Supreme Judicial Court for the Commonwealth Full Court: SJC-12883 Filed: 8/20/2020 4:39 PM

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12883

Appeals Court No. 2019-P-0622

CHRISTOPHER P. KAUDERS and HANNAH KAUDERS,

Appellees,

v.

UBER TECHNOLOGIES, INC. and RAISER LLC,

Appellants.

ON APPEAL FROM SUFFOLK SUPERIOR COURT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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Dated: August 20, 2020

RULE 1:21 CORPORATE DISCLOSURE STATEMENT

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

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I. **INTEREST OF *AMICUS CURIAE***

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 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 that raise issues of concern to the nation's business community.[1]

Many Chamber members conduct substantial business online. Indeed, trillions of dollars' worth of e-commerce transactions are conducted every year in the United States. The enforceability of online contracts

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[1] Pursuant to Mass. R. A. P. 17(c)(5), the Chamber declares that no party or counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. The Chamber and its counsel further declare that they have not represented one of the parties to the present appeal in any proceeding involving similar issues, nor have they been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

is thus of critical importance to the Chamber and its members, as well as the Nation's economy more generally.

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

The Chamber has accordingly filed *amicus curiae* briefs in numerous cases in state and federal court regarding the proper standard for the formation of online contracts, including briefs at both the merits and rehearing stages in *Cullinane v. Uber Technologies, Inc.*, No. 16-2023 (1st Cir.)—the

decision relied upon by the Superior Court in this case. For the reasons we explain below, the decision in *Cullinane* is wrong as a matter of Massachusetts law, and the Superior Court's holding to the contrary creates an unacceptable cloud of uncertainty over online contracts. The Chamber therefore has a strong interest in this Court's resolution of the appeal.

II. STATEMENT OF THE ISSUES

The Chamber agrees with all of Uber's points, but focuses its brief on the issue on which this Court solicited *amicus* briefs: *i.e.*, "Whether, under Massachusetts law, a binding agreement was formed when the plaintiffs completed the registration process for the smartphone application offered by the defendant Uber Technologies, Inc., enabling riders to request rides from registered drivers; including, whether the arbitration clause in the purported agreement was enforceable." *See* Opening Br. 34-50.

III. INTRODUCTION

In 2017, the U.S. economy included an estimated $1 *trillion* in revenues from electronic transactions in the service industry alone. *See* U.S. Dep't of Commerce, *E-Stats 2017: Measuring the Electronic Economy* 2, https://www.census.gov/

content/dam/Census/library/publications/2017/econ/e17-estats1.pdf (Sept. 23, 2019). And e-commerce transactions in the retail industry added over $461 billion to the economy, growing twelve percent faster than the overall retail industry. *Id.* Increasingly, with the advent of smartphones and tablets, these transactions are taking place on mobile devices rather than on desktop computers. The enormous, and rapidly expanding, e-commerce sector of the economy relies more and more on online contracts such as those that the superior court refused to enforce.

Here, Uber's sign-up process required plaintiffs and any other potential Uber rider to click a "DONE" button accompanied by both (1) a straightforward statement that pressing the button constituted assent to Uber's terms of service and (2) a clearly-marked button that, when pressed, led the user to the terms themselves. That process—used by untold numbers of businesses and consumers around the country—satisfies traditional standards for contract formation. *See, e.g.*, *Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2d Cir. 2017).

Two years ago, the First Circuit disagreed when it attempted to predict whether Massachusetts law

would depart from those traditional standards, *see Cullinane v. Uber Techs., Inc.*, 893 F.3d 53 (1st Cir. 2018), and the superior court followed the First Circuit's wayward approach. Specifically, the *Cullinane* court flyspecked the design of Uber's registration screen in a manner that does not reflect reasonable expectations of participants in online transactions. For example, the First Circuit concluded that the terms of service button was unusual or less conspicuous because it was not blue and underlined, the way that hyperlinks used in first-generation web browsers on desktop and laptop computers appeared. Yet that understanding of website or mobile application design is outmoded. For years, buttons have routinely been used to attract users' attention and provide links to other websites. What's more, the First Circuit's analysis gives inadequate weight to "[t]he transactional context of the parties' dealings," which "reinforces [the] conclusion" that plaintiffs and other Uber users expect to agree to terms and conditions governing their use of the Uber application when they register to use that app. *Meyer*, 868 F.3d at 80.

