No. 16-2023

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RACHEL CULLINANE, JACQUELINE NUNEZ, ELIZABETH SCHAUL, and ROSS MCDONAUGH, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

UBER TECHNOLOGIES, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Massachusetts

MOTION FOR LEAVE TO FILE BRIEF OF PUBLIC JUSTICE, P.C. AND NATIONAL CONSUMER LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29(b), Public Justice, P.C. and the National Consumer Law Center hereby move for leave to file a brief as *amici curiae* in support of Appellants. Public Justice endeavored to obtain the consent of all parties before filing this motion. While Appellants consented to the filing of the amicus brief, Appellee Uber Technologies, Inc. did not respond to *Amici*'s requests for consent. A copy of the proposed brief is attached to this motion.

INTERESTS OF AMICI CURIAE

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (7th ed. 2015) and Consumer Class Actions (9th ed. 2016) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers, and access to justice for consumers. NCLC frequently appears as *Amicus Curiae* in consumer law cases before trial and appellate courts throughout the country.

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. As part of this project, Public Justice has fought to protect the fundamental principle underlying both contract law and arbitration law: that parties may not be forced to abide by a contract—arbitration or otherwise—to which they have not agreed.

In this case, Uber seeks to impose on consumers terms of which they had no notice and to which they did not unambiguously assent. This is not only contrary to longstanding law, but also fundamentally unfair. Companies should not be permitted to force consumers to abide by terms to which they did not agree, simply because those terms are online.

Public Justice frequently represents consumers challenging unfair arbitration contracts. It, therefore, has a strong interest in ensuring that the law is as clear online as it is off: Consumers who never agreed to arbitrate cannot be forced to do so.[1]

RELEVANCE OF AMICUS BRIEF

As commerce increasingly moves online, the standard governing companies' ability to bind their customers to contract terms over the internet—or, as here, via mobile phone—is becoming evermore important. The proposed *amicus* brief will aid the Court by providing empirical research and arguments not present in the district court opinion or Appellants' brief, demonstrating the need for courts to stringently enforce the rule that, at a minimum, companies seeking to bind consumers to contract terms online must provide conspicuous notice of those terms

[1] Pursuant to Federal Rule of Appellate Procedure 29, Public Justice and NCLC state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than Public Justice and NCLC, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

and a mechanism for consumers to unambiguously manifest their consent (or refusal).

Therefore, Public Justice and NCLC respectfully request that this Court grant leave to file the attached brief.

Respectfully submitted,

Dated: February 16, 2017

s/ Jennifer D. Bennett
Jennifer D. Bennett
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607
(510) 622-8150

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered ECF filers, and they will be served by the CM/ECF system. The following counsel were served with the foregoing document through CM/ECF:

Emma D. Hall
S. Elaine McChesney
Lawrence T. Stanley, JR.
MORGAN LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

/s/ *Jennifer D. Bennett*
Jennifer D. Bennett
Public Justice, P.C.

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Jonathan D. Selbin
Jason L. Lichtman
Lieff Cabraser
Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
(212) 355-9500

Jahan Sagafi
Outten & Golden LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 638-8800

Counsel for Amici Curiae *Public Justice, P.C. and National Consumer Law Center*
(additional counsel on inside cover)

Andrew R. Kaufman
Lieff Cabraser
Heimann & Bernstein, LLP
1250 Fourth Avenue North, Suite 1650
(615) 313-9000

Paul W. Mollica
Outten & Golden LLP
161 Clark Street, Suite 1600
Chicago, IL 60601
(312) 809-7010

Jennifer D. Bennett
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607
(510) 622-8150

Stuart Rossman
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010

CORPORATE DISCLOSURE STATEMENT

Each of the *amici curiae* on behalf of whom this brief is submitted certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series, including Consumer Arbitration Agreements (7th ed. 2015) and Consumer Class Actions (9th ed. 2016) and actively has been involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers and access to justice for consumers. NCLC frequently appears as Amicus Curiae in consumer law cases before trial and appellate courts throughout the country.

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[1] Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, *Amici* affirm that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person, other than *Amici*, their members, and counsel, contributed money that was intended to fund preparing to submitting this brief.

the fundamental principle underlying both contract law and arbitration law: that parties may not be forced to abide by a contract—arbitration or otherwise—to which they have not agreed.

In this case, Uber seeks to impose on consumers terms of which they had no notice and to which they did not unambiguously assent. This is not only contrary to longstanding law, but also fundamentally unfair. Companies should not be permitted to force consumers to abide by terms to which they did not agree, simply because those terms are online.

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INTRODUCTION

It goes without saying that the internet has changed just about everything about the way we do business in our society. That is particularly true for consumers purchasing goods and services on mobile devices. But, as courts have repeatedly held, "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *See, e.g.*, *Register.com v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004); *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 580 (2013) ("[T]he pertinent legal principles do not change simply because a contract was entered into online.")

