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COURT OF APPEALS

STATE OF NEW YORK

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WU,

Appellant,

-against-

NO. 90

UBER TECHNOLOGIES, INC.,

Respondent.

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20 Eagle Street  
Albany, New York  
October 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Wu v. Uber Technologies.

3 MR. KELNER: Good afternoon, Your Honors. And  
4 may it please the court. My name is Joshua Kelner, and I  
5 represent Emily Wu. May I reserve five minutes for  
6 rebuttal, please?

7 CHIEF JUDGE WILSON: Yes.

8 MR. KELNER: Your Honors, this case is about  
9 whether New York law contains any safeguards to protect  
10 consumers doing business on the internet. Emily Wu clearly  
11 and explicitly chose the forum where she wanted her case  
12 against Uber to be litigated, the Supreme Court of the  
13 State of New York. And if Uber's attorneys had come to a  
14 preliminary conference in this case and asked Ms. Wu's  
15 counsel if she would agree to give up her right to trial by  
16 jury and go arbitrate in a forum of Uber's choosing, the  
17 answer we all know would have been no.

18 JUDGE GARCIA: But what if they had chosen to  
19 enforce the 2016 arbitration agreement that she  
20 acknowledged when she got the car?

21 MR. KELNER: Well, there's a number of courts  
22 around the country, including the Massachusetts Supreme  
23 Court in Kauders, the Maine Supreme Court in Maine, the  
24 Federal First Circuit, and even a court in New York before  
25 that time have all held the 2016 terms didn't bring about

1 legitimate contractual assent. And that's true for a  
2 couple of reasons.

3 JUDGE GARCIA: But it seemed when I was reading  
4 your briefs at first, that this was as you were just  
5 describing, and all of a sudden Uber comes in and says,  
6 wow, too bad you signed this 2021 arbitration agreement.  
7 And I know that's what they put in their notice, but there  
8 is this 2016 agreement out there. So how does that affect  
9 the analysis here? We have 2021, but we also have 2016.

10 MR. KELNER: Well, I think first, the 2021 terms  
11 shouldn't be viewed in a vacuum apart from 2016. This  
12 quote, unquote, "update" was circulated. It's no  
13 coincidence, very shortly after Kauders dropped down the  
14 2016 terms. But even looking at the terms - - -

15 JUDGE GARCIA: Are there courts that have not  
16 struck down the 2016 terms?

17 MR. KELNER: Yes. Of course, Judge. But looking  
18 at the 2016 terms, they are problematic. They created an  
19 assembly line of repetitive clicking, where they would have  
20 prompts at the top of the page. And then every time you  
21 were allowed to go forward, an arrow would turn from gray  
22 to black telling you to go ahead. Then on the very last  
23 page of that process, it said at the top, what's your name.  
24 And if you entered your name, then that arrow would turn  
25 from gray to black, prompting you to go forward.

1 JUDGE TROUTMAN: Okay. So if you say you don't  
2 look at them without considering the other agreement, the  
3 2021 is a clickwrap agreement. You have to affirmatively  
4 act. So is she bound by the terms of that agreement?

5 MR. KELNER: No, judge. So looking at the 2021 -  
6 - -

7 JUDGE TROUTMAN: Why is she not bound when she  
8 clicks? She has to do something.

9 MR. KELNER: Sure. So the test that all of the  
10 courts have applied or at least done with some consensus  
11 is, first, is there a reasonable notice? And second, is  
12 there a manifestation of acceptance? Whether there is a  
13 box to click goes to the action you need to manifest  
14 acceptance, but it doesn't go to reasonable notice. What  
15 this case is about is what do you need to do to have  
16 reasonable notice.

17 JUDGE HALLIGAN: Are there any cases - - -  
18 setting aside the question of pending lawsuits, right? Are  
19 there any cases that have found that the 2021 click-through  
20 is not sufficient for contract formation purposes?

21 MR. KELNER: There have been a handful of very  
22 low court cases around the country, but this is something  
23 that is very recent. And this is the first court other  
24 than the Massachusetts Supreme Court in - - -

25 JUDGE CANNATARO: I'm sorry. What's - - - what's



1 very recent? Clickwrap or - - -

2 MR. KELNER: I'm saying - - -

3 JUDGE CANNATARO: - - - the 2021 agreement?

4 MR. KELNER: The 2021 terms have been subject to  
5 a lot of different action - - -

6 JUDGE HALLIGAN: I thought that Massachusetts  
7 case, but correct me if I'm wrong, pertained to either the  
8 identical or an equivalent of the 2016 agreement, not the  
9 2021 agreement. Am I wrong about that?

10 MR. KELNER: Well, Kauders is 2016 and then the  
11 Good case, which is more recent and is in the supplemental  
12 letter briefing, that goes to 2021. And certainly as to  
13 Good, we think that the dissent is more persuasive in its  
14 analysis.

15 JUDGE RIVERA: Well, is there any way - - - I'm  
16 over here. Is there any way, in your view, that they could  
17 have written this update that would have - - - if she had  
18 clicked it through, would have resulted in both reasonable  
19 notice and - - - and assent?

20 MR. KELNER: Well, I think it's important to pull  
21 apart the thread of arbitration in general and retroactive  
22 - - -

23 JUDGE RIVERA: Yeah.

24 MR. KELNER: - - - arbitration to a represented  
25 litigant. For arbitration in general, reasonable notice



1 would have said something about how this contains an  
2 arbitration clause, it may affect your right to trial by  
3 jury.

4 JUDGE RIVERA: Okay.

5 MR. KELNER: For a represented litigant,  
6 describing it as an update that would go into effect at a  
7 future time, no reasonable person encountering that  
8 language would have understood it to apply retroactively.

9 JUDGE RIVERA: So would they have had to include  
10 something in - - - I think it's section 2 on the  
11 arbitration agreement language in - - - in the terms that -  
12 - - of - - - of how a pending lawsuit would - - - would be  
13 treated given this term?

14 MR. KELNER: Putting aside the no contact issues,  
15 I think it's problematic in general - - -

16 JUDGE RIVERA: So put that - - - yes, put that  
17 aside.

18 MR. KELNER: I think it's problematic in general  
19 to call it an update. But putting that aside, yes, there  
20 would have to be something explicit.

21 JUDGE SINGAS: So your argument is not that  
22 notice itself was not sufficient - - - notice in this  
23 particular case because she had pending - - - legislation  
24 was insufficient?

25 MR. KELNER: I don't think that we need to get to



1 get to the question of whether notice was sufficient for a  
2 general arbitration clause here, say, for a new user, but  
3 certainly somebody. And what makes this case different  
4 from any that my colleagues cite in their brief is that  
5 it's somebody who was a represented party with a pending  
6 lawsuit, who was already in litigation. And everything  
7 about these terms from the notice to even once you get  
8 through the hyperlinks - - -

9 JUDGE TROUTMAN: So do you agree, though, that  
10 simply saying, I didn't read it, doesn't get you off the  
11 hook of being bound?

12 MR. KELNER: Sure. So we have no quarrel with  
13 the idea that there is a duty to read a contract. That is  
14 a valid concept in the law. The real question here is  
15 whether there is any stopping point on the duty to read  
16 when you get to the outer boundaries of it.

