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 Appeal from N.D. Cal., No. C-14-5200 EMC Hon. Edward M. Chen
RONALD GILLETE, Plaintiff-Appellee, v. UBER TECHNOLOGIES, INC., Defendant-Appellant.	No. 15-16181 Appeal from N.D. Cal., No. C-14-5241 EMC Hon. Edward M. Chen
ABDUL KADIR MOHAMED, Plaintiff-Appellee, v. HIREASE, LLC, Defendant-Appellant.	No. 15-16250 Appeal from N.D. Cal., No. C-14-5200 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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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every 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 curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the enforceability of arbitration agreements. See http://www.chamberlitigation.com/cases/issue/arbitration-alternative-dispute-resolution.

Many of the Chamber's members include arbitration provisions in their contracts. Arbitration is simpler, faster, and less expensive and adversarial than judicial dispute resolution. Accordingly, by agreeing to arbitration, parties can avoid the excessive—and growing—costs and

[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 *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

ever-lengthening delays associated with resolving disputes in court. And by achieving efficiencies in dispute resolution, the overall cost of doing business is reduced, which results in lower prices for consumers and higher wages for employees.

These benefits of arbitration, however, are lost if arbitration agreements are not enforced when one party sees a post-hoc advantage to suing in court and attempts to avoid the arbitration agreement. For many years, judicial hostility to arbitration enabled parties to evade their agreements to arbitrate disputes. 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 secure the benefits of arbitration to parties who enter into arbitration agreements.

The decision below in these consolidated cases poses a significant threat to the continued enforceability of arbitration agreements and the federal policy favoring arbitration. In refusing to enforce Uber's arbitration provisions, the court condemned features of those provisions that are hallmarks of arbitration, as well as a method of informing individuals of the existence of an arbitration provision that this Court has repeatedly endorsed and that the district court itself had previously

mandated. The district court's analysis thus reflects the very judicial hostility to arbitration that Congress enacted the FAA to prevent. If allowed to stand, the ruling below would potentially unsettle many millions of arbitration agreements. The Chamber and its members therefore have a powerful interest in expressing their views on the issues presented in these consolidated appeals.

SUMMARY OF THE ARGUMENT

Failing to heed controlling precedent, the district court read Uber's arbitration provisions through an anti-arbitration lens, in contravention of the FAA's strong policy favoring arbitration. This erroneous approach infected every step of the district court's analysis.

Uber's brief thoroughly explains why each step of the district court's analysis was legally flawed. The Chamber will focus in this brief on the district court's deeply misguided assessment of California's law of unconscionability and its failure to honor the FAA's prohibition against interpreting state law to disfavor or otherwise discourage arbitration provisions.

As both this Court and the California Supreme Court have recently reiterated, California law requires the presence of both

procedural and substantive unconscionability before a contract term may be invalidated. Neither element of unconscionability is present here at all, much less to a degree sufficient to invalidate Uber's arbitration provisions.

First, the manner in which Uber drivers agree to arbitration is fully consistent with this Court's precedents; among other things, Uber uses an opt-out procedure that this Court repeatedly has endorsed. The district court acknowledged those decisions—but then chose to reject them as "inaccurate." ER 34-36 n.31. That approach to this Court's binding precedents is remarkable, not only because it defies this Court's authority but also because it is substantively incorrect on the merits. Equally alarming is the fact that, with respect to Uber's 2014 arbitration provision, the district court declared the opt-out mechanism unconscionable even though the ***district court itself had ordered*** Uber to use that procedure.

Second, the district court's treatment of substantive unconscionability is similarly irreconcilable with both precedent and the FAA. For example, not only is the requirement that proceedings be kept confidential—deemed "unconscionable" by the district court—

commonplace in arbitration agreements, but courts have repeatedly suggested that it is a central characteristic of arbitration as envisioned by the FAA.

The district court also flatly misconstrued Uber's arbitration provision in holding that the fees for a driver to pursue arbitration are excessive. The provision in fact specified that Uber would pay all arbitration costs when required by law.

Moreover, in declaring aspects of the arbitration provision to be one-sided in Uber's favor, the district court failed to acknowledge countervailing benefits for Uber drivers. For example, the court criticized a mutual carve-out from arbitration for certain intellectual-property claims that the court believed favored Uber, but overlooked the carve-out of certain types of drivers' claims. And each time the court concluded that an aspect of the arbitration provisions was unlawful, rather than declaring it inapplicable or severable—as the agreement's express text and California law both require—the court instead declared the offending clause non-severable from the arbitration agreement.

Under the district court's approach, few arbitration agreements would withstand scrutiny. That result is directly contrary to the FAA.