That holding is no less applicable—or true—where those principles of contract arise in the context of an arbitration clause. While the Supreme Court has made clear that courts cannot single out arbitration clauses in consumer contracts for disfavor simply because they involve arbitration, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), it has also made clear that "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . , courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties *agreed* to arbitrate that dispute.") (emphases altered).

Indeed, in providing the fifth vote for the majority in the Supreme Court's seminal decision in *Concepcion*, Justice Thomas reiterated the continued importance and vitality of state common law defenses to contract formation, writing: "the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress," that is, shows that there are "defects in the making of an agreement." 563 U.S. at 353 (Thomas, J., concurring).

Or, as the Tenth Circuit has put it:

> Everyone knows the Federal Arbitration Act favors arbitration. But before the Act's heavy hand in favor of arbitration swings into play, the parties themselves must agree to have their disputes arbitrated. . . . [E]ven under the FAA it remains a "fundamental principle" that "arbitration is a matter of contract," not something to be foisted on the parties at all costs.

Howard v. Ferrellgas Partners, 748 F.3d 975, 977 (10th Cir. 2014) (Gorsuch, J.).

It is one thing to accept, as in *Concepcion*, the legal fiction that consumers knowingly and expressly waive their constitutional right to a jury trial by ordering goods or services subject to contracts with arbitration clauses, all because of a 1925 statute that sought to protect arbitration between sophisticated commercial parties from a now long-extinct judicial hostility to arbitration. It is quite another thing to add yet another layer of legal fiction by pretending consumers have agreed to contractual terms that do not meet even the most basic contractual principles of offer and assent, principles that apply with no less force simply because they relate

to a purported agreement to arbitrate. The Federal Arbitration Act ("FAA"), for all the deference to arbitration it requires, does not displace the basic rules of contract formation. Even where an arbitration clause is at issue, courts must still determine whether a contract exists in the first place.

It is easy for companies to provide to consumers on the Internet sufficient notice of contractual terms to create a binding contract—indeed, Uber itself has repeatedly done so in other contexts. Nevertheless—perhaps because they want to reduce as much as possible the transaction costs of signing up for a new service or perhaps because they want to obscure the presence of hidden, binding legalese—companies sometimes attempt to enforce contracts that do not satisfy the basic rules of contract formation. *See, e.g.*, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 22-23 (2d Cir. 2002) (Sotomayor, J.) (affirming district court finding of no consent where terms were located only down the page below the download button); *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-36 (7th Cir. 2016) (same, where the defendant's website actively misled the consumer); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1176 (9th Cir. 2014) (same, where user was not required to affirmatively acknowledge the terms of use).

That is precisely what happened in this case. Here, Uber hid its terms of service where an ordinary user could easily overlook them and provided no method for users to unambiguously communicate whether they agreed to those terms. This

Court should reject this attempt to contract by subterfuge. And it should make clear that companies cannot escape the basic requirements of contract formation, simply because their contracts are online.

SUMMARY OF THE ARGUMENT

The law is clear. To form a contract online, companies must provide conspicuous notice of the contract and a mechanism for the consumer to unambiguously manifest assent. This standard should be rigorously enforced. Otherwise, companies like Uber will continue to try to bind consumers to contracts to which they never agreed—and courts will continue to be mired in cases trying to determine whether a reasonable consumer would have seen a tiny link at the bottom of a site or known that clicking a particular button meant assenting to a contract they'd never read. Online companies have the burden of offering contracts in a way that consumers can understand—and unambiguously accept (or reject). This Court should hold them to their burden. This turns out to be an easy case: the barely discernable notice and lack of unambiguous assent are glaring problems.

Providing effective and conspicuous notice is not difficult. One need only look at the kinds of notice Uber itself provides to users in other contexts. In the past, when Uber has required its drivers to agree to arbitration, it has done so using far more prominent notice and unambiguous assent than here. And when Uber has

required passengers to pay so-called premium "surge prices," it likewise ensures that they know exactly what they agree to pay before initiating the transaction.

Companies should not be able to provide less notice to consumers—or bind them to contracts without their unambiguous consent—simply because their contracts are online. Consumers should not bear the burden of trying to ferret out nonobvious terms of service, for fear that they will later learn they are bound to a contract they never knew existed. Regardless of how a customer accesses a company's services, a company should be required to provide effective notice—and an unambiguous method of consent—for any terms to which it wishes to bind its customers. Indeed, available research indicates that mobile consumers need *more stringent* forms of notice on mobile technology, not less.

ARGUMENT

I. WELL-ESTABLISHED CONTRACT PRINCIPLES REQUIRE THAT COMPANIES PROVIDE CONSPICUOUS NOTICE OF CONTRACT TERMS AND AN UNAMBIGUOUS MECHANISM FOR CONSENT.

