**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Supreme Court Case No. 82556**

Uber Technologies, Inc.; Rasier, LLC;
and Rasier-CA, LLC,
*Appellants*



v.

Megan Royz;
and Andrea Eileen Work,
*Respondents*

Appeal
Eighth Judicial District Court
Case No. A-20-810843-C

# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

The issue on appeal is whether the district court erred by deciding the disputed questions of arbitrability, including the Arbitration Agreement's scope and applicability, instead of referring these questions to the arbitrator in accordance with the parties' delegation clause.[1] As shown in Uber's Opening Brief, the answer is yes.

In response, Respondents, largely abandoning the district court's reasoning, raise a bevy of arguments, several of which were not raised below, for why this Court should affirm the result.

Yet regardless of how many arguments Respondents raise, the outcome remains: the district court lacked authority to interpret the scope and applicability of the Arbitration Agreement as to the underlying claims and Royz. These questions were expressly delegated to the arbitrator. The FAA and *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) required enforcement of the parties' valid and clear and unmistakable delegation—reversal and remand is warranted.

[1] Capitalized terms are used consistent with their definition in Appellants' Opening Brief.

## ARGUMENT

### A. The district court erred by interpreting the scope and applicability of the Arbitration Agreement.

The district court decided that it did not have to delegate questions of arbitrability to the arbitrator based on its own incorrect interpretation of the scope and applicability of the Arbitration Agreement to the underlying claims. *See* 4 AA 371; 3 AA 356-59.

The Opening Brief showed that the district court erred by rendering this decision because the parties delegated all threshold questions of arbitrability to the arbitrator, including the authority to interpret the scope and applicability of the Arbitration Agreement. *See* AOB 10-17.

Respondents argue that the district court did not so err for four reasons: (1) the district court was required to interpret the scope and applicability of the Arbitration Agreement; but, alternatively, even if that was not the case, the delegation clause fails because it: (2) does not satisfy the "clear and unmistakable" standard; (3) lacks mutual assent; and (4) is unconscionable. *See* RAB 9-24.

As shown below, these arguments fail. The district court erred when it interpreted the scope and applicability of the Arbitration Agreement. The "clear and unmistakable" standard is satisfied. And Respondents' mutual assent and conscionability challenges to the delegation clause are meritless. The district court should have honored the parties' delegation of authority to the arbitrator.

### 1. The district court did not have to and should not have interpreted the scope and applicability of the Arbitration Agreement.

Respondents argue that the district court was required to interpret the scope and applicability of the Arbitration Agreement for two reasons: (1) "[t]here are limits to the reach of a delegation clause, even after *Schein*"; and (2) "the instant dispute does not arise out of the alleged contract." RAB 9-13.

As shown below, Respondents are wrong. There is no limitation to the delegation at issue which would give the district court any authority to interpret the scope and applicability of the Arbitration Agreement. Respondents' "arising out of" argument certainly does not change this conclusion.

#### a. There is no limitation on the delegation at issue that left the district court with any authority to interpret the scope and applicability of the Arbitration Agreement.

In *Henry Schein,* the U.S. Supreme Court made clear that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. The D.C. Circuit's recent treatment of *Henry Schein* is particularly apt:

> [W]e adhere to the straightforward rule we understand *Henry Schein* to have established: once the parties subject some set of issues to an arbitrator for resolution, and once the parties clearly and unmistakably assign to an arbitrator the authority to decide whether disputes fit within that set of issues, the question whether a particular

> dispute is arbitrable is strictly for the arbitrator, not a court.

*Commc'ns Workers of Am. v. AT&T Inc.*, 6 F.4th 1344, 1349 (D.C. Cir. 2021).

Here, the parties delegated to the arbitrator "***any*** disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement . . . [and] ***all*** threshold arbitrability issues." 1 AA 80 (emphasis added). Applying the rule from *Henry Schein*, as stated by the D.C. Circuit, the result is clear. The parties: (1) "subject[ed] some set of issues to an arbitrator for resolution," (*i.e.*, the Arbitration Agreement) and (2) "clearly and unmistakably assign[ed] to an arbitrator the authority to decide whether disputes fit within that set of issues," thus, the question of "whether a particular dispute is arbitrable is strictly for the arbitrator, not a court." *Communications Workers of America*, 6 F.4th at 1349.

Despite this, Respondents argue for some unspecified limitation on the delegation, contending that "*Schein* did not contemplate such an infinite construction of delegation clauses as that proffered by Uber" and that "[n]either Respondents nor the District Court invoked the 'wholly groundless' exception in the proceedings below." RAB 9-10.

Uber, however, is not proffering an "infinite construction." Uber is merely attempting to enforce what the parties agreed to: the delegation of "***any*** disputes relating to the interpretation, applicability, enforceability or formation of this

Arbitration Agreement . . . [and] ***all*** threshold arbitrability issues"—the very issues wrongly decided by the district court. 1 AA 80; *see Masto v. Second Judicial Dist. Court*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("In interpreting a contract, we construe a contract that is clear on its face from the written language, and it should be enforced as written.").

Respondents appear to bemoan unspecified policy concerns (RAB 9); yet, *Henry Schein* addressed and dispatched any such concerns. There, the Court explained that it cannot rewrite the law and that arbitrators, like courts, "can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable." 139 S. Ct. at 530-31.

Moreover, while *Henry Schein* addressed the "wholly groundless" exception and the district court did not explicitly invoke the "wholly groundless" exception, this distinction makes no difference here. In *Henry Schein*, the Court specified that under the FAA, courts must enforce "clear and unmistakable" delegations of authority to decide threshold issues of arbitrability, even if the lower court believes that the argument in favor of arbitration is "wholly groundless." *Id.* at 529-31. Whether the district court in this case made an explicit "wholly groundless" finding or not, the principle is the same—"[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id.* at 531.

Accordingly, while Respondents and the district court are free to disagree with the wisdom of *Henry Schein's* holding, they may not ignore it. The district court should have "respected" the parties' delegation of authority to the arbitrator. *Id.* at 531.

**b. Respondents' "arising out of" argument lacks merit.**

Respondents next argue that the district court was required to interpret the scope and applicability of the Arbitration Agreement under Section 2 of the FAA (9 U.S.C. § 2), which provides the following in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . 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; *see* RAB 10-13. Respondents contend that under Section 2, courts must interpret the scope and applicability of the underlying arbitration agreement to determine whether the underlying "controversy" "arises out of" the underlying contract. RAB 10-13.[2]

This argument falls flat. First, the "arising out of" language in 9 U.S.C. § 2 does not impose a separate condition on the applicability of an arbitration agreement. Second, even if Respondents' premise was correct, the inquiry is met

[2] Respondents appear to contend that the district court adhered to this reasoning, RAB 12, but, while the effect appears to have been the same, the district court did not premise its decision on 9 U.S.C. § 2. *See* 3 AA 358-359.

because the relevant "controversy" is the narrow dispute at issue regarding threshold questions of arbitrability, which clearly "arise out of" the parties' contract.

