No. 20-16030

IN THE

United States Court of Appeals for the Ninth Circuit

JOHN CAPRIOLE, MARTIN EL KOUSSA, and VLADIMIR LEONIDAS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UBER TECHNOLOGIES, INC. and DARA KHOSROWSHAHI,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
The Honorable Edward M. Chen | Case No. 3:20-cv-02211-EMC

ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1(a), Uber Technologies, Inc. hereby states that it is a publicly held corporation with no parent company. Based solely on filings made on February 14, 2020, by SB Cayman 2 Ltd. with the U.S. Securities and Exchange Commission ("SEC") regarding beneficial ownership, SB Cayman 2 Ltd., a private company, beneficially owns more than 10% of Uber's outstanding stock. SB Cayman 2 Ltd. is an affiliate of Softbank Group Corp., a publicly held corporation. Based on SEC filings regarding beneficial ownership of Uber's stock, Uber is unaware of any other publicly held corporation that beneficially owns more than 10% of Uber's outstanding stock.

Dated: August 27, 2020

/s/ Theane Evangelis
Theane Evangelis

Counsel for Defendants-Appellees Uber Technologies, Inc. and Dara Khosrowshahi

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INTRODUCTION

Plaintiffs are independent transportation providers who allege that Uber Technologies, Inc. violated Massachusetts law by failing to classify them as employees. Plaintiffs do not dispute that they agreed to submit these claims to arbitration, or that they had a full and unfettered right to opt out of arbitration but declined to do so. Instead, they deploy a battery of devices in an attempt to avoid application of the Federal Arbitration Act ("FAA") and circumvent their contractual obligation to arbitrate. The district court (Chen, J.) correctly rejected Plaintiffs' arguments, compelling individual arbitration and denying Plaintiffs' request for preliminary injunctive relief. This Court should affirm.

First, Plaintiffs assert that the FAA exempts from its scope arbitration agreements contained in "contracts of employment of ... any … class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. But Plaintiffs did not—and could not—rebut the evidence showing that the class of workers to which they belong performs inherently *local* transportation (less than 10 miles per trip on average). Plaintiffs insist that they are nevertheless exempt from the FAA because they occasionally transport people to and from airports. But courts across the

country have rejected this argument as to transportation providers, like Plaintiffs, who are not part of an integrated chain of interstate or foreign transportation due to travelers' unfettered choice regarding how to get to and from airports. *See*, *e.g.*, *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). This Court in *Rittmann v. Amazon.com, Inc.*, __ F.3d __, 2020 WL 4814142 (9th Cir. Aug. 19, 2020), embraced this very distinction, and expressly distinguished local delivery drivers as beyond the reach of the Section 1 exemption. *See id.* at *8.

Second, Plaintiffs argue that their request for a preliminary injunction falls within the FAA's savings clause because they seek "public injunctive relief," which in California may not be completely waived. This argument is doubly erroneous, and the district court correctly rejected it. Plaintiffs conceded that Massachusetts courts have never held that public injunctions cannot be waived in arbitration agreements. And even if Massachusetts were to adopt such a rule, an order reclassifying Plaintiffs as employees does not constitute a public injunction because it inures primarily to Plaintiffs and similarly situated individuals, while any benefit to the public is merely incidental. *See*, *e.g.*, *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745, 753–54 (2019).

Third, the district court's denial of Plaintiffs' motion for a preliminary injunction was correct and should be affirmed. Plaintiffs' motion sought relief that would thwart the parties' right to arbitrate, and the district court was correct to deny that motion upon compelling arbitration of Plaintiffs' claims. In addition, Plaintiffs' motion was flawed on the merits, as Plaintiffs failed to satisfy the traditional requirements for injunctive relief.

In short, Plaintiffs have spent nearly a year "undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it'" (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001)), by asserting a series of evasive arguments that have correctly been rejected multiple times in this case and several other similar cases. This Court should affirm the district court's judgment granting Uber's motion to compel arbitration and denying Plaintiffs' motion for a preliminary injunction.

STATEMENT OF JURISDICTION

Uber agrees with Plaintiffs' Jurisdictional Statement. AOB5–6.

STATEMENT OF THE ISSUES

1. Did the district court properly conclude that Plaintiffs do not belong to a "class of workers engaged in … interstate commerce" (9 U.S.C. § 1) exempt from the FAA where they engage in inherently local transportation, covering less than 10 miles on average, and are not part of an integrated chain of interstate commerce?

2. Did the district court correctly conclude that Plaintiffs' claims for injunctive relief are arbitrable where Massachusetts law has never recognized an exception to arbitration for claims that seek public injunctive relief and, even if it did, Plaintiffs do not seek a public injunction?

3. Did the district court correctly decide Uber's motion to compel arbitration before Plaintiffs' motion for a preliminary injunction where the proposed injunction sought the ultimate relief in the case—wholesale reclassification of drivers—but the parties' arbitration agreements allowed the district court to grant preliminary relief only to preserve the status quo and guard the efficacy of arbitration?

STATEMENT OF THE CASE

I. Factual Background

Uber is a technology company that develops several multi-sided platforms that connect service providers with customers. Multi-sided "platform[s] offer[] different products or services to two different groups who both depend on the platform to intermediate between them." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018). The Uber platform under attack in this litigation (the "Rides platform") operates like a digital marketplace that connects individuals in need of transportation ("riders") with individuals who provide transportation services ("drivers"). ER737. Uber provides its technology through a smartphone application (the "Uber App"), which drivers can license. *Id.*

Plaintiffs John Capriole, Martin El Koussa, and Vladimir Leonidas have used the Uber App as drivers since at least May 2016. ER245. In order to do so, they each accepted the 2015 Technology Services Agreement (the "TSA"), which governs the relationship between Uber and drivers. ER743.

The first page of the TSA advised Plaintiffs in bold, capitalized letters that it contained an arbitration agreement (the "Arbitration Provision"):

> **IMPORTANT: PLEASE NOTE THAT TO USE THE UBER SERVICES, YOU MUST AGREE TO THE TERMS AND CONDITIONS SET FORTH BELOW. PLEASE REVIEW THE ARBITRATION PROVISION SET FORTH BELOW CAREFULLY, AS IT WILL REQUIRE YOU TO RESOLVE DISPUTES WITH THE COMPANY ON AN INDIVIDUAL BASIS, EXCEPT AS PROVIDED IN SECTION 15.3, THROUGH FINAL AND BINDING ARBITRATION UNLESS YOU CHOOSE TO OPT OUT OF THE ARBITRATION PROVISION.... IF YOU DO NOT WISH TO BE SUBJECT TO ARBITRATION, YOU MAY OPT OUT OF THE ARBITRATION PROVISION BY FOLLOWING THE INSTRUCTIONS PROVIDED IN THE ARBITRATION PROVISION BELOW.**

ER749. The Arbitration Provision stated that Uber and drivers agree to submit virtually all disputes to bilateral arbitration:

> This Arbitration Provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the "FAA") and evidences a transaction involving interstate commerce. This Arbitration Provision applies to any dispute arising out of or related to this Agreement or termination of the Agreement and survives after the Agreement terminates….
>
> **[T]his Arbitration Provision is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before any forum other than arbitration.... [T]his Arbitration Provision requires all such disputes to be resolved only by an arbitrator through final and binding arbitration on an individual basis only and not by way of court or jury trial, or by way of class, collective, or representative action**….

> [T]his Arbitration Provision also applies, without limitation, to all disputes between You and the Company or Uber, as well as all disputes between You and the Company's or Uber's fiduciaries, administrators, affiliates, subsidiaries, parents, and all successors and assigns of any of them, including but not limited to any disputes arising out of or related to this Agreement and disputes arising out of or related to your relationship with the Company, including termination of the relationship.

ER765 (emphasis in original). It also contained a delegation clause:

> Except as provided in Section 15.3(v), below, regarding the Class Action Waiver, such disputes include without limitation disputes arising out of or relating to interpretation or application of this Arbitration Provision, including the enforceability, revocability or validity of the Arbitration Provision or any portion of the Arbitration Provision. All such matters shall be decided by an Arbitrator and not by a court or judge.

Id.

The Arbitration Provision affords drivers an unfettered right to opt out of arbitration for 30 days after accepting the TSA simply by sending an email to Uber. ER769. Although thousands of drivers nationwide have exercised their right to opt out of the Arbitration Provision in the TSA, Plaintiffs did not. ER744.

In January 2020, Plaintiffs agreed to a new Platform Access Agreement (the "PAA"), which contains a materially identical version of the Arbitration Provision. ER788; *see* ER745; D.Ct. Dkt. 75-1 ¶¶ 16–17.

II. Procedural Background

Notwithstanding the Arbitration Provision, Capriole filed a Class Action Complaint on September 12, 2019, in the United States District Court for the District of Massachusetts, seeking to represent "all other individuals" who used the Uber App as drivers "in Massachusetts who have not released all of their claims against Uber." ER1220; ER1229.

Plaintiffs' complaint alleged that Uber misclassified drivers as independent contractors rather than employees and asserted claims for (1) declaratory judgment (28 U.S.C. §§ 2201–2202); (2) misclassification (Mass. Gen. L. ch. 149, §§ 148B, 150); (3) expense reimbursement (*id.* §§ 148, 148B, 150); (4) minimum-wage violations (*id.* ch. 151, §§ 1, 20); and (5) overtime violations (*id.* §§ 1A, 1B). ER1226–28. Among other remedies, the complaint sought "public injunctive relief in the form of an order requiring Uber" to reclassify drivers and afford them rights and benefits available to employees under Massachusetts law. ER1228.

One week later, Capriole moved for a preliminary injunction. *See* D.Ct. Dkt. 4. This motion sought the exact same relief requested in the complaint: an order requiring Uber to "reclassify its drivers as employees and henceforth comply with Massachusetts wage laws." *Id.* at 20.

Uber moved to compel arbitration of Plaintiffs' claims under the Arbitration Provision. ER8.

The Massachusetts district court denied the motion for a preliminary injunction. *Capriole v. Uber Techs., Inc.*, 2020 WL 1323076, at *1 (D. Mass. Mar. 20, 2020), *appeal filed*, No. 20-1386 (1st Cir.). The court found that a preliminary injunction was inappropriate "[b]ecause Plaintiff has not made a sufficient showing of immediate threat of irreparable harm." *Id.* at *3. In particular, the court noted that "[a]lthough Plaintiff states that drivers will suffer irreparable harm … he offers no evidence in support of these claims"—and even if he did, these harms "can be remedied by compensatory awards." *Id.* at *2 n.5.

Capriole then filed a First Amended Class Action Complaint, adding a claim for paid sick time under Massachusetts General Laws ch. 149, § 148C. ER900. And three days later, he filed a new, emergency

motion for a preliminary injunction, seeking once more to force Uber to reclassify drivers. ER854.

The district court in Massachusetts did not rule on the new motion, however, because the court transferred the action to the United States District Court for the Northern District of California. *Capriole v. Uber Techs., Inc.*, 2020 WL 1536648, at *1 (D. Mass. Mar. 31, 2020). In the new district court, Capriole filed a Second Amended Complaint that added El Koussa and Leonidas as named plaintiffs (ER242), and Uber again moved to compel the claims to arbitration (D.Ct. Dkt. 67).

