APL-2023-00203

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Appellate Division, First Department Case No. 2022-05749

Court of Appeals

STATE OF NEW YORK

EMILY WU,

Plaintiff-Appellant,

against

UBER TECHNOLOGIES, INC.,

Defendant-Respondent,

and

JERRY ALVAREZ, AHMED ELHASHASH,
and ARMAN KHAN,

Defendants.

RESPONSE TO *AMICI CURIAE* U.S. CHAMBER OF COMMERCE, ET AL. IN SUPPORT OF DEFENDANT-RESPONDENT

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PRELIMINARY STATEMENT

In their brief, the *amici* try to tell a story of a company that wishes to make a routine, neutral update to its terms, but is afraid it might accidentally affect a pending lawsuit. They argue that this innocent, well-intentioned company should not be penalized for the unintended effects of necessary business dealings conducted in good faith. The problem is that this story bears no resemblance to what happened here. This is not a case, unlike the ones the *amici* cite, in which a company made an innocuous update to the minutiae of an arbitration clause that everyone agreed was enforceable, for a controversy everyone agreed had to be arbitrated. It is not even a case involving a "normal" prospective arbitration clause intended to govern the parties' future relations from the date of their contract forward. Uber used its electronic terms to try and retroactively sweep in users who were not otherwise bound to arbitration and who had already invoked the right to a jury trial. In that respect, it is unlike any other case either Uber or its *amici* cites.

There is nothing "routine" about what happened here – though, if Uber and its *amici* were to prevail, it undoubtedly would become commonplace for corporations to target represented parties in pending cases with "updates" to their terms. This Court should not be the first to countenance the weaponized use of electronic terms to wrench pending cases from the courts.

ARGUMENT

I. Uber Misled Users Into Accepting A Novel Arbitration Clause And The *Amici*'s Reliance On Cases Involving Technical Updates To Existing, Enforceable Arbitration Agreements Is Therefore Misplaced

The *amici* start their brief with a defense of corporations' right to make "routine" updates to terms of use. *See* Am.Br.8-12. This case does not present the issue of how revisions to existing, binding arbitration agreements should be treated. It presents the question of whether an extraordinary term like this one, which Uber admits was *intended* to circumvent counsel and remove pending cases from the courts, is appropriate.

As discussed in plaintiff's prior submissions, before Uber tried to update its terms in 2021, its 2016 terms already had been stricken down by courts across the country because they were misleading. It very probably is no coincidence that the 2021 update which is the subject of this case was disseminated about two weeks after *Kauders* struck down the 2016 terms as unenforceable. The 2021 terms were intended to bring users like Ms. Wu, who had been misled in 2016, retroactively into the scope of an arbitration clause. In the absence of a retroactive term like this one, users who had signed up in 2016 and had never been offered a clear choice about the acceptance of an arbitration clause would not have been obligated to arbitrate already existing claims.

The cases the *amici* cite uniformly addressed minor, technical updates to existing, enforceable arbitration clauses. They rely most heavily upon *Haider v. Lyft, Inc.,* 2021 WL 3475621 (S.D.N.Y. 2021), which provides an excellent example of a routine update. In that case, which was a class action[1] relating to driver wages, both sides agreed that there was an enforceable, longstanding arbitration agreement between Lyft and its drivers. The question was whether an update Lyft had made to its choice of law clause, which specified that Delaware law would apply if the FAA was found inapplicable, was enforceable. (Pltf.Reply.Br.9-10). Lyft, unlike Uber, sent this minor update with a specific notice to "inform potential class members of their impact on pending litigation" and even decided to "provide a mechanism for opt-out." *Id.*, *2.

The drivers, who accepted the update and then did not opt out, contended that, "because Lyft revised its terms of service during this litigation, the Court must set the new terms of service aside." *Id.*, *2. The Court found that a proposed rule preventing any updates to terms at all "would…be unworkable in practice" because companies must be allowed to make "routine amendments to their terms of service." *Id.*, *3. The Court specifically distinguished its holding from cases – like Ms. Wu's here – where a consequential change was made during the pendency of litigation

[1] The *amici*, like Uber, freely cite class action cases when it suits their position, but then inexplicably claim without any real explanation that the limits class action cases pose on contact with represented parties are inapplicable.

without clear notice. It wrote, denying reargument and explaining the basis for its prior decision, as follows:

> The Court held that Rule 23(d) does not bar enforcement of the revised arbitration agreement. It explained that Lyft's revision to the terms of service were minor, that Lyft properly explained the impact of the revision on putative class members, and that such class members could opt out. Opinion & Order at 4–5. Those features distinguish this case from those cases relied on by the drivers where revisions were major—like introducing a novel arbitration agreement rather than modifying a choice-of-law provision—and/or did so in an opaque or coercive manner. *Id.*

Haider, 2022 WL 1500673, at *2 (emphasis added).