*i. The "arising out of" language in 9 U.S.C. § 2 does not impose a separate condition on the applicability of an arbitration agreement.*

Respondents' treatment of Section 2 runs head-long into authoritative precedent and Section 2's plain language and purpose.

The First Circuit recently rejected the very argument Respondents rely on. *See Bossé v. New York Life Ins. Co.*, 992 F.3d 20, 23 (1st Cir. 2021). In *Bossé*, the plaintiff sought to challenge his termination from a job under a contract that had no arbitration clause; yet his prior employment contract (for the same employer but a different role) had such a clause. 992 F.3d at 23-26. The employer moved to compel arbitration. The district court denied the motion, reasoning, as Respondents argue here, that "*Schein* presupposes a dispute arising out of the contract or transaction," and that the FAA "does not provide for enforcement of arbitration clauses with respect to disputes plainly not 'arising out of such contract.'" 2019 WL 5967204, at *5 (D.N.H. Nov. 13, 2019).

The First Circuit reversed. 992 F.3d at 32. In evaluating the district court's decision that "Section 2 of the FAA requires that an arbitration clause have some relationship or connection to the underlying contract to be enforceable," the court

reasoned that it had "found no Supreme Court or circuit case law . . . which supports [this] contention regarding the 'arising out of' language in Section 2 of the FAA." *Id.* To the contrary, it found the parties' delegation clause valid and enforceable, notwithstanding whether the parties dispute "arose out of" the contract or not, and it required the district court to compel arbitration pursuant to *Henry Schein*. *Id.* at 27-32. The court noted that the parties' contract, not Section 2, governed which disputes were arbitrable and, in any event, that question did not vitiate the delegation clause the court was required to enforce under *Henry Schein*. *Id.* at 28-31 & n.15.

Moving to the statute's language, contrary to Respondents' argument, Section 2's "arising out of" language does not relate to whether an arbitration agreement *applies to a given dispute*. Section 2 does not parse whether particular disputes fall within the scope of a given agreement; rather, it deems enforceable under the FAA "[a] written provision in . . . a contract evidencing a transaction involving commerce . . . to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2; *see, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019) (stating that "Section 2 provides that the Act applies only when the parties' agreement to arbitrate is set forth as a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce'"); *accord U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 186, 415 P.3d

32, 38 (2018) ("By its terms, the FAA applies to contracts 'evidencing a transaction involving [interstate] commerce.'" (quoting 9 U.S.C. § 2)). By its own terms, Section 2 has nothing to do with whether the "written provision" for arbitration applies to a given dispute.

Respondents' interpretation of Section 2 would also undermine its purpose. The U.S. Supreme Court has consistently held that Section 2 promotes arbitration and the rigorous enforcement of arbitration agreements according to their terms, like any other contract. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983) ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (providing that Section 2 is "the FAA's substantive command that arbitration agreements be treated like all other contracts."); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (providing that Section 2 "reflects the overarching principle that arbitration is a matter of contract . . . [a]nd consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms"). There is no basis to treat Section 2 as an independent constraint on the applicability of an arbitration agreement separate and apart from the parties' contractual language.

The arguments raised by Respondents do not overcome this reasoning. *See* RAB 10-13. Respondents cite to *Coors Brewing Co. v. Molson Breweries*, 51 F.3d

1511, 1516 (10th Cir. 1995), but that case is inapposite as it neither addressed *Henry Schein* nor a delegation clause.[3]

Respondents also rely on *Moritz v. Universal City Studios LLC*, 268 Cal. Rptr. 3d 467, 475 (Cal. App. 2020). Yet there, the California court's conclusion is inconsistent with Section 2's plain language and purpose and *Henry Schein*. For one, the court's conclusion is premised on a fear of "absurd results." *Id.* at 475. The results the court fears, however, are the exact results that *Henry Schein* taught are not a basis to do what the California court did—ignore the parties' delegation clause. *Mortiz* attempts to find refuge in *Henry Schein*, *see* 268 Cal. Rptr. 3d at 475, but *Henry Schein* was clear that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." 139 S. Ct. at 531. *Henry Schein* did not caveat that directive by saying it only applies if the court pre-decides the arbitrability question.

Moreover, the California court's reasoning sounds in judicial hostility to arbitration. The court suggests that if it did not reach its decision and instead let the threshold questions of arbitrability go to an arbitrator, the result would be "a perpetual obligation to arbitrate any conceivable claim that Moritz might ever have against the [appellants]." 268 Cal. Rptr. at 476. But arbitrators must be viewed as having the same capability as courts when it comes to fairly and correctly deciding

[3] Tellingly, the district court that was reversed in *Bossé* also relied on *Coors*. *See* 2019 WL 5967204, at *3.

threshold issues of arbitrability. *See Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020), cert. denied sub nom. *Piersing*, 141 S. Ct. 1268 (2021) ("And as the Supreme Court has often said, parties don't give up any of their substantive rights when they choose to arbitrate an issue; they simply select a different forum to resolve their dispute."). If they are viewed the same, the fear of creating an unwarranted "perpetual obligation" falls by the wayside.

In addition, Respondents cite *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 719 (9th Cir. 2020) for the notion that "[t]he FAA's savings clause was intended to make arbitration agreements as enforceable as other contracts, but not more so." RAB 12. But, Uber's argument does not rely on an interpretation of the delegation clause that would make it "more enforceable" than other contracts. It simply relies on the clause's plain language.

Lastly, Respondents' claim that "Appellant's reasoning would allow a delegation clause to transcend and trump the entirety of the rest of the contract it resides within, rendering every contract superfluous and in contravention of the FAA." RAB 12. Enforcing a delegation clause, however, does not render any part of the underlying arbitration agreement or underlying contract superfluous. The arguments related to scope and applicability can be made to the arbitrator, just as they can be made to the court. Nothing is transcended; nothing is trumped. The arbitrator can conclude that the underlying claims do not fall within the scope of an

arbitration agreement, just as a court can. Respondents' concerns are no different than the policy arguments considered and rejected in *Henry Schein*. *See* 139 S. Ct. at 53-31.

For these reasons, this Court should follow the reasoning of the First Circuit in *Bossé* and conclude that Section 2 of the FAA does not justify the district court's decision to interpret the scope and applicability of the Arbitration Agreement. That job was reserved for the arbitrator.

