16-2750(L)

(consolidated with 16-2752)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SPENCER MEYER, Individually and on behalf of those similarly situated,

Plaintiff-Counter-Defendant – Appellee

v.

UBER TECHNOLOGIES, INC.,

Defendant-Counter-Claimant – Appellant

TRAVIS KALANICK,

Defendant-Appellant,

ERGO,

Third-Party Defendant.

On appeal from the United States District Court for the
Southern District of New York, No. 15-cv-9796, Hon. Jed S. Rakoff

BRIEF OF *AMICUS CURIAE* FIFTY-ONE LAW PROFESSORS IN SUPPORT OF PLAINTIFF/APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amici are fifty-one law professors who teach, research, and write in the areas of contracts, civil procedure, Internet, commercial, and arbitration law. As academics, they have an interest in ensuring that contract doctrine keeps pace with technology. They are concerned that innovations like online contracting will eviscerate the normative foundation of the entire field: the idea that deals are binding because they stem from the mutual assent of the parties.

Amici believe that the district court's thoughtful opinion should be affirmed. First, the hyperlink to Uber's Terms of Service was not conspicuous. Second, because Uber only required users to click a button labelled "REGISTER"—rather than "I Agree"—it was not apparent that advancing through the company's sign-up process would consummate a contract. Third, contrary to the arguments put forth by Uber and its *amici*, the district court's decision applies well-entrenched principles for gauging assent to *any* Terms of Service—not an arbitration-specific rule. Moreover, despite the dire warnings of Uber and its *amici*, the ruling below will not wreak havoc with electronic contracting. Remedying the deficiencies that

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1(b), *Amici* submit the following disclosure statement: No counsel for any party authored this brief in whole or in part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *Amici* or their counsel made such a contribution. All parties have consented to the filing of this brief.

the district court spotted requires nothing more than making a few key changes to the layout of Uber's website.

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INTRODUCTION

Assent is the first principle of contract law. *See, e.g., Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 197 (1819) ("A contract is an agreement in which a party undertakes to do, or not to do, a particular thing."). As is well known, the process by which contracts are formed has evolved during the past half-century. The mass production of goods spawned the mass production of contract terms: a shift that made transactions more efficient, but also increased the risk that drafters would sneak onerous provisions into the boilerplate. More recently, the rise of the Internet has altered the way in which consumers signal their acceptance of a deal from a signature or a handshake to clicking a mouse or merely visiting a website. But despite these great changes, one constant has remained: "[t]o form a contract, a manifestation of mutual assent is necessary." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012).

When an internet vendor contends that a user agreed to hyperlinked terms, "the dispositive questions are (1) did the [vendor] 'provide reasonable notice of the proposed terms, and (2) did the [user] 'unambiguously manifest assent' to them?" *In re Facebook Biometric Information Privacy Litigation*, No. 15-CV-03747-JD, 2016 WL 2593853, at *6 (N.D. Cal. May 5, 2016) (quoting *Nguyen v. Barnes &*

Noble Inc., 763 F.3d 1171, 1173 (9th Cir. 2014)).[3] Uber cannot meet either prong of this test. First, virtually no user would spot User's "Terms of Service," which is hidden in a nondescript hyperlink that users encounter near the tail end of registering with the company. Second, Uber purported to secure their customers' assent *not* by asking them to push a button that says "I AGREE," but rather one that merely says "REGISTER." To "register" is to sign up for future services—not to form a complex contractual relationship. Each of these factors is an independent basis for upholding the district court's determination that users did not agree to Uber's Terms of Service.

Uber and its *amici* also claim that the Federal Arbitration Act ("FAA") preempts the district court's opinion. They contend that the district court impermissibly held that the arbitration provision in the Terms of Service was not binding because it was not highlighted. But the cases that Uber and its *amici* cite only establish the unremarkable proposition that states cannot insist that arbitration clauses—and only arbitration clauses—be conspicuous. In stark contrast, the court below applied the generally-applicable doctrine that *all* electronic terms must be

[3] Courts are more sanguine about "clickwrap" agreements, which "require a user to affirmatively click a box on the website acknowledging awareness of and agreement to the terms of service before he or she is allowed to proceed with further utilization of the website." *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 397 (E.D.N.Y. 2015). Because Uber does not force users to view its Terms of Service or click an "I agree" button, "the User Agreement to which plaintiff Meyer allegedly assented was clearly not a clickwrap agreement." *Meyer, v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *6 (S.D.N.Y. July 29, 2016).

clearly communicated to the user. This rule applies even-handedly to asserted electronic contracts whether they contain arbitration clauses or not, and thus complies with the FAA's directive to place arbitration clauses on the same footing as other contracts.