This Court should reject *Cullinane* as a mistaken

prediction of Massachusetts law, which instead requires reasonable communication of contractual terms and assent to those terms. The *Cullinane* decision deprives businesses and consumers of a clear, predictable, and uniform standard for the formation of online contracts. For example, the *Cullinane* court recognized that the language and minimalist design of Uber's registration screens "could be seen to favor Uber's position" and that the button linking to Uber's Terms "did possess some of the characteristics that make a term conspicuous." 893 F.3d at 63-64. Yet the court concluded that the button was not conspicuous enough. That arbitrary balancing approach offers businesses inadequate guidance to predict whether their online contracts will be enforceable. And given the ubiquity today of electronic commerce, uncertainty about the standards for online contract formation threatens to impose massive and unwarranted costs on businesses that enter into transactions in the mobile economy.

Accordingly, the decision of the Superior Court should be reversed.

IV. ARGUMENT

A. The Mobile Sign-Up Process At Issue Creates An Enforceable Online Contract.

As courts have long recognized, "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). Both online and off, mutual assent is the "touchstone of contract." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (Sotomayor, J.) (citing *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999)). And while the Second Circuit in *Specht* was applying California law, the principles of contract formation are similar under Massachusetts law. *See, e.g.*, *Ajemian v. Yahoo!, Inc.*, 83 Mass. App. Ct. 565, 573 (2013).

In both the online and offline contexts, under Massachusetts law contract terms are binding if "reasonably communicated and accepted." *Ajemian*, 83 Mass. App. Ct. at 573. Applying that principle, Massachusetts—like many other states—requires only that a reasonably prudent person would be on notice of the terms. *Id.* at 573-74 & n.12.

That standard is readily satisfied here. The notice of the terms and conditions was:

- immediately viewable;
- in the center of the screen;
- bolded;
- in a contrasting color;
- written in larger font than other text on the screen; and
- further visually emphasized with a box around it.

See Opening Br. 17 (image of the relevant screen).

As Uber points out, other courts have concluded that the same or similar visual presentation by Uber readily provides sufficient notice for contract formation. Opening Br. 38-40. Notably, in *Meyer*, the Second Circuit upheld a similar version of Uber's registration process, recognizing the pervasiveness of smartphones and mobile transactions and concluding that the "uncluttered" design of Uber's payment screen and the use of a link pointing to the Terms put a "reasonably prudent smartphone user" on "constructive notice" of those Terms. 868 F.3d at 77-79.

That conclusion is consistent with the decisions of other courts that have upheld online registration processes of this type. After all, the use of a button linking to a company's full terms of service along with an acknowledgment that completing the sign-up process constitutes assent to those terms is simply the twenty-first century equivalent of incorporating terms by reference on the back of a printed form—something that Massachusetts courts have long endorsed. *See, e.g.*, *Roberts v. Enterprise Rent-A-Car Co. of Boston*, 438 Mass. 187, 195 (2002); *Structural Sys., Inc. v. Siegel*, 3 Mass. App. Ct. 757, 757 (1975); *Alpha One v. NYNEX Info. Resources Co.*, 2 Mass. L. Rptr. 568, 1994 WL 879488, at *5 (Super. Ct. May 23, 1994).

