APL-2023-00203

Bronx County Clerk's Index No. 33964/2020E

Appellate Division, First Department Case No. 2022-05749

Court of Appeals
of the
State of New York

EMILY WU,

Plaintiff-Appellant,

– against –

UBER TECHNOLOGIES, INC.,

Defendant-Respondent,

– and –

JERRY ALVAREZ, AHMED ELHASHASH, and ARMAN KHAN,

Defendants,

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE BUSINESS COUNCIL OF NEW YORK STATE, INC., AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT AND AFFIRMANCE

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STATEMENT UNDER RULE 500.1(f)

Pursuant to Rule 500.1(f) of this Court's Rules of Practice, *amici curiae* state as follows:

The Chamber of Commerce of the United States of America ("the Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation. The Chamber is affiliated with the Center for International Private Enterprise and the U.S. Chamber of Commerce Foundation. Its subsidiaries include CC1, LLC; CC2, LLC; USIBC Global Private Limited; Article III Films, LLC; and Madison County Record, LLC.

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the 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* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber has frequently filed amicus briefs in the New York courts, including in the Appellate Division in this case.[2]

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[1] Pursuant to Rule 500.23(a)(4)(iii), *amici* state that no party's counsel contributed content to this brief or otherwise participated in the preparation of this brief, and no party, party's counsel, or other person or entity other than *amici*, their members, and their counsel contributed money that was intended to fund the preparation or submission of this brief.

[2] *See also, e.g.,* Amicus Curiae Brief of Chamber of Commerce of the United States of America et al., *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, No. CTQ-2022-00003 (N.Y.) (choice-of-law); Amicus Curiae Brief of Chamber of Commerce of the United States of America, *Britton v. Seneca Meadows, Inc.*, No. 21-00681 (4th Dep't) (mass tort and class action abuses); Amicus Curiae Brief of Chamber of Commerce of the United States of America, *Burdick v. Tonoga,* No. 527117 (3d Dep't) (class certification requirements); Amicus Curiae Brief of Coalition for Litigation Justice, Inc. et al., *In re New York City Asbestos Litig.*, No. APRL-2017-00114 (N.Y.) (punitive damages); Amicus Curiae Brief of Business Council of New York State, Inc. et al., *Caronia v. Philip Morris UAS, Inc.*, No. CTQ-2013-00004 (N.Y.) (medical monitoring); Amicus Curiae Brief of Chamber of

The Business Council of New York State, Inc. ("the Business Council") is the leading business organization in New York State, representing the interests of large and small firms throughout the state. The Business Council's membership is made up of more than 3,000 companies, local chambers of commerce, and professional and trade associations. The Business Council's membership consists of both small businesses and some of the largest corporations in the world. The Business Council serves as an advocate for businesses in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise on the internet. Toward those ends, NetChoice is engaged in litigation, amicus curiae work, and political advocacy. At both the federal and state levels, NetChoice fights to ensure the internet stays innovative and free.

Many of *amici*'s members conduct substantial business online. Indeed, hundreds of billions of dollars' worth of e-commerce transactions are conducted every year in the United States, topping $1 trillion in 2023. *See* U.S. Census Bureau, *Quarterly Retail E-Commerce Sales, 4th Quarter 2023* (Feb. 20, 2024), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf. The enforceability of

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Commerce of the United States of America et al., *Sperry v. Crompton Corp.*, No. 2004-6518 (N.Y.) (indirect purchaser class actions).

online contracts, including those formed through the use of mobile applications, is therefore of critical importance to the Chamber and its members, as well as to the Nation's economy more generally.

Moreover, many of *amici*'s members regularly employ arbitration agreements in their online contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policy embodied in the Federal Arbitration Act and the United States Supreme Court's consistent affirmation of the legal protection the Federal Arbitration Act provides for arbitration agreements, *amici*'s members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

Amici accordingly have a strong interest in this Court's resolution of the appeal and in affirmance of the order below. As explained below, several of plaintiff's arguments for reversal, if accepted, would transform the landscape of online commerce in New York, resulting in significant adverse consequences for businesses operating in New York.

INTRODUCTION AND SUMMARY OF ARGUMENT

The trial court issued a comprehensive decision granting Uber's motion to compel arbitration, and the appellate division affirmed. As Uber's brief persuasively

explains, the lower courts' decisions are correct in their entirety, and plaintiff's arguments are precluded by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and generally applicable principles of New York law.