Ultimately, Uber's version of a contract is not a contract. We have come a long way from the ideal of an individually-negotiated agreement, but if "contract" is to have any meaning, consumers must at least be *aware* of the allegedly binding terms. Inconspicuous words on a screen do not constitute assent.

ARGUMENT

I. Plaintiff Did Not Assent to Uber's Electronic Contract Because the Hyperlink to Uber's Terms of Service Was Not Obvious and Clicking "Register" Would Not Be Understood as Agreeing to those Terms

As the United States Supreme Court has repeatedly declared, "arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). As a result, "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). Accordingly, when an arbitration provision appears in a purported electronic contract, the drafter must prove that (1) it provided "reasonable notice" of the terms and (2) the consumer "unambiguously manifest[ed] assent to them."

Nguyen, 763 F.3d at 1173; *see also Schnabel*, 697 F.3d at 120 (holding that a consumer is only bound "if he or she is on inquiry notice of the term and assents to it through the conduct that a reasonable person would understand to constitute assent").

"[T]he ultimate question of whether the parties agreed to arbitrate is determined by state law." *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002). Under California law, which governs here, "[m]utual assent is a question of fact." *Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.*, 240 Cal. App. 4th 763, 772 (2016) (internal quotation omitted).[4] As a result, the district court's determination that plaintiff did not consent to Uber's Terms of Service should be "reviewed under a 'clearly erroneous' standard." *Schnabel*, 697 F.3d at 118–19.[5] As we explain next, Uber cannot meet this high burden.

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[4] The district court and the parties have relied largely on California law. *See Meyer*, 2016 WL 4073012, at *3 ("Although the Court does not view the choice between California law and New York law as dispositive with respect to the issue of whether an arbitration agreement was formed, the Court confirms its prior decision to apply California law to the User Agreement."). In any event, New York law also treats the existence of contractual consent as a factual matter. *See, e.g., Bazak Int'l Corp. v. Tarrant Apparel Grp.*, 378 F. Supp. 2d 377, 389 (S.D.N.Y. 2005).

[5] Uber mistakenly claims that a *de novo* standard of review applies, and that this court must "resolve[] doubts as to the arbitrability of a claim in favor of arbitrability." Opening Brief at 12 (quoting *State of N.Y. v. Oneida Indian Nation of N.Y.*, 90 F.3d 58, 61 (2d Cir. 1996)). But Uber conflates two different issues. Although courts "apply the federal policy favoring arbitration when addressing ambiguities regarding whether a question falls within an arbitration agreement's scope, [they] do not apply this policy when determining *whether a valid agreement*

A. Uber Did Not Provide Reasonable Notice of its Terms of Service Because the Hyperlink Was Inconspicuous

In cases such as this, where there is no allegation that a consumer was *actually* aware of electronic terms, the pivotal question is whether he or she was on "inquiry notice" of the terms. *Specht v. Netscape Communications Corp.*, 306 F. 3d 17, 30 (2d Cir. 2002). "In making this determination, the [c]larity and conspicuousness [of the term is] important." *Schnabel*, 697 F.3d at 120 (alteration in original and internal quotation marks omitted).

In the domain of paper contracts, courts find language to be "conspicuous" when it would naturally catch the eye. For example, a "conspicuous" insurance policy exclusion "must be positioned in a place and printed in a form which would attract a reader's attention." *Ponder v. Blue Cross of So. Cal.*, 145 Cal. App. 3d 709, 719 (1983); *see also Esparza v. Burlington Ins. Co.*, 866 F. Supp. 2d 1185, 1201 (E.D. Cal. 2011) ("[c]onspicuous terms include a heading in capitals, language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color"). Releases of liability and warranty disclaimers are only "conspicuous" when they stand out on the page. *See, e.g., Leon v. Family Fitness Ctr. (No. 107), Inc.*, 61 Cal. App. 4th 1227, 1233 (1988)

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exists." *Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 381 (5th Cir. 2008) (emphasis added). *Accord Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 215 (2d Cir. 2014) (presumption in favor of arbitrability applies only to determining the scope of an enforceable arbitration agreement, not to assessing whether an arbitration agreement was validly formed).

