23-521(L)

23-522(C)

United States Court of Appeals for the Second Circuit

MIRIAM DAVITASHVILI, individually and on behalf of all others similarly situated, ADAM BENSIMON, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

PHILIP ELIADES, JONATHAN SWABY, JOHN BOISI, and NATHAN OBEY,

Consolidated Plaintiffs-Appellees,

MIA SAPIENZA, and MALIK DREWEY,

Plaintiffs,

v.

GRUBHUB INC., DBA SEAMLESS, POSTMATES INC., UBER TECHNOLOGIES, INC., in its own right and as parent of wholly owned subsidiary UBER EATS,

Defendants-Appellants,

DOORDASH, INC.,

Defendant.

On Appeal from the United States District Court for the Southern District of New York, Case Nos. 20-CV-3000 and 20-cv-5134 (LAK)

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members conduct substantial business online. Indeed, e-commerce transactions in the United States exceeded $1 trillion in 2022. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales, 4th Quarter 2022* (Feb. 17, 2023), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

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[1] No counsel for a party authored this brief in whole or in part, and no party, party's counsel, or person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

The enforceability of online contracts is therefore of critical importance to the Chamber and its members, as well as to the Nation's economy more generally.

Moreover, many of the Chamber's members regularly employ arbitration agreements in their online contracts with consumers. Arbitration allows them to resolve any disputes that may arise promptly and efficiently while avoiding the high costs associated with traditional litigation. Studies repeatedly confirm that arbitration is just as fair, and also speedier, less expensive, and less adversarial when compared to litigation in court. In reliance on the legislative policy embodied in the Federal Arbitration Act and the U.S. Supreme Court's consistent affirmation of the legal protection the Federal Arbitration Act provides for arbitration agreements, the Chamber's members have structured millions of contractual relationships—including enormous numbers of online contracts—to include arbitration agreements.

The Chamber has a strong interest in this case and in reversal of the judgment below because the district court's decision undermines the enforceability of these widely-used agreements that are protected under

federal law—depriving businesses and claimants alike of the benefits of arbitration.

INTRODUCTION AND SUMMARY OF ARGUMENT

Almost all of the plaintiffs in this case agreed to broadly written arbitration provisions that, by their plain terms, cover the claims that those plaintiffs assert here. The district court, however, refused to enforce any of those arbitration agreements. It concluded that all of the arbitration agreements at issue were unenforceable in the context of claims that the district court believed lack a nexus to the underlying contracts. It also concluded that the plaintiffs who used the Grubhub platform did not agree to Grubhub's terms, including the arbitration provision, in any event.

The district court was wrong on both counts.[2]

First, the district court's refusal to enforce the arbitration agreements as written contravenes the Federal Arbitration Act. The Supreme Court has repeatedly held that the FAA generally requires

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[2] As Uber persuasively explains, the district court should not have addressed the question of whether Uber's arbitration provision is enforceable because that provision contains a delegation clause, and plaintiffs did not specifically target the enforceability of the delegation clause. Uber Br. 13-29. However, because the Grubhub terms provide that a court should decide the enforceability of Grubhub's arbitration provision, the Chamber focuses on the merits of the district court's holding that the arbitration clauses are not enforceable with respect to the claims in this case.

courts to enforce arbitration agreements according to their terms. They may not apply rules that single out arbitration agreements for disfavored treatment. Because New York does not impose a nexus limitation on other types of contract terms, the lower court's application of such a requirement to the arbitration agreements at issue here runs headlong into the FAA. The district court's premise that consumers are harmed by agreeing to arbitrate a broad range of disputes additionally reflects the precise hostility to arbitration that Congress prohibited when it enacted the FAA.

That said, this Court need not reach the FAA preemption question raised by the district court's application of a state law nexus requirement, because the claims in this case ***do*** have a nexus to the underlying contracts.

