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

IN THE

United States Court of Appeals for the Ninth Circuit

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

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant Uber Technologies, Inc. hereby files its corporate disclosure statement as follows. Uber Technologies, Inc. is a privately held corporation. No parent corporation or publicly held corporation owns 10% or more of its stock.

Dated: February 4, 2016

Respectfully submitted,

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INTRODUCTION

The district court imposed a sweeping prior restraint on communications between Uber Technologies, Inc. ("Uber") and current and prospective transportation providers ("drivers")—including members of the public who are not, and may never be, putative class members—in clear violation of the First Amendment and Supreme Court precedent. *See Gulf Oil v. Bernard*, 452 U.S. 89, 101–02 (1981). In addition, the district court has ordered Uber to send all current and prospective drivers a so-called "corrective" email and revised contract encouraging drivers to opt out of arbitration—a violation of both the First Amendment and the Federal Arbitration Act ("FAA"). These rulings disrupt the contractual relationship between Uber and *millions* of current and prospective drivers, against Uber's will. And they are unwarranted and invasive intrusions into Uber's business. This Court should vacate the district court's unprecedented and improper Rule 23(d) injunction orders.

Over the past three years, the district court has issued a series of unparalleled anti-arbitration orders that have wreaked havoc on the contractual relationships between Uber and drivers who use the Uber smartphone application. Through these orders, the district court has invalidated, and then rewritten—and then invalidated again, rewritten again, invalidated again, and then rewritten again—

millions of arbitration agreements between Uber and current and prospective drivers. With each order, Uber has done (under protest) exactly what the court asked—adding unnecessary notices to its agreements, creating ever-enhanced opt-out mechanisms, issuing "corrective" cover letters, and affording drivers one opportunity after another to opt out of arbitration. But with each successive order, the court has moved the goalpost, demanding that Uber provide *more* notices, create *more* opt-out mechanisms, and make *more* revisions to its agreements, all in an effort to encourage as many drivers as possible to opt out of arbitration and join the class and putative class actions pending against Uber.

The Rule 23(d) injunction at issue in this appeal demonstrates a transparent and improper preference for class action litigation over arbitration. It requires Uber (yet again) to send new arbitration agreements to all drivers nationwide and provide drivers yet another opportunity to opt out of arbitration, this time by clicking a "push button" hyperlink that Uber must send in a cover email—thereby encouraging drivers to opt out *before* they even open or read Uber's arbitration agreement. It also requires Uber to add even more gratuitous warnings about arbitration, describe in detail *every* putative class action pending against Uber in the Northern District of California, and provide drivers with class counsel's contact information for every one of those cases, thereby sending a clear and inappropriate

message: drivers *should* opt out of arbitration. And the injunction prohibits Uber from sending any further arbitration agreements or certain other communications to current or prospective drivers without prior court approval—a "presumptively invalid" prior restraint on Uber's speech that inhibits Uber's ability to run its business. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2008).

There is no justification for the district court's orders, which violate both the First Amendment and the FAA. Uber respectfully requests that this Court vacate these orders.

STATEMENT OF JURISDICTION

On January 27, 2016, this Court consolidated six preliminary injunction appeals and cross-appeals for all purposes: *O'Connor, et al. v. Uber Technologies, Inc.*, Nos. 15-7532 and 16-15000 ("*O'Connor*"); *Mohamed v. Uber Technologies, Inc., et al.*, Nos. 15-17533 and 16-15035 ("*Mohamed*"); and *Yucesoy v. Uber Technologies, Inc.*, Nos. 15-17534 and 16-15001 ("*Yucesoy*").

The district court has jurisdiction over *O'Connor*, *Mohamed*, and *Yucesoy* pursuant to 28 U.S.C. § 1332(d)(2) because the putative classes each consist of more than 100 members, including one or more members with citizenship diverse from Uber, and the matter in controversy exceeds $5 million exclusive of interests

and costs. The district court also has jurisdiction over *Mohamed* under 28 U.S.C. § 1331 because the plaintiffs assert claims under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, and the district court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

On December 23, 2015, the district court entered an order granting in part plaintiffs' motions to enjoin enforcement of Uber's December 11, 2015 arbitration agreement and to enjoin Uber's communications with drivers and prospective drivers. ER-1. On January 19, 2016, the district court issued an additional order clarifying certain of the terms of the December 23, 2015 injunction. ER-9. Uber filed timely notices of appeal on December 28, 2015, and amended notices of appeal on January 19, 2016. ER-17, ER-20, ER-23, ER-34, ER-37, ER-40; *see also* Fed. R. App. P. 4(a)(4)(A)(vi).

This Court has jurisdiction to review the district court's orders granting and modifying the injunction under 28 U.S.C. § 1292, as plaintiffs acknowledge in their notices of cross-appeal. ER-26, ER-29, ER-32; 28 U.S.C. § 1292(a)(1) ("[T]he courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions"); *Cobell v. Kempthorne*, 455 F.3d 317, 322–23 (D.C. Cir. 2006) (Rule 23(d) order was

immediately appealable injunction under 28 U.S.C. § 1292(a)(1)). In addition, the orders are appealable final decisions under the collateral order doctrine and 28 U.S.C. § 1291. *See In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008).

STATEMENT OF ISSUES

1. Whether the district court exceeded its authority under Rule 23(d) and violated Uber's First Amendment rights by imposing a sweeping prior restraint on Uber's speech and compelling Uber to engage in undesired speech, all based on speculation and without conducting the careful weighing of competing factors as required by *Gulf Oil v. Bernard*, 452 U.S. 89 (1981).

2. Whether the district court improperly encouraged drivers to opt out of arbitration and participate in class action litigation, in violation of the Federal Arbitration Act.