This case hits the trifecta of distinguishing factors the *Haider* court found significant: (1) Uber provided no explanation of the effect on litigation or opt out; (2) the revision was "major" because it consisted of a "novel arbitration agreement" that would require arbitration of a claim that otherwise would have proceeded in court; and (3) it was presented in an "opaque" manner with a misleading notice implying that the update was purely "prospective" (R117).

The remaining cases the *amici* cite are similarly distinguishable. In *Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099 (N.D. Ill. 2020), the court allowed enforcement of a minor revision to an existing, enforceable arbitration clause that predated the dispute at issue. The court specifically *declined* to reach the issue of whether the defendant's later attempt to induce an agreement to a retroactive arbitration clause was enforceable. *See id.* at *7. *See also Enderlin v. XM Satellite Radio Holdings, Inc.*, 2008 WL 830262, at *7 (E.D. Ark. 2008) (revision to existing

arbitration clause); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (revision to existing arbitration clause).

Many of the cases they cite, including what they call the "foundational case" of *AT&T Mobility LLC v. Concepcion* (*supra*) (Am.Br.11), also involved updates circulated before a class was certified.[2] Class certification is the point at which an attorney-client relationship arises between counsel and class members and triggers the application of Rule 4.2. *See also Enderlin*, 2008 WL 830262, *1.

Nor would finding for Ms. Wu mean that "whenever an individual files a lawsuit, the agreements governing her ongoing relationship with the defendant are effectively frozen in time" or that a company would need to cease to do business with users who were suing it. (Am.Br.10). Almost nothing in a company's terms of use will have any bearing on a pending case. Uber's terms contained clauses about (to offer several examples) refund policies, customer conduct, and copyright issues. (R117-28). Of Uber's lengthy terms here, only a single sentence in a single clause had anything to do with pending lawsuits – and as Uber has repeatedly affirmed, that single sentence was specifically *intended* by the company to remove pending cases involving represented parties from the court system without notice to counsel.

[2] *Concepcion* also involved a unilateral update clause – which may well present other legal problems, but did not require AT&T to make any ex parte contact with a represented party for purposes of trying to secure an agreement to an update.

There is no prohibition on a company updating its terms of use during litigation. There is only a prohibition on using terms to circumvent counsel to force pending lawsuits out of the courts, in violation of RPC 4.2. If a company feels that it is not worth doing business with consumers at all if it is not allowed to try and deceive them into arbitration once litigation is pending (Am.Br.10), that is the company's judgment to make. But we doubt most companies would consider a prohibition on targeted, predatory conduct to be a significant impediment to commerce.

The *amici* also write that it was "plaintiff's own affirmative use of the application that caused" the dialogue box relating to the terms to appear and consider it significant that "plaintiff chose to use the Uber application to obtain a ride." (Am.Br.8). Again, there is nothing improper about litigants making contact with each other for matters unrelated to their pending litigation. See RPC 4.2, comment [4]. Ms. Wu was permitted to contact Uber to obtain a taxi ride during the pendency of her case, just as she would have been allowed, if she had fallen on the sidewalk outside a Burger King and brought a lawsuit, to have walked inside a restaurant and ordered a Whopper. By the same token, Uber was allowed to provide her with taxis if she asked for them, to send her updates on new products, and otherwise to conduct business as usual. But it was not permitted to take advantage of that neutral contact. It knew that many thousands of represented users would log into its application, on

the assumption that doing so would not have anything to do with their pending cases. There was nothing accidental about its decision to lay a trap for those users here.

II. The Evaluation Of An Electronic Contract Must Make Provision For Consideration Of The Expectations Of The User In The Transaction, Which *Meyer* Itself Allowed For.