Second, the district court's denial of Grubhub's motion was also wrong because the court's rejection of Grubhub's contract formation process conflicts with the overwhelming consensus of decisions upholding similar processes, including decisions of this Court. The district court insisted that Grubhub users should have been required to manifest their assent to the contract terms by checking a separate box or taking some

action other than pressing an order-completing button that was next to an acknowledgment of, and link to, the contract terms. But that ruling conflicts with *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017), in which this Court upheld a materially identical process that also did not require users to click on a separate check box.

The district court's erroneous approach to contract formation, if adopted, would generate substantial uncertainty for businesses that implemented contracting procedures in reliance on the decisions of this and other courts. And given the ubiquity today of electronic commerce, uncertainty about the standards for online contract formation would impose massive and unwarranted costs on the tens of thousands of businesses that enter into transactions in the digital economy.

The district court's decision should be reversed.

ARGUMENT

I. The FAA Requires Enforcement Of The Arbitration Agreements In This Case Because The Claims Here Are Expressly Covered By The Broad Terms Of The Agreements.

The district court's holding that the arbitration agreements here are unenforceable as overbroad is preempted by the FAA and wrong even on its own terms.

Section 2 of the FAA makes arbitration agreements "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 has explained that "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)); *accord Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

Through the FAA, "Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Epic Sys.*, 138 S. Ct. at 1612 (quoting 9 U.S.C. § 2). In particular, the FAA requires courts, with narrow exceptions, to "enforce arbitration agreements according to their terms," *id.*, and bars application of rules that single out arbitration agreements for less favorable treatment than other contract terms.

Notwithstanding the FAA's mandate, the district court refused to enforce the parties' arbitration agreements according to their terms.

Instead, it held that, either as a matter of contract formation or unconscionability, the agreements were overbroad and could not be enforced as applied to claims that lack a "nexus to the underlying contracts." A-265. Echoing one commentator's pejorative characterization of broadly written arbitration agreements as "infinite arbitration clauses," the district court concluded that it would yield "absurd results" to enforce the agreements as written. A-262-263 (quotation marks omitted).

The district court's criticism of the breadth of defendants' arbitration agreements ignores the compelling reasons why parties draft arbitration agreements in broad, all-encompassing terms. Before businesses did so, they faced extensive collateral litigation over the scope of their arbitration clauses, litigation that undermined the FAA's purposes and generated needless uncertainty and expense.

The district court's refusal to enforce the arbitration agreements at issue violated the FAA. The nexus requirement applied by the district court both imposes restrictions on arbitration agreements that do not apply to contracts in general and rests on the very hostility to arbitration that Congress prohibited by enacting the FAA.

And even if that were not the case, courts must evaluate contracts based on the actual claims before them, not remote hypotheticals, and the claims in this case *do* have a nexus to the contracts. Thus, the district court's conclusion was incorrect on its own terms—which is sufficient for this Court to reverse without addressing FAA preemption.

A. Businesses have adopted broad arbitration clauses to avoid the burdens of collateral litigation and secure the benefits of arbitration protected by the FAA.

Nearly three decades ago, this Court described an arbitration agreement covering "any claim or controversy arising out of or relating to the agreement" as "the paradigm of a broad clause." *Collins v. Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995) (quotation marks and alterations omitted).

But over the ensuing years, businesses discovered that even that broad language was insufficient to cover, with certainty, the full range of claims that plaintiffs might assert and avoid burdensome collateral litigation over the scope of the arbitration clause.

A federal district court in Alabama, for example, held that a wireless carrier's arbitration clause covering "any and all disputes and claims (including but not limited to claims based on or arising from an

alleged tort) arising out of relating to this Agreement" did not cover a Fair Credit Reporting Act claim based on a credit check that occurred prior to, albeit on the same day as, the execution of the contract. *New v. Cingular Wireless, LLC*, 2006 WL 8436901, at *1, *7-9 (N.D. Ala. Sept. 21, 2006).

The court observed that the parties could have agreed to a broader clause, such as one covering "*all controversies which may arise between us.*" *Id.* at *8 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kirton*, 719 So.2d 201, 202 (Ala. 1998)); *see also, e.g.*, *Church v. Gruntal*, 698 F. Supp. 465, 469 (S.D.N.Y. 1988) (holding that an arbitration clause did not apply to RICO and New York state law claims that arose in connection with the investment relationship but prior to the execution of an investment agreement, because the arbitration clause was limited to matters "arising out of or related to this contract").