Nearly fifteen years ago, the Second Circuit set forth two criteria for forming online contracts: "conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers." *Specht*, 306 F.3d at 35. The Massachusetts Appeals Court, along with other courts around the country, has adopted this standard. *See Ajemian*, 83 Mass. App. Ct. at 575; *see also Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1257 (10th Cir. 2012)

(applying same standard); *Long v. Provide Commerce, Inc.*, 200 Cal. Rptr. 3d 117, 125 (Cal. Ct. App. 2015) (same). Both criteria are "essential if electronic bargaining is to have integrity and credibility." *Ajemian*, 83 Mass. App. Ct. at 575 (internal quotation marks omitted).

This two-part standard is grounded in core principles of contract law, and balances protection of consumers in the dynamic web-based environment with web retailers' ability to experiment with the design of their web portals.

As seen below, retailers often meet this standard by adopting what have come to be known as "clickwrap" contracts—interfaces that require a customer to expressly click a button that states that they agree to the terms of service before proceeding. While it possible that such assent could be unambiguously manifested by customers through *other* technological means, the *particular* method deployed by Uber—a method never before approved by this Court or Massachusetts courts—fell far short of doing so.

The only way to avoid this conclusion would be to water down the notice-and-assent standard for mobile apps. This would disturb the careful balance that courts considering mobile contracts have struck. Online customers, already operating at a bargaining disadvantage, could be pushed unknowingly by online retailers into contracts that they never contemplated. Mobile apps, however convenient, must not be allowed to run roughshod over the well-settled contractual

requirement of assent. This Court should make clear that the legal standard applied by the Second Circuit in *Specht* and the Massachusetts Appeals Court in *Ajemian* for examining notice and assent in internet contracts applies with equal force in this Circuit—and that companies cannot water down that standard simply because their services are online.

A. This court should affirm that online and mobile contracts require unambiguous assent.

Offline, contract formation is commonly achieved by a written contract (notice), which is accepted by signing (unambiguous assent). Many companies have replicated this formulation online by preventing customers from accessing goods and services until they have been shown the company's terms of service (notice) and clicked a button stating that they agree to those terms (unambiguous assent).

These so-called "clickwrap" contracts have generally been approved by courts. *See, e.g.*, *Mohamed v. Uber Techs., Inc.*, 109 F. Supp. 3d 1185, 1190-91 (N.D. Cal. 2015), *reversed in part on other grounds*, 836 F.3d 1102 (9th Cir. 2016) (interface in which drivers could not access app without clicking a button marked "Yes, I agree" beneath the phrase "By clicking below, you acknowledge that you agree to all the contracts above," with the contracts hyperlinked, and then clicking "Yes, I agree" on a screen containing text stating "Please confirm that you have reviewed all the documents and agree to all the new contracts."); *Nat'l Fed'n of the*

Blind v. Container Store, Inc., No. 15-CV-12984 (NMG), 2016 WL 4027711, at *10 (D. Mass. July 27, 2016), appeal filed (1st Cir. No. 16-2112) ("[T]o enroll online, Plaintiff Lineback must have checked a box that reads 'I agree to the POP! terms and conditions'").

Uber's contract here is not a clickwrap contract. Riders are not required to click a button or check a box, the sole purpose of which is to indicate assent to Uber's terms of service. Instead, Uber contends that riders agree to its terms simply by clicking the "Done" button after entering their credit card information. The problem, of course, is that clicking "Done" is the action riders must take to indicate they are finished entering their credit card information, regardless of whether they also intend to agree to Uber's terms of service—indeed, regardless of whether they even know Uber has terms of service. Clicking "Done," then, is, at best, ambiguous: It is impossible to tell whether a consumer who has clicked "Done" has seen and intends to accept Uber's terms or whether the rider has no idea such terms even exist and merely wishes to register an Uber account. The action for both is exactly the same. This Court has never held that such an ambiguous action can constitute unambiguous assent. Nor have Massachusetts courts.

Requiring consumers to click a separate box or press a separate button that unambiguously states that the consumer assents to contractual terms is easy.

Companies do it all the time. *See, e.g.*, *Bar-Ayal v. Time Warner Cable Inc.*, No. 03 CV 9905(KMW), 2006 WL 2990032, at *9-10 (S.D.N.Y. Oct. 16, 2006) (requiring users to click "Accept" to confirm that they "had the opportunity to read and understand each and every term set forth [in the agreements]."); *Bekele v. Lyft, Inc.*, No. 15-11650-FDS, 2016 WL 4203412, at *8 (D. Mass. Aug. 9, 2016) (finding assent where user "clicked the prominent 'I accept' button at the bottom of the" terms of service).

Indeed, as explained below, Uber itself does exactly that in other contexts. There is, therefore, no technological reason for a company ever to rely on ambiguous actions to demonstrate assent.

