Nos. 15-17420, 15-17422, 15-17475

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUGLAS O'CONNOR, THOMAS COLOPY, MATTHEW MANAHAN, and ELIE GURFINKEL, *Plaintiffs-Appellees*, v. UBER TECHNOLOGIES, INC. *Defendant-Appellant*.	No. 15-17420 Appeal from N.D. Cal., No. C-13-3826 EMC Hon. Edward M. Chen
HAKAN YUCESOY, ABDI MAHAMMED, MOKHATAR TALHA, BRIAN MORRIS, and PEDRO SANCHEZ *Plaintiffs-Appellees*, v. UBER TECHNOLOGIES, INC. *Defendant-Appellant*.	No. 15-17422 Appeal from N.D. Cal., No. C-15-262 EMC Hon. Edward M. Chen
RICARDO DEL RIO and TONY MEHRDAD SAGHEBIAN, *Plaintiffs-Appellees*, v. UBER TECHNOLOGIES, INC., and RASIER-CA, LLC *Defendants-Appellants*.	No. 15-17475 Appeal from N.D. Cal., No. C-15-3667 EMC Hon. Edward M. Chen

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.[1]

The Chamber represents the interests of its members before courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community, including cases involving the enforceability of arbitration agreements.[2] If allowed to stand, the rulings below would potentially unsettle many millions of arbitration agreements. The Chamber and its members therefore have a powerful

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

[2] See http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

interest in expressing their views on the issues presented in these consolidated appeals.

INTRODUCTION

For many years, judicial hostility to arbitration enabled parties to evade their arbitration agreements. In response, Congress enacted the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, to ensure that arbitration agreements are enforceable as a matter of federal law and to secure the benefits of arbitration to parties who enter into those agreements.

Many of the Chamber's members include arbitration provisions in their contracts because arbitration is simpler, faster, less expensive, and less adversarial than judicial dispute resolution. By agreeing to arbitration, parties can avoid the excessive—and growing—costs and delays associated with resolving disputes in court. Such efficiencies reduce the cost of doing business overall, which in turn results in lower prices for consumers, higher wages for employees, and increased income for independent contractors.

These advantages are lost, however, if arbitration agreements are not enforced when one party sees a post-hoc advantage to suing in

court. Indeed, as the lengthy history of these consolidated cases illustrates, litigation ***about*** arbitration has become increasingly labyrinthine and unpredictable as parties—and, sometimes, courts—seek creative ways to avoid the mandate of the FAA.

The decision below exemplifies the problems caused by this continuing hostility to arbitration. Although the governing legal rules in California supposedly apply across-the-board to all contracts, in practice those rules too often are applied in a way that discriminates against arbitration, with the result that arbitration agreements are invalidated in circumstances in which other types of contracts would be upheld. In this case, for example, the district court ignored clear holdings by this Court that a meaningful opt-out opportunity forecloses a finding of procedural unconscionability; singled out for condemnation features of the arbitration provision that are longstanding hallmarks of arbitration; and refused to sever unenforceable provisions, in a manner that departed from the parties' intent and the preference of California law for severance of unenforceable contract provisions over invalidation of the entire contract.

Simply put, no court would go to these lengths to invalidate an agreement that did not involve arbitration. Yet as the Supreme Court repeatedly has made clear, courts run afoul of the FAA when, as here, they employ ostensibly general contract-law principles in ways that disfavor arbitration in practice, every bit as much as when they apply rules that single out arbitration expressly. It is imperative that this Court affirm the clear governing principle: that federal law requires the enforcement of arbitration agreements as written unless a general principle of contract law—that is actually applied to all contracts—requires otherwise, and that doubts about a contract's scope be resolved in favor of arbitration. The district court's decisions, which are inconsistent with that principle, must be reversed.