In more recent years, courts have reached similar results, concluding that the language "arising out of or related to the agreement" is not broad enough to cover, for example, claims for fraud or false advertising. *See, e.g.*, *Cavlovic v. J.C. Penny Corp., Inc.*, 884 F.3d 1051, 1060 (10th Cir. 2018) (false advertising); *Armor All/STP Prods. Co. v.*

TSA Prods., Inc., 337 F. Supp. 3d 156, 170-71 (D. Conn. 2018) (unfair competition, false advertising, and trademark and copyright infringement); *Mohebbi v. Khazen*, 2014 WL 6845477, at *10 (N.D. Cal. Dec. 4, 2014) (false advertising predating the agreement).

It is no surprise that businesses, faced with routine—and sometimes successful—attacks on the scope of their arbitration agreements, have accepted courts' invitation to avoid scope disputes by requiring arbitration of all disputes or claims that may arise between the parties, or at minimum all disputes arising out of the parties' relationship. That approach has the virtue of being simple to understand and easy to apply without the need for protracted litigation into questions of scope—furthering "Congress' clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983).

Certainly, the alternative to broadly written clauses is undesirable. Attempting to predict and then list every category of claim that may arise is not only a fool's errand, but also would make arbitration agreements substantially longer and harder to read, eliminating the practical

benefits of using straightforward language. And while businesses commonly carve out certain claims from arbitration, as Uber and Grubhub did here, attempting to list *all* theoretical exceptions to an otherwise broad clause faces similar difficulties, and again invites litigation over the reach of the carve-outs.

The upshot is that businesses often use straightforward, broadly written language in their arbitration clauses to avoid the very costs and burdens of litigation that the parties contracted to avoid. In reliance on the FAA's robust protection of arbitration agreements, businesses understandably structure their agreements to avoid "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995).

B. The FAA preempts the district court's application of state contract doctrine to manufacture a nexus requirement.

The district court's interpretation of state law to prevent enforcing these reasonable and practical contractual decisions is preempted by the FAA. First, that interpretation violates the FAA's equal-footing principle because it treats arbitration clauses less favorably than other contractual

terms. Second, it rests on the premise, impermissible under the FAA, that arbitration is an inferior mode of dispute resolution.

1. The district court's nexus requirement violates the FAA's equal footing principle.

Section 2 of the FAA "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Section 2's savings clause thus prohibits courts from invaliding arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). And that is true even if the discriminatory rule is cloaked in the guise of "a doctrine normally thought to be generally applicable, such as … unconscionability." *Id.* at 341; *cf. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 534 (2012) (per curiam) (vacating unconscionability holding and remanding for reconsideration "under state common-law principles that are not specific to arbitration and not preempted by the FAA").

This "equal-treatment principle" means that the FAA preempts not only laws that outright prohibit arbitration agreements, but also "any

rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017).

For the reasons explained by Uber and Grubhub, the district court erred in couching its concerns about the breadth of the arbitration agreements under the rubric of contract formation rather than enforceability. *See* Uber Br. 23 n.5; Grubhub Br. 62-63. For purposes of FAA preemption, however, the distinction is irrelevant.

The Supreme Court in *Kindred* expressly held that discriminatory state-law rules making arbitration agreements harder to form than other contracts are just as impermissible as rules making arbitration agreements harder to enforce once formed: "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once properly made." 581 U.S. at 251-52. As the Ninth Circuit recently summarized, *Kindred* and the U.S. Supreme Court's other cases have "made clear that the FAA's preemptive scope is not limited to state rules affecting the enforceability of arbitration agreements, but also extends to

state rules that discriminate against the formation of arbitration agreements." *Chamber of Commerce v. Bonta*, 62 F.4th 473, 483-84 (9th Cir. 2023).