*ii. Alternatively, the relevant controversy arises out of the parties' contract.*

Even if Respondents' view of Section 2 of the FAA were correct, their novel argument still fails on the merits. Respondents conflate the two distinct arbitration agreements implicated in this case: the substantive arbitration agreement and the delegation clause contained therein.

The severable delegation clause "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center, West. Inc. v. Jackson*, 561 U.S. 63, 70 (2010). The only arbitration agreement before the district court and now this Court is the delegation clause. When enforcing that provision, courts need not—and in fact, cannot—address the scope, applicability, or enforceability of the broader Arbitration Agreement. *See id.* at 71-72 (explaining that "Section 2 operates on the specific 'written provision'

to 'settle by arbitration a controversy' that the party seeks to enforce" and "the 'written provision . . . that Rent-A-Center asks us to enforce is the delegation provision"); *Henry Schein*, 139 S. Ct. at 528-29; *see also New Prime*, 139 S. Ct. at 538 ("A delegation clause is merely a specialized type of arbitration agreement, and the Act 'operates on this additional arbitration agreement just as it does on any other.'") (quoting *Rent-A-Center*, 561 U.S. at 70).

With that in mind, turning back Respondents' read of Section 2: "[a] written provision in . . . a contract . . . to settle by arbitration a *controversy thereafter arising out of such contract* . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (emphasis added). The "controversy" at issue here is the parties' disagreement over threshold arbitrability issues, such as the scope, applicability, and enforceability of the Arbitration Agreement—*not* the parties' core merits dispute, as Respondents suggest. This "controversy" undoubtedly "aris[es] out of" the Arbitration Agreement. Indeed, the parties' arbitrability dispute is a contractual dispute about the scope, applicability, and enforceability of the Arbitration Agreement—it could not be anymore tied to the Arbitration Agreement. *Cf. Rent-A-Center*, 561 U.S. at 72 (providing that when a delegation provision is at issue, "the underlying contract is [the] arbitration agreement").

Therefore, Respondents' "arising out of" argument fails either because Section 2 does not operate as Respondents say, or, if it does, it operates on the

"additional, antecedent" delegation clause. *Rent-A-Center*, 561 U.S. at 70. Either way, the district court erred by exceeding its authority when it interpreted the scope and applicability of the Arbitration Agreement. While the arbitrator could conclude that the underlying claims do not fall within the Arbitration Agreement—that is solely the arbitrator's decision to make.[4]

**2. The delegation satisfies the "clear and unmistakable" standard.**

The parties appear to agree that "parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." *Henry Schein,* 139 S. Ct. at 530 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). As explained in *First Options*, this inquiry looks to whether the parties' agreement is "silen[t] or ambigu[ous]" as to "who should decide arbitrability." 514 U.S. at 944-45.

The Opening Brief showed that the Arbitration Agreement is neither silent nor ambiguous as to who has the authority to decide threshold questions of arbitrability. *See* AOB 14-17. The Arbitration Agreement features both an incorporation of the AAA Rules and an express delegation clause, which provides

[4] To extent that the Court disagrees and concludes that the "arising out of" language in the FAA requires an assessment as to whether the claims at issue arise out of the underlying contract, that question has been delegated to the arbitrator because it would constitute a gateway arbitrability issue as it relates to scope. 2 Ian R. Macneil, *et al.*, *Federal Arbitration Law* § 15.1.4.2 (1994) (defining "substantive arbitrability" as "whether the dispute falls within the scope of a valid arbitration agreement").

that the arbitrator "shall have exclusive authority to resolve ***any*** dispute relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement" and "***all*** threshold arbitrability issues." 1 AA 80 (emphasis added).

Despite this, Respondents argue that the incorporation of the AAA Rules and the express delegation "are insufficient" to satisfy the "clear and unmistakable" standard. RAB 14. Respondents fail to supply any authority in support of this conclusion. The weight of authority actually stands for the proposition that the incorporation of the AAA Rules alone is enough to satisfy the standard. Yet, the Court need not even reach that issue, because the express delegation here easily carries the standard on its own. Respondents' remaining "carve-out" argument, *see* RAB 14-15, does not change this outcome. The Court should therefore conclude that the "clear and unmistakable" standard is satisfied.

**a. The incorporation of the AAA Rules alone is enough to satisfy the standard.**

The Sixth Circuit's recent analysis of whether the incorporation of the AAA Rules alone is enough to satisfy the "clear and unmistakable" standard is comprehensive, landing on the conclusion that it is. *See Blanton*, 962 F.3d at 846. There, the court makes clear that "every one of our sister circuits to address the question—eleven out of twelve by our count—has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides 'clear and unmistakable' evidence that the parties agreed to arbitrate arbitrability." *Id.* (citing

to the cases). The court further notes that while the U.S. Supreme Court has not directly resolved the issue, it has "relied on the incorporation of the AAA Rules to determine what the parties agreed to" and that there should be "little doubt about the final picture." *Id*. at 845.

Even with this one-sided precedent, Respondents argue that the incorporation of the AAA Rules is ineffective because Royz and Work are not "sophisticated parties." RAB 16. Respondents ground this argument on the Ninth Circuit's decision in *Brennan v. Opus Bank*, where the court held that the "incorporation of the AAA rules constitutes clear and unmistakable evidence that contracted parties agreed to arbitrate," but with a caveat: "we limit our holding to the facts of the present case, which do involve an arbitration agreement 'between sophisticated parties.'" 796 F.3d 1125, 1131 (9th Cir. 2015).

Respondents take the caveat from *Brennan* to mean that parties must be "sophisticated" for the incorporation of the AAA Rules to satisfy the "clear and unmistakable" standard. RAB 16. Yet the Ninth Circuit guarded against this overreach, clarifying that "[o]ur holding today should not be interpreted to require that the contracting parties be sophisticated or that the contract be 'commercial' before a court may conclude that incorporation of the AAA rules constitutes 'clear and unmistakable' evidence of the parties' intent." *Brennan*, 796 F.3d at 1130. The court further elaborated that "our holding does not foreclose the possibility

that this rule could also apply to unsophisticated parties or to consumer contracts" and noted that "the ***vast majority*** of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent do so without explicitly limiting that holding to sophisticated parties or to commercial contracts." *Id.* at 1130-31 (emphasis added).

When the Sixth Circuit in *Blanton* faced the "sophisticated" argument, it made short work of it, reasoning that nothing in the FAA allows for a court to distinguish between a "sophisticated" and an "unsophisticated" party, and to do so, would be to improperly "redline Congress's work" (akin to the reasoning applied by the U.S Supreme Court in *Henry Schein* when it eliminated the "wholly groundless" exception). 962 F.3d at 851.

