court largely granted. 4ER765, 1ER25, 1ER1, 4ER777, 3ER552. In its orders (the "2015 Rule 23(d) Orders"), the court acknowledged it had previously "permitted the issuance" of a virtually identical Agreement—i.e., the 2014 Arbitration Agreement—but found that drivers presented with the December 2015 Arbitration Agreement "may" be confused by the new Agreement. 1ER27–28. The district court therefore enjoined Uber from enforcing the December 2015 Arbitration Agreement in any case pending before the district court, and ordered Uber to amend the December 2015 Arbitration Agreement by adding—(1) summaries of *all* class and putative class actions pending against Uber in the Northern District of California, (2) contact information for *all* plaintiffs' counsel, and (3) an updated description of the *O'Connor* case. 1ER30–32. The district court also directed Uber to send drivers a cover letter with a new, "easily-accessible" opt-out mechanism—a one-click hyperlink to a pre-addressed email stating, "My name is _____. I opt out of the Arbitration Provision in the driver-partner agreement," which drivers could click and invoke before ever viewing the Arbitration Agreement.[3] 1ER1, 1ER8.

[3] On August 18, 2016, the district court lifted the 2015 Rule 23(d) Orders on a going-forward basis and found that Uber may enforce the December 2015 Arbitration Agreement for drivers who accepted that Agreement on or after August 18, 2016; however, the court held that Uber may *not* enforce the December 2015 Arbitration Agreement for drivers who accepted the Agreement prior to August 18, 2016. 2ER318.

VII. Subsequent Appellate Proceedings

On September 7, 2016, this Court issued an opinion in *Mohamed* reversing the district court's orders invalidating the 2013 and 2014 Arbitration Agreements. *Mohamed v. Uber Techs., Inc.*, 836 F.3d 1102 (9th Cir. 2016). This Court severed the PAGA waiver from the 2013 Arbitration Agreement[4] and found that disputes regarding the PAGA waiver in the 2014 Arbitration Agreement must be arbitrated. *Id.* at 1112–14. It also upheld the delegation clauses in both the 2013 and 2014 Arbitration Agreements, finding that drivers' opt-out rights preclude a finding of unconscionability. *Id.* at 1112. On December 21, 2016, the Court denied en banc rehearing and issued an amended opinion, 848 F.3d 1201 (9th Cir. 2016).[5]

ARGUMENT

I. Enforceability Appeals: This Court Should Reverse The Orders Denying Uber's Motions To Compel Arbitration

A. Standard Of Review

An order denying a motion to compel arbitration is reviewed *de novo*, *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1057 (9th Cir. 2013) (en banc),

---

[4] The 2013 Arbitration Agreement contains a carve-out to the delegation clauses requiring a court to decide the validity and severability of the PAGA waiver. *Mohamed*, 848 F.3d at 1208. In *Mohamed*, this Court held that the 2013 Arbitration Agreement's PAGA waiver was invalid, yet severable. *Id*. at 1206.

[5] Since *Mohamed*, eighteen other federal courts have *unanimously* enforced the delegation clauses in the 2013 and 2014 Arbitration Agreements. *See* No. 15-17420, Dkt. 82, 86, 88, and 91 (listing cases).

and "'with a healthy regard for the federal policy favoring arbitration,'" *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 936 (9th Cir. 2001) (citation omitted).

B. This Court Already Held That The Delegation Clauses In The Arbitration Agreements Are Enforceable

Less than six months ago, this Court issued a unanimous decision upholding the delegation clauses in the Arbitration Agreements at issue here (i.e., in the 2013 and 2014 Arbitration Agreements). *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016). In its decision, the Court held that "[t]he delegation provisions clearly and unmistakably delegate[] question[s] of arbitrability" and must "be enforced according to [their] terms." *Id.* at 1209, 1214. That decision is binding, *see Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014), and—on this basis alone—the Court should resolve the Enforceability Appeals by holding that the delegation provisions in the 2013 and 2014 Arbitration Agreements are enforceable, severing the PAGA waiver from the 2013 Arbitration Agreement, and reversing and remanding with instructions ordering that all remaining disputes be resolved by the arbitrator.

C. Plaintiffs' Argument That The Class Waiver Violates The NLRA Is Waived And Meritless

Notwithstanding *Mohamed*, the *O'Connor* and *Yucesoy* plaintiffs have argued that this Court may still affirm the orders denying arbitration because the Arbitration Agreements contain a class waiver that supposedly violates drivers'

collective action rights under the National Labor Relations Act ("NLRA"). No. 15-17420, Dkt. 45. With respect to the 2014 Arbitration Agreement, however, the validity of the class waiver is an issue that has been reserved for the arbitrator in the first instance. *See Mohamed*, 848 F.3d at 1209, 1214. In any event, Plaintiffs' argument is squarely foreclosed by circuit precedent: In *Johnmohammadi v. Bloomingdale's, Inc.*, this Court unambiguously held that a class waiver does *not* violate the NLRA where an employee has a right to opt out of the class waiver.[6] 755 F.3d 1072, 1075 (9th Cir. 2014); *id.* (an individual who "freely elect[s] to arbitrate employment-related disputes" "cannot claim that enforcement of that agreement violates … the NLRA.").

Plaintiffs implore this Court to overrule this precedent and grant *Chevron* deference to a vacated decision of the National Labor Relations Board ("NLRB," or "Board")—*On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231 (Aug. 27, 2015), *overruled in* 2016 WL 3685206 (5th Cir. 2016)—in which the Board found that employment-related arbitration agreements containing class waivers violate the NLRA, even if they contain opt-outs. For several reasons, this Court should reject plaintiffs' invitation.

---

[6] As discussed *infra* Part I(C)(2), plaintiffs have not demonstrated that drivers who use the Uber app are Uber's employees, such that they are even covered by the NLRA.

1. Plaintiffs Waived Their NLRA Argument

As an initial matter, plaintiffs waived their argument by failing to present it to the district court. *See Lubow v. U.S. Dep't of State*, 783 F.3d 877, 884 (D.C. Cir. 2015) ("[A] party [] can forfeit … [*Chevron*] deference by failing to raise it."); *Dutcher v. Matheson*, 840 F.3d 1183, 1203 (10th Cir. 2016) (plaintiffs waived *Chevron* deference argument). To be sure, plaintiffs argued that class waivers can, under certain circumstances, violate the NLRA. 4ER929–32. However, they did *not* address the relevance of the Agreements' opt-out provisions, argue that *On Assignment* deserves *Chevron* deference, or suggest that *Johnmohammadi* should be overruled—the fundamental issues they ask this Court to address now.

Alternatively, the Court may resolve plaintiffs' argument by concluding that they are judicially estopped from raising it. Indeed, plaintiffs' counsel recently initiated several arbitration proceedings against Uber on behalf of drivers in the *O'Connor* class and *Yucesoy* putative class regarding the claims at issue in those cases. 2ER208 ("Plaintiffs' counsel has begun bringing individual arbitrations against Uber"). By enforcing and benefitting from the Arbitration Agreements, plaintiffs are judicially estopped from taking the exact *opposite* position here, and claiming that they are *not* subject to enforceable Arbitration Agreements. *See Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935–36 (9th Cir. 2011) (applying

estoppel where plaintiffs took "a contradictory and [] confusing array of positions" regarding whether they were subject to an arbitration agreement).

2. The NLRA Does Not Apply To Drivers

This Court also should reject plaintiffs' NLRA argument because plaintiffs have not demonstrated that drivers who use the Uber app are Uber's employees, rather than independent contractors that fall outside of the NLRA's coverage. *See* 29 U.S.C. § 152(3). In fact, the parties' licensing agreements state they are "not [] employment agreement[s]" and do not "create an employment relationship[] between [Uber] and [drivers]," and that drivers are "independent contractors." *See, e.g.*, 7ER1518, 7ER1564–65; *see also, e.g.*, 7ER1555 (Uber "does not, and shall not be deemed to, direct or control [drivers]"). Consistent with these provisions, courts in California and elsewhere have held that drivers who use the Uber app are independent contractors. *Uber Techs., Inc. v. Eisenberg*, 2017 WL 1418695, at *1 (Cal. Super. Ct. Feb. 21, 2017) (affirming finding that driver is independent contractor under California law); *McGillis v. Dep't Econ. Opp.*, 210 So. 3d 220 (2017) (same, under Florida law).