The district court granted Uber's motion to compel arbitration and denied Plaintiffs' emergency motion for a preliminary injunction. The district court recognized its "limited" "ability to grant injunctive relief prior to arbitration," and found that "the injunctive relief sought here would upend, rather than preserve, the status quo and would not preserve the meaningfulness of the arbitration process." ER11. The court thus concluded that "[i]t would not be appropriate to plow ahead on the motion for a preliminary injunction before ruling on [Uber's] motion to compel." *Id.*

Turning to Uber's motion to compel arbitration, the district court rejected Plaintiffs' contention that the FAA did not apply to the Arbitration Provision under Section 1 of the statute, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. As the district court explained, "[t]he critical issue is whether Uber drivers are 'engaged in interstate commerce,'" a term that "is to be interpreted narrowly." ER14. And "[a]s the party opposing arbitration, Plaintiffs have the burden of proving that the exemption applies." ER13.

To carry its burden, "Plaintiffs allege[d] both that Uber drivers sometimes cross state lines while transporting passengers and also that Uber drivers frequently pick up and drop off passengers at airports, thereby placing themselves within the flow of interstate commerce." ER15. But the district court found this insufficient because any "interstate rides given by Uber drivers ... [are] not only incidental—they are rare," while "Uber drivers do not perform an integral role in a chain of interstate transportation" simply by transporting people to and from airports. ER18. Indeed, "only 2.5% of all trips fulfilled using the Uber

Rides marketplace in the United States between 2015 and 2019 ... started and ended in different states," and only "10.1% of all [Uber] trips taken in the United States in 2019 began or ended at an airport." ER15. The district court noted that its conclusion was consistent with "[o]ther courts [that] have found Section 1 of the FAA does not apply to similarly situated workers." ER18.

The district court next considered Plaintiffs' argument that arbitration could not be compelled because Plaintiffs purported to seek public injunctive relief. Citing the District of Massachusetts's order denying Plaintiffs' first motion for a preliminary injunction, the district court observed that, unlike California law, "'the Massachusetts Wage Act includes no provisions for public injunctive relief.'" ER20. And even if it did, "[a] growing number of cases have ... rejected application of the public injunction exception to classification question[s], finding such disputes to be matters of private dispute." ER21.

As a result, the district court denied Plaintiffs' emergency motion for a preliminary injunction and compelled their claims to arbitration. ER22.

SUMMARY OF ARGUMENT

I. Plaintiffs do not fall within the Section 1 exemption to the FAA because the class of workers to which they belong is not "engaged in foreign or interstate commerce" in the same way as railroad employees and seamen.

A. The relevant inquiry under Section 1 is whether rideshare drivers as a class are engaged in foreign or interstate commerce.

B. Rideshare drivers engage in inherently *local* transportation, traveling on average less than 10 miles per trip, and are not part of any integrated chain of interstate or foreign transportation. Plaintiffs emphasize that they occasionally transport riders to and from the airport, but the Supreme Court has made clear that travelers' unfettered choice regarding how to get to and from airports breaks the chain of interstate transportation. *See United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). Plaintiffs are also nothing like the delivery drivers this Court considered in *Rittmann*, who alleged they transported goods intrastate as part of a purported unbroken chain of interstate shipment coordinated by their putative employer. Plaintiffs here have no such connection to passengers' interstate travel—as *Rittmann* itself recognized in distinguishing local

delivery drivers. *Rittmann v. Amazon.com, Inc.*, __ F.3d __, 2020 WL 4814142, at *8 (9th Cir. Aug. 19, 2020).

C. The Arbitration Provision does not appear in a "contract[] of employment." 9 U.S.C. § 1. This term "capture[s] any contract for the performance of work by workers" (*New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 541 (2019) (emphasis omitted)), but nothing in the TSA or PAA requires Plaintiffs to do any work at all. On the contrary, those contracts merely license access to the Uber App, leaving drivers complete discretion regarding whether and when to perform work.

II. The district court correctly compelled Plaintiffs to submit their claims to individual arbitration.

A. Massachusetts law does not recognize an exception from arbitration for claims seeking "public injunctive relief," as Plaintiffs admit. Even if it did, the relief sought by Plaintiffs here does not constitute public injunctive relief, which is limited to injunctions that "benefit 'the public directly by the elimination of deceptive practices,' but do not otherwise benefit the plaintiff." *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819, 824 (9th Cir. 2019).

B. The district court correctly decided Uber's motion to compel arbitration before addressing Plaintiffs' emergency motion for a preliminary injunction. As Plaintiffs' own cases acknowledge, the scope and duration of any preliminary relief a court may award is defined by the parties' agreement to arbitrate. *See Braintree Labs., Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 40 n.4 (1st Cir. 2010). And here, the Arbitration Provision invested the arbitrator with authority to grant emergency preliminary relief and denied such authority to the district court except insofar as necessary to preserve the effectiveness of any arbitration. The district court's authority certainly does not extend to awarding on a preliminary basis the ultimate relief sought in the case.

C. Even if Plaintiffs' claims were not arbitrable under the FAA, they are arbitrable under Massachusetts law. "Similar to the Federal [Arbitration] Act, the Massachusetts Act 'express[es] a strong public policy favoring arbitration.'" *St. Fleur v. WPI Cable Systems/Mutron*, 879 N.E.2d 27, 31 (Mass. 2008). And while a class waiver may invalidate an arbitration agreement when it deprives a party of "the ability to pursue a claim against the defendant in individual arbitration according to the terms of the agreement" (*Feeney v. Dell Inc.*, 989 N.E.2d 439, 460

(Mass. 2013)), the evidence below showed that thousands of individual arbitrations have been filed against Uber—including by Plaintiffs' counsel in this action.

III. Plaintiffs have not carried their burden of showing a clear entitlement to a preliminary injunction, as other courts have found in nearly identical circumstances. Among other things, Plaintiffs cannot show a likelihood of success because they do not even contend that they "provide services" to Uber as opposed to providing services directly to riders—a threshold requirement for demonstrating employee status—and they have not produced a shred of evidence to support their contention that they will be irreparably harmed absent a preliminary injunction reclassifying them as employees.

STANDARD OF REVIEW

"The district court's order compelling arbitration is subject to de novo review," while "[t]he factual findings underlying the district court's decision are reviewed for clear error." *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 888 (9th Cir. 2001). This Court "review[s] the district court's order denying a preliminary injunction for an abuse of discretion, which occurs if the district court bases its decision on an erroneous legal

standard or on clearly erroneous findings of fact." *Russell v. Gregoire*, 124 F.3d 1079, 1083 (9th Cir. 1997).

ARGUMENT

I. The Arbitration Provision Is Governed by the FAA.

The FAA provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court "ha[s] interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). Plaintiffs do not dispute that the TSA and the PAA fall within the broad scope of Section 2 of the FAA.

Instead, Plaintiffs insist that they are exempt from the FAA under *Section 1* of the statute, which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce."

9 U.S.C. § 1. But as the Supreme Court emphasized in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), "the § 1 exclusion provision [must] be afforded a *narrow* construction." *Id.* at 118 (emphasis added). Determining whether a plaintiff falls within this narrow exemption entails a three-step inquiry. First, the court must identify the "class of workers" to which the plaintiff belongs. *Wallace v. Grubhub Holdings, Inc.*, __ F.3d __, 2020 WL 4463062, at *2 (7th Cir. Aug. 4, 2020). Second, it must determine whether that class of workers is "engaged in foreign or interstate commerce." *Id.* at *1. And third, the court must evaluate whether the arbitration agreement appears in a "contract[] of employment." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019).

Applying this framework, the district court correctly determined that "Uber drivers do not fall within the Section 1 exemption to the FAA." ER18. Indeed, nearly every court to consider the question—with respect to drivers who use the Uber App as well as similar workers—has reached the same conclusion. *See*, *e.g.*, *Grice v. Uber Techs., Inc.*, 2020 WL 497487, at *9 (C.D. Cal. Jan. 7, 2020) ("Plaintiff does not fit within the residual clause of the Section 1 exemption as a 'transportation worker' who is 'engaged in interstate commerce.'"); *Heller v. Rasier LLC*, 2020

WL 413243, at *9 (C.D. Cal. Jan. 7, 2020) (same); *Scaccia v. Uber Techs., Inc.*, 2019 WL 2476811, at *5 (S.D. Ohio June 13, 2019) ("[T]he FAA's exclusion provision in § 1 does not apply to Plaintiff's claims."); *Rogers v. Lyft*, __ F. Supp. 3d __, 2020 WL 1684151, at *5 (N.D. Cal. Apr. 7, 2020) ("Lyft drivers, as a class, are not engaged in interstate commerce.").[1]

Two recent decisions—including one from this Court—confirm the reasoning of these district court decisions. *See Rittmann v. Amazon.com, Inc.*, __ F.3d __, 2020 WL 4814142 (9th Cir. Aug. 19, 2020); *Wallace v. Grubhub Holdings, Inc.*, __ F.3d __, 2020 WL 4463062 (7th Cir. Aug. 4, 2020). Both decisions rejected many of the same arguments asserted by Plaintiffs here. *See infra*, Section I.B.2.

A. Plaintiffs Belong to a Class of Workers Comprising Rideshare Drivers.

"[T]he first thing we see in the text of the residual category is that the operative unit is a 'class of workers.'" *Wallace*, 2020 WL 4463062, at *2. As a result, "in determining whether the exemption applies, the

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[1] *See also Lee v. Postmates Inc.*, 2018 WL 6605659, at *6–7 (N.D. Cal. Dec. 17, 2018); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 899–900 (N.D. Cal. Oct. 22, 2018); *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1152–55 (N.D. Cal. 2015); *Kowaleski v. Samandarov*, 590 F. Supp. 2d 477, 480–86 (S.D.N.Y. 2008).

question is 'not whether the *individual worker* actually engaged in interstate commerce, but whether *the class of workers to which the complaining worker belonged* engaged in interstate commerce.'" *Id.* (quoting *Bacashihua v. U.S. Postal Serv.*, 859 F.2d 402, 405 (6th Cir. 1988)); *see also Singh v. Uber Techs., Inc.*, 939 F.3d 210, 227 (3d Cir. 2019) ("[T]he inquiry regarding § 1's residual clause asks a court to look to classes of workers rather than particular workers.").

Plaintiffs do not dispute this (AOB54 n.51), although they make no attempt to identify the relevant class of workers. Uber submits that the class should be defined as rideshare drivers.

This definition of the class of workers is consistent with how the parties themselves have described Plaintiffs. In particular, both the TSA and PAA describe drivers as "independent providers of rideshare or peer-to-peer (collectively, '*P2P*') passenger transportation services using the Uber Services." ER749; *see also* ER775 ("This PAA governs your access to our Platform (defined below) which facilitates your provision of rideshare or peer-to-peer transportation service."). And it tracks the Department of Transportation's description of the Uber App as "an online platform to connect riders to drivers" who predominantly "us[e] their

personal vehicles." BUREAU OF TRANSP. STAT., U.S. DEP'T OF TRANSP., 2018 TRANSPORTATION STATISTICS ANNUAL REPORT 1-13 (2018), https://tinyurl.com/urx3guk.

