16-2750(L)

(consolidated with 16-2752)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SPENCER MEYER, Individually and on behalf of those similarly situated,
Plaintiff-Counter-Defendant-Appellee,

v.

UBER TECHNOLOGIES, INC.,
Defendant-Counter-Claimant-Appellant
TRAVIS KALANICK,
Defendant-Appellant,
ERGO,
Third-Party Defendant.

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

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS/APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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.

One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members and affiliates 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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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Moreover, many of the Chamber's members and affiliates 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 ("FAA") and the United States Supreme Court's consistent affirmation of the legal protection the FAA provides for arbitration agreements, 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 heightened test for enforceability, the district court has created an unacceptable cloud of uncertainty over those agreements.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2014, the U.S. economy included an estimated $510 billion in e-commerce transactions in the service industry alone, growing six percent faster year-to-year than the overall service industry. *See* U.S. Dep't of Commerce, *E-Stats 2014: Measuring the Electronic Economy* 2, http://www.census.gov/content/dam/Census/library/publications/2016/econ/e14-estats.pdf. And e-commerce transactions in the retail industry added over $298 billion to the economy, growing nearly eight 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 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 district court refused to enforce here.

The district court's order departed from settled principles of contract law that courts consistently have applied in deciding whether parties have entered into enforceable contracts online. Courts have regularly held that the method of contractual formation at issue here—in which Uber's sign-up process required plaintiff and any other potential Uber rider to click a "Register" button that was accompanied by both (1) a clear statement that pressing the button constituted assent to Uber's terms of service and (2) a hyperlink to the terms themselves—satisfies traditional standards for contract formation.

But instead of recognizing these well-settled legal principles, and real-world practice, which compel enforcement of the contract here, the court below strained to conclude that an enforceable contract had not been formed, flyspecking the design of Uber's registration screen as it appeared on the plaintiff's mobile device—and doing so based on a meaningfully degraded version of the screen created by the court itself. The court found dispositive the absence of a separate checkbox stating "I agree" and the placement and font size of the statement on the screen acknowledging assent to Uber's terms. These justifications for refusing to

enforce Uber's terms, including the arbitration provision, represent an extreme minority view—and one that is inconsistent with the standards of contract formation set forth by this Court. If the district court's approach is allowed to stand, it will create considerable uncertainty over the formation and enforceability of online contracts, imposing massive and unwarranted costs on businesses that enter into transactions in the mobile economy.

Moreover, the district court's reliance on the location of the arbitration clause within Uber's terms as a basis for denying enforcement of the provision improperly created a higher standard for notice of arbitration agreements. That heightened notice requirement violates well-established Supreme Court precedent holding that arbitration clauses must be subject to the same standards as other provisions in the contract. As the Supreme Court has stated, the Federal Arbitration Act forbids courts from "singling out arbitration provisions for suspect status" under the guise of state-law contract rules. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468-69 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

ARGUMENT

I. The District Court's Order Undermines Recognized Principles Of Online Contract Formation.

A. The mobile sign-up process at issue creates an enforceable online contract.

As this Court underscored over a decade ago, "[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) (citing *Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999)).[2]

In both contexts, there must be (i) "[r]easonably conspicuous notice of the existence of contract terms" and (ii) "unambiguous manifestation of assent to those terms by consumers." *Specht*, 306 F.3d at 35. The district court here thus should have asked the same questions it would have asked had it been presented with a traditional paper contract: whether Uber's registration screen, as it appeared on the mobile device used by the plaintiff, included "[r]easonably conspicuous notice of the existence of contract terms" and required "unambiguous manifestation of assent to those terms." *Id.*

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[2] This Court in *Specht*, like the court below, was applying California law. The traditional principles of contract formation are the same under New York law. *See, e.g.*, *Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp.*, 715 N.E.2d 1050, 1053 (N.Y. 1999).

The sign-up process used by Uber complied with these well-established principles of contract formation. The use of a clear hyperlink 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 the practice, held enforceable in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), of placing terms on the back side of a cruise ship ticket.