3. The Class Waiver Does Not Violate The NLRA Because Drivers Have An Opt-Out Right

a. The Court Should Follow *Johnmohammadi*

If the Court reaches the merits of plaintiffs' NLRA argument, it should follow its own precedent because "[a] court's prior judicial construction of a

statute trumps an agency construction … [whenever] the prior court decision … follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *see also United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841–44 (2012) (plurality). Because *Johnmohammadi*'s construction of the NLRA follows from the statute's plain language, this Court's precedent defeats any contrary Board interpretation.

Indeed, in *Johnmohammadi*, this Court "*quickly dismiss[ed]* any notion" that a defendant who enforces a voluntary class waiver "coerce[s] [a plaintiff] into waiving her right to file a class action." 755 F.3d at 1075 (emphasis added). Under such circumstances, where employees have the "option" to reject bilateral arbitration, "[t]here [is] *no basis* for concluding that [a defendant] coerce[s] [plaintiff] into waiving her right to file a class action." *Id.* (emphasis added). Nor is there "*any basis* for concluding that [defendant] interfere[s] with or restrain[s]" an employee. *Id.* (emphasis added). Thus, there is no violation where a "[defendant] merely offer[s] [plaintiff] a choice: resolve future employment-related disputes in court, in which case she would be free to pursue her claims on a collective basis; or resolve such disputes through arbitration" on an individual basis. *Id.* at 1076.

Notably, *Johnmohammadi* did not resort to statutory interpretation techniques suggesting ambiguity in the application of the NLRA to voluntary arbitration agreements. *In re HP Inkjet Printer Litig.,* 716 F.3d 1173, 1180 (9th Cir. 2013) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). On the contrary, this Court's singular focus on the NLRA's text—which prohibits only conduct that "interfere[s] with, restrain[s], or coerce[s]" one's rights, 29 U.S.C. § 158(a)(1)—confirms "there is 'no gap for the agency to fill,'" "'no room for agency discretion,'" and no basis for this Court to overrule *Johnmohammadi*. *Home Concrete*, 132 S. Ct. at 1843 (citations omitted).

Moreover, this Court reaffirmed *Johnmohammadi* just last year in *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 983 n.4 (9th Cir. 2016), after the NLRB issued *On Assignment* and with the benefit of briefing from the parties—and the NLRB, participating as *amicus curiae*—regarding *On Assignment*. No. 13-16599, Dkt. 37 at 1 (discussing *On Assignment*); *id.*, Dkt. 52 at 10–11 n.6 (same); *see also Lamour v. Uber Techs., Inc.*, 2017 WL 878712, at *12 (S.D. Fla. Mar. 1, 2017) (finding that *Morris* "reject[ed] the [NLRB's] analysis").[7] This Court's reaffirmation of

[7] In *Morris*, this Court held that class waivers in *mandatory* employment agreements violate the NLRA. 834 F.3d at 981–90. Uber submits this holding was erroneous for the reasons stated in the *Morris* dissent. The Supreme Court recently granted certiorari to resolve this issue, *see* No. 16-300, and Uber preserves its argument in the event the Supreme Court reverses.

Johnmohammadi—after, and with knowledge of, *On Assignment*—is dispositive and binding on this panel.

b. The NLRB's Interpretation Of The NLRA Is Unreasonable

Alternatively, this Court may reject plaintiffs' argument because *On Assignment* is an unreasonable interpretation of the NLRA. *See NLRB v. Health Care & Ret. Corp of Am.*, 511 U.S. 571, 576 (1994) (declining to apply NLRB rule that was not "rational and consistent" with the NLRA). In *On Assignment*, the NLRB found that voluntary arbitration agreements with class waivers violate the NLRA for two reasons—(1) arbitration agreements with opt-outs are "mandatory," not voluntary, because signatories who want to opt out must "affirmatively act," which supposedly "reveal[s] their sentiments" regarding collective action; and (2) individuals may *never* prospectively waive their ability to participate in class actions, even if they act voluntarily. 362 NLRB No. 189, at 1–7. These holdings are unreasonable because they contravene the FAA and misinterpret the NLRA.

i. *On Assignment* Violates The FAA

"The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (citations omitted). This includes class waiver provisions, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013), which are not only enforceable, but desirable: "'In bilateral arbitration,

parties … realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,'" *Concepcion*, 563 U.S. at 348 (citation omitted).

On Assignment impermissibly prevents employees from realizing any of these benefits, and ignores the Supreme Court's admonition that employees—like all other persons—may enter into FAA-compliant agreements. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). The Board's "single-minded[]" focus on the NLRA "ignore[s] other and equally important Congressional objectives," *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942), and unreasonably "trench[es] upon federal statutes and policies unrelated to the NLRA," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002)—namely, the FAA.[8]

In short, "where the policies of the [NLRA] conflict with another federal statute, the Board cannot ignore the other statute," and must interpret the NLRA "in a manner that minimizes the impact of [the Board's] actions on the policies of the other statute." *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 153 (D.C. Cir. 2003). Here, such an "accommodation of the NLRA and the FAA would require

[8] The Board "has no special competence or experience in interpreting the [FAA]," *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); therefore, this Court "do[es] not owe deference to [the Board's] interpretation" of the FAA, or its attempts to "resolve[] a conflict" between the FAA and the NLRA, *Assoc. of Civilian Technicians v. FLRA*, 200 F.3d 590, 592 (9th Cir. 2000).

[a] finding that … a [voluntary class] waiver does not violate the [NLRA]." 362 NLRB No. 189, at 16 (Member Johnson, dissenting). Because *On Assignment* fails to engage in this important accommodation of interests, it is unreasonable.

ii. *On Assignment* Misinterprets The NLRA

On Assignment is also undeserving of *Chevron* deference because its interpretation of the NLRA itself is unreasonable.

A. In *On Assignment*, the Board concluded that arbitration agreements with opt-outs are "mandatory" because signatories must "take affirmative steps" to opt out that purportedly "reveal their sentiments" regarding collective action. 362 NLRB No. 189, at 3–7. Like its interpretation of the FAA, these findings are entitled to no deference because the NLRB "is neither the sole nor the primary source of authority" regarding opt-out rights and contract formation issues. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202–03 (1991). *Id.* Rather, "courts are … the principal sources of contract interpretation" and formation. *Id.* And, unlike the NLRB, courts have roundly concluded that arbitration agreements with opt-out provisions are voluntary. *See, e.g.*, *Johnmohammadi*, 755 F.3d at 1075–76; *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999).

On Assignment is also wrong in suggesting that an opt-out "interferes" with one's rights simply because an individual must "take affirmative steps" to opt out. 362 NLRB No. 189, at 4. As the *On Assignment* dissent explained, affirmative

compliance with "deadlines [is] part and parcel of administrative procedure under the NLRA" and many other federal statutes. *Id.*, at 12 (Member Johnson, dissenting). For example, employees must take affirmative steps to "opt in" to collective actions under the Fair Labor Standards Act. *See* 29 U.S.C. § 216(b). Yet no one would plausibly argue that these procedures violate the NLRA.

Also incorrect is *On Assignment*'s suggestion that an arbitration agreement with an opt-out forces a signatory to "make an observable choice" about collective action that "pressures" signatories. 362 NLRB No. 189, at 5, 13. An individual might opt out for reasons that have nothing to do with her view of collective action—such as a desire to have her claims heard by a jury, or dissatisfaction with the arbitration agreement's confidentiality, discovery, or remedial provisions. Thus, opting out reveals *nothing* about one's collective action views. Nor is there reason to believe that any driver *here* felt pressure. Plaintiffs certainly did not, given that many of them (and, at minimum, hundreds of other drivers) opted out. 9ER1987. And Uber advised all drivers that "[a]rbitration [was] not a mandatory condition of [their] contractual relationship" and drivers "will not be subject to retaliation" if they "opt-out." *See, e.g.*, 7ER1442.

B. The NLRA guarantees employees not only the right "to engage in [] concerted activity," but also "'the right to refrain from any or all' § 7 activities." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008) (quoting 29 U.S.C.