Defining the class of workers as rideshare drivers is also supported by the text of Section 1. As the Supreme Court has explained, the *ejusdem generis* canon of construction teaches that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Circuit City*, 532 U.S. at 115. Like "seamen" and "railroad employees," the class of workers here must reach beyond the workers of a particular *company*. And like those two classes of workers listed in the statute, any other class of workers must not be artificially constrained to a particular state or region. Such an approach would produce the absurd result that the Section 1 analysis—and the applicability of the FAA—would turn not just on the *work* performed, but the mere happenstance of *where* it is performed. *See Rogers*, 2020 WL 1684151, at *6 ("Interstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers."); *Wallace*,

2020 WL 4463062, at *2 ("To determine whether a class of workers [is exempt], we consider whether the interstate movement of goods is a central part of the class members' job description."); *Hill v. Rent-A-Ctr., Inc.*, 398 F.3d 1286, 1289–90 (11th Cir. 2005) (noting that "[t]here is no indication that Congress" would be "concerned about the regulation of the interstate transportation activity incidental to Hill's employment").

The context and purposes underlying Section 1 also support this definition of the class of workers. The Supreme Court has indicated that the classes of "seamen" and "railroad employees" exempted from the FAA are intended to be coextensive with classes of workers recognized under *other* federal laws—in particular, those outlining alternative arbitration regimes for those workers. *See Circuit City*, 532 U.S. at 120–21. And both the Motor Carrier Act of 1935 and ICC Termination Act of 1995 recognize classes of workers similar to rideshare drivers. *See* Motor Carrier Act of 1935 § 203(b)(2), Pub. L. No. 74-255, 49 Stat. 543, 545 (exempting "taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini"); ICC Termination Act of 1995 § 103, Pub. L. No. 104-88, 109 Stat. 803, 861,

codified at 49 U.S.C. § 13506(a)(2) (exempting "a motor vehicle providing taxicab service").

B. Rideshare Drivers Are Not "Engaged in Foreign or Interstate Commerce" Within the Meaning of Section 1.

Section 1 exempts only classes of workers "engaged in interstate commerce," and the Seventh Circuit explained recently that "we and our sister circuits have repeatedly emphasized that transportation workers are those who are '*actually engaged* in the movement of goods in interstate commerce.'" *Wallace*, 2020 WL 4463062, at *2 (emphasis added). The court concluded that "[t]o determine whether a class of workers meets that definition, we consider whether the interstate movement of goods is a *central part of the class members' job description*." *Id.* (emphasis added). This Court endorsed and elaborated upon the Seventh Circuit's decision in *Rittmann*—expressly distinguishing local delivery drivers from the broader, purportedly integrated delivery system that the plaintiffs alleged in that case. *See* 2020 WL 4814142, at *8.

This rule is derived from the Supreme Court's decision in *Circuit City*. *See Wallace*, 2020 WL 4463062, at *2; *Rittmann*, 2020 WL 4814142, at *3–4. There, the Supreme Court held that "the § 1 exclusion provision [must] be afforded a narrow construction." *Circuit City*, 532 U.S. at 118.

This conclusion stemmed from the text, structure, and purpose of Section 1.

As a textual matter, "[t]he plain meaning of the words 'engaged in commerce' is narrower than the more open-ended formulation 'affecting commerce' and 'involving commerce'" used in Section 2, and "'denote[s] only persons or activities within the flow of interstate commerce.'" *Id.* (quoting *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 195 (1974)).[2] Plaintiffs latch onto this aspect of *Circuit City* on the (erroneous) premise that their conduct falls "within the flow of interstate commerce." *See*, *e.g.*, AOB55–56. But they ignore the thrust of the Court's decision.

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[2] Plaintiffs' contention that "Uber drivers must be engaged in interstate commerce because, if they are not, then the FAA does not apply at all to their contracts" (AOB67) is facially wrong because it ignores the distinct language employed in Section 1 as compared to Section 2. *See Wallace*, 2020 WL 4463062, at *3 ("[W]hile § 2 expands the FAA's reach to the full extent of Congress's commerce power, § 1 carves out a narrow exception from the FAA for a small number of workers who otherwise would fall within § 2's ambit. There is therefore nothing remarkable about an employment contract failing to meet § 1's more stringent 'engaged in interstate commerce' requirement while still meeting the far broader 'involving commerce' requirement of § 2.") (citations omitted).

The Court in *Circuit City* emphasized that "[t]he wording of § 1 calls for the application of the maxim *ejusdem generis*," under which "the residual clause should be ... controlled and defined by reference to the enumerated categories of workers which are recited just before it." *Circuit City*, 532 U.S. at 115. In other words, the class of workers must be engaged in interstate commerce not simply in a general sense; the class must be engaged in interstate commerce *in the same way as* railroad employees and seamen. *See Wallace*, 2020 WL 4463062, at *2 ("The residual clause, then, exempts only workers who are akin to 'seamen' and 'railroad employees.'").

Circuit City also highlighted the FAA's policy favoring arbitration, observing that "the fact that the provision is contained in a statute that 'seeks broadly to overcome judicial hostility to arbitration agreements' ... gives no reason to abandon the precise reading of a provision that exempts contracts from the FAA's coverage." 532 U.S. at 118–19. Indeed, the Court reasoned that the Section 1 exemption was drafted not to *exclude* workers from arbitration, but rather to funnel them into industry-specific federal arbitral regimes. "By the time the FAA was passed, Congress had already enacted federal legislation providing for

the arbitration of disputes between seamen and their employers," and "grievance procedures existed for railroad employees under federal law." *Id.* at 121. The Court thus concluded that "[i]t is reasonable to assume that Congress excluded 'seamen' and 'railroad employees' from the FAA for the simple reason that it did not wish to unsettle established or developing statutory dispute resolution schemes covering specific workers." *Id.*

In light of these interpretive principles, it is clear that Plaintiffs have not carried their burden of establishing that they are "engaged in ... interstate commerce." The interstate movement of goods and passengers is not "a central part of the class members' job description" (*Wallace*, 2020 WL 4463062, at *2), and absent "active engagement in the enterprise of moving goods across state lines" as part of an integrated interstate delivery system (*Rittmann*, 2020 WL 4814142, at *8), Plaintiffs are not exempt from the FAA.

1. Rideshare Transportation Is Inherently Local.

There is nothing about the work performed by rideshare drivers that necessarily entails cross-border transportation—and certainly not in the same manner as railroad employees and seamen. On the contrary,

crossing state lines is the rare exception for these workers, the vast majority of whom perform only "short and concentrated [trips] in downtown core neighborhoods," with "[m]any t[aking] place within a single zip code." Sharon Feigon & Colin Murphy, BROADENING UNDERSTANDING OF THE INTERPLAY AMONG PUBLIC TRANSIT, SHARED MOBILITY, AND PERSONAL AUTOMOBILES 1 (2018). These trips span only a few miles on average and typically take less than 30 minutes. *See The New Automobility: Lyft, Uber and the Future of American Cities* 13, SCHALLER CONSULTING (July 25, 2018), https://tinyurl.com/vo7vzw7 (observing that "trips typically travel 6.1 miles with a duration of 23 minutes" nationwide, with "[t]rips in large, densely-populated metro areas tend[ing] to be somewhat shorter (4.9 miles)" and "[t]rips in suburban and rural areas tend[ing] to be somewhat longer in distance (8.7 miles)"); Feigon, *supra*, at 1 ("Across the five regions represented in the TNC trip data, the mean TNC trip was between 2 and 4 miles.").

The same is true of rideshare drivers when they use the Uber App. As the undisputed evidence below shows, "[f]or all trips fulfilled using the Uber Rides marketplace in the United States between 2015 and 2019, the average distance was approximately 6.1 miles and the average

duration was approximately 16.6 minutes." ER732; *see also* ER732–33 ("For all trips fulfilled using the Uber Rides marketplace in Massachusetts between 2015 and 2019, the average distance was approximately 4.4 miles and the average duration was approximately 15.4 minutes."). This is a far cry from the type of interstate commerce in which railroad employees and seamen are engaged.

Plaintiffs nevertheless insist that they fall within the Section 1 exemption because "*some* Uber drivers *do* transport drivers across state lines." AOB53 (first emphasis added); *see also* AOB62 ("Uber and Lyft drivers provide service anywhere and routinely cross city limits, sometimes even crossing state lines or international borders."); AOB64 ("Uber *admits* that its drivers do sometimes cross state lines."). This argument fails for several reasons.

As an initial matter, only a vanishingly small proportion of trips ever cross state lines—2.5% of all trips nationwide and 0.3% of trips fulfilled in Massachusetts. ER732. This contrasts starkly with, for example, long-haul truckers who generally transport goods long distances. It is natural to say that the class of long-haul truckers engages in interstate commerce even if individual truckers occasionally transport

goods only within a particular state. *See Rogers*, 2020 WL 1684151, at *5 ("If a class of workers (say, truckers) transports goods or people between states, a trucker who only occasionally drives across state lines is still exempt from the FAA.... Indeed, that remains true even if the trucker has never left his home state."). For this reason, Plaintiffs' observation that "some courts have held that even if a small amount of a driver's work is across state lines, even that minor amount of interstate transportation is sufficient to qualify them for the Section 1 exemption" (AOB63) misses the point, as each of those cases involved commercial truckers.[3]

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[3] Moreover, each of these cases comes only from the Seventh Circuit, and those cases preceded both *Wallace* and *Circuit City* (or relied on pre-*Circuit City* caselaw). *See Central States, Se. & Sw. Areas Pension Fund v. Central Cartage Co.*, 84 F.3d 988, 993 (7th Cir. 1996); *Int'l Bhd. of Teamsters Local Union No. 50 v. Kienstra Precast, LLC*, 702 F.3d 954, 958 (7th Cir. 2012) (finding "no basis for distinguishing *Central Cartage*").

The two other cases cited by Plaintiffs (AOB64) do not directly address the question. In *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112 (N.D. Cal. Mar. 14, 2016), the district court acknowledged the above Seventh Circuit decisions in dicta before concluding that "[t]he evidence in this case, however, does not support the conclusion that Plaintiffs made interstate deliveries even occasionally." *Id.* at *4. And the Fifth Circuit's decision in *Siller v. L&F Distributors, Ltd.*, 109 F.3d

For rideshare drivers, even those trips that cross state lines are still inherently local. Again, the evidence below shows that "[f]or all trips that started and ended in different states" nationwide, "the average distance was approximately 13.5 miles and the average duration was approximately 30.0 minutes." ER732; *see also* ER732–33 (noting that "[f]or trips that crossed state lines" from Massachusetts, "the average distance was approximately 29.7 miles and the average duration was approximately 40.3 minutes"). In other words, these trips were not interstate in the sense that railroad and maritime shipping is interstate; rather, they were local trips that crossed state lines only by the happenstance of geography, as when a rideshare driver takes a rider from Arlington, Virginia to Washington, D.C., or from Manhattan to Hoboken, New Jersey. And as Judge Chhabria recently observed in a similar case, "[i]nterstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers." *Rogers*, 2020 WL 1684151, at *6.