Perhaps even closer to the situation here is the example discussed in *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012). As Judge Holwell put it, 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*, 499 U.S. at 587). Applying those principles, a federal district court recently held that another version of Uber's registration screen placed users on reasonable notice of Uber's Terms. *Cullinane v. Uber Techs., Inc.*, 2016 WL 3751652, at *7 (D. Mass. July 11, 2016) (following the reasoning of *Fteja* and similar cases).

Indeed, in 2016, the existence and function of a hyperlink cannot be considered a plausible source of mystery or confusion. As one judge put it a few

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. Indeed, given the increasing ubiquity of smartphones and other mobile devices, using hyperlinks 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.

Given these commonsense understandings of how the Internet works, it is unsurprising that courts have repeatedly held that the combination of hyperlinked terms and an acknowledgment that clicking or pressing a button accepts those terms establishes mutual assent. *See* Uber Opening Br. 20-21 (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.

Another judge in this Circuit likewise enforced a defendant's terms of service, because, unlike in *Specht*, "defendant's reference to its Terms and Conditions of Service appear on the same screen as the button a prospective user must click in order to move forward in the registration process." *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 452-54 (E.D.N.Y. 2013). And in *Starke v. Gilt Groupe, Inc.*, 2014 WL 1652225 (S.D.N.Y. Apr. 24, 2014), Judge Stanton enforced a similar-looking registration screen because it "directed [the plaintiff] exactly where to click in order to review th[e] terms" and explained that "[b]y joining Gilt through email" the plaintiff assented to those terms when he entered his email address and clicked the "Shop Now!" button. *Id.* at *1, *3; *see also* Uber Opening Br. 21 (reproducing Gilt's registration screen).

Courts in California are in accord. For instance, following the reasoning of *Fteja*—and the Ninth Circuit's endorsement of that reasoning in *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014)—a federal district court recently held that an on-line contract had been validly formed, because the "user . . . had to take some action" to indicate assent and proceed with the use of the site, rather than having assent "foisted upon him simply by passively viewing a website." *In re Facebook Biometric Information Privacy Litigation*, 2016 WL 2593853, at *8 (N.D. Cal. May 5, 2016). Another court held that a user assented to the contract, and its arbitration provision, by clicking on a button located above text that stated

that "[b]y proceeding" the user was agreeing to the company's hyperlinked terms of service. *Swift v. Zynga Game Network, Inc.* , 805 F. Supp. 2d 904, 908, 911-12 (N.D. Cal. 2011). And in still another case, the court held that the user assented to the agreement by clicking a "PLACE ORDER" button near a hyperlink to the full terms and an acknowledgement that by clicking the button the user "ha[s] read and understand[s] the" terms. *Crawford v. Beachbody, LLC*, 2014 WL 6606563, at *1 (S.D. Cal. Nov. 5, 2014).

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). As we next discuss, the district court offered no persuasive reason for failing to reach the same result.

B. The district court's opinion cannot be squared with ordinary contract-formation principles.

Although the district court paid lip service to the contract-formation standards just discussed, it departed from them in numerous respects.

First, relying heavily on Judge Weinstein's opinion in *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359 (E.D.N.Y. 2015), and adopting his novel nomenclature of

"sign-in wrap," the district court faulted Uber for not including a separate check "box stating 'I agree'" on the registration screen. SPA18, 20.[3]

Generally applicable contract law does not mandate the use of a check box. Instead, it is more than enough to satisfy the reasonable-notice and manifestation-of-assent requirements to provide a hyperlink to a company's full Terms plus the click-to-accept acknowledgment. For instance, the sign-up screens used to create a contractual relationship between the business and the user in *Fteja*, *Starke*, *Crawford*, and *Swift*—all discussed above—did not include a blank check box. And in other cases in which sign-up screens did include blank boxes—such as *Zaltz* or *Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at *3 (N.D. Cal. June 25, 2014), *aff'd*, --- F.3d ---, 2016 WL 6072192 (9th Cir. Oct. 13, 2016)—the decisions did not suggest that the outcome would have been any different without the check box. The Ninth Circuit in *Nguyen*, for example, treated *Fteja* and *Zaltz* equally—citing both with approval in explaining the enforceability of a click-to-accept acknowledgment plus hyperlink. *See Nguyen*, 763 F.3d at 1176-77.