("the releasing paragraph is not prefaced by a heading to alert the reader that it is an exculpatory release, contains no bold lettering, and is in the same smaller font size as is most of the document"); *Dorman v. Int'l Harvester Co.*, 46 Cal. App. 3d 11, 18 (1975) ("[a]lthough the disclaimer provision was printed in a slightly larger type face than was the preceding paragraph of the contract, it was not in bold face type, and we are of the opinion that it was not sufficiently conspicuous"); *cf. Cole v. U.S. Capital*, 389 F.3d 719, 731 (7th Cir. 2004) (explaining that the phrase "clear and conspicuous" in federal statute that required that there "must be something about the way that the notice is presented in the document such that the consumer's attention will be drawn to it").

Likewise, electronic terms are not "conspicuous" when they are not eye-catching to computer users. For example, in *Long v. Provide Commerce*, 245 Cal. App. 4th 855 (2016), a California appellate court examined whether a retailer's Terms of Use were enforceable. A flower vendor's website included "a capitalized and underlined hyperlink titled "TERMS OF USE" located at the bottom of each webpage." *Id.* at 859. In addition, when buyers placed an order, they clicked through several screens that featured the same hyperlink. *See id.* Finally, the company sent customers a confirmation email that contained yet another hyperlink. *See id.* at 860. Nevertheless, the appellate panel had little difficulty concluding that the "Terms of Use hyperlinks—their placement, color, size, and other qualities

relative to the . . . website's overall design" fell far short of establishing inquiry notice. *Id.* at 865-66.

In *Nguyen*, the Ninth Circuit applying California law reached the same conclusion. A bookseller's website featured hyperlinks to its Terms of Use "in the bottom left-hand corner of every page," which were visible without scrolling down, "and i[n] close proximity to the buttons a user must click on to complete an online purchase." 763 F.3d at 1177. In addition, users encountered the hyperlink multiple times during the checkout process, where it appeared "either directly below the relevant button a user must click on to proceed in the checkout process or just a few inches away." *Id.* at 1178. However, the court held that the purported terms were not binding, reasoning that "consumers cannot be expected to ferret out hyperlinks to terms and conditions to which they have no reason to suspect they will be bound." *Id.* at 1179.

Even more than the unenforceable hyperlinks in *Long* and *Nguyen*, "the hyperlink here to the 'Terms of Service & Privacy Policy' is by no means prominently displayed on Uber's registration screen." *Meyer*, 2016 WL 4073012, at *8. Uber's own ultra-high-resolution screenshot[6] proves this point:

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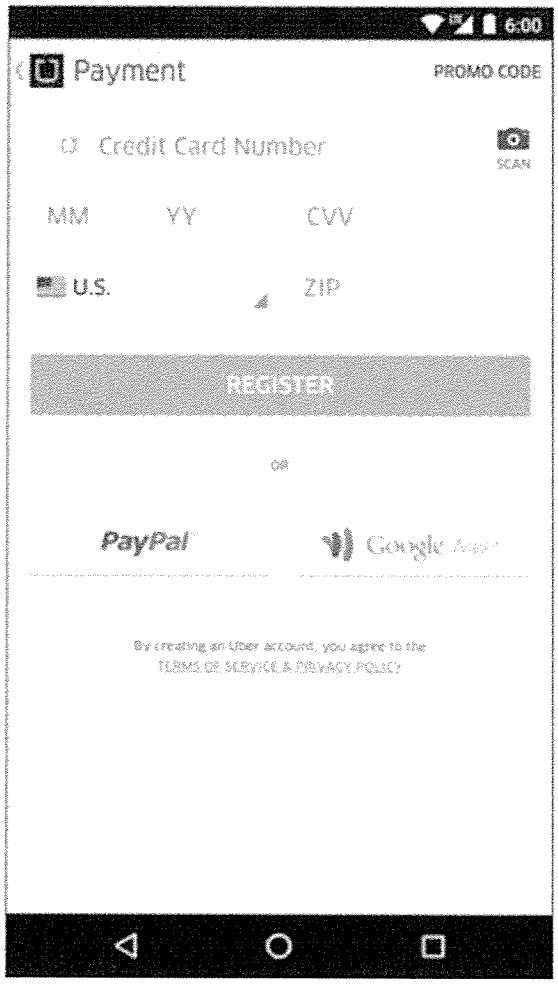
[6] As the district court noted, the plaintiff observed the screen on a Samsung Galaxy S5, which has a 5.1 inch-high screen. *See Meyer*, 2016 WL 4073012, at *4. That is also the height of the image below. Conversely, the images presented in Uber's brief appear to be of a 6 inch-high screen, which is not representative of the device that plaintiff actually used. *See* Opening Brief at 8, 30.