17 JUDGE HALLIGAN: But - - - but if you are asking  
18 us to focus specifically on the issue here, which I take it  
19 from what you just said is that there was a pending lawsuit  
20 and - - - and you're saying that differentiates it from the  
21 more generic contract formation question, why doesn't that  
22 issue about the pending lawsuit go to the question of  
23 unconscionability as opposed to the standard for contract  
24 formation?

25 MR. KELNER: Sure. So what I'd go to on that is



1 the concepts expressed both in the Restatement on Contracts  
2 and also the Restatement on Consumer Contracts, which,  
3 since our supplemental letter briefs has been finalized and  
4 published and also just to the concept of inquiry notice as  
5 a whole. And what all of those say is that when you are  
6 dealing with standardized contracts, one where consumers we  
7 know are highly unlikely to read and are very likely unable  
8 to understand, that for terms that are beyond the realm of  
9 reasonable expectations for the transaction, that those  
10 terms require notice.

11 JUDGE HALLIGAN: So you'd have us pull out  
12 specific terms with respect to the contract formation test  
13 and - - - and suggest that - - - that some heightened  
14 standard of - - - of notice applies?

15 MR. KELNER: Well, that's what the Restatement  
16 does. Though, it's not a heightened standard. It's just,  
17 if you're putting something in your terms, that materially  
18 exceed the realm of reasonable expectations - - -

19 JUDGE HALLIGAN: Right.

20 MR. KELNER: - - - for this sort of transaction -  
21 - -

22 JUDGE HALLIGAN: So why isn't the - - - the  
23 description that's set forth in the terms for 2021  
24 sufficient to do that? What more would you - - - would you  
25 require them to say for it to constitute reasonable notice



1 in your view?

2 MR. KELNER: Well, this one's actively misleading  
3 because they say it's an update, that it's going into  
4 effect at a future time. Even if you get past the  
5 hyperlink, it says that it affects how cases can be  
6 brought. That further signifies that it is prospective,  
7 not retroactive. And all of those - - -

8 JUDGE HALLIGAN: But there was some language  
9 which indicated it applied to - - - to existing disputes,  
10 but - - - but maybe I misread that.

11 MR. KELNER: I mean, if there is some language,  
12 at best, what you have is somebody who is very  
13 sophisticated, who knows what they're doing and has  
14 designed a misleading and unclear process. And no  
15 layperson represented by counsel in a pending lawsuit  
16 thinks that a generally applicable or allegedly generally  
17 applicable update sent to them while they're trying to hail  
18 a taxi is going to take their pending lawsuit out of the  
19 court. It flouts those expectations.

20 JUDGE CANNATARO: Could we just go back to  
21 reasonable expectations for one second? And I'm just  
22 curious, what is your definition of a reasonable  
23 expectation with respect to this kind of provision?  
24 Because my understanding from the commentary to the  
25 Restatement is that it has to really be - - - I think the

1 word they use is bizarre or oppressive. In this pending  
2 litigation term, you know, it's - - - it's damaging to your  
3 client, but I don't know that it would be considered  
4 bizarre or - - - or oppressive even.

5 MR. KELNER: I think that the commentaries go a  
6 little beyond that and also the Consumer Contracts  
7 Restatement does as well. But reasonable expectations goes  
8 to what anybody would expect when entering a transaction.  
9 And it is certainly oppressive to tell a litigant who  
10 already has elected a trial by jury that we are going to  
11 take away that right where we approached you outside the  
12 presence of your counsel, and that you have unwittingly  
13 agreed to affect your pending case without the chance to  
14 talk to your lawyer. And also - - -

15 JUDGE CANNATARO: And - - - and that - - - to - -  
16 - to just echo a question that I think you already got,  
17 that strikes at the heart of the creation of the agreement  
18 itself?

19 MR. KELNER: Sure. Because it goes to inquiry  
20 notice. Everybody agrees that what we're talking about  
21 here is inquiry notice. What we say is that inquiry notice  
22 means, what are you expected to inquire after? Uber's  
23 answer to that is: we can put anything behind a hyperlink,  
24 and it's your responsibility to click the hyperlink and  
25 ferret out whatever we have put in it. The burden

1 shouldn't rest - - -

2 JUDGE CANNATARO: Well, in this case, though, the  
3 - - - the email that went out prior to the - - - the  
4 clickwrap that comes through on the app did mention that  
5 this is going to impact your - - - or it says that there  
6 are going to be changes to the arbitration agreement. So  
7 there is some amount of notice. We're just quibbling over  
8 how specific that paragraph needed to be, aren't we?

9 MR. KELNER: Well, I read that paragraph almost  
10 as consciousness of guilt because they make the vaguest,  
11 most anodyne possible reference to changes or updates to  
12 the arbitration clause that will go into effect in the  
13 future. They could easily have said, if you have a pending  
14 lawsuit, this arbitration clause will take it out of the  
15 courts. They didn't do that. And it's fair to wonder why  
16 weren't they explicit.

17 JUDGE RIVERA: And if they did that, from your  
18 perspective, you wouldn't be here, correct?

19 MR. KELNER: Well, at least there would be no  
20 contact issue.

21 JUDGE RIVERA: They did that and she clicked on -  
22 - - and she clicked, I consent. Your position is - - -  
23 well, that looks like assent. That looks like it's enough  
24 notice. She's clicked it. It's - - - it's assent.

25 MR. KELNER: On the - - - the question of



1 contract formation, yes. If there is notice of a provision  
2 that's beyond expectations - - -

3 JUDGE RIVERA: Yes. Yes.

4 MR. KELNER: - - - then sure. Like, if they know  
5 what they're doing, they know what they're entering into,  
6 then that forms a contract. But when - - -

7 JUDGE RIVERA: Isn't that unconscionable?

8 MR. KELNER: Then we would get to  
9 unconscionability. But at least there's contract formation  
10 in the first place.

11 JUDGE RIVERA: Yes. Okay.

12 JUDGE GARCIA: Why would Uber ever put that  
13 notice in if their view is the 2016 agreement is effective?  
14 Because then they're basically admitting that it wasn't  
15 effective to already remove your case from - - -

16 MR. KELNER: I would say - - - well, they could  
17 have used may, but it's also a predicament of Uber's  
18 creation because they played fast and loose in 2016 and  
19 tried to get people through an assembly line without  
20 knowing they were entering into a very, very consequential  
21 clause.

