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. Defendants-Appellants.	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

On Appeal from an Order of the United States District Court
for the Northern District of California
The Honorable Edward M. Chen, Judge Presiding
Case No. 14-cv-05200-EMC

BRIEF OF NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND TOWARDS JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The National Employment Law Project, National Employment Lawyers Association, National Association of Consumer Advocates, and Towards Justice each states that it does not have a parent corporation and that no publicly-held corporation owns stock in it.

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INTERESTS OF THE *AMICI CURIAE*

The **National Employment Law Project (NELP)** is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP has litigated and participated as amicus in numerous cases addressing the rights of workers under the Fair Labor Standards Act, federal employment and labor statutes, and related state laws. NELP works to ensure that all workers receive the basic workplace protections guaranteed in our nation's labor and employment laws; this work includes breaking down barriers workers face to enforcing the most basic labor standards rules. Our experience advocating with and on behalf of low-wage workers informs our skepticism about most mandatory agreements imposed on job applicants by employers at the time of hire. When seeking a job, workers have very little bargaining power and will sign almost anything, from contracts creating sham "independent contractor" relationships, to unilaterally-imposed arbitration agreements limiting workers' collective action and enforcement options to recover unpaid wages or other workplace standards.

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and

justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **National Association of Consumer Advocates (NACA)** is a nationwide non-profit corporation whose over 1,000 members are private, public sector, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the effective and ethical representation of consumers. Toward this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised third edition of which is published at 299 F.R.D. 160 (2014).

NACA is dedicated to promoting justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country and serving as a voice for its members and for consumers in an ongoing effort to curb deceptive and exploitative business practices. NACA has furthered this interest in

part by appearing as *amicus curiae* in support of consumer interests in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumer parties in *Kilgore v. KeyBank, N.A.*, 718 F.3d 1052 (9th Cir. 2013) (*en banc*), and *Del Campo v. Kennedy*, 517 F.3d 1070 (9th Cir. 2008), among other cases.

The **National Consumer Law Center (NCLC)** is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer protection regulations.

Towards Justice is a non-profit legal organization based in Denver, Colorado and launched in 2014 to ensure that everyone in this country can achieve a decent livelihood through work. Towards Justice fills a gap in direct legal services for low-wage, mainly immigrant victims of wage theft and provides

systematic advocacy for low-wage workers nationwide. Towards Justice is currently litigating cutting-edge cases on behalf of large groups of low-wage workers, including shepherds, truck drivers, kitchen-hood cleaners, and agricultural workers. These cases address systemic injustices in the labor market and use a combination of wage and hour, antitrust, racketeering, and anti-trafficking laws to protect and advance workers' rights.[1]

SUMMARY OF THE ARGUMENT

This case is about Uber's illegal uses of Uber drivers' consumer credit reports in hiring and firing decisions and Uber's violation of drivers' rights as employees under state law. Soon after Plaintiffs filed this action, Uber sought to deprive them of their day in court by invoking unlawful and unconscionable arbitration clauses in adhesive contracts.

The "liberal federal policy in favor of arbitration" has its limits. Federal law protects the discretion of contracting parties to settle on an arbitration procedure that is speedy and efficient, but it does not license courts to craft an arbitral mechanism to which the parties have not agreed. Yet, that is precisely what Defendants ask the Court to do here. Defendants urge the Court to ignore

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, 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.

contractual terms that are unenforceable as a matter of federal and state law and that interfere with speedy and efficient dispute resolution. They say, among other things, that they will absolve the agreements of unfairness by paying the costs that the agreements require Plaintiffs to pay, that the agreements' opt-out mechanisms insulate them from substantive attack, and that the Court should strike the illegal terms and enforce the arbitration agreements in their absence. In line with the principal goal of the Federal Arbitration Act to ensure the enforcement of arbitration agreements *according to their terms*, the Court must reject these arguments.

For the reasons spelled out in Plaintiffs' brief, this case should be resolved easily. The arbitration agreements contain a poison pill. If their Private Attorney General Act ("PAGA") waivers are deemed unenforceable, both the 2013 and 2014 arbitration agreements sink with them. By operation of contract, therefore, this Court's decision in *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015), dictates affirmance.

Also for the reasons spelled out in Plaintiffs' brief, even if the Court decides that it needs to move beyond this initial, dispositive question, it should affirm the lower court's order. The district court's exceptionally careful analysis correctly concluded that the arbitration agreements' delegation clauses were not "clear and

unmistakable"—and, even if they were, that they were unconscionable—and that both agreements were unenforceable as a matter of state law.

Amici do not rehash all of those arguments here. Instead, they focus on Defendants' attempts to insulate themselves from liability by undoing the illegal and unfair aspects of the arbitration agreements. For the reasons spelled out here, businesses like Uber should not be allowed to draft illegal arbitration agreements that may chill valid claims, and then rely on those agreements to force consumers and employees out of court.