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765 (5th Cir. 1997) (unpublished), is unpublished (a fact Plaintiffs do not disclose), interpreted the Fair Labor Standards Act rather than the FAA, was decided before *Circuit City*, and (like the Seventh Circuit cases) involved "long-haul truckers." *Id.* at *1.

The Eleventh Circuit put the point succinctly: "There is no indication that Congress would be any more concerned about ... the interstate transportation activity incidental to" otherwise intrastate work than it would in "the interstate 'transportation' activities of an interstate traveling pharmaceutical salesman who incidentally delivered products in his travels, or a pizza delivery person who delivered pizza across a state line to a customer in a neighboring town." *Hill*, 398 F.3d at 1289–90. Plaintiffs attempt to distinguish *Hill* on the ground that the plaintiff there was not a transportation worker (AOB65–66), but the court clearly did not see its opinion as so limited; otherwise, it would not have rejected the proposition that the incidental cross-border work of a pizza-delivery person—clearly a transportation worker—would not bring the worker within the Section 1 exemption. *See Wallace*, 2020 WL 4463062, at *2 (discussing *Hill* and concluding that "someone whose occupation is not defined by its engagement in interstate commerce does not qualify for the exemption just because she occasionally performs that kind of work").

2. Transporting Some Riders to and from Airports Is Not Engagement in Interstate Commerce.

Plaintiffs note that "many Uber drivers routinely transport passengers to and from airports, bus terminals, and the like as part of the *passengers'* continuous interstate journeys" (AOB54–55 (emphasis added)), but a ride to or from the airport does not constitute engagement in interstate commerce when it is arranged separately from the air travel and therefore is not part of an integrated and coordinated chain of interstate transportation.

The Seventh Circuit rejected just such an argument in *Wallace*, where food-delivery drivers argued that they were engaged in interstate commerce because "they carry goods that have moved across state and even national lines." 2020 WL 4463062, at *3. As the court explained, this "completely ignore[s] the governing framework" of Section 1 by treating "the residual exemption [a]s not so much about what the worker does as about where the goods have been." *Id.* "But," the Seventh Circuit concluded, "to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders." *Id.*; *see also Rittmann*, 2020 WL 4814142, at *8

("[T]he focus of the § 1 inquiry is 'on the worker's active engagement in the enterprise of moving goods across interstate lines.'").

The Supreme Court's decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), illustrates the distinction. There, the Court considered whether an alleged conspiracy to restrain competition in taxi services to and from Chicago train stations fell within the purview of the Sherman Act. The Court answered in the affirmative with respect to taxi transportation between railroad stations, finding that "[t]he transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce" where "[t]he railroads often contract with the passengers to supply between-station transportation in Chicago" and the defendants "then contract[] with the railroads and the railroad terminal associations to provide this transportation." *Id.* at 228.

But it reached the opposite conclusion with respect to taxi transportation "to and from Chicago railroad stations," finding that "such transportation is too unrelated to interstate commerce to constitute a part thereof." *Id.* at 230. As the Court explained, "the common understanding is that a traveler intending to make an interstate rail

journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination." *Id.* at 231. This is because "[t]he traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance," with "[t]axicab service … but one of the many that may be used," "contracted for independently of the railroad journey." *Id.* at 232. As a result, "[w]hat happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement." *Id.* This analysis has all the more force here, given that "[t]he Sherman Act [is] construed broadly," whereas "Section 1 of the FAA … has consistently been construed narrowly." *Vargas*, 2016 WL 946112, at *4; *see also Circuit City*, 532 U.S. at 118 ("[T]he § 1 exclusion provision [must] be afforded a narrow construction.").

Plaintiffs argue that "*Yellow Cab* does not control the transportation worker exemption analysis in this case" because "at the time Congress enacted the FAA in 1925, case law under the Federal Employers' Liability Act interpreted the phrase 'engaging in interstate

commerce' to include intrastate transportation that was one part of a continuous interstate journey or had a strong nexus with the interstate journey." AOB61–62.[4] But *Yellow Cab* simply clarifies that intrastate transportation is *not* "part of a continuous interstate journey" when the traveler "has complete freedom to arrive at or leave the station" however she wants, and "[t]o the taxicab driver, it is just another local fare." 332 U.S. at 232. This is entirely consistent with the FELA cases cited by Plaintiffs, as well as this Court's recent decision in *Rittmann*.

Ultimately, however, whether rideshare drivers can be considered "active[ly] engage[d] in the enterprise of moving goods across state lines" when they pick up or drop off passengers at the airport is beside the point, because this transportation does not constitute a "central part of the class members' job description." *Wallace*, 2020 WL 4463062, at *2. The

[4] Plaintiffs also argue that "*Yellow Cab* is distinguishable on the facts" because "the Chicago ordinance explicitly limited the cab drivers to transportation within the city limits, whereas here, it is undisputed that Uber and Lyft drivers provide service anywhere and routinely cross city limits, sometimes even crossing state lines or international borders." AOB62. But the Chicago ordinances played no role in the Court's analysis in *Yellow Cab*, and as explained above, drivers' incidental cross-border transportation is not sufficient to bring them within the Section 1 exemption. *See supra*, Section II.A.2.a.

undisputed evidence shows that "only 10.1% of all trips taken in the United States in 2019 began or ended at an airport" and "only 9.1% of all trips taken in Massachusetts in 2019" did so. ER732–33. And of course, not every passenger going to or from an airport is doing so as part of an interstate trip. This is consistent with the behavior of rideshare drivers more generally. *See*, *e.g.*, Regina R. Clewlow & Gouri Shankar Mishra, *Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States*, INST. TRANSP. STUD., U.C. DAVIS, Oct. 2017, at 11–12 (noting that nearly 90% of trips taken through ride-hailing apps are for the purpose of performing errands and attending social events near home, with no plausible connection to a broader interstate trip).

3. *Rittmann* and the Cases Applying FELA Do Not Help Plaintiffs.

As shown above, Section 1 requires "active engagement in the enterprise of moving goods across interstate lines" (*Wallace*, 2020 WL 4463062, at *2), and for local drivers to be so engaged, they must be part of an integrated and coordinated chain of interstate transportation.

That is what the plaintiffs alleged in *Rittmann*. This Court held that Amazon's intrastate delivery drivers fall within the Section 1

exemption based on allegations that "Amazon's business includes not just the selling of goods, but also the delivery of those goods" (2020 WL 4814142, at *9), such that "[t]he interstate transactions *between Amazon and the customer* do not conclude until the packages reach their intended destination" (*id.* at *8 (emphasis added)). In fact, the Court expressly said as much in distinguishing *Wallace*: "Unlike in *Wallace*, here AmFlex workers complete the delivery of goods *that Amazon ships across state lines* and for which Amazon hires AmFlex workers to complete the delivery." *Id.* (emphasis added). The Court noted that "cases involving food delivery services like Postmates or Doordash are likewise distinguishable." *Id*.

The same is true of the caselaw interpreting the Federal Employers Liability Act ("FELA") relied on by Plaintiffs. In each of those cases, the worker was performing an intrastate portion of *their employer's* continuous and unbroken interstate transportation. In *Philadelphia & Reading Railway Co. v. Hancock*, 253 U.S. 284 (1920), for example, the Court found that a worker was engaged in interstate commerce "[w]hen he belonged to a crew operating a train of loaded cars from Locust Gap colliery to Locust Summit yard, two miles away" because "[t]he coal was

in the course of transportation to another state when the cars left the mine" and "[t]here was *no interruption of the movement*; it always continued towards points as originally intended." *Id.* at 285–86 (emphasis added); *see also Baltimore & O. S. W. R. Co. v. Burtch*, 263 U.S. 540, 544 (1924) (finding that "the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it").

But where the intrastate work was performed in the course of the employer's wholly intrastate transportation, the Supreme Court has held that the worker was not covered by FELA irrespective of whether the goods were ultimately bound for out of state. In *Illinois Central Railroad Co. v. Behrens*, 233 U.S. 473 (1914), for example, the Court held that a worker "was not [providing] a service in interstate commerce" when he "was engaged in moving several cars, all loaded with intrastate freight, from one part of the city to another," without even mentioning what the

goods were or whether they would subsequently be shipped elsewhere once delivered by the railroad to their intrastate destination. *Id.* at 478.[5]

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[5] The Section 1 cases cited by Plaintiffs follow this same pattern. *See*, *e.g.*, *Waithaka v. Amazon.com, Inc.*, 404 F. Supp. 3d 335, 343 (D. Mass. 2019) ("[W]hile last-mile drivers themselves may not cross state lines, they are indispensable parts of Amazon's distribution system. That system, of course, transports goods in interstate commerce."), *aff'd*, 966 F.3d 10, 14 & 26 n.11 (1st Cir. 2020); *Nieto v. Fresno Beverage Co.*, 33 Cal. App. 5th 274, 284 (2019) (finding that an intrastate driver fell within the Section 1 exemption where his employer's products were "delivered from out-of-state to VWB's warehouse where they are held for a short period before delivery to VWB's customers" by plaintiff); *Bacashihua*, 859 F.2d at 405 ("If any class of workers is engaged in interstate commerce, it is postal workers.... '[T]hey are responsible for dozens, if not hundreds, of items of mail moving in interstate commerce on a daily basis.'"); *Palcko v. AirborneExpress, Inc.*, 372 F.3d 588, 590 (3d Cir. 2004) ("Airborne is a package transportation and delivery company that engages in intrastate, interstate, and international shipping."); *Muller v. Roy Miller Freight Lines, LLC*, 34 Cal. App. 5th 1056, 1068–69 (2019) ("[Plaintiff's] employer, RMFL, is a licensed motor carrier company in the business of transporting freight."); *Christie v. Loomis Armored US, Inc.*, 2011 WL 6152979, at *3 (D. Colo. Dec. 9, 2011) ("Loomis is registered with the Department of Transportation and identifies itself as engaged in the business of interstate transport of currency."); *Hamrick v. Partsfleet, LLC*, No. 6:19-cv-137 (M.D. Fla. Aug. 15, 2019), Dkt. 88 at 4–5 ("[T]he goods at issue in this case originate in interstate commerce and are delivered, untransformed, to their destination by Plaintiffs."); *Ward v. Express Messenger Sys., Inc.*, No. 1:17-cv-2005 (D. Colo. Jan. 28, 2019), Dkt. 118 ("OnTrac is a Delaware corporation that 'provides regional same-day and overnight package delivery services within Arizona, California, Nevada, Oregon, Washington, Utah, Colorado[,] and Idaho.").

Neither *Rittmann* nor the FELA cases Plaintiffs rely on have any bearing on the question presented here—where the transportation at issue is not purportedly integrated into, but rather completely disconnected from, the broader interstate commerce.