STATEMENT OF THE CASE

These consolidated appeals arise from three putative class actions (*O'Connor*, *Mohamed*, and *Yucesoy*), in which drivers who use the Uber smartphone application allege that Uber has misclassified them as independent contractors (rather than employees), deprived them of gratuities and expense reimbursements under California and Massachusetts law, and committed violations of federal and state credit and consumer reporting laws.

Most of these drivers agreed to arbitrate their claims against Uber. Nonetheless, through a series of orders, the district court has invalidated Uber's arbitration agreements, rewritten these agreements to encourage participation in class action litigation over arbitration, repeatedly denied Uber's motions to compel arbitration (orders that are currently on appeal before this Court), certified a "mega" class in *O'Connor* consisting almost entirely of drivers who agreed to arbitrate their claims, ER-472, ER-340, and most recently, issued orders in all three actions enjoining Uber's communications with current and prospective drivers—the subject of this appeal.

1. Uber Licenses Its Software Application to Drivers

Uber is a technology company that connects individuals in need of transportation with independent drivers searching for passengers. ER-596. Uber facilitates this connection through a smartphone application (the "Uber app"), which Uber licenses to drivers pursuant to a software licensing agreement ("Licensing Agreement") and a Driver Addendum Related to Uber Services ("Driver Addendum"). *Id*.

Drivers who use the Uber app's "uberX" platform[1] are also required to accept an agreement called the Transportation Provider Service Agreement (the "Rasier Agreement") with Uber's wholly-owned subsidiary, Rasier, LLC ("Rasier"), in lieu of, or in addition to, a Licensing Agreement and Driver Addendum. ER-596–597. On occasion, Uber implements updates to these agreements, which drivers must accept to continue accessing the app. *Id.*

2. Uber's 2013 Licensing Agreement

On July 23, 2013—*before* plaintiffs had filed any of these actions—Uber sent an email to drivers stating that it intended to update its Licensing Agreement (the "2013 Licensing Agreement") and Driver Addendum. ER-597–598. When drivers logged onto the app, they were presented with a notification window that (1) advised them Uber had updated these agreements, and (2) provided hyperlinks to the agreements. ER-598. In order to continue using the app, drivers were required to click a "Yes, I agree" button indicating they accepted the updated agreements. *Id*. A second notification window then appeared asking drivers to

[1] The uberX platform connects riders to vehicles operated by private individuals (i.e., "ridesharing" services) as well as vehicles operated by transportation companies. ER-597. Other relevant platforms include UberBLACK, which connects riders to limousines and town cars operated by transportation companies, and UberSUV, which connects riders to luxury sport utility vehicles operated by transportation companies. *See id.*

confirm that they had reviewed the agreements, and drivers were again required to click a "Yes, I agree" button to access the app. ER-598, ER-602.

The 2013 Licensing Agreement included an Arbitration Provision, displayed under a bold, underlined heading—"**Arbitration.**" ER-614. The Arbitration Provision contained: (i) a delegation provision (giving the arbitrator authority to determine the enforceability and validity of the Arbitration Provision) (§ 14.3.i); (ii) a waiver provision (requiring the parties to assert claims "on an individual basis only") (§ 14.3.v); (iii) and a standalone payment provision (stating that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees") (§ 14.3.vi). ER-614–618.

The Arbitration Provision also gave drivers the ability to opt out of arbitration. It stated (under the heading: "Your Right To Opt Out Of Arbitration") that arbitration "is not a mandatory condition of [drivers'] contractual relationship with Uber," and that drivers "may opt out of [the] Arbitration Provision by notifying Uber in writing of [their] desire to opt out." (§ 14.3.viii). ER-617. In bold font, the opt-out provision stated that any opt-out "**must be post-marked within 30 days**" of the date of acceptance, and may be delivered to Uber either by hand delivery or overnight mail delivery service. *Id*. It further stated that drivers "have the right to consult with counsel of [their] choice concerning [the]

Arbitration Provision" and reiterated that drivers "will not be subject to retaliation if [they] exercise [their] right to . . . opt-out of coverage under [the] Arbitration Provision." *Id*. It is undisputed that drivers successfully opted out of arbitration using these methods. *See* ER-412–415; No. 15-16178, Dkt. 13–14.

3. The *O'Connor* Action

On August 16, 2013—*after* Uber had rolled out the 2013 Licensing Agreement and updated Driver Addendum—two drivers filed a putative class action against Uber and its executive officers, on behalf of drivers "who have driven for Uber," captioned *O'Connor v. Uber Technologies, Inc.*, No. 13-03826-EMC. The *O'Connor* plaintiffs alleged that drivers who use the Uber app are Uber's employees and are entitled to reimbursement of expenses and gratuities under the California Labor Code. ER-900.

Five days after filing the lawsuit, the *O'Connor* plaintiffs filed an emergency motion for a protective order, in which they asked the district court to find that the Arbitration Provision in the 2013 Licensing Agreement was unconscionable or, alternatively, to require Uber to: (1) notify putative class members about the *O'Connor* action; and (2) afford putative class members a renewed opportunity to opt out of arbitration. ER-872. Plaintiffs argued that the court had authority to

regulate communications with putative class members under Federal Rule of Civil Procedure Rule 23(d). ER-881–882.

The district court granted, in part, plaintiffs' request for relief. ER-860. The court found that the Arbitration Provision threatened to "adversely affect[] [drivers'] rights" and ordered Uber to give drivers "clear notice of the arbitration provision, the effect of assenting to arbitration on their participation in [the] [*O'Connor*] lawsuit, and reasonable means of opting out of the arbitration provision within 30 days of the notice." ER-868, 870. The district court also prohibited Uber from distributing *any* Licensing Agreement containing *any* Arbitration Provision without prior court approval. ER-871. The court directed the parties to submit proposed "corrective notices" (fixing the "problems" the district court identified) and a revised Licensing Agreement. ER-870–871. This order is the subject of a separate pending appeal before this Court. *See* No. 14-16078.