***First*,** because the cost- and fee-splitting provision prevents Plaintiffs from effectively vindicating their rights under the Fair Credit Reporting Act, it violates federal law. Defendants cannot escape this result by suggesting that they might pay the costs of arbitration or by relying on the cost- and fee-splitting provision's "savings clause." Sanctioning these efforts would run counter to generally applicable principles of contract law designed to deter drafters of standardized form agreements from overreaching and including clearly unenforceable terms.

***Second*,** if the Court reaches the question of whether the contracts are enforceable as a matter of state law, it should affirm the district court's order. In particular, the Court should reject Defendants' suggestion that the opt-out mechanism present in the 2013 and 2014 arbitration agreements renders those agreements procedurally conscionable. This argument contravenes basic principles

of California contract law and is inconsistent with recent empirical data regarding opt-out mechanisms in arbitration agreements. Furthermore, accepting it would provide an incentive for drafters to include illegal and unfair terms and protect their enforceability with an opt-out procedure that the non-drafting party would unlikely comprehend.

Third, the Court should reject Defendants' invitation to sever the agreements' illegal terms. Consistent with state law regarding the severability of unfair terms from standardized form agreements and the FAA's fundamental purpose of enforcing arbitration agreements according to their terms, the district court declined to sever the illegal provisions because they suggested that the purpose of the agreement was tainted by illegality.

Finally**,** the Court should reject Defendants' and amicus's arguments that the district court's order violates the FAA by correctly applying generally applicable principles of California law regarding the enforceability of standardized form contracts. If, however, the Court has any concern about whether California law might stretch beyond the limits of the FAA or conflict with any of this Court's recent decisions applying California law, it should certify to the California Supreme Court a question regarding the scope of state law.

ARGUMENT

I. THE FAA, CALIFORNIA LAW, AND THE UNFAIR TERMS AT ISSUE IN THIS CASE

Defendants argue that the district court "erred at nearly every step of its analysis, refusing to enforce valid Arbitration Provisions based on sheer hostility toward arbitration." Appellants' Br. 2. This argument either misapprehends the purposes of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA") as interpreted by the United States Supreme Court, or is blind to the district court's exceptionally thorough decision denying Defendants' motion to compel arbitration. The same district court judge that denied the motion to compel arbitration in this case, has compelled arbitration in a number of other cases notwithstanding plaintiffs' assertions that the arbitration agreements at issue violated federal or state law. Uber's arbitration agreements, however, are marked by unfair and illegal terms that the district court properly concluded rendered the agreements unenforceable. The district court's analysis of "the totality of the agreement[s'] substantive terms as well as the circumstances of [their] formation," *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1146 (2013), is entirely consistent with the FAA.

A. The Scope of the FAA's Protections

The FAA provides that written agreements to arbitrate shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any

contract." 9 U.S.C. § 2. To reconcile this "savings clause" with the protections that the FAA was intended to afford against "judicial hostility to arbitration agreements," *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 225 (1987), the Supreme Court and this Court have described two FAA-based restrictions on courts' authority to deny enforcement of arbitration agreements: (1) courts must not treat arbitration agreements with disfavor relative to other agreements, *see, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (arbitration clauses must be placed on "equal footing with other contracts" (internal quotation marks omitted)), or arbitration with disfavor relative to resolution in a public forum, *see, e.g*, *Marmet Health Care Ctr. Inc. v. Brown*, 132 S. Ct. 1201 (2013); *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 934 (9th Cir. 2013) (state rule must not "prohibit[] outright arbitration of a particular type of claim"); and (2) courts must not employ generally applicable laws or rules of decision to limit the contracting parties' "discretion in designing arbitration processes [that are] efficient [and] streamlined," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011); *see also Smith v. Jem Grp., Inc.*, 737 F.3d 636, 641 (9th Cir. 2013).

Yet, as the Supreme Court and this Court have also explained, the inverse of these propositions is equally important to the FAA landscape. First, because arbitration is fundamentally a creature of contract, arbitration agreements may be defeated by the same defenses that are applicable to other contracts. *Jem Grp.*, 737

F.3d at 642 (concluding that Washington law not preempted because it required only that drafter "disclose the arbitration agreement . . . to the same degree that he or she must disclose *all material terms*" (emphasis added)). More specifically, when arbitration clauses are included in standardized contracts of adhesion, they are subject to the same constraints as other terms included in such contracts. *See Concepcion*, 563 U.S. at 347 n.6 ("States remain free to take steps addressing the concerns that attend contracts of adhesion."); *Sakkab*, 803 F.3d at 432 (citing *Concepcion* and noting that FAA "savings clause" does not require that contract defense applied to arbitration agreement "apply generally to all *types* of contracts," just that it "apply equally to arbitration and non-arbitration agreements").

