22-0557

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

NAJAH EDMUNDSON, individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

—against—

KLARNA, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT[1]

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

[1] No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part. No party or counsel for any party in the pending appeal made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity—aside from amicus curiae, its members, or its counsel—made any monetary contribution intended to fund the preparation or submission of this brief.

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INTEREST OF THE AMICUS CURIAE[2]

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 curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

Many of the Chamber's members conduct substantial business online. Indeed, hundreds of billions of dollars' worth of e-commerce transactions are conducted every year in the United States. Most of those transactions involve online contracts. The enforceability of online contracts is thus of critical importance to the Chamber and its members, as well as the Nation's economy more generally.

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[2] Amicus curiae submits this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties have consented to the filing of this brief.

Moreover, many of the Chamber's members regularly employ arbitration agreements in their online contracts. Arbitration allows those members 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. The Chamber's members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements. By subjecting online contracts that include arbitration provisions to a vague but heightened test for enforcement, the district court has created an unacceptable cloud of uncertainty over those agreements.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trillions of dollars of business are transacted online every year. The businesses involved in these transactions frequently rely on terms and conditions that contain arbitration clauses. Such clauses provide greater predictability in costs of dispute resolution, which better enables businesses to set prices and serve their customers. The Federal Arbitration Act ("FAA") generally requires the courts to enforce such clauses.

The district court's order here injects substantial uncertainty into the realm of online contracting generally and arbitration clauses specifically. Such contracts are vital to e-commerce, where traditional in-person contracting is impractical for all concerned. But they are still fundamentally contracts and should not be subjected to any heightened standards for contract formation. Rather, courts should apply the reasonableness standard that prevails among the states to determine whether the parties had notice of the contract terms and manifested assent to them.

The district court in this case failed to do so, electing to write its own law of online contracting and substituting a deep dive into web

page layout, font size, and font color for the reasonableness inquiry. It did so by relying upon a decision of this Court that was not even applying the relevant legal standard. The district court thus introduced unworkable standards by which the enforceability of an online contract will turn not on the overall evidence of notice and assent, but on individual judges' perspectives as graphic designers: Should the hyperlink have been blue? Or some other color? Was it close enough to the button manifesting the customer's assent?

The district court's focus on such details is irreconcilable with the FAA's policy promoting arbitration and would eliminate the cost-certainty that arbitration clauses promote. Absent correction by this Court, businesses—lacking a reliable means to determine when a court will enforce an agreement—will need to price that uncertainty into their services going forward, thus increasing costs for businesses and consumers alike.

The stakes of this appeal are significant. Affirming the district court's approach to arbitration clauses would encourage judges to superintend customer-facing web design and provide a ready means of bypassing the FAA. Worse, it would potentially call into question the

enforceability of countless agreements created in reliance on existing precedent. Such a result would only introduce unnecessary uncertainty into the online economy.

ARGUMENT

I. The District Court's Ruling Extended Second Circuit Precedent in a Manner Contrary to the FAA

The FAA expressly requires enforcement of a "contract . . . to settle by arbitration a controversy thereafter arising out of such contract." 9 U.S.C. § 2. It was enacted in response to widespread hostility to arbitration, which had "manifested itself in a great variety of devices and formulas," and embodies a "liberal federal policy favoring arbitration agreements." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342, 346 (2011) (quotation omitted). Accordingly, as the Supreme Court noted earlier this month, "Section 2 of the statute makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Viking River Cruises, Inc. v. Moriana*, 596 U.S. __, No. 20-1573, slip op. at 7–8 (June 15, 2022) (quoting 9 U.S.C. § 2).

The FAA's mandate attaches at the contract formation stage. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428

(2017). If the rule were otherwise, undermining the FAA would be "trivially easy" and the "FAA would then mean nothing at all." *Id.*

All of this is good news for business and consumers alike. As a recent study sponsored by the Chamber's Institute for Legal Reform showed, consumers are more likely to win in arbitration, to receive higher awards in arbitration, and to resolve their disputes faster in arbitration than in litigation. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, (Nov. 2020).[3]

Yet here the district court not only failed to enforce the arbitration agreement at issue, but it replaced long-standing state contracting principles with its own micro-analysis of font size and color to invalidate the agreement at the contract formation stage. No authority permits federal courts to engage in such an analysis.

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[3] https://instituteforlegalreform.com/wp-content/uploads/2020/11/FINAL-Consumer-Arbitration-Paper.pdf

a. Second Circuit Precedent and State Common Law Establish a Straightforward Contract Formation Analysis

Contractual relationships like those at issue in this case are governed by state law, and the district court indicated that Connecticut law applies here. *See* A-82. Under long-standing Connecticut law, as in many states, a contract is created when there is "a bargain in which there is a manifestation of mutual assent." *See Ubysz v. DiPietro*, 185 Conn. 47, 51 (1981). Express assent is not necessary: "The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act." *Id.* (quoting Restatement (Second), Contracts § 21 (1)).