ARGUMENT

I. The FAA Forbids Judicial Hostility To Arbitration Agreements And Preempts State-Law Rules That Discriminate Against Arbitration Agreements.

The FAA was "designed to promote arbitration"; it "embod[ies] [the] national policy favoring arbitration, … notwithstanding any state or substantive procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (internal quotation marks omitted). Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

As the U.S. Supreme Court recently observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S. Ct. at 1747 (citation omitted). The FAA swept aside all such devices and formulas by "preclud[ing] States from singling out arbitration provisions for suspect status." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996).

Specifically, Section 2 of the FAA commands that arbitration agreements "shall be valid, irrevocable, and enforceable," subject only to a narrow exception for generally applicable state-law "grounds … for the revocation of ***any*** contract." 9 U.S.C. § 2 (emphasis added). It forbids courts from refusing to enforce arbitration agreements by resorting to "generalized attacks on arbitration" that "'res[t] on suspicion of arbitration[.]'" *Gilmer*, 500 U.S. at 30 (citation omitted; alteration by Court). It likewise bars courts from invalidating arbitration agreements on the basis of state-law "defenses that apply only to arbitration," "that derive their meaning from the fact that an agreement to arbitrate is at issue," or that are premised on the "uniqueness of an agreement to arbitrate." *Concepcion*, 131 S. Ct. at 1746-47.

In sum, a "court may not, … in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). This rule reaches beyond open and obvious differential treatment. As the Supreme Court recently made clear, courts also may

not apply a "doctrine normally thought to be generally applicable"—such as "unconscionability"—in "a fashion that disfavors arbitration." *Concepcion*, 131 S. Ct. at 1747. Nor may courts apply ostensibly neutral state-law rules that "interfere[] with fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Id.* at 1748.

These overriding principles of federal law mean that the FAA forbids courts from imposing obstacles to the enforcement of arbitration agreements that are inapplicable to other kinds of contracts, applying contract-law principles with heightened rigor in the arbitration context, or imposing requirements that are incompatible with "arbitration as envisioned by the FAA." *Id.* at 1753. The ruling below violated each of these principles.

II. The District Court Erred In Refusing To Enforce Uber's Arbitration Provisions On Unconscionability Grounds.

The Chamber agrees with Uber's contention that the district court improperly considered the merits of plaintiffs' challenges to the enforceability of their arbitration agreements because the parties had delegated that issue to the arbitrator. Opening Br. 50-55; see also *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010). But even if the court

had properly addressed those challenges, its ruling that Uber's arbitration provisions are unconscionable was erroneous in multiple respects.

As this Court has recognized, "[a] contract provision is" unconscionable under California law only "if it is ***both*** procedurally and substantively unconscionable." *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc) (emphasis added); see also *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 748 (Cal. 2015) ("The prevailing view is that [procedural and substantive unconscionability] must *both* be present") (alteration and emphasis by court; internal quotation marks omitted). The district court erred at both steps of the analysis.

A. Uber's Arbitration Agreements Are Not Procedurally Unconscionable.

Binding precedent forecloses the district court's conclusion that the manner in which Uber drivers agreed to Uber's 2013 and 2014 arbitration provisions was procedurally unconscionable. California law does not permit "courts to scrutinize ***all*** contracts with a paternalistic attitude" for perceived unconscionability. *Morris v. Redwood Empire Bancorp.*, 27 Cal. Rptr. 3d 797, 810 (Ct. App. 2005) (emphasis added;

internal quotation marks omitted). To the contrary, a contract is procedurally unconscionable under California law only if its formation deprived the weaker party of "meaningful choice," such as through the use of "oppression" or "surprise." *Sanchez*, 353 P.3d at 748. No such indicia of procedural unconscionability were present here.

To begin with, the district court's holding that Uber's 2014 arbitration provision is procedurally unconscionable is a classic example of judicial hostility to arbitration. The same district judge, in connection with another pending class action, took the extraordinary step of ***himself*** drafting the disclosures regarding arbitration in Uber's terms of service and directing how those disclosures and the 2014 provision must be distributed to Uber drivers—including by specifying the precise methods by which Uber drivers could opt out of arbitration and how the provision would inform drivers of the opt-out right. See Appellants' Joint Request for Judicial Notice ("RJN"), Ct. App. Dkt. No. 28, Ex. C at 11; *id.* Ex. F at 12-14; *id.* Ex. H at 6. The district court previously expressed the opinion that these steps would provide drivers with "clear notice of the arbitration provision … and reasonable means

of opting out of the arbitration provision[.] *Id.* Ex. C at 11. It is undisputed that Uber complied with the district court's mandate.

