Nos. 15-16178, 15-16181, 15-16250

IN THE

United States Court of Appeals for the Ninth Circuit

ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. UBER TECHNOLOGIES, INC., *et al.*, Defendants-Appellants.	No. 15-16178 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
RONALD GILLETTE, Plaintiff-Appellee, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-16181 No. C-14-5241 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding
ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. HIREASE, LLC, Defendant-Appellant.	No. 15-16250 No. C-14-5200 EMC N. Dist. Cal., San Francisco Hon. Edward M. Chen presiding

RESPONSE TO PETITION FOR REHEARING EN BANC

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I. INTRODUCTION

Plaintiffs seek rehearing en banc of a panel decision ordering them to arbitrate their claims pursuant to an arbitration agreement that *seven* other federal courts across the country have *unanimously* enforced. The panel's decision is consistent with binding Supreme Court and Ninth Circuit precedent, including an en banc Ninth Circuit decision from just three years ago that is directly on point. Accordingly, there is no basis for rehearing this case en banc.

First, the panel held that an unconditional, non-illusory right to opt out of arbitration—a right that hundreds of putative class members in this case exercised without any difficulty or repercussions—forecloses a finding of procedural unconscionability under this Court's recent en banc decision, *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052 (9th Cir. 2013) (en banc). *Kilgore* is squarely on point and has not been questioned or unsettled by any intervening authority. There is no reason for en banc review of the same issue this Court, sitting en banc, decided just three years ago.

Second, Plaintiffs argue that the panel violated Supreme Court precedent by enforcing a supposedly "ambiguous" delegation clause. But the allegedly "ambiguous" provision highlighted by Plaintiffs has *nothing* to do with the delegation clause and, as the panel correctly held, does not inject ambiguity into the

clear delegation clause. The panel's decision also adheres to binding Supreme Court case law holding that delegation clauses are stand-alone contracts that must be enforced according to their own terms. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010). This Court does not sit en banc to review such fact-bound questions of contract interpretation.

Third, the panel correctly held that Plaintiffs waived their argument regarding the validity of class-action waivers under the National Labor Relations Act ("NLRA"). Slip Op. at 18 n.6 ("Plaintiffs also raised the argument that the class and collective action waivers in the arbitration agreements may violate the [NLRA] . . . for the first time in a sur-reply. That untimely submission waived the argument."). In any event, this Court has already held that where an arbitration agreement contains a non-illusory opt-out provision, as it does here, the NLRA is satisfied. *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072, 1075–76 (9th Cir. 2014). There is no circuit split on that issue, and no reason to reconsider it en banc.

Finally, the panel rejected Plaintiffs' argument that they are unable to effectively vindicate their rights because Uber has offered to pay the costs of arbitration. That ruling is sensible, consistent with the overwhelming majority of courts to consider the issue, creates no intra- or inter-circuit split, and provides no basis for en banc rehearing.

For all these reasons, this Court should deny Plaintiffs' petition.

II. BACKGROUND

Uber is a technology company that connects individuals in need of rides ("riders") with independent transportation providers searching for riders ("drivers"). Uber provides its technology through a smartphone application (the "App") pursuant to a software licensing agreement ("Licensing Agreement").

Plaintiffs Abdul Kadir Mohamed and Ronald Gillette accepted substantially similar versions of the Licensing Agreement.[1] The Licensing Agreement contained an arbitration provision requiring the parties to arbitrate all "disputes arising out of or related to … [their] relationship with Uber." 2 ER 177, 209 (the "Arbitration Provision"). The Arbitration Provision included a delegation clause, providing that an arbitrator will decide issues relating to the "enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision." *Id.* It also provided drivers with an unconditional right to opt out of the Arbitration Provision.

[1] Gillette accepted a 2013 version of the Licensing Agreement, while Mohamed accepted a version released in 2014. As relevant to Plaintiffs' petition, the only material difference is that the 2013 Agreement grants drivers 30 days to opt out of arbitration by notifying Uber in person or by overnight delivery service, while the 2014 Agreement permits drivers to opt out by U.S. mail or by sending an email to Uber as well.