4. The District Court Redrafts the Arbitration Provision

Following the district court's ruling, the *O'Connor* plaintiffs and Uber submitted proposed corrective notices and a revised Licensing Agreement for the district court's review. ER-855. The district court found that Uber's corrective notice gave drivers adequate "notice . . . that a New Licensing Agreement [would]

ensue, that actions against Uber [were] pending . . . , and that assenting to the New Licensing Agreement preclude[d] participation in . . . lawsuits against Uber." ER-809. The court also found that Uber's proposed Licensing Agreement gave "clear notice of the arbitration provision." *Id*. The court nonetheless ordered Uber to submit *another* revised corrective notice and Licensing Agreement with a more "fair" opt-out procedure. ER-809, 812. The district court emphasized that, in its view, the distribution of Uber's Arbitration Provision "jeopardize[d] the fairness of the [*O'Connor*] litigation" and required the district court to intervene in order "to protect [putative] class members." ER-801, 804.

Uber then submitted revised corrective notices and a revised Licensing Agreement (*see* ER-768), which, the district court concluded, gave drivers "a reasonable means of opting out—sending a letter by U.S. mail," and afforded drivers "a renewed opportunity to opt out." ER-742. Nonetheless, the court imposed a number of additional edits, ordering Uber to: (1) bold the paragraph in its Arbitration Provision describing the opt-out procedure; (2) allow drivers to opt out via email; (3) provide drivers with contact information for plaintiffs' counsel; and (4) submit another round of documents for the court's review. ER-744.

Uber then filed a third round of corrective notices, a revised Licensing Agreement, and a revised Rasier Agreement.[2] ER-686. The district court made yet another series of edits before finally approving the documents and ordering Uber to "issue the documents, as corrected." ER-660. On or about June 21, 2014, Uber rolled out the court-approved Licensing Agreement (the "2014 Licensing Agreement") and Rasier Agreement (the "2014 Rasier Agreement") (together, the "2014 Agreements"), using the same procedure it had used for the 2013 Licensing Agreement. *See* ER-598–597, ER-620–659.

5. The 2014 Agreements

As a result of the district court's active role in redrafting Uber's Arbitration Provisions, the 2014 Agreements included (1) a two-page, court-approved "advance notice" advising drivers of the Arbitration Provision *before* they viewed the 2014 Agreements and the renewed opportunity to opt out, and (2) a two-page, court-approved "corrective notice" with the same information contained in the "advance notice." ER-620. In addition, the first page of the agreement (in a bolded, capitalized, over-sized message) directs drivers to the Arbitration Provision and advises them that they may opt out of arbitration by following the opt-out

[2] Although Rasier is not a defendant in *O'Connor*, Uber submitted a revised Rasier Agreement to ensure that this agreement was also "in conformity with the Court's orders." ER-720.

procedure. ER-620. The Arbitration Provision then contains the same information as the court-approved "advance notice" and "corrective notice," a bolded opt-out provision, and the ability to opt-out by: (1) sending an email to optout@uber.com; or (2) delivering Uber a letter via hand delivery, U.S. mail, or "any nationally recognized delivery service (e.g., UPS or Federal Express)." ER-636. Hundreds of drivers opted out of arbitration using these mechanisms. *See* ER-570 ¶ 5; No. 15-16178, Dkt. 15 at 13–14.

6. The *Mohamed* and *Gillette* Actions

In November 2014, two additional putative class actions were filed against Uber and assigned to the same district judge. First, in *Mohamed v. Uber Technologies, Inc.*, a former driver alleged that Uber and a background screening company had procured or obtained drivers' consumer reports in violation of federal, California, and Massachusetts law. ER-962. Second, in *Gillette v. Uber Technologies, Inc.*, another former driver alleged similar consumer claims, as well as a representative claim under the California Private Attorneys General Act ("PAGA") based on alleged violations of the California Labor Code. ER-983.

7. The District Court Denies Uber's Motions to Compel Arbitration in *Mohamed* and *Gillette*

Uber filed a motion to compel arbitration in *Gillette* on the basis that the named plaintiff agreed to arbitrate by accepting the 2013 Licensing Agreement—

i.e., the Arbitration Provision that existed *before* the *O'Connor* action was filed and before the court rewrote Uber's Licensing Agreement. ER-985. Uber also filed a motion to compel arbitration in *Mohamed* on the basis that the named plaintiff agreed to arbitrate by accepting the 2014 Agreements—i.e., the revised Arbitration Provisions that the court rewrote in *O'Connor*. ER-964. Notwithstanding the district court's extensive participation in drafting the 2014 Agreements and overseeing their rollout, the court consolidated and denied *both* motions and invalidated *all* of Uber's arbitration agreements as unconscionable. ER-500. Uber appealed the district court's order and briefing is underway in this Court. *See* No. 15-16178.

8. The Court Certifies the *O'Connor* Class Notwithstanding Drivers' Agreements to Arbitrate

Meanwhile in *O'Connor*, the district court granted the plaintiffs' request to certify a "mega-class" consisting of hundreds of thousands of California drivers, most of whom had agreed to arbitrate under Uber's 2013 or 2014 Agreements—even though the court acknowledged "there is a chance that the Ninth Circuit might reverse [the order denying Uber's motions to compel arbitration]" with regard to the 2014 Arbitration Provision. ER-340; *see also* ER-472, 494. The district court also acknowledged that it may have been wrong to declare the 2014 Agreements unconscionable in *Mohamed*. ER-348–349. But, based on this Court's recent

decision in *Sakkab v. Luxxottica Retail North America, Inc.*, 803 F.3d 425, 431 (9th Cir. 2015), the district court determined that Uber's 2014 Agreements are "unenforceable" because they contain a waiver of representative PAGA claims, even though an express severability clause applies to the PAGA waiver. ER-349–350. As soon as the district court certified the class, Uber filed a motion to compel arbitration as to all absent class members, and the district court immediately denied that motion. ER-945, 946. Uber appealed that order to this Court. *See* No. 15-80220.