22 JUDGE RIVERA: Why - - - why isn't she bound with  
23 - - - by the fact that she - - - after they - - - they  
24 sought the mandatory arbitration, she continued to ride  
25 Uber taxis. Why - - - why is she bound by that? Her

1           conduct, why is that - - -

2                   MR. KELNER:   So I think that that goes to their  
3           citation to the Second Circuit's non-precedential decision  
4           in Nicosia.   And it said this isn't supposed to be  
5           precedent.   But that case, Amazon actually told its users,  
6           by buying a product on our website, you agree to be bound  
7           by our terms.   That's not what we have factually in this  
8           case.   What we have factually in this case - - - so I'm  
9           putting aside the notice - - - Uber was very explicit about  
10          what you have to do to manifest assent.   It said, check a  
11          box and click confirm.   They never said to Emily Wu during  
12          - - - during the nearly two-year pendency of her motion as  
13          to these terms, and by the way, forget what we already said  
14          about checking a box, if you keep using our taxis, that  
15          will be another way you can manifest assent to these terms.  
16          She had every right to believe, while the validity of those  
17          terms was being litigated, that whatever preexisting terms  
18          they had in - - -

19                   JUDGE TROUTMAN:   But why - - -

20                   MR. KELNER:   - - - there in relationship  
21          controlled without assent.

22                   JUDGE TROUTMAN:   Why isn't she not expected to  
23          talk to her attorney about the fact that she's litigating  
24          against a party?

25                   MR. KELNER:   Well, the no contact rule - - -



1 putting aside expectations, no - - -

2 JUDGE TROUTMAN: And - - - and what - - -

3 MR. KELNER: Yeah.

4 JUDGE TROUTMAN: - - - should she do? What  
5 should she do with respect to future use?

6 MR. KELNER: Well, with regard to - - - to the no  
7 contact rule, the no contact rule contemplates that there  
8 will be ongoing, potentially, neutral contacts between  
9 litigants. So she was allowed to reach out to Uber and try  
10 to get a taxi, and they while - - -

11 JUDGE TROUTMAN: And so their non-lawyers could  
12 send notices: if you using our services, here are the  
13 rules.

14 MR. KELNER: Well, the no - - - the no contact  
15 rule also contemplates that. And a lawyer can't outsource  
16 their ethical obligations to support staff. I can't tell  
17 my paralegal I want to make contact with a represented  
18 party, how do you sent out this letter?

19 JUDGE TROUTMAN: But how do we know a lawyer was  
20 involved with respect to the update of the agreement?

21 MR. KELNER: Well, if there's any ambiguity about  
22 this, we had asked for a hearing and there should be one.  
23 But all we have is them hiding behind the affidavit of a  
24 paralegal who lives halfway across the country from where  
25 the terms were drafted.

1 JUDGE TROUTMAN: Well, where is the evidence that  
2 an actual lawyer reached out to her?

3 MR. KELNER: Well, the evidence about - - - all  
4 we have to do is look at the terms. They never denied that  
5 a lawyer drafted the terms. And no lawyer - - - no one  
6 other than a lawyer could write a legal document as  
7 detailed and intricate and conceptually complex as these  
8 terms - - -

9 JUDGE TROUTMAN: So if a lawyer writes it, then a  
10 lawyer is presumed to have sent it, or even if someone else  
11 sends it on behalf of the company itself, it's deemed to be  
12 an act of a lawyer. Is that what you're saying?

13 MR. KELNER: Well, that's what the no contact  
14 rule says. It says that a lawyer can counsel a client  
15 about how to make contact with represented parties, but  
16 they have to give notice to opposing counsel.

17 JUDGE CANNATARO: Counsel, is this the - - -

18 JUDGE SINGAS: Let's suppose that there was an  
19 ethical violation here. Isn't what you're asking for - - -  
20 it's basically case ending. The sanctions would just end  
21 this case. And isn't that a bit draconian and move much  
22 further away from what we usually do in these  
23 circumstances?

24 MR. KELNER: Well, what we say in our brief is we  
25 are more than accepting of the concept that an appropriate

1 sanction would be that they shouldn't be allowed to enforce  
2 the arbitration clause. But it's clear that there  
3 shouldn't have been contact with a represented party here.  
4 It concerned the representation. They knew that she was  
5 represented. They knew they were reaching out  
6 systematically to represented parties. And at a minimum,  
7 they shouldn't be able to enforce the - - -

8 JUDGE CANNATARO: So if you - - -

9 MR. KELNER: - - - proper benefit of that  
10 bargain.

11 JUDGE CANNATARO: If you're willing to accept the  
12 possibility that they shouldn't be allowed to enforce the  
13 arbitration clause, doesn't that really just go back to the  
14 unconscionability issue? And shouldn't that - - - and  
15 because you do have a delegation clause in this agreement,  
16 which is not the subject of a dispute as I understand it,  
17 you've agreed to give that question to an arbitrator.

18 MR. KELNER: I don't think so, Your Honor.  
19 First, no contact is separate from unconscionability. No  
20 contact is a boundary that's part of the adversarial  
21 process and says you cannot reach out to a represented  
22 party who is represented by counsel to try to get something  
23 of value - - -

24 JUDGE CANNATARO: Yes, Counsel. But we're  
25 talking about the remedy you asked for. And originally, as



1 we heard, the remedy that you asked for was striking of the  
2 answer and - - - and sanctions - - - monetary sanctions.  
3 But you - - - you very graciously conceded that you would  
4 also take non-enforcement of the arbitration provision.  
5 That's the part, to me, that seems can only go to the  
6 unconscionable way in which the arbitration agreement was  
7 secured.

8 MR. KELNER: Well, we - - -

9 JUDGE CANNATARO: And that's for the arbitrator.

10 MR. KELNER: Well, we cite a number of cases in  
11 our brief about inherent authority of courts. Public  
12 Justice as amicus cites a case, Billingsley, that also  
13 talks about other cases where courts exercised inherent  
14 authority not to enforce arbitration clauses. And on the  
15 delegation issue, we did validly challenge the delegation  
16 clause. Our language in our brief is almost identical to  
17 what the Supreme Court found valid in Coinbase in footnote  
18 2, literally almost word-for-word verbatim identical. And  
19 Uber also didn't even contend in the court below that we  
20 had failed to raise some sort of delegation issue. They  
21 just said that we hadn't shown that either of them were  
22 unconscionable, and that itself should be a waiver of the  
23 argument.

24 JUDGE GARCIA: Quick factual question. Is this  
25 the same account she used to order the car that was

1 involved in the accident?

2 MR. KELNER: Which account, Your Honor?

3 JUDGE GARCIA: Uber account. Is it the same Uber  
4 account?

5 MR. KELNER: Yeah. She didn't open a second  
6 account, Your Honor.

7 JUDGE GARCIA: Thank you.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. KELNER: I see my red light is on. Thank  
10 you.

11 MR. HUSTON: May it please the court. I'm  
12 Michael Huston, of Perkins Coie, on behalf of the  
13 respondents. Courts in this state and around the country  
14 from California to Massachusetts have repeatedly recognized  
15 that Uber's 2021 clickwrap agreement forms an enforceable  
16 contract under basic principles of contract law. That's  
17 because the clickwrap ensures that a user gives an  
18 unambiguous manifestation of assent to the contract terms  
19 and a clear and simple interface to - - -

20 JUDGE RIVERA: Have they considered its  
21 application to someone who has a pending lawsuit?

22 MR. HUSTON: So I don't think that specific  
23 question has come up in any - - -

24 JUDGE RIVERA: So isn't that really what it turns  
25 on?



1 MR. HUSTON: Yes. I - - - I think so, Your  
2 Honor. But that just gets to the fundamental point.

3 JUDGE RIVERA: Okay.

4 MR. HUSTON: The - - -

5 JUDGE RIVERA: Where - - - make believe for one  
6 moment. I'm not a judge. I'm not a lawyer. I haven't had  
7 all that legal training. I just need this cab to get  
8 somewhere. And - - - and I open it up. Let's say I click  
9 all the way through, and I - - - and I spend the time to  
10 read section 2. What - - - what would alert me that that  
11 case I filed months ago is now not going to be resolved in  
12 a court of law but must be sent to mandatory arbitration?