C. The Arbitration Provision Does Not Appear in a "Contract of Employment."

Finally, the Section 1 exemption does not apply to Plaintiffs irrespective of whether rideshare drivers are engaged in interstate commerce because the Arbitration Provision does not appear in a "contract[] of employment." 9 U.S.C. § 1.

In *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the Supreme Court held that "Congress used the term 'contracts of employment'" in Section 1 "to capture any contract for the performance of work by workers." *Id.* at 541. As Plaintiffs note (*see* AOB53 n.50), the Court held that the term is not limited to contracts that establish an employer-employee relationship, but captures independent-contractor relationships as well (*see New Prime*, 139 S. Ct. at 543–44).[6] But the

[6] For this reason, the question whether the TSA or PAA constitute a "contract[] of employment" for purposes of Section 1 is entirely distinct

Court's opinion (and the text of the FAA) make clear that the contract must still be a contract "*for*" the performance of work in order to trigger the Section 1 exemption. *Id.* at 541 (emphasis added).

A license is not a contract for the performance of work. Rather, it is a "contract that authorizes access to ... information or informational rights, but expressly limits the access or uses authorized or expressly grants fewer than all rights in the information." Uniform Computer Information Transactions Act § 102(a)(42) (Unif. Law Comm'n 2002); *see also* 2 Raymond T. Nimmer *et al.*, INFORMATION LAW §§ 11:3, 11:14 (2019 ed.) ("A license consists of a conditional or limited grant of rights or privileges with respect to the informational assets that are the subject matter of the agreement," and includes "online license[s]" in which an "information provider gives licensed access to information contained in its online system"). Courts routinely acknowledge this difference. *See*, *e.g.*, *Black Cowboys, LLC v. State of Ind. Dep't of Nat. Res.*, 2007 WL 896889, at *6 (S.D. Ind. Mar. 22, 2007) (holding that "the license agreement is easily distinguishable from an employment contract"

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from the underlying question whether Plaintiffs are employees under California law. The latter question is not at issue in this appeal.

because it "is an agreement ... to engage in a business venture"); *Winston Franchise Corp. v. Williams*, 1992 WL 7843, at *7 (S.D.N.Y. Jan. 10, 1992) ("The Licensing Agreement is not an employment contract"; rather, it is an agreement Williams entered into to gain access to the "Roth Young system benefits" that would enable Williams to operate his own "employment agency business").

The TSA and PAA are clearly licenses to use Uber's software, not "agreements to perform work." *New Prime*, 139 S. Ct. at 542. They describe themselves as granting drivers "a personal, non-exclusive, non-transferable *license* to install and use the Driver App." ER753 (emphasis added); *see also* ER776 ("Uber hereby grants you a non-exclusive, non-transferable, non-sublicensable, non-assignable license, during the term of this Agreement."). And as is typical of a license, the TSA and PAA grant drivers access to Uber's online platform, subject to limitations and restrictions on how they may use the platform and the information contained thereon, including restrictions on a driver's ability to "modify or make derivative works based upon the Uber Services or Driver App," and to "reverse engineer, decompile, modify, or disassemble the Uber Services or Driver App." ER757; *see also* ER785.

At the same time, neither the TSA nor the PAA require drivers who use the Uber App to perform any work at all. On the contrary, they expressly reserve to drivers "the sole right to determine when and for how long [they] will utilize the Driver App," as well as "the option, via the Driver App, to attempt to accept or to decline or ignore a User's request for Transportation Services via the Uber Services, or to cancel an accepted request." ER752; *see also* ER776 (providing that "you decide when, where, and whether (a) you want to offer P2P Services facilitated by our Platform and (b) you want to accept, decline, ignore or cancel a Ride," and that "you are not required to accept any minimum number of Rides in order to access our Platform").

Because the TSA and PAA are licenses rather than contracts of employment, the Section 1 exemption has no application. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) ("[I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment," but rather a "securities registration application"); *Harrington v. Atlantic Sounding Co.*, 602 F.3d 113, 121 (2d Cir. 2010) ("[A]rbitration agreements such as the one at issue in this case do not

constitute 'contracts of employment' where the arbitration agreement is 'not contained' in a broader employment contract between the parties.") (citations omitted).

II. Plaintiffs' Claims Must Be Arbitrated.

The FAA evinces "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Accordingly, "the Act 'leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.'" *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). A district court's "role under the Act is therefore limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Id.*

Plaintiffs do not dispute that the Arbitration Provision is valid and binding. Indeed, this Court has already held repeatedly that it is. *See*, *e.g.*, *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087 (9th Cir. 2018); *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201 (9th Cir. 2016). Nor do they

dispute that the Arbitration Provision, by its own terms, covers their underlying misclassification and wage-and-hour claims.

Instead, Plaintiffs assert that the Arbitration Provision is not enforceable here because they seek public injunctive relief that cannot be waived under California law, and because the district court retains authority to grant a preliminary injunction irrespective of the Arbitration Provision. Plaintiffs are wrong on both counts. And even if they were not, the Arbitration Provision would still be enforceable under Massachusetts law.

A. Plaintiffs Cannot Escape Arbitration by Seeking Purportedly "Public" Injunctive Relief.

The FAA's savings clause makes clear that arbitration agreements may be invalidated only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This savings clause "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). And "any doubts concerning the scope of

arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, *or a like defense to arbitrability*." *Moses H. Cone*, 460 U.S. 1, 24–25 (1983) (emphasis added).

According to Plaintiffs, they fall within the savings clause because they seek public injunctive relief, which "cannot be waived wholesale through a predispute arbitration agreement." AOB43 n.38 (citing *McGill v. Citibank, N.A.*, 2 Cal. 5th 945 (2017)). In doing so, Plaintiffs rely on *California* caselaw that has (1) interpreted the injunctive relief provided by certain California consumer-protection statutes as having the "evident purpose … not to resolve a private dispute but to remedy a public wrong" (*Broughton v. Cigna Healthplans of Cal.*, 21 Cal. 4th 1066, 1080 (1999)), and (2) held that such injunctive relief "'cannot be contravened by a private agreement'" as a "generally applicable contract defense" for purposes of the FAA's savings clause (*McGill*, 2 Cal. 5th at 962). But this

argument fails in this case, which is premised on *Massachusetts* law, for at least two reasons.[7]

First, Massachusetts has never before recognized public injunctive relief as a basis for avoiding arbitration—a fact that Plaintiffs openly acknowledge. *See* AOB43–47. And while Plaintiffs speculate that, "if presented with the question, the Massachusetts Supreme Judicial Court would recognize that Massachusetts law, like California law, provides for public injunctive relief that cannot be foreclosed altogether through the use of an arbitration clause" (AOB44), the only basis they identify for this belief is an amicus brief filed in this case by the Massachusetts Attorney General (AOB44–46).

The Attorney General's brief offers an interpretation of Massachusetts *wage-and-hour* law, but whether Massachusetts wage-and-hour law affords public injunctive relief is only half the question. As noted above, the court must *also* find that a private agreement waiving such relief is unenforceable on state-law "grounds as exist at law or in

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[7] Although this Court has held that the *McGill* rule is not preempted by the FAA (*see Blair*, 928 F.3d at 830–31), Uber maintains that is incorrect and reserves the right to argue in a petition for rehearing en banc or for certiorari that the *McGill* rule is preempted.

equity for the revocation of any contract." 9 U.S.C. § 2. Plaintiffs do not suggest that the Attorney General's opinion on questions of general Massachusetts contract law is entitled to deference—obviously it is not.

Even with respect to the Attorney General's interpretation of state wage-and-hour law, "'[t]he appropriate weight (of such interpretation), in a particular case, will depend on a variety of factors, including whether the agency participated in the drafting of the legislation ... , whether the interpretation dates from the enactment of the legislation, and whether it has been consistently applied.'" *ENGIE Gas & LNG LLC v. Dep't of Public Utilities*, 56 N.E.3d 740, 751 (Mass. 2016) (alterations in original).

Tellingly, each of the cases cited by Plaintiffs in support of their argument that the Attorney General's interpretation is entitled to deference (*see* AOB18 & n.15) involved interpretations issued by the Attorney General in administrative adjudications or publicly issued guidelines (*see Smith v. Winter Place LLC*, 851 N.E.2d 417, 421–22 (Mass. 2006); *Electronic Data Systems Corp. v. Attorney General*, 907 N.E.2d 635, 639–40 (Mass. 2009); *Camara v. Attorney General*, 941 N.E.2d 1118, 1120 (Mass. 2011)). Such an interpretation is cabined by a host of procedural protections, including scrutiny by administrative and

political actors and review by the judiciary. *See* Mass. Gen. Laws ch. 23, § 1; Mass. Gen. Laws ch. 30A, § 1 *et seq*.

Here, by contrast, the Attorney General adopted her interpretation in an amicus brief outside the usual rulemaking framework, and did so in the midst of this litigation—shortly before filing a similar misclassification action of her own. As the Supreme Court has noted in interpreting the federal Administrative Procedures Act, "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

In any event, the Attorney General's interpretation of Massachusetts's wage-and-hour law is not reasonable. When California has recognized public injunctive relief as a remedy for certain statutory violations, it has done so because "the evident purpose of the injunctive relief provision ... is not to resolve a private dispute but to remedy a public wrong," with "the benefits of granting injunctive relief by and large ... not accru[ing] to that party, but to the general public in danger of being victimized by the same deceptive practices as the plaintiff suffered." *Broughton*, 21 Cal. 4th at 1080. Indeed, the three California statutes for

which a public injunctive remedy has been recognized—the Consumer Legal Remedies Act, the Unfair Competition Law, and the False Advertising Law—all involve protections against misleading and deceptive practices, where an injunction will provide a meaningful benefit *only* to the public "because the plaintiff has 'already been injured, allegedly, by such practices and [is] aware of them.'" *McGill*, 2 Cal. 5th at 955 (quoting *Broughton*, 21 Cal. 4th at 1080 n.5).

Plaintiffs emphasize "the public purpose of the Independent Contractor and Earned Sick Leave laws" (AOB45), but this is not enough to authorize a *public* injunction. As the California Supreme Court recognized, "many injunctions will have effects beyond the parties themselves" (*Broughton*, 21 Cal. 4th at 1080 n.5), but these collateral benefits to the public are not enough to render the relief public in nature. *See McGill*, 2 Cal. 5th at 955 (holding that relief that "benefits the public, if at all, only incidentally" is not public injunctive relief). Rather, "in a public injunction action a plaintiff acts in the purest sense as a private attorney general." *Cruz v. Pacificare Health Sys., Inc.*, 30 Cal. 4th 303,

312 (2003). Plaintiffs do not contend that Massachusetts wage-and-hour law places private plaintiffs in the position of a private attorney general.[8]

Second, even if Massachusetts did recognize a public-injunction remedy, and even if it excepted claims seeking such a remedy from arbitration under state law, Plaintiffs seek only a *private* injunction. Whereas "[p]rivate injunctions 'resolve a private dispute' between the parties and 'rectify individual wrongs,' though they may benefit the general public incidentally," the defining feature of a public injunction is that it "benefit[s] 'the public directly by the elimination of deceptive practices,' but *do[es] not otherwise benefit the plaintiff*." *Blair*, 928 F.3d at 824 (emphasis added); *see also McGill*, 2 Cal. 5th at 955 (defining

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[8] Plaintiffs request in the alternative that this Court certify to the Massachusetts Supreme Judicial Court the question whether "Massachusetts law would follow" California in recognizing public injunctive relief as a remedy for certain statutory violations, and in foreclosing waivers of such relief as a matter of general contract law. AOB44 n.41. But California adopted this rule more than two decades ago, and Plaintiffs have not pointed to a *single* Massachusetts decision to even *hint* that an analog exists under Massachusetts law in the intervening years. In any event, the Massachusetts Supreme Judicial Court will only accept a certified question where the question "may be determinative of the cause then pending." SJC Rule 1:03 § 1. As explained herein, whether Massachusetts follows California law on this issue would not be determinative because there are numerous other grounds on which to affirm the district court's order.

public relief as "relief that 'by and large' benefits the general public and that benefits the plaintiff, 'if at all,' only 'incidental[ly]' and/or as 'a member of the general public'").