Although *hundreds* of drivers have exercised this right, Plaintiffs did not. Slip Op. at 17; Appellants' Opening Br. ("AOB"), ECF 27 at 28–30.

Instead, Plaintiffs filed putative class actions alleging that Uber violated the Fair Credit Reporting Act and state consumer protection laws. The district court denied Uber's motion to compel arbitration, concluding that the Arbitration Provision was unconscionable. 1 ER 69–70. Although the district court acknowledged that the delegation clause clearly and unmistakably delegated such questions of arbitrability to the arbitrator, it declined to enforce that clause on the ground that it was supposedly inconsistent with provisions found *elsewhere* in the Licensing Agreement. 1 ER 15–23. The district court then found the Arbitration Provision procedurally unconscionable based on its speculation that some drivers *might* feel pressure to agree to arbitration, notwithstanding their unconditional right to opt out. 1 ER 39–40. The district court acknowledged that this Court has repeatedly held that a meaningful opportunity to opt out of arbitration precludes a finding of procedural unconscionability—most recently in *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc)—but nevertheless refused to follow that precedent. 1 ER 36 n.31. It then found that the Arbitration Provision contained substantively unconscionable provisions and invalidated the agreement in its

entirety, notwithstanding the existence of two severability and savings clauses. 1 ER 42–49, 62–69.

The panel unanimously reversed. It agreed with the district court that the delegation clause was clear and unmistakable, and concluded that the ambiguities the district court identified by looking *outside* the delegation clause were "artificial." Slip Op. at 13–14. The panel similarly rejected the district court's procedural unconscionability holding, agreeing with this Court's precedents that there can be no procedural unconscionability where an unconditional and non-illusory opt-out right exists, as it does here. *Id.* at 14–18. Finally, the panel declined to evaluate whether a cost-splitting provision in the Agreement prevented Plaintiffs from effectively vindicating their rights because Uber had committed to paying all arbitration costs. *Id.* at 19. The panel therefore ordered Plaintiffs to arbitrate their disputes, including all threshold questions of arbitrability. *Id.* at 28.

III. ARGUMENT

An en banc rehearing "is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Because neither condition is satisfied here, this Court should deny Plaintiffs' petition.

A. The Panel Correctly Ruled That The Delegation Provision Is Not Procedurally Unconscionable

In its opinion enforcing the delegation clause contained within the parties' arbitration agreement, the panel—faithfully adhering to this Court's precedents—correctly recognized that "'the existence of a meaningful right to opt-out of [arbitration] necessarily renders [an arbitration clause] (and the delegation clause specifically) procedurally conscionable as a matter of law.'" Slip Op. at 16–18 (quotation omitted). Despite Plaintiffs' suggestions to the contrary, this Court has *repeatedly* held that an arbitration agreement is not procedurally unconscionable where, as here, signatories have a meaningful opportunity to opt out of arbitration.

In fact, this Court decided this exact question en banc just three years ago, holding that an arbitration agreement was not procedurally unconscionable because it "allowed [signatories] to reject arbitration within sixty days of signing the [agreement]." *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1059 (9th Cir. 2013) (en banc). Numerous panel decisions have reached the same conclusion under similar circumstances. *See Hoffman v. Citibank (South Dakota) N.A.*, 546 F.3d 1078, 1085 (9th Cir. 2008) ("[P]roviding a 'meaningful opportunity to opt out' can preclude a finding of procedural unconscionability."); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("[I]f an employee has a meaningful opportunity to opt out . . . then it is not procedurally unconscionable."); *Circuit City Stores, Inc.*

v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1108 (9th Cir. 2002). Even the district court agreed that Ninth Circuit case law in this area is settled:

> Uber argues that the existence of a meaningful right to opt-out . . . necessarily renders those [arbitration] clauses . . . procedurally conscionable as a matter of law, citing [*Ahmed*, *Najd*, and *Kilgore*] . . . . It cannot be denied that each of the cited decisions stand for the precise proposition of law that Uber advocates.