13 MR. HUSTON: Sure. So I - - - I think two points  
14 about that, Your Honor.

15 JUDGE RIVERA: Yes.

16 MR. HUSTON: The first is that - - - of course,  
17 you already knew in the hypothetical that you had agreed,  
18 long before the accident, long before this clickwrap to  
19 another contract with the exact - - -

20 JUDGE RIVERA: Yeah. But that's not what you  
21 relied on. So let's just stick with 2021.

22 MR. HUSTON: Sure. So I would direct the court  
23 to page 118 - - -

24 JUDGE RIVERA: Okay.

25 MR. HUSTON: - - - of the record. This is the



1 contract terms.

2 JUDGE RIVERA: Yeah.

3 MR. HUSTON: We're in - - - you know, the very  
4 first page of the - - - of the term says, be aware, this is  
5 - - - you're - - - you're forming a contract. Take the  
6 time to read this. It creates an important decision.

7 JUDGE RIVERA: Right.

8 MR. HUSTON: So I think right away, we're  
9 alerting the user, this is a serious thing that should be  
10 taken seriously. If you want to know about the arbitration  
11 provision, how disputes can be brought between you and - -  
12 - you and Uber, go to section 2.

13 JUDGE RIVERA: Okay.

14 MR. HUSTON: Right there in section 2, it's going  
15 to say, you and Uber agree that any dispute, claim, or  
16 controversy in any way arising from your use of the  
17 services - - -

18 JUDGE RIVERA: Yes.

19 MR. HUSTON: - - - whether it arose before or  
20 after you - - -

21 JUDGE RIVERA: Right.

22 MR. HUSTON: - - - accepted these terms - - -

23 JUDGE RIVERA: Right.

24 MR. HUSTON: - - - must go - - - be decided by an  
25 arbitrator - - -



1 JUDGE RIVERA: Again, how would that tell a  
2 layperson, having already incurred the kind of event that  
3 created an injury that they then are filing a personal  
4 injury lawsuit on and they have actually made their choice,  
5 that now they are going to have to take - - - I mean,  
6 they're going to have to take some action and proceed in a  
7 different manner from the choice that they made, which is,  
8 I made a choice to go to court, and if I - - - if I check  
9 this little box, I'm going to have to forfeit that?

10 MR. HUSTON: Sure. So the answer, Your Honor, is  
11 that regular people understand what the phrase before or  
12 after means. This isn't written in - - -

13 JUDGE RIVERA: Well, no, that - - - one would  
14 read that, I think, without legal training, to mean  
15 occurrences of the past, occurrences for the future, but  
16 not necessarily an occurrence that now I've already chosen  
17 to file a lawsuit on and I have done that.

18 MR. HUSTON: So respectfully, Your Honor, I think  
19 I just disagree about what a reasonable person - - -

20 JUDGE RIVERA: You may. I don't know who gets a  
21 better end of that, but yeah.

22 MR. HUSTON: Sure. So I - - - I - - - I guess  
23 what I - - - what I - - - I would urge the court to take a  
24 look at the language on page 118 because I think what  
25 you'll see is we're talking about any - - - first of all,

1 we're using the broad phrase - - - phrase any. Any means  
2 any, as the Supreme Court of the United States has  
3 repeatedly instructed. But what I think you're looking at  
4 here is any - - -

5 JUDGE RIVERA: If we disagreed with you, doesn't  
6 this mean you just add one little sentence?

7 MR. HUSTON: So - - -

8 JUDGE RIVERA: This includes pending litigation.

9 MR. HUSTON: Your Honor - - -

10 JUDGE RIVERA: That's all it would mean.

11 MR. HUSTON: So your - - -

12 JUDGE RIVERA: Correct?

13 MR. HUSTON: No. I - - - I - - - I mean, Your  
14 Honor, if - - -

15 JUDGE RIVERA: You wouldn't do that if we  
16 disagreed with you?

17 MR. HUSTON: Uber strives to have valid, you  
18 know, agreements. We would respond to the court's  
19 decisions, obviously.

20 JUDGE RIVERA: Good idea.

21 MR. HUSTON: I think the key point, though, is  
22 you can always demand one more sentence. Every plaintiff  
23 will come to court - - - no matter what you say in this  
24 case about, well, we needed just one more sentence, the  
25 plaintiffs in the next case will say, well, we needed just

1 one more sentence for our lawsuit.

2 JUDGE RIVERA: No. But we're talking about this  
3 lawsuit, and we're talking about the fact that it was a  
4 pending lawsuit. I - - - I just - - - I'm struck. I've  
5 never come across - - - and it just may be that I've never  
6 come across it, maybe others have, of a situation where you  
7 have someone who's filed a lawsuit, they have record  
8 representation by a lawyer, and now another lawyer wants  
9 them to - - - to proceed outside of that lawsuit to go into  
10 binding arbitration by the fact that they signed some other  
11 contract without the benefit of counsel that never refers  
12 to that particular lawsuit. Usually, if you want, this  
13 would be - - - wouldn't this be something you come in and  
14 negotiate and say, look, would your client consider the  
15 following? Let's resolve this in - - - in - - - in  
16 arbitration. It'll be better for your client and mine.

17 MR. HUSTON: So Your Honor, I think I have to  
18 take issue with the premise of the question because, as  
19 we've already discussed earlier this afternoon, it is  
20 simply not the case that this term was added to this  
21 agreement for purposes of Ms. Wu's lawsuit, for purposes -  
22 - -

23 JUDGE RIVERA: No.

24 MR. HUSTON: - - - of this agreement.

25 JUDGE RIVERA: That - - - I wasn't asking

1 anything like that. I actually understand your argument.  
2 I think it's a very compelling one, that if we just carve  
3 out pending lawsuits, this gives quite robust notice. I  
4 think it's a very compelling argument. The issue is about  
5 someone who is in litigation and having a lawyer depending  
6 on this, you know - - -

7 CHIEF JUDGE WILSON: How - - - how hard - - -

8 JUDGE RIVERA: - - - the clickwrap in that case.

9 CHIEF JUDGE WILSON: How hard practically would  
10 it have been for Uber to identify the set of people who had  
11 pending lawsuits and treat them differently?

12 MR. HUSTON: Sure, Your Honor. So I think with -  
13 - - with regard to this case specifically, it's important  
14 to understand that the - - -

15 CHIEF JUDGE WILSON: No. I'm asking not about  
16 this case specifically. You can get to that in a second,  
17 but generally, there's - - - I - - - I assume people have  
18 sued Uber, and there's some number of pending lawsuits.  
19 And you have a legal department, and they have - - - keep  
20 track of that?