This Court has recognized that e-commerce "has not fundamentally changed the principles of contract." *See Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017) (quoting *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004)). As this Court has explained, "It is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the

offeree." *Register.com*, 356 F.3d at 403 (citing Restatement (Second) of Contracts § 69(1)(a)). Thus, this Court has expressly rejected special rules for online contract formation, such as requiring that one must click "I agree" to establish an online contract. *See id.*

Under binding circuit precedent, the question before the district court was merely whether the terms were "reasonably conspicuous" and whether the parties unambiguously manifested assented to them. *See Meyer*, 868 F.3d at 76. As the word "reasonably" implies, the analysis follows state common law by being flexible and not rigid. For example, in *Meyer*, the Court did not impose strict requirements for the design of a web interface, but only briefly referred to elements of the interface when describing the overall impression the page created. *See id.* at 78.

b. Neither State Law Nor Second Circuit Precedent Casts Judges in the Role of Graphic Designers

Instead of conducting this reasonable inquiry or evaluating contract formation under governing state common law principles, the district court conducted a blinkered analysis that focused solely on the particular interfaces in *Meyer* and in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016). *See, e.g.*, A-86 ("The Court finds that the screen is more akin to the cluttered screen in *Nicosia* than the cleaner

screen in *Meyer*."). This led to the district court taking a deep dive into the graphic design of the disputed web pages. Specifically, the district court evaluated, *inter alia*, the number of items on the screen (*id.*), in what corner certain information is listed (*id.*), the color of various texts (*id.*, A-89, A-92), the color of different backgrounds (A-86, A-87, A-89, A-92), the size of various texts (A-86, A-87, A-92), and how "spatially related" certain elements of the screen are (A-87). But nothing in *Meyer* or *Nicosia* suggested that any of the particular features of those interfaces was necessary to a finding of mutual assent.

To the contrary, *Nicosia* was not even applying the same standard that is at issue here. The Court in that case was reviewing an order granting a 12(b)(6) motion to dismiss, which the district court expressly did not treat as a motion to compel arbitration. *See* 834 F.3d at 230. Under that standard, the Court looked for a manifestation of agreement so clear that "reasonable minds could [not] disagree on the reasonableness of notice." *Id.* at 238. But the Court did "not hold that there was no objective manifestation of mutual assent . . . as a matter of law." *Id.* To the contrary, this Court later affirmed the grant of a motion to compel arbitration in the same case. *See* 815 F. App'x 612 (2d

Cir. 2020). It is thus no surprise that *Meyer* primarily relied on *Nicosia* only as background and cited it in just two sentences in the "application" section of the opinion. *See* 868 F.3d at 78.

By taking *Nicosia*'s analysis out of this context and setting it up as the touchstone for insufficient evidence of assent, the district court fundamentally erred. Judges are not well suited to second-guess the graphic design choices of businesses, and no state or federal law requires them to do so. Indeed, neither of the two cases applying Connecticut law that the district court cited even discusses fonts or line spacing. *See* A-82 & A-84 (citing *Auto Glass Exp., Inc. v. Hanover Ins. Co.*, 975 A.2d 1266, 1273–74 (Conn. 2009) and *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012)). And no authority permits federal courts to create a federal common law of online contracting for arbitration agreements. *Cf. Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."). The court should have followed the reasonableness standard that Connecticut law establishes.

Not only is the district court's approach unauthorized by state law, it is contrary to Congress' intent in enacting the FAA, which was

"'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)). The district court's flyspecking of a business's web design will only encourage litigation and undermine the promise of the FAA.

II. Affirming the District Court's Misreading of this Circuit's Precedent Will Increase Costs and Could Call Into Question The Enforceability of Countless Agreements

The issues presented in this case have potentially significant reach. In 2019, U.S. retailers sold $578.5 billion through e-commerce. *See* U.S. Dep't of Commerce, *E-Stats 2019: Measuring the Electronic Economy*, (Aug. 5, 2021).[4] For service industries, revenue from electronic sources exceeded $1.29 trillion, and e-commerce sales for manufacturers exceeded $2.87 trillion. *See id.* The volume of online commerce appears only to be increasing—for example, U.S. retail e-commerce sales in the first quarter of 2022 totaled $250 billion. *See*

[4] https://www.census.gov/content/dam/Census/library/publications/2019/econ/e19-estats_3.pdf

U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales: 1st Quarter 2022* (May 19, 2022).[5]

Business depends on predictable legal results, and merchants rely on the enforceability of their agreements. That basic premise is no less true when contracts are created through fast and efficient webpages that allow consumers to have access to global commerce with a single click. Including arbitration clauses in online contracts allows businesses a measure of cost-certainty, a policy endorsed by Congress when it created the FAA. And merchants have implemented those clauses in reliance on existing law. But affirming the district court's judgment would upend that reliance and thwart any such effort at cost-certainty. Worse, it could throw the enforceability of existing agreements into doubt.

Further, affirming would substantially increase costs for business and consumers. Allowing the district court's order to stand would pose difficult choices to businesses every time they sought to update their webpage. The world of web design has moved on from the blue hyperlinks that were once ubiquitous for terms of service, but have

[5] https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

judges? Would something as simple as a refreshed check-out page throw into question the enforceability of longstanding terms of service? Businesses would also face the possibility of collateral litigation over web design any time they moved to compel arbitration, "in the process undermining the FAA's proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001), *quoting Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995). And all of these costs would need to be passed on to consumers in the form of higher prices.

Simply put, businesses cannot operate as effectively and efficiently when their contractual rights to arbitration turn on a judge's subjective assessment of font size and color.

CONCLUSION

The judgment of the district court should be reversed, consistent with both the FAA and the need for a predictable jurisprudence regarding the enforcement of online arbitration clauses.

Dated: June 23, 2022

Respectfully submitted,

By: */s/ Neil G. Nandi*

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CERTIFICATE OF COMPLIANCE

This complies with the type-volume limitations set forth in the Federal Rule of Appellate Procedure ("Rule") 29(a)(5) because it contains 2,315 words, excluding the parts exempted by Rule 32(f). This brief complies with typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: June 23, 2022

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