Amici write separately to focus on three of the arguments presented by plaintiff, which, if accepted, would create enormous disruption for this State's online economy.

First, plaintiff is flat wrong in characterizing Uber's update to its standard contract terms—a revision made in the ordinary course of business for the many millions of its users nationwide—as a "flagrant" ethical violation. Appellant Br. 17. Uber updated its terms of service for all of its users and provided advance notice by email informing users of the update to its terms. Plaintiff nonetheless insists that, because she had filed a lawsuit, Uber was required to carve her out from any communications about its contract terms sent en masse to all of its users.

Plaintiff cites no authority accepting that argument, and that is not surprising. As Judge Nathan—now on the U.S. Court of Appeals for the Second Circuit—put it in rejecting a virtually identical argument in a case involving Lyft, such a "rule would be unworkable in practice." *Haider v. Lyft, Inc.*, 2021 WL 3475621, at *3 (S.D.N.Y. Aug. 6, 2021), *reconsideration denied*, 2022 WL 1500673 (S.D.N.Y. May 11, 2022). "A large corporation like Lyft may face a number of lawsuits at any given

time, and prohibiting routine amendments to their terms of service would essentially freeze their contracts in place." *Id.*

Indeed, because most businesses face litigation at all times, it is commonplace—and inevitable—for businesses to make generally-applicable revisions to their terms during the pendency of litigation. Yet under plaintiff's proposed rule, every business would have to track and exclude every existing plaintiff in a pending lawsuit from routine contract updates.

Moreover, Judge Nathan further explained that the fact that lawyers are doubtless involved in drafting contract terms makes no difference; as she held, nothing in "the New York Rules of Professional Conduct bar[s] routine amendments to a company's terms of service." *Haider*, 2021 WL 3475621, at *3. Rule 4.2—the rule plaintiff relies upon here—applies only to communications by lawyers themselves or targeted to the recipient at lawyers' direction, and the trial court made a factual finding that no such communication occurred here.

Plaintiff offers no basis to disturb that finding. More fundamentally, the heart of her argument appears to be that it is ethically improper for lawyers to draft revisions to contract terms that apply to parties in pending lawsuits. But she has no support for that position. On the contrary, as detailed below, courts routinely enforce post-litigation modifications to standard contract terms.

Second, plaintiff's argument that she did not agree to Uber's contract terms in January 2021 is wrong as a matter of law. There is an overwhelming consensus among courts that the contract formation process used by Uber here is valid. Plaintiff's own principal authorities confirm the enforceability of Uber's process—in which plaintiff and other Uber users clicked both a check box to expressly "agree to the Terms of Use" available by a hyperlink on the same screen and a "Confirm" button to advance past the screen and continue to use the Uber application. While, as discussed below, clicking a separate check box is not required to form an online contract under New York law, its presence makes this an easy case. The "Confirm" button is the digital equivalent of a signature, and the check box is similar to a belt-and-suspenders initialing requirement.

The contrary result urged by plaintiff would generate substantial uncertainty for businesses by undermining the longstanding and predictable rule that contract terms accepted online are enforceable in this State. 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 mobile economy. And it would place New York into square conflict with the rules in other States.

Third, and relatedly, in both the trial court and appellate division, the plaintiff insisted that New York can impose a higher "clear, explicit, and unequivocal"

standard of proof to demonstrate the existence of an arbitration agreement than the ordinary standard for proving other types of contracts. *See, e.g.*, *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assocs., LLP*, 6 N.Y.3d 371, 374 (2006) (quoting *Matter of Waldron [Goddess]*, 61 N.Y.2d 181, 183 (1984)). That approach is barred by federal law. As the trial court here recognized, the Second Circuit held over three decades ago that the FAA preempts application of such a rule to arbitration agreements. Instead, the party moving to compel arbitration must satisfy only the preponderance of the evidence standard that New York courts generally apply to a party seeking to enforce contract terms. *See Progressive Cas. Ins. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993).

The Second Circuit's holding in *Progressive* foreshadowed the U.S. Supreme Court's subsequent decision in *Kindred Nursing Centers Limited Partnership v. Clark*, 581 U.S. 246 (2017), which held that the FAA applies with full force to issues of "contract formation" and prohibits States from making arbitration agreements harder to form than other types of contracts. *Kindred* controls here and makes clear that the Second Circuit in *Progressive* correctly interpreted the FAA.