The district court's holding that defendants' arbitration provisions are impermissibly broad reflects an arbitration-specific rule. The district court did not identify any other types of contract clauses that New York invalidates on the ground that they lack a nexus to the underlying contract or transaction. And, to the contrary, New York law is replete with examples of such clauses being enforced.

Forum-selection clauses, for example, routinely extend beyond claims with a nexus to the underlying contract. As the Supreme Court has explained, "[a]n agreement to arbitrate … is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). The general rule is that a forum-selection clause governing "any dispute arising" between the parties is "mandatory and all-encompassing" and applies to all claims. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2, 20 (1972); *see also*, *e.g.*, *Starkey v. G Adventures, Inc.*, 796 F.3d 193, 197-98 (2d Cir. 2015) (enforcing forum-selection clause covering "any and all disputes"). New York courts follow the same rule

and enforce broad forum-selection clauses. *See, e.g.*, *Camacho v. IO Practiceware, Inc.*, 136 A.D.3d 415, 416 (2d Dep't 2016) ("any dispute" between the parties); *Premium Risk Grp., Inc. v. Legion Ins. Co.*, 294 A.D.2d 345, 346 (2d Dep't 2002) ("all disputes"). The FAA's equal-footing principle bars New York from applying a different rule to arbitration clauses.

Other examples of contract terms enforced without a nexus requirement include general releases or otherwise broad releases. Parties to litigation (or threatened litigation) commonly agree to releases that cover claims that were not asserted in the underlying litigation. And New York law allows parties to use "broad, all-encompassing language" to release both known and unknown claims. *Desiderio v. Geico Gen. Ins. Co.*, 107 A.D.3d 662, 663 (2d Dep't 2013) (citing *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 952 N.E.2d 995, 1000 (N.Y. 2011)). Thus, New York courts have long enforced a "general release" that releases "'all claims of any and every kind.'" *Hallmark Synthetics Corp. v. Sumimoto Shoji New York, Inc.*, 232 N.E.2d 646, 647 (N.Y. 1967) (holding that the "general release constituted a release of all of the claims and not merely those arising under [the] contracts" that were the subject

of the parties' prior dispute); *Spector v. Sovereign Constr. Co.*, 45 A.D.2d 673, 673 (1st Dep't 1973) (enforcing a "general release of all existing claims and demands whatsoever").

Because New York law does not require other types of contract terms to be limited in scope to the underlying contract or transaction, Section 2 of the FAA preempts New York from imposing such a limitation on arbitration provisions.

2. The district court's nexus requirement reflects impermissible hostility to arbitration.

The district court identified nothing unfair or one-sided about the terms of defendants' arbitration provisions. Its belief that the breadth of a mutual agreement to arbitrate can render the agreement unenforceable can only rest on the assumption that a consumer is harmed by agreeing to arbitrate a broad range of disputes. The assumption that arbitration is less desirable than litigation in court embodies the very hostility towards arbitration that the FAA prohibits.

For decades, the Supreme Court has reiterated that "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" is "far out of step with our current strong endorsement of the federal statutes favoring this method

of resolving disputes." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *accord*, *e.g.*, *14 Penn Plaza LLC*, 556 U.S. at 266; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Congress enacted the FAA "precisely to still" any "cry of 'unconscionable!' [that] just repackages the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). The Court has therefore rejected arguments that an arbitration agreement should not be enforced based on assertions that arbitration is less fair than litigation in court or will yield results less favorable to claimants. *See Gilmer*, 500 U.S. at 30-33; *Rodriguez de Quijas*, 490 U.S. at 479-84.

Allowing the ruling below to stand would frustrate the FAA's protection of "parties' freedom to determine the issues subject to arbitration" and to obtain the benefits of arbitration for those issues. *Viking River*, 142 S. Ct. at 1923 (quotation marks omitted). Congress recognized "the costliness and delays of litigation … can be largely eliminated by agreements for arbitration." H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924). Arbitration offers a "quicker, more informal, and often cheaper resolution[] for everyone involved." *Epic Sys.*, 138 S. Ct. at 1621.

The "benefits of private dispute resolution" are myriad—including "lower costs" and "greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010).