1 ER 34. The district court swept this binding authority to the side, but the panel correctly concluded that this Court's holdings cannot be so easily dismissed: "The district court does not have authority to ignore circuit court precedent, and neither do we." Slip Op. at 17.

Plaintiffs also argue that *Kilgore* (and therefore the panel's ruling) is contrary to California law, but as the panel correctly observed, no "intervening California authority" has changed California law since this Court decided *Kilgore* just three years ago. Slip Op. at 16–17 & n.5. Nor is there any reason to believe that the panel's decision, *Kilgore*, or any of this Court's other decisions addressing procedural unconscionability incorrectly interpreted California law; to the contrary, the California Supreme Court's recent decision in *Sanchez v. Valencia Holding, Co.*, 61 Cal. 4th 899 (2015), confirms that this Court got it right. *Id.* at 914 (holding that an arbitration agreement was procedurally unconscionable after noting that the

defendant did "not contend in this court that [the plaintiff] could have opted out of the arbitration agreement"). In support of their argument that this Court has it wrong, Plaintiffs point only to a decision that *pre-dated* *Kilgore* by six years, *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007). Plaintiffs argue that *Gentry* allows a finding of procedural unconscionability even in the face of a meaningful opt-out provision, particularly if the agreement fails to highlight certain "disadvantageous terms" pertaining to arbitration. Pet. at 6. But the appellants in *Kilgore* made the exact same argument about *Gentry*, *see Kilgore*, No. 09-16703, Dkt. 7 at 27–28, and this Court rejected it. *See Kilgore*, 718 F.3d at 1059. Moreover, even if *Gentry* once supported Plaintiffs' position (it did not), the California Supreme Court rejected any such requirement in *Sanchez*. Although Plaintiffs make no mention of this case, *Sanchez* squarely holds that the Federal Arbitration Act ("FAA") preempts any state-law rule requiring a party to "highlight" or draw special attention to arbitration provisions. 61 Cal. 4th at 914.[2]

Finally, "[i]t should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original

[2] Indeed, even the district court—which initially relied on *Gentry* to deny Uber's motion to compel arbitration—later seemed to acknowledge that *Gentry* was no longer good law. Dkt. 63-5 at 9–10 ("*Sanchez* . . . cast[s] doubt on the viability of" the district court's procedural unconscionability analysis).

appeal proceedings." *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 990 (9th Cir. 2010) (citation omitted). But that is precisely what Plaintiffs have done here, rehashing the same fact-bound arguments—that the opt-out provisions in their agreements purportedly were "hidden" or "illusory"—that the panel correctly rejected. As the district court acknowledged, the opt-out provision in the 2014 Agreement was "highly conspicuous" and enabled "drivers to obtain all of the benefits of the contracts, while avoiding any potential burdens of arbitration." *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1231 (N.D. Cal. 2015). The opt-out provision in the 2013 Agreement was no less conspicuous. Like the agreement in *Kilgore*, the opt-out clause in the 2013 Agreement was set forth in a clearly labeled section of the contract with an underlined heading entitled, "Your Right to Opt Out Of Arbitration," and emphasized the opt-out deadline in boldface. 2 ER 212; *Kilgore*, 718 F.3d at 1059; *see also Sanchez*, 61 Cal. 4th at 914–15. Indeed, Plaintiffs' claim that the opt-out provisions were "hidden" is belied by the undisputed fact that *hundreds* of drivers opted out of arbitration.[3] *See* Slip Op. at 17; AOB at 28–30.

[3] To the extent Plaintiffs argue that an *illusory* opt-out provision is insufficient, by itself, to avoid procedural unconscionability, *see* Pet. at 5, the panel's fact-bound conclusion that the agreement at issue here is not illusory makes clear that this case does not present that question, *see* Slip Op. at 17–18.

In short, the panel's fact-bound conclusion that the Arbitration Provision provides drivers a "meaningful" right to opt out of arbitration, and thus there is no procedural unconscionability, was both correct and consistent with the undisturbed and controlling precedent from this Court.