The order below enforcing the arbitration agreement between plaintiff and Uber should be affirmed.

ARGUMENT

I. The Court Should Reject Plaintiff's Attempt To Transform An Ordinary-Course Revision Of Contract Terms Into A Violation Of The Rules Of Professional Conduct.

There is nothing improper about a company issuing a routine, widespread update of its contractual terms while litigation is pending against the company. Plaintiff's attempts to characterize Uber's routine update as a "flagrant" ethical violation (Appellant Br. 17) are meritless.

To begin with, plaintiff's argument that the January 2021 pop up screen in the Uber application qualifies as an ex parte communication is based on a misguided factual premise. It was plaintiff's own affirmative use of the application that caused the screen to appear. As Uber demonstrated, the screen automatically appeared only when, and because, plaintiff chose to use the Uber application to obtain a ride. *See* Uber Br. 71.

More fundamentally, plaintiff is wrong to argue that the rules of professional conduct prohibit businesses from making routine updates to their contract terms. Plaintiff's primary contention is that Rule 4.2 applies even to contractual terms communicated and agreed to in the ordinary course of business, because lawyers are the ones who draft contracts. *See, e.g.*, Appellant Br. 17-30. But the fact that lawyers draft legal terms cannot possibly mean that presenting those terms in the ordinary

course of business amounts to an improper attorney communication with represented parties.

As Judge Nathan recognized, "drafting revisions" to any contractual term, arbitration agreement or otherwise, is not the same as a communication, by or on behalf of counsel, with a represented party about pending litigation. *Haider*, 2021 WL 3475621, at *3. Simply put, "[a]n amendment to a company's terms of service is not a prohibited communication with a represented party merely because the company's counsel presumably drafted the amendment." *Haider*, 2022 WL 1500673, at *3.

As Uber's brief details (at 74-77), none of plaintiff's cases concludes that a routine nationwide update of contract terms in the ordinary course of business implicates the ethical rules. Plaintiffs' cases from the class-action context are inapposite. For example, the defendants in *In re Currency Conversion Antitrust Litigation* added arbitration clauses to their contract terms for the first time during the pending class action, "solely for the purpose of altering the status of the pending litigation." 224 F.R.D. 555, 569 (S.D.N.Y. 2004) (cited at Appellant Br. 31). The same was true in *OConner v. Agilant Solutions*, 444 F. Supp. 3d 593, 603 (S.D.N.Y. 2020) (cited at Appellant Br. 31). Nothing of the sort occurred here; Uber has had an arbitration provision in its terms long before 2021. Accordingly, these and the other cases plaintiff cites shed no light on the enforceability of updates "to *existing*

arbitration provisions in the ordinary course of business." *Haider*, 2021 WL 3475621, at *2 (emphasis added) (distinguishing *OConner* and *Currency Conversion*).

Plaintiff's unsupported argument also is breathtaking in its implications. It would mean that whenever an individual files a lawsuit, the agreements governing her ongoing relationship with the defendant are effectively frozen in time. Every defendant would have to track and exclude every such plaintiff from routine updates to contracts until and unless the litigation was complete.[3] During pending litigation, defendants' only options would be either (1) to seek consent to such routine contract modifications from every plaintiff's counsel, which would be completely impractical; or (2) discontinue ongoing relationships with plaintiffs who have filed lawsuits to avoid the risk of an ethical violation—something most plaintiffs would presumably find undesirable.[4]

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[3] As Uber demonstrated and the trial court found, plaintiff also cannot satisfy the requirements of Rule 4.2 because she has not shown that Uber had actual knowledge of this lawsuit and her representation by counsel in January 2021. That is an additional reason to reject plaintiff's asserted ethical violations in this case, but, for the above reasons, Rule 4.2 should not be interpreted to require companies to exclude even known plaintiffs from routine updates to contract terms issued in the ordinary course of business.

[4] To be sure, a plaintiff can control whether or not she wishes to continue to do business with a defendant she is suing. But plaintiffs often do wish to continue doing business with the defendant. This case is illustrative; the plaintiff affirmatively chose to make use of the Uber platform after filing suit, and Uber's continued offer of that platform (to all of its users) was based upon acceptance of its updated contract

Plaintiff further argues that Uber and its attorneys were ethically obligated to exclude pending lawsuits from the arbitration provision in Uber's Terms of Use. Appellant Br. 17-23. That argument also lacks any support. On the contrary, just as Judge Nathan did in *Haider*, courts across the country regularly enforce post-litigation modifications to existing contractual terms, including arbitration clauses, that govern a plaintiff's ongoing relationship with the defendant.