Empirical analyses bear out the Supreme Court's assessment. In the consumer context, for example, claimants obtain outcomes in arbitration equal to—if not better than—the outcomes in litigation. A study released by the Chamber's Institute for Legal Reform surveyed more than 40,000 consumer arbitration cases and 90,000 consumer litigation cases resolved between 2014 to 2021 and found that consumers were over 12 percent more likely to win in arbitration than in court. Nam D. Pham, Ph.D. & Mary Donovan, *Fairer, Better, Faster III: An Empirical Assessment of Consumer and Employment Arbitration* 9, 11 (Mar. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf (reporting win rates of 41.7% in arbitration compared to 29.3% in litigation). In addition, the median award won by consumers who prevailed in arbitration was over three times the median award won by consumers in court. *Id.* at 13 ($20,356 in arbitration compared to $6,669).

Not only do claimants fare better or just as well in arbitration, but their claims are also resolved more efficiently. One study determined that arbitrators awarded relief in less than half the time of courts—taking an average of 11 months to decision, versus over 26 months to verdict in state court jury trial cases. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019); *see also, e.g.*, Pham, *Fairer, Better, Faster III*, *supra*, at 5-6, 11-12 (reporting that average resolution for consumer arbitration was over 25% faster than litigation). That speed derives in large measure from the decreased procedural complexity and costs of arbitral proceedings. *E.g.*, Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008).

Notwithstanding arbitration's benefits and the FAA's "liberal federal policy favoring arbitration" (*Concepcion*, 563 U.S. at 339), the ruling below rests on the assumption that there is something unfair or harmful about agreeing to arbitrate disputes that (in the court's view) lack a nexus to the underlying contract. That approach "'stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.'" *Concepcion*, 563 U.S. at 352 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It therefore is preempted.

C. The claims in this case have a nexus to the underlying contracts in any event.

Even setting aside the FAA, the district court's decision was wrong. As Uber and Grubhub explain, the antitrust claims in this case are related to the plaintiffs' underlying contracts and their use of the Uber, Postmates, and Grubhub platforms. Uber Br. 33-35; Grubhub Br. 52-60. The plaintiffs' theory is that defendants' alleged anticompetitive conduct affects *all* purchasers of restaurant offerings—both those who purchase directly from the restaurant and those who purchase through third-party platforms. And plaintiffs seek injunctive relief that would affect all such purchasers.

Plaintiffs' decision to assert damages claims for direct purchases and for purchases using third-party platforms *other* than those operated by the defendants—carving out only purchases on defendants' platforms—is a transparent effort to circumvent their arbitration agreements. Plaintiffs' attempt to manufacture a Swiss-cheese claim to evade their contractual obligations fails. The artificial distinctions plaintiffs draw cannot obscure that their claims, which rest on the terms

of the platforms' agreements with the restaurants, in fact do relate to the use of third party platforms to make restaurant purchases and the prices charged for those purchases—the precise subject of plaintiffs' contracts containing the arbitration provisions. *Cf. Collins*, 58 F.3d at 21 (holding that claims arise out of or relate to a contract if the factual "allegations underlying the claims touch matters covered by" the contract) (quotation marks and emphasis omitted).

The district court's remark that the "literal terms" of the arbitration agreements "would require a user of defendants' platforms to arbitrate claims for securities fraud, personal injury, or wrongful termination," A-265, is beside the point.

The Fourth and Eighth Circuits have squarely, and persuasively, held that a court addressing the permissible scope of an arbitration clause should focus on the actual claims before it, and should not assess the agreement's enforceability based on hypotheticals relating to its reach in the "abstract"; nor should a court attempt to "define [the agreement's] outer limits." *Mey v. DIRECTV, LLC*, 971 F.3d 284, 294 (4th Cir. 2020) (citing *Parm v. Bluestem Brands, Inc.*, 898 F.3d 869, 878 (8th

Cir. 2018)). Rather, the question of enforceability should be "tethered to the facts of *this dispute*." *Id.* (emphasis added).