The relevant language is perhaps as small as six point font, and—when crammed onto the tiny canvas of a mobile device—is "barely legible." *Id.* at *4 & n.5. Moreover, the hyperlinked words "Terms of Service" are overshadowed by the white-on-gray contrast of the "Register" button and the colorful "PayPal" and "Google Wallet" icons. *Compare Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 404 (E.D.N.Y. 2015) (refusing to enforce "terms of use" when other buttons on screen were more "user-friendly and obvious" and appeared "in a clearly delineated box"). As the district court below put it, "it is hard to escape the inference that the creators of Uber's registration screen hoped that the eye would be drawn

seamlessly to the credit card information and register buttons instead of being distracted by the formalities in the language below." *Meyer*, 2016 WL 4073012, at *9. Finally, as Uber admits, the hyperlink is "set off from the rest of the text on the page by ample negative space." Opening Brief at 7. From a user's perspective, this visual lacuna suggests that the hyperlink is unimportant, as it is disassociated from the fields with which one needs to interact. In fact, the hyperlink's placement far below the "action" items such as the credit card interface all but ensures that it will remain unseen.[7]

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[7] Uber protests that the court below is "out of sync with the overwhelming consensus of district courts." Opening Brief at 20. But Uber supports this claim by citing a string of distinguishable opinions. Some dealt with hyperlinks that were right next to the button necessary to advance to the next screen. *See, e.g., In re Facebook Biometric Info. Privacy Litig.*, No. 15-CV-03747-JD, 2016 WL 2593853, at *5 (N.D. Cal. May 5, 2016) (hyperlink was "[i]mmediately below the . . . 'Sign Up' button"); *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 197 (D. Mass. 2015) (website "prominently featured a portion of the terms in the center of the screen, above the "continue" button that the users clicked"); *Crawford v. Beachbody*, LLC, No. 14CV1583-GPC KSC, 2014 WL 6606563, at *1 (S.D. Cal. Nov. 5, 2014) ("[i]mmediately above the 'Place Order' box, there was language that said "By clicking Place Order below, you are agreeing that you have read and understand the . . . Terms and Conditions"); *cf. Starke v. Gilt Groupe, Inc.*, No. 13 CIV. 5497 (LLS), 2014 WL 1652225, at *1 (S.D.N.Y. Apr. 24, 2014) (hyperlink appeared *between* action buttons "Shop Now!" and "Sign In Here"). Others featured websites that required consumers to take additional steps to telegraph their assent. *See, e.g., Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 835 (S.D.N.Y. 2012) ("[t]he following sentence appears immediately below [the Sign Up] button: 'By clicking Sign Up, you are indicating that you have read and agree to the Terms of Service'"); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 454 (E.D.N.Y. 2013) (website mandated that users "check the box next to the statement 'I confirm that I have read and agreed to the Terms and Conditions of Service'"); *5381 Partners LLC v. Sharesale.com, Inc.*, No. 12–CV–4263 (JFB) (AKT), 2013

Uber easily could have remedied these deficiencies. Uber could have placed the hyperlinked "Terms of Service" close to the "Register" textbox, or framed the hyperlink in its own textbox. Uber could have used a font that was as at least as large as other primary elements on the screen. And Uber could have *required* users to click on the hyperlink. *See, e.g., Be In, Inc. v. Google Inc.*, No. 12-CV-03373-LHK, 2013 WL 5568706, at *9 (N.D. Cal. Oct. 9, 2013) ("the mere existence of a link" is not enough to create inquiry notice that the "use of [a] website would be interpreted as agreement to the Terms of Service"). But Uber did none of these things.