For example, the Second Circuit held that a plaintiff was bound by an arbitration clause that he agreed to when making multiple post-litigation purchases. *See Nicosia v. Amazon.com, Inc.*, 815 F. App'x 612, 614 (2d Cir. 2020). *Nicosia* is especially instructive here, given that plaintiff repeatedly used Uber's application after filing her lawsuit and being put on additional notice that her use of the application was governed by Uber's Terms of Use, including the terms' arbitration provision. *See* Uber Br. 51-54.

In the foundational case of *AT&T Mobility LLC v. Concepcion*, AT&T likewise sent the controlling arbitration provisions as an update during the litigation. 563 U.S. 333, 336-37 (2011) (litigation filed in March 2006 and governed by AT&T's "revised" arbitration terms dated December 2006). On these facts, the U.S.

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terms. If plaintiff were correct that it was unethical for Uber to require acceptance of the new terms as a condition of offering future access to the platform to plaintiffs in pending lawsuits, then it would be rational for Uber to decide to discontinue access to its platform for those plaintiffs going forward. Otherwise, plaintiff's approach to the law would "freeze their contracts in place." *Haider*, 2021 WL 3475621, at *3.

Supreme Court issued a sweeping decision on the enforceability of arbitration clauses in service agreements between businesses and consumers.

In another decision, a federal district court in Chicago compelled arbitration notwithstanding the defendant technology company's issuance of a nationwide update to its terms of service (including the arbitration clause) after the litigation was filed. *Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099, at *9 (N.D. Ill. May 15, 2020). The court there rejected the plaintiff's argument that the update was improper, finding "no indication that Shutterfly engaged in improper conduct" by issuing a regular update to its terms of service. *Id.* Other cases have reached the same conclusion. *See Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *2, *7 (E.D. Ark. Mar. 25, 2008) (named plaintiff compelled to arbitration based on changes to arbitration agreement more than a year after suit filed); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 575-78 (W.D.N.C. 2000) (named plaintiff precluded from pursuing class action based on class waiver added during litigation).

All of these cases are consistent with the text of the Federal Arbitration Act and of New York's arbitration statute, both of which mandate the enforcement of agreements to arbitrate "an existing controversy." 9 U.S.C. § 2; NY CPLR § 7501.

Plaintiff necessarily is asserting that the courts in *Nicosia*, *Shutterfly*, and the numerous other cases just discussed both erroneously decided those cases *and* (from

plaintiff's perspective) disregarded breaches of ethical rules. Fortunately, plaintiff's baseless reading of the rules of professional conduct is not the law in any jurisdiction in the United States.

II. This Court Should Adopt The Same Contract Formation Standard Used By The Second Circuit, Under Which Uber's Contract Formation Process Produces Enforceable Online Contracts.

It is routine for businesses, including those operating in New York, to enter into online contracts using similar (and sometimes less robust) contract formation processes than the one Uber used here. But with rare exceptions, courts—most notably including the Second Circuit—have had little difficulty enforcing those online contracts so long as users receive sufficient inquiry notice of the existence of the contract terms. Indeed, under that standard the Second Circuit already upheld a different version of Uber's registration process in *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017). *See also, e.g.*, *Edmunson v. Klarna, Inc.*, 85 F.4th 695, 705-09 (2d Cir. 2023) (relying heavily on *Meyer* in upholding another app-based online contract formation process).

A. Plaintiff Had Inquiry Notice Of The Contract Terms And Manifested Assent To Those Terms.

"While 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 assent is the "touchstone of contract" formation. *Edmunson*, 85 F.4th at

703 (citing *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (Sotomayor, J.)).

While the Second Circuit applied Connecticut law in *Edmunson* and California law in *Meyer* and *Specht*, the principles of contract formation are the same under New York law. *See, e.g.*, *Express Indus. & Terminal Corp. v. N.Y. Dep't of Transp.*, 93 N.Y.2d 584, 589-90 (N.Y. 1999); *see also Edmunson*, 85 F.4th at 702-03 (noting similarity between Connecticut and other states' laws); *Meyer*, 868 F.3d at 74 ("New York and California apply substantially similar rules for determining whether the parties have mutually assented to a contract term.") (quotation marks omitted).