The Eighth Circuit in *Parm* rejected similar hypotheticals offered by the plaintiffs in that case—such as being required to arbitrate "a car accident" or "some other personal injury claim"—because they had nothing to do with the "*actual* allegations in the case." *Parm*, 898 F.3d at 874, 878. The same is true of the district court's hypotheticals here—and they should have no bearing on the enforceability of the clause for the same reason.[3]

This Court could thus reverse the district court simply by looking to the factual allegations in this case and noting that the claims have a

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[3] The district court also cited the Seventh Circuit's decision in *Smith v. Steinkamp*, 318 F.3d 775 (7th Cir. 2003). But *Steinkamp*'s author clarified in a subsequent decision that it would be "untenable" to interpret *Steinkamp* as forbidding broad arbitration clauses: "What we said [in *Steinkamp*] … is that 'absurd results' would ensue if the arising-from and relating-to provisions contained in a payday loan agreement, defining what disputes would have to be arbitrated rather than litigated, were cut free from the loan and applied to a subsequent payday loan agreement that did not contain those provisions." *Andermann v. Sprint Spectrum L.P.*, 785 F.3d 1157, 1159 (7th Cir. 2015). The Seventh Circuit in *Andermann* then compelled arbitration of the claims before it, even though they did not relate to the underlying wireless service agreement with U.S. Cellular, but rather were statutory claims against Sprint, which had later acquired U.S. Cellular and then sent text messages to the plaintiffs advertising Sprint services. *Id.* at 1158.

nexus to the underlying contracts, even assuming *arguendo* that such a requirement were consistent with the FAA (which again, it is not).

II. Grubhub's Contract Formation Process Produces Enforceable Online Contracts.

The district court's assessment of Grubhub's contract formation process is also flawed. Under established principles of contract formation, including this Court's precedents, Grubhub's process for obtaining assent to its terms results in enforceable contracts.

A. This Court has made clear that "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). Both online and off, "mutual manifestation of assent" is required "to form a contract." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 74 (2d Cir. 2017) (quotation marks and alterations omitted). While *Meyer* involved California law, this Court recognized that "New York and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term." *Id.* (quotation marks omitted); *see also Express Indus. & Terminal Corp. v. N.Y. Dep't of Transp.*, 93 N.Y.2d 584, 589-90 (N.Y. 1999).

In both the online and offline contexts, contract terms are binding under New York law if "the user takes some action demonstrating that they have at least constructive knowledge of the terms of the agreement, from which knowledge the court can infer acceptance." *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 25 (2d. Cir. 2010) (citing *Moore v. Microsoft Corp.*, 293 A.D.2d 587 (2d Dep't 2002)). Applying that principle, New York, like many other states, requires only that a reasonably prudent user—here, a smartphone or computer user—be put on inquiry notice of the contract terms. *See Starke v. SquareTrade, Inc.*, 913 F.3d 279, 289 (2d Cir. 2019) (citing 22 N.Y. Jur. 2d Contracts § 29; *Arthur Philip Ex. Corp. v. Leathertone, Inc.*, 275 A.D. 102 (1st Dep't 1949)).

B. The district court concluded that this standard was not satisfied for the plaintiffs who used Grubhub's mobile application or website, because the plaintiffs were not required to "check a box or take any affirmative action indicating that they have assented to" Grubhub's terms. A-257.

But Grubhub's users, whether using a mobile device or a computer, did have sufficient notice of and assent to Grubhub's terms under New York law: they clicked or pressed a button to complete their orders

directly above a conspicuous acknowledgement that "by placing your order you agree to Grubhub's terms of use and privacy policy," with blue hyperlinks to the full terms of use and privacy policy.

The district court's separate-check-box requirement is impossible to square with this Court's opinion in *Meyer*, which upheld a version of Uber's registration process that (like Grubhub's here) did *not* require clicking on a separate check box. This Court recognized that smartphones and mobile transactions are commonplace and concluded that the "uncluttered" design of Uber's payment screen and the use of a link pointing to Uber's terms put a "reasonably prudent smartphone user" on "constructive notice" of those terms. 868 F.3d at 77-79. That smartphone user had "reasonable notice" of Uber's terms because they were "available … by hyperlink" and "the hyperlinked text was itself reasonably conspicuous." *Id.* at 78-79. So too here.

