No. 16-2023

In the

United States Court of Appeals

for the

First Circuit

RACHEL CULLINANE, JACQUELINE NUNEZ, ELIZABETH SCHAUL, and ROSS MCDONOUGH, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– v. –

UBER TECHNOLOGIES, INC.,

Defendant-Appellee.

On appeal from a final judgment of the
United States District Court for the District of Massachusetts
Case No. 1:14-cv-14750

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NEW ENGLAND LEGAL FOUNDATION, AND ACT | THE APP ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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MISCELLANEOUS

INTEREST OF THE *AMICI 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.

New England Legal Foundation ("NELF") is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977, and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* affirm that no party or counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their 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.

include both large and small businesses located primarily in the New England region.

ACT | The App Association is an international grassroots advocacy and education organization representing more than 5,000 small and mid-sized app developers and information technology firms. ACT advocates for an environment that inspires and rewards innovation while providing resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

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

Moreover, many of *amici*'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 pro-

vides for arbitration agreements, *amici*'s members have structured millions of contractual relationships—including enormous numbers of online contracts—around arbitration agreements.

The panel's decision announces an ad hoc and flawed approach to the formation of online contracts that does not comport with the reasonable expectations of participants in electronic transactions and deprives businesses of predictability and uniformity in the critically important field of e-commerce. *Amici* therefore have a strong interest in rehearing by the *en banc* Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2016, the U.S. economy included an estimated $608.7 billion in e-commerce transactions in the service industry alone, growing nearly five percent faster year-to-year than the overall service industry. *See* U.S. Dep't of Commerce, *E-Stats 2016: Measuring the Electronic Economy* 2, https://www.census.gov/content/dam/Census/library/publications/2018/econ/e16-estats.pdf (May 24, 2018). And e-commerce transactions in the retail industry added over $389 billion to the economy, growing nearly 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 panel refused to enforce.

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

Yet the panel flyspecked the design of Uber's registration screen in a manner that is inconsistent with reasonable expectations of participants in online transactions. For example, as Uber's petition details, the panel's conclusion that the terms of service button was unusual or less conspicuous because it was not blue and underlined—the typical appearance of hyperlinks used in web browsers on desktop and laptop computers—does not reflect the modern realities of website or mobile application design, in which buttons are routinely used to attract users' attention and provide links to other websites. And it does not give adequate weight to "[t]he transactional context of the parties' dealings," which "reinforces [the] conclusion" that plaintiffs and other Uber riders 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.

The panel's decision has received widespread attention because it has generated significant uncertainty for businesses by depriving them of a clear, predictable, and uniform standard for the formation of online contracts. For example, the panel recognized that the language and minimalist design of Uber's registration screens "could be seen to favor Uber's position" and that button linking to Uber's Terms "did possess some of the characteristics that make a term conspicuous." Yet the panel concluded that the button was not conspicuous enough. That seemingly 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.

ARGUMENT

I. The Panel's Decision Is Incorrect And Creates A Conflict With Other Courts.

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.).[2] In both contexts, the question is whether there has been notice of contract terms and manifestation of assent to those terms. In other words, the relevant inquiry under Massachusetts law is whether Uber's terms and conditions "were reasonably communicated and accepted." *Ajemian*, 987 N.E.2d at 573.

The panel recognized this standard. But it proceeded to apply it in a manner that conflicts with the decisions of other courts and the realities of modern contracting. *See* Pet. 4-10. Most 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 hyperlink pointing to the Terms put a "reasonably prudent smartphone user" on "constructive notice" of those Terms. 868 F.3d at 77-79.

The panel in this case 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

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[2] The Second Circuit was applying California law in *Specht*. The principles of contract formation are similar under Massachusetts law. *See, e.g.*, *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 613 (Mass. Ct. App. 2013).

little to do with whether the link to the Terms was "reasonably communicated" to the plaintiffs. *Ajemian*, 987 N.E.2d at 612. 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* Pet. 5-8. And while different colored and underlined font is used to highlight hyperlinks that appear in a larger field of *text*, the use of a button is another accepted method for communicating 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 blogger summarized, the panel's decision thus "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.

More broadly, the panel's view of Uber's registration process fails to appreciate the commercial reality that 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. Unlike the panel here, the Second Circuit in *Meyer*

acknowledged that reality in language that should have had equal force in this case:

> 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 [appellants'] 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 panel did here, that a reasonable user does not realize that an e-commerce transaction involves terms and conditions. That is especially true for 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 (1) have a smartphone; (2) have registered for an account to use Ap-

ple'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 about Uber's customers that this Court should have drawn, it is that they are, relatively speaking, technologically sophisticated.

Finally, the panel 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 sum, the panel's decision creates an unwarranted division of authority on the fundamental question of how contracts are formed online via

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[3] *See* Apple ID Support, Apple, https://support.apple.com/apple-id (last visited July 11, 2018) ("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 July 11, 2018) (requiring users to "Sign In" to download applications).

mobile smartphones. And the panel based its decision on outdated assumptions about website design that are inapplicable to the modern smartphone user.

II. The Panel'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 the panel's decision has created 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 noted just last month, "[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" last year, "and it shows no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *see also* pages 2-3, *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*, 134 S. Ct. 2473, 2484 (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 77%. *See* Pew Research Center, *Mobile Fact Sheet* (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/mobile/. Indeed, "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 panel's 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 panel's 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 panel's decision, if permitted to stand, 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 FAA'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)).

CONCLUSION

The petition for rehearing should be granted.

Dated: July 16, 2018

Respectfully submitted.

s/ Andrew J. Pincus

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief:

(i) complies with the type-volume limitations of Rule 29(b)(4) and Rule 35(b)(2)(A) because it contains 2,420 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2018, I electronically filed the foregoing with the Clerk of the Court 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.

s/ Andrew J. Pincus
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