ARGUMENT

I. The FAA Forbids All Forms Of Judicial Hostility To Arbitration Agreements.

Congress enacted the FAA in 1925 in "response to hostility of American courts to the enforcement of arbitration agreements." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001). This "old judicial hostility to arbitration" (*Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 480 (1989)) had its roots in the English common law

and was thought to be so entrenched in American courts that a strong statutory antidote was needed to override it. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 & n.6 (1985). The FAA was intended to replace this "judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

1. The heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting 9 U.S.C. § 2); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

As the Supreme Court has recognized, "the judicial hostility towards arbitration that prompted the FAA * * * manifested itself in a great variety of devices and formulas." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (internal quotation marks omitted). The Court accordingly has construed Section 2 to prohibit all such devices or formulas, no matter their form. Most obviously, state-law rules that "prohibit[] outright the arbitration of a particular type of claim" are "straightforward[ly] * * * displaced by the FAA." *Id.* at 341. So too are rules that "singl[e] out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Both of these types of rules "take[] their meaning precisely from the fact that a contract to arbitrate is at issue" and therefore fly in the face of section 2's command that arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of *any* contract." *Perry*, 482 U.S. at 492 n.9 (emphasis in original).

The FAA reaches further, however, than rules that facially disfavor arbitration. It also forbids courts from applying contract-law principles "in a fashion that disfavors arbitration" or has a "disproportionate impact on arbitration." *Concepcion*, 563 U.S. at 341-

42. For example, the Supreme Court struck down under the FAA a facially neutral California rule that had the practical effect of imposing a *per se* ban on agreements to arbitrate modest-sized claims on an individual basis. *Id.* at 341. Even though the rule purported to be based on a generally applicable contract-law defense (unconscionabilty), and even though California applied a similar rule outside the arbitration context, the Court determined that the rule was preempted because "[r]equiring the availability of classwide arbitration [procedures] interferes with fundamental attributes of arbitration." *Id.* at 344; *see also Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1159 (9th Cir. 2013) ("Any general state-law contract defense, based in unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.").

By the same token, the FAA also prohibits courts from applying special ***interpretive*** rules to arbitration agreements. As the Supreme Court has explained, "[a] court may not * * * construe [an arbitration] agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 492 n.9. And if application of the ordinary rules of interpretation do

not settle the dispute, a court must resolve "any doubts concerning the scope of arbitrable issues * * * in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25.

In sum, Section 2's "substantive command" is that state and federal courts must "treat[]" arbitration agreements—in ***all*** respects—"like all other contracts." *Buckeye Check Cashing,* 546 U.S. at 447. This means that courts may not erect obstacles to the enforcement of arbitration agreements that are inapplicable to other kinds of contracts, impose requirements that are incompatible with "arbitration as envisioned by the FAA" (*Concepcion*, 563 U.S. at 351), or apply purportedly general contract-law principles in a more demanding fashion in the arbitration context.

2. Despite the Supreme Court's clear instructions to treat agreements to arbitrate like any other contract, the "old judicial hostility to arbitration" (*Rodriguez de Quijas*, 490 U.S. at 480) has proved stubbornly persistent. Courts today rarely discriminate against arbitration expressly;[3] increasingly, they manifest their hostility to

[3] *But see Nitro-Lift Techs., LLC v. Howard,* 133 S. Ct. 500 (2012) (per curiam) (summary reversal); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (summary reversal).

arbitration by more subtly applying general rules in a manner that ***effectively*** discriminates against arbitration.

Most recently, the Supreme Court held that a California court's idiosyncratic interpretation of an arbitration contract was preempted by the FAA. In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), the Court addressed an arbitration agreement that precluded class-wide arbitration and provided separately that, if the provision precluding class arbitration were deemed unenforceable under "the law of your state," the entire arbitration provision would be unenforceable as well. 136 S. Ct. at 466. After two California customers brought suit against DIRECTV and DIRECTV sought to compel arbitration under this provision, the customers replied that the arbitration provision was unenforceable because the law of California at the time the parties had agreed to the arbitration provision—the so-called *Discover Bank* rule—precluded the waiver of class arbitration and class actions. In 2011, however, the Supreme Court had invalidated the *Discover Bank* rule as inconsistent with, and preempted by, the FAA. *Concepcion*, 563 U.S. at 352.