9. *Yucesoy*

On June 26, 2014, two drivers filed *Yucesoy v. Uber Technologies, Inc.* in Massachusetts state court, a putative class action in which drivers alleged that Uber has misclassified drivers, failed to pay drivers overtime and minimum wage, and failed to remit unpaid expenses and gratuities to drivers in violation of Massachusetts law. ER-1000. Uber removed the *Yucesoy* action to federal court on October 21, 2014, and on January 20, 2015, the Massachusetts district court transferred the action to the same district court judge presiding over *O'Connor*, *Mohamed*, and *Gillette* in the Northern District of California. ER-1000, 1001.

Uber filed a motion to compel arbitration as to the two named plaintiffs in *Yucesoy*, both of whom are bound by the Arbitration Provision in Uber's 2013

Licensing Agreement. ER-1006. And after the district court permitted the *Yucesoy* plaintiffs to add additional named plaintiffs, Uber filed a second motion to compel arbitration as to two of those plaintiffs—one bound by the Arbitration Provision in Uber's 2014 Licensing Agreement, and the other bound by the Arbitration Provision in an even more recent version of the Licensing Agreement, Uber's April 2015 Licensing Agreement (which is materially identical to the 2014 Agreements). ER-1009.

The district court denied both motions to compel arbitration, citing its class certification order in *O'Connor* and its orders denying arbitration in *Gillette* and *Mohamed*. ER-70.

10. Uber's December 2015 Arbitration Agreement

Following the court's decisions invalidating all of Uber's arbitration agreements, counsel for Uber informed the district court that Uber intended to roll out an updated Arbitration Provision to address the perceived deficiencies identified by the district court. ER-198-199. The district court responded, "certainly, I understand that." *Id.*

Thus, on December 11, 2015, Uber issued a new arbitration agreement (the "December 2015 Agreement") to all drivers nationwide in an effort to remove any doubt regarding the enforceability of its agreements. Specifically, Uber:

(i) amended its PAGA waiver provisions to address the court's stated concerns; (ii) amended its cost-splitting provisions to guarantee that drivers would not bear any fees or expenses in arbitration that they would not otherwise bear in court; and (iii) deleted certain provisions that the district court found to be unconscionable. *See* ER-73–74. Other than these changes, however, the December 2015 Agreement was identical to the 2014 Agreements that the district court had approved, including all of the same warnings and opt-out mechanisms. ER-101–108. Uber stated publicly and in court that it would not seek to enforce the December 2015 Agreement against members of the certified *O'Connor* class in any manner that would affect their rights to participate in that litigation (though Uber reserved its right to continue seeking to enforce the 2013 and 2014 Agreements against *O'Connor* class members through its various pending appeals). ER-201, ER-81.

11. Plaintiffs Seek to Enjoin the Agreement

On December 11 and 15, 2015, plaintiffs in *O'Connor*, *Mohamed*, and *Yucesoy* filed motions to enjoin (i) enforcement of the December 2015 Agreement and (ii) any further communications between Uber and drivers. Plaintiffs requested that the Court "rescind and refuse to enforce" the December 2015 Agreement on the grounds that it was an "improper attempt to interfere with court

supervised notice and opt out procedures." ER-277. Plaintiffs speculated that drivers "receiving the agreement would not realize that they are class members in [*O'Connor*], or that by agreeing or failing to opt out of the arbitration agreement, they may be giving up their right to participate." *Id.* To support this conjecture, plaintiffs' lead trial counsel submitted a conclusory declaration stating that unidentified drivers contacted her after the rollout of the December 2015 Agreement expressing "confusion." ER-286. And on this thin reed, plaintiffs asked the district court to enjoin Uber's "future communications" with current and prospective drivers, including any updated arbitration agreements. ER-279.

Uber opposed plaintiffs' emergency requests, noting that Uber did not intend to invoke the December 2015 Agreement vis-à-vis members of the certified *O'Connor* class with respect to any claims and damages that the district court had certified for class treatment, up to and including the date of certification. ER-74. Rather, Uber only intended the updated agreements to correct the perceived deficiencies that the district court identified in its various orders. *Id.* Indeed, the December 2015 Agreement contained *all* of the opt-out mechanisms, warnings, messages, and red flags that the district court had approved with respect to the 2014 Agreement. *Id.* In fact, by the time the district court held a hearing on plaintiffs' motion for an injunction, *thousands* of drivers nationwide had opted out

of the Arbitration Provisions contained in Uber's December 2015 Agreement. ER-63-64. As Uber explained, plaintiffs' request to enjoin Uber from sending certain communications to current and prospective drivers would interfere with Uber's ability to run its business, infringe its First Amendment rights, exceed the district court's authority under Rule 23(d), and violate the FAA. ER-71.