The Second Circuit's decision in *Meyer* cited with approval *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012), in which Judge Holwell offered the following instructive analogy. Imagine that a customer takes an apple from a roadside bin with a sign that reads: "By picking up this apple, you consent to the terms of sales by this fruit stand. For those terms, turn over this sign." *Id.* at 839. Nobody would dispute that such terms bind the customer

whether or not he or she chooses to review them. *Id.* at 839-40 (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587 (1991)).

That principle applies equally in cases like this one where a company uses a button linking to its terms and conditions in order to "reasonably communicate[]" those terms to the user. *Ajemian*, 83 Mass. App. Ct. at 573. Indeed, in 2020, the existence and function of links cannot be considered a plausible source of mystery or confusion. As one judge put it seven years ago: "Not so long ago, the Second Circuit could not discuss the hyperlink without defining the innovation for its readers. . . . Nearly two decades later, it is simply assumed that persons navigating the Internet understand hyperlinks as means of connecting one webpage to another." *Adelson v. Harris*, 973 F. Supp. 2d 467, 483 (S.D.N.Y. 2013); *see also Fteja*, 841 F. Supp. 2d at 839. What was true in 2013 is all the more true in 2020. Indeed, given the increasing ubiquity of smartphones and other mobile devices, using links to navigate to related pages on the Internet is an everyday occurrence.

Similarly, virtually every purchase of goods or services online carries with it a set of terms and

conditions. Accordingly, it is implausible to assume that a user who signs up to purchase goods or services on the Internet would not know that (i) the transaction is governed by terms and conditions, and (ii) those terms are available via a link to a different screen. And that is especially so when notice of both facts appears on the user's screen.

Given these commonsense understandings of how the Internet works, it is unsurprising that courts have repeatedly held that the combination of linked terms and an acknowledgment that a user, by clicking or pressing a button, is accepting those terms establishes mutual assent. *See* Opening Br. 37-38 (collecting cases). In *Fteja*, for example, the court held that a similar sign-up process formed a valid contract because the plaintiff "was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences. That was enough." 841 F. Supp. 2d at 840.[2]

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[2] In addition to the Second Circuit in *Meyer*, courts across the country—including the Appeals Court in *Ajemian*—have relied on the analysis in *Fteja*. *See Ajemian*, 83 Mass. App. Ct. at 576 (recognizing *Fteja* but distinguishing it from the case before the court, in which there was virtually no evidence about how the

This Court should similarly conclude that, as a matter of Massachusetts law, Uber's sign-up process "was enough" to provide sufficient notice of the contract terms.

In addition, as Uber explains (Opening Br. 38-40, 47-48), its process ensures that users have a reasonable means of communicating their acceptance of the terms. In response, plaintiffs argue that they did not manifest their assent to the terms (Br. 41-42)—surmising, without any legal or factual support, that a reasonable user would not be able to make the connection between clicking a button marked "DONE" and an acknowledgment that "[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy."

Not so. Assent is not subject to plaintiffs' magic-words test. *See* Opening Br. 47-48 & n.10; Reply Br. 23. Instead, courts consider a variety of phrases to be equivalent to "I agree" or "I assent" in the context of an e-commerce transaction. *See* Opening Br.

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agreement was communicated and accepted); *see also, e.g.*, *Feld v. Postmates, Inc.*, 442 F. Supp. 3d 825, 831-32 (S.D.N.Y. 2020); *Beture v. Samsung Electronics Am., Inc.*, 2018 WL 4259845, at *5 (D.N.J. July 18, 2018); *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016); *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 453-54 (E.D.N.Y. 2013).

37-38 (collecting cases). Here, the word “DONE” comes on the same screen as a clear statement—equivalent to a signature line—that creation of an account requires acceptance of Uber’s Terms of Service. A reasonably prudent smartphone user could not have missed the import of that statement.

In short, as the Tenth Circuit has put it, online agreements of the sort formed here “are increasingly common and have routinely been upheld.” *Hancock v. Am. Tel. & Tel. Co.*, 701 F.3d 1248, 1256 (10th Cir. 2012) (quotation marks and citation omitted).