There is no credible argument that the injunction sought here would benefit Plaintiffs only insofar as they are members of the general public. The relief Plaintiffs seek—reclassification as employees—is directed solely at Plaintiffs and similarly situated drivers, and the public-health implications Plaintiffs point to (*e.g.*, AOB50) are incidental to that reclassification. The Second Amended Complaint requests an injunction "in the form of an order requiring Uber to comply with the Mass. Gen. Laws ch. 149, §§ 148B, 148C, 148, 150, and other provisions called herein" (ER254), and only one of these provisions deals with paid sick leave. Even their emergency motion for a preliminary injunction asks the court to "enjoin Uber from misclassifying its drivers as independent contractors, thus entitling them to the protections of Massachusetts wage laws, *including paid sick leave*." ER874 (emphasis added).

Courts have routinely confirmed that such relief is not "public." In *Clifford v. Quest Software Inc.*, 38 Cal. App. 5th 745 (2019), for example, the plaintiff sought to enjoin his employer from "misclassifying him as an

exempt employee resulting in several Labor Code violations." *Id.* at 753. But because "[t]he only express beneficiary of Clifford's requested injunctive relief is Clifford, and the only potential beneficiaries are Quest's current employees," the Court of Appeal concluded that "Clifford's UCL claim for injunctive relief is private in nature." *Id.* The district court drew upon this precedent in another misclassification case brought by a driver, concluding that the plaintiff was "seeking a private, not public, injunction" where he "alleg[ed] that Uber misclassifies its drivers as independent contractors." *Colopy v. Uber Techs., Inc.*, 2019 WL 6841218, at *1, 3 (N.D. Cal. Dec. 16, 2019) (citing *Clifford*, 38 Cal. App. 5th at 755). A wealth of other caselaw is in accord. *See*, *e.g.*, *Rogers v. Lyft, Inc.*, 2020 WL 2532527, at *4 (Cal. Super. Ct. Apr. 30, 2020) ("The request for injunctive relief directing Lyft to reclassify its drivers is likewise directed to Plaintiffs and other Lyft drivers as individuals, not to the general public ..., and therefore seeks private, not public, injunctive relief."); *Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 901 (N.D. Cal. 2018) ("[P]laintiff's operative complaint … seek[s] injunctive relief only for his California Labor Code claims. Those claims have the primary purpose and effect of redressing and preventing harm to DoorDash's

employees."). As the district court explained here, "[a] growing number of cases have thus rejected application of the public injunction exception to classification question[s], finding such disputes to be matters of private dispute," while "no court" has come out the other way. ER21.

Plaintiffs take issue with these cases because they did not "address[] a company's denial of state-mandated paid sick leave for employees during a public pandemic" (AOB48), but again, the injunction sought by Plaintiffs here is not limited to sick leave. And even if "the incidental public interest in relief here arguably is greater than in other misclassification cases, the difference is one of degree rather than of kind." *Rogers*, 2020 WL 2532527, at *4. As in *Rogers*, "Plaintiffs 'appear to conflate the magnitude of the public interest in a private injunction with the manner in which a public injunction benefits the general public in equal shares (for example, by enjoining false advertising or deceptive labeling that could trick any member of the public).'" *Id.*

B. The District Court Properly Denied Plaintiffs' Motion for Injunctive Relief.

Plaintiffs also fault the district court for "holding that '[i]t would not be appropriate to plow ahead on the motion for a preliminary injunction before ruling on [Defendant's] motion to compel.'" AOB18.

But it was plainly correct to proceed in this fashion because the availability of preliminary relief in arbitration necessarily defines the scope of any such relief a court may award. Plaintiffs' own cases recognize as much. *See*, *e.g.*, *Braintree Labs., Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 40 n.4 (1st Cir. 2010) ("[I]f in this case the arbitration panel could give temporary relief, then any court relief would last until the arbitrator could act on such a request.").

What Plaintiffs really challenge is not so much the order in which the district court decided the motions, but its conclusion that the Arbitration Provision barred the court from granting the preliminary injunction sought below. Curiously, they do so without any meaningful discussion of the Arbitration Provision—a critical omission, given that the Arbitration Provision empowers the arbitrator (and *only* the arbitrator) to award this relief.

The Arbitration Provision permits the arbitrator to "award any party any remedy to which that party is entitled under applicable law." ER768; *see also* ER793. This includes preliminary injunctive relief; in fact, the JAMS Rules that govern arbitration under the Arbitration Provision (*see* ER765–66; ER790) specifically allow "[a] party in need of

emergency relief prior to the appointment of an Arbitrator" to seek expedited appointment of an "Emergency Arbitrator" who "shall determine whether the Party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief" and "enter an order or Award granting or denying the relief" (JAMS Comprehensive Arbitration Rules & Procedures, Rule 2(c), https://tinyurl.com/y56kp8tj). As this Court held in *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999), where "the district court correctly concluded that all of [the plaintiff's] claims were arbitrable and the ICC arbitral panel is authorized to grant the equivalent of an injunction *pendente lite*, it would have been inappropriate for the district court to grant preliminary injunctive relief." *Id.* at 726.

In the alternative, Plaintiffs insist that the district court should have simply ignored the Arbitration Provision because, under its equitable powers, "the analysis to determine whether a plaintiff has established a need for interim relief should remain unaltered." AOB22. But their cases do not support this sweeping proposition. In *PMS Distributing Co. v. Huber & Suhner, A.G.*, 863 F.2d 639 (9th Cir. 1988),

for example, this Court merely held that a district court does not lose *jurisdiction* to grant preliminary relief when it compels arbitration:

> The fact that a dispute is arbitrable and that the court so orders under Section 4 of the Arbitration Act does not strip it of authority to grant a writ of possession pending the outcome of the arbitration so long as the criteria for such a writ are met. A district court's order to arbitrate, with or without a retention of jurisdiction, has an 'ongoing effect,' and the parties may return to the district court for interpretation or modification of the order.

Id. at 642. Whether a district court has jurisdiction to grant relief, however, is an entirely different question from whether the court may exercise its equitable powers to grant that relief notwithstanding the parties' agreement expressly investing that authority in another forum.

Nothing in *Toyo Tire Holdings of Americas Inc. v. Continental Tire North America, Inc.*, 609 F.3d 975 (9th Cir. 2010), supports Plaintiffs' assertion that this Court "sought to enlarge district courts' understanding of their equitable powers." AOB22. That case did not turn on courts' equitable powers at all; rather, "the very rules that the parties agreed would govern their arbitration proceedings allow[ed] a party to request the relief that Appellant Toyo s[ought] in th[at] case." 609 F.3d at 981. Those rules provided that, "[b]efore the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances

even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures." *Id.* at 979. In light of this language, the Court held that "a court may grant interim relief *pursuant to ... the ICC Rules* to maintain the status quo while the parties are awaiting the creation of an arbitration panel and a decision by that panel with respect to injunctive relief." *Id.* at 980 (emphasis added).

As in *Toyo*, the Arbitration Provision here authorizes district courts to grant preliminary relief, but *limits* that authority to relief that conserves the status quo: "A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, *but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief*." ER767 (emphasis added). To the extent a party seeks more expansive preliminary relief—as Plaintiffs plainly do here—that request must be submitted to the arbitrator.[9]

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[9] Plaintiffs may point to the San Francisco Superior Court's order granting a preliminary injunction prior to deciding a motion to compel arbitration in an enforcement action brought against Uber and Lyft. There, however, the defendants argued only that the plaintiff's *restitution* claim was arbitrable, and one defendant conceded that the

C. In the Alternative, the Arbitration Provision Is Enforceable Under Massachusetts Law.

Even if this Court agrees with the district court's FAA analysis, it may still affirm the judgment under the Massachusetts Uniform Arbitration Act, which does not have an analog to the Section 1 exemption. *See Hall v. North American Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007) ("We may affirm on any basis supported by the record, whether or not relied upon by the district court."). As the Supreme Judicial Court has acknowledged, "[s]imilar to the Federal [Arbitration] Act, the Massachusetts Act 'express[es] a strong public policy favoring arbitration.'" *St. Fleur v. WPI Cable Systems/Mutron*, 879 N.E.2d 27, 31 (Mass. 2008) (quoting *Home Gas. Corp. of Mass., Inc. v. Walter's of Hadley, Inc.*, 532 N.E.2d 681, 68 (Mass. 1989)).

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motion to compel arbitration could be deferred. *See California v. Uber Techs., Inc., et al.*, No. CGC-20-584402, Order on People's Mot. for Prelim. Inj. at 14 n.10 (Cal. Super. Ct. Aug. 10, 2020) ("In light of the partial nature of the motion to compel—which seeks arbitration of only one of three types of relief sought in one of the People's two causes of action—Uber's contention that the Court may not grant Plaintiff's motion for a preliminary injunction without first deciding them is mistaken. Lyft informs the Court in its motion to compel arbitration that it is 'amenable to the Court hearing it at a later date.'").

Plaintiffs assert that "Massachusetts law (stripped of the overlay of federal preemption) does not allow enforcement of arbitration agreements containing class action waivers." AOB69 (citing *Feeney v. Dell Inc.*, 908 N.E.2d 753, 759 (Mass. 2009); *Machado v. System4 LLC*, 989 N.E.2d 464, 471–72 (Mass. 2013)). But in fact, a class waiver invalidates an arbitration agreement only where it deprives a party of "the ability to pursue a claim against the defendant in individual arbitration according to the terms of the agreement." *Feeney v. Dell Inc.*, 989 N.E.2d 439, 460 (Mass. 2013).[10] Plaintiffs have not shown that this is the case here. On the contrary, more than 60,000 drivers nationwide have initiated (or announced their intention to pursue) arbitration with

[10] Plaintiffs may point to the First Circuit's decision suggesting otherwise in *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020). But that case considered the issue only in conducting a choice-of-law analysis. *See id.* at 34 ("[W]e must assess whether Massachusetts law would oust the contractual choice of Washington law—based on our assumption for purposes of this case that Washington law would permit the class waiver provisions to be enforced."). Moreover, it acknowledged that Massachusetts has never adopted a categorical rule against class waiver, but rather reasoned that "[s]everal statements in *Machado* confirm that the SJC *would conclude* that the Commonwealth's fundamental public policy protects the right to bring class actions in the employment context." *Id.* at 33 (emphasis added).