Finally, prospective riders only encounter the hyperlink when they have almost completed the time-consuming process of signing up for Uber's services. Users start by downloading the Uber app. *See* Appellant's Opening Brief ("Opening Brief") at 7. Then they click a button entitled "Register." *See id.* In turn, this brings up a new screen, on which users are "prompted either to register using Google+ or Facebook, or to enter their name, email address, phone number, and password and click "Next." *Meyer*, 2016 WL 4073012, at *4. Only then does

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WL 5328324, at *7 (E.D.N.Y. Sept. 23, 2013) (website warned users multiple times that they were assenting to terms). And still others involve far more visually-arresting hyperlinks than the one in the case at bar. *See, e.g., Cullinane v. Uber Techs., Inc.*, No. CV 14-14750-DPW, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016) (featuring a different iteration of Uber's hyperlinked "Terms of Service" in which (1) the hyperlink appeared in a text box and (2) was set off in white against a pitch-black background).

the user arrive at the screen with the "Terms of Service" hyperlink. But the purpose of this screen is *not* to highlight the existence of Uber's contract; rather, it is to collect the user's credit card or other payment information. *See* Opening Brief at 7. Even in the unlikely event that a user would want to disrupt the cumbersome registration process to investigate the "Terms of Service," he or she would be taken to an *additional* screen, where he or she would need to click an *additional* button to see the actual provisions. *See Meyer*, 2016 WL 4073012, at *4.

For these reasons, the district court correctly concluded that Uber did not provide "[r]easonably conspicuous notice of the existence of contract terms." *Specht*, 306 F.3d at 35. For that reason alone, Uber's arbitration provision lacks assent and is not enforceable.

B. Alternatively, Plaintiff Did Not "Unambiguously Manifest Assent" to Uber's Terms

Even if Uber *had* provided conspicuous notice, it would still lose because it has not established that consumers unmistakably manifested their assent to its Terms of Service. The problem for Uber is that clicking "REGISTER"—which a user must do to navigate to the next screen—would not necessarily alert a user that he or she has formed a binding agreement.

The bare fact that a consumer has clicked on a button "does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those

terms." *Specht*, 306 F. 3d at 29-30. For example, in *Nguyen*, 763 F.3d at 1178-79, the Ninth Circuit refused to enforce Barnes and Nobles' terms of service even though its customers would likely have noticed the hyperlink to the terms when they clicked the "Proceed With Checkout" button. The appellate panel explained that companies needed to do "something more to capture the user's attention and secure her assent," such as expressly warning users that pressing a particular button constituted acceptance of electronic provisions. *Id.* at 1178 & n.1.

In the same vein, the Second Circuit recently held that a reasonable factfinder could conclude that consumers did not manifest assent to Amazon.com's "conditions of use." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 236 (2d Cir. 2016). Amazon.com's order page contains a button entitled "[p]lace your order." *Id.* at 236. Near this button is a notice that states "[b]y placing your order, you agree to [our] privacy notice and conditions of use"; in turn, the words "privacy notice" and "conditions of use" are blue, indicating that they are hyperlinks to the relevant provisions. *Id.* The Second Circuit reasoned that this arrangement did not clearly telegraph the fact that clicking "[p]lace your order" formed a *contract*:

> Notably, unlike typical 'clickwrap' agreements, clicking '[p]lace your order" does not specifically manifest assent to the additional terms, for the purchaser is not specifically asked whether she agrees or to say 'I agree.' Nothing about the "[p]lace your order" button alone suggests that additional terms apply, and the presentation of terms is not directly adjacent to the "[p]lace your order" button so as to indicate that a user should construe clicking as acceptance.

Id. at 236-37.

Uber's Terms of Service suffer from the same problem. The hyperlink to the provisions appears on the page where users enter their payment information. Once a user has completed this task, he or she clicks a button that only states: "REGISTER." There is no "explicit textual notice warning users to '[r]eview terms' 'or admonishing users that by clicking a button to complete the transaction 'you agree to the terms and conditions in the [agreement].'" *Long*, 245 Cal. App. 4th at 865 (quoting *Nguyen*, 763 F.3d at 1178 & n.1); *see also Friedman v. Guthy-Renker LLC*, No. 2:14-CV-06009-ODW, 2015 WL 857800, at *4 (C.D. Cal. Feb. 27, 2015) (finding no assent where the website "does not require the customer to affirmatively acknowledge the terms of use"). Because clicking "REGISTER" is a far cry from clicking "I AGREE," it cannot be the predicate for contractual liability.[8]