B. The Panel Correctly Held That The Delegation Clause Is Clear and Unmistakable

The panel also correctly determined—consistent with U.S. Supreme Court precedent—that the parties' delegation clause clearly and unmistakably delegates threshold questions of arbitrability to the arbitrator. Slip Op. at 11–14. Indeed, *every* federal court to consider the same delegation clause in these agreements (or in substantially similar iterations of these agreements) agrees.[4]

Plaintiffs attempt to manufacture ambiguity by claiming that a severability provision, which appears several pages *after* the delegation clause in a separate section of the Licensing Agreement, is inconsistent with delegation. *Compare* 2 ER

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[4] *Micheletti v. Uber Techs., Inc.*, 2016 WL 5793799, at *4 (W.D. Tex. Oct. 3, 2016); *Lee v. Uber Techs., Inc.*, 2016 WL 5417215, at *4 (N.D. Ill. Sept. 21, 2016); *Rimel v. Uber Techs., Inc.*, 2016 WL 6246812, at *7–8 (M.D. Fla. Aug. 4, 2016); *Bruster v. Uber Techs., Inc.*, ___ F. Supp. 3d ___, 2016 WL 2962403 (D. Ohio May 23, 2016); *Suarez v. Uber Techs., Inc.*, 2016 WL 2348706, at *4 (M.D. Fla. May 4, 2016); *Varon v. Uber Techs., Inc.*, 2016 WL 1752835, at *6 (D. Md. May 3, 2016); *Sena v. Uber Techs., Inc.*, 2016 WL 1376445, at *3–4 (D. Ariz. Apr. 7, 2016).

177, 209; *with* 2 ER 179, 211. As the Supreme Court has held, however, a delegation clause is independent from the container contract in which it appears, and so a court reviewing the enforceability of a delegation clause should only look within the four corners of the delegation clause. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010). In any event, any supposed "ambiguity" regarding whether a provision should be *severed* if found to be invalid has no bearing on whether the parties to an agreement "clearly and unmistakably" *delegated* threshold questions of arbitrability to an arbitrator. This Court should decline Plaintiffs' invitation to grant rehearing and *create* a split of authority with the seven other federal courts that have enforced this unambiguous delegation clause.

C. Plaintiffs Waived Their NLRA Argument And The Panel's Ruling Does Not Create A Circuit Split

In *Johnmohammadi v. Bloomingdales, Inc.*, 755 F.3d 1072, 1075–76 (9th Cir. 2014), this Court concluded that an employer that promulgates and enforces a class-action waiver in an arbitration agreement *with an opt-out clause* does not violate section 8 of the NLRA—that is, the employer does not "interfere, with, restrain, or coerce employees in the exercise of [their] rights" under 29 U.S.C. § 158(a)(1). As this Court explained, "we fail to see how asking employees to choose . . . can be viewed as interfering with or restraining their right to do anything." *Johnmohammadi*, 755 F.3d at 1076. Since that decision, this Court has twice re-

affirmed that holding, in *Morris v. Ernst & Young LLP*, ___ F.3d ___, 2016 WL 4433080, at *4 n.4 (9th Cir. Aug. 22, 2016), and more recently in the panel decision in this case. Slip Op. at 18 n.6.

In their petition, Plaintiffs argue that rehearing is warranted because, according to Plaintiffs, this Court's decisions conflict with the Seventh Circuit's recent opinion in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016). This Court should reject that argument for two reasons.