The *amici* next argue, echoing Uber, that the standard for evaluating whether the parties intended to enter an electronic contract should not allow any room at all for consideration of the content of terms. Their main argument is that this Court should ratify the standard they claim the Second Circuit has been applying to evaluate online contracts, particularly *Meyer v. Uber Technologies*, 868 F.3d 66 (2d Cir. 2017) (Am.Br.13-16).

Meyer involved the application of California law. In that case, a user accepted a version of Uber's terms when first signing up for the service. He then attempted to bring a class action lawsuit alleging that Uber's drivers were engaged in illicit price fixing, in response to which, Uber invoked its arbitration clause. The District Court (Rakoff, J.) found the terms unenforceable. *See Meyer*, 200 F. Supp.3d 408, 410 (S.D.N.Y. 2016).

The Second Circuit reversed. In evaluating the sufficiency of the process Uber used, *Meyer* took account of three things: (1) whether the user had "reasonably conspicuous notice" as judged from the "perspective of a reasonably prudent smartphone user"; (2) whether the user unambiguously manifested assent to the

terms; and (3) the "transactional context" in which the parties entered the alleged agreement. *Meyer,* 868 F.3d at 77-80 (emphasis added). When discussing the "transactional context," the Court emphasized its view that, because the parties intended to enter into a forward-looking relationship, the user might reasonably have expected that there would be terms to that relationship. *See id.* at 80.

Several California appellate courts have since distinguished *Meyer* in a way that heavily cabins its rationale, and it is questionable whether the decision even today represents a correct statement of California law, let alone a blueprint for New York's. *See, e.g.*, *Sellers v. JustAnswer LLC*, 73 Cal. App. 5th 444, 476-77 (Cal. Ct. App. 2021) (distinguishing *Meyer*, applying more searching inquiry into transactional context, and finding that it was unlikely consumer would have expected arbitration clause); *Herzog v. Superior Ct. of San Diego County*, 101 Cal. App. 5th 1280 (Cal. Ct. App. 2024) (distinguishing *Meyer* and finding that arbitration clause would not have been reasonably expected by consumer). Indeed, these California cases look more like Judge Rakoff's decision in *Meyer* than the Second Circuit's.

Nor is the Second Circuit's decision in *Meyer* irreconcilable with anything plaintiff has said.[3] *Meyer* found the "transactional context" of the agreement to be

[3] There is reason to find Judge Rakoff's thorough and well-reasoned opinion in *Meyer* more persuasive than the appellate decision that reversed it. But the two opinions applied essentially the same analytical framework and merely came to different outcomes, which is not altogether unusual in what the Second Circuit described as a "a fact-intensive inquiry." *Meyer*, 868 F.3d at 76.

important, and considered how that context would have influenced the expectations of the offeree. *See id.*, 868 F.3d at 80. One does not have to disagree with *Meyer* to find for Ms. Wu here. A represented party with a pending case against Uber would not have inquiry notice from the "transactional context" of an "update" explained in misleadingly prospective terms that it could affect her lawsuit.

The *amici*'s discussion of the "transactional context" of this case (see Am.Br.16-18) is unpersuasive. They write that there was "nothing novel or unusual about being presented with…contract terms on a smartphone" and that she should have known that her "ongoing relationship with Uber was governed by terms and conditions." (Am.Br.17-18). This clause, however, had nothing to do with an "ongoing" relationship between Ms. Wu and Uber. It was retroactive and affected a pending lawsuit brought as a result of their past interactions.

The *amici*'s argument ultimately suffers from the same flaw as Uber's: if we all agree that the "transactional context" and expectations of the offeree are relevant to assessing whether there was a meeting of the minds, there is no sound analytical reason to cut that consideration off without allowing any accounting for whether a highly consequential term was unexpected and undisclosed. It is contrary to the concept of inquiry notice as commonly understood, and to the principles contained in Restatement §211. *See* Pltf.Br.45-46.

The *amici* also write that this Court "should adopt *Meyer's* approach to avoid creating a conflict with the Second Circuit," which they describe as the "federal appellate court governing New York." (Am.Br.15-16). This is somewhat ironic, given that *Meyer* did not even apply New York law. But more importantly, the Second Circuit does not "govern" (Am.Br.16) New York's courts on questions of New York State law. It is emphatically this Court's province to say what New York law is. A decision here would not create any conflict. It would merely guide the Second Circuit about the requirements of New York law in an area where such guidance did not previously exist.