B. *Cullinane*, And By Extension The Superior Court’s Decision, Cannot Be Squared With Ordinary Contract Formation Principles.

On the issue of contract formation, the Superior Court relied heavily on *Cullinane*. But the First Circuit’s decision, as one court has put it, “departs dramatically both from what other courts have found regarding Uber’s registration process, and from the overall legal landscape regarding assent to online agreements.” *West v. Uber Techs., Inc.*, 2018 WL 5848903, at *4 (C.D. Cal. Sept. 5, 2018).

The *Cullinane* court principally attempted to distinguish *Meyer* by pointing out that the screens in that case used hyperlinks that were “blue and

underlined." *Meyer*, 868 F.3d at 78. But that factual distinction has little to do with whether the link to the Terms was "reasonably communicated" to the plaintiffs. *Ajemian*, 83 Mass. App. Ct. at 573. The use of a button, as Uber did here, is widely recognized as a standard form of linking to another page—whether or not the text in the button is blue or underlined. *See* Opening Br. 42 & n.9. And while different colored and underlined font has been used—especially in the earlier days of the Internet—to highlight hyperlinks that appear in a larger field of *text*, the use of a button is another accepted method for informing users that the button (and the text within it) can be clicked on (or pressed on a phone screen) to navigate to another webpage. As one commentator summarized, the *Cullinane* decision "creates an odd preference for blue hyperlinks." Liz Kramer, *Uber Defeated by the Color of Its Hyperlink*, American Bar Association (July 5, 2018), https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2018/uber-defeated-by-color-of-its-hyperlink.html. Indeed, the *Cullinane* court's blue-hyperlink requirement is more closely aligned with the wax seals of yore than the

mobile Internet of the last decade. But Massachusetts contract law is not so ossified.

Moreover, *Cullinane*'s view of Uber's registration process fails to appreciate the reasonable consumer's expectation that virtually every purchase of goods or services online carries with it a set of terms and conditions. Unlike the *Cullinane* court, the Second Circuit in *Meyer* acknowledged that reality in language that should have had equal force under Massachusetts law:

> The transactional context of the parties' dealings reinforces our conclusion [that a contract was formed]. Meyer located and downloaded the Uber App, signed up for an account, and entered his credit card information with the intention of entering into a forward-looking relationship with Uber. The registration process clearly contemplated some sort of continuing relationship between the putative user and Uber, one that would require some terms and conditions, and the Payment Screen provided clear notice that there were terms that governed that relationship.

868 F.3d at 80. Likewise, the Third Circuit has remarked that "it is impossible to infer that a reasonable adult in [plaintiffs'] position would believe that" a company was offering to provide recurring access to its services without any kind of contract. *Schwartz v. Comcast Corp.*, 256 F. App'x

515, 519-20 (3d Cir. 2007).

It makes little sense to assume, as the *Cullinane* court did, that a reasonably prudent smartphone user does not realize that an e-commerce transaction involves terms and conditions. That is especially true for consumers, like plaintiffs, who are knowledgeable enough about the Internet and mobile devices to sign up for and use Uber's services through its mobile application. Such riders must, at minimum (1) have a smartphone; (2) have registered for an account to use Apple's or Google's application store (for iPhone or Android users);[3] (3) know how to search for and download Uber's application; (4) know how to and be willing to enter their payment information online to complete the registration process—a sure sign that a transaction is in progress; and (5) anticipate using Uber's application to obtain ride-sharing services.

Thus, if there were any particular inference

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[3] *See* Where Can I Use My Apple ID, Apple, https://support.apple.com/en-us/HT202659 (last visited August 20, 2020) ("Your Apple ID is the account you use to access Apple Services like the App Store, Apple Music, iCloud, iMessage, FaceTime, and more."); Google Play - Apps, Google, https://play.google.com/store/apps?hl=en (last visited August 20, 2020) (requiring users to "Sign In" to download applications).

about riders using Uber that the *Cullinane* court should have drawn, it is that they are, relatively speaking, aware of technological developments since the advent of the smartphone in 2007.