Ostensibly "applying general principles of California contract law," the California Court of Appeal held that the agreement should be construed to preclude arbitration since (in its view) "the law of your state" refers to California law as it existed at the time the agreement was formed—*i.e.*, without regard to the Supreme Court's subsequent holding that the FAA preempted that state law rule. *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338, 342 (2014). But the Supreme Court reversed, concluding that "California courts would not interpret contracts other than arbitration contracts the same way" (*DIRECTV*, 136 S. Ct. at 469)—that is, as governed by preempted, and therefore ***invalid***, state law.

3. *DIRECTV* is the latest example of a disturbing trend. A number of lower courts, and California courts in particular, have shown themselves to be especially enthusiastic about using general contract principles, such as contract interpretation or unconscionability, in ways that disfavor arbitration in practice.[4] Indeed, many of the Supreme

[4] *See Concepcion*, 563 U.S. at 342 (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006), and Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L.

Court's seminal cases addressing the obligation of courts to enforce arbitration agreements involved anti-arbitration holdings of California courts applying California law.[5]

Some see this resistance to the FAA as cause for celebration. As one commentator has said with evident approval, "[b]y invoking the rhetoric of unconscionability, these judges are not merely acting tactically in a game of legal chess * * *[,] they are sending a message, not just to the U.S. Supreme Court, but to the other officials and institutions that collectively make up our legal system." Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609, 624 (2009). But whatever one's views on the desirability of arbitration as a

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Rev. 185 (2004)); Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law,* 83 N.Y.U. L. Rev. 1420, 1481 (2008) (noting that "the Ninth Circuit * * * is in many ways the circuit most hospitable to state unconscionability rulings").

[5] *See Perry*, *supra*; *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In addition, the Supreme Court recently granted certiorari to consider "[w]hether California's arbitration-only severability rule is preempted by the FAA" (*see MHN Gov't Servs., Inc. v. Zaborowski*, 136 S. Ct. 27 (2015)), although the parties ultimately settled before argument.

matter of policy, the governing federal rule has been set, unambiguously, by the FAA: It states a "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House*, 534 U.S. 278, 289 (2002).

In reaching its conclusion, the six-Justice majority in *DIRECTV* took care to note that "[t]he Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act," no matter that the Court in that case was "closely divided" or that the lower court might "disagree[]" with *Concepcion* on the merits. *DIRECTV*, 136 S. Ct. at 468. Like the Supreme Court, lower courts must take care to follow the FAA's language and be guided by its principles. Courts should not dodge the existing precedents or engage in interpretive gymnastics to invalidate agreements to arbitrate. They should not, in other words, "act[] tactically" (Charles L. Knapp, *supra*, at 624) in an effort to frustrate the FAA's manifest purpose. Rather, in line with the Supreme Court's repeated direction, lower courts must "rigorously enforce" arbitration agreements, like any other contract, "according to their terms." *American Express Co. v. Italian Colors Rest.*,

133 S. Ct. 2304, 2309 (2013); *see also*, *e.g.*, *Concepcion*, 563 U.S. at 339; *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 682 (2010).[6]

II. The District Court Failed To Treat Uber's Arbitration Agreement As It Would Any Other Agreement.

1. For the reasons set forth in Uber's brief, as well as the Chamber's *amicus* brief in *Mohamed v. Uber Technologies, Inc.*, No. 15-16178 (9th Cir. 2016), it is apparent that the district court in these consolidated appeals departed from the Supreme Court's guidance by reading Uber's arbitration provisions through an anti-arbitration lens at every step of the analysis. That approach is irreconcilable with the FAA's demand that courts "place[] arbitration agreements on equal footing with all other contracts.'" *Buckeye Check Cashing,* 546 U.S. at 443.