Given the ease of providing for unambiguous assent, it's hard to escape the conclusion that the only reason companies like Uber might attempt to garner assent to contractual terms through actions a consumer would do anyway—such as entering their payment information or browsing a website—is to gain "consent" to terms to which a consumer does not actually *intend* to agree, terms a consumer may not even know exist. Uber wants to make it seem like signing up for an account is easy, fast, and risk-free, but it also wants to bind consumers to thirty-five pages of legalese. It can't have it both ways. If Uber wants to bind its customers to a contract, it must clearly notify them and unambiguously gain their assent.

This Court should make clear that companies cannot evade the requirement of unambiguous assent simply by placing an inconspicuous reference to terms of service somewhere on their website (or mobile app). As the Second Circuit held in *Specht*, "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract." *Specht*, 306 F.3d at 29. But mutual assent cannot be determined (let alone unambiguously) if consumers are not offered an express option to back out of the transaction, because they do not assent to the contract's terms.

This Court, therefore, should adopt the holding in *Specht* that at a minimum, companies are required to provide "*conspicuous*" notice that a contract is being offered and that a particular action will constitute acceptance of that contract. *See Specht*, 306 F.3d at 32 (emphasis added). Conspicuous notice is essential to ensuring that a consumer that performs an action that ostensibly indicates assent to contractual terms actually intends to manifest assent to those terms. That is, it is essential to ensuring the fundamental integrity of contract law.

B. This court should strictly apply the conspicuous notice standard.

Providing conspicuous notice online is not difficult. For example, in *Feldman v. Google*, the court held an online contract was validly formed, where the text of the agreement was "immediately visible to the user" upon visiting the webpage, "as was a prominent admonition in boldface to read the terms and

conditions carefully," and an "instruction to indicate assent if the user agreed to the terms." 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007). And in *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit held that a software user had accepted the software company's licensing agreement, where the "software splashed the license on the screen" every time it was used and "would not let [the user] proceed without indicating acceptance." 86 F.3d 1447, 1452 (7th Cir. 1996).

Although the methods of providing conspicuous notice vary, the underlying principle is the same: Notice is conspicuous if it is "immediately visible"—that is, if a reasonable consumer could not miss it, *Feldman*, 513 F. Supp. 2d at 237; *see also, e.g.*, *ProCD*, 86 F.3d at 1452. Where notice is not "immediately visible"—where the design of a website or mobile app obscures the fact that certain conduct will be deemed acceptance of contractual terms—courts have refused to enforce those terms. *See, e.g.*, *Specht*, 306 F.3d at 31; *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 402 (E.D.N.Y. 2015); *Long*, 200 Cal. Rptr. 3d 117.

In *Specht*, for example, Netscape argued that by downloading free software from its website, users were bound by contractual terms, which stated that installing the software constituted consent to those terms. *See Specht*, 306 F.3d at 24, 30. The Second Circuit disagreed. *Id.* at 31. The problem, the court explained, was that while the button to download the software was "immediately visible," the "sole reference" to the contractual terms was not. *Id.* at 23, 31. To

the contrary, the terms would only become visible if users scrolled down below the Download button—an action that was totally unnecessary to download the software. *Id.* at 31. Netscape's webpage, therefore, was "printed in such a manner that it tended to conceal," rather than make conspicuous, "the fact that [downloading the software] was an express acceptance of Netscape's rules and regulations." *Id.* at 32 (internal quotation marks and brackets omitted). Downloading the software, therefore could not constitute an unambiguous manifestation of assent to those rules. *Id.*

Netscape literally placed its terms of service out of sight. Some companies, however, like Uber in this case, have tried more subtle ways of binding consumers to terms without drawing the consumer's attention to those terms. These subtle attempts are no less harmful than the blatant ones: If allowed to stand, consumers are still bound to terms they never agreed to. Courts, therefore, have rightfully rejected them.

In *Long*, for example, the California Court of Appeal refused to enforce a company's terms of use, despite the fact that a link to the terms was technically visible on the website's check-out page. *Long*, 200 Cal. Rptr. 3d 117. Although the link was present on the page, the court held that it was not sufficiently conspicuous. *Id.* at 126. While the company contended that the link was "next to the fields and buttons a consumer must interact with to complete his order," in fact,

to find the link, a consumer would need to look "below the buttons he must click to proceed with the order," "even further below a 'VeriSign Secured' logo and notification," and "still further below a thick dark green bar with a hyperlink for "SITE FEEDBACK." *Id.* Though "no scrolling [was] required" to find the link, given the link's "placement, color, size and other qualities relative to the . . . website's overall design," the court held, the "practical reality" was that, just as in *Specht*, the site "tended to conceal" rather than reveal "the fact that placing an order was an express acceptance of [the] rules and regulations." *Id.* (internal quotation marks and brackets omitted). It, therefore, did not provide sufficiently conspicuous notice. *Id.*