Indeed, *Berkson* is the only decision relied on by the district court that adopts the "sign-in wrap" distinction between the use of a button and the use of a

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[3] The order in *Berkson* was appealed to this Court, and the Chamber submitted an *amicus* brief detailing the substantial flaws in Judge Weinstein's approach. *See* Dkt. No. 85, No. 15-1407 (2d Cir. Aug. 7, 2015). The parties subsequently settled the case, however, and withdrew the appeal before this Court had the opportunity to rule.

button plus a check box. But *Berkson* rested on the premise that the standards for forming contracts online should be more restrictive than in the paper world—a premise that in turn was based on Judge Weinstein's erroneous views of online commerce. Judge Weinstein stated: "It is not unreasonable to assume that there is a difference between paper and electronic contracting. Based on assumptions about internet consumers, they require clearer notice than do traditional retail buyers." *Berkson*, 97 F. Supp. 3d at 382. Yet that premise is irreconcilable with this Court's repeated pronouncements that there are no separate rules of the road for online contract formation. *See, e.g.*, *Register.com*, 763 F.3d at 1175; *Specht*, 306 F.3d at 29.[4]

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[4] In a subsequent case involving Gogo's terms, Judge Weinstein backtracked from some of his assumptions in *Berkson*. He acknowledged that the parties in *Berkson* had subsequently "submitted convincing evidence that plaintiffs, and others who used Gogo's product, were generally sophisticated business persons, rather than average individuals." *Salameno v. Gogo, Inc.*, 2016 WL 4005783, at *5 (E.D.N.Y. July 25, 2016) (quotation marks omitted). More important, in enforcing Gogo's terms in *Salameno*, Judge Weinstein remarked that "[i]n today's technologically driven society, it is reasonable to charge experienced users—as plaintiffs appear to be—with knowledge of how hyperlinks work and, by extension, how to access the terms of use." *Id.* at *6; *see also Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1178 (9th Cir. 2010) ("Consumers who use the internet for shopping are generally quite sophisticated about such matters"). The same surely can be said of individuals who are entering into transactions via mobile devices. *See, e.g.*, *Looking Forward: Keeping Up With Consumers in 2015 and Beyond*, Webgains, http://www.webgains.com/public/looking-forward-keeping-up-with-consumers-in-2015-and-beyond/ (last visited Oct. 28, 2016) ("The modern consumer is one who is vocal online, sophisticated in their needs and confident in their use of personal technology").

Moreover, *Berkson* expressly disagreed with *every other case on the subject*. Judge Weinstein acknowledged that the "sign-in wrap" at issue in that case "most closely resemble[d] the online contract discussed in *Fteja*," but asserted that "*Fteja*, and lower court cases that follow its lead"—including California cases such as *Crawford* and *Swift*, and by extension the Ninth Circuit's decision in *Nguyen*—were wrongly decided. 97 F. Supp. 3d at 403. This iconoclastic view of contract formation should be rejected, not endorsed. *See Cullinane*, 2016 WL 3751652, at *7 (expressly refusing to follow *Berkson* because its analysis "disregards the customary contract analysis applied by the vast majority of courts").

Second, the district court surmised, without any legal or factual support, that a reasonable user would not be able to make the connection between a button saying "Register" and an acknowledgment that "[b]y creating an Uber account, you agree to the Terms of Service & Privacy Policy." SPA24. But observers of e-commerce practices take a different view. As one such commentator remarked, "when the call-to-action says 'By creating an Uber account . . .' and there's a button on the page saying 'Register,' what do users think the 'Register' button does? . . . [M]ost users surely think they are going to *create a registered user account* when they register." *Judge Declines to Enforce Uber's Terms of Service—Meyer v. Kalanick*, Technology & Marketing Law Blog (Aug. 3, 2016), http://blog.ericgoldman.org/archives/2016/08/judge-declines-to-enforce-ubers-

terms-of-service-meyer-v-kalanick.htm (first alteration and emphasis in original). And as the Third Circuit has explained, it is "nonsensical" for a customer who signs up with a company to think that "his contract with [the company] consisted entirely of a single promise" that the company would provide service. *Schwartz v. Comcast*, 256 F. App'x 515, 519-20 (3d Cir. 2007).