First, as the panel correctly held and Plaintiffs do not dispute, Plaintiffs waived their NLRA-related arguments by failing to present them to the district court in the first instance *or* in their answering brief on appeal. Indeed, Plaintiffs did not even *mention* the NLRA until they filed a surreply on appeal. Slip Op. 18 n.6; *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011); *see also Bruster v. Uber Techs., Inc.*, 2016 WL 4086786, at *3 (N.D. Ohio Aug. 2, 2016) (finding NLRA challenge to the same arbitration agreement at issue here waived when presented for the first time in a petition for reconsideration).[5]

[5] Plaintiffs try to justify their waiver by arguing that "[a]t the time Plaintiffs filed their Response Brief, no court of appeals had held that the NLRA prohibits class waivers" in mandatory arbitration agreements. Pet. at 12 n.2. That is irrelevant. Whether class waivers can violate employees' section 7 rights has been the subject of considerable judicial and scholarly attention for years; in fact, several

Second, even if Plaintiffs preserved their NLRA argument (they did not), and even if the NLRA applied to Plaintiffs (it does not[6]), the panel's decision does *not* conflict with the Seventh Circuit's decision in *Lewis*. Unlike the agreements at issue here, "it [was] undisputed [in *Lewis*] that assent to [the employer's] arbitration provision was a condition of continued employment" and that plaintiff had no option to opt out. 823 F.3d at 1155. For that reason, the Seventh Circuit expressly *declined* to address the issue that this Court reached in *Johnmohammadi* and this case, reasoning that it "ha[d] no need to resolve" whether an arbitration agreement waiving class claims could be enforced if an "employee had the right to opt out of the agreement without penalty." *Id.*; *see also Lee*, 2016 WL 5417215, at *6 (noting that *Lewis* "left open" the question that this Court addressed in *Johnmohammadi*).[7]

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circuit courts had squarely addressed this issue long before Uber filed its motion to compel in this case. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *see also Bruster*, 2016 WL 4086786, at *3 ("*Lewis* is not a novel legal theory.").

[6] As the Ninth Circuit has explained, "Congress specifically amended the Act in 1947 to exclude 'independent contractors'" like Plaintiffs. *NLRB v. Friendly Cab Co.*, 512 F.3d 1090, 1096 n.6 (9th Cir. 2008); *see also* 29 U.S.C. § 152(3) (defining "employee" under the NLRA as "not includ[ing] any individual . . . having the status of an independent contractor").

[7] Plaintiffs note that the National Labor Relations Board ("NLRB") has disagreed with *Johnmohammadi*. *See On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189 (2015). But that NLRB order was later reversed on appeal (*On*

Here, as in *Johnmohammadi* (and in contrast to *Lewis*), Plaintiffs were presented with a "highly conspicuous" provision permitting them to opt out of arbitration without penalty. 1 ER 61. Uber repeatedly advised drivers that "[a]rbitration [was] not a mandatory condition of [their] contractual relationship with Uber" and "[i]f [drivers] [did] not want to be subject to [the] Arbitration Provision, [they] may opt out." 2 ER 212. And Plaintiffs have never disputed that many drivers *did* opt out of arbitration with no adverse consequences. *See* Slip Op. at 17; AOB at 28–30. Accordingly, even if a class waiver contained within an arbitration agreement with an opt-out provision might violate the NLRA under some hypothetical set of circumstances rendering the opt-out illusory, this is not such a case.[8] *See Bruster*, 2016 WL 4086786, at *3 (applying *Johnmohammadi* to the

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Assignment Staffing Servs., Inc. v. NLRB, 2016 WL 3685206 (5th Cir. June 6, 2016)), and would not be entitled to deference in any event, both because this Court's *Johnmohammadi* holding was based on the plain and unambiguous text of the NLRA and because the NLRB purported to interpret a statute *other than* the NLRA—namely, the FAA—on which it is not entitled to any deference. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). That likely explains why this Court has now reaffirmed *Johnmohammadi* on two occasions since the NLRB issued *On Assignment Staffing*. *See* Slip Op. at 18 n.6; *Morris*, 2016 WL 4433080, at *4 n.4.

[8] Because *Lewis* and *Morris* both involved class waivers in arbitration agreements *without* opt-out provisions, there is also no need for this Court to "grant en banc to review to await the outcome of [the] petitions for writ of certiorari" that were filed in those cases. Pet. at 11. Even if the Supreme Court were to grant review in those cases, it is extremely unlikely that the disposition of those appeals would

arbitration agreement at issue here and concluding that the agreement did not violate the NLRA "because Plaintiff Bruster could have opted out of arbitration").