21 MR. HUSTON: Sure. So there's thousands of  
22 lawsuits that get filed - - - that touch Uber in some way.

23 JUDGE HALLIGAN: Do you have a process in place  
24 for identifying those individuals, though, and shielding  
25 them from communications like this, which send out updated



1 terms of service?

2 MR. HUSTON: I - - - I don't think the - - - the  
3 record doesn't reflect that, Judge Halligan, but I think  
4 it's - - - I - - - I do think it's important to understand  
5 that this term and specifically the before and after clause  
6 that gives rise to - - - in the 2021 terms that makes the  
7 contract enforceable as to Ms. Wu even though she'd already  
8 filed her lawsuit that wasn't added in 2021.

9 JUDGE HALLIGAN: I understand, but - - - but - -  
10 -

11 MR. HUSTON: It was added in 2016.

12 JUDGE HALLIGAN: But you - - - it sounds to me,  
13 just so I'm clear, that you can't tell us whether your  
14 client has in place any mechanism for identifying  
15 individuals who are plaintiffs in a pending lawsuit and  
16 taking their name off of whatever list there is that goes  
17 out with respect to updated terms of service, or even  
18 perhaps telling them that they can't procure services or  
19 something like that. So you - - - you don't - - - you  
20 don't know whether you have that mechanism?

21 MR. HUSTON: The record does not reflect anything  
22 about that in the - - -

23 JUDGE CANNATARO: Well, Counsel, you have done  
24 that for class action litigants. Uber is able to screen  
25 for class action litigants, right? They've been directed

1 to do that.

2 MR. HUSTON: So litigators at Uber who are  
3 responsible for the handling of those cases do have a  
4 process, obviously, to comply with Federal Rule of Civil  
5 Procedure 23(d), which affects our ability to contact them  
6 when they are absent class members. That's, of course, for  
7 the purpose that if you're an absent class member, you may  
8 not know that you - - -

9 JUDGE CANNATARO: But - - -

10 MR. HUSTON: - - - have a lawsuit that - - -

11 JUDGE CANNATARO: - - - my only point is it  
12 doesn't seem like it would be that far leap to identify  
13 those other people who have their own individual, say,  
14 personal injury lawsuit and they're represented.

15 MR. HUSTON: So - - -

16 JUDGE CANNATARO: I mean, I get that the record  
17 doesn't reflect whether the technological capability is  
18 there, but it seems like something very much like it exists  
19 in other contexts.

20 MR. HUSTON: So Your Honor, I - - - I think what  
21 we're - - - what we're striving to do in this line of  
22 inquiry is come up with a process to mitigate the apparent  
23 unfairness of a situation where somebody files a lawsuit  
24 and then, for the first time, agrees to an arbitration  
25 clause that takes that case out of this court. That's not



1 what happened in this case for two reasons.

2 JUDGE CANNATARO: But - - - yeah. I - - - we all  
3 understand that there's a - - - there's an issue involving  
4 how notice was served in this case that you could make an  
5 argument that you weren't aware. But there are other  
6 litigants who - - - who, as Judge - - - as Chief Judge  
7 Wilson said, there are other litigants, surely, who had  
8 active suits against Uber who could theoretically have been  
9 screened out of this update.

10 MR. HUSTON: So respectfully, Your Honor, I'm not  
11 sure that that's actually correct. I mean, this provision,  
12 the before or after clause, was added to Uber's terms of  
13 use in 2016, four years before - - -

14 JUDGE TROUTMAN: However, in our modern society,  
15 people have to use the services, whether - - - if they  
16 become a part of their everyday life, whether it's Disney  
17 Channel or others that have these arbitration agreements,  
18 Uber, if you live in New York City as opposed to upstate  
19 New York, you may be more dependent upon. What my  
20 colleagues are asking you is you have this great power  
21 here. And arguably, some might think it's unfair to the  
22 consumer this broad sweeping, that even though I filed a  
23 lawsuit, it applies to everybody. And there's a concern.  
24 I - - - it's - - - it's not a defense. She didn't read it,  
25 but it's packed with all of this information in it. Why is

1           it unfair to Uber to - - - to excise out people with  
2           pending lawsuits in - - - due to the fact - - - we have  
3           software that can search all kinds of things.

4           MR. HUSTON: So I completely understand the  
5           question, Your Honor. I think what you're - - - what  
6           you're asking is, why is this particular term fair as - - -  
7           you know, and enforceable in Ms. Wu's case specifically.  
8           The first and most important answer that I have to give is  
9           that that question has expressly been delegated to the  
10          arbitrator for resolution. You can see this at page 119 of  
11          the record.

12          JUDGE TROUTMAN: So your argument is these  
13          agreements are fine. And as to her, if there is an issue  
14          as it being overreaching, unfair, it is something - - -  
15          because of the delegation clause, she's - - - she gets to  
16          have it answered, but she gets to have it answered there,  
17          just not in a court?

18          MR. HUSTON: That's exactly right, Your Honor.  
19          That's critically important. The Federal Arbitration Act,  
20          as interpreted by the Supreme Court of the United States in  
21          cases like Rent-A-Center - - -

22          JUDGE RIVERA: Why - - - why didn't you raise  
23          that issue previously?

24          MR. HUSTON: I'm sorry, Your Honor. Could - - -

25          JUDGE RIVERA: Why didn't you raise that issue

1           previously?

2                       MR. HUSTON:  We - - - we absolutely did, Your  
3 Honor, respectfully.  I mean, I - - - I think this is - - -  
4 it's all - - -

5                       JUDGE RIVERA:  Where would I find that in the  
6 record?

7                       MR. HUSTON:  Sure.  It's all over our opposition  
8 to the - - - the plaintiff moved to stay the arbitration.  
9 In response, we cross-moved to compel arbitration and  
10 oppose that.  The very first, you know, paragraph, I think  
11 - - - first page of our brief.  And I think it's at record  
12 191 if I'm not mistaken.  I'll have it for you exactly in a  
13 moment.  But we certainly argued at length that this  
14 question - - - any question about the enforceability of the  
15 terms, the unconscionability of the term in plaintiff's  
16 case specifically, have been delegated to the arbitrator  
17 for resolution.

18                       JUDGE CANNATARO:  Counsel - - -

19                       JUDGE GARCIA:  Counsel - - -

20                       JUDGE CANNATARO:  - - - even if we agree with  
21 that proposition, this body, as - - - as the stewards of  
22 the ethical standards of our profession, I would think, has  
23 an interest in saying we don't want attorneys to obtain  
24 arbitration clause.  Whether they're - - - you know,  
25 whether they're delegable to the arbitrator or resolvable

1 in the court is another issue under the contract. But we  
2 don't want attorneys obtaining these kinds of favorable  
3 terms through unethical conduct. And the - - - the  
4 question that I was trying to ask previously is it seems to  
5 me it would have been pretty easy to avoid this allegedly  
6 unethical conduct by screening out those people. So - - -  
7 so why wouldn't you do that?

8 JUDGE GARCIA: Counsel, on that case - - - let me  
9 ask you something on a follow-up on the screening. If I'm  
10 riding in an Uber, I wasn't the one that ordered it. I'm  
11 with the person that ordered it. I get in an accident. I  
12 sue Uber. Am I bound by the arbitration agreement that the  
13 person who ordered the Uber signed?