Third, and relatedly, the district court unreasonably speculated that the average "smartphone user" or "online purchaser[]" may not realize that the standard phrase "Terms of Service" refers to a contract. SPA26. But that guesswork is contrary to the real-world experiences of countless customers—both online and off—not to mention the large number of cases holding that the phrases "Terms of Service" or "Terms of Use" mean the terms of a contract.[5] Nor did the district court identify any basis for believing that individuals who purchase goods and services online tend to be particularly unsophisticated. Indeed, it is unclear what the district court would wish a company to call the terms governing the use of its services that would fit the bill better than "Terms of Service."

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[5] *See Cullinane*, 2016 WL 3751652, at *7; *Fteja*, 841 F. Supp. 2d at 835; *see also, e.g.*, *Tompkins*, 2016 WL 6072192, at *2; *Hancock*, 701 F.3d at 1257; *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011); *Carson v. LendingTree LLC*, 456 F. App'x 234, 236 (4th Cir. 2011); *Gay v. CreditInform*, 511 F.3d 369, 390 (3d Cir. 2007); *Bassett v. Elec. Arts, Inc.* , 93 F. Supp. 3d 95, 102 (E.D.N.Y. 2015); *Blau v. AT & T Mobility* , 2012 WL 10546, at *3 (N.D. Cal. Jan. 3, 2012); *Swift*, 805 F. Supp. 2d at 912.

Certainly "it is impossible to infer that a reasonable adult in [plaintiff's] position would believe that" Uber was offering to provide recurring access to its services without any kind of contract. *Schwartz*, 256 F. App'x at 519-20 (customer was bound by contract terms for Internet service available on provider's website).

Moreover, there is less reason to impose a heightened standard for contract formation with respect to the group of consumers 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 (i) have a smartphone; (ii) have registered for an account to use Apple's or Google's application store (for iPhone or Android users);[6] (iii) know how to search for and download Uber's application; (iv) know how to and be willing to enter their credit card information online to complete the registration process—a sure sign that a transaction is in progress; and (v) anticipate using Uber's application to obtain ride-sharing services. Thus, if there were any particular inference about Uber's customers that the district court should have drawn, it is that they are, relatively speaking, technologically sophisticated.

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[6] *See Apple ID Support*, Apple, https://support.apple.com/apple-id (last visited Oct. 28, 2016) ("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 Oct. 28, 2016) (requiring users to "Sign In" to download applications).

Fourth, the district court's criticism of the layout and the font size of the "Terms of Service" acknowledgment and hyperlink on Uber's registration screen was based on an apparent misunderstanding of how these images actually appear on the high-resolution screens that are ubiquitous on mobile devices. The defendants' opening brief describes (and shows) the dramatic difference between the district court's judicially created, low-resolution image and the actual authenticated version of the registration screen on which it should have based its decision. *E.g.*, Uber Opening Br. 23-24, 38-42.

As contracts formed online and on mobile devices become more common, it is critical that courts evaluate contract formation through a proper lens—which includes understanding how people interact with high-resolution screens on their mobile devices. To take plaintiff's (already two-years-old) phone as an example, one reviewer has described the Samsung Galaxy S5's "5.1-inch, 1080p AMOLED display" as "simply gorgeous," with "near-perfect viewing angles." David Pierce, *Samsung Galaxy S5 Review*, The Verge (Apr. 14, 2014, 11:01 AM), http://www.theverge.com/2014/4/14/5608222/samsung-galaxy-s5-review. Another reviewer noted that the quality of the S5's display makes it "easier to read onscreen text." Brad Molen, *Samsung Galaxy S5 Review: A Solid Improvement, but Don't Rush to Upgrade*, Engadget (Apr. 11, 2014), https://www.engadget.com/2014/04/11/samsung-galaxy-s5-review/.

Those qualities are not unique to the plaintiff's device. Indeed, more recent phones, like the Apple iPhone 7 and the Google Pixel, have even larger screens with higher resolution. Thus, it is no surprise 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.

Finally, the district court also speculated about the subjective intent of "the creators of Uber's registration screen," asserting that they "hoped" users would ignore that they were assenting to Uber's Terms. SPA26. But the record does not support that assumption. Contrary to the district court's suggestion that there is something troubling about drawing a user's attention "to the credit card information and register buttons" (SPA26), it is hardly surprising that the fields that the user must fill out in order to register would be front and center on a registration screen. And as discussed above, numerous courts have enforced similar sign-up processes in which the link to the terms of service is located below the button that the user pushes to complete the process.