The *amici*'s further reliance on another California case, *Keebaugh v. Warner Bros. Entertainment*, 100 F.4th 1005 (9th Cir. 2024) (Am.Br.19-20), is similarly misplaced. In *Keebaugh*, the Ninth Circuit found that a "sign-in wrap" which accompanied the registration process for an online game put "the reasonable user on notice that they are agreeing to be bound by the Terms of Service" when playing the game. (Am.Br.20). The Court noted the California Court of Appeals' prior decision in *Sellers* (see Pltf.Rep.Br.20), but found it inapplicable. Several weeks later, the California Court of Appeals distinguished *Keebaugh* in another case involving a sign-up process, relying heavily on *Sellers* (which it found was applicable) and applying significantly more stringent scrutiny to the sufficiency of the notice provided. *See Herzog*, 101 Cal. App. 5th 1280, 321 Cal.Rptr.3d 93 (Cal. Ct. App.

2024). The California Court of Appeals, as it had in *Sellers*, affirmed that under California law, to show mutual assent to an electronic contract, "a provider must first establish the contractual terms were presented to the consumer in a manner that made it apparent the consumer was assenting *to those very terms* when checking a box or clicking on a button" and that the "full context of any transaction is critical to determining whether any particular notice is sufficient to put a consumer on inquiry notice of contractual terms contained on a separate, hyperlinked page." *Id.*, 321 Cal. Rptr.3d at 105 (emphasis in original). It also noted that "California law is clear—an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he or she was unaware, contained in a document whose contractual nature is not obvious. *Id.* It held that, because the content of the notice would have misled the user about the scope of the terms at issue, the arbitration clause was not enforceable. *See id.* at 108-13. In this regard, *Herzog* is similar to Ms. Wu's case. A user cannot be considered to have been on inquiry notice when she was actively misled as to the scope of the agreement being put before her.

The *amici* also make a lengthy argument to the effect that the Court "should conclude that a separate checkbox is not required to form a valid contract." (Am.Br.19-23). They contend that "courts have repeatedly held that mutual assent

is established by the combination of linked terms and an acknowledgement that a user, by clicking or pressing a button, is accepting those terms." (Am.Br.22).

This issue does not appear to be presented by this case. As both plaintiff and Uber have previously discussed, the evaluation of an online contract involves consideration of two issues: first, whether the consumer received reasonable notice of the terms; and second, whether the consumer unambiguously manifested their assent to the terms. *See generally Edmundson v. Klarna, Inc.*, 85 F.4th 695, 703 (2d Cir 2023). The parties here have a clear and obvious disagreement about the first of these factors, i.e., the scope of notice required. The issue the *amici* are raising about whether a clickbox is necessary goes to the second factor, i.e., whether the user manifested assent. *See generally Sarchi v. Uber Tech.*, 2022 Me. 8, ¶28 ("the question of assent often comes down to whether the website adequately informs the user that conduct such as clicking on a button constitutes assent to contract terms so as to justify an inference that the user intends to be bound"). Plaintiff has not contended in this case that a checkbox is required in all instances. It may well offer a clearer manifestation of intent than other kinds of processes, but that does not mean it is *per se* required.

III. There Is No Need To Consider Whether New York's Longstanding Rule For The Evaluation Of Forum Selection Clauses Is Preempted Because The Issue Is Not Presented By This Case

The *amici* also offer a lengthy digression about why this Court should overrule an almost 50-year-old line of precedent about the standard to be applied when evaluating the enforceability of contractual forum clauses under New York law. While they are wrong on the merits, the issue is not presented by this case and there is no need to reach it here.

Under New York law, an agreement to arbitrate a particular dispute "must be clear, explicit and unequivocal …and must not depend upon implication or subtlety." *Matter of Waldron v Goddess*, 61 N.Y.2d 181, 183-84 (1984) (internal citations omitted). "[B]y agreeing to arbitrate a party waives in large part many of his normal rights under the procedural and substantive law of the State, and it would be unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent." *Marlene Indus. Corp. v. Carnac Textiles, Inc.,* 45 N.Y.2d 327, 333-34 (1978). The applicability of this rule, under longstanding New York law, is not limited to arbitration. "[C]ontractual choice of forum, whether as to place or the preclusion of the right to litigate in favor of arbitration, must be express." *Gangel v. DeGroot*, 41 N.Y.2d 840, 841 (1977). It is not, in other words, a rule exclusively applicable to arbitration clauses or otherwise created to disfavor them.