14 MR. HUSTON: Multiple courts have found that you  
15 - - - you probably are if - - - you know, because you're a  
16 third - - - intended third-party beneficiary of that  
17 contract. And the - - - the contract specifically covers  
18 third-party beneficiaries. Of course, it's not - - - you  
19 know, not presented for this case for decision. If I could  
20 return to Your Honor's question just about - - -

21 JUDGE GARCIA: But just to go to screening, that  
22 would mean that - - - as I understand it, that Uber lawyers  
23 then would have to determine passengers and what accounts  
24 they had so that they didn't violate this no contact rule.

25 MR. HUSTON: So I agree with that, Your Honor. I

1 think that's yet one more problem with the suggestion  
2 about, well, it actually - - - it would have been so easy  
3 to carve that out. Again, even if we could carve that out,  
4 even if we could identify exactly what is the status of  
5 every person's assent at any given time and track that  
6 against whatever litigation filings they may have, and  
7 we're talking about thousands of cases going on at any  
8 given time all across the country, even if we had the  
9 technological capability to do it, it's not going to do - -  
10 -

11 CHIEF JUDGE WILSON: So let me - - -

12 MR. HUSTON: - - - anything to help Ms. Wu - - -

13 CHIEF JUDGE WILSON: Let me - - -

14 MR. HUSTON: - - - because she agreed to  
15 arbitration - - -

16 CHIEF JUDGE WILSON: Let me just - - -

17 MR. HUSTON: - - - four years before that.

18 CHIEF JUDGE WILSON: Let me just understand - - -  
19 we've - - - we've gotten the four-year point several times  
20 now. I think we get that one. Let me ask you something  
21 about Judge Garcia's question. So suppose the passenger in  
22 his hypothetical had an Uber account, gets a click - - -  
23 clickwrap and rejects the new terms, right?

24 MR. HUSTON: Yes, sir.

25 CHIEF JUDGE WILSON: Still bound?



1 MR. HUSTON: No, Your Honor. I mean, at that  
2 point they won't - - - well - - -

3 CHIEF JUDGE WILSON: No. If they're a passenger,  
4 they're still bound to the third-party beneficiary of the  
5 person they're riding with.

6 MR. HUSTON: Oh, I'm sorry. So maybe, but it  
7 would depend on, you know, what is the status of that  
8 person's account and are they a third - - - is there  
9 another method - - -

10 CHIEF JUDGE WILSON: Okay. So if they have no  
11 Uber account, they're bound. If they have an Uber account  
12 but they reject the clickwrap and they no longer have an  
13 account because they rejected the clickwrap, then they're  
14 not bound?

15 MR. HUSTON: So, you know, I'm appreciating that  
16 it's - - - it's not the question before the court. Like,  
17 if there were an instance - - -

18 CHIEF JUDGE WILSON: Well, it's a hypothetical.

19 MR. HUSTON: Sure. Sure. If there were an  
20 instance where a person rejected the clickwrap, they're not  
21 going - - - you know, those - - - they - - - they haven't  
22 manifested their assent unless they use - - -

23 CHIEF JUDGE WILSON: But they are - - -

24 MR. HUSTON: - - - the services.

25 CHIEF JUDGE WILSON: But they are a passenger.





1 MR. HUSTON: Sure. So in that instance, they're  
2 an intended third-party beneficiary of another person's  
3 contract.

4 CHIEF JUDGE WILSON: So even though they  
5 themselves rejected the - - - the idea that they're going  
6 to be forced into arbitration - - - they're going to be  
7 forced into arbitration?

8 MR. HUSTON: So that's - - - but, Your Honor,  
9 that happens all the time, you - - - you know. You can - -  
10 - you can form a contract. You can be a third-party  
11 beneficiary of somebody else's contract.

12 JUDGE GARCIA: Would the flip also happen? Let's  
13 say the passenger has an Uber account and they've accepted  
14 the terms, but the person who ordered the car rejected  
15 them. Then would the person in the car be bound by their  
16 own acceptance of the arbitration agreement?

17 MR. HUSTON: Respectfully, I don't think the - -  
18 - I don't think the situation would arise because if you  
19 don't accept the terms, you won't have the means to access  
20 Uber services. That's actually, I think, a virtue of this,  
21 right? It calls the user's attention specifically that,  
22 look, if you want to - - -

23 JUDGE HALLIGAN: Yeah.

24 MR. HUSTON: - - - enter - - - use our services,  
25 you have got to agree to these terms.



1 JUDGE HALLIGAN: Can I ask you about the 2016  
2 agreement? Is it indistinguishable from the agreement at  
3 issue in Kauders?

4 MR. HUSTON: No. Yeah. No, it is not  
5 indistinguishable. It is distinguishable, Judge - - -

6 JUDGE HALLIGAN: In what respect?

7 MR. HUSTON: Sure, Judge Halligan. So I would  
8 urge the court to take a look at the record on page - - -  
9 this is the - - - the interface is in the record at 289.  
10 So in Kauders and in the other cases that my friend refers  
11 to that he says invalidated the 2016 agreement, that was a  
12 different user interface. What was - - - what the courts  
13 found problematic about that interface in Kauders was that  
14 you were - - - the terms of use hyperlink was on a screen  
15 where you were also asked to provide payment information.  
16 So they said - - -

17 JUDGE HALLIGAN: So I'm looking at 289.

18 MR. HUSTON: Sure.

19 JUDGE HALLIGAN: How is it different - - -

20 MR. HUSTON: Sure.

21 JUDGE HALLIGAN: - - - exactly?

22 MR. HUSTON: Because in Kauders, this - - - what  
23 you see on 289 is not what you would have seen in Kauders.

24 JUDGE HALLIGAN: Yes.

25 MR. HUSTON: In Kauders, there was a screen that

1 was about, enter your credit card information, and that's  
2 the feature that the court in Kauders said made it  
3 problematic. Because you're - - - they said the user is  
4 focused on entering her credit card, she doesn't know that  
5 she's being asked to agree to terms and conditions. Well,  
6 in - - - you know, we - - - the interface here is very  
7 different from 2016 because, of course, it says, I confirm  
8 that I have read and agreed to the terms and conditions and  
9 the privacy policy. And you have to hit that arrow to  
10 confirm that agreement, so - - -

11 JUDGE HALLIGAN: So it is distinguishable, though  
12 - - -

13 MR. HUSTON: Yes.

14 JUDGE HALLIGAN: - - - that you're not - - -  
15 sorry, from the 2021 agreement in that you're not clicking  
16 the specific box?

17 MR. HUSTON: So that's also true. 2021 is a  
18 little bit of a different agreement. The Massachusetts  
19 Supreme Judicial Court's decision - - -

20 JUDGE HALLIGAN: Clearer, one would say; is that  
21 fair? I understand you said 2016 is also clear enough.

22 MR. HUSTON: Yes. I - - - I agree - - - I agree  
23 with that, that the 2021 is clear in - - - in some  
24 respects, the key ones being that you have to give your  
25 assent twice. You have to both put a check box - - - click

1 box next to - - - I mean, check a box that says, I have  
2 read and agree to the terms of use. Then you have to hit a  
3 separate confirm button.