Uber. *See* Uber Registration Statement Form S-1 at 28 (Apr. 11, 2019), https://tinyurl.com/y4kgfcmo. And Plaintiffs' counsel claims to have filed thousands of arbitration demands against gig-economy companies, including Uber and Lyft. *See Uber Drivers*, Lichten & Liss-Riordan, P.C., https://uberlawsuit.com/.

Consequently, the decision below was correct under two independent sources of law.

III. Plaintiffs Failed to Carry Their Burden of Showing Entitlement to a Preliminary Injunction.

"A plaintiff seeking a preliminary injunction must establish [(1)] that he is likely to succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is in the public interest." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A "mandatory injunction" like the one Plaintiffs sought here—an injunction requiring a party to act, rather than just refrain from acting—"is particularly disfavored" and thus requires a "doubly demanding" showing. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). In fact, such relief is "not granted unless extreme or very serious damage will result and [is] not issued in doubtful cases or where the injury

complained of is capable of compensation in damages." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009). Even when these criteria are satisfied, "[t]he grant or denial of a preliminary injunction rests in the discretion of the trial court," and such relief "never may be obtained as a matter of right." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948 (3d ed. 2020).

This Court need not even reach the substance of Plaintiffs' request for a preliminary injunction because, in addition to the numerous threshold issues recounted above, it is well-established that "[r]elief cannot be granted to a class before an order has been entered determining that class treatment is proper." *Zepeda v. I.N.S.*, 753 F.2d 719, 729 (9th Cir. 1983). Thus, any injunction would need to be limited to Plaintiffs, and could not apply to any other drivers they seek to represent. *See M.R. v. Dreyfus*, 697 F.3d 706, 738–39 (9th Cir. 2012) (en banc) ("Subject to exceptions not applicable here, '[w]ithout a properly certified class, a court cannot grant relief on a class-wide basis.'"). This follows from the "due process 'principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a

litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). In fact, courts have denied preliminary injunctions on materially similar facts for this exact reason. *See*, *e.g.*, *Colopy*, 2019 WL 6841218, at *1–2 (noting that "[w]ithin the Ninth Circuit, the issuance of class-wide relief prior to the certification of the class is strongly disfavored," and denying a preliminary injunction reclassifying Uber drivers because "[r]elief can be granted to Mr. Colopy without necessarily granting relief to other drivers").

Even if the Court considers Plaintiffs' request for a preliminary injunction on the merits, however, it should still affirm the judgment below because Plaintiffs have not carried their heavy burden of demonstrating that they are entitled to a preliminary injunction. As this Court has emphasized, "[a] preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

A. Plaintiffs Have Not Demonstrated a Likelihood of Irreparable Harm.

"A preliminary injunction may issue only upon a showing that 'irreparable harm is *likely* in the absence of an injunction.'" *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 865 (9th Cir. 2017). Crucially, "'unsupported and conclusory statements regarding harm [a party] *might* suffer'" are insufficient to demonstrate a likelihood of irreparable injury; rather, such a finding must be "grounded in … evidence." *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013); *see also Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1132–33 (9th Cir. 2014). Plaintiffs, however, produce no evidence to support their claim of irreparable harm.

Even ignoring this fatal deficiency, Plaintiffs' arguments regarding irreparable harm still fail. They contend that they "established irreparable harm … both to the drivers and to the public at large" (AOB27), but these alleged harms are not likely to occur and, even if they were, they are not irreparable as a matter of law.

First, the irreparable harm that *the public* will allegedly face absent an injunction is irrelevant to this prong of the analysis. As noted above, *Winter* plainly requires the plaintiff to show "that *he* is likely to suffer

irreparable harm in the absence of preliminary relief." 555 U.S. at 20 (emphasis added); *see also Doe #1 v. Trump*, 957 F.3d 1050, 1060 (9th Cir. 2020) (holding that "injury to third parties, such as health care providers, or to the economy in general provides an even weaker justification for a finding of 'irreparable harm'" for purposes of a stay pending appeal because the "irreparable harm standard is 'whether the *applicant* will be irreparably injured absent a stay'"); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 163 (2010) ("Respondents in this case do not represent a class, so they could not seek to enjoin such an order on the ground that it might cause harm to other parties."); *Warth v. Selden*, 422 U.S. 490, 499 (1975) ("[T]his Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). And because the fourth *Winter* factor considers whether "an injunction is in the public interest" (*Winter*, 555 U.S. at 20), it is axiomatic that the public interest is independent from the irreparable-harm analysis.

Even if harm to the public were relevant in determining whether Plaintiffs have demonstrated that a preliminary injunction is warranted,

Plaintiffs have not carried their burden of establishing such harm here. *See infra*, Section III.D.

Second, the only allegedly irreparable harm drivers face absent an injunction is "[l]oss of basic employee protections." AOB28. But these alleged losses can be fully remedied through a damages award, which Plaintiffs themselves seek in this action. *See* ER254 (requesting that the court "[a]ward compensatory damages, including all expenses and wages owed, or other forms of restitution that are due to Plaintiffs and the class because of their misclassification as independent contractors in an amount according to proof"). This Court has repeatedly rejected claims of irreparable harm where money damages are available. *See*, *e.g.*, *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1280 (9th Cir. 2020) ("Irreparable harm is 'harm for which there is no adequate legal remedy, such as an award for damages.' For this reason, economic harm is not generally considered irreparable.") (internal citation omitted); *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 32 (9th Cir. 2011) ("The [Supreme] Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury

and the inadequacy of legal remedies."); *Doe #1*, 957 F.3d at 1060 ("[M]onetary injury is not normally considered irreparable.").

Plaintiffs do not dispute that the vast majority of their wage-and-hour claims can be fully remedied through damages. Nor did Capriole do so in his original motion for a preliminary injunction, which was materially identical to this one save for the sick-leave claim. As the District of Massachusetts explained in denying that motion, "in response to Defendants' contention that the harms Plaintiff claims that he and other drivers will suffer can be remedied by compensatory awards … Plaintiff merely points back to alleged harms suffered by the public writ large." *Capriole*, 2020 WL 1323076, at *2 n.5.

Instead, Plaintiffs focus exclusively on their new sick-leave claim, asserting that "[i]f a driver is forced to continue working because he cannot afford to stay home, without paid sick leave, the harm of having continued to work through illness—particularly during a pandemic—cannot be remedied later through monetary damages." AOB28. Even if this could constitute irreparable harm, it does not support Plaintiffs' emergency motion for a preliminary injunction. As noted above, that motion asks the Court to "enjoin Uber from misclassifying its drivers as

independent contractors, thus entitling them to the protections of Massachusetts wage laws, *including* paid sick leave." ER874 (emphasis added). But Plaintiffs cannot secure a preliminary injunction granting them *all of their requested relief* on the merits—from the reimbursement of business expenses to minimum wage and overtime—based only on the purported irreparable harm attributable to the denial of up to five days of sick leave.

More importantly, Plaintiffs have not demonstrated that this harm is *likely* to occur absent an injunction. Because this is a putative class action, Plaintiffs must establish a likelihood of irreparable harm with respect to *all* of the drivers they seek to represent: "[I]n the absence of a foundation from which one could infer that all (or virtually all) members of a group are irreparably harmed, we do not believe that a court can enter a mass preliminary injunction." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 487 (3d Cir. 2000). Plaintiffs have not even alleged this to be the case, while the evidence available shows that only a small fraction of drivers have either contracted or been exposed to the coronavirus. *See Status Report: COVID-19 Support for Uber Drivers and Delivery People*, UBER (May 21, 2020), https://www.uber.com/newsroom/status-report-

covid-19-support/ (reporting that only 48,892 drivers or delivery people had claimed financial assistance for "people diagnosed with an active case of COVID-19 or those who have been told to individually quarantine because they have preexisting conditions that put them at a higher risk of suffering serious illness from COVID-19").

In fact, the undisputed evidence demonstrates that the preliminary injunction sought by Plaintiffs will make *virtually all* putative class members *worse off*. A survey of drivers submitted in the district court "determined how many Massachusetts drivers would receive more financial assistance under Families First [Coronavirus Response Act] … than they would receive under Massachusetts law." ER733. The results were staggering: "approximately 99% of such drivers … would likely receive more under Families First than under Massachusetts law." ER733–34. And while Plaintiffs insist that it is *possible* that drivers could qualify *both* as employees for purposes of state law *and* as self-employed for purposes of federal law (AOB36–37), such speculation cannot support the drastic relief sought here. *See Rogers*, 2020 WL 1684151, at *2 (declining to grant a preliminary injunction where, "if the Court ordered Lyft to reclassify its drivers immediately, it's possible that

the drivers would lose the opportunity to obtain emergency assistance totaling thousands of dollars from the federal government").

The benefits Plaintiffs would reap from reclassification are not only eclipsed by the federal relief to which they are currently entitled as self-employed workers—they are also negligible. Employees under Massachusetts law are entitled *at most* to *five* paid sick days in a calendar year—*if* they work at least 1,200 hours, and only *after* working 90 days. Mass. Gen. Laws ch. 149, § 148C(d)(1). As the record below makes clear, however, only about half of drivers in Massachusetts use the Uber App more than 90 days. ER733 ("From tracing these drivers' experiences on the platform during 2019, I found that 48% of Cohort Drivers stopped driving on Uber's platform within the first 90 days.").

Even if an employee meets the qualification thresholds, the individual earns just one hour of paid sick leave per 30 hours of work, and employers are entitled to cap sick leave at no more than three days in the absence of medical documentation, and five days if appropriate medical documentation is provided. Mass. Gen. Laws ch. 149, §§ 148C(d)(1), (d)(4), (f). Again, the evidence produced in the district court shows that a vanishingly small percentage of drivers will

accumulate meaningful sick leave under state law. In fact, based on a sample of Massachusetts drivers, "only 27.9% of these drivers drove enough to accumulate eight or more hours of sick leave," while only "17.3% drove enough to accumulate 16 or more hours, 10.9% drove enough to accumulate 24 hours, and 3.9% drove enough to accumulate 40 hours." ER733.

In other words, even if Plaintiffs succeeded on their claim for *prospective* injunctive relief, they would begin to accrue paid sick leave only now, and they could not use that leave *until three months from now*. Mass. Gen. Laws ch. 149, § 148C(d)(1). As the San Francisco Superior Court acknowledged in denying a preliminary injunction in a similar action on behalf of drivers who use the Lyft smartphone application, "the extraordinary relief Plaintiffs seek would provide at most modest benefits to a small subset of Lyft drivers, while potentially risking the eligibility of *all* Lyft drivers to receive substantially greater relief under the emergency federal legislation." *Rogers*, 2020 WL 2532527, at *6.