And in *Berkson*, the court held that even a hyperlink that was directly above the sign-in button—and stated that clicking the button would constitute acceptance of the terms—was insufficient to constitute conspicuous notice. 97 F. Supp. 3d at 402. Though the company had linked to the terms of service, the "design and content of the website" ensured that the link was not "readily and obviously" available. *Id.* at 404. While the sign-in button was "very user-friendly and obvious, appearing in all caps, in a clearly delineated box in both the upper right hand and the lower left hand corners of the homepage," the notice of the existence of terms of service was in small font, and was neither in "all caps" nor "bold." *Id.* Thus, the company's small-print notice of terms was "obscured by the physical

manifestation of assent, in this case clicking the 'SIGN IN' button." *Id.* It was not enough, the court made clear, to simply provide the right words. A website must ensure that those words are "conspicuous"—that the user's attention is drawn towards and not away from the notice the company is required to provide.

These cases make good sense. The "conspicuous notice" and unambiguous manifestation of assent standard should be stringently applied. Requiring companies to provide truly conspicuous notice and a mechanism for truly unambiguous consent will ensure that consumers are not bound to contracts they never agreed to; that courts are not mired in endless factfinding to determine whether an ambiguous action should be deemed to manifest assent; and that companies have no incentive to push the envelope to see how inconspicuous they can make their terms and still have them enforced.

As demonstrated above, providing conspicuous notice and unambiguous assent is not difficult. It is just as easy to design a website (or mobile app) where the existence of terms of service—and the action taken to accept those terms—is "immediately visible" as it is to obscure the terms by other features. There is now plenty of case law providing examples of online notice and assent mechanisms that courts will accept as valid as a matter of law. There is no reason that companies like Uber cannot adopt one of these mechanisms. Indeed, in other contexts, it already has.

C. This case exemplifies the need for rigorous application of the notice and assent standard.

There is a wide body of empirical research demonstrating that people who are focused on a particular task will fail to notice unexpected objects or events that are unrelated to that task—even those right before their eyes. *See, e.g.*, Siri Carpenter, *Sights Unseen*, Monitor on Psych., April 2001, *available at* http://www.apa.org/monitor/apr01/blindness.aspx (summarizing research). For example, in one study, participants told to count the number of passes in a basketball game—and focused on that task—famously missed the fact that a person dressed as a giant gorilla walked right through the game. *See id*. Or, for a more mundane example, participants told to focus on a particular shape on a screen are likely to miss entirely the presence of a different shape, even if it's directly in their field of view. *See id*.

This phenomenon—called inattentional blindness—explains why it's so important that companies seeking to achieve meaningful consent to contract terms do not bury their terms in unrelated screens, but instead ensure that consumers' attention is specifically drawn to the terms and that consumers have a mechanism for unambiguously demonstrating that they have seen those terms and assent to them.[2] Uber, here, did precisely the opposite.

[2] This phenomenon also explains why judges, reviewing online and mobile interfaces for the express purpose of determining whether there is sufficient notice

Uber's terms were hidden behind a small link in the middle of a busy screen—a screen that expressly stated that its purpose was to allow customers to link their account with a credit card. Focused on entering their credit card information, it's doubtful that many customers even noticed the link to the terms of service.

And, even if while entering their payment information, Uber customers managed to register that there was a tiny unrelated link to the company's terms, it is even more doubtful that they would have known that clicking the "Done" button would be construed as accepting those terms. The "Done" button was located not near the terms of service link, but instead directly above the field for entering credit card information. And it could only be clicked after that information was entered—making clear that it was meant to indicate that a customer was "done" entering his or her payment information. (In contrast, the ability to click the "Done" button was entirely unaffected by whether a customer clicked the link to the terms of service.) There is no reason that customers would believe that clicking the "Done" button to indicate that they were done entering their payment

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of contract terms, are much more likely to notice links to the terms—and to think that these links are more obvious—than consumers actually interacting with these interfaces in the real world. Consumers, told to focus on something like payment or registration, are likely to miss anything irrelevant to that task, whereas judges evaluating the interface are paying attention specifically to the presence (or absence) of the contract terms.

information would suddenly bind them to pages of terms they likely didn't even know existed.

This problem is not solved simply because above the link to the terms of service—a link that, again, it is likely customers never even noticed—there was an even tinier statement that creating an Uber account would bind customers to those terms. For one thing, even this statement does not provide notice that clicking the "Done" button would constitute acceptance. It states that *creating an Uber account* would constitute acceptance. But nowhere does the app say that clicking the "Done" button is synonymous with creating an account. To the contrary, as explained above, the "Done" button was directly tied to whether a customer had entered a credit card number, seemingly indicating that it meant that a customer was "done" entering this number. Moreover, "create an account" was the title of a previous, different screen in which customers were required to enter their email address, phone number, and a password. Thus, upon reaching the screen which enabled customers to "link" their credit card to their account, many customers would likely reasonably believe they had *already* created an account—and, therefore, had no ability to accept or reject the terms.