12. The District Court Enjoins Uber

The district court granted plaintiffs' motion in part on December 23, 2015, relying on Federal Rule of Civil Procedure 23(d). ER-1. The court acknowledged that it had previously "permitted the issuance" of an Arbitration Provision virtually identical to the one contained in the December 2015 Agreement—i.e., the 2014 Arbitration Provision. ER-3. But the court nevertheless invalidated the December 2015 Agreement nationwide and ordered Uber to provide drivers with *another* revised arbitration agreement containing even *more* warnings, corrective notices, and *more* opt-out mechanisms than the court itself had previously required for the 2014 Agreements. ER-7–8. Citing no evidence, the court reasoned that recent developments in the pending litigation "may have an impact on drivers' evaluation of the benefits of arbitration versus litigation." ER-3. For example, the court speculated that "drivers who failed to opt out of" Uber's previous agreements "may still believe they are required to arbitrate and thus pay little heed to the opt

out provisions of the new arbitration agreement." *Id.* In addition, the court speculated that "drivers may give greater credence to litigation over arbitration in view of the progression of the *O'Connor* case and the problematic nature of some of the arbitration provisions." ER-3–4.

The court ordered Uber to revise the notice provision in the arbitration agreement to: (i) identify and summarize all certified and putative class actions pending in the district court; (ii) explain that the *O'Connor* case is scheduled to proceed to trial, describing who is and who is not included in the class; and (iii) list the current contact information for counsel in each case. ER-7–8. Further, the court enjoined Uber from enforcing the December 2015 Agreement against any driver nationwide—whether a member of the *O'Connor* class or not—requiring Uber to provide all drivers with a new agreement, a new cover letter, and *another* opportunity to opt out of arbitration. *Id.* The new cover letter, the court held, must: (i) be accessible without having to open a link or attachment; (ii) be succinct (i.e., one page); and (iii) explain that there is an arbitration clause and afford recipients a renewed opportunity to opt out within thirty days after informing the recipients that a decision *not* to opt out will prevent the driver from participating in ongoing class actions. *Id.* The court gave the parties ten days to meet and confer

regarding the proper form, content, and procedures of the revised arbitration provision and corrective cover letter. *Id.*

After the parties could not reach agreement, the court issued an order on January 19, 2016 describing in detail the corrective cover letter *and* including a "redlined version of the corrective letter" as an exhibit to the court's order. ER-9, 12. The court ordered that that the new opt-out provision include "a pre-addressed e-mail accessible via hyperlink," with the email stating "My name is ____. I opt out of the Arbitration Provision in the driver-partner agreement." ER-10. The court also ordered that the following statement be written in bold in the cover letter: "**A decision not to opt out will prevent you from participating in ongoing class actions.**" *Id.* In addition, the court ordered that the "subject heading of the corrective letter" state: "Notice re Updated Driver-Partner Agreement and Opt-Out from Arbitration Agreement." ER-11. Finally, the court ordered Uber to send the so-called "corrective letter" to *prospective* drivers when they sign up to use the Uber app for the first time, even though those individuals are not (and may never become) putative class members in any litigation against Uber, and even though they never received the December 2015 Agreement in the first place. ER-10.

SUMMARY OF THE ARGUMENT

The district court far exceeded its authority under Rule 23(d) and *Gulf Oil*, both by compelling speech *from* Uber and by imposing a prior restraint *on* Uber—a particularly egregious pair of First Amendment harms.

As an initial matter, the district court lacked any basis for imposing its Rule 23(d) order, given that Uber's December 2015 Agreement posed no threat of "interference" with the rights of any class or putative class members. *Gulf Oil*, 452 U.S. at 101. To the contrary, the December 2015 Arbitration Provision contained *all* of the warnings, notices, and opt-out mechanisms that the district court itself had previously approved. And Uber disclaimed any intention of enforcing the Arbitration Provision in its December 2015 Agreement vis-à-vis members of the *O'Connor* class for any of their certified claims, thereby eliminating any risk of abuse for *O'Connor* class members. Moreover, the district court had absolutely no authority—under Rule 23(d) or any other law—to regulate Uber's communications with members of the general public who are not (and may never become) putative class members.

In addition, the court's far-reaching orders violate Rule 23(d) because they are not "carefully drawn . . . [to] limit[] speech as little as possible." *Gulf Oil*, 452 U.S. at 102. The orders force Uber to offer drivers a "push-button" opt-out

hyperlink, an unprecedented requirement that has no bearing whatsoever on any alleged driver confusion regarding *whether* they should opt out. The orders oblige Uber to send "corrective" notices to prospective drivers who have no contractual relationship with Uber, have never received a Licensing Agreement in need of "correction," and could not possibly have their rights compromised because they have, at most, purely *hypothetical* rights to participate in a class action. The orders force Uber to provide all drivers nationwide with the contact information for four different plaintiffs' firms that are currently suing Uber. And they prohibit Uber from issuing *any* Licensing Agreements containing Arbitration Provisions without prior court approval for as long as *any* class or putative class actions remain pending in the Northern District of California—an unprecedented restraint that finds no basis in Rule 23(d) or existing case law.

These measures, together with the district court's orders requiring Uber to affix additional, unnecessary warnings to its Arbitration Provisions and cover letter, also evince an improper hostility to arbitration that contravenes the Federal Arbitration Act ("FAA") and ignores the U.S. Supreme Court's repeated admonition that courts must "'give due regard . . . to the federal policy *favoring* arbitration.'" *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468, 471 (2015) (emphasis added). Indeed, throughout these actions, the district court has drawn

every possible inference *against* arbitration at every turn, encouraged as many drivers as possible to avoid arbitration, and declared its belief that arbitration "jeopardizes the fairness of [class action] litigation . . . ." ER-804.

For all of these reasons, and those discussed more fully below, the Court should reverse the district court's orders.

STANDARD OF REVIEW

This Court reviews Rule 23(d) orders for abuse of discretion. *Gulf Oil*, 452 U.S. at 100–01; *Great Rivers Co-Op. of Southeastern Iowa v. Farmland Indus., Inc.*, 59 F.3d 764, 766 (8th Cir. 1995). A district court necessarily abuses its discretion when "it bases its decision on an erroneous legal standard or on clearly erroneous factual findings." *United States v. Schiff*, 379 F.3d 621, 625 (9th Cir. 2004) (citation omitted). This Court reviews the underlying issues of law de novo. *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th Cir. 2011).