For example, the district court disregarded on-point, binding Ninth Circuit precedent holding that a meaningful opportunity to opt out of an arbitration contract ***precludes*** a finding of procedural

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[6] Following *Imburgia*, the Court vacated and remanded for further consideration two additional cases in which the lower court had failed to give even-handed treated to an arbitration provision. *See Schumacher Homes of Circleville, Inc. v. Spencer*, 2016 WL 763198 (U.S. Feb. 29, 2016); *Ritz-Carlton Dev. Co., Inc. v. Narayan*, 136 S. Ct. 799 (2016).

unconscionability (*Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014); *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc)), looking instead to a distinguishable state-court case decided six years earlier (*Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007)). *See Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1213 (N.D. Cal. 2015). As this Court has explained, however, a Ninth Circuit interpretation of California state law is "binding in the absence of any ***subsequent*** indication from the California courts that our interpretation was incorrect." *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983) (emphasis added).

Likewise, the district court concluded that the fee-shifting provisions in the arbitration agreement were unconscionable even though those provisions stated that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." The court then refused to sever these provisions on the ground that "severing the fee-splitting provision leaves the contract silent as to how fees and costs will be apportioned." *O'Connor v. Uber Techs., Inc.*, – F. Supp. 3d –, 2015 WL 8587879, at *6 (N.D. Cal. Dec. 10, 2015). Yet the California Supreme Court has explained that "[t]he absence of specific provisions

on arbitration costs ***would * * * not*** be grounds for denying the enforcement of an arbitration agreement." *Armendariz v. Found. Health Psychare*, 6 P.3d 669, 689 (Cal. 2000) (emphasis added).

2. The blatancy of these errors has a broader significance than the particular legal mistakes committed by the district court; it also suggests that the court, in every aspect of its decision, viewed the arbitration agreements through a highly-skeptical lens that would not be applied to other types of contracts.

For instance, the district court applied a uniquely demanding standard for procedural unconscionability—one that it would not apply to non-arbitration contracts. According to the court, although the arbitration agreements afforded drivers a right to opt out of arbitration by sending a letter via hand delivery or overnight mail, that right was not "meaningful" "because the agreement was a contract of adhesion which buried the arbitration clause on the eleventh page." *O'Connor*, 2015 WL 8587879, at *3. But the district court pointed to no other context in which a clear, legible, unambiguous term under a ***separate subheading*** was deemed procedurally unconscionable because it appeared toward the back of the contract. To the contrary, the court has

acknowledged that "it is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them." *Mohamed*, 109 F. Supp. 3d at 1197. And, of course, the Supreme Court already has held that the FAA preempts state rules that require that arbitration provisions be made more conspicuous than other contractual terms. *Casarotto*, 517 U.S. at 687-88; *see also Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 751 (Cal. 2015) (a party has "no obligation to highlight the arbitration clause of its contract" and "[a]ny state law imposing such an obligation would be preempted by the FAA").

Similarly, the district court cited no case outside the arbitration context in which an opt-out provision was found to be deficient because it required that opt-outs be delivered only by hand or overnight mail. Perhaps that is because courts have rejected the argument that it is too "burdensome" for class members to opt out of class settlements by "certified mail, overnight mail, or by hand." *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 123 (S.D.N.Y. 2009), *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010).

Indeed, even if California did have an even-handed rule that "buried" terms or supposedly onerous delivery requirements could negate the effect of an unambiguous opt-out provision, the district court cited no case adopting this rationale for finding procedural unconscionability when, as here, many parties to the contract—including the named plaintiff in the *O'Connor* case—***did*** opt out. *See* Uber Br. at 12-13. The district court nonetheless held that "there is no evidence that drivers could *actually* reject the arbitration provision." *Mohamed*, 109 F. Supp. 3d at 1206 (emphasis in original)). Aside from being incorrect on its face and contrary to circuit precedent (*see Johnmohammadi*, 755 F.3d at 1074; *Kilgore*, 718 F.3d at 1059), this conclusion is powerful evidence that the district court's approach to procedural unconscionability was "unique" to the arbitration context. *DIRECTV*, 136 S. Ct. at 469.