In any case, whatever the statement above the link to the terms might mean, most customers would never even see it anyway. It was miniscule and *greyed out*, making it nearly impossible to read under the best of circumstances. Under the

circumstances here, where a customer believed they were merely entering their credit card information and had no reason to be looking for contract terms, the color and size of the statement virtually ensured that most customers would not even notice it.

This is not the "immediately visible" notice basic contract law requires. To the contrary, as one court explained in describing a similar Uber interface, "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 [done] button[ ] instead of being distracted by the formalities in the language below." *Meyer v. Kalanick*, No. 15 CIV. 9796, 2016 WL 4073012, at *9 (S.D.N.Y. July 29, 2016). "Uber's registration [process] 'made joining [Uber] fast and simple and made it appear—falsely—that being a [user] imposed virtually no burdens on the consumer besides payment.'" *Id.* (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 127–28 (2d Cir. 2012); *cf. Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005) (holding that employee had insufficient notice of arbitration agreement where "the tone" of the email that purported to provide notice of the agreement "downplay[ed] the obligations" it imposed and "undersold" its "significance").

It is impossible to tell from Uber's "Link Payment" screen whether a user would actually have noticed—or intended to assent to—Uber's terms of service.

Yet, as explained below, Uber knows very well how to provide conspicuous notice of its terms of service and how to capture the unambiguous manifestation of assent. It simply chose not to do so here. Because of that choice, the plaintiffs risk being bound to terms they never agreed to. And the lower court—and now this Court—are required to spend time examining Uber's interface and hypothesizing what a reasonable consumer might think of it, all the while delaying the adjudication of the plaintiffs' substantive claims.

The costs of companies' decision not to clearly communicate their contracts—and provide consumers an unambiguous method of consent—should not fall on the consumer or the courts. Given that companies are easily able to create online and mobile interfaces that leave no doubt that a consumer unambiguously assented, they should be required to do so.

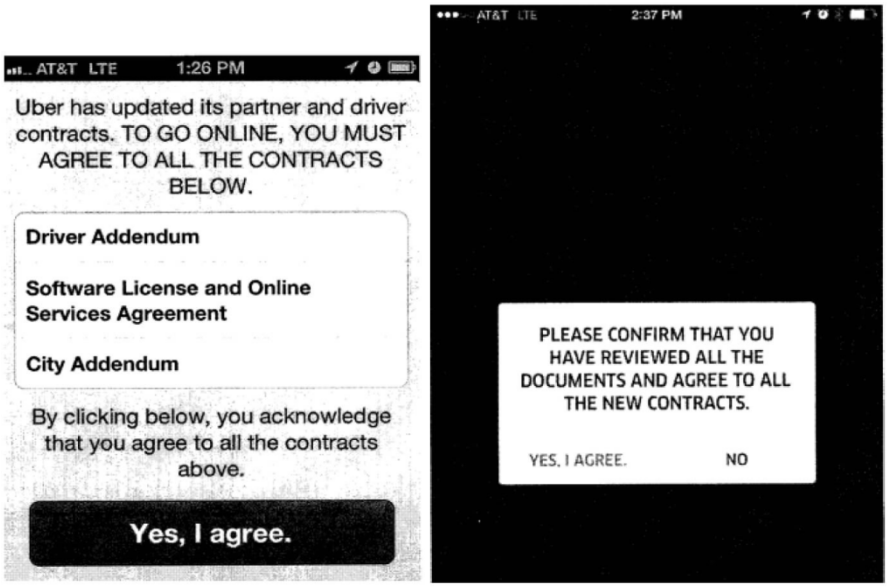
II. UBER KNOWS HOW TO PROVIDE MORE CONSPICUOUS NOTICE WHEN IT CHOOSES TO DO SO.

Mobile businesses can operate perfectly well without duping consumers into waiving away their rights. One need not speculate whether it is unduly burdensome for such businesses to provide effective, conspicuous notice through a smartphone application: Uber's own actions readily establish that it is not.

In *Mohamed*, drivers alleged that Uber violated the Fair Credit Reporting Act and similar state laws through its use of background checks in hiring and firing decisions. 109 F. Supp. 3d 1185. The district court found that the plaintiffs

consented to the terms of the contracts between Uber and its drivers, including arbitration clauses. *Id.* at 1189-90. The drivers in *Mohamed*, like the plaintiffs here, used smartphones to access the Uber application. *Id.* at 1190-91. And, like here, the process of accessing the application included reference to terms of service providing for arbitration of the disputes at issue. *Id.* at 1193. That is where the similarities end.