Here, this Court should adopt the reasoning from *Blanton* and join "the vast majority of the circuits," *Brennan*, 796 F.3d at 1030-31, by concluding that the incorporation of the AAA Rules in the Arbitration Agreement satisfies the "clear and unmistakable" standard.[5]

[5] The other four cases cited by Respondents on this issue, *see* RAB 16-17, add nothing to the discussion. *Aviles v. Quik Pick Express, LLC* simply references *Brennan*. 703 F. App'x 631, 632 (9th Cir. 2017). *Lim v. TForce Logistics, LLC* does not even address the issue, as it only discusses unconscionability. 8 F.4th 992, 1000 (9th Cir. 2021). *Simply Wireless, Inc. v. T-Mobile US, Inc.* merely mirrors the decision from *Brennan*. 877 F.3d 522, 528 (4th Cir. 2017), abrogated by *Henry Schein, Inc.* 139 S. Ct. 524 (2019). Lastly, *Shivkov v. Artex Risk Sols., Inc.* is distinguishable and unhelpful. 974 F.3d 1051, 1068 (9th Cir. 2020), cert. denied, 141 S. Ct. 2856, 210 L. Ed. 2d 962 (2021). For one, it concerns the

### b. The express delegation easily satisfies the standard.

This Court, however, need not even reach the issue regarding the AAA Rules because the express delegation in the Arbitration Agreement could not be any more clear and unmistakable. It is for this reason, as pointed out in Uber's Opening Brief, that courts across the country have found the same and similar express delegation language "dispositive." *See* AOB 16 & n. 8 (citing to several cases); *see also Bossé*, 992 F.3d at 28 (concluding that the district court erred in not enforcing a similarly worded express delegation clause).

Respondents offer no argument or explanation as to why these cases are misguided or distinguishable. Rather, Respondents argue that "the Nevada Supreme Court has held that the mere incorporation of 'general language,' such as that in Uber's delegation clause . . . 'falls short of the clear and unmistakable evidence [standard].'" RAB 17 (quoting *Principal Invs. v. Harrison*, 132 Nev. 9, 19-20, 366 P.3d 688, 695-96 (2016)). Respondents are wrong.

In *Principal*, the issue was whether the parties' agreement "clearly and unmistakably" delegated the issue of "litigation-conduct waiver to the arbitrator." 132 Nev. at 19, 366 P.3d at 696. The Court decided that it did not because the

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delegation of the issue of "class arbitration," which, as pointed out by *Blanton*, is a separate and distinguishable issue. 962 F.3d at 850-51. Moreover, the court did not even have to reach the issue at hand, concluding that "[u]nlike the arbitration clause in *Brennan*, the Clause does not incorporate the AAA Rules, and thus *Brennan* does not apply." 974 F.3d at 1068.

agreement was silent as to litigation-conduct waiver, concluding that "[h]ad Rapid Cash intended to delegate litigation-conduct waiver to the arbitrator, rather than the court, the agreements could and should have been written to say that explicitly." *Id.* at 20, 366 P.3d at 696.

Here, litigation-conduct waiver is not at issue. The issue is whether the parties delegated the authority to the arbitrator to decide all threshold arbitrability issues, including the scope, applicability, and enforceability of the Arbitration Agreement. Considering that is exactly what the express delegation provides, 1 AA 80, the Court should conclude that the "clear and unmistakable" standard is satisfied.

**c. Respondents' "carve-out" argument lacks merit.**

Lastly, Respondents' argue that the "clear and unmistakable" standard is not satisfied because, "[s]imilar to *Schein II*, Uber's agreement carves out claims such as those brought by Ms. Work and Ms. Royz." RAB 15. Respondents' "carve-out" argument is inapposite, circular, and foreclosed by *Henry Schein*.

In *Schein II*, the "carve-out" was part of the delegation language. *See Archer & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274, 281 (5th Cir. 2019) ("*Schein II*") (cert. history omitted). The language at issue provided: "any dispute arising under or related to this Agreement (*except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other*

*intellectual property of [the predecessor*]), shall be resolved by binding arbitration *in accordance with the arbitration rules of the American Arbitration Association*." *Id.* at 280 (emphasis added). The reference to the "American Arbitration Association" in that sentence was the operative delegation language. For this reason, the Fifth Circuit reasoned that "[t]he most natural reading of the arbitration clause at issue here states that any dispute, except actions seeking injunctive relief, shall be resolved in arbitration in accordance with the AAA rules." *Id.* at 281. Thus, the court concluded that there was not a "clear and unmistakable" intent to delegate arbitrability for "actions seeking injunctive relief." *Id.* at 281-82.

Yet, in cases where the parties do not have similar carve-out language in the operative delegation clause, courts quickly reject the "carve-out" argument as inapposite, fatally circular, and defeated by *Henry Schein*. *See Blanton*, 962 F.3d at 847; *Bossé*, 992 F.3d at 30; *Communications Workers of America,* 6 F.4th at 1349.

In *Blanton*, the party seeking to avoid arbitration raised this "carve-out" argument, contending that "his arbitration agreement incorporates the AAA Rules only as to claims that fall within the scope of the agreement." 962 F.3d at 847. The Sixth Circuit rejected the argument for several reasons. *Id.* First, the court distinguished *Schein II*, explaining that "nothing in the relevant provision limits the incorporation in this way," noting that the clause "simply provides that 'the

arbitration will be conducted in accordance with then-current AAA Rules.'" *Id.* Second, the court looked to other authority, reasoning that "[o]ther courts have read similar references to 'arbitration' or 'the arbtration' as generally authorizing an arbitrator to decide question of 'arbitrability.'" *Id.* (citing to four cases). Third, the court criticized the logic, explaining that the parties' "reading of the agreement ***doesn't make much sense***. He reads the agreement to say that the arbitrator shall have the power to determine the scope of the agreement *only* as to claims that fall within the scope of the agreement. Yet that reading would render the AAA's jurisdictional rule ***superfluous***." *Id.* (emphasis added). Fourth and finally, the court explained that, if the delegation clause contained a similar carve-out to *Schein II*, the result would perhaps be different, but "to the extent that Piersing's arbitration agreement carves out certain claims from arbitration, it does so from the agreement in general, not from the provision that incorporates the AAA Rules." *Id.* at 848.