§ 157). If this "right to refrain" is to have any meaning, it must, at minimum, guarantee employees a right to choose *for themselves* whether to accept a class waiver. *On Assignment*, however, "operates in reverse—not to *protect* employees' right to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right to *choose* …." *Bloomingdales, Inc.*, 363 NLRB No. 172, at 8 n.9 (2016) (Member Miscimarra, dissenting). For this reason, too, *On Assignment* is unreasonable.[9]

* * *

On Assignment contravenes the Congressional goals embodied by the FAA and the NLRA. Furthermore, this Court has repudiated *On Assignment*'s flawed rationale both before (in *Johnmohammadi*) and after (in *Morris*) the Board issued its vacated decision. It should do so once again here.

D. Plaintiffs' Argument That The Named Plaintiffs "Constructively Opted Out" All Absent Class Members Is Waived And Meritless

Finally, the *O'Connor* and *Yucesoy* plaintiffs recently argued—for the first time—that this Court may affirm the orders denying arbitration, irrespective of the validity of the Arbitration Agreements. No. 15-17420, Dkt. 90-1 at 1. According to plaintiffs' latest theory, the Arbitration Agreements are "not actually relevant"

[9] The NLRB's categorical prohibition against class waivers is also unreasonable because Section 9(a) of the NLRA guarantees each "individual employee" the right, "at any time," to "have [her] grievances adjusted." 29 U.S.C. § 159(a).

because the mere filing of a putative class action lawsuit purportedly opts *all* absent class members out of arbitration. *Id.* Needless to say, no federal court has adopted such an outlandish theory; plaintiffs rely entirely on an inapposite Georgia case interpreting Georgia contract law, *Bickerstaff v. Suntrust Bank*, 299 Ga. 459 (2016). This Court should reject plaintiffs' argument for several reasons.

1. Plaintiffs Waived Their "Constructive Opt Out" Argument

As an initial matter, plaintiffs waived their argument because they did not present it to the district court. *See* No. 15-17420, Dkt. 89 at 6 (conceding that plaintiffs did "not previously raise[] this argument below to the District Court."); 2ER201–02 ("THE COURT: And have you raised this issue? …. MS. LISS-RIORDAN: No …. [I]t hasn't been presented anywhere."); *see also In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014). Indeed, when plaintiffs asserted this argument just a few short weeks ago, the district court asked them: "Why didn't you raise this issue? It seems very odd …." 2ER204.

Plaintiffs also waived their "constructive opt out" argument because they failed to raise it in any of the *four* merits briefs they filed in these appeals. *See* No. 15-17420, Dkt. 90-1 at 7 ("Plaintiffs recognize that the issue was not raised in their appellate brief[s]"); *see also Mohamed*, 848 F.3d at 1212 n.6 (9th Cir. 2016).

Finally, plaintiffs made numerous judicial admissions that foreclose their argument. *See United States v. Crawford*, 372 F.3d 1048, 1055 (9th Cir. 2004) (en

banc). They conceded, for instance, that the "procedure to opt-out of arbitration requires the driver to send, by hand or overnight delivery, a signed, written statement" to Uber. 10ER2178. They acknowledged that "a couple hundred [drivers] opted out," *not* the entire absent class. No. 15-17420, Dkt. 45 at 17 n.9. And they admitted that the Arbitration Agreements will "gut the certified class"—an outcome that would not be possible if the entire absent class had opted out of arbitration. 2ER332; 10ER2181–82 ("[T]he arbitration provision will, without a doubt, … prevent[] the ability of class members to participate in litigation.").

2. Plaintiffs' "Constructive Opt Out" Argument Violates The FAA, Rule 23, The Rules Enabling Act, And California Law

This Court may also dispose of plaintiffs' "constructive opt out" argument because it violates the FAA. Indeed, plaintiffs' argument disregards the FAA's cardinal command that courts must "'rigorously enforce' arbitration agreements according to their terms, … including terms that 'specify *with whom* the parties choose to arbitrate,'" *Italian Colors*, 133 S. Ct. at 2309 (citation omitted), as well as class waivers, *Concepcion*, 563 U.S. at 348. In this case, the Arbitration Agreements contain class waivers and specify the sole method by which a driver may opt out—by sending a "dated and signed" opt-out within 30 days of acceptance. 7ER1526–27; *see also* 7ER1442. If the mere filing of a class action

could nullify class waivers, then much of the Supreme Court's FAA jurisprudence—including *Concepcion*—would be a dead letter.

Notably, *Bickerstaff*—the sole case on which plaintiffs rely—is a Georgia decision interpreting Georgia contract law, not the FAA. In fact:

> The Federal Arbitration Act ('FAA') is not discussed in the [*Bickerstaff*] opinion for a simple reason—[the defendant] did not timely raise the issue …. [The defendant] briefed *only* state-law issues. [The defendant] did not even mention the FAA, nor did it in any way discuss preemption or hostility to arbitration.

Response to Supplemental Brief of Petitioner, 2016 WL 6994886 at *2 (Nov. 23, 2016). Thus, *Bickerstaff* is irrelevant. *See Reinkemeyer v. SAFECO Ins. Co. of Am.*, 166 F.3d 982, 984 (9th Cir. 1999) (courts may "disregard[] state court interpretations of state law … [that] violate federal law.").

Plaintiffs' argument—that a named plaintiff may opt an entire absent putative class out of arbitration the moment she files her lawsuit—also violates Rule 23. *See Standard Fire Ins. Co. v. Knowles,* 133 S. Ct. 1345, 1349 (2013) (a named plaintiff "cannot legally bind members of the proposed class before the class is certified"). It violates the Rules Enabling Act as well. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right'"). And it violates California law. *See, e.g.*, Cal. Civ. Code § 1638 ("The language of a

contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

* * *

For all of these reasons, this Court should vacate all of the district court's orders denying Uber's motions to compel arbitration, and remand with directions that the district court compel individual arbitration pursuant to: (1) the 2013 Arbitration Agreement, for *Yucesoy* plaintiffs Yucesoy and Mahammad and *Del Rio* plaintiff Sagebian; and (2) the 2014 Arbitration Agreement, for *Yucesoy* plaintiffs Sanchez and Morris and *Del Rio* plaintiff Del Rio. As discussed below, *see infra* Part III, the Court should reverse class certification in *O'Connor* entirely; however, if any class remains certified in *O'Connor*, the Court should remand with directions that the district court compel individual arbitration of any absent class members in *O'Connor* who are subject to the 2013 or 2014 Arbitration Agreements.

II. Rule 23(d) Appeals: This Court Should Reverse The Rule 23(d) Orders

Over the past three and a half years, the Rule 23(d) Orders have prevented Uber from entering into its preferred Arbitration Agreement with drivers—forcing Uber to offer an Arbitration Agreement of the district court's choosing. These Orders, each of which added layer upon layer of unnecessary warnings to the Arbitration Agreements, created ever-enhanced opt-out mechanisms, and afforded

drivers one opt-out opportunity after another, lack a "clear record and specific findings" showing that they were ever needed in the first place. *Gulf Oil v. Bernard*, 452 U.S. 89, 100 (1981). And they have come at great cost to Uber, by altering the nature of Uber's contractual relationships with drivers, compelling undesired speech from Uber, and imposing a "presumptively invalid" prior restraint on Uber, in violation of the FAA and the First Amendment. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2008).

A. Standards Of Review

Rule 23(d) vests courts with authority to "exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil*, 452 U.S. at 100. This authority "is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules" and the First Amendment. *Id.* Therefore, a Rule 23(d) order must "be based on a clear record and specific findings that reflect a weighing of the need for [the] limitation and the potential interference with the rights of the parties." *Id.* at 101. Moreover, it must be "carefully drawn" to "limit[] speech as little as possible" and to avoid "serious restraints on expression …." *Id.* at 102, 104.

This Court reviews orders under Rule 23(d) for abuse of discretion, *Gulf Oil*, 452 U.S. at 100–01, and evaluates issues of law *de novo*, *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th Cir. 2011).

B. This Court Should Reverse The 2013 Rule 23(d) Orders

1. The 2013 Rule 23(d) Orders Violate Rule 23(d)

a. The District Court Had No Basis For Invoking Rule 23(d)

As an initial matter, this Court should reverse the 2013 Rule 23(d) Orders—Orders that require Uber to (1) give "clear notice" of the Arbitration Agreements; (2) bold all contractual opt-out provisions; (3) provide U.S. mail and email opt-out mechanisms; and (4) provide drivers the contact information for *O'Connor* plaintiffs' counsel—because the district court had no justification for invoking Rule 23(d) in the first place. This Court need not take Uber's word for it—the *O'Connor* plaintiffs themselves recently conceded that the 2013 Rule 23(d) Orders were "superfluous and unnecessary." No. 14-16078, Dkt. 89 at 2.