ARGUMENT

I. The District Court's Orders Violate Rule 23(d) and Infringe Uber's First Amendment Rights

Rule 23(d) vests district courts with the 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. However, as the U.S. Supreme Court has recognized, this authority "is not unlimited, and indeed is bounded by the relevant

provisions of the Federal Rules" and the First Amendment. *Id.* Thus, the U.S. Supreme Court has held that a "mere possibility of abuses does not justify" a Rule 23(d) order. *Id.* at 104. Rather, any "order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Id.* at 101. Moreover, because Rule 23(d) orders can "involve[] serious restraints on expression," a district court's "weighing" process must "result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 102, 104; *see also In re Sch. Asbestos Litig.*, 842 F.2d 671, 680–81, 684 (3d Cir. 1988) ("Orders regulating communications between litigants . . . pose a grave threat to first amendment freedom of speech").

Here, the district court's orders violate Rule 23(d) and infringe Uber's First Amendment rights for at least three reasons: (1) there was no justification for the district court to invoke Rule 23(d) in the first place, in part because the district court failed to engage in the careful weighing of interests that *Gulf Oil* requires; (2) the district court imposed sweeping speech restrictions and compulsions that are not narrowly tailored to address any alleged driver confusion; and (3) the

district court had no authority to regulate communications between Uber and members of the public who are not, and may never be, putative class members.

A. The District Court Had No Basis for Invoking Rule 23(d)

As an initial matter, this Court should vacate the district court's sweeping and erroneous injunction orders because the district court had no justification for invoking Rule 23(d). Indeed, the Arbitration Provision that Uber sent to drivers on December 11, 2015 as part of the December 2015 Agreement was *the same* as the Arbitration Provision Uber was issuing to drivers (including putative class members in the very same actions) up to and including December 10, 2015, *with the district court's blessing*. The *only* difference between the two agreements was that Uber corrected the specific provisions the district court perceived to be unenforceable, and eliminated some provisions the district court found to be unconscionable. ER-73–74. Under these circumstances—where the district court itself drafted the arbitration warnings and opt-out notices, and imposed opt-out mechanisms that it found to be "reasonable," (ER-506)—there can be no "potential interference" with the rights of any class or putative class members. *Gulf Oil Co.*, 452 U.S. at 101.

It is no surprise, then, that the district court failed to make the "specific findings" of injury to class or putative class members necessary to justify a Rule

23(d) order. *Gulf Oil Co.*, 452 U.S. at 101; *see also Domingo v. New England Fish Co.*, 727 F.2d 1429, 1439–40 (9th Cir. 1984) (reversing district court order under Rule 23 for failure to "make the specific findings required by *Gulf Oil*"). To be sure, the district court stated that drivers "may" believe they are "required to arbitrate" their claims. ER-3. But, as support for these findings, the court relied entirely on a single paragraph of inadmissible hearsay from the declaration of lead plaintiffs' counsel, in which counsel claims she received "inquiries from Uber drivers who [were] concerned, dismayed, and confused about the new arbitration agreement distributed to drivers this morning. They [were] uncertain whether they need to opt out in order to participate in this case." ER-4, ER-286. Even if this declaration were admissible (it is not), this one paragraph from plaintiffs' counsel's declaration does not explain *what* drivers found confusing about the Arbitration Provision, let alone why the Arbitration Provision was suddenly *more* confusing than the (virtually identical) Arbitration Provision Uber was promulgating with the district court's express approval just one day prior.

In fact, the evidence before the district court demonstrated that drivers *were* "given adequate information" and did *not* "pay little heed to the opt out provisions of the new arbitration agreement," as the district court erroneously ruled. ER-3–4. As Uber informed the district court, less than one week after Uber promulgated the

December 2015 Agreement, "*five times* as many people [had already] opted out of [the] agreement than opted out of" *all* of Uber's previous Arbitration Provisions combined. ER-65 (italics added) .

Moreover, with respect to members of the certified *O'Connor* class, Uber's December 2015 Agreement could not have threatened the rights of class members because, as Uber expressly informed the district court, Uber did "not intend (and has never intended) to invoke the . . . [updated] arbitration provisions vis-à-vis members of the certified *O'Connor* class with respect to any claims and damages that the Court has already certified for class treatment, up to and including the date of certification." ER-201; *see also* ER-4 ("Uber contends that it does not intend to invoke the new agreement against the members of the certified class as to certified claims"). Thus, there could be no "likelihood of serious abuses" justifying a Rule 23(d) order for these drivers. *Gulf Oil Co.*, 452 U.S. at 103–4.

Notwithstanding all of these facts, and without holding a single evidentiary hearing or identifying the provisions in the Arbitration Provision the court found objectionable, the district court invalidated the December 2015 Agreement nationwide, compelled Uber to rewrite its agreement yet again, and imposed a sweeping prior restraint on Uber's communications with prospective drivers. ER-1. Nothing about the court's orders comes remotely close to satisfying the

Supreme Court's admonition that district courts must base their Rule 23(d) orders "on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil*, 452 U.S. at 101; *see also In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 311-312 (3d Cir. 2005) (vacating "broad and sweeping" Rule 23(d) order because, *inter alia*, district court "never specified which portions of the solicitation letters were objectionable" and "conducted no evidentiary hearing"); *cf. Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 602 (2d Cir. 1986) (court held two evidentiary hearings, placed "findings of fact and conclusions of law on the record," and then "offered the parties an opportunity to request additional findings").