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[8] Uber cites *In re Facebook Biometric Info. Privacy Litig.*, 2016 WL 2593853, at *8 and *Fteja*, 841 F. Supp. 2d at 838, for the proposition that "a user need not click 'I agree' to assent to an agreement." Opening Brief at 27. These cases involve facts that are not present here. In the former, two of the plaintiffs "had to click a box separately affirming that they had read and agreed to the Terms of Use." *In re Facebook*, 2016 WL 2593853, at *7. In the latter, the court relied heavily on the fact that the plaintiff was a savvy internet user "whose social networking was so prolific that losing Facebook access allegedly caused him mental anguish." *Fteja*, 841 F. Supp. 2d at 839. *Fteja* has also been criticized. *See Berkson*, 97 F. Supp. 3d at 403 (E.D.N.Y. 2015) ("*Fteja* and lower court cases that follow its lead mischaracterize important Supreme Court and Court of Appeals precedent regarding contracts and the reasonable person standard that must be applied to

Uber tries to avoid this conclusion by arguing that plaintiff should have understood "that the 'payment' page requesting his credit card information was an offer regarding Uber's services." Opening Brief at 31-32. But this argument is circular. It simply assumes what Uber is trying to prove: that plaintiff knew that he would form a *contract* by clicking "REGISTER." In fact, because "to register" means "to put your name on an official list," Merriam-Webster Dictionary, *http://www.merriam-webster.com/dictionary/register* (last accessed Nov. 7, 2016),[9] consumers would *not* necessarily understand the effect of clicking the button that way. *See, e.g., Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1035 (7th Cir. 2016) ("where a website specifically states that clicking means one thing, that click does not bind users to something else"). Indeed, consumers would more likely believe that once they had "registered," they were now *able* to enter into a series of discrete contractual relationships with Uber when they wanted to order rides.[10]

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inquiry notice of, and manifestation of assent to, the terms in a contract of adhesion.").

[9] *See also Black Diamond CCT Holdings, LLC v. Coupons, Inc.*, CIV. A. No. RDB-02-3701, 2003 WL 25783115, at *6 (D. Md. Dec. 17, 2003) ("to register" is "'[t]o enroll officially or formally' or 'to place one's name in a register'") (quoting American Heritage College Dictionary (3d ed. 1993)); *State v. Erskine*, 29 N.E.3d 272, 279 (Ohio 2015) ("[t]he ordinary and common meaning of 'registered' is '[e]ntered or recorded in some official register or record or list'") (quoting Black's Law Dictionary 1154 (5th ed. 1979)).

[10] Accordingly, Uber's citations to cases that illustrate the unremarkable principle that "an offeree cannot avoid his contractual obligations by failing to take reasonable steps to inform himself of the contract's terms" are irrelevant. Opening

After all, we routinely "register" for things—voting, classes, and wedding gifts, to name a few—without binding ourselves to an exchange.

In sum, Uber cannot establish that plaintiff should have understood that clicking "REGISTER" was the functional equivalent of "I AGREE." That is an independent ground on which this court could affirm the opinion below.

II. The Rule Applied by the District Court is Not Preempted Because It Neither Discriminates Against Arbitration Nor is Specific to Arbitration

Uber and its *amici* also argue that the FAA preempts the district court's ruling. *See* Opening Brief at 13-17; Internet Association Brief at 16-19; Chamber of Commerce Brief at 17-20. They are wrong.

First, Uber and its *amici* contend that the district court's "antipathy for arbitration" triggers the FAA. Opening Brief at 13; Chamber of Commerce Brief at 19. But their evidence of this "hostility" is falling-down flimsy. For example, Uber faults the district court for observing that (1) "arbitration [i]s a means of denying consumers 'access to the courts,'" *id.* at 13 (quoting *Meyer*, 2016 WL 4073012, at *1)) and (2) "'the Congress that enacted that Act in 1925' could not have 'remotely contemplated the vicissitudes of the World Wide Web,'" Opening

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Brief at 34-38. Indeed, "regardless of apparent manifestation of consent," a consumer "is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Knutson*, 771 F.3d at 565 (quoting *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 993 (1972)).

Brief at 15 (quoting *Meyer*, 2016 WL 4073012, at *1)). Uber cites no authority that the FAA bars judges from pointing out commonly-accepted facts about arbitration.