Courts in this Circuit and elsewhere have overwhelmingly held that the same or similar means of presenting contract terms provides sufficient notice for contract formation. *See* Grubhub Br. 26-32. After all, providing a link to the full terms of service along with an acknowledgment that completing the transaction constitutes assent to

those terms is simply the twenty-first century equivalent of printing terms on the back of a hard-copy form, and clicking the link is the twenty-first century equivalent of turning the document over.

This Court in *Meyer* cited with approval *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), in which a federal district court offered the following instructive analogy: Imagine that a customer takes an apple from a roadside bin with a sign that reads, "[b]y picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign." *Id.* at 839. As that court explained, nobody would dispute that those terms bind the customer whether the customer chooses to review them or not. *Id.* at 839-40 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991)).

That principle applies equally in cases in which a company uses a hyperlink to its terms to make those terms available to the user. In today's world, the existence and function of hyperlinks is not a source of mystery or confusion. As another Southern District judge put it a decade ago: "Not so long ago, the Second Circuit could not discuss the hyperlink without defining the innovation for its readers. . . . Nearly two decades later, it is simply assumed that persons navigating the Internet

understand hyperlinks as means of connecting one webpage to another." *Adelson v. Harris*, 973 F. Supp. 2d 467, 483 (S.D.N.Y. 2013); *see also Fteja*, 841 F. Supp. 2d at 839.

What was true in 2013 has become even more true by the time plaintiffs clicked to accept Grubhub's terms nine years later, in 2022. Indeed, given the ubiquity of smartphones and other mobile devices, as well as laptop computers, using links to navigate to related pages on the Internet is an everyday occurrence. E-commerce transactions are rapidly growing in number: As the Supreme Court recognized five years ago, "[t]he Internet's prevalence and power have changed the dynamics of the national economy"—and the Court supported that conclusion with data showing that "e-commerce grew at four times the rate of traditional retail" in 2016 and that there is "no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

The explosion in the use of smartphones is equally well documented. This Court in *Meyer*, for instance, echoed the Supreme Court's colorful observation that "'modern 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 human

anatomy.'" 868 F.3d at 77 (alteration in original; quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). The *Meyer* court further cited empirical evidence showing that nearly two-thirds of American adults owned a smartphone as of 2015 (*id.*)—a figure that had grown to 85% as of 2021. *See* Pew Research Center, *Mobile Fact Sheet* (Apr. 7, 2021), http://www.pewinternet.org/fact-sheet/mobile. Indeed, roughly 15% of American adults *exclusively* use their smartphones for broadband access to the Internet. *Id.* And Americans have grown accustomed to using their mobile devices to read documents. *See* Jennifer Maloney, *The Rise of Phone Reading*, Wall St. J. (Aug. 14, 2015), http://www.wsj.com/articles/the-rise-of-phone-reading-1439398395.

Just as obvious to today's Internet users is the reality that virtually every online purchase of goods or services carries with it a set of terms and conditions. Accordingly, a reasonable user who signs up for an account and uses the account to purchase goods or services on the Internet knows that (i) the transaction is governed by terms and conditions, and (ii) those terms are available via a link to a different screen. And that is especially so when notice of both facts appears on the user's smartphone or computer screen.

Given these virtually universal understandings of how the Internet works, it is unsurprising that courts have repeatedly held that mutual assent is established by the combination of linked terms and an acknowledgment that a user, by clicking or pressing an adjacent button, is accepting those terms. In *Fteja*, for example, the court held that a sign-up process containing a button, an acknowledgment that clicking the button constitutes assent to the contract terms, and a hyperlink to the terms themselves formed a valid contract because the plaintiff "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough." 841 F. Supp. 2d at 840.[4]

C. Rather than meaningfully confront *Meyer* or the numerous other courts that have upheld similar methods of contract formation, the