B. Plaintiffs Have Not Demonstrated a Likelihood of Success on the Merits.

Plaintiffs' sole argument that they are likely to prevail on the merits turns on their assertion that they are employees under Prong B of

the ABC test. *See* AOB26. But Plaintiffs skip over the "threshold question whether the [drivers] provided services to [Uber]." *Sebago v. Boston Cab Dispatch, Inc.*, 28 N.E.3d 1139, 1147 (Mass. 2015); *see also Carey v. Gatehouse Media Mass. I, Inc.*, 94 N.E.3d 420, 429 n.18 (Mass. App. Ct. 2018) (noting that if putative employees do not provide services to an entity, "they are not that entity's employees, and no analysis of § 148B's three prongs is necessary").

The answer to this question is clearly "no." Drivers use the Uber App to create independent business relationships *with riders*, arrange for and render transportation *for riders*, and receive payments for those rides *from riders*. Uber provides services to drivers—helping them secure passengers, providing locational information, and processing payments. ER737–38. That Uber "obtains some indirect economic benefit as a result of work performed by an individual for someone else is not sufficient to implicate [section] 148B." *Jinks v. Credico (USA) LLC*, 2020 WL 1989278, at *6 (Mass. Super. Ct. Mar. 31, 2020). For this reason alone—completely ignored by Plaintiffs in the district court and the opening brief on appeal—Plaintiffs are unlikely to succeed on the merits. *See Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1149 (9th Cir. 2016)

("[A]n appellant waives an issue if it fails to provide argument about the issue in its opening brief.").

But even if drivers did provide services for Uber, they still would not be able to demonstrate that they are employees. Under Prong B, the court considers whether an individual's work is "necessary to ... or merely incidental" to that of the putative employer and the manner in which the entity defines its business. *Sebago*, 28 N.E.3d at 1150. Like other intermediaries, Uber's usual course of business is connecting consumers with service providers—not providing the services themselves. *See*, *e.g.*, *Daw's Critical Care Registry, Inc. v. Dep't of Labor, Emp't Sec. Div.*, 622 A.2d 622, 636–37 (Conn. Super. Ct. 1992) (broker of nursing personnel for medical facilities was not in the business of providing health care), *aff'd*, 622 A.2d 518 (Conn. 1993). Moreover, the work performed by drivers is not comparable to that of Uber's employees who develop its products—working in "engineering, product development, marketing, and operations." ER737; *see Layton v. DHL Express (USA), Inc.*, 686 F.3d 1172, 1180 (11th Cir. 2012) (finding drivers' role was not "analogous to employees" where they "performed most of their work away from DHL's facilities and supervision"; "operated vehicles not owned by DHL[;] and

they were not contractually restricted from using those vehicles to serve other companies needing delivery services").

The recent ruling from a San Francisco Superior Court ordering a preliminary injunction against Uber (which Uber has appealed, and the Court of Appeal has stayed) under *California's AB5* does not undercut Uber's argument that Plaintiffs are not likely to succeed under *Massachusetts law*. For example, the Superior Court expressly (though incorrectly) noted that AB5 "does not establish any 'threshold requirement'" that must be met before applying the ABC test. *California v. Uber Techs., Inc.*, No. CGC-20-584402, Order on People's Mot. for Prelim. Inj. at 20 (Cal. Super. Ct. Aug. 10, 2020). By contrast, Massachusetts law unquestionably has such a requirement. *See Sebago*, 28 N.E.3d at 1147 ("The threshold question is whether the plaintiffs provided services to the defendants."); *Depianti v. Jan-Pro Franchising Int'l, Inc.*, 990 N.E.2d 1054, 1066 (Mass. 2013) (noting that only "'an individual *performing any service*' [for the putative employer] is presumed to be an employee'") (emphasis added); *Chambers v. RDI Logistics, Inc.*, 65 N.E.3d 1, 7 (Mass. 2016) ("The independent contractor statute 'establishes a standard to determine whether *an individual*

performing services for another shall be deemed an employee or an independent contractor for purposes of our wage statutes.'") (emphasis added).

The Superior Court also relied for its "Prong B" analysis on the fact that "Defendants are regulated by the California Public Utilities Commission as transportation network companies" (*California v. Uber Techs., Inc.*, Order on People's Mot. for Prelim. Inj. at 22), but the regulatory decisions of a California agency obviously have no bearing on Massachusetts law. On the contrary, Massachusetts courts have recognized that certain dispatch services satisfy Prong B such that drivers are not employees. For example, in *Kubinec v. Top Cab Dispatch, Inc.*, the court found taxi drivers performed a service outside the usual course of the dispatch company's business where the drivers used their own cars and the company provided referrals that a driver could accept or reject. 2014 WL 3817016, at *12–13 (Mass. Super. Ct. June 25, 2014). Here too, Uber provides the technology platform, permits drivers to accept or reject ride requests, and supplies neither cars nor equipment to drivers. ER738–39.

C. Plaintiffs Have Not Demonstrated That the Balance of Equities Favors a Preliminary Injunction.

Weighed against the monetary harm Plaintiffs assert is the enormous and irreparable harm to Uber, drivers, and the public from a preliminary injunction upending Uber's entire business model. The balance of equities plainly favors Uber.

Reclassifying drivers as employees would require a fundamental restructuring of Uber's business model and its technology. ER740–41; *see* Andrew J. Hawkins, *Uber CEO on the Fight in California: 'We Can't Go Out and Hire 50,000 People Overnight'*, THE VERGE (Aug. 19, 2020), https://tinyurl.com/y3ardvaz ("'Everything that we have built is based on this platform that … brings people who want transportation or delivery together. You can't flip that overnight.'"). An enormous administrative infrastructure—currently non-existent—would be required to manage driver-employees. Among other things, "Uber would have to rework its pay structure; setup processes and hire staff to manage payroll withholding and payment of payroll taxes; administer workers' compensation, disability, and unemployment benefits; pay its share of premiums on those policies; provide health insurance; reimburse certain

work-related expenses for any Drivers who become 'employees'; and create a department to train, supervise, and control Drivers." ER740.

The undisputed evidence below demonstrated that Plaintiffs' preliminary injunction would increase Uber's costs by between 23 and 39 percent. ER647–48. And "as a result of the cost increases resulting from such a required reclassification, consumers will face higher prices and service providers will have fewer work opportunities, even absent any changes in how these businesses organize themselves." ER648.

This would also dramatically change drivers' experience with the Uber App and remove the independence and flexibility that drivers enjoy. Because businesses must track the hours their employees work in order to ensure compliance with minimum-wage, overtime, and meal-and-rest break laws, it is likely that Uber would have to "forbid multi-apping"—the practice by which many drivers use multiple lead-generation apps at the same time—which, in turn, "would negatively impact the market." ER654. The businesses might also be forced to "impose strict work schedules and only let workers work for other companies outside those hours," which "would eliminate the scheduling flexibility that many workers value as well as the efficiency benefits of such flexibility." *Id.*;

see also Johann Bhuiyan, *Instacart Shoppers Say They Face Unforgiving Metrics: 'It's a Very Easy Job to Lose'*, L.A. TIMES (Aug. 27, 2020), https://tinyurl.com/y5kbdyty (describing set schedules, caps on weekly hours due to health insurance regulation, and 6 to 20 percent of shoppers in one store fired each week for not meeting stringent performance metrics).

In short, in order to comply with the preliminary injunction sought by Plaintiffs, Uber would likely "need to shut down operations … in order to retool their businesses." Hawkins, *Uber CEO on the Fight in California*. And Uber would need to reverse the entire, cumbersome process if, after discovery and proper adversarial testing, the court ultimately finds that drivers are not employees. ER741. Courts have held that a party facing such massive and fundamental change has demonstrated irreparable injury. *See*, *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (upholding a preliminary injunction where "absent preliminary relief [the respondent] would suffer a substantial loss of business and perhaps even bankruptcy"); *American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (holding that a company suffers irreparable harm where it would

be "forced to incur large costs which … will disrupt and change the whole nature of its business," and would be "faced with either continuing in that form, or … unwinding that and returning to the old form" if it prevails at trial); *California Trucking Association v. Becerra*, 433 F. Supp. 3d 1154, 1169–70 (S.D. Cal. 2020) (finding motor carriers would suffer irreparable harm if required to "significantly restructure their business model[s]" to "treat independent-contractor drivers as employees" and thus "hire[] and train[] employee drivers, and establish[] administrative infrastructure compliant with AB-5").

Plaintiffs contend that these harms are somehow less serious because the ABC test "pre-dates [Uber's] arrival in the Commonwealth" (AOB40), but the opposite is true. The fact that Uber has been operating in Massachusetts since 2014 without once having been found to be in violation of the law confirms both its good faith and the extent of its reliance interests—interests that would be upended by the preliminary injunction sought by Plaintiffs.

D. Plaintiffs Have Not Demonstrated That a Preliminary Injunction Is in the Public Interest.

Plaintiffs' argument that the public interest favors a preliminary injunction fails for the same reason that their argument that they will

suffer irreparable harm absent such an injunction fails: it erroneously assumes that reclassification will increase drivers' ability to stay home when they feel ill. *See* AOB41 ("It is unquestionably in the public interest to ensure compliance with Massachusetts law, which will help stem the spread of a global pandemic that has already killed millions."). As explained above (Section III.A), this argument fails on the facts because reclassification will produce marginal (if any) benefits for drivers while potentially depriving them of important federal emergency assistance, as other courts have recognized (*see*, *e.g.*, *Rogers*, 2020 WL 1684151, at *2; *Rogers*, 2020 WL 2532527, at *6).

If anything, the public interest resoundingly *disfavors* Plaintiffs' requested injunction. Under Massachusetts's COVID-19 Order No. 13, drivers have been deemed "essential workforce" in the battle against the spread of the coronavirus. ER650–51. And as cities in Massachusetts and elsewhere have shut down their mass transit systems, the need for drivers has only grown more acute, particularly for those who do not have their own vehicles—including other essential workers. *Id.* Yet Plaintiffs' proposed injunction would *frustrate* that battle and *harm* the public health, with no countervailing benefits. As explained above, the evidence

below established that "forced reclassification would be predicted to lead to fewer products and services sold through on-demand platforms," which "may be particularly harmful today, given that some individuals may critically need certain on-demand services during the coronavirus outbreak." ER650. Even if the public can access these critical services in the wake of reclassification, they will cost more and be in shorter supply than they are currently. ER648.

CONCLUSION

The Court should affirm the judgment of the district court.

Dated: August 27, 2020

Respectfully submitted,

/s/ Theane Evangelis
Theane Evangelis

Counsel for Defendants-Appellees Uber Technologies, Inc. and Dara Khosrowshahi

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, undersigned counsel states that this case is related to *In Re: William Grice*, No. 20-70780 (9th Cir.), which presents the same question as to the enforceability of the Arbitration Provision at issue here.

Dated: August 27, 2020

/s/ Theane Evangelis
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface and typestyle requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared in a proportionately spaced 14-point New Century Schoolbook typeface using Microsoft Word 2016. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1(a), and this Court's order extending the word limit (*see* Dkt. 16), because it contains 16,370 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

Dated: August 27, 2020

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