3. The district court also homed in on several provisions of the arbitration agreement—the confidentiality clause, the intellectual property carve-out, and others—and concluded that each was so unreasonably favorable to Uber as to be substantively unconscionable. As has been amply demonstrated already, these determinations were

wrong on their own terms. *See* Uber Br. at 49-54; Chamber *Mohamed* Br. at 17-33. But beyond that, they are the result of applying legal rules that are not generally applicable to all contracts.

The district court's holding that the intellectual property carve-out "lack[ed] any mutuality, making it unconscionable" is a case in point. *O'Connor*, 2015 WL 8587879, at *8. Not only have numerous courts in other states rejected the notion that a lack of perfect "mutuality" renders arbitration agreements unconscionable,[7] but California itself does not require point-by-point mutuality for any other kind of contract. To the contrary, the California Supreme Court has made clear that "[i]f the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged, or mutuality of obligation." *Foley v. Interactive Data Corp.*, 765 P.2d 373, 381 n.14 (Cal. 1988) (internal quotation marks omitted); *see generally* Restatement (Second) of Contracts § 79(c) (1981) ("If the requirement of

[7] *See THI of New Mexico at Hobbs Center, LLC v. Patton*, 741 F.3d 1162, 1168-69 (10th Cir. 2014); *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76-77 (1st Cir. 2011); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 966-67 (8th Cir. 2009); *Oblix, Inc. v. Winiecki*, 374 F.3d 488, 490-91 (7th Cir. 2004); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183 (3d Cir. 1999); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 757 & n.35 (Tex. 2001).

consideration is met, there is no additional requirement of * * * 'mutuality of obligation.'"). Of course, an arbitration-only point-by-point mutuality requirement is preempted by the FAA's bar on state-law rules that "singl[e] out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687.

So too with the agreement's confidentiality provisions. Outside the arbitration context, California courts routinely enforce confidentiality or nondisclosure agreements. *See, e.g.*, *Grail Semiconductor, Inc. v. Mitsubishi Elec. & Elecs. USA, Inc.*, 170 Cal. Rptr. 3d 581, 587-88 (Ct. App. 2014) ("It is beyond question here that Grail established every element of breach of contract" regarding an alleged breach of the parties' "NDA[.]"); *Sanchez v. Cnty. of San Bernadino*, 98 Cal. Rptr. 3d 96, 105 (Ct. App. 2009) (rejecting contention that confidentiality clause in severance agreement was "contrary to public policy"); *Milton v. Regency Park Apts.*, 2015 WL 546045, at *1 (E.D. Cal. Feb. 9, 2015) (noting that "plaintiff entered into a legally enforceable, confidential settlement agreement").

Against this background, the district court's general approach to unconscionability reflected a heavy thumb on the scales against

enforcing the arbitration agreement. Outside the arbitration context, a court is unlikely to strike down an agreement merely because one of its terms seems to favor one party. Rather, a court will examine the entire agreement in context to determine whether the term is unduly oppressive to the non-drafting party. Indeed, even if a particular arbitration term "is favorable to the drafting party," California does not treat the provision as unconscionable if it is offset by another term that "likely favors" the non-drafting party. *Valencia Holding*, 353 P.3d at 756. Yet here, the district court did not even attempt to determine whether the arbitration provision, much less the contract as a whole, offered drivers offsetting benefits for the provisions the court believed to unduly favor Uber.

3. Finally, in refusing to sever the Private Attorney General Act ("PAGA") waiver in the 2013, 2014, and 2015 agreements, the district court once again held arbitration agreements to a higher standard than other contracts.