Second, the FAA does not offer protection to terms that *undermine* the principles of fair, efficient, and effective dispute resolution. While some arbitration clauses appear to be crafted to promote streamlined and fair adjudication, others may be designed to impede that result. In *Concepcion*, the Supreme Court confronted an arbitration agreement that it deemed to fall within the first category. 563 U.S. at 337. AT&T told the Court that it had "revised its arbitration provision over time in order to make bilateral arbitration a realistic and effective dispute-resolution mechanism for consumers," Pet'r Br. at 5, *Concepcion*, 563 U.S. 333 (2011) (09-893), and the Chamber of Commerce stated that its members frequently entered into similar arbitration agreements prescribing

bilateral dispute resolution that is "speedy, fair, inexpensive, and effective," Br. of Chamber of Commerce of the U.S.A. as *Amicus Curiae*, *Concepcion*, 563 U.S. 333 (2011) (09-893). Against this backdrop, the Court concluded not only that class actions are inconsistent with the "informality of arbitral proceedings," which is "itself desirable," *id.* at 345, but that consumers may be "better off under their arbitration agreement with AT&T than they would have been as participants in a class action," *id.* at 352.

And, yet, the Supreme Court—and this Court following its lead—have not lost sight of the specter of "unfair" arbitration agreements. Although the FAA insulates arbitration clauses from attack based solely on their designation of an arbitral forum, *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013), where the terms of an arbitration clause render the arbitral process fundamentally "[un]fair," courts may refuse to enforce the agreement based on "generally applicable polic[ies] against abuses of bargaining power." *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013). Moreover, in the context of the federal "effective vindication" doctrine, the Supreme Court has clarified that although the FAA-protected "prospect of speedy resolution" may require the enforcement of class waivers in arbitration agreements, a term that eliminates the "right to pursue [a federal] statutory remedy" is clearly unenforceable. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

B. California's Evolving Arbitration Law

Faithful to the "liberal federal policy favoring arbitration agreements," *Concepcion*, 563 U.S. at 346, while recognizing that this policy does not "immunize all arbitration agreements from invalidation no matter how unconscionable they may be," *Chavarria*, 733 F.3d at 927, the California Supreme Court scrupulously has charted out the appropriate course for courts to follow in determining whether arbitration agreements are revocable "on grounds that exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2. The court's recent decisions defy the suggestion that California law is hostile to arbitration: in *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109 (2013), and *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899 (2015), the California Supreme Court reversed the lower courts' findings that the arbitration agreements at issue were unconscionable. In both cases, however, the court clarified the core and common principles of California unconscionability doctrine that continue to apply to agreements to arbitrate.

In *Sonic*, the court concluded that a *per se* rule prohibiting waiver of certain state administrative procedures that might, theoretically, delay resolution of a dispute would interfere with a "fundamental attribute" of arbitration—namely its purported speed. However, the court clarified that although state law cannot "interpose[] [certain state administrative hearings] hearing as an unwaivable

prerequisite to arbitration," state law does require that arbitration agreements in adhesive contracts "provide for . . . accessible, affordable resolution of . . . disputes." *Id.* at 206.

The court's opinion in *Sanchez* includes its most recent and thorough elucidation of the scope of state unconscionability. In *Sanchez*, the court rejected a simple formulation of the unconscionability test—instead explaining that no matter the precise formulation, the fundamental question at the core of every unconscionability dispute is whether "in view of all the relevant circumstances," the contract exhibits a "substantial degree of unfairness beyond a simple old-fashioned bad bargain." 61 Cal.4th at 911 (internal quotation marks and emphasis omitted). The standard involves a factually-intensive and case-dependent inquiry into facts "in the record" to determine whether a term is "unreasonably" "one-sided." *Id.*

Under California law, and consistent with the principles of FAA preemption, this is a steep burden and is as "rigorous and demanding for arbitration clauses as for any contract clause." *Id.* The court acknowledged, for example, that adhesive arbitration clauses, like other agreements, permissibly may include "margins of safety that provide the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need." *Id.* at 912 (internal quotation marks omitted). The court also explained, however, that using

arbitration clauses in standardized form contracts to chill, squelch, or impede the claims of consumers or employees is *not* a *legitimate* commercial interest. Quoting Professor Williston, the court explained that general unconscionability law deems unenforceable boilerplate terms that are "unreasonably favorable to the drafting party," because, for example, they "attempt to alter in an impermissible manner fundamental duties otherwise imposed by law," or "seek to negate the reasonable expectations of the non-drafting party." *Id.* at 911 (quoting WILLISTON ON CONTRACTS (4th ed. 2010, § 18.10)).

C. The FAA Does *Not* Protect All Arbitration Agreements.

Not surprisingly, in the wake of *Concepcion* and *Italian Colors*, the majority of arbitration clauses likely include class waivers. *See, e.g.*, Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015) 10 ("*CFPB Study*") (noting that "[n]early all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis"). But not all businesses have gone out of their way to "make bilateral arbitration a realistic and effective dispute-resolution mechanism," as AT&T boasted about its own provision in *Concepcion*. Some drafters, like Uber in this case, continue to include arbitration terms that interfere with efficient and streamlined dispute resolution,

notwithstanding the Supreme Court's clear case law about the limits of the FAA's protections.