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, 587 (2d Dep't 2002)). Applying that principle, New York—like many other states—requires only that a reasonably prudent person would be on inquiry notice of the contract terms. *See Meyer*, 868 F.3d at 74-75; 22 N.Y. Jur. 2d Contracts § 29.

That standard is readily satisfied here. Plaintiff concedes that she clicked through the January 2021 pop up screen in the Uber application, which:

- concerned only Uber's updated contract terms;
- encouraged users in large bold font "to read our terms in full";
- provided a blue, underlined hyperlink to the full "Terms of Use" right below that encouragement;
- required the user to check a box right next to the statement "By checking the box, I have reviewed and agree to the terms of use"; and
- also required the user to click a "Confirm" button at the bottom of the screen in order to move past the screen and continue using the Uber application.

See Uber Br. 11-13.

As Uber demonstrates, courts have overwhelmingly concluded that the same or similar means of presenting contract terms provides sufficient notice for contract formation. Uber Br. 28-31, 44-47.

In *Meyer*, the Second Circuit upheld a version of Uber's registration process that, unlike the 2021 process here, did *not* require clicking on a separate check box, recognizing that smartphones and mobile transactions are commonplace and concluding that the "uncluttered" design of Uber's payment screen and the use of a link pointing to the Terms put a "reasonably prudent smartphone user" on "constructive notice" of those Terms. 868 F.3d at 77-79; *see also Edmunson*, 85 F.4th at 705-09. The federal appellate court governing New York therefore has already placed both businesses and consumers on notice that it will uphold the validity of a notification process *less* robust than the process Uber used here. As detailed below (at 18-22), this Court should adopt *Meyer*'s approach to avoid

creating a conflict with the Second Circuit on a straightforward question of online contract formation.

And here, the separate check box makes this an easy case. Even plaintiff's principal case, *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), recognizes that courts generally enforce agreements formed under processes that "require a user to affirmatively click a box." *Id.* at 397. The use of a check box makes the interface "even clearer" than the Uber process upheld in *Meyer*: "[t]he explicit acceptance required here [by requiring the user to check a box] is an even clearer signal that a Coinbase account would be subject to terms and conditions, and an even stronger prompt to a reasonably prudent user to click on the link to see what those terms and conditions were before agreeing." *Sultan v. Coinbase, Inc.*, 354 F. Supp. 3d 156, 161 (E.D.N.Y. 2019).

B. The Ongoing Relationship Between Plaintiff And Uber Reinforces The Existence Of A Contract.

The "transactional context of the parties' dealings"—in particular, the ongoing relationship between plaintiff and Uber—reinforces the conclusion that plaintiff consented to Uber's terms. *Meyer*, 868 F.3d at 80. As the Third Circuit has explained, "it is impossible to infer that a reasonable adult in [plaintiffs'] position would believe that" a company was offering to provide recurring access to its services without any kind of contract. *Schwartz v. Comcast Corp.*, 256 F. App'x 515, 519-20 (3d Cir. 2007).

A reasonably prudent smartphone user must realize that an e-commerce transaction involves terms and conditions. That is especially true for consumers, like plaintiff, who are knowledgeable enough about the Internet and mobile devices to use Uber's services through its mobile application. Such users must, at minimum (1) have a smartphone; (2) have registered for an account to use Apple's or Google's application store (for iPhone or Android users);[5] (3) know how to search for and download Uber's application; (4) provide their credit card or other payment information; and (5) know how to and be willing to use Uber's application to obtain ridesharing services.

Moreover, when plaintiff clicked to accept Uber's terms in 2021, there was nothing novel or unusual about being presented with, and agreeing to, contract terms on a smartphone or other mobile device. E-commerce transactions are rapidly growing in number: As the Supreme Court noted six years ago in another context, "[t]he Internet's prevalence and power have changed the dynamics of the national economy," citing data showing that "e-commerce grew at four times the rate of

[5] *See* Where Can I Use My Apple ID, Apple, https://support.apple.com/en-us/HT202659 (last visited May 15, 2024) ("Your Apple ID is the account that you use to access Apple Services like the App Store, Apple Music, iCloud, iMessage, FaceTime, and more."); Google Play - Apps, Google, https://play.google.com/store/apps?hl=en (last visited May 15, 2024) (requiring users to "Sign In" to download applications).

traditional retail" in 2016, "and it shows no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184-85 (2018).