Indeed, the district court reasoned that the 2013 Rule 23(d) Orders were necessary because the 2013 Arbitration Agreement was not "conspicuous" enough. 1ER196. Not so—the 2013 Arbitration Agreement constitutes a third of the entire licensing agreement and is set apart in a standalone section by a bolded, underlined heading. 7ER1439–43; *see Kilgore v. KeyBank Nat. Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc) ("Nor was the arbitration clause buried in fine print in the Note, but was instead in its own section, clearly labeled, in boldface."). In any event, special labeling requirements that apply only to arbitration agreements

violate the FAA. *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996); *Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 914 (2015).

Also incorrect is the district court's finding that the opt-out right in the 2013 Arbitration Agreement was "illusory." 9ER1940, 1ER197–98. As *Mohamed* held, the opt-out "promise was not illusory" in the 2013 Arbitration Agreement. 848 F.3d at 1211.

Finally, the district court reasoned that the 2013 Rule 23(d) Orders were necessary because the court had "[s]uspicion[s]" that Uber desired to use arbitration to "thwart" plaintiffs' class claims. 1ER194. That justification is unsupported by a shred of evidence; in fact, Uber issued its Arbitration Agreement *before* plaintiffs filed these cases. 7ER1387. And, in any event, there is nothing improper about a defendant seeking to minimize the burden and expense of class litigation through arbitration. *See infra* Part II(B)(2).

b. The District Court Did Not Carefully Draw Its Orders To Limit Speech As Little As Possible

Alternatively, this Court may reverse the Orders because they are not "carefully drawn" to limit Uber's speech as "little as possible." *Gulf Oil*, 452 U.S. at 102. On the contrary, the district court did not discuss the effects the Orders would have on Uber's rights; instead, it matter-of-factly stated that the Orders "balance[d] the interests of all parties involved consistent with *Gulf Oil*." 1ER197.

Such a conclusory statement is insufficient to justify a Rule 23(d) order. *See Domingo v. New England Fish Co.*, 727 F.2d 1429, 1439–40 (9th Cir. 1984) (reversing Rule 23(d) order for failure to "make the specific findings required by *Gulf Oil*"); *A.J. by L.B. v. Kierst*, 56 F.3d 849, 857 (8th Cir. 1995) (vacating Rule 23(d) order that "made no discernible effort to weigh the [defendant's] interest").

The district court's statement is not only unsupported, but also wrong. The Orders significantly altered the contractual relationships between Uber and millions of drivers against Uber's will, by requiring Uber to include unnecessary opt-out mechanisms and copious warnings in its Agreements. This First Amendment impairment indisputably constitutes "'irreparable injury,'" *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828–29 (9th Cir. 2013) (citation omitted), and is far from "carefully drawn," *Gulf Oil*, 452 U.S. at 102.

c. The District Court Lacked Authority To Regulate Communications With Prospective Drivers

Finally, this Court may vacate the Orders because Rule 23(d) only permits courts to regulate communications with class and putative class members, not the general public. *See In re Sch. Asbestos Litig.*, 842 F.2d 671, 683–84 & n.25 (3d Cir. 1988) (reversing Rule 23(d) order because it mandated notice to groups "'reasonably believed' to include class members"); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 237, 258 (S.D.N.Y. 2005). Here, plaintiffs' class and

putative class definitions are limited only to drivers who have *already* used Uber. 1ER71–73; 2ER465; 4ER838–39; 2ER395. However, the Orders regulate Uber's communications with *prospective* drivers who are receiving a licensing agreement for the first time—individuals who may have no existing relationship with Uber, may not end up using Uber, and have not satisfied (and may *never* satisfy) the prefatory conditions required to become putative class members.

2. The 2013 Rule 23(d) Orders Violate The FAA

This Court should also reverse the 2013 Rule 23(d) Orders because they incorrectly presume that arbitration is inherently unfair or, at minimum, undesirable. In fact, the Orders leave no doubt about this: They state that arbitration would bar "drivers from … benefitting from a class action[,]" thereby "adversely affecting [drivers'] rights." 1ER196. This is the exact kind of anti-arbitration stance that the FAA prohibits. *Concepcion*, 563 U.S. at 344–45. And, as the Supreme Court has explained, Rule 23 cannot be used to justify such unwarranted antagonism towards bilateral arbitration, because parties have no "entitlement to class proceedings." *Italian Colors*, 133 S. Ct. at 2309. By weighing the merits of bilateral arbitration and class litigation, and treating class litigation as an absolute right, the district court engaged in the very "'tally[ing] of [] costs and burdens'" of arbitration that the FAA proscribes. *Id*. at 2312.

3. The 2013 Rule 23(d) Appeal Is Not Moot

Finally, in a recent motion, plaintiffs argued that this Court's decision in *Mohamed* renders the 2013 Rule 23(d) Appeal "moot." No. 14-16078, Dkt. 89. To be sure, Uber agrees that *Mohamed* undercuts the rationale underpinning the 2013 Rule 23(d) Orders. *See supra* Part II(B)(1)(a). But until this Court vacates the Orders, Uber will continue to be constrained by their injunctive effect. Thus, this Court can provide "effective relief." *In re Thorpe Insulation Co.*, 677 F.3d 869, 880 (9th Cir. 2012); *see also Tory v. Cochran*, 544 U.S. 734, 736–37 (2005) (appeal not moot where "injunction remain[ed] in effect"); *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561, 569 (1984) (appeal not moot where injunction was "in force").

C. This Court Should Reverse The 2015 Rule 23(d) Orders

1. The 2015 Rule 23(d) Orders Violate Rule 23(d)

a. The District Court Had No Basis For Invoking Rule 23(d)

The December 2015 Arbitration Agreement contained each and every notice, warning, and opt-out mechanism that the district court previously ordered Uber to include. These opt-out mechanisms were, as the district court previously found, "meaningful," 9ER1948, and gave "drivers a reasonable means of opting out." ER1949 (brackets omitted). As the district court once put it, "it would be hard to draft a more visually conspicuous opt-out clause even if the [c]ourt were to

aid in the drafting process, which it actually did." ER1948–49. And, up until December 2015, Uber was distributing the 2014 Arbitration Agreement with no complaint from plaintiffs or the district court.

Yet, when Uber made a handful of changes to the 2014 Arbitration Agreement to "correct" provisions that the district court had identified as problematic—provisions that Uber had no obligation to correct, *see Mohamed*, 848 F.3d 1201—the district court found that the December 2015 Arbitration Agreement was "potentially misleading." 1ER31. Under these circumstances—where the district court itself ordered the warnings and opt-out mechanisms at issue, *see* 1ER198–99—it defies all logic to suggest that the December 2015 Arbitration Agreement "interfered" with drivers' rights so as to warrant a Rule 23(d) order. *Gulf Oil*, 452 U.S. at 101.

Again, the district court failed to make any "specific findings" of injury necessary to warrant a Rule 23(d) order. *Gulf Oil*, 452 U.S. at 101. Instead, the court stated that drivers "may" be confused about whether to opt out and may refrain from opting out due to the "complexity" of the "legal landscape." 1ER27. But, in support of these speculative findings, the court relied entirely on a single paragraph of inadmissible hearsay from a declaration submitted by the *O'Connor* plaintiffs' counsel. 3ER548–51. Even if this declaration were admissible (it is not), it does not explain *what* drivers found confusing, let alone why the December

2015 Arbitration Agreement was suddenly *more* confusing than the 2014 Arbitration Agreement that Uber was promulgating with the district court's blessing, just one day before. On this basis alone, the Court should reverse. *See In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 311–12 (3d Cir. 2005) (vacating Rule 23(d) order where the court "conducted no evidentiary hearing" and "never specified which portions of the solicitation letters were objectionable").[10]

b. The District Court Did Not Carefully Draw Its Orders To Limit Speech As Little As Possible

The district court also did not "carefully draw[]" the 2015 Rule 23(d) Orders to limit Uber's speech rights as "little as possible." *Gulf Oil*, 452 U.S. at 102. In fact, the only references the Orders make to Uber's rights are two passing statements that the Orders are "narrowly tailored as required under *Gulf Oil*" and "impose[] little burden on Uber." 1ER31. As discussed above, such perfunctory statements are plainly insufficient under *Gulf Oil*. *See supra* Part II(B)(1)(b).