Likewise, in *Bossé*, the party seeking to avoid arbitration raised the same "carve-out" argument, contending that the "court must assess whether the particular dispute falls within the scope of the arbitration agreement to determine whether the arbitrability of that dispute was delegated to the arbitrator." 992 F.3d at 30. The First Circuit rejected the argument, criticizing the reasoning as "circular," rendering the delegation clause "meaningless," and running afoul of

*Henry Schein*, as it is "merely an application of the 'wholly groundless exception' under a different guise." *Id.* at 30-31.

Finally, in *Communications Workers of America*, the D.C. Circuit squarely rejected the same argument, pointing out the same concerns as the Sixth and First Circuits. 6 F.4th at 1348.

Here, this Court should follow the lead of the Sixth, First, and D.C. Circuits and conclude that Respondents' "carve-out" argument fails. Unlike *Schein II*, the operative delegation clause, both the incorporation of the AAA Rules and the express language, does not contain a carve-out. *See* 1 AA 80. When it comes to what threshold arbitrability issues are "clearly and unmistakably" delegated to the arbitrator, the answer is "any" and "all," without subject to any carve-out. *Id.* Respondents' "carve-out" argument is inapposite.

Given this, applying the "carve-out" argument, as Respondents' contend, would render the parties' delegation clause superfluous, engage in fatally circular logic, and violate *Henry Schein*. If the delegation language contained a carve-out like *Schein II*; for instance, if the express delegation language stated that the arbitrator "shall have exclusive authority to resolve any disputes relating to . . . this Arbitration Agreement . . ., *except in cases concerning claims of personal injury*," the analysis may change. But that is not the case.

Consequently, this Court should conclude that, either through the incorporation of the AAA Rules or the express delegation or both, the parties "clearly and unmistakably" delegated the authority to the arbitrator to "resolve ***any*** disputes relating to the interpretation, applicability, enforceability or formation of this Arbitration Agreement . . . [and] ***all*** threshold arbitrability issues." 1 AA 80 (emphasis added).

### 3. Respondents' mutual assent challenge to the delegation clause lacks merit.

Respondents argue that "[t]here was no mutual assent to enter into the delegation clause." RAB 18. This argument fails because: (1) it should be deemed waived; (2) it should not be considered in the first instance; and (3) Respondents are wrong on the merits.

#### a. The mutual assent challenge should be deemed waived.

"A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see Rent-A-Center*, 561 U.S. at 73-75; *Brennan*, 796 F.3d at 1133 (following *Rent-A-Center's* guidance). In *Rent-A-Center*, the U.S. Supreme Court concluded that an argument related to the conscionability of a delegation provision was waived because the respondent did not raise it in the lower courts. *Id.* In the lower courts, the respondent had challenged the conscionability of the overall agreement and even

the arbitration clause, but he did not challenge the conscionability "of the delegation provision in particular." *Id.* at 74. As a result, the Court determined that the respondent "brought [his] challenge to the delegation provision too late, and we will not consider it." *Id.* at 75-76.

Here, Respondents did not properly challenge the delegation clause in the district court for lack of mutual assent. In the Motion to Compel Arbitration, Uber affirmatively argued that the Arbitration Agreement satisfied the mutual assent requirement. 1 AA 47-49. In their Opposition to Uber's Motion to Compel Arbitration, Respondents failed to oppose this argument, much less argue that the delegation lacked mutual assent. *See* 1 AA 146-153. Thus, not only did Respondents fail to raise the issue, they tacitly conceded that there was no lack of mutual assent.

In their Opposition to Uber's Motion for Reconsideration, Respondents mention the issue through incorporation by reference. *See* 2 AA 252. Yet, as just shown, the incorporation by reference is meaningless because Respondents did not challenge the delegation for lack of mutual assent in the original briefing.

Standing alone, Respondents' passing mention of the issue in their Opposition to Uber's Motion for Reconsideration, particularly after tacitly conceding the issue, is not sufficient to preserve the issue for appeal, where, as here, the district court's original order did not turn on the issue and there is no

indication that the district court entertained the issue on the merits on reconsideration. *See Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007), as amended (Nov. 21, 2007) (concluding "that if the reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment"). Accordingly, the Court should deem Respondents' mutual assent challenge to the delegation clause waived.

**b. The Court should not address the mutual assent challenge in the first instance.**

This Court typically will not address an issue in the first instance, particularly where the issue turns on nuanced legal arguments or a fact intensive inquiry. *See 9352 Cranesbill Tr. v. Wells Fargo Bank*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (providing that "this court will not address issues that the district court did not directly resolve"); *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 592 n. 6, 262 P.3d 699, 704 n. 6 (2011) (declining to address a legal issue that the district court did not reach).

Here, to the extent that Respondents' mutual assent challenge to the delegation clause is not deemed waived, the Court should decline to address the issue in the first instance. The district court did not decide the issue and, while Uber submits that the issue ultimately falls in its favor, the issue undoubtedly turns

on nuanced legal and factual issues concerning inquiry notice, as addressed below. This Court need not grapple with and decide this issue in the first instance.[6]

**c. The mutual assent requirement is satisfied.**

An enforceable contract "requires a manifestation of mutual assent in the form of an offer by one party and acceptance thereof by the other . . . [and] agreement or meeting of the minds of the parties as to all essential elements." *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring). Respondents challenge the delegation clause in the Arbitration Agreement for lack of mutual assent based on two arguments. *See* RAB 18-19. Neither argument survives scrutiny—the mutual assent requirement is met.

First, Respondents contend that "no reasonable person in Ms. Work's or Ms. Royz's position would understand that by creating an Uber account, they had assented to delegate all threshold questions of arbitrability to an arbitrator, under

[6] To the extent that Respondents contend that the district court decided the issue by implication because the issue was arguably a pre-requisite to the district court having reached the issues it ultimately decided, such an argument lacks merit and does not compensate for the fact that the district court did not provide a written conclusion on the issue. *See Rust v. Clark Cty. Sch. Dist*., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("An oral pronouncement of judgment is not valid for any purpose, NRCP 58(c); therefore, only a written judgment has any effect, and only a written judgment may be appealed."). Moreover, if this were the case, Respondents should have filed a cross-appeal, challenging the implicated-conclusion, which they did not. *See Ford v. Showboat Operating Co*., 110 Nev. 752, 756, 877 P.2d 546, 549 (1994) (explaining that a "respondent who seeks to alter the rights of the parties under a judgment must file a notice of cross-appeal"). The mutual assent issue is not properly before the Court.

all circumstances." RAB 18. Yet the delegation clause is plainly stated. *See* 1 AA 80. There is no reason its clear terms should not be enforced as written.