[4] In addition to this Court in *Meyer*, many other courts have relied on the analysis in *Fteja*. *See*, *e.g.*, *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 831-32 (S.D.N.Y. 2020); *Hosseini v. Upstart Network, Inc.*, 2020 WL 573126, at *5 (E.D. Va. Feb. 5, 2020); *Harbers v. Eddie Bauer, LLC*, 2019 WL 6130822, at *6-7 (W.D. Wash. Nov. 19, 2019); *Temple v. Best Rate Holdings, LLC*, 360 F. Supp. 3d 1289, 1303-05 (M.D. Fla. 2018); *Beture v. Samsung Electronics Am., Inc.*, 2018 WL 4259845, at *5 (D.N.J. July 18, 2018); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 453-54 (E.D.N.Y. 2013).

district court here faulted Grubhub for not specifying which plaintiffs used the mobile application and which used the website. It then likened Grubhub's checkout page on Grubhub's website to the Amazon order page at issue in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220; *see* A-257-258.

But Grubhub's checkout page, whether on a mobile device or on a computer screen, far more closely resembles the "uncluttered" payment screen in *Meyer* than the order page in *Nicosia*, which "contained, among other things, summaries of the user's purchase and delivery information, between fifteen and twenty-five links, text in at least four font sizes and six colors, and several buttons and advertisements." *Meyer*, 868 F.3d at 78 (distinguishing *Nicosia*) (quotation marks and alterations omitted); *see* Grubhub Br. 7-8 (displaying the Grubhub pages).

The *Meyer* Court further distinguished *Nicosia* because the notice of the terms and conditions "was 'not directly adjacent' to the button intended to manifest assent to the terms, unlike the text and button at issue here." *Meyer*, 868 F.3d at 78 (quoting *Nicosia*, 834 F.3d at 236). Again, this case is more like *Meyer* than *Nicosia*: the acknowledgement on Grubhub's screen that "by placing your order you agree to Grubhub's terms of use and privacy policy" is directly below the button that users

press to place the order. The acknowledgement and the button are therefore "spatially coupled," just as in *Meyer*. *Id.*

The district court also gave short shrift to the "transactional context of the parties' dealings"—in particular, the ongoing relationship between plaintiffs and Grubhub—that reinforces the conclusion that plaintiffs consented to Grubhub's terms. *Meyer*, 868 F.3d at 80.

As explained above, a reasonably prudent mobile device or computer user must realize that an e-commerce transaction involves terms and conditions. That is especially true for consumers, like plaintiffs, who are knowledgeable enough about the Internet to use Grubhub's services through its mobile application or website. Such users must, at minimum (1) have a mobile device or Internet-connected computer; (2) register for an account with Grubhub; (3) provide their credit card or other payment information, as well as their delivery address or location; and (4) know how to and be willing to use Grubhub's platform to obtain food delivery services, including navigating through restaurants' menus and selecting items for purchase.

Finally, as part of their ongoing relationship with Grubhub, plaintiffs received emails in 2021 reminding them that their use of the

Grubhub platform is governed by terms and conditions, including Grubhub's "dispute resolution and arbitration agreement," and notifying them of an update to those terms. *See* Grubhub Br. 32-35. That independently adequate notice underscores the district court's error in concluding that plaintiffs did not subsequently consent to Grubhub's terms when placing orders in 2022.

* * *

For these reasons, the district court erred as a matter of law in concluding that the relevant plaintiffs did not agree to Grubhub's terms and conditions. This Court should reject the district court's separate-check-box requirement and reiterate that a customer has consented to contract terms when, as here, the customer presses a button to complete a transaction after being presented with (1) clear language adjacent to that button stating that clicking or pressing the button manifests assent to the terms; and (2) a hyperlink to the full terms.

CONCLUSION

The Court should reverse the district court's order denying the motions to compel arbitration.

Dated: June 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Cir. R. 29.1(c) because it contains 6,381 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionately spaced typeface using Microsoft Word in Century Schoolbook 14-point type for text and footnotes.

Dated: June 2, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants.

Dated: June 2, 2023

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