Uber has already explained why the district court's non-severability determinations—which ignored the intent of the parties and erroneously treated the PAGA waiver as the "heart" of the

arbitration provisions—were incorrect. *See* Uber Br. at 30-40. The primary thrust of the arbitration agreements is plain: The parties desired to arbitrate all disputes "to the fullest extent under law." Uber Br. at 33. That intent must control. And if there is any question about what the parties actually had in mind, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language"—as it is here—or otherwise. *Moses H. Cone*, 460 U.S. at 24-25.

Moreover, California generally "take[s] a very liberal view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law would be furthered." *In re Marriage of Facter*, 212 Cal. App. 4th 967, 987 (2013) (quoting *Adair v. Stockton Unified Sch. Dist.*, 162 Cal. App. 4th 1436, 1450 (2008)). In neglecting to consider California's general rule favoring severance, let alone the "liberal federal policy favoring arbitration (*Concepcion*, 563 U.S. at 339), the district court plainly failed to "place arbitration contracts on equal footing with other contracts" (*DIRECTV*, 136 S. Ct. at 471 (internal quotation marks omitted)).

The district court's determination as to the 2013 agreement is illustrative. The district court concluded that the PAGA waiver in the 2013 agreement could not be severed, and therefore that the "entire arbitration agreement" must "fail," because of the second sentence of Section 14.3(v)(c) of the agreement. *O'Connor*, 2015 WL 8587879, at *9 (stating that "the Court's analysis of the 2013 Agreements is even simpler than that of the 2014 and 2015 Agreements"). Section 14.3(v)(c) of the 2013 agreement states in relevant part:

> There will be no right or authority for any dispute to be brought, heard or arbitrated as a private attorney general representative action ("Private Attorney General Waiver"). The Private Attorney General Waiver shall not be severable from this Arbitration Provision in any case in which a civil court of competent jurisdiction finds the Private Attorney General Waiver is unenforceable. In such instances and where the claim is brought as a private attorney general, such private attorney general claim must be litigated in a civil court of competent jurisdiction.

According to the district court, the "PAGA waiver bars *any* PAGA claim from all fora, and [the] waiver expressly is non-severable from the entire arbitration provision." *Id.* at *9 (emphasis in original). Citing *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1090 (9th Cir. 2009), the court concluded that because the second sentence of Section 14.3(v)(c)

prohibits severance of the PAGA waiver, the entire arbitration agreement is unenforceable. *Id.*

But it simply does not follow from the language of that Section that the whole arbitration agreement must fall. After all, Section 14.3(v) is entitled "How Arbitration Proceedings Are Conducted" and applies only to disputes "***in arbitration***." And the last sentence of Section 14.3(v)(c) provides that if "a civil court * * * finds the [PAGA waiver] unenforceable * * * such [PAGA] claim ***must be litigated*** in a civil court of competent jurisdiction" (emphasis added). Thus, when the PAGA waiver is invalidated by a court, there is no need to "sever" anything. The court can simply enforce the provision as written.[8]

The district court seemed to recognize the import of Section 14.3(v)(c)'s last sentence, noting that "[e]ven if the last sentence states that the PAGA claim must be litigated in a civil court, this does not

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[8] *Chalk* itself is inapposite. The opinion gives no indication that the arbitration agreement in that case contained fallback instructions in the event of invalidity, as does Section 14.3(v)(c). And the case *Chalk* cited for the proposition that a non-severance provision triggers the invalidation of the agreement as a whole is even further afield from the agreement in this case. *See Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 986-87 (9th Cir. 2007) (analyzing a clause that read: if a "specific proviso * * * is found to be unenforceable, then the *entirety of this arbitration clause* shall be null and void") (emphasis in original).

negate the general prohibition on any PAGA claim from being brought under the first sentence of the paragraph." *O'Connor*, 2015 WL 8587879, at *9 n.12. It gets things backwards, however, to ask whether the last sentence of Section 14.3(v)(c) "negates" the first. The last sentence kicks in only when the prohibition on the arbitration of PAGA claims has ***already been negated*** (i.e., held "unenforceable") by a court; the question is what is the ***consequence*** of that judicial determination (*i.e.*, allowing litigation of the PAGA claim in court while other claims proceed in arbitration or invalidating the arbitration clause entirely).