4 JUDGE HALLIGAN: Yes.

5 MR. HUSTON: So I agree that the 2021 is even  
6 more clear. We went above and beyond. I still think that  
7 the agreement in 2020 - - - in 2016 is fully enforceable  
8 because this key language here, by continuing, I confirm  
9 that I have read and agree, that was the word - - -

10 JUDGE RIVERA: So why didn't you rely on it?

11 MR. HUSTON: I'm sorry?

12 JUDGE RIVERA: Why didn't you rely on it?

13 MR. HUSTON: We did, Your Honor. Respectfully, I  
14 - - - I mean, I - - - I just don't think that this is - - -  
15 I'm not sure why my friend says we didn't. Again, if Your  
16 Honor looks at our response in opposition to the motion to  
17 stay the arbitration in the Supreme Court, we again  
18 referred to the 2016 interface by which the user confirmed  
19 her agreement and the fact that the terms of use are  
20 exactly the same including the before and after clause,  
21 which I think, again, just reinforces that was not a  
22 provision that was somehow added only in 2021, and like,  
23 Ms. Wu became bound by that for the very first time in  
24 2021.

25 JUDGE RIVERA: Is that the first time it was



1 raised?

2 MR. HUSTON: No.

3 JUDGE RIVERA: It's not raised in your initial  
4 papers - - -

5 MR. HUSTON: The - - - the 2016 - - -

6 JUDGE RIVERA: - - - just to be clear, the 2016.  
7 Your reliance is on the 2016.

8 MR. HUSTON: We invoked the 2016 terms.

9 JUDGE RIVERA: Right. And you said, in response?

10 MR. HUSTON: In response to the plaintiff's  
11 motion to stay the arbitration - - -

12 JUDGE RIVERA: Right. Right.

13 MR. HUSTON: Sure.

14 JUDGE RIVERA: In your initial papers seeking the  
15 stay for mandatory - - -

16 MR. HUSTON: So Your Honor - - -

17 JUDGE RIVERA: - - - arbitration, did you refer  
18 to the 2016?

19 MR. HUSTON: The - - - the plaintiff filed - - -  
20 made the first motion. The plaintiff - - -

21 JUDGE RIVERA: Okay.

22 MR. HUSTON: - - - filed in the Supreme Court, a  
23 motion to stay the arbitration. We responded and said, we  
24 think the 2021 clickwrap is enforceable, but also, by the  
25 way, you - - - you signed up for arbitration in 2016.



1 JUDGE RIVERA: But - - - but - - - I'm sorry.  
2 Their motion is filed in response to your only asserting  
3 the 2021, or have I misunderstood - - -

4 MR. HUSTON: Okay.

5 JUDGE RIVERA: - - - what went on here?

6 MR. HUSTON: I understand, Your Honor. So it - -  
7 - it is true that in our initial demand for arbitration - -  
8 -

9 JUDGE RIVERA: Yes.

10 MR. HUSTON: - - - which was not a court filing,  
11 we sent it to the plaintiff.

12 JUDGE RIVERA: Yes. Yes.

13 MR. HUSTON: We said, you are bound by the 2021  
14 terms. Of course, it made sense to do that. That was the  
15 operative contract. That was the most recent contract.  
16 The Appellate Division's decision in Mejia addresses this  
17 issue and cites multiple cases for the proposition that a  
18 party's failure to mention every sequential contract that  
19 might be in existence does not mean we're waiving our  
20 reliance on those other ones. We cite the one that's, you  
21 know, the most operative. That creates a binding contract.  
22 We're not saying and nothing else does. Plaintiff  
23 certainly had a fair opportunity to brief to the Supreme  
24 Court the validity of the 2016 terms. And the last one - -  
25 -

1 JUDGE RIVERA: But - - - but if the - - - let me  
2 just say this. To - - - if - - - if the dispositive  
3 deficiency, let me put it that way, of 2021 is the failure  
4 to somehow refer specifically to pending actions, whatever  
5 language might have been used for that, you would agree  
6 that that would be the same problem in 2016.

7 MR. HUSTON: No.

8 JUDGE RIVERA: Right?

9 MR. HUSTON: Because it wouldn't - - -

10 JUDGE RIVERA: Neither one refers to pending  
11 actions.

12 MR. HUSTON: That's - - -

13 JUDGE RIVERA: Correct?

14 MR. HUSTON: Yes. That is correct, Your Honor.

15 JUDGE RIVERA: Okay.

16 MR. HUSTON: No. No. I'm sorry. They both have  
17 the same clause. They have the same before and after  
18 clause - - -

19 JUDGE RIVERA: Yes.

20 MR. HUSTON: - - - in 2016 and 2021.

21 JUDGE RIVERA: Yes.

22 MR. HUSTON: So I guess, if Your Honor - - - but  
23 of course, in 2016 there is no pending litigation, right?  
24 I mean, that's the whole point. Is that when she signed up  
25 for arbitration in 2016, that is years before the accident.

1 JUDGE RIVERA: Yes. I know it's applied to her,  
2 but I'm talking about that - - -

3 MR. HUSTON: So - - -

4 JUDGE RIVERA: - - - that carve out.

5 MR. HUSTON: Yes. I - - -

6 JUDGE RIVERA: It's not found in either one. But  
7 of course, you are correct in 2016, at the time, she was  
8 not in litigation.

9 MR. HUSTON: And the last thing I want to say  
10 about 2016 is just that this language, I confirm, I have  
11 read and agree to the terms and conditions, I think that's  
12 exactly the kind of solemn - - - what the Massachusetts  
13 Supreme Judicial Court called solemn I agree language that  
14 alerts the user that they are forming a contract. It's  
15 what - - -

16 JUDGE HALLIGAN: Sorry. Can I just ask you  
17 before your light - - - well, now it goes on, but to  
18 briefly address the Coinbase Rent-A-Center point?

19 MR. HUSTON: Sure, Your Honor. Absolutely. So I  
20 think any - - - I think your - - - I agree with Your  
21 Honor's suggestion to my friend that the heart of this case  
22 is really not about whether there was a valid contract  
23 form. It's almost all but common ground that the 2021  
24 clickwrap forms a contract. The question is whether one  
25 provision of that contract, the arbitration agreement, is



1 enforceable because of Ms. Wu's specific circumstances.  
 2 That's an argument that the contract term is unenforceable  
 3 or maybe unconscionable. That - - - but that argument was  
 4 expressly delegated by the parties to an arbitrator and  
 5 that separate arbitration provision, Rent-A-Center tells  
 6 us, has to be enforced by this court. The only - - -

7 JUDGE HALLIGAN: And what about Coinbase footnote  
 8 2 which, I think, is what your adversary is relying on?

9 MR. HUSTON: So I think it's - - - it's - - - I  
 10 don't mean to be pedantic. I think it's the star footnote  
 11 in Coinbase - - -

12 JUDGE HALLIGAN: Sorry.

13 MR. HUSTON: - - - Your Honor, respectfully.

14 JUDGE HALLIGAN: Whichever footnote.

15 MR. HUSTON: But the - - - but the - - - the - -  
 16 - the relevant footnote in Coinbase says - - - and first of  
 17 all, I think it's dicta in Coinbase, but because that  
 18 wasn't the - - - what the court was talking about. But  
 19 what the Supreme Court is saying is, in response to - - -  
 20 to the delegation provision specifically, the plaintiff in  
 21 Coinbase said what that plaintiff thought was wrong with  
 22 the delegation provision. We don't have anything like that  
 23 here.