This level of judicial supervision—itself virtually unprecedented—should have precluded the same district court from then turning around and declaring that the manner in which Uber drivers assented to the 2014 arbitration provision was procedurally unconscionable. The purpose of the procedural-unconscionability doctrine is to identify situations in which the stronger party has exploited "'unequal bargaining power'" to deprive the weaker party of a choice, so that courts know when to "'scrutinize the substantive terms of the contract.'" *Sanchez*, 353 P.3d at 748, 751. But when the drafter's superior bargaining power has been checked by an even higher authority—here, the district court—there is no danger of procedural overreach and thus no procedural unconscionability.

For example, in *Pinnacle Museum Tower Association v. Pinnacle Market Development (US), LLC*, an association of condominium owners contended that the developer's declaration of covenants, conditions, and restrictions was procedurally unconscionable because it was drafted "before the sale of any unit and without input from the" association's

members. 282 P.3d 1217, 1232 (Cal. 2012). The California Supreme Court rejected that argument because the timing of the preparation of the declaration "was a circumstance dictated by the legislative policy choices embodied in the Davis-Stirling Act." *Ibid.* At the time, that Act authorized developers to prepare and record the declaration—under the oversight of the "Department of Real Estate"—before condominiums are sold and an owners' association could be formed. *Id.* at 1232-33. "Thus, while a condominium declaration may perhaps be viewed as adhesive," the court explained, "a developer's procedural compliance with the Davis-Stirling Act provides a sufficient basis for rejecting an association's claim of procedural unconscionability." *Id.* at 1233.

That principle bars a finding of procedural unconscionability here: The district court specifically directed Uber to present its 2014 arbitration provision to drivers and obtain their assent to it in a certain way in order to eliminate any risk that Uber was coercing or misleading drivers. RJN Ex. H. A contracting process that is superintended by a court cannot be procedurally unconscionable—at least not under the non-discriminatory approach mandated by the FAA.

Nor is Uber's 2013 arbitration provision procedurally unconscionable. As Uber observes, many Uber drivers exercised their right to opt out of the 2013 arbitration provision. Opening Br. 30. And Ninth Circuit precedent establishes that arbitration provisions in form consumer or employment agreements are not procedurally unconscionable under California law when, as here, the consumer or employee could return a form to opt out of the arbitration provision. *Kilgore*, 718 F.3d at 1059; *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).

The district court acknowledged that "[i]t cannot be denied that each of" these Ninth Circuit "decisions stand[s] for the precise proposition of law that Uber advocates." ER 34. That should have been the end of the matter. But the court refused to follow these decisions because, in its view, the *en banc* Ninth Circuit's ***2013*** decision in "*Kilgore* present[ed] an inaccurate picture of" the California Supreme Court's ***2007*** decision in *Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007). ER 36.

That was error; district courts are not free to reject this Court's interpretations of state law "in the absence of any ***subsequent*** indication from the California courts that" this Court's "interpretation was incorrect." *Owen ex rel. Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983) (emphasis added). A state-court decision from six years before this Court's decision is not a "subsequent indication" that state law has changed.

In any event, *Kilgore*'s articulation of California law is correct. In its 2015 *Sanchez* decision, the California Supreme Court addressed whether an "adhesive" arbitration provision in an auto sales contract was procedurally unconscionable. 353 P.3d at 750. In concluding that the contracting process did exhibit "some degree of procedural unconscionability," the court emphasized that the car dealer had not argued "that [the consumer] could have opted out of the arbitration agreement[.]" *Id.* at 751. That is a powerful indication that the presence of a conspicuous opt-out provision forecloses a finding of procedural unconscionability.

Moreover, even under the district court's reading of *Gentry*, Uber's opt-out procedure is not procedurally unconscionable. The *Gentry* court

believed that the employer had misled employees about the relative merits of arbitration and litigation and that employees felt "pressure not to opt out of the arbitration agreement." 165 P.3d at 574. Neither concern is present here.

Nor was the opt-out clause in the 2013 arbitration provision "buried in the contract," as the district court maintained (see ER 25). That clause was set off from the rest of the contract terms in a separate section entitled "Your Right To Opt Out Of Arbitration." ER 212 (underlining in original). This Court, sitting *en banc*, approved of similar formatting of an opt-out clause in *Kilgore*. See 718 F.3d at 1059 (opt-out clause was not "buried in fine print," but "instead [was] in its own section, clearly labeled, in boldface").