These findings are also wrong. The Orders instruct Uber to send revised licensing agreements (again) to *millions* of drivers *nationwide* containing terms and conditions that Uber does not wish to include, or else forgo arbitration altogether. 1ER30–32, 1ER1–3. And they impose requirements that bear no

[10] With respect to the members of the certified *O'Connor* class, in particular, there could not have been any prospect of injury because Uber informed the district court it would not enforce this Agreement against *O'Connor* class members in any manner that would affect their participation in that litigation. 3ER693–696.

relationship to the alleged driver confusion that the district court was supposedly trying to cure. For example, the requirement that Uber afford drivers a push button hyperlink opt-out option, *see* 1ER2, 1ER8—in addition to the four other opt-out mechanisms that already existed—has no apparent connection to the purported confusion about *whether* to opt out.

Moreover, there are more narrowly tailored forms of relief. For example, Uber suggested a hyperlink that would take drivers directly to the opt-out section of the December 2015 Arbitration Agreement, thus allowing drivers to review the Arbitration Agreement for themselves before making an opt-out choice. 3ER487–91, 3ER521–22. Apart from calling this option "inadequate," the district court did not address Uber's proposal, or consider other more limited forms of relief. 1ER2. Because the Orders do not "limit[] speech as little as possible, consistent with the rights of the parties under the circumstances," this Court should reverse. *Gulf Oil*, 452 U.S. at 102.

c. The District Court Lacked Authority To Regulate Communications With Prospective Drivers

Finally, the 2015 Rule 23(d) Orders are invalid because they regulate communications with individuals who have not used (and may never use) the Uber app, and are not (and may never become) putative class members. *See supra* Part II(B)(1)(c); *see also* 1ER32 ("During the pendency of Uber driver cases before this

Court, all cover letters, notices and arbitration provisions given to *new or prospective drivers* must conform with the requirements.") (emphasis added).

2. The 2015 Rule 23(d) Orders Violate The FAA

This Court should also vacate the 2015 Rule 23(d) Orders because they violate the FAA's "'liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (citation omitted). In issuing the Orders, the district court found that the copious warnings and notices in the 2014 Arbitration Agreement (which the district court ordered) did not provide drivers "adequate information to determine whether they should opt out" of arbitration. 1ER28. But, far from giving drivers too *little* information about arbitration, Uber's detailed disclosures provide drivers much *more* information than the FAA requires. *See Casarotto*, 517 U.S. at 687; *Sanchez*, 61 Cal. 4th at 914.

The district court also required Uber to provide all drivers a one-click hyperlink that allows drivers to opt out *before* opening or reading the Arbitration Agreement. 1ER2, 1ER8. By encouraging drivers to make an uninformed decision to opt out, the Orders violate "the basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (internal quotation marks omitted).

* * *

Both the 2013 and 2015 Rule 23(d) Orders—which compel Uber to engage in unwanted speech, impose prior restraints on Uber, and mandate that Uber include the court's preferred opt-out mechanisms—violate Rule 23(d), the FAA, and the First Amendment. This Court should vacate these Orders and remand with instructions to (1) remove all restraints on Uber's ability to enter into Arbitration Agreements of its choosing, and (2) enforce the December 2015 Arbitration Agreement with respect to any drivers who accepted and did not timely opt out of that Agreement.

III. Rule 23(f) Appeal: This Court Should Decertify The *O'Connor* Class

A. Standards Of Review

"Rule 23 does not set forth a mere pleading standard," and "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350–51. These "stringent requirements … in practice exclude most claims." *Italian Colors*, 133 S. Ct. at 2310.

This Court reviews class certification decisions for abuse of discretion. *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009). A court "abuses its discretion if its certification order is premised on legal error,"

Hawkins v. Comparet-Cassani, 251 F.3d 1230, 1237 (9th Cir. 2001), or if its assessment of facts is "illogical, implausible, or without support in inferences that may be drawn from the facts in the record," *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

B. The Arbitration Agreements Preclude Class Certification

Class certification in *O'Connor* hinges on the district court's flawed rulings invalidating the Arbitration Agreements. Indeed, just days before this Court issued *Mohamed*, the district court noted that a decision enforcing the Arbitration Agreements would "jeopardiz[e] the scope and potential viability of the class action …." 2ER300. Plaintiffs, too, have repeatedly conceded that valid Arbitration Agreements would preclude class certification. 2ER449–50 (the Arbitration Agreements will "destroy the certified class"); 2ER332 (the Arbitration Agreements will "gut the certified class"). Now that this Court has enforced the Arbitration Agreements and reversed the district court's faulty arbitration rulings, *Mohamed*, 848 F.3d 1201, this Court should reverse the class certification rulings in *O'Connor* as well.

1. The Arbitration Agreements Preclude Commonality, Predominance, And Superiority

The vast majority of absent class members in *O'Connor* accepted and chose not to opt out of the Arbitration Agreements. 9ER1987. These Agreements apply to claims "arising out of or related to" drivers' contracts with Uber, including

disputes about "compensation" and "expense reimbursement." *See, e.g.*, 7ER1440. They contain class waivers, too, meaning that most drivers agreed to bring their claims in bilateral arbitration. *See, e.g.*, 7ER1441–42. And, although the district court mistakenly believed the Agreements were invalid, this Court has since found that the delegation clauses in the Agreements are enforceable. *See Mohamed*, 848 F.3d 1201.

Given that most class members have agreed to bring their claims in a forum other than this litigation, a class proceeding cannot possibly generate "common answers" to "common questions" under Rule 23(a)(2). *Dukes*, 564 U.S. at 350; *see also Tan v. Grubhub, Inc.*, 2016 WL 4721439, at *4 (N.D. Cal. July 19, 2016). For the same reason, Plaintiffs cannot prove predominance—i.e., that "common questions [are] [] a significant aspect of the case that can be resolved for all members of the class in a single adjudication," *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir. 2014) (internal quotation marks omitted)—or that class litigation is the "superior" vehicle to resolve hundreds of thousands of claims that belong in bilateral arbitration, *see, e.g.*, *Tan*, 2016 WL 4721439, at *4–5.

2. The Arbitration Agreements Preclude Adequacy And Typicality

The Arbitration Agreements preclude findings of adequacy and typicality as well, because the *O'Connor* plaintiffs—unlike most drivers—opted out of

arbitration. To be sure, this preserved their ability to pursue claims in court. However, it also destroyed their "standing to assert any rights [that] the unnamed … class members might have to preclude [Uber] from moving to compel arbitration." *In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1039 (11th Cir. 2015).

Indeed, in *Avilez v. Pinkerton Government Services, Inc.*, this Court vacated a class certification order where absent class members had accepted an arbitration agreement with a class waiver and the named plaintiff did not. 596 F. App'x 579 (9th Cir. 2015). Because absent class members had "potential defenses" to arbitration that the named plaintiff was "unable to argue," the named plaintiff was inadequate and atypical. *Id.*[11] The Court should reach the same decision here.

C. Class Certification Should Be Reversed For Many Other Reasons

The Court should also address several other fatal flaws in the district court's class certification analysis that persist regardless of the Arbitration Agreements; without this Court's input now, the plaintiffs have announced that they will renew their class certification request on remand for the group of drivers who are not

[11] Many other federal courts in California have reached this conclusion under similar circumstances. *See Tan*, 2016 WL 4721439, at *3; *Tschudy v. J.C. Penney Corp., Inc.*, 2015 WL 8484530, at *3 (S.D. Cal. Dec. 9, 2015); *Quinlan v. Macy's Corp. Servs., Inc.*, 2013 WL 11091572, at *3 (C.D. Cal. Aug. 22, 2013).

subject to arbitration agreements. In fact, plaintiffs have *already* filed a motion to expand the class definitions, relying on the same flawed arguments that the district court previously endorsed. 2ER227–53. Reversing the district court's analysis now would avoid supplemental class certification briefing, more interlocutory appeal requests, and potentially even an unconstitutional class trial.