Defendants and their *amicus* make unsubstantiated assertions about judicial hostility to arbitration. "Under the district court's approach," the Chamber of Commerce tells the Court, "few arbitration agreements would withstand scrutiny." Amicus Br. of Chamber of Commerce of the U.S.A. 6. These alarm bells are disingenuous. For one, the Chamber fails to acknowledge the multitude of arbitration agreements that courts in this Circuit enforce when compelling bilateral arbitration of consumer and employment claims. Indeed, the same district court judge that the Chamber and Defendants accuse of rabid prejudice to arbitration agreements in this case routinely enforces arbitration agreements that force plaintiffs out of court. [2]

[2] *See, e.g.*, *Colvin v. NASDAQ OMX Grp., Inc.*, No. 15-CV-02078-EMC, 2015 WL 6735292, at *5 (N.D. Cal. Nov. 4, 2015); *Cobarruviaz v. Maplebear, Inc.*, No. 15-CV-00697-EMC, 2015 WL 6694112, at *7 (N.D. Cal. Nov. 3, 2015); *Woods v. Vector Mktg. Corp.*, No. C-14-0264 EMC, 2014 WL 4348285, at *1 (N.D. Cal. Aug. 28, 2014); *King v. Hausfeld*, No. C-13-0237 EMC, 2013 WL 1435288, at *7 (N.D. Cal. Apr. 9, 2013); *Platte River Ins. Co. v. Dignity Health*, No. C-12-2356 EMC, 2013 WL 1149656, at *9 (N.D. Cal. Mar. 19, 2013); *Oguejiofor v. Nissan*, No. C-11-0544 EMC, 2011 WL 3879482, at *4 (N.D. Cal. Sept. 2, 2011); *Kanbar v. O'Melveny & Myers*, 849 F. Supp. 2d 902, 915 (N.D. Cal. 2011); *Kimble v. Rhodes Coll., Inc.*, No. C-10-5786 EMC, 2011 WL 2175249, at *4 (N.D. Cal. June 2, 2011); *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc.*, No. C-11-0052 EMC, 2011 WL 1086035, at *8 (N.D. Cal. Mar. 24, 2011); *Martin v. Ricoh Americas Corp.*, No. C-08-4853 EMC, 2009 WL 1578716, at *7 (N.D. Cal. June 4, 2009); *Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 842 (N.D. Cal. 2007).

Second, just over five years after it urged the outcome in *Concepcion* by assuring the Supreme Court that bilateral arbitration presents consumers and employees with a realistic mechanism for asserting claims—indeed, a "speedy, fair, inexpensive, and effective" one—the Chamber of Commerce seeks to cloak Uber's arbitration agreements' *unfair, expensive,* and *ineffective* arbitral procedures in the FAA's protections. Among other things, the arbitration agreement at issue in *Concepcion* provided that AT&T would pay all "filing, administration and arbitrator fees." Pet'r Br. at 5, *Concepcion*, 563 U.S. 333 (2011) (09-893). In this case, however, the arbitration agreement provides that fees shall be "apportioned equally between the Parties," unless the *arbitrator* determines that the law requires otherwise. ER-158. In *Concepcion*, the arbitration agreement allowed AT&T customers and their attorneys to speak publicly about their claims and to learn from other customers and attorneys how their disputes against AT&T had been resolved. Pet'r Br. at 5, *Concepcion*, 563 U.S. 333 (2011) (09-893). By contrast, here, the arbitration agreements prevent Uber drivers from learning anything about the "contents[,] results," or even the "*existence*" of prior arbitrations against Uber. ER-158 (emphasis added). In these ways, along with all of the others specified by the district court, the arbitral scheme imposed on drivers through their standardized form agreements does not provide

drivers with a realistic and fair process for resolving individual claims against Uber.

The suggestion that "few arbitration agreements" would withstand the district court's scrutiny relies on the assumption that all arbitration agreements are created equal. As the United States Supreme Court, the California Supreme Court, this Court, and the district court have all recognized, this premise is false. The district court's opinion is important in the development of the case law, not in that it breaks new ground in arbitration law—it does not—but in that it exemplifies the careful and balanced analysis that courts should apply to determine whether an arbitration agreement in a standardized form contract is enforceable.

II. THE COST-SPLITTING PROVISION PREVENTS PLAINTIFFS FROM "EFFECTIVELY VINDICATING" THEIR RIGHTS UNDER FEDERAL LAW.

The unenforceable and—by its own terms—unseverable PAGA waiver is dispositive in this case. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). However, if the Court decides it needs to reach the validity of any of the terms of the arbitration agreement besides the PAGA waiver, it can affirm the decision below on the basis of federal "effective vindication" doctrine, without having to decide whether the agreements are procedurally or substantively unconscionable under California law.

A. Plaintiffs Have Met Their Burden of Establishing That Arbitration Costs Prevent Them from Accessing the Arbitral Forum to Assert Their Claims.

The Supreme Court has authorized arbitration of most federal statutory claims, but has also held that arbitration clauses are invalid as a matter of federal law if they prevent a prospective litigant from "effectively vindicat[ing a federal] statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *see also Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). As explained above, although class waivers may not, standing alone, prevent plaintiffs from "effectively vindicating" their rights under federal law, an arbitration clause violates federal law when the plaintiff meets her burden of demonstrating the "likelihood of incurring," *Green Tree*, 531 U.S. at 92, "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable," *Italian Colors*, 133 S. Ct. at 2310-11.