B. The District Court Did Not Carefully Draw Its Orders to Limit Speech As Little As Possible

This Court also should vacate the district court's orders because the court did not "carefully draw[]" its orders to limit Uber's speech as "little as possible." *Gulf Oil*, 452 U.S. at 102; *see also id.* ("'[T]he district court must . . . giv[e] explicit consideration to the narrowest possible relief which would protect the respective parties'") (quoting *Coles v. Marsh*, 560 F.2d 186 (3d Cir. 1977)).

The district court's orders lack any meaningful discussion regarding the significant adverse effects that the orders will have on *Uber's* speech rights. Instead, the district court simply stated, without elaboration, that the orders

"impose[] little burden on Uber" and are "narrowly tailored as required under *Gulf Oil*." ER-7; *see also* ER-57–58 (stating that the district court compelled "very modest" speech from Uber). The district court's conclusory statements about the "little burden" resulting from its orders—which lack any "specific findings" "reflect[ing] a weighing of . . . the potential interference with the rights" of Uber—are plainly insufficient under *Gulf Oil*. 452 U.S. at 101; *see also In re School Asbestos Litig.*, 842 F.2d at 683 ("Neither the nature of the harm identified by the district court nor the scope of its findings provides a basis for the kind of sweeping disclosure requirement [the court] imposed"); *A.J. by L.B. v. Kierst*, 56 F.3d 849, 857 (8th Cir. 1995) (vacating Rule 23(d) order because "the district court made no discernible effort to weigh the [defendant's] interest . . . against the potential interference with the class members' rights").

These findings are also plainly wrong. The district court is forcing Uber to send revised contractual agreements to *millions* of drivers nationwide—Licensing Agreements and Arbitration Provisions that form Uber's primary business relationship with drivers—even though those Agreements will contain binding provisions *that Uber does not wish to include*. These agreements could alter permanently the relationship between Uber and drivers against Uber's will—hardly a "little burden" on Uber's business practices. In any event, the district court's

perception of the "modest[y]" of its own order is irrelevant; both the Ninth Circuit and the Supreme Court have repeatedly held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828–29 (9th Cir. 2013) (citation omitted); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2008).

Far from being "carefully drawn" and "narrowly tailored," the district court's orders also impose bizarre requirements that bear no relationship whatsoever to the alleged confusion the district court supposedly was trying to cure. For example, the orders require Uber to send drivers cover emails containing a "push button" hyperlink to enable drivers to opt out of arbitration using a pre-drafted opt-out email *before* they even open or read Uber's Arbitration Provision. ER-57–58. But Uber's Arbitration Provision already contained *four* opt-out mechanisms—including an email option the district court had previously required Uber to include—and the district court had already found those opt-out procedures to be "reasonable". ER-532–533 ("Put simply, it would be hard to draft a more visually conspicuous opt-out clause even if the Court were to aid in the drafting process, which it actually did"); ER-560 (the "highly conspicuous and non-illusory opt-out provisions . . . permit drivers to obtain all of the benefits of the contracts,

while avoiding any potential burdens of arbitration"). Providing drivers with *yet another* mechanism by which to opt out bears no relation to the district court's stated goal of minimizing supposed "confusion among the drivers" regarding *whether* to opt out. ER-4.

In addition, the district court's orders are not "carefully drawn" to limit speech "as little as possible" because they regulate Uber's future communications with *prospective* drivers—members of the public who have *not* yet signed a Licensing Agreement or Arbitration Provision and are *not* (and may never be) putative class members in any action. Such individuals could not have been "confused" or "misled" by any previous arbitration agreements sent by Uber because, by definition, *prospective* drivers are individuals who have not yet entered into *any* contractual relationship with Uber. And sending so-called "corrective" emails to prospective drivers (in connection with them signing up to use the app for the very first time), as the district court ordered, makes no sense because there are no prior communications that require "correction."

C. The District Court Had No Authority to Regulate Uber's Communications with Prospective Drivers Who Are Not, and May Never Be, Putative Class Members

Rule 23(d) gives district courts the power to regulate certain communications between a class action defendant and members of a class or

putative class for the protection of "class members." Fed. R. Civ. P. 23(d)(1)(B). But neither the text of Rule 23(d) nor the case law interpreting it authorizes district courts to regulate a defendant's communications with members of the public who simply *might*—through some future hypothetical sequence of events—become class members or putative class members. *See* Fed. R. Civ. P. 23(d)(1)(B)(i) (authorizing a court to "protect *class members*" by requiring "appropriate notice to some or all *class members*") (emphases added); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 237, 258 (S.D.N.Y. 2005) ("[T]here is no basis for restricting a defendant from communicating with persons who are not putative class members"); *Balasanyan v. Nordstrom, Inc.*, 294 F.R.D. 550, 573–74 (S.D. Cal. 2013); *cf. In re Sch. Asbestos Litig.*, 842 F.2d at 683–84 & n.25 (reversing order as overbroad because notice was required for "any individuals or group 'reasonably believed' to include class members").

Here, the district court orders regulate Uber's communications with *all* current *and* prospective drivers, some of whom have never used (and may never use) the Uber app. Plaintiffs' class definitions, however, include only "drivers who have driven for Uber"—*i.e.*, drivers who have already executed a Licensing Agreement, used the Uber App for lead generation services, and accepted at least one ride request. ER-341; *see also* ER-43 (defining putative class as "individuals

who have worked as Uber drivers"); ER-372 (defining putative class as "individuals . . . who worked for, or applied to work for, Uber and/or Rasier"). Thus, the court's orders regulate Uber's communications with certain individuals who have satisfied *none* of the prefatory conditions required to become putative class members and could *never* satisfy such conditions until sometime after they have accepted the terms of the Licensing Agreement. The litigation rights of these individuals are purely "hypothetical" at the time they receive the communication that the district court's orders regulate. *In re Currency Conversion Antitrust Litig.*, 361 F. Supp. 2d at 258. For this reason, too, the district court far exceeded its authority under Rule 23(d) and this Court should vacate its sweeping orders. *See*, *e.g.*, *id.*; *Balasanyan*, 294 F.R.D. at 573–74; *In re Sch. Asbestos Litig.*, 842 F.2d at 683–84 & n.25.