1. Individualized Inquiries Predominate On The Issue Whether Drivers Are Independent Contractors

To prevail on their gratuities and expense reimbursement claims, the *O'Connor* plaintiffs must prove an employment relationship between Uber and drivers. Cal. Labor Code §§ 351, 2802(a). The difference between an independent contractor and employee turns on the day-to-day interactions between the individual and the company: "Independent contractors typically have greater control over the way in which they carry out their work than employees, and businesses assume fewer duties with respect to independent contractors than employees." *Sistare-Meyer v. Young Men's Christian Ass'n*, 58 Cal. App. 4th 10, 16–17 (1997). As a result, "the process of distinguishing employees from independent contractors is fact specific and qualitative rather than quantitative." *State Comp. Ins. Fund v. Brown*, 32 Cal. App. 4th 188, 202 (1995).

California courts conduct this inquiry in accordance with *S.G. Borello & Sons, Inc. v. Department of Industrial Relations,* 48 Cal. 3d 341, 350 (1989), which

established a "multi-faceted" test for determining putative employment status. *Narayan v. EGL, Inc.*, 616 F.3d 895, 901, 904 (9th Cir. 2010). These "factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends on particular combinations." *Id*. at 901. "[E]ven if [most] factors [are] able to be determined on a classwide basis," class certification should *still* be denied if "individual [evidence] would be required" for other factors. *Sotelo v. MediaNews Grp., Inc.*, 207 Cal. App. 4th 639, 660 (2012).

Here, the class certification orders took the opposite approach, sweeping aside material differences regarding numerous *Borello* factors. In so doing, they violated the Rules Enabling Act and Uber's due process right to defend itself by arguing that drivers are independent contractors—an analysis that varies depending on the circumstances of each driver. *See Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1100 (9th Cir. 2014); *see also Dukes*, 564 U.S. at 367 ("[A] class cannot be certified on the premise that [a defendant] will not be entitled to litigate its … defenses to individual claims."); *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 40 (2014). The district court's class certification rulings prevent Uber from presenting these arguments and, on that basis, this Court should reverse.

a. The Evidence Shows Material Variation Regarding Uber's Putative Right To Control

A putative employer's "right to control the manner and means of accomplishing the result desired" is an important factor bearing on a worker's putative employment status. *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014). The propriety of class certification "does not depend upon deciding the actual scope of [Uber's] right of control over [drivers]." *Id.* at 537. Rather, "[t]he relevant question is whether [Uber's] scope of the right of control, whatever it might be, is susceptible to classwide proof." *Id.*

Here, Uber's putative right to control the details of drivers' work cannot be adjudicated through common proof because it depends on "independent legal analysis" that applies to each contract that each particular class member accepted. *Berger*, 741 F.3d at 1069. Indeed, Uber entered into seventeen contracts and addenda with drivers over the class period. 7ER1384–93. Although some provisions in these agreements have remained similar over time, many vary in significant ways that bear upon Uber's putative right to control.

i. Use of Other Lead Generation Applications: Five agreements between Uber and drivers prohibit drivers from displaying the insignia of, or using, other lead generation applications at the same time as the Uber app. 5ER1133–39; *see also* 7ER1413, 7ER1450, 7ER1467, 7ER1500, 7ER1535. Twelve agreements

do not. 5ER1133–39; *see also* 7ER1397–1401, 7ER1402–10, 7ER1428–43, 7ER1444–47, 7ER1482–93, 7ER1494–97, 7ER1510–27, 7ER1528–32, 7ER1551–1571, 7ER1572–78, 7ER1579–98, 7ER1599–1619. These differences are significant and could compel a fact-finder to reach different conclusions regarding Uber's "right to control" across the class. *See Yellow Cab Coop., Inc. v. Workers' Comp. Appeals Bd.*, 226 Cal. App. 3d 1288, 1298 (1991) (defendant's "prohibition on driving cabs for other companies" was "[p]erhaps [the] most significant" control measure).

The district court acknowledged these differences and briefly noted in a footnote that some (but not all) contracts prohibit simultaneous use and insignia display. 1ER138. But the court dismissed these provisions as irrelevant because there supposedly was "no evidence that Uber has ever enforced these provisions." *Id.* Not only is that finding factually incorrect—plaintiffs submitted evidence and argued that drivers were "reprimanded for having Lyft branding visible," 9ER2028–30; 9ER2043–47—it is also based on a misreading of the governing law: "[W]hat matters … is not how much control a hirer *exercises*, but how much control the hirer retains the *right* to exercise." *Ayala*, 59 Cal. 4th at 533; *see also Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 994 (9th Cir. 2014).

Because the district court misinterpreted this black-letter rule of law, and focused exclusively on Uber's *historical* exercise of control, class certification

"was premised on a legal error"—a "per se abuse of discretion." *Marlo v. United Parcel Service, Inc.*, 639 F.3d 942, 946 (9th Cir. 2011) (citation omitted).

ii. Right to Negotiate Fares: Uber's agreements also vary as to whether drivers may negotiate the fares for rides obtained through the Uber app. Five agreements grant drivers a "right to negotiate a Service Fee different from the pre-arranged fee." 5ER1165–70; *see also* 7ER1415, 7ER1452, 7ER1469, 7ER1502, 7ER1537. Another three agreements grant drivers a right to negotiate fares that are "lower than [the] pre-arranged Fare." 5ER1165–70; 7ER1558–59, 7ER1585–86, 7ER1606–07. And nine agreements do not grant drivers *any* right to negotiate fares. 5ER1165–70; 7ER1397–1401, 7ER1402–10, 7ER1428–43, 7ER1444–47, 7ER1482–93, 7ER1494–97, 7ER1510–27, 7ER1528–32, 7ER1572–78. Although Uber highlighted these differences for the district court, 5ER1125–27, 5ER1165–70, the court did not address this evidence in its rulings. These variations could have a substantial impact on a fact-finder's determination regarding Uber's putative control. *See Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333, 1349 (2009) (affirming order denying class certification in a misclassification case, in part, because some drivers "set their own rates, such as flat rates for trips, or rates below the standard metered rate," yet other drivers did not).

iii. Acceptance of Gratuities: The parties' agreements likewise differ regarding whether drivers may accept gratuities from riders. Five agreements

prohibit drivers from accepting gratuities. 5ER1177–82; *see also* 7ER1416, 7ER1453, 7ER1470, 7ER1503, 7ER1538. Twelve agreements do not. 5ER1177–82; see also 7ER1397–1401, 7ER1402–10, 7ER1428–43, 7ER1444–47, 7ER1482–93, 7ER1494–97, 7ER1510–27, 7ER1528–32, 7ER1551–71, 7ER1572–78, 7ER1579–98, 7ER1599–1619. And there was evidence that these variations matter in practice. *Compare* 9ER2048–57 (claiming that Uber emailed plaintiff that "[a]ccepting tips is against Uber['s] policy"), *with* 6ER1252–53 (advising drivers they "are permitted to take tips from passengers"). A fact-finder likely would give significant weight to these variations when evaluating Uber's putative right to control. *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1073, 1078–79 (N.D. Cal. 2015) (denying summary judgment in misclassification action, in part, because company prohibited drivers from accepting gratuities). Again, Uber presented the district court with evidence highlighting these variations, 5ER1119–24, 5ER1125–27, 5ER1177–82, but the class certification rulings do not address them.

iv. Account Deactivation: Finally, Uber's ability to deactivate drivers' accounts varies by agreement. Seven agreements give Uber a unilateral right to terminate the contractual relationship at will, (7ER1432, 7ER1446, 7ER1486, 7ER1496, 7ER1515, 7ER1530, 7ER1575), eight provide Uber and drivers a mutual right to terminate the contractual relationship at will (7ER1420–22,

7ER1457–59, 7ER1474–75, 7ER1507–08, 7ER1542–43, 7ER1564, 7ER1591, 7ER1612), and two are silent on this issue (7ER1397–1401, 7ER1402–10). In its orders, the district court acknowledged these distinctions, but found that a unilateral at-will termination right is functionally indistinguishable from a mutual at-will termination right; thus, in the district court's view, all of these provisions constituted "common proof" of Uber's control rights. 1ER140–44.