In any event, the FAA prohibits California from requiring that an opt-out clause be given extra prominence in a contract. It is settled that the FAA preempts any state-law rule imposing a "special notice requirement" on arbitration provisions, such requiring that they—or a special disclosure of the arbitration requirement—be on the "first page" of the contract. *Casarotto*, 517 U.S. at 684, 687. The California Supreme Court recently recognized as much, holding that a business

"was under no obligation to highlight the arbitration clause of its contract" or to "specifically call that clause to [the consumer's] attention," because "[a]ny state law imposing such an obligation would be preempted by the FAA." *Sanchez*, 353 P.3d at 751. California may not evade this bar on "special notice requirements" for arbitration provisions (*Casarotto*, 517 U.S. at 687) by instead mandating that arbitration opt-out clauses be given special emphasis.

The same principle disposes of the district court's contention that the opt-out right was "meaningless" because drivers had to deliver opt-out forms by hand or overnight delivery. ER 25-26. Contrary to the district court's assertion, the fact that drivers could not opt out via "email or by simply sending Uber a message" using another medium (ER 34) does not render the opt-out right illusory. 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 v. Silberman*, 405 F. App'x 532 (2d Cir. 2010). And in no other setting are contracts unenforceable if notices concerning the agreement cannot be emailed; mortgages and

leases, for example, frequently require that notices be sent using methods for which delivery can later be corroborated. Accordingly, the FAA bars imposing such a rule on arbitration provisions. See, *e.g.*, *Casarotto*, 517 U.S. at 687.

In sum, Uber's arbitration agreements are not procedurally unconscionable. Accordingly, this Court "need not address" any potential "substantive unconscionability." *Crippen v. Cent. Valley RV Outlet, Inc.*, 22 Cal. Rptr. 3d 189, 194-95 (Ct. App. 2004).

B. The District Court Erred In Holding That Uber's Arbitration Provisions Are Substantively Unconscionable.

Under California law, a contract term may not be declared substantively unconscionable unless it imposes "a substantial degree of unfairness *beyond 'a simple old-fashioned bad bargain.'*" *Sanchez*, 353 P.3d at 749 (emphasis added by *Sanchez* court; citations omitted). Uber's arbitration provisions do not run afoul of this "rigorous and demanding" standard because they are not so "'*overly* harsh,' '*unduly* oppressive,' [or] '*unreasonably* favorable'" to Uber as to "'shock the conscience.'" *Id.* at 748-49 (emphasis in original; internal citations omitted).

1. The allocation of arbitration costs is not substantively unconscionable.

The district court erred in holding that Uber's arbitration provisions are substantively unconscionable under *Armendariz v. Foundation Health Psychcare Services, Inc.*, 6 P.3d 669 (Cal. 2000), because Uber drivers might be subject to "hefty fees" in arbitration. ER 29.

To begin with, the district court's belief that Uber's arbitration provisions contravened *Armendariz* is incorrect.[2] The *Armendariz* court held that a "mandatory employment arbitration agreement" that encompasses certain statutory claims "impliedly obliges the employer to pay all types of costs that are unique to arbitration." 6 P.3d at 689. Contrary to the district court's holding, Uber's arbitration provisions

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[2] The district court also erred at the threshold by mistakenly assuming that *Armendariz* applies to Uber's arbitration provisions. The *Armendariz* rule applies only to "mandatory arbitration agreements." See *Armendariz*, 6 P.3d at 759 n.8. But Uber drivers were free to opt out of the arbitration provisions. ER 180, 212. At least one court has held that *Armendariz* is inapplicable when, as here, the plaintiffs had an "opportunity to negotiate or reject the arbitration clauses." *Swarbrick v. Umpqua Bank*, 2008 WL 3166016, at *4 (E.D. Cal. Aug. 5, 2008); see also *Mill v. Kmart Corp.*, 2014 WL 6706017, at *5 (N.D. Cal. Nov. 26, 2014) ("[I]t is unclear whether *Armendariz* even applies … because Plaintiff had an opportunity to opt out [of arbitration] without facing any adverse employment action.").

are specifically designed to conform to this requirement by specifying that "in all cases where required by law, Uber will pay the Arbitrator's and arbitration fees." ER 158, 179.

The district court erred in giving this language no effect. Indeed, in *Armendariz* itself, the California Supreme Court explained that, barring contrary language in the arbitration agreement, it would "interpret the arbitration agreement … as providing, consistent with the above, that the ***employer must bear the arbitration forum costs***"; "[t]he absence of specific provisions on arbitration costs would therefore not be grounds for denying the enforcement of an arbitration agreement." 6 P.3d at 689 (emphasis added). Other courts have confirmed that an agreement that requires the drafter to pay "all fees that it is legally required to pay as an employer under state law" complies with *Armendariz* and therefore is "valid." *Mill v. Kmart Corp.*, 2014 WL 6706017, at *4-*5 (N.D. Cal. Nov. 26, 2014).