II. The District Court's Orders Violate the Federal Arbitration Act

This Court also should vacate the district court's orders because the orders violate the FAA. For nearly one hundred years, the FAA has stood as a bulwark against "widespread judicial hostility to arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). In order to advance the "federal policy favoring [] arbitration" as a "streamlined method of resolving disputes," *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2315 (2013) (internal

quotation marks omitted), the Supreme Court has time and again held that whether and how disputes are arbitrated is a question left to the parties. *See*, *e.g.*, *Concepcion*, 563 U.S. at 352 ("Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("the foundational FAA principle [is] that arbitration is a matter of consent"). As a result, courts must "rigorously enforce arbitration agreements according to their terms," *Italian Colors*, 133 S. Ct. at 2309, and may not put a thumb on the scale so as to disfavor arbitration, *see Concepcion*, 563 U.S. at 339.

The district court's orders violate both of these precepts, running headlong into the well-established "liberal federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Specifically, the district court—in issuing the orders—found that the copious warnings and notices in Uber's Licensing Agreement regarding arbitration, the effects of accepting Uber's Arbitration Provision, and the effects of opting out of arbitration were insufficient to provide drivers "adequate information to determine whether they should opt out of the December 2015 Agreement." ER-4. But, far from giving drivers too *little* information about arbitration, Uber's detailed disclosures (which the district court required in the first place) provide drivers with far *more*

information than the law requires. *See Sanchez v. Valencia Holding, Co.*, 61 Cal. 4th 899, 914 (2015) (holding that a party has "no obligation to highlight [an] arbitration clause [in] its contract" and that "[a]ny state law imposing such an obligation would be preempted by the FAA").

Moreover, the *additional* "corrective" notice and opt-out opportunities that the district court required are plainly intended to *discourage* arbitration. The orders require Uber to issue a corrective notice to all current and prospective drivers that includes an "easily accessible opt-out function," namely, a hyperlink that brings up a pre-addressed, pre-drafted opt-out e-mail to Uber. ER-7, ER-10. But the corrective notice on which this one-click opt-out hyperlink must appear does not even contain the arbitration agreement at issue—the orders make sure of this, requiring that the corrective notice be only one page long, while also containing certain mandated information about the status of the litigation and the effects of the arbitration agreement. *Id.* Thus, drivers will be presented with an "easily accessible opt-out function" *before they have even had the opportunity to open or read the agreement*. Stacking the deck so as to encourage drivers to make an *uninformed* decision to opt out of arbitration contravenes "the basic precept that arbitration is a matter of consent, not coercion." *Stolt-Nielsen*, 559 U.S. at 681 (internal quotation marks omitted).

The extraordinary measures taken by the district court to discourage drivers from arbitrating disputes with Uber are motivated by an ill-founded concern that "the rights of the putative class members" to participate in class-action litigation would not otherwise be "reasonably protected." ER-6. But a long line of Supreme Court decisions has established unequivocally that it is not the place of courts to craft rules that elevate the class-action mechanism above arbitration. To the contrary, "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *Italian Colors*, 133 S. Ct. at 2312 n.5; *id.* at 2309 (Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights"); *see also Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2550 (2011) ("The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only'"); *Concepcion*, 563 U.S. at 351 (rejecting argument "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system"). The district court got this exactly backwards, eviscerating Uber's Arbitration Provisions to facilitate class-action litigation.

CONCLUSION

For the reasons set forth above, Uber respectfully requests that the Court vacate the district court's December 23, 2015 and January 19, 2016 Rule 23(d) orders. In particular, Uber respectfully requests that the Court:

1. Allow Uber to enforce the Arbitration Provision in its December 2015 Agreement as written, without sending out corrective notices or revised arbitration agreements, vis-à-vis: (1) current drivers, *excluding O'Connor* class members with respect to their certified claims up to the date of certification, but *including* putative class members in all other pending cases; and (2) prospective drivers;

2. Lift the prior restraint requiring Uber to obtain district court approval before sending Licensing Agreements with Arbitration Provisions to current or prospective drivers;

3. At a minimum, remove the district court's requirements that Uber (1) send "corrective" notices to *prospective* drivers; and (2) include a "push-button" hyperlink opt-out function.

Dated: February 4, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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STATEMENT OF RELATED CASES

Uber is aware of the following related cases: (1) *O'Connor v. Uber Techs., Inc.*, No. 14-16078, District Court No. 3:13-cv-03826-EMC; (2) *Mohamed v. Uber Techs., Inc.*, No. 15-16178, District Court No. 3:14-cv-05200-EMC; (3) *Gillette v. Uber Techs., Inc.*, No. 15-16181, District Court No. 3:14-cv-05241-EMC; (4) *Yucesoy v. Uber Techs., Inc.*, No. 15-17422, District Court No. 3:15-cv-00262-EMC; (5) *Del Rio v. Uber Techs., Inc.*, No. 15-17475, District Court No. 3:15-cv-03667-EMC; (6) *O'Connor v. Uber Techs., Inc.*, No. 15-80220, District Court No. 3:13-cv-03826-EMC.

Dated: February 4, 2016 *__/s/ Theodore J. Boutrous, Jr.__*

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Court Rule 32-1 because it contains 8,153 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

Dated: February 4, 2016

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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 4, 2016.

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

Dated: February 4, 2016 /s/ Theodore J. Boutrous, Jr.