As this Court has explained, however, mutual and unilateral termination provisions impact the *Borello* analysis in manifestly different ways. A unilateral "right to discharge at will is '[s]trong evidence in support of an employment relationship.'" *Alexander*, 765 F.3d at 994 (citation omitted). By contrast, a "'mutual termination provision is consistent with either an employer-employee or independent contractor relationship.'" *Id.* at 995 (quoting *Ruiz*, 754 F.3d at 1105).[12] The California Courts of Appeal agree. *See Beaumont-Jacques v. Farmers Grp., Inc.*, 217 Cal. App. 4th 1138, 1147 (2013) (the "mutuality" of a termination clause "augur[ed] against" control); *Varisco v. Gateway Science & Eng'g, Inc.*, 166 Cal. App. 4th 1099, 1107 (2008) (rejecting argument that a mutual

[12] Other California federal courts have reached this same conclusion. *See Hennighan v. Insphere Ins. Sols., Inc.*, 38 F. Supp. 3d 1083, 1105 (N.D. Cal. 2014); *Desimone v. Allstate Ins. Co.*, 2000 WL 1811385, at *15 (N.D. Cal. Nov. 7, 2000); *Robinson v. City of San Bernardino Police Dep't*, 992 F. Supp. 1198, 1207 n.6 (C.D. Cal. 1998).

at-will provision demonstrates control). By departing from this authority, the district court "abuse[d] [its] discretion." *Marlo*, 639 F.3d at 946.

* * *

The district court concluded that Uber maintains a uniform right to control by misapplying the precedents of this Court and the California courts, and incorrectly minimizing contractual differences between drivers. Accordingly, this Court should reverse. *See Ayala*, 59 Cal. 4th at 533 ("[A]bsent a common (or individual, but manageable) means of assessing the degree of the hirer's control, we doubt [misclassification] claims … could be certified.").

b. The Evidence Shows Variation Regarding Drivers' Beliefs About Their Putative Employment Status

In addition to the right to control, courts must also consider "whether or not the parties believe they are creating the relationship of employer-employee." *Borello*, 48 Cal. 3d at 351. In its rulings, the district court found that this factor is "entitled to the least weight," such that any variability cannot defeat class certification. 1ER154. However, *Borello* held that a plaintiff's beliefs are a "significant" factor affecting classification. 48 Cal. 3d at 348; *see also Castaneda v. Ensign Grp., Inc.*, 229 Cal. App. 4th 1015, 1022 (2014). Moreover, courts must "assess and weigh *all* of the incidents" of a putative employment relationship. *Narayan*, 616 F.3d at 901 (emphasis added). For these reasons, many courts have

properly concluded—unlike the district court here—that class certification is inappropriate where class members' subjective beliefs vary.

In *Sotelo*, 207 Cal. App. 4th 639, for example, the California Court of Appeal affirmed an order denying class certification because, *inter alia*, plaintiffs failed to prove predominance. Although there was "little variance as to the issue of [defendants'] control," individual issues *still* predominated, in large part, because "the beliefs held by putative class members concerning their relationships with [defendants] varied." *Id.* at 657, 659; *see also Ali*, 176 Cal. App. 4th at 1350–52 (affirming order denying class certification because "the testimony of putative class members would be required" to determine drivers' "understanding of their relationships"). As these cases confirm, it was improper for the court here to effectively ignore drivers' varying beliefs regarding their relationships with Uber.

The district court also reached clearly erroneous conclusions about the factual record, finding "no evidence" of varying beliefs between drivers. 1ER153. Nothing could be further from the truth. In fact, plaintiffs themselves conceded that this factor is "[n]ot common" to the class because "[s]ome drivers believe they are Uber's employees while other[s] believe they are independent contractors." 4ER1041.

Moreover, Uber submitted more than 400 declarations from drivers who intended to be, view themselves as, and desire to remain, independent contractors.

8ER1905–07; *see, e.g.*, 8ER1899 ("[I've] been an employee and … an independent contractor … With Uber, [I'm] an independent contractor."). By contrast, the named plaintiffs and certain other drivers who lodged filings with the district court claim to believe they are Uber's employees. 8ER1793–95, 8ER1859, 8ER1866–1868, 8ER1891–92, 8ER1882–83, 8ER 1885; 2ER374–381. Thus, as the evidence demonstrates (and all parties agree), drivers' beliefs are *not* common.

c. The Evidence Shows Variation Regarding Whether Drivers Engage In A Distinct Business

Individualized inquiries are also required to evaluate whether each driver is engaged in a "distinct . . . business," another factor affecting one's proper classification. *Borello*, 48 Cal. 3d at 351. The district court found "tremendous (and likely material) variance" for this factor, and acknowledged that it could "have a significant impact on the merits" of plaintiffs' claims. 1ER144, 147. Plaintiffs agreed, conceding that individualized proof is needed to determine whether each driver is engaged in a "distinct business." *See* 4ER1041. Rather than deny class certification, however, the district court instead tried to erase this variability by defining a class that excluded all drivers who signed up to use Uber and/or are paid by Uber in a "fictitious/corporate name." 1ER148. But this shortcut did not solve the problem.

For example, Uber's driver declarations show that while many class members provide rides exclusively through the use of the Uber app, *see, e.g.*, 6ER1339–41, many others use the lead generation applications of Uber's competitors, *see, e.g.*, 6ER1365–67, 8ER1913–15—the hallmark of a "distinct business." *See State Comp. Ins. Fund v. Brown*, 32 Cal. App. 4th 188, 203 (1995) (truckers were independent contractors because they "work[ed] for brokers other than the defendants"). These driver declarations also show that some class members operate as sole proprietorships, independently advertising their services and building independent client rosters, as one might expect of an independent contractor. *See, e.g.*, 6ER1368–72 ("I have business cards that I give out"); 6ER1288–90; 6ER1335–38; *see also Santa Cruz Transp., Inc. v. Unemploy. Ins. Appeals Bd.*, 235 Cal. App. 3d 1363, 1376 (1991). Other drivers do *not* operate sole proprietorships, do *not* advertise their services, and do *not* try to independently solicit or retain clients. *See, e.g.*, 6ER1307–10. Finally, while most drivers use Uber only to add a little extra cash to their incomes, *see, e.g.*, 6ER1373–77, a small fraction uses Uber as a major source of income, *see, e.g.*, 6ER1321–23; 8ER1901–11—yet another factor affecting the distinct business inquiry. *Messenger Courier Ass'n of Americas v. Cal. Unemployment Appeals Bd.*, 175 Cal. App. 4th 1074, 1092 (2009) (employment status depends on the "economic dependence of the worker").

The district court's solution—which focuses exclusively on whether a driver uses a corporate name—does not account for these material differences.[13] Because individualized issues predominate on the "distinct business" factor, class certification is improper. *See Ali*, 176 Cal. App. 4th at 1349 (individual issues predominated where some drivers "independently advertised and promoted their own services," and others did not); *see also Narayan v. EGL, Inc.*, 285 F.R.D. 473, 478 (N.D. Cal. 2012); *Spencer v. Beavex, Inc.*, 2006 WL 6500597, at *16 (S.D. Cal. Dec. 15, 2006).

* * *

In a single-plaintiff trial, Uber would present individualized evidence regarding each of these important factors affecting the driver's putative employment status. Uber would elicit testimony from the driver about whether she views herself as an independent contractor. Uber would question the driver about her decision to use other lead generation applications, advertise her services, and compile client rosters—or, conversely, her decision *not* to do these things. Uber would engage in an individual analysis of the particular agreement that the driver

[13] Plaintiffs themselves have acknowledged that "whether a worker has incorporated is not relevant" to the worker's putative employment status. 4ER891; *see also* 4ER892 ("[W]hether an individual has incorporated … does not affect the underlying economic reality of the relationship").

accepted and the parties' day-to-day relationships. And, most importantly, Uber would show how the combination of *all* of these factors affect that driver's status.

The class certification rulings here deprive Uber of its right to do any of this, in violation of the Rules Enabling Act and due process. *See Dukes*, 564 U.S. at 367–68. They incorrectly relieve plaintiffs of their obligation to prove that a class-action proceeding can resolve the putative employment status of more than 240,000 drivers "in one stroke." *Id.* at 350. And they improperly ignore the indisputable fact that individual questions "will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). For all these reasons, this Court should reverse class certification.