Finally, the *Cullinane* court similarly gave short shrift to the fact that Americans have grown accustomed to using their mobile devices to read documents. *See* Jennifer Maloney, *The Rise of Phone Reading*, Wall St. J. (Aug. 14, 2015), http://www.wsj.com/articles/the-rise-of-phone-reading-1439398395. Indeed, "[o]n Twitter, people have celebrated major feats of reading, accomplished entirely on smartphones, including 'Moby-Dick,' 'War and Peace,' and 'Swann's Way.'" *Id.*

In short, *Cullinane* is wrong, and the First Circuit based its decision on outdated assumptions about website design that are inapplicable to the modern reasonably prudent smartphone user.

C. *Cullinane*'s Approach To Online Contract Formation Deprives Businesses Of Needed Clarity And Predictability In A Critically Important Sector Of The Nation's Economy.

The conflict that *Cullinane*'s incorrect prediction of Massachusetts law creates with other courts enforcing online contracts is especially

untenable in light of the immense economic importance of the issue presented. E-commerce transactions are rapidly growing in number: As the Supreme Court recently noted, "[t]he Internet's prevalence and power have changed the dynamics of the national economy," citing data showing that "e-commerce grew at four times the rate of traditional retail" in 2016, "and it shows no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *see also* pages 9-10, *supra*.

The explosion in the use of smartphones in particular is equally well documented. The Second Circuit in *Meyer*, for instance, echoed the Supreme Court's colorful observation that "'modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.'" 868 F.3d at 77 (alteration in original; quoting *Riley v. California*, 573 U.S. 373, 385 (2014)). And the *Meyer* court further cited empirical evidence showing that nearly two-thirds of American adults owned a smartphone as of 2015 (*id.*)—a figure that has since grown to 81%. *See* Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), http://www.

pewinternet.org/fact-sheet/mobile/. Indeed, "roughly one-in-five American adults" *exclusively* use their smartphones for broadband access to the Internet. *Id.*

The countless businesses that engage in mobile transactions need clear and uniform standards governing the formation of agreements with consumers and other users of their websites or mobile applications. The *Cullinane* approach—with an outdated view of hyperlinks, a failure to understand the use of "buttons" on e-commerce websites, and a refusal to recognize the modern realities of transactions on the Internet—fails to provide such guidance.

Finally, the lack of clarity and predictability in the *Cullinane* approach is especially problematic in the context of arbitration agreements governed by the Federal Arbitration Act, given "Congress' intent" in the statute "'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 inevitable result of the uncertainty created by the *Cullinane* approach, if adopted, will be to invite collateral litigation over the design of websites and

mobile applications any time a business moves to compel arbitration, "in the process undermining the [Federal Arbitration Act]'s proarbitration purposes and 'breeding litigation from a statute that seeks to avoid it.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995)). This case well illustrates that danger; plaintiffs sought and obtained a do-over from the Superior Court after failing to prevail on their claims on the merits in arbitration. *See* Opening Br. 9-18.

CONCLUSION

The Superior Court's order should be reversed and the Superior Court should be directed to confirm the arbitration award.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, under the pains and penalties of perjury, that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to:

Rule 16(a)(13) (addendum);
Rule 16(e) (references to the record);
Rule 18 (appendix to the briefs);
Rule 20 (form and length of briefs, appendices, and other documents); and
Rule 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, not more than 10.5 characters per inch, and contains 20 total non-excluded pages.

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I, Steven P. Lehotsky, hereby state under the penalties of perjury that on August 20, 2020, a true and correct copy of the foregoing Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Appellants, was electronically filed with the Clerk of Court and electronically served on the following counsel of record:

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