Second, Respondents contend that "Uber provides no evidence that Respondents had actual knowledge of the delegation clause. Nor does Uber provide evidence that Respondents had sufficient inquiry notice of the delegation clause." RAB 19. This argument is wrong. Even though this was not an issue on appeal, Uber's Opening Brief still explained how Work and Royz both assented to the 2016 version of the Terms & Conditions. *See* AOB 2-3.

Respondents further ignore the extensive body of case law that supports the conclusion that given the nature of the notice of the Terms & Conditions provided to Work and Royz (the clear hyperlink), the fact that Royz assented to the Terms & Conditions directly, and the fact that Work assented to the Terms & Conditions through continued use of Uber, the actual knowledge and inquiry notice standards are satisfied. *See, e.g.*, *Meyer v. Uber Techs., Inc*., 868 F.3d 66, 79 (2d Cir. 2017) (concluding that an Uber rider had "reasonably conspicuous notice of the Terms of Service" and "unambiguously manifested his assent to Uber's Terms of Service"); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) ("[C]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else.").

This conclusion is all the more obvious when viewed through the perspective of the reasonably prudent smart-phone user, as must be the case. *See Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir. 2012) ("[T]he touchstone of the analysis is whether reasonable people in the position of the parties would have known about the terms and the conduct that would be required to assent to them."); *Riley v. California*, 573 U.S. 373, 385 (2014) ("[M]odern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of the human anatomy."). Consequently, the Court should conclude that Respondents' mutual assent challenge to the delegation clause lacks merit.

**4. Respondents' conscionability challenge to the delegation clause fails.**

In their final challenge to the delegation clause, Respondents contend that "[t]he delegation clause is unconscionable." RAB 19. Yet, like their mutual assent challenge, this argument fails for three reasons: (1) it should be deemed waived; (2) it should not be considered in the first instance; and (3) Respondents are wrong on the merits—the delegation is not unconscionable.

**a. The conscionability challenge should be deemed waived.**

In their Motion to Compel, Uber affirmatively argued that the Arbitration Agreement was not unconscionable. 1 AA 51-52. In their Opposition to Uber's Motion to Compel Arbitration, Respondents did not contest the conscionability of

the Arbitration Agreement or the delegation clause. *See* 1 AA 146-153. Thus, not only did Respondents fail to raise the issue at hand but they also tacitly conceded that the Arbitration Agreement was not unconscionable.

In their Opposition to Uber's Motion for Reconsideration, Respondents argued that the delegation was unconscionable, albeit on different grounds than they now present in their Answering Brief. *See* 2 AA 245-252. During the reconsideration hearing, the district court entertained arguments on the issue, but ultimately did not render a ruling as to unconscionability. *See* 3 AA 353-361; 4 AA 362-371.

Consequently, because Respondents tacitly conceded that the Arbitration Agreement was not unconscionable and did not challenge the conscionability of the delegation in the original briefing, and because the district court did not reach a decision on the merits on the issue during the reconsideration phase, the Court should conclude that this issue is waived for the purposes of this appeal.

**b. The Court should not address the conscionability challenge in the first instance.**

To the extent that Respondents' conscionability challenge to the delegation is not deemed waived, the Court should decline to address the issue in the first instance. *See, e.g.*, *9352 Cranesbill*, 136 Nev. at 82, 459 P.3d at 232. Like the mutual assent issue, the district court did not decide the issue and, while Uber submits that the conscionability issue ultimately falls in its favor, it undoubtedly

turns on nuanced legal arguments, as addressed more fully below. Thus, this Court need not and should not decide the conscionability challenge in the first instance.[7]

**c. The delegation clause is not unconscionable.**

The conscionability of a delegation clause is a narrow issue as it only concerns the nature and terms of the severable delegation clause. *See Mohamed v. Uber Techs., Inc*., 848 F.3d 1201, 1210 (9th Cir. 2016) (explaining that when considering "an unconscionability challenge to a delegation provision, the court must consider only arguments 'specific to the delegation provision'" (quoting *Rent-A-Center.*, 561 U.S. at 73)). Respondents fail to show that the delegation clause at issue here is unconscionable.[8]

In Nevada, "[a] contract is unconscionable only when the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party." *Bill*

[7] The reasoning from footnote 6, *supra*, regarding the potential need for Respondents to have filed a cross-appeal, applies equally to the unconscionability issue.

[8] In their Opposition to Uber's Motion for Reconsideration, Respondents premised their unconscionability argument on Nevada law. *See* 2 AA 245-252. In their Answering Brief, Respondents appear to premise the argument on California law, considering that they do not cite to a single Nevada case when it comes to unconscionability. *See* RAB 19-24. Respondents offer no explanation for their reliance on California law. Given this, Respondents' argument is not supported by "cogent argument and citation to relevant authority" and should not be considered. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288, n. 38 (2006) (providing that the Court will not consider argument not supported by "cogent argument and citation to relevant authority").

*Stremmel Motors, Inc., v. IDS Leasing Corp.*, 89 Nev. 414, 418, 514 P.2d 654, 657 (1973). Nevada law requires a showing of "both procedural and substantive unconscionability to invalidate a contract as unconscionable." *Ballesteros*, 134 Nev. at 190, 415 P.3d at 40. Procedural and substantive unconscionability operate on a sliding scale, such that "less evidence of substantive unconscionability is required" where the procedural unconscionability is great. *Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 444, 49 P.3d 647, 650 (2002). Substantive unconscionability concerns the substance of the terms, while procedural unconscionability concerns the process associated with entering into the terms. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 554, 96 P.3d 1159, 1163 (2004), overruled on other grounds by *Ballesteros*, 134 Nev. at 415 P.3d at 32. The burden to prove unconscionability lies with the moving party. *See, e.g.*, *Hayes v. Oakridge Home*, 908 N.E.2d 408, 412 (Ohio 2009).

In assessing unconscionability, the FAA "preempts state laws that single out and disfavor arbitration." *Ballesteros*, 134 Nev. at 188, 415 P.3d at 40. Accordingly, where the FAA applies, district courts may invalidate an arbitration provision under a generally applicable contract defense, such as unconscionability—but it may not apply that defense "in a fashion that disfavors arbitration." *Id.* at 189, 415 P.3d at 40. This means, for instance, a state "may not . . . 'decide that a contract is fair enough to enforce all of its basic terms (price,

service, credit), but not fair enough to enforce its arbitration clause.'" *Id.* (quoting *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995)).

Here, the delegation clause is not unconscionable. Even to the extent it suffers from some minor degree of procedural or substantive unconscionability, neither rise to the level to render it unconscionable. *See Loewen v. Lyft, Inc.*, 129 F. Supp. 3d 945, 957 (N.D. Cal. 2015) (concluding that although low levels of procedural and substantive unconscionability existed, they did not rise to a level to warrant a finding of unconscionability).