Plaintiffs have easily met that burden here. In this case, they assert claims under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (FCRA), and pursuant to federal law, they cannot waive their right to "effectively vindicate" their individual FCRA claims. *Nesbitt v. FCNH, Inc.*, No. 14-1502, 2016 WL 53816, at *7 (10th Cir. Jan. 5, 2016).[3] The arbitration agreements at issue here,

[3] While not relevant to this case, the district court in *Nesbitt* concluded that, under

however, would require Plaintiffs to pay exorbitant and entirely unaffordable arbitration fees to bring these claims. Based on evidence in the record—for example, likely arbitral costs that include $5,000 to initiate the arbitration along with Plaintiff Gillette's sole income of $775 per month in Social Security payments, ER 29—these fees and costs render the pursuit of Plaintiffs' individual FCRA claims not just impracticable in theory but "impossible" in reality. *See Italian Colors*, 133 S. Ct. at 2311 n.3.

B. Defendants' Counterarguments Ignore that Arbitration is a Creature of Contract.

In addressing whether an arbitration agreement violates the "effective vindication" doctrine, courts must look to the language of the agreement and facts in the record regarding the effect of that language on the plaintiff's federal claims. *See, e.g.*, *Green Tree*, 531 U.S. at 92. Defendants, however, ask the court to look past the clear language of the arbitration agreement because of Defendants' self-

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(continued . . .)

Colorado law, the arbitration agreement at issue was "procedurally conscionable" because it provided, among other things, an opt-out opportunity. *Nesbitt v. FCNH, Inc.*, 74 F. Supp. 3d 1366, 1372 (D. Colo. 2014). The court nonetheless refused to enforce the arbitration agreement on "effective vindication" grounds.

The district court's procedural unconscionability analysis applied Colorado and not California law, and it was likely incorrect as a matter of Colorado law. *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986) (*en banc*) (setting out seven different factors that may be relevant to a finding of unconscionability under state law). However, the Tenth Circuit declined to reach that issue because it agreed that the agreement was unenforceable under the federal effective vindication doctrine. *Nesbitt*, 2016 WL 53816, at *8 n.3.

serving, non-binding assurances that facts outside of the agreement make the forum accessible. These arguments fail.

For one, although it is true that under the arbitration agreements at issue an arbitrator *could* award fees and costs to Plaintiffs if they prevailed on their individual FCRA claims in arbitration, *see* 15 U.S.C. §§ 1681*n*(a)(3), 1681*o*(a)(2), this possibility provides small comfort to Plaintiffs, with limited funds, forced to front the exorbitant costs of arbitration. As the Tenth Circuit recently observed in the course of concluding that a similar cost-splitting term prevented the plaintiffs from effectively vindicating their rights under the Fair Labor Standards Act, "it is unlikely that an employee in [the plaintiff's] position, faced with the mere possibility of being reimbursed for arbitrator fees in the future, would risk advancing those fees in order to access the arbitral forum." *Nesbitt v. FCNH, Inc.*, --- F.3d ----, No. 14-1502, 2016 WL 53816, at *7 (10th Cir. Jan. 5, 2016) (internal quotation marks omitted).

Defendants cannot save their arbitration agreements by pointing to the contractual proviso that Uber will pay costs "if required by law." For one, although Defendants have on occasion suggested that this language would mean that Plaintiffs would not need to pay for the costs of arbitration, they have equivocated about this point. Before the district court, for example, Defendants asserted that Plaintiffs were not employees and, thus, under California law, would

be required to pay their share of the costs of arbitration. ER-31 ("I believe absent a showing of employee status, each party would bear their own expenses."). Defendants' equivocation precisely illustrates the weakness of their contract-interpretation argument. Drafters are not permitted to include clearly illegal and unfair terms but insulate those terms from legal challenge by stating that they are enforceable only to the extent permitted by law. As this Court has observed in other contexts, these "savings clauses" often amount to "subterfuge or sham" by purporting to insulate unfair terms to which the non-drafting party—who may be unfamiliar with her legal rights—may feel bound. *In re Dominguez*, 995 F.2d 883, 887 (9th Cir. 1993) (examining "savings clause" in potentially usurious mortgage loan contract); *see also Blue Growth Holdings Ltd. v. Mainstreet Limited Ventures, LLC*, No. CV13-1452, 2013 WL 4758009, at *3 (N.D. Cal. Sept. 4, 2013) (concluding that lender had "usurious intent regardless of the presence of the savings clause"); *see also Kolani v. Gluska,* 64 Cal. App. 4th 402, 408 (1998) (refusing to narrow covenant not to compete notwithstanding "savings clause").

Moreover, the contract provides that the *arbitrator* will decide whether Uber must bear the costs of the arbitration. ER-158. However, as Plaintiffs pointed out in the court below in contesting the validity of the "delegation clause," they would have to pay exorbitant costs to access the arbitral forum to obtain even a preliminary determination on any of the threshold matters at issue here. In other

words, for the opportunity to convince an arbitrator that Uber is "required by law" to pay all or substantially all of the costs of arbitration, Plaintiff would have to pay thousands of dollars in fees. This qualification to the "savings clause" undermines any force that it might otherwise have in making the forum accessible to Plaintiffs and other Uber drivers.