2. The District Court Erred In Finding That Plaintiffs Are Adequate Class Representatives

a. Countless Drivers Oppose Plaintiffs' Lawsuit

This Court should also reverse class certification because the named plaintiffs seek a remedy (employment status) that countless absent class members oppose—a fact made apparent by the 400+ driver declarations that Uber submitted opposing class certification. *See* 8ER1658–1756. For some drivers, being declared Uber's employee could cause their *actual* employers to sue or terminate them. *See, e.g.*, 6ER1304–06. And because the duty of loyalty implicit in any employment relationship would preclude drivers from using competitors' lead-generation apps, *Stokes v. Dole Nut Co.*, 41 Cal. App. 4th 285, 295 (1995),

plaintiffs' suit would cause drivers who depend on other lead-generation apps to "suffer tremendously." 6ER1352–54; *see also, e.g.*, 6ER1301–03 ("[Plaintiffs] aren't just interfering with Uber, they're interfering with my business").

Plaintiffs acknowledged these conflicts in the district court, but argued that they are "irrelevant" to class certification. 5ER1237. The district court agreed, finding that it does not matter whether "'putative class members are happy with things as they are.'" 1ER129 (citation omitted). But as the decisions of the Supreme Court and circuit courts across the nation make clear, plaintiffs and the district court are mistaken—a named plaintiff is inadequate when her claim is "in tension with the evident desire of many [putative class members]." *Broussard v. Meineke Discount Muffler Shops*, 155 F.3d 331, 338 (4th Cir. 1998); *see also E. Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977) (no adequacy where class members voted against a merger, yet the "complaint [demanded] just such a merger"); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (no adequacy where plaintiffs' "interests … [are] antithetical to the interests of [absent] class members").[14]

[14] The existence of a Rule 23(b)(3) opt-out mechanism does not fix the problem; if it did, Rule 23(a)'s requirements would be "stripped of any meaning." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Furthermore, as plaintiffs conceded below, "a court ruling that Uber is misclassifying its drivers will likely affect all … drivers," regardless of whether they opt out of the class. 5ER1239.

b. Plaintiffs Intentionally Cast Aside Drivers' Claims

Over the course of this litigation, the *O'Connor* plaintiffs and dozens of driver declarants described driving expenses they incur that are not encapsulated within the IRS formula: car washes, 6ER1261–62, 6ER1248–51; car detailing, 6ER1259–60, 6ER1360–61; driver clothing, 6ER1291–92, 6ER1255–58; food and refreshments, 6ER1286, 6ER1329–31; cell phone mounts and chargers, 6ER1307–10, 6ER1296–97; seat covers, 6ER1311–13; paid radio programming, 6ER1319–20, 6ER1357–58; wifi, newspapers, and magazine for riders, 6ER1355–56, 6ER1325–28; garage expenses, 6ER1346–48; permitting fees, 6ER1378–80; parking citations, 6ER1293–95; and bridge and road tolls, 6ER1381–83, 6ER1266–69. Under California law, such expenses are reimbursable only if they are "necessary" and "incurred … in direct consequence of the discharge of [a worker's] duties." *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341, 1355 (2012). Due to the volume of individualized inquiries that would be needed to make these determinations, plaintiffs abandoned these various expenses, and instead moved for certification only for expenses encapsulated within the IRS formula. 5ER1232–33, 4ER1039, 1ER130–31.

Based on this decision, the district court initially (and correctly) denied class certification for plaintiffs' expense claim, finding that plaintiffs' willingness to split drivers' claims raised alarming "questions" about their adequacy. 1ER129–

32. After supplemental briefing, however, the court reversed its decision, certified a class, and found that plaintiffs' claim-splitting was "reasonable" because it was "self-evident" that the expense categories within the IRS formula constituted a "majority" of drivers' total expenses. 1ER94–101. This unprecedented, bright-line rule—that a plaintiff is adequate so long as she waives less than a "majority" of class members' claims—creates a "perverse incentive[] for class representatives to place at risk potentially valid claims for monetary relief," *Dukes*, 564 U.S. at 364, and therefore constitutes clear error. *See Hawkins*, 251 F.3d at 1237.

This rule also stands starkly at odds with decisions reached by circuit courts across the country, including this one, which have held that a plaintiff's decision to "sacrifice[] absent class members' rights to avail themselves of significant legal remedies" is "too high a price" for class certification—without ever nitpicking into whether those legal rights make up a "majority" of the class' claims. *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 282–83 (5th Cir. 2008); *see also Drimmer v. WD-40 Co.*, 343 F. App'x 219, 221 (9th Cir. Aug. 19, 2009) (plaintiff inadequate where he failed to "purs[ue] all remedies available"); *Nafar v. Hollywood Tanning Sys., Inc.*, 339 F. App'x 216, 223–24 (3d Cir. Aug. 5, 2009) (reversing certification because plaintiffs waived personal-injury damages).

Moreover, there can be no dispute that the particular expense claims that plaintiffs waived here would be quite significant, if proven to be meritorious.

Based entirely on evidence that plaintiffs themselves submitted, Berkeley Professor Justin McCrary calculated that plaintiffs' waiver would deprive drivers of up to 26% of their actual expenses, totaling $81,600,000 over a mere three-month window and *hundreds* of millions of dollars over the full class period.[15]

Because Rule 23(a)(4) serves to uncover any "conflicts of interest between named parties and the class they seek to represent," *Amchem*, 521 U.S. at 625—not just conflicts that jeopardize the "majority" of class members' interests—this Court should reverse the district court's finding of adequacy.

3. The District Court Adopted An Arbitrary Classwide Damages Methodology

In *Comcast*, the Supreme Court held that predominance under Rule 23(b)(3) would be reduced to a mere "nullity" if a court could certify a class based on an "arbitrary" classwide damages methodology, without regard for whether that methodology is "speculative" or "'consistent with [plaintiffs'] liability case.'" *Comcast,* 133 S. Ct. at 1433 (citation omitted). Similarly, this Court has explained that plaintiffs must "show that their [claimed] damages stemmed from the defendant's actions that created the legal liability." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013); *see also Doyle v. Chrysler Group, LLC*, 663 F. App'x 576, 579 (9th Cir. Oct. 24, 2016) (no predominance where there was "no

[15] Plaintiffs submitted six declarations estimating that plaintiffs' waiver decision cost an average of $340 per driver over three months. 4ER807–14.

way to determine whether the proposed damages model measures damages that [were] solely attributable to the theory of liability.").

Here, the *O'Connor* plaintiffs' gratuities claim is premised on a novel theory that Uber should be deemed to have "included [a tip] in all of its fares" because, in a few statements prior to 2012, Uber had "advertised to customers that a tip is included in the cost of its fares." 1ER160. Based on this liability theory, the district court adopted plaintiffs' equally novel damages theory, in which a jury would be asked to estimate, "from its own common experience," an amount an "average customer" would expect Uber's gratuity to be, and apply that amount to every ride from the class period. 1ER162–63. This approach—which asks a jury to indiscriminately pull a figure out of thin air, call it an "average," and apply it across the class—is as "arbitrary" as the damages methodology that *Comcast* condemned. Nor is there any connection between plaintiffs' damages methodology (what a jury *thinks* a rider would consider an appropriate tip) and plaintiffs' theory of liability (that Uber *actually* charged some definite tip amount).

This Court should reverse class certification because plaintiffs' damages methodology is the epitome of arbitrariness, *see Comcast*, 133 S. Ct. at 1433, and an impermissible "Trial by Formula," *Dukes*, 564 U.S. at 367. As the D.C. Circuit said in a similar context, "[n]o damages model, no predominance, no class

certification." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013).

CONCLUSION

For the reasons set forth above, this Court should: (1) reverse the orders denying Uber's motions to compel arbitration in *O'Connor*, *Yucesoy*, and *Del Rio* (Appeal Nos. 15-17420, 15-17422, and 15-17475), (2) vacate the 2013 Rule 23(d) Order in *O'Connor* (Appeal No. 14-16078) and the 2015 Rule 23(d) Orders in *O'Connor*, *Yucesoy*, and *Mohamed* (Appeal Nos. 15-17532, 15-17533, 15-17534, 16-15000, 16-15001, and 16-15035), and (3) decertify the *O'Connor* class (Appeal No. 16-15595).

Dated: May 3, 2017

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

Attorney for Defendants-Appellants Uber Technologies, Inc. and Rasier, LLC

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32-1 because it contains 13,913 words, excluding the parts of the brief exempted by 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: May 3, 2017

/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 May 3, 2017.

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: May 3, 2017

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