*i. The delegation clause is not substantively unconscionable.*

In an effort to cast the delegation as substantively unconscionable, Respondents make two meritless arguments. *See* RAB 23-24. First, Respondents contend that "[w]hile the arbitration agreement states that Appellant waives its rights to recover attorneys' fees and expenses if it prevails in arbitration, there is no provision that 'preclude[s] eventual recovery for attorney's fees arising from the arbitrator's initial decision on arbitrability." RAB 23. There is no indication, however, that the terms of this clause do not apply equally to an arbitration on the merits and an arbitration on threshold issues of arbitrability. *See* 1 AA 81 (under the section "Arbitrator's Decision"). Thus, Respondents' concern that this safeguard may not apply to an arbitration under the delegation clause is misplaced.

Second, Respondents contend that "as to Ms. Work, the choice of law provision in the agreement is substantively unconscionable, requiring that the arbitrator be a retired judge or attorney 'specifically licensed to practice law in the state of California.'" RAB 23 (citing 1 AA 81). Respondents assert that this purported requirement "restrict[s] the legal arguments that Ms. Work, a Nevada resident who suffered bodily injuries in a car accident that occurred in Nevada, could make if required to arbitrate the issue of arbitrability." RAB 24. Yet, that is simply not accurate.

The language actually allows for the appointment of a "retired judge" or a California licensed attorney and the appointment is subject to the agreement of the parties or, if no agreement can be reached, the AAA Rules. 1 AA 81. This clause does not "restrict the legal arguments" that anyone can make. The suggestion made by Respondents that a "retired judge" or a California licensed attorney would be unable to grasp arguments made under Nevada law is absurd. Courts interpret and apply law from jurisdictions other than their own frequently—it is the nature and result of choice of law arguments. The assertion that a court is capable of applying law from an outside jurisdiction, but an arbitrator is not, rings of the exact type of hostility to arbitration that the FAA precludes. *See Ballesteros*, 134 Nev. at 191, 415 P.3d at 41; *Blanton*, 962 F.3d at 852 ("And as the Supreme Court has

often said, parties don't give up any of their substantive rights when they choose to arbitrate an issue' they simply select a different forum to resolve their dispute.").

Because Respondents have made no showing of substantive unconscionability, there is no need to address procedural unconscionability, as both are required for a finding of unconscionability. *Ballesteros,* 134 Nev. at 192, 415 P.3d at 42 ("We do not address substantive unconscionability, since both must exist to invalidate a contract as unconscionable.").

*ii. The delegation clause is not procedurally unconscionable.*

Nonetheless, it is worth noting that Respondents' procedural unconscionability arguments fare no better. To start, the cases Respondents primarily rely on—*Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1001 (9th Cir. 2021) (applying California law), *Pinela v. Neiman Marcus Grp., Inc.*, 190 Cal. Rptr. 3d 159, 172 (Cal. App. 2015), *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 794 (Cal. App. 2012), and *Cabatit v. Sunnova Energy Corp.*, 274 Cal. Rptr. 3d 720, 725 (Cal. App. 2020)—are readily distinguishable.

*Lim*, *Pinela*, and *Ajamian* all arose out of employment contracts, which amplifies any procedural unconscionability concerns with adhesion contracts under California law. *See Lim*, 8 F.4th at 1001 ("indicate some degree of procedural unconscionability . . . *especially* in the employment context") (emphasis added) (string citing several cases including *Pinela*). This makes sense because, when it

comes to the question of "oppression" for procedural unconscionability under California law, the "oppression" associated with take-it *and have a job* or leave-it *and have no job* is much greater than the use of a consumer service, like Uber, that has multiple competitors. *See Lim*, 8 F.4th at 1001; *Pinela*, 190 Cal. Rptr. 3d at 172 ("Pinela states it was his understanding he had to sign the Agreement to be hired, and a human resources manager later confirmed that was the case."); *Ajamian*, 137 Cal. Rptr. 3d at 793 ("A nonnegotiable contract of adhesion in the employment context is procedurally unconscionable.").

While *Cabatit* does not concern an employment relationship, it too is distinguishable. There, the procedural unconscionability arose primarily from the fact that the agreement language was presented to the consumer on an electronic device on which the "salesperson scrolled through to the parts to be signed or initialed[,]" and the consumer "did not receive a copy of the agreement until this dispute arose . . . ." *Cabatit*, 274 Cal. Rptr. 3d at 723. That is not the case here. Respondents had complete access to the Terms & Conditions and a full opportunity to review them. This is not a case of a salesperson pressuring a consumer to sign an agreement without reading it or even giving them a copy.

Respondents also quip that the delegation clause was not set apart in any special way and did not require separate signature or initials. RAB 20-21. Yet, this Court has foreclosed such an argument, making clear that "[r]equiring an

arbitration clause to be more conspicuous than other contract provisions . . . is exactly the type of law the Supreme Court has held the FAA preempts because it imposes stricter requirements on arbitration agreements than other contracts generally." *Ballesteros*, 134 Nev. at 190, 415 P.3d at 41.

Moreover, Respondents contest the very nature of consumer agreements accessed through electronic means. *See* RAB 21-22. Courts around the country, however, regularly find that consumer agreements accessed through electronic means, such as the one at issue here, are proper and enforceable. *See Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 264 (5th Cir. 2014) (rejecting these same arguments and noting that the plaintiff failed to present any evidence that it "could not have abstained from contracting with the Defendants at all," which applies equally here); *Rent-A-Ctr., Inc. v. Ellis*, 672, 827 S.E.2d 605, 617 (W. Va. 2019) (rejecting all the same arguments and "acknowledg[ing] the realities of consummating standardized business transactions and the attendant unworkability of individualized bargaining"); *Burch*, 118 Nev. at 442, 49 P.3d at 649 (explaining that adhesion contracts are enforceable, but the one at issue in *Burch* was not because the consumer "did not receive a copy" until after assenting and, as a result, "did not have an opportunity" to read it, which did not occur here). Respondents have presented no unique circumstances as to why this consumer agreement is procedurally unconscionable, as compared to the general consensus.

In sum, there is simply not enough to support a finding of procedural unconscionability. Thus, this Court should conclude that Respondents' unconscionability challenge to the delegation clause fails.

### B. The district court erred by determining that the Arbitration Agreement was not applicable as to Royz.

With respect to Royz, the district court concluded that Royz "did not use the Uber App to request transportation. Thus, Plaintiff Royz did not enter into a contract that could compel her claims to arbitration." 4 AA 371.[9]

Respondents argue that the district court had the authority to make this determination as to Royz because *Henry Schein* instructs that "'before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.'" RAB 6 (quoting 139 S. Ct. at 530). Respondents essentially argue that, even if the district court did not have authority to decide issues related to scope, applicability, and enforcement, its decision as to Royz turned on "validity."