It also makes no difference that Defendants have made a non-binding offer to pay some of the costs of arbitration. The primary purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms, *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989)—this goal counsels against allowing defendants to rehabilitate *post-hoc* an unfair arbitral forum by altering its procedures in contravention of the terms of the agreement.

Accepting Defendants' proposal would not only run afoul of state contract law and the FAA, it would also provide an incentive for drafters to overreach by packing form contracts with clearly unenforceable terms, knowing that, at worst, they could offer to undo these terms later if their adhesive contracts ever faced a serious challenge. *See, e.g.*, *Lelouis v. W. Directory Co.*, 230 F. Supp. 2d 1214, 1225 (D. Or. 2001) ("[I]f I were to accept defendants' proposal, employers would have no incentive to ensure that a coerced arbitration agreement is fair to both sides. Instead, the employer could write a one-sided agreement that favors the

employer, and then make the bare minimum modifications necessary to obtain the court's approval.").

Defendants argue, nonetheless, that the offer to pay fees and costs "moots" Plaintiffs' argument that the cost-splitting term is unenforceable. Appellants' Br. at 42 n.13. As Defendants acknowledge, to the extent this argument has any force, it applies only to Plaintiffs' "effective vindication" argument, and not to their unconscionability argument under California law. *Id.*; *see also* Cal. Civ. Code § 1670.5(a) (unconscionability analysis looks to agreement "at the time it was made"). Even with respect to their "effective vindication" argument, however, the Court should reject Defendants' efforts to undo the plain meaning of the arbitration agreements. Many of the cases cited by Defendants rely on a fleeting reference to mootness in *Livingston v. Associates Financial, Inc.*, 339 F.3d 553 (7th Cir. 2003). However, in that case, the defendant's offer to pay arbitration costs was expressly contemplated by the arbitration agreement, which provided that the defendants "may pay the arbitration costs . . . if [the plaintiffs] are unable to do so themselves." *Id.* at 554-55. That case does not support Defendants' request that the Court rewrite these arbitration agreements. *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 258 (Ill. 2006).

Finally, it is of no import that JAMS's rules *might* require Uber to pay the costs of the arbitration. Defendants' arguments misinterpret how JAMS's rules

would likely apply in this case. First, the 2014 arbitration agreement provides that the arbitration shall be conducted under JAMS's "Streamlined Rules," which require the party initiating arbitration to pay a $1,200 filing fee, even if the party is indigent. Appellees' Br. 43 n.9. Furthermore, under either the 2013 or 2014 agreement, if a JAMS arbitrator determines that JAMS's "Minimum Standards of Procedural Fairness" apply to the dispute, she will likely refuse to administer the arbitration at all. *See* JAMS Employment Minimum Standards, *available at* http://www.jamsadr.com/employment-minimum-standards/ ("If an arbitration is based on a clause or agreement that is required as a condition of employment, JAMS will accept the assignment only if the proceeding complies with the 'Minimum Standards of Procedural Fairness for Employment Arbitration.'"). And even if JAMS refuses to administer the arbitration because of a lack of procedural fairness, Uber could still attempt to compel arbitration before an administrator that does not require such protections for employees. 9 U.S.C. § 5; *Cobarruviaz v. Maplebear, Inc.*, No. 15-CV-00697-EMC, 2015 WL 6694112, at *5 (N.D. Cal. Nov. 3, 2015) (Chen, *J.*).

III. THE ARBITRATION AGREEMENTS ARE UNCONSCIONABLE.

Even if the Court decides that neither the non-severable PAGA waiver nor Plaintiffs' "effective vindication" argument defeats the arbitration agreements on

its own, it should affirm based on the district court's careful unconscionability analysis.

A. The Arbitration Agreements are Procedurally Unconscionable.

The question of whether a contract is procedurally unconscionable turns on an analysis of the totality of the circumstances surrounding contract formation—including the nature of the contract, the parties' relative bargaining power, and the form in which the contractual terms are presented—to determine whether they exhibit "oppression" or "surprise." *See, e.g.*, *Armendariz v. Found. Health Psychcare Servs., Inc.,* 24 Cal. 4th 83, 114 (2000). As Plaintiffs demonstrate, the district court correctly concluded that both of the arbitration agreements at issue in this case were procedurally unconscionable. Appellees' Br. 31-39. Here *amici* focus solely on Defendants' and *amicus*'s suggestion that the opt-out mechanism included in the agreements insulate them from a finding of procedural unconscionability.

As an initial matter, notwithstanding the opportunity to opt out of the arbitration agreements, they are both unquestionably contracts of adhesion because they are presented in a "standard-form . . . prepared by one party, to be signed by another party in a weaker position." Contract, Black's Law Dictionary (10th ed. 2014); *see also Duran v. Discover Bank,* No. B203338, 2009 WL 1709569, at *5 (Cal. Ct. App. June 19, 2009) ("[E]ven a contract with an opt-out provision can be

a contract of adhesion."). As a matter of California law, then, both of the arbitration agreements are procedurally unconscionable to at least "some degree." *Sanchez*, 61 Cal.4th at 915.