The explosion in the use of smartphones is equally well documented. The Second Circuit in *Meyer*, for instance, echoed the Supreme Court's colorful observation that "'[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 human anatomy.'" 868 F.3d at 77 (alteration in original; quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). And 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* (Jan. 31, 2024), 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.

For all of these reasons, plaintiff is wrong in contending that a reasonably prudent smartphone user would not understand that her ongoing relationship with Uber was governed by terms and conditions.

C. The Court Should Conclude That A Separate Check Box Is Not Required To Form A Valid Contract.

This is an easy case because plaintiff affirmatively clicked a separate check box to accept Uber's Terms of Use. Accordingly, the Court need not opine further about what other types of contract formation processes might suffice under New York law.[6] But should the Court decide to provide more detailed guidance, it should recognize that a check box is not needed; instead, as the Second Circuit held in *Meyer*, the combination of hyperlinked terms and reasonable notice that clicking or pressing a button constitutes accepting those terms is more than enough to form a valid contract.

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[6] In addition to the separate check box that courts have uniformly recognized as sufficient, the hyperlink to Uber's Terms in this case was blue and underlined. That suffices to distinguish cases like *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018), and *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033 (Mass. 2021), although *amici* do not agree with those courts' outdated views of how hyperlinks should be presented. *See Cullinane*, 893 F.3d at 63 (expressing the view that hyperlinks are "commonly blue and underlined"). Another court has rejected as "unpersuasive" a reading of *Cullinane* that would require all hyperlinks to be blue and underlined; as that court explained, what matters is that the hyperlink is sufficiently "conspicuous[]"; for example, "'[t]he mere lack of an underline does not materially change the Court's analysis.'" *Margulis v. HomeAdvisor, Inc.*, 2020 WL 4673783, at *5 (E.D. Mo. Aug. 12, 2020) (quoting *Babcock v. Neutron Holdings, Inc.*, 454 F. Supp. 3d 1222, 1231 n.7 (S.D. Fla. 2020)). Indeed, the Ninth Circuit recently upheld a mobile application contract formation process that used white font on a black background and white borders to signify a hyperlink, noting that these "design elements" denoted the existence of a hyperlink. *Keebaugh v. Warner Bros. Entm't, Inc.*, --- F.4th ----, 2024 WL 1819651, at *10 (9th Cir. Apr. 26, 2024); *see also id.* at *2 (images of the screens).

It's notable that the Uber process at issue in *Meyer* did *not* require clicking on a separate check box. Still, Judge Chin, writing for the Second Circuit, had little difficulty concluding that a user was on "reasonable notice" of Uber's Terms because they were "available … by hyperlink" and "the hyperlinked text was itself reasonably conspicuous." 868 F.3d at 78-79.

Numerous decisions from other courts have upheld similar online registration processes. After all, the use of a link to a company's full terms of service along with an acknowledgment that completing the sign-up process constitutes assent to those terms is simply the twenty-first century equivalent of incorporating terms by reference on the back of a printed form.

For example, the Ninth Circuit recently upheld the validity of a mobile application process that also did not require clicking a separate check box. *See Keebaugh v. Warner Bros. Entm't, Inc.*, --- F.4th ----, 2024 WL 1819651, at *4-10 (9th Cir. Apr. 26, 2024). Instead, the application screen contained a hyperlink to the full terms of service and stated that tapping the "Play" button to play the game for the first time demonstrated the user's acceptance of the linked terms. *Id.* at *2. The court held that this process "puts the reasonable user on notice that they are agreeing to be bound by the Terms of Service." *Id.* at *10.

In addition, the Second Circuit 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, "'By 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. The court explained that those terms would bind the customer whether the customer chooses to review them or not. *See id.* at 839-40 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991)).

That principle applies equally in cases where a company uses a hyperlink to its terms in order to communicate those terms to the user. Indeed, the existence and function of hyperlinks cannot be considered a plausible source of mystery or confusion. As another court put it over 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 is even truer now. Indeed, given the increasing ubiquity of smartphones and other mobile devices, using links to navigate to related pages on the Internet is an everyday occurrence. *See* pages 17-18, *supra*.

Just as obvious to today's Internet users is the reality that virtually every purchase of goods or services online carries with it a set of terms and conditions.

Accordingly, a reasonable user who signs up 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 screen.

Given these commonsense 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 a 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.