D. The Panel Correctly Held That Plaintiffs Are Not Prevented From Effectively Vindicating Their Claims

Finally, Plaintiffs take issue with the panel's conclusion that the cost-sharing provision in the parties' arbitration agreement does *not* preclude Plaintiffs "from effectively vindicating their federal statutory rights," in part because "Uber has committed to paying the full costs of arbitration." Slip Op. at 19. As the panel explained, "the fee term in the arbitration agreement presents Plaintiffs with no obstacle to pursuing vindication of their federal statutory rights in arbitration." *Id.*

Plaintiffs do not argue that this holding violates Supreme Court precedent—nor could they, as the Supreme Court has never even recognized an "effective-vindication" exception. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013) (noting that some lower courts have "asserted the existence of an 'effective vindication' exception" based on "dictum"). Nor do Plaintiffs contend that the panel's holding creates a conflict within the Ninth Circuit. Instead, they seek en banc review because two *other* courts have declined to consider offers to pay arbitration costs made during the course of litigation when evaluating an

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affect this case, where the agreement *has* a clear and effective opt-out.

effective-vindication challenge. *See* Pet. at 13–14 (citing *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 285 n.17 (3d Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676–77 (6th Cir. 2003) (en banc)).

What Plaintiffs fail to mention is that those courts are outliers in a lopsided circuit split. Indeed, the First, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuit Courts of Appeals—and now the Ninth, as well—all agree that the effective-vindication doctrine is concerned solely with the *particular* litigants at issue; therefore, an offer to pay arbitration costs may be considered in evaluating whether an arbitration agreement prevents effective vindication of statutory claims.[9] District courts in another two Circuits—the Second Circuit and the D.C. Circuit—are in accord.[10]

Because the panel decision here is comfortably situated among the clear majority of courts to consider the relevance of an offer to pay arbitration costs, this

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[9] *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56–57 (1st Cir. 2002); *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 183 n.10 (4th Cir. 2013); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 567 (8th Cir. 2007); Slip Op. at 19; *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 554 (11th Cir. 2016).

[10] *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 411–12 (S.D.N.Y. 2003); *Nelson v. Insignia/ESG, Inc.*, 215 F. Supp. 2d 143, 157–58 (D.D.C. 2002).

case does not present a question of exceptional importance warranting en banc review. *See Makaeff v. Trump Univ., LLC*, 736 F.3d 1180 (9th Cir. 2013) (Wardlaw, J., concurring in denial of rehearing en banc) (observing that en banc review is improper "[b]ecause the panel opinion . . . *creates* no inter-circuit split") (emphasis added). Moreover, this case would be an exceptionally poor vehicle for addressing this issue because the arbitration provisions here require *Uber* to pay all arbitration fees and costs "required by law." 2 ER 212. Thus, even if the Court ignored Uber's offer to pay all arbitration costs, as Plaintiffs request, it will not change the outcome of Plaintiffs' effective-vindication challenge because Uber will *still* pay those costs under the arbitration agreements themselves to the extent required by law.[11]

[11] Plaintiffs argue that Uber "equivocated on its offer to bear costs" and raised this issue for the first time in its "appellate brief." Pet. at 14. That is both false and irrelevant. In the district court (and again on appeal), Uber repeatedly and unequivocally offered to pay the costs and fees of arbitration. 2 ER 92 ("[W]e've already offered to pay those – the [arbitration] costs in the first instance."); 2 ER 94–95 ("[H]ere, there isn't even a dispute . . . . [W]e've already offered to pay the arbitration fees . . . ."). For that reason, the panel correctly found that "Uber has committed to paying the full costs of arbitration." Slip Op. at 19.

IV. CONCLUSION

For the foregoing reasons, Uber respectfully requests that the Court deny Plaintiffs' petition.

Dated: November 3, 2016

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Circuit Rules 35-4 and 40-1 that this brief is proportionally spaced, has a typeface of 14-point Times New Roman font, and contains 3,269 words.

Dated: November 3, 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 November 3, 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: November 3, 2016

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