More importantly, however, based on the facts of this case, the district court correctly found that Uber drivers who assented to the agreements did so without a "meaningful choice" about the matter, *see, e.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965), and the drivers' opportunity to opt out does not alter this analysis. As the Consumer Financial Protection Bureau's recent and comprehensive study of the use of forced arbitration clauses revealed, the vast majority of credit card consumers are unaware of opt-out opportunities even when clearly provided in a form contract, *CFPB Study* at 11, and there is no reason to think that the Uber drivers assenting to the arbitration agreements here would be in a better position to understand their rights under the agreements.

It is true, as Defendants point out, that there is no requirement that arbitration clauses, as opposed to other contractual terms, be highlighted with any special prominence within a form contract. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). That proposition is consistent, however, with a procedural unconscionability analysis that considers the relative lack of prominence of an arbitration term within a form contract—just as it would consider

the lack of prominence of any other material term in a standardized form contract. *Id.* ("[G]enerally applicable contract defenses, such as . . . unconscionability, may be applied to arbitration agreements without violating [the FAA]." (internal citations omitted)).

Finally, it is extraordinarily unlikely that a rule precluding a finding of procedural unconscionability in the presence of an opt-out provision is an accurate prediction of California law. As the California Supreme Court has stated, "a conclusion that a contract contains no element of procedural unconscionability is tantamount to saying that, no matter how one-sided the contract terms, a court will not disturb the contract because of its confidence that the contract was negotiated or chosen freely." *Gentry v. Superior Court*, 42 Cal. 4th 443, 573 (2007). Particularly in light of new empirical evidence regarding layperson apprehension of opt-out opportunities presented in form contracts, the rule posited by Defendants makes little sense. If it were the law, drafting parties could pack their arbitration clauses with unfair terms and ensure that they escaped scrutiny under California unconscionability law by including an opt-out mechanism. However, if the Court has any uncertainty about the scope of California law on this issue, it should certify that question to the California Supreme Court.

B. The Arbitration Agreements are Substantively Unconscionable.

For the reasons explained in the Plaintiffs' Joint Response Brief, the district court properly applied California unconscionability law in deciding that the arbitration agreements' (1) cost- and fee-splitting provision, (2) confidentiality requirement, (3) absence of mutuality, (4) reservation of the right to unilaterally amend the agreement to Uber, and (5) PAGA waiver is each substantively unconscionable. Those arguments need not be rehashed here, except to note that with respect to the cost- and fee- shifting provision, the same considerations supporting the "effective vindication" argument set out above also support Plaintiffs' unconscionability argument under California law. *Armendariz*, 24 Cal. 4th at 101.

Furthermore, as explained above, neither Uber's offer to pay the costs of arbitration nor JAMS's rules prohibiting the imposition of excessive costs on employees asserting claims undermine the finding of unconscionability with respect to the cost- and fee-splitting provision. It is blackletter contract law that unconscionability analysis turns on an examination of the language of the contract "at the time it was made." Cal. Civ. Code § 1670.5(a). Subsequent unilateral assertions that offensive terms will not be enforced because of the drafters' forbearance or a fact about the world that exists outside of the four corners of the document—in this case, a prediction about what a JAMS arbitrator might decide—

are irrelevant to this analysis. Indeed, taking these considerations into account runs counter to the "principal purpose of the FAA . . . to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344.

Finally, a word about the Chamber of Commerce's suggestion that "if *Armendariz* were construed to impose a rule under which arbitration provisions are unenforceable unless they categorically require employers to pay all arbitration cost, that rule would be preempted by the FAA," Chamber Br. at 20: the Chamber cannot seriously contend that such a rule would interfere with the principles of "speedy and efficient" dispute resolution. *Concepcion*, 563 U.S. at 344. If anything, it would further that interest. Instead, the Chamber argues that the rule would be preempted because it treats arbitration agreements with disfavor relative to other agreements. *DIRECTV*, 136 S. Ct. at 468.

This argument is pressed by the Chamber alone, and not Defendants. The Court should reject it. A judicial or legislative application of general state rules is not preempted merely because its articulation refers to "arbitration." Indeed, such a technical analysis runs counter to FAA-preemption doctrine, which looks not to the language of a rule's formulation, but rather the rule's purposes and effects. *Mortensen*, 722 F.3d at 1161. As this Court has explained, any state law that invalidates an arbitration provision because of a specific feature of the arbitral

process will have a "disproportionate impact on arbitration because the term is arbitration specific." *Chavarria*, 733 F.3d at 927. But, as long as the rule does not disfavor arbitration relative to other forms of dispute resolution, "it is agnostic towards arbitration." *Id.*

If the Court, however, is inclined to consider whether some aspect of the *Armendariz* opinion is preempted, it should instead certify to the California Supreme Court a question regarding the scope of California law. As explained above, that court has now considered on multiple occasions the application of California law in light of *Concepcion* and its progeny. Recently, it suggested that *Armendariz* was still good law, but it did not consider that question directly. *See Sanchez*, 61 Cal. 4th at 921. Before deciding whether any aspect of California law is preempted by federal law, this Court should give the California Supreme Court an opportunity to explain the current scope of California law.