The Second Circuit is not alone in relying on *Fteja*; many other courts have done so as well.[7]

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[7] *See, e.g.*, *Lewis v. Samsung Electronics Am., Inc.*, 2023 WL 7623670, at *7 (S.D.N.Y. Nov. 14, 2023); *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 Elecs. 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).

In short, this Court should not depart from the consensus of the Second and Ninth Circuits, and many other courts across the country, that a separate check box is not required to form a valid contract. Instead, it should conclude that, as a matter of New York law, a customer has received sufficient notice of terms when he or she is presented with (1) clear language stating that clicking or pressing a button manifests assent to contract terms and (2) a hyperlink to those terms.

III. Plaintiff's Attempts Below To Invoke A Heightened Standard Of Proof of Contract Formation For Arbitration Agreements Under New York Law Are Foreclosed By Federal Law.

In the trial court and appellate division, plaintiff argued that New York law imposes a heightened standard of proof of contract formation for arbitration agreements than it does for other contracts, and sought to avoid Uber's arbitration provision on that basis. She does not explicitly repeat that argument in this Court, but to the extent she does—or the Court considers that argument—it is flatly foreclosed by the FAA, which preempts such anti-arbitration rules.

Specifically, 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. Accordingly, Section 2's savings clause 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." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333,

339 (2011) (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). The FAA therefore 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).

In *Kindred*, the Supreme Court 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: "the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." 581 U.S. at 254. "Or said otherwise: 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." *Id.* at 254-55.

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) (emphasis added).

The Second Circuit held over thirty years ago that New York's heightened state-law standard requiring "express, unequivocal" proof of an agreement to arbitrate is just such a discriminatory rule. *Progressive*, 991 F.2d at 46 (quoting *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 333 (1978)); *see also God's Battalion*, 6 N.Y.3d at 374 (intent to form an arbitration agreement must be "clear, explicit, and unequivocal") (quoting *Matter of Waldron [Goddess]*, 61 N.Y.2d at 183). The Second Circuit explained that the approach taken in *Marlene Industries* and *Matter of Waldron*—the one subsequently taken in *God's Battalion*—is foreclosed by federal law: "New York law requires that nonarbitration agreements be proven only by a mere preponderance of the evidence," and the FAA "prohibits such discriminatory treatment of arbitration agreements." *Progressive*, 991 F.2d at 46 (citing *Fleming v. Ponziani*, 24 N.Y.2d 105, 110 (1969)).

The U.S. Supreme Court's decision in *Kindred*—which postdates all of the cases from this Court applying a "clear, explicit, and unequivocal" standard to the formation of arbitration agreements—confirms that *Progressive*'s holding is correct. In *Kindred*, the U.S. Supreme Court held that the FAA preempts a Kentucky state law specifying that a general power of attorney "could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." 581 U.S. at 250.

The Kentucky Supreme Court justified that heightened clear-statement rule as "safeguard[ing] a person's 'right to access the courts and to trial by jury.'" *Id.* at 252. In rejecting the Kentucky rule, the U.S. Supreme Court observed that Kentucky "adopt[ed] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* "Such a rule is too tailor-made to arbitration agreements-subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.*

The New York rule plaintiff invoked in the lower courts is indistinguishable from the Kentucky rule invalidated in *Kindred*. The rationale New York courts have provided for the rule—that a higher standard of proof is required because an arbitration agreement involves the waiver of "rights under the procedural and substantive law of the State" (*Marlene Indus.*, 45 N.Y.2d at 333-34)—is the very same rationale that the Kentucky courts offered for their arbitration-specific rule. But that rationale just confirms that the New York rule impermissibly targets arbitration agreements, because the waiver of a jury trial and right to go to court are defining characteristics of such agreements.

The party defending the Kentucky rule in *Kindred* argued that FAA preemption should not apply because Kentucky's clear-statement rule governed all contractual waivers of jury trials and rights to sue in court. But the Supreme Court

squarely rejected that argument, stating arbitration agreements must be subject to the rules that apply to contracts generally. 581 U.S. at 252-54. That principle applies here and requires preemption of New York's rule disfavoring arbitration agreements.

CONCLUSION

The order of the Appellate Division should be affirmed.

Dated: May 17, 2024

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1), I hereby certify that this brief was prepared on a computer using Microsoft Word for Microsoft 365 in double-spaced 14-point Times New Roman font. According to the program's word count function, this brief is 6,448 words, inclusive of point headings and footnotes and excluding signature blocks and the other material specified in Rule 500.13(c)(3).

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