Second, both Uber and its *amici* assert that the district court's distrust of arbitration caused it to apply a special, more-demanding standard of proof to the issue of whether the plaintiff assented. *See* Opening Brief at 14-15; Chamber of Commerce Brief at 18-19; Internet Association Brief at 18-19. Uber and its *amici* base this theory on the following passage from the opinion:

> Since the late eighteenth century, the Constitution of the United States and the constitutions or laws of the several states have guaranteed U.S. citizens the right to a jury trial. This most precious and fundamental right can be waived only if the waiver is knowing and voluntary, with the courts indulg[ing] every reasonable presumption against waiver. But in the world of the Internet, ordinary consumers are deemed to have regularly waived this right, and, indeed, to have given up their access to the courts altogether, because they supposedly agreed to lengthy 'terms and conditions' that they had no realistic power to negotiate or contest and often were not even aware of.

Meyer, 2016 WL 4073012, at *1-2 (internal quotations omitted); *see also* Opening Brief at 10, 14;[11] Chamber of Commerce Brief at 18. But Uber and its *amici* omit

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[11] Uber claims that the district court announced that it planned to "'indulge every reasonable presumption *against*' arbitration." Opening Brief at 10 (emphasis added by Uber). But as the block quote above illustrates, the district court said no such thing. The sentence that Uber quotes only makes the prosaic observation that there is a strong presumption against the waiver of the right to a jury trial. It is Uber's brief—not the district court—that speaks of a presumption "against arbitration."

the sentence that follows: "This legal fiction is sometimes *justified*, at least where mandatory arbitration is concerned, by reference to the 'liberal federal policy favoring arbitration.'" *Meyer*, 2016 WL 4073012, at *1 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)) (emphasis added). Acknowledging the FAA's primacy is hardly "an attack on a defining characteristic of arbitration." Chamber of Commerce Brief at 19. Moreover, Uber and its *amici* do not mention that this supposedly tainted passage appears in the first paragraph of the opinion, and serves as a mere framing device. They make no effort to explain *specifically* how it infects the analysis that follows. And they ignore later parts of the decision in which the district court applied "customary and established principles of contract law." *Meyer*, 2016 WL 4073012, at *6 (quotation omitted).

Third, Uber and its *amici* claim that the opinion below violated the FAA by "requir[ing] *special placement* of an arbitration provision within a contract" and "*special formatting* to draw more attention to an arbitration provision than to other provisions of the contract." Opening Brief at 16; *see* Chamber of Commerce Brief at 20. This is a clumsy attempt at sleight-of-hand. The cases that Uber and its *amici* cite stand for the uncontroversial proposition that states cannot "singl[e] out arbitration provisions for suspect status" through "threshold limitations placed *specifically and solely on arbitration provisions*." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (emphasis added). The injunction against

treating arbitration agreements differently than other contractual terms means that a state legislature cannot demand that arbitration clauses—and only arbitration clauses—be bolded or highlighted. *See id.* at 684, 687 (holding that the FAA eclipses a Montana statute that insisted that "[n]otice that a contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract" (quoting Mont. Code Ann. § 27-5-114(4) (West 1995)). And it means that judges cannot adopt a bright-line rule that the addition of an arbitration provision to an offer is a "material alteration" under Uniform Commercial Code section 2-207. *See Aceros Prefabricados, S.A. v. TradeArbed, Inc.*, 282 F.3d 92, 100 (2d Cir. 2002). These surgically-tailored anti-arbitration rules "do[] not place arbitration contracts 'on equal footing with all other contracts.'" *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

The district court here did not refuse to enforce Uber's contract because of an arbitration-specific conspicuousness requirement. Instead, the district court invoked the well-established principle that assent to *any* alleged Terms of Service hinges on "[r]easonably conspicuous notice of the existence of [the] terms." *Long*, 245 Cal. App. 4th at 865 (quoting *Specht*, 306 F.3d at 35). Indeed, the portion of the opinion about which Uber and its *amici* complain simply explains why the company's registration process would not have put "a reasonably prudent user . . .

on inquiry notice of the terms." *Meyer*, 2016 WL 4073012, at *5 (quoting *Nguyen*, 763 F.3d at 1177). A court must answer this question whether or not a purported electronic agreement mandates arbitration. *See, e.g., Long*, 245 Cal. App. 4th at 867-68 (engaging in the same analysis for a purported electronic forum selection clause); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (same). Thus, the district court applied the general standard for assessing contractual assent—not a "rule[] 'that appl[ies] only to arbitration." Opening Brief at 16 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2010)). For these reasons, Uber's preemption theories fail.

CONCLUSION

Amici respectfully request that this Court affirm the district court's order.

Dated: December 6, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,110 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: December 6, 2016

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