The only reason the parties would need to specify where representative PAGA claims must be brought in the event that the PAGA waiver is held unenforceable is if they intended that the parties' contract (including the arbitration provision) would otherwise continue to govern. Thus, as with the 2014 and 2015 agreements, the only plausible reading of the 2013 agreement is that it requires arbitration for all non-PAGA claims while establishing a clear "hierarchy of intentions" for representative PAGA claims: no representative PAGA claims in any forum, but to the extent that such claims must be allowed

to proceed somewhere, the forum is court, not arbitration. Uber Br. at 32-33 n.12.

At worst, Section 14.3(v)(c) is ambiguous, but in that case any ambiguity must be resolved in favor of arbitration for two reasons. First, that is the only result that is consistent with the "liberal federal policy favoring arbitration." *Concepcion*, 563 U.S. at 339.

Second, it is an "established principle[]" of California contract law that a contract should not be interpreted in a way that would make some of its provisions meaningless. *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1268 (Cal. 1990); *see also*, *e.g.*, Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."); *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith*, 68 Cal. App. 4th 445, 473 (1998) ("Courts must interpret contractual language in a manner which gives force to *every* provision, and not in a way which renders some clauses nugatory, inoperative or meaningless.") (emphasis in original). Yet that is the effect of the district court's reading, as automatic invalidation of the entire arbitration agreement in the event that a court deems the PAGA waiver unenforceable makes

Section 14.3(v)(c)'s last sentence—requiring that representative PAGA claims be brought in court if the waiver is unenforceable—totally superfluous; the entire arbitration provision would then be struck and ***all*** claims would be channeled to court.

III. The District Court's Approach Frustrates Companies' Efforts To Craft Enforceable Arbitration Agreements

The district court's approach to arbitration agreements, which is typical of many California courts, does not just undermine the goals of the FAA in individual cases. It also frustrates the policy of the FAA by making it difficult for companies to draw up enforceable arbitration agreements in the future.

As the Supreme Court has recognized, the opportunity for customization is one of arbitration's main advantages:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

Concepcion, 563 U.S. at 344-45. The malleable nature of the unconscionability inquiry, however, combined with California courts' uneven and aggressive use of the doctrine in arbitration cases, means

that parties seeking the acknowledged benefits of arbitration never can be certain that their agreements will be enforced as written.

As Uber's brief in this case and the Chamber's *amicus* brief in *Mohamed* illustrate, this reality greatly complicates the formation and implementation of arbitration agreements when courts within the same federal circuit or federal and state courts within the same State reach conflicting results regarding the enforceability of virtually identical provisions. The problem is vastly compounded for large companies, like Uber, that do business nationwide and are therefore potentially subject to fifty different bodies of unconscionability law.

Even the district judge in this case recognized "just how complicated this area of law has become." *Mohamed*, 109 F. Supp. 3d at 1194. That complexity is an enormous drag on one of the FAA's central goals: that the "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *see also Preston*, 552 U.S. at 357-58 ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results'"). And it is all the more reason to ensure that lower

courts do not bend over backwards to find reasons to invalidate arbitration agreements and instead "give due regard * * * to the federal policy favoring arbitration" by "plac[ing] arbitration contracts on equal footing with all other contracts." *DIRECTV*, 136 S. Ct. at 471 (internal quotation marks omitted).

CONCLUSION

This Court should reverse the district court's orders denying Uber's motions to compel arbitration and hold that Uber's arbitration agreements are enforceable.

Respectfully submitted,

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March 25, 2016

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March 25, 2016

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