The district court's failure to adhere to *Armendariz*'s interpretive rule is not just incorrect, but also deeply troubling. Form contracts of all sorts—both inside and outside the arbitration context—contain similar provisions to indicate that particular terms apply "only to the

extent permitted" or "required by applicable law." Such language is a necessity when form contracts are used nationwide, thus potentially implicating the differing laws of every state. Otherwise, companies operating nationwide would be forced—at great expense—to produce contracts specific to each jurisdiction. That increase in transaction costs would cause ripple effects throughout the economy.

In any event, if *Armendariz* were construed to impose a rule under which arbitration provisions are unenforceable unless they categorically require employers to pay all arbitration costs, that rule would be preempted by the FAA. The FAA forbids states from recognizing "defenses that apply only to arbitration [agreements]." *Concepcion*, 131 S. Ct. at 1746. On its face, the *Armendariz* rule applies only to "arbitration agreements." 6 P.3d at 689. And no principle of California contract law requires employers to pay ***all*** forum fees—such as filing fees—for disputes resolved in court or in mediation. Ipso facto, as construed by the district court, *Armendariz* violates the FAA and is preempted.[3]

[3] Several district courts have suggested that *Armendariz*'s rule regarding arbitration costs or other requirements for employee arbitration agreements are (or may be) preempted by the FAA. See,

To be sure, under the FAA, courts may refuse to enforce arbitration agreements that impose prohibitive costs to access the arbitral forum. As the Supreme Court has observed, "[i]t may well be that the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000); see also *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013) (noting possibility that plaintiffs may challenge "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable"). But there is no risk of that happening here. Even if the arbitration provisions did not by their own terms obligate Uber to pay all arbitration costs, Uber has committed to pay the plaintiffs' full arbitration costs. ER 92-96. And it is clear that the arbitrator would enforce that commitment: Under the applicable JAMS rules, "[e]ach Party shall pay its pro rata share of JAMS fees and

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e.g., *Ruhe v. Masimo Corp.*, 2011 WL 4442790, at *2 (C.D. Cal. Sept. 16, 2011) ("Plaintiffs assert that the arbitration agreement violates the *Armendariz* requirement regarding forum costs," but if *Armendariz* "provides a … set of 'requirements'" for "'employer-drafted arbitration agreement[s],'" then "such a requirement would appear to be preempted by the FAA[.]"). But see, *e.g.*, *Beard v. Santander Consumer USA, Inc.*, 2012 WL 1292576, at *9 (E.D. Cal. Apr. 16, 2012) (holding that *Concepcion* does not abrogate *Armendariz*).

expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration, ***unless the Parties agree on a different allocation of fees and expenses***." JAMS Streamlined Arbitration Rule 26(a) (emphasis added). Accordingly, because plaintiffs may arbitrate for free, they cannot meet their "burden" under the FAA "of showing the likelihood of incurring" arbitration costs so high as to make "arbitration … prohibitively expensive." *Randolph*, 531 U.S. at 91.

2. Uber's arbitration provisions are not unconscionably non-mutual.

The district court also concluded that Uber's arbitration provisions lack sufficient "mutuality" because they exempt from arbitration certain claims regarding intellectual-property rights. ER 56-57. That ruling, too, was mistaken.

First, that exclusion does not, as a practical matter, exempt Uber from arbitration. The California Supreme Court recently has clarified that arbitration provisions may be "unconscionable if they provide for the arbitration of claims most likely to be brought by the weaker party but exempt from arbitration claims most likely to be filed by the stronger party." *Sanchez*, 353 P.3d at 756 (internal quotation marks

omitted). But intellectual-property claims are not the "claims most likely to be filed by" Uber. Other types of claims—pertaining to enforcement of Uber's terms, safety, and customer service—are far more likely and remain subject to arbitration. The obligation to arbitrate therefore is not "one-sided, much less unreasonably so." *Id.* at 753.

Second, even if the exclusion were one-sided, the district court failed to consider whether there was a "reasonable justification" for the exclusion based on "business realities." *Armendariz*, 6 P.3d at 691-92 (internal quotation marks omitted). For example, in *Sanchez*, the California Supreme Court "s[aw] nothing unconscionable about" a car dealer's "exempting the self-help remedy of repossession from arbitration," because although that exclusion was one-sided, that "remedy … fulfills a 'legitimate commercial need.'" 353 P.3d at 756-57.