Moreover, a defendant's alleged subjective intent or internal design choices are irrelevant: Under California law, "determining the existence of '[m]utual assent to contract is based upon *objective* and *outward manifestations* of the parties; a party's subjective intent, or subjective consent, therefore is irrelevant."

Al-Thani v. Wells Fargo & Co., 2009 WL 55442, at *6 (N.D. Cal. Jan. 7, 2009) (emphases added; quotation marks omitted) (quoting *Stewart v. Preston Pipeline Inc.*, 134 Cal. App. 4th 1565, 1587 (2005)); *see also Comolli v. Huntington Learning Ctrs., Inc.*, 2016 WL 1464598, at *4 & n.27 (S.D.N.Y. Apr. 13, 2016) (same rule under New York law).

In short, the district court's speculation was improper.

II. The District Court Impermissibly Created A Heightened Standard For Enforcement Of Arbitration Agreements.

As the United States Supreme Court has observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 563 U.S. at 342 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)). Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted).

At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate . . . is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). "By enacting § 2, . . . Congress

precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Casarotto*, 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In other words, as the Supreme Court has reiterated time and time again, Section 2 of the FAA preempts state-law rules that are "restricted to [the] field" of arbitration and do not "place arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468-69 (quotation marks omitted).[7]

The order below ran afoul of these well-settled principles in numerous respects. To begin with, the district court's view that courts should "indulg[e] every reasonable presumption against" the enforceability of a contract that contains an arbitration clause that displaces the consumer's "precious and fundamental right" to a "jury trial" and "very access to courts" (SPA1-2) necessarily rests on "the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.* , 372 F.3d 903, 906 (7th Cir. 2004). As the Supreme Court explained three decades ago, "we are well past

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[7] *See also, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 563 U.S. at 339; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009); *Preston v. Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 & 16 n.11 (1984).

the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

The "mistrust of the arbitral process" reflected in the conditions imposed by the court below on the enforceability of arbitration agreements long "has been undermined by" the Supreme Court's "arbitration decisions." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991); *see also, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987).

Moreover, the district court's attack on the waiver of a jury trial is, not coincidentally, an attack on a defining characteristic of arbitration. *See, e.g.*, *Concepcion*, 563 U.S. at 342. That is why, as this Court has confirmed, it is "well-settled that waivers of jury trial are fully enforceable under the FAA." *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 126 (2d Cir. 2010). Thus, the district court's rule that contracts with waivers of jury trials should be viewed more harshly is plainly a contract defense that specifically targets arbitration agreements and is accordingly preempted by the FAA.

Nor could the district court's antipathy to arbitration be set aside as mere rhetorical flourish. On the contrary, the court considered "the placement of the

arbitration clause" several pages into Uber's Terms to erect "a further barrier to reasonable notice." SPA27-28. The district court acknowledged that the arbitration provision itself was clearly marked under a bolded heading marked "dispute resolution," but concluded that Uber needed to do more to highlight the arbitration provision at the outset of the Terms. *Id.*

That is precisely the kind of heightened notice provision for arbitration agreements that the Supreme Court held unlawful in *Casarotto*. There, the Montana Supreme Court refused to enforce an arbitration agreement in reliance on a Montana statute that required contracts containing arbitration clauses to declare that fact in "underlined capital letters on the first page of the contract." 517 U.S. at 683 (quotation marks omitted). That requirement, the Court held, "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a *special notice requirement not applicable to contracts generally.*" *Id.* at 687 (emphasis added). In other words, a rule "'requiring *greater information or choice* in the making of agreements to arbitrate than in other contracts is preempted.'" *Id.* (emphasis added) (quoting 2 Ian R. Macneil *et al.*, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (1995)).

In short, by treating arbitration clauses as a disfavored term and applying every presumption against them, the district court created a higher standard for the

formation of contracts that contain arbitration clauses than for contracts that do not. The FAA, and decades of Supreme Court precedent interpreting the statute, forbid that result.

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 4,854 words.

s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

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