IV. THE DISTRICT COURT APPROPRIATELY DECLINED TO SEVER THE UNENFORCEABLE TERMS.

Defendants argue that even if any of the terms of the arbitration agreements are unenforceable, the district court should have severed them and enforced the arbitration agreement notwithstanding the offending provisions. As an initial matter, Defendants appear confused about the basis for the district court's decision not to sever unenforceable terms. The district court did not mechanically apply a "non-severability" rule that prohibits severance where there are "multiple

unconscionable clauses." Chamber Br. at 36. Instead, the district court concluded that the number, nature, and prevalence of the offending terms suggested that the "central purpose[s]" of the agreements were "tainted with illegality." ER-50 (internal quotation marks omitted); *see O'Connor v. Uber Techs., Inc.,* No. 13-CV-03826-EMC, 2015 WL 9303979, at *2 (N.D. Cal. Dec. 22, 2015). This analysis is faithful to California law and consistent with the FAA.[4]

General contract doctrine permits courts to decline to sever unfair and unenforceable terms from a standard contract when the contract is "permeated by . . . unconscionability." *Armendariz*, 24 Cal. 4th at 122 (quoting Legis. Com. com., at 9 West's Ann. Civ. Code (1985 ed.) p. 494). This rule is grounded, among other things, in the general principle that "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." Restatement (Second) of Contracts § 184, cmt. (b) (1981). Courts can and do sever unenforceable terms when doing so best honors the parties' purposes. However, when an examination of the contract's terms suggests that the purposes of the contract are permeated by

[4] Even if the Court decides that the cost- and fee-splitting provision is unenforceable as a matter of *federal* "effective vindication" doctrine, the question of whether that term is severable from the remainder of the arbitration agreement turns on a question of *state* law. *See Jackson v. Cintas Corp.*, 425 F.3d 1313, 1317 (11th Cir. 2005).

illegality, refusing to sever illegal terms undermines neither the freedom of contract nor any of the policies designed to protect it. *See Nino v. Jewelry Exch., Inc.,* 609 F.3d 191, 206 (3d Cir. 2010).

By allowing courts to decline to sever unenforceable terms from a standardized form agreement when the prevalence, extent, or interconnectedness of the terms suggest that the purpose of the agreement is tainted or permeated by illegality, severability doctrine appropriately deters drafters from intentionally including illegal terms in standardized form contracts. By contrast, in certain cases, severing unenforceable terms may create an incentive for drafters to include as many unfair terms as possible, without fear that the inclusion of these terms will prevent enforcement of the agreement as a whole. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 683 (1960) ("If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable. This smacks of having one's employee's cake, and eating it too.").

For at least two reasons, providing proper incentives for drafters is critically important in the context of standardized form contracts. First, because of their own limitations, it is impossible for courts to police the legality of all contracts on a *post hoc* basis. Therefore, to protect against the purposeful subversion of contract-

enforceability doctrines, the law must sufficiently deter the inclusion of illegal terms at the drafting stage. *See generally* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1288 (2003).

Second, contract law must protect against the *in terrorem* effects of clearly unenforceable contract terms. As courts have recognized in a number of contexts—including when examining landlord-tenant agreements and covenants not to compete—courts should refuse to sever illegal terms where the inclusion of those terms may prevent parties from asserting their legal rights or, perversely, from challenging the enforcement of the same illegal terms. *Summers v. Crestview Apartments*, 236 P.3d 586, 593 (Mont. 2010); *Baierl v. McTaggart*, 629 N.W.2d 277, 285 (Wis. 2001); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 682 (1960). In the context of arbitration agreements, the chilling effects of illegal terms are apparent. Would a low-wage worker or low-income consumer, already skeptical that the law provides an avenue for the vindication of her rights, decide to pursue a claim after her attorney explains to her that she is bound by a contract that purports to waive those rights or a term that requires her to pay the other side's fees and costs if she loses? Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1175 (2009).

In this sense, severability doctrine as articulated by California courts and applied by the district court is grounded in general rules of contract law that apply across all types of form contracts. Furthermore, because the doctrine is designed to deter the inclusion of unfair and unenforceable terms that would require lengthy and costly proceedings to excise, it is entirely consistent with—and indeed *furthers*—the FAA's purposes of encouraging "speedy and efficient" dispute resolution.

Severability doctrine under California law involves a complex weighing of a number of factors, including a linguistic analysis of the terms of the agreement, the number and pervasiveness of illegal terms, and general equitable considerations. *See, e.g.*, *O'Connor v. Uber Techs., Inc.*, 2015 WL 8292006, at *12 (N.D. Cal. Dec. 9, 2015). Any lingering uncertainty about the scope of California severability doctrine could be resolved by certifying that question to the California Supreme Court to provide a definitive interpretation of California law.

CONCLUSION

For these reasons, the district court's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
(Fed. R. App. P. 32(a) & 9th Cir. Rule 32-l)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains less than 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 word processing program, a 14-point font size, and the Times New Roman type style.

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