Numerous courts have recognized that mutual exemptions for intellectual-property claims are permissible. See, *e.g.*, *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *17 (N.D. Cal. June 25, 2014); *Farrow v. Fijitsu Am., Inc.*, 37 F. Supp. 3d 1115, 1124 (N.D. Cal. 2014). And there are practical reasons for allowing these claims to proceed in court; in a typical case alleging theft of intellectual property, the

dispute involves not only the parties to the contract, but also various third parties who allegedly benefited from the theft. Those third parties have not agreed to arbitrate disputes with Uber or its drivers. And given the potential inefficiencies of litigating piecemeal against the third parties in court and the driver in arbitration, it is reasonable to agree that such claims will be pursued in the only forum that can exercise jurisdiction over all parties.

Third, in condemning the exclusion as one-sided, the district court overlooked the carve-outs for claims that would benefit Uber drivers alone, such as certain types of claims under ERISA or claims pertaining to workers' compensation, disability, or unemployment insurance. ER 57. Even if one exemption from arbitration "is favorable to the drafting party," it "is not unconscionable" if it is offset by a carve-out for other types of claims that "likely favors the" non-drafting party. *Sanchez*, 353 P.3d at 756-57.

Fourth, even if a California court would hold Uber's arbitration provisions unconscionable because of non-mutuality, the FAA precludes California from insisting upon term-by-term mutuality in arbitration agreements. In other contexts, California does not require every

provision of every contract to be mutual. To the contrary, "[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 also Restatement (Second) of Contracts § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of … 'mutuality of obligation.'"). Accordingly, imposing an arbitration-specific mutuality rule would contravene the FAA's bar on state-law rules that "singl[e] out arbitration provisions for suspect status." *Doctor's Assocs.*, 517 U.S. at 687; see also, *e.g.*, *Concepcion*, 131 S. Ct. at 1746; *Perry*, 482 U.S. at 492 n.9.[4]

[4] Accord, *e.g.*, *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76-77 (1st Cir. 2011) ("[T]he FAA preempts [a state] from imposing" a requirement "applicable only to arbitration provisions" that "both parties have identical remedies[.]"); *Se. Stud & Components, Inc. v. Am. Eagle Design Build Studios, LLC*, 588 F.3d 963, 966-67 (8th Cir. 2009) ("[P]ursuant to Supreme Court precedent," a state "could not have imposed additional requirements" of "mutuality of obligation within the contract's arbitration agreement[.]").

3. Confidential arbitration is not substantively unconscionable.

The district court also erred in holding that Uber's arbitration provisions are substantively unconscionable because they specify that "[e]xcept as may be permitted or required by law, as determined by the Arbitrator, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all Parties." ER 158, 212.

To begin with, the confidentiality requirement is by its own terms inapplicable if not "permitted … by law." *Ibid.* If the district court believed that California law forbids confidentiality, the court could have ruled that requirement inapplicable.

But any such rule of California law would be preempted by the FAA. Confidentiality is considered to be an inherent characteristic—and a key benefit—of arbitration. See, *e.g.*, 4 HON. PAUL A. CROTTY & ROBERT E. CROTTY, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 48:32 (3d ed. Supp. 2014) ("Arbitration is generally considered to be confidential."); 1 THOMAS H. OEHMKE & JOAN M. BROVINS, COMMERCIAL ARBITRATION § 10:55 (Supp. 2015) ("One hallmark of arbitration is the confidentiality of the process and the award, unless all

parties stipulate otherwise"). As the Seventh Circuit has observed, "businesses that fear harm from disclosure required by the rules for the conduct of litigation [in court] often agree to arbitrate." *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002).

For this reason, leading arbitration providers guarantee the confidentiality of arbitration proceedings—even in the absence of an express confidentiality agreement. For example, the rules of the Institute for Conflict Prevention & Resolution ("CPR") require both the tribunal and the parties to maintain the confidentiality of proceedings. See CPR Rule R-20 ("Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party."). Similarly, under the rules of JAMS and the American Arbitration Association ("AAA"), the arbitrator generally must "maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing" and can enter additional orders to bar parties

from disclosing information produced during the proceedings. JAMS Comprehensive Arbitration Rule 26(a)-(b); accord AAA Commercial Arbitration Rules R-23(a), R-25.

Moreover, confidentiality provisions are ubiquitous in arbitration agreements. In contracts of all stripes—ranging from form consumer contracts to commercial agreements negotiated in arms-length transactions by parties with equal bargaining power—arbitration provisions specify that the arbitration proceedings are to remain confidential.