[9] In an attempt to alter or expand the scope of the district court's conclusion as to Royz, Respondents cite to portions of the reconsideration hearing transcript. *See* RAB 7. Yet, it is axiomatic that the district court's decision is reflected in and limited to the written order, not the hearing transcript. *See 9352 Cransbill*, 136 Nev. at 82, 459 P.3d at 232 ("A court's oral pronouncement is ineffective for any purpose, and this court will not address issues that the district court did not directly resolve.") (internal citations omitted).

Respondents correctly state the rule from *Henry Schein*, but misapply it to the instant circumstances.[10]

At times, whether a question is one of "validity" for the court or a question that can be delegated to an arbitrator can turn on a nuanced distinction. Honing in on this distinction, the U.S. Supreme Court has previously held that "our precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis in original); *see Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 202 (5th Cir. 2016) (explaining that in the face of a delegation clause, the court still determines "whether the parties entered into any arbitration agreement at all," but nothing further). In essence, a delegation provision can transfer the authority to decide a question of

[10] Respondents argue that the Court should review this issue under a clearly erroneous instead of de novo standard. *See* RAB viii, 8. Respondents are incorrect. The only pertinent fact is undisputed—Work, not Royz, requested and paid for the ride at issue. The district court's decision turned on a matter of contract interpretation because the district court interpreted the Terms & Conditions (including the Arbitration Agreement) and concluded that based on the undisputed fact that Work requested and paid for the ride at issue, the Terms & Conditions (including the Arbitration Agreement) were not applicable as to Royz. This issue, like the others in this appeal, is reviewed de novo. *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007).

"enforceability or applicability to the dispute" to the arbitrator, but a question of "formation" remains with the court.

A case cited in the Answering Brief, *Belyea v. GreenSky, Inc.*, No. 20-CV-01693-JSC, 2020 WL 3618959, at *4 (N.D. Cal. July 2, 2020), and a case cited in the Opening Brief, *Elko Broadband Ltd. v. Dhabi Holdings PJSC,* No. 319CV00610LRHWGC, 2020 WL 6435754, at *4 (D. Nev. Nov. 2, 2020), help give clarity to this line.

In *Belyea*, the court determined that, despite the presence of a delegation provision, it had the authority to determine "whether Plaintiff agreed to the Arbitration Provision." 2020 WL 3618959, at *4. There, the party seeking to avoid arbitration argued there was no evidence that she consented to arbitration because she had not signed the agreement relied on by the party seeking to compel arbitration. *Id.* at *3. As such, the court determined that it had the authority to determine whether the arbitration agreement existed—a question of formation. *Id.* at *4.

Conversely, in *Elko*, the court determined that, because of a delegation provision, nearly the same issue was "better left to an arbitrator." 2020 WL 6435754, at *4. There, the arbitration agreement was signed by a person (Bajwa) on behalf of the company seeking to avoid arbitration (WTI), but the company contended that the person did not have the authority to sign on the company's

behalf. *Id.* at *3. As such, the court concluded, citing to *Henry Schein*, that "threshold issues of arbitrability—including whether Bajwa could bind WTI to the arbitration agreement—are better left to an arbitrator." *Id.* at *4.

The difference between the two cases was that the lack of a signature in *Belyea* created a clear question as to whether an arbitration agreement existed at all, while the authority dispute in *Elko* created a question as to whether the agreement, which existed, was enforceable as to the company.

Here, the unique issue as to Royz is not whether the Arbitration Agreement exists—there really is no legitimate question that she assented to the Terms & Conditions when she registered for an account with Uber via the Uber website. AOB 3. Rather, like in *Elko*, the question is whether the Arbitration Agreement is enforceable or applicable as to Royz even though she did not request and pay for the ride at issue—a question of enforcement and applicability, not formation.

This conclusion is actually supported by the arguments raised by Respondents in their Answering Brief and in the district court. Respondents assert that the district court's "ruling [as to Royz] is consistent with Uber's Terms, which expressly apply only when 'accessing or using the Services.'" RAB 7 (citing 1 AA 79). Respondents go on to say that "[s]ince Ms. Royz was not 'accessing or using the Services' as defined in the Terms, she was not bound by any aspect of the Terms, including the delegation provision contained within them." RAB 7-8.

Likewise, in their Opposition to Uber's Motion to Compel, Respondents did not argue that no agreement existed between Uber and Royz. Rather, they only argued that the Arbitration Agreement was not enforceable as to Royz because she did not request and pay for the ride at issue. 1 AA 148-150.[11]

Respondents' arguments are arguments of interpretation, applicability, and enforceability. Respondents are not arguing that no agreement exists. They are arguing, and the district court concluded, that based on the terms of the existing Arbitration Agreement, the Arbitration Agreement is not applicable as to Royz under the undisputed facts. The authority to decide this question, however, was expressly delegated to the arbitrator. *See* 1 AA 80. Only the arbitrator has the authority to decide whether the Arbitration Agreement applies to Royz given the fact that the ride at issue was requested and paid for by Work. As such, this Court should conclude that the district court erred by deciding the issue.

[11] Uber will not dwell on Respondents' interpretation of the Terms & Conditions, because it is a question for the arbitrator not the courts, except to say that it is absurd. For one, Royz agreed to the Terms when she registered for an account with Uber via its website. AOB 3. There is no support for the notion that the Terms somehow cease to exist while a person is not "accessing or using the Services," and then are resurrected when they are "accessing or using the Services." The reference to "accessing or using the Services" is not a temporal limitation. The sentence—"By accessing or using the Services, you confirm your agreement to be bound by these Terms."—is simply reaffirming that once a person accesses or uses "the Services" they have agreed "to be bound by these Terms."

## CONCLUSION

For the foregoing reasons, Uber respectfully requests that this Court vacate the district court's order denying Uber's motion to compel arbitration and remand with directions to refer the matter to arbitration and, under 9 U.S.C. § 3 (or NRS 38.221), stay all proceedings until the arbitration between Uber and Respondents is completed.

DATED: January 14, 2022.

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## AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED: January 14, 2022.

*/s/ Ryan T. Gormley*

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRS 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

2. I further certify that while this brief exceeds the page or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 10,179 words, Appellants have moved in good faith for relief to do so under NRAP 32(a)(7)(D).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters to the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: January 14, 2022.

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## CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on January 14, 2022, I submitted the foregoing **APPELLANTS' REPLY BRIEF** for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

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