In *Progressive Cas. Ins. Co. v. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993), the Second Circuit expressed the view that this rule was preempted by the Federal Arbitration Act because it impermissibly singles out and disfavors arbitration. However, New York courts have not agreed with *Progressive*. In *J.J.'s Mae, Inc. v. H. Warshow & Sons, Inc.*, 277 A.D.2d 128 (1st Dept. 2000), the First Department considered *Progressive* and declined to credit it. It has, since then, continued to follow longstanding New York law. This Court, too, has continued to apply the same rule it always has since *Progressive*, including in *God's Battalion of Prayer Pentecostal Church v. Miele Associates, LLP*, 6 N.Y.3d 371 (2006). *See id.* at 374 ("A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' "clear, explicit and unequivocal" agreement to arbitrate").

A. The issue is not presented by this case

In the underlying motion practice here, both sides accepted the applicability of New York's longstanding rule. Plaintiff cited New York's traditional standard for the evaluation of forum selection clauses as the governing rule and Uber did not contend it was inapplicable or otherwise was preempted. (R84, R182, R519). However, the motion court raised the issue of preemption *sua sponte* in its decision, in *dicta*. (R32-34). It expressed its disagreement with the First Department's decision in *J.J.'s Mae*, which it called "dubious," but ultimately found that the

question of whether the existing rule was preempted – which, again, no party had raised – was purely academic, because, even if it did apply, a valid arbitration agreement existed between plaintiff and Uber. (R35).

On appeal, plaintiff argued that the motion court had erred in refusing to follow binding First Department (and Court of Appeals) case law, but also said that it was an academic issue that the Court did not need to address to decide the case. *See* Pltf.Br. to Appellate Division, First Department, at 73 (NYSCEF Docket No. 4). The First Department did not find the preemption issue relevant to its analysis either and declined to reach it. (R660-61). In this Court, plaintiff has not raised any argument that is dependent on the applicability of New York's standard for the evaluation of forum selection clauses. It remains a purely academic issue that has no meaningful bearing on the outcome of the case. There is no need to consider it here.

B. If the Court were to reach the merits, the rule is not preempted, because it applies generally to forum selection clauses and does not pretextually disfavor arbitration

If we are to reach the merits of the issue, there is nothing improper about New York's longstanding rule requiring that a contractual choice of forum be unambiguous and not depend on implication or subtlety.

Courts have sometimes made reference to the FAA's policy "favoring arbitration." But, as the United States Supreme Court has made clear, the policy "is

merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010). It is not, on the other hand, intended to accord arbitration contracts a privileged position that other kinds of agreements do not enjoy. A "court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 412 (2022). *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967) (FAA intended to make "arbitration agreements as enforceable as other contracts, but not more so"); *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) ("The Supreme Court has made clear" that the FAA's policy "is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism"). "If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan,* 596 U.S. at 418.

The Supreme Court's recent decision in *Morgan v. Sundance*, 596 U.S. 411 (2022), is instructive. In that case, the Court considered whether a defendant waived

its right to rely on an arbitration clause by proceeding with litigation without invoking it. Many of the federal circuit courts had followed a rule to the effect that an arbitration clause could only be deemed waived if the other party was *prejudiced* by the delay. *See Morgan*, 992 F.3d 711 (8th Cir. 2021). This rule differed from how waiver is evaluated in cases that do not concern a right to arbitration, which typically look only to whether a party intentionally relinquished a known right, without requiring a showing of prejudice. *See Morgan*, 596 U.S. at 413-15. The Supreme Court held that the FAA is "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration" and that arbitration contracts are subject to the same legal rules as other kinds of agreements. *Id.* at 419. Thus, it held, the arbitration clause was subject to the same waiver analysis as any other kind of contractual term.