Because confidentiality has long been understood as a central feature of arbitration when parties contract for it—just as much as limitations on the discovery procedures allowed in court—the FAA precludes states from declaring that agreements to maintain the confidentiality of arbitration are "unconscionable or unenforceable as against public policy." *Concepcion*, 131 S. Ct. at 1747. Regardless of a state's motives, that rule "[i]n practice" would "have a disproportionate impact on arbitration agreements." *Id.*; see also, *e.g.*, *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004)

("[An] attack on the confidentiality provision is, in part, an attack on the character of arbitration itself[.]").

Moreover, any rule against confidential arbitration is improperly "arbitration-specific." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013). 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 a "NDA[.]"); *Sanchez v. Cnty. of San Bernardino*, 98 Cal. Rptr. 3d 96, 105 (Ct. App. 2009) (rejecting contention that confidentiality clause in severance agreement was "contrary to public policy"). California courts also generally enforce settlement agreements containing confidentiality clauses. See, *e.g.*, *Milton v. Regency Park Apartments*, 2015 WL 546045, at *1 (E.D. Cal. Feb. 9, 2015) (noting that "plaintiff entered into a legally enforceable, confidential settlement agreement").[5]

[5] In certain circumstances, California courts forbid confidentiality agreements that forbid parties from disclosing unlawful conduct to regulators. See *Cariveau v. Halferty*, 99 Cal. Rptr. 2d 417 (Ct. App.

To the extent that California's rule against confidentiality clauses "disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions," the "FAA preempts" that rule. *Mortensen*, 722 F.3d at 1161.

Moreover, the district court's assumption that confidentiality requirements inherently and inevitably favor the drafting party smacks of the judicial hostility to arbitration that the FAA was enacted to halt. As the First Circuit has observed, "each side" in an employment case may "prefer arbitration because of the confidentiality and finality that comes with arbitration." *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 n.4 (1st Cir. 1999); see also, *e.g.*, *Iberia*, 379 F.3d at 175 ("Confidentiality can be desirable to customers [arbitrating claims] in some circumstances.").

Sometimes the non-drafting party benefits from confidentiality in arbitration because it shields that party from embarrassment. For example, Uber drivers who seek to challenge the termination of their

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2000) (holding that investors must be permitted to report misconduct in compliance with NASD rules, notwithstanding confidentiality agreement). But there is no allegation here that Uber drivers are forbidden from reporting alleged wrongdoing to regulators.

relationship with Uber for alleged misconduct likely would be dismayed if the testimony in the arbitration or its results could be made public.

Confidential arbitration may also benefit Uber drivers in other ways. To be sure, confidential arbitrations would not build a body of binding precedent, as some critics of confidentiality in consumer and employee arbitration agreements have argued. See, *e.g.*, Geraldine Szott Moohr, *Opting in or Opting Out: The New Legal Process or Arbitration*, 77 Wash. U. L.Q. 1087, 1093-97 (1999). But "the creation of precedent," as the Fifth Circuit has noted, "can cut both ways, since precedent can be helpful or harmful, depending on the decision." *Iberia*, 379 F.3d at 176.

In sum, the district court's rejection of the confidentiality clause cannot be squared with the FAA.

4. The change-in-terms clause is not substantively unconscionable.

Also contrary to precedent is the district court's ruling that Uber's arbitration provisions are substantively unconscionable because a change-in-terms clause allows Uber to modify the agreement. ER 153, 208. This Court recently rejected the argument that a change-in-terms clause renders an arbitration provision unconscionable, because the

"covenant of good faith and fair dealing implied in every contract" prevents the drafting party from abusing the right to modify an arbitration provision unilaterally. *Ashbey v. Archstone Prop. Mgmt., Inc.*, 612 F. App'x 430, 432 (9th Cir. 2015) (internal quotation marks omitted). And California courts agree. See, *e.g.*, *Serpa v. Cal. Sur. Investigations, Inc.*, 155 Cal. Rptr. 3d 506, 515-16 (Ct. App. 2013); *24 Hour Fitness, Inc. v. Super. Ct.*, 78 Cal. Rptr. 2d 533, 541-42 (Ct. App. 1998).

In fact, even if arbitration provisions in contracts with change-in-terms clauses were invalid under California law—which they are not—the FAA would preempt such an anti-arbitration rule. As the California Supreme Court recently explained, "the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses, such as" a requirement that "unilateral modification clause[s]" must "favor[] the nondrafting party." *Pinnacle*, 282 P.3d at 1231.

Moreover, the district court's ruling on this point, if approved, would have dire consequences. As the Fifth Circuit has noted, "the economy is saturated with contracts that contain change-in-terms

provisions[.]" *Iberia*, 379 F.3d at 173. The district court's decision, if allowed to stand, would cast a pall over the arbitration provisions in all of those contracts, even if the change-in-terms clause had never been exercised (or exercised only in ways that benefited the non-drafting party).