In order to access the Uber application, drivers were required to pass through two screens. *Id.* at 1190. The top of the first screen stated in all-caps, "TO GO ONLINE, YOU MUST AGREE TO ALL THE CONTRACTS BELOW." *Id.* Below that, the screen provided direct hyperlinks to the contracts in bold type. *Id.* Below that, the screen provided "By clicking below, you acknowledge that you agree to all of the contracts above." *Id.* Only beneath all of that was a button with large texting stating "Yes, I Agree," which, if clicked, sent the drivers to the second screen. *Id.* The second screen consisted only of a box stating (in bold and caps) "**PLEASE CONFIRM THAT YOU HAVE REVIEWED ALL OF THE DOCUMENTS AND AGREE TO ALL THE NEW CONTRACTS**," followed by "YES I AGREE" and "NO" buttons. *Id.* at 1191. The following images were reproduced in the district court's opinion:



Uber's choice of notice mechanism to its drivers in *Mohamed* stands in stark contrast to its choice here with respect to consumers. Unlike the drivers in *Mohamed*, who were required to *twice* indicate their assent to the agreements, the customers here never clicked a button indicating they so agreed. Whereas the notice in *Mohamed* appeared in prominent size and font taking up the whole screen, the binding language at issue here was hidden, greyed out in tiny font buried among much larger features of the screen. And while the driver-sign-up in *Mohamed* featured two screens dedicated solely to providing notice of the contracts and securing assent, here the notice was subtly incorporated into a screen explicitly aimed at securing payment.

Uber has also demonstrated its ability and willingness to provide effective and conspicuous notice in other contexts involving passengers. At times, Uber has employed "surge pricing," a multiplier on the typical fare to reflect increased

passenger demand and/or decreased driver supply. *See O'Connor v. Uber Techs., Inc.*, No. 13-3826, 2015 WL 5138097, at *17 (N.D. Cal. Sept. 1, 2015); Lowrey, *Is Uber's Surge-Pricing an Example of High-Tech Gouging?*, N.Y. Times Mag., Jan. 10, 2014; Kedmey, *This is How Uber's 'Surge Pricing' Works*, Time, Dec. 15, 2014.

When Uber employs surge pricing, it "work[s] on making sure sur[g]e pricing is clear and understandable to riders." Uber, *Uber Help: Accepting surge pricing*, https://help.uber.com/h/707e5567-a8ea-47c0-9e2b-bd2fbc2aa763 (last accessed Dec. 5, 2016); *see also id.* ("[Y]our app screen will let you know if surge pricing is in effect."); Uber, *Uber Newsroom: Clear and Straight-forward Surge Pricing*, https://newsroom.uber.com/clear-and-straight-forward-surge-pricing (last accessed Dec. 5, 2016). That commitment to effective notice results in a screen like this:

Kosoff, *Stop complaining about Uber's surge pricing*, Business Insider, Nov. 1, 2015, http://www.businessinsider.com/uber-surge-pricing-on-new-years-eve-2015-10.

Uber's surge pricing notice is effective in every way that the notice at issue in this case is not. The customer must assent to the surge pricing before she "can even hail the car." *Id.* ("Uber will never spring surge pricing on you without consciously acknowledging what you're paying for."). The application provides the notice in "big bold print so [the customer] can't miss it." *Id.* Indeed, sometimes, when surge-pricing rates are particularly high, Uber has required customers to type in the multiplier manually to affirm that they consent to its use, *i.e.*, "to make sure they know what to expect." *Id.*

It is apparent that Uber views surge-pricing as a critical term of its contracts with passengers, and works to ensure those passengers have effective notice of the price multiplier. It is equally apparent that Uber views the terms of service at issue in this case, including the arbitration clause, as insignificant, and so permits customers to use the service without assenting to the terms, and puts little effort into making the terms a prominent part of the sign-in process..

What constitutes reasonably conspicuous notice does not turn on whether Uber considers the contract provisions at issue important to customers, nor on whether the contractual term involves arbitration (as here) or more generic terms (as in surge pricing). Uber's use of prominent and effective notice of surge pricing shows that Uber itself thinks that giving notice to "a reasonably prudent offeree," *Specht*, 306 F.3d at 35, requires more than small, greyed-out text sandwiched in the middle of a screen used for an entirely different purpose, with no button prompting the customer to assent to the terms.

III. MOBILE CONTRACTING DEMANDS A HIGHER STANDARD OF NOTICE, NOT A LOWER ONE.

The mobile Internet has in many ways changed everything about the modern consumer experience. But as courts have repeatedly made clear, "[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*, 356 F.3d at 403. Yet Uber seems to believe that the brave new world of mobile contracting permits

it to apply a lower standard of notice and assent. It does not. The law requires Uber to provide effective notice regardless of how users interact with Uber's services. *See Long*, 200 Cal. Rptr. 3d at 127 ("[T]he onus must be on website owners to put users on notice of the terms to which they wish to bind consumers.") (citation omitted).