In the case the *amici* rely upon primarily, *Kindred Nursing Homes, Ltd. Partnership v. Clark*, 581 U.S. 246 (2017), the Supreme Court merely applied the flip side of this coin and held that a rule developed pretextually for the *sole* purpose of disfavoring arbitration clauses was not enforceable. That case came to the United States Supreme Court from the Kentucky Supreme Court, which had considered the enforceability of arbitration clauses presented to nursing home residents in their admissions papers. The contract at issue was signed by a relative of a patient, pursuant to a power of attorney. The Kentucky Supreme Court created a new rule

called the "clear statement rule," which required that a power of attorney specify explicitly the bearer's authority to waive the right to a jury trial or other "fundamental constitutional rights." *Id.* at 250. The United States Supreme Court found that the rule was unenforceable because it was merely a pretext created specifically for the purpose of disfavoring arbitration clauses:

> The clear-statement requirement, the court suggested, could also apply when an agent endeavored to waive other 'fundamental constitutional rights' held by a principal. But what other rights, really? No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees. Nor did the opinion below indicate that such a grant would be needed for the many routine contracts—executed day in and day out by legal representatives—meeting that description.

Id. at 253 (internal citations omitted).

In short, a nonpretextual rule of State law that happens to relate to arbitration clauses as well is permissible. A rule that singles out arbitration clauses alone for disfavored treatment is not. For example, consider *Manhattan Cryobank, Inc., v. Hensley*, 2020 WL 4605236 (S.D.N.Y. 2020). In that case, the Court addressed the issue of whether the FAA prohibited the application of CPLR 1209, which requires that a "controversy involving an infant, person judicially declared to be incompetent or conservatee shall not be submitted to arbitration except pursuant to a court order made upon application of the representative of such infant, incompetent or conservatee..." *Manhattan Cryobank, Inc. v. Hensley,* 2020 WL 4605236, at *3 (S.D.N.Y. 2020). The Court found that CPLR 1209 was not "aimed at a circumstance

unique to arbitration" and was instead "aimed at the capacity of the party agreeing to arbitrate, whether an infant or an incompetent." It therefore found that the CPLR provision did not conflict with the FAA. *See also Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819, 824 (9th Cir. 2019) (California rule of law finding that the right to seek an injunction of a deceptive practice for benefit of the public could not be waived by contract did not violate the FAA, because it "expresses no preference as to whether public injunction claims are litigated or arbitrated, it merely prohibits the waiver of the right to pursue those claims in any forum"); *N. Kentucky Area Dev. Dist. v. Snyder*, 570 S.W.3d 531, 537 (Ky. 2018) (statute prohibiting state agency from requiring employees to arbitrate as a condition of employment did not violate FAA).

Here, the New York rule does not apply only to arbitration and is not a "custom-made rule[]" to "to tilt the playing field in favor of (or against) arbitration." *Morgan*, 596 U.S. at 419. It merely tracks the general requirement of New York law that *any* kind of forum selection clause be express and unequivocal. As this Court put it, "contractual choice of forum, whether as to place or the preclusion of the right to litigate in favor of arbitration, must be express." *Gangel*, 41 N.Y.2d at 841. New York law treats arbitration clauses like other kinds of forum selection rules: it requires that a contractual choice of forum which would displace the otherwise applicable background rules concerning an action must be unambiguous and explicit and cannot depend on implication or subtlety.

New York has followed the same general requirement that the selection of forum be unambiguous and unequivocal in cases that do not involve arbitration. *See, e.g., Gangel*, 41 N.Y. at 841; *New Greenwich Litig. Tr., LLC v. Citco Fund Services (Europe) B.V.*, 145 A.D.3d 16, 28 (1st Dept. 2016); *Majer v. Schmidt***,** 169 A.D.2d 501, 505 (1st Dept. 1991); *H. Sand & Co., Inc. v. Tishman Const. Corp. of New York*, 191 A.D.2d 678, 678 (2nd Dept. 1993). The standard therefore is not pretextual. *Accord Manhattan Cryobank, Inc.,* 2020 WL 4605236, *3.

CONCLUSION

WHEREFORE, it is respectfully submitted that the Order of the Appellate Division, First Department, should be reversed.

Dated: New York, New York
June 19, 2024

Respectfully submitted,

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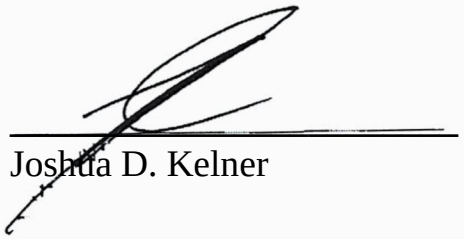

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