5. The PAGA waiver in Uber's arbitration provisions is not substantively unconscionable.

The Chamber acknowledges that this Court recently held that the FAA does not preempt the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015), which ruled that PAGA waivers in arbitration agreements are unenforceable. See *Sakkab v. Luxottica Retail N. Am., Inc.*, __ F.3d __, 2015 WL 5667912 (9th Cir. Sept. 28, 2015).[6]

Iskanian (and therefore *Sakkab*) should have no bearing in this case, however, because *Iskanian*'s rule applies only if the PAGA waiver is a "condition of employment." 327 P.3d at 133. Putting aside the fact

[6] The Chamber respectfully suggests that *Sakkab* was wrongly decided for the reasons explained in its amicus brief in that case and by the dissent. *Sakkab*, 2015 WL 5667912, at *12-*20 (Smith, J., dissenting). This Court has extended the time for filing a rehearing petition in *Sakkab* to November 11, 2015.

that Uber drivers are not employees, Uber's PAGA waiver—like the rest of Uber's arbitration provisions—is not a condition of the driver-Uber relationship because drivers were given the right to opt out of the arbitration provisions entirely. ER 8. Those drivers who did opt out are free to bring PAGA claims in court.

Moreover, *Iskanian* is wholly inapplicable to the *Mohamed* action because the plaintiff in that case does not assert a PAGA claim. ER 64. Indeed, the district court acknowledged that the plaintiff in *Mohamed* "cannot" raise a PAGA claim because he is a Massachusetts resident. ER 64 & n.50. Accordingly, the question "whether a PAGA waiver taints" Uber's 2014 arbitration provision—which is at issue only in *Mohamed*—"is not even a genuine issue." *Dauod v. Ameriprise Fin. Servs., Inc.*, 2011 WL 6961586, at *5 (C.D. Cal. Oct. 12, 2011) (holding that a plaintiff who does not assert a PAGA claim may not challenge the enforceability of a PAGA waiver in an arbitration agreement).

For the same reason, the district court erred in holding that the PAGA waiver in Uber's 2013 arbitration provision should be invalidated as to the entire nationwide putative class in *Gillette*. ER 43-53. The named plaintiff in *Gillette* may be asserting a PAGA claim. ER 1-2.

But as the district court recognized, drivers outside of California "cannot[] raise any PAGA claims." ER 64 (footnote omitted). For the district court to invoke the PAGA waiver as a basis for declaring the arbitration provisions unconscionable ***as to drivers who do not have PAGA claims*** is the epitome of judicial hostility to arbitration.

C. Any Substantively Unconscionable Features In Uber's Arbitration Provisions Should Be Severed.

Finally, even if the district court were correct that the challenged aspects of Uber's arbitration provisions are unenforceable under California law and notwithstanding the FAA, the court should have severed those parts of the arbitration provisions rather than refusing to compel arbitration altogether. See Cal. Civ. Code § 1670.5(a) ("If the court as a matter of law finds … any clause of the contract to have been unconscionable," the court "may enforce the remainder of the contract without the unconscionable clause[.]").

Courts applying California law routinely sever features of arbitration provisions that they consider unconscionable, such as cost-sharing clauses and confidentiality provisions. See, *e.g.*, *DeGraff v. Perkins Coie LLP*, 2012 WL 3074982, at *5 (N.D. Cal. July 30, 2012)

(severing confidentiality clause); *Roman v. Super. Ct.*, 92 Cal. Rptr. 3d 153, 166-67 (Ct. App. 2009) (severing cost-splitting clause).[7]

The district court held that under *Armendariz* the existence of multiple unconscionable clauses in an arbitration provision renders the entire provision unenforceable. ER 31 (citing *Armendariz*, 6 P.3d at 697). But that no-severability rule applies disproportionately to arbitration agreements and therefore is preempted by the FAA. Indeed, 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. v. Zaborowski*, 2015 WL 3646800 (U.S. Oct. 1, 2015).

The district court also erred in concluding that it was barred by the language of the agreements from severing the PAGA claims and compelling arbitration of the remaining claims. This Court recently has recognized that even when a PAGA waiver "may not be enforced," the "non-PAGA claims" may still "be arbitrated." *Sakkab*, 2015 WL 5667912, at *12.

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[7] For the reasons explained above (at 18-35), those provisions are not unconscionable.

In sum, the district court's severability analysis was mistaken as a matter of law.

CONCLUSION

The district court's orders should be reversed.

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Respectfully submitted,

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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 October 28, 2015. 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.

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