Indeed available research shows that, if anything, the standard of notice for a reasonable consumer who engages in mobile-contracting should be higher, not lower. The length and complexity of a contract is a significant factor in why consumers decide not to read form contracts. *See* Maronick, *Do Consumers Read Terms of Service When Installing Software? A Two-Study Empirical Analysis*, 4 Int'l J. of Bus. & Soc. Res. 137, 144 (2014); Becher & Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DePaul Bus. & Com. L.J. 199, 220-21 (2009). In the world of online and mobile contracting, businesses do not save any costs by shortening or simplifying contracts. As a result, long, difficult-to-read contracts are common, just like the thirty-five pages of legalistic text in this case, *see* Appellants Br. 11. Mobile customers, accustomed to page after page of legalese, may be especially averse to reviewing terms and conditions. *See* Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. of Legal Studies 1 (2014) (finding that only one or two of every thousand internet retail

software shoppers choose to access license agreements, and that the cost of reading and comprehending the contracts are key factors).

Because consumers are so unlikely to actually read and understand the content of internet and mobile contracts, the requirements of reasonable notice should be *more* stringent, not less. The bare minimum often applied is not sufficient to ensure that even a minimal percentage of consumers are aware of the rights they give up.

More stringent notice standards may be particularly necessary for terms that are especially important to consumers. In September 2009, the Federal Trade Commission issued a final consent order resolving allegations that Sears violated Section 5 of the FTC Act by installing tracking software on customers' computers. *See In re Sears Holding Mgmt. Corp.*, No. C-4263 (F.T.C. June 4, 2009), goo.gl/ESw2Mc. The FTC alleged and settled the violations even though Sears had included a description of the tracking software in a user license agreement. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears*, 8 Nw. J. of Tech. & Intell. Prop. 1, 1 (2009). The Commission found this insufficient and required Sears to display the tracking software terms "[c]learly and predominately, and on a separate screen from, any" user agreement. *Sears* at 3. In other words, although "*Sears* did obtain what many would consider[] affirmative consent from consumers

prior to allowing installation of the Tracking Application . . . the FTC disregarded the consent because it was not *informed* consent." Gindin, 8 Nw. J. of Tech. & Intell. Prop. at 19 n.98.

As explained in Section I above, the notice provided in this case fell well below the prevailing standards for reasonable, effective notice. And Uber provided no mechanism at all for customers to register unambiguous assent. That low bar—conspicuous notice and unambiguous assent—asks very little of mobile businesses. Nevertheless, Uber seeks to avoid even this bare minimum—presumably to create the illusion that using its service entails no obligations whatsoever. But Uber cannot lure customers into thinking its service is obligation-free while also imposing upon them page after page of legal obligations. That's not how contract law works.

Courts grant extensive deference to arbitration provisions under the guise that a 1925 statute requires it. But even expansive interpretations of the Federal Arbitration Act do not override basic principles of contract formation. Uber's attempt to smuggle in thirty-five pages of terms through a tiny link on a screen that explicitly stated that it was about something else entirely does not accord with these basic principles.

CONCLUSION

The district court's decision should be reversed.

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Respectfully submitted,
By: /s/ *Jennifer D. Bennett*

Jennifer D. Bennett
Public Justice, P.C.
555 12th Street, Suite 1230
Oakland, CA 94607
(510) 622-8150

Jonathan D. Selbin
Jason L. Lichtman
Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
(212) 355-9500

Andrew R. Kaufman
Lieff Cabraser Heimann & Bernstein, LLP
1250 Fourth Avenue North, Suite 1650
(615) 313-9000

Jahan Sagafi
Outten & Golden LLP
One Embarcadero Center, 38th Floor
San Francisco, CA 94111
(415) 638-8800

Paul W. Mollica
Outten & Golden LLP
161 Clark Street, Suite 1600
Chicago, IL 60601
(312) 809-7010

Stuart Rossman
National Consumer Law Center
7 Winthrop Square, 4th Floor
Boston, MA 02110
(617) 542-8010

Counsel for Amicus Curiae *Public Justice, P.C and National Consumer Law Center*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,186 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

Dated: February 16, 2017

/s/ *Jennifer D. Bennett*
Jennifer D. Bennett
Public Justice, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all parties or their counsel of record are registered ECF filers, and they will be served by the CM/ECF system. The following counsel were served with the foregoing document through CM/ECF:

Emma D. Hall
S. Elaine McChesney
Lawrence T. Stanley, JR.
MORGAN LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

/s/ *Jennifer D. Bennett*
Jennifer D. Bennett
Public Justice, P.C.