24 JUDGE HALLIGAN: So you're saying nothing that  
 25 specifically is targeted at the delegation provision as

1           opposed to the agreement as a whole?

2                       MR. HUSTON: That's - - - that's exactly right,  
3           Your Honor.

4                       JUDGE HALLIGAN: Okay. Thank you.

5                       MR. HUSTON: And that matters. That's critical  
6           because that - - - you know, that word, a specific  
7           challenge to the delegation provision, that's what the  
8           Supreme Court of the United States said the Federal  
9           Arbitration Act demands. And if there's any way that the  
10          delegation provision won't be - - - won't be enforced. And  
11          you will find nothing in my friend's papers in the Supreme  
12          Court where he said, what is unconscionable or  
13          unenforceable about allowing an arbitrator to resolve this  
14          question. So for that reason, all of the questions in this  
15          case that go to enforceability or alleged unconscionability  
16          or alleged unfairness of the term - - - in this particular  
17          case, Ms. Wu is going to have an opportunity to make those  
18          arguments, but she has to make them to the arbitrator.

19                      CHIEF JUDGE WILSON: Thank you.

20                      MR. HUSTON: Thank you.

21                      MR. KELNER: So if I might, I want to start on  
22          the no contact rule and to get to Judge Garcia's  
23          hypothetical.

24                      JUDGE TROUTMAN: Why don't you instead pick up on  
25          delegation?

1 MR. KELNER: Sure, Your Honor.

2 JUDGE TROUTMAN: And what - - - did she  
3 specifically assert that which would allow her to the point  
4 you're asking?

5 MR. KELNER: So the Coinbase - - - my apologies.  
6 Star footnote says that using the objection to the word  
7 arbitrability was sufficient to challenge the delegation  
8 clause. Our paper is below. It's in the record at 361 and  
9 362, also said, in response to Uber's argument about  
10 arbitrability that no issue was properly delegated to the  
11 arbitrator. So that is identical. Getting to no contact,  
12 numerous courts have held across the country that you can't  
13 use mass communications to affect contact with represented  
14 parties.

15 Judge Garcia, you asked about the passenger.  
16 There wouldn't be contact with the passenger there because  
17 the contact would be with the person who hailed the cab.  
18 So if so facto, there wouldn't be a breach of no contact -  
19 - -

20 JUDGE TROUTMAN: Well, let me ask you - - -

21 JUDGE GARCIA: But let's say the passenger has  
22 their own account, right?

23 MR. KELNER: Oh, but if the question is, what are  
24 you allowed to do if you contacted represented party - - -

25 JUDGE GARCIA: Right.



1 MR. KELNER: - - - in your version there is  
2 contact - - -

3 JUDGE GARCIA: The passenger sues - - -

4 MR. KELNER: - - - with represented party.

5 JUDGE GARCIA: Passenger is represented. I sue.  
6 Let's say it's Joe Smith. Joe Smith sues. He goes with  
7 Jones' account, though. He's a passenger in the car they  
8 hail on the app. And now Mr. Smith orders an Uber on his  
9 own account. That's my hypothetical.

10 MR. KELNER: I - - - I don't know if I'm exactly  
11 following it, but if I understand it, it's person A has the  
12 lawsuit and person B hails the cab?

13 JUDGE GARCIA: Yes.

14 MR. KELNER: Well, there's no contact there with  
15 person A. So the attorney - - -

16 JUDGE GARCIA: Let's say they get - - - person A  
17 has their own account - - -

18 MR. KELNER: Right.

19 JUDGE GARCIA: - - - and later the 2021 terms  
20 come around, and person A clicks, sure. Why isn't that  
21 contact with a represented party?

22 MR. KELNER: Well, if they're contacting the  
23 person with the lawsuit for the purpose of affecting the  
24 lawsuit, then that is contact.

25 JUDGE GARCIA: But they're contacting them

1 exactly the same way. Let's put the rhetoric aside.

2 MR. KELNER: Sure.

3 JUDGE GARCIA: They're contacting them exactly  
4 the same way they contacted plaintiff here. New terms go  
5 out to everyone. Passenger A has their own account, and  
6 they click yes on the terms.

7 MR. KELNER: Well, what they're doing there, even  
8 if there - - - it's the same email, there's a specific term  
9 of the terms of use that is intended to affect represented  
10 parties. The reason we are here is because they admit they  
11 drafted a clause of their terms of use to try to take  
12 pending cases out of the courts.

13 JUDGE GARCIA: But I - - - to go back to my  
14 hypothetical, A is represented. They just didn't hail the  
15 cab - - - the - - - the car in the original incident.  
16 Would that also be contact for you? Since now they're  
17 using their own account in the - - -

18 MR. KELNER: If they're trying to affect person  
19 B's lawsuit, then it wouldn't concern the subject of the  
20 representation.

21 JUDGE TROUTMAN: But in - - - in this - - -

22 MR. KELNER: I'm sorry.

23 JUDGE TROUTMAN: What about the fact that in - -  
24 - does it make a difference if it's the person seeking a  
25 ride that causes the click to come up as to, well, if you

1 want the ride, you have - - - now you have to review the  
2 updated terms? Is that still a lawyer contacting a  
3 represented party?

4 MR. KELNER: If the lawyer drafted the terms of  
5 use with the intention of affecting the lawsuit, then 4.2  
6 would say that.

7 JUDGE TROUTMAN: So even though the person sought  
8 contact with Uber, that's still on Uber?

9 MR. KELNER: Yeah. 4.2 specifically contemplates  
10 that. You're allowed to have neutral contacts with a  
11 litigant. What you can't do is weaponize it to affect a  
12 case. And the commentaries are pretty clear on that. The  
13 other thing that I would say, we talked before about how -  
14 - -

15 JUDGE CANNATARO: I'm sorry, Counsel.

16 MR. KELNER: Okay.

17 JUDGE CANNATARO: Before you get to that - - -

18 MR. KELNER: Yes, Judge.

19 JUDGE CANNATARO: - - - other thing, I want to  
20 get back to the - - - the actual terms of use in the  
21 agreement. Because there was a question to your adversary  
22 about what a normal person would understand and a non-  
23 lawyer would understand - - -

24 MR. KELNER: Yes.

25 JUDGE CANNATARO: - - - if they took the time to



1 really read the terms of use. Do you agree with your  
2 adversary that, you know, if you really spent time reading  
3 the terms that - - - that the effect of the - - - of that  
4 language is to give up your right to a trial in an already  
5 pending action?

6 MR. KELNER: I think every part of the process  
7 was intended to be set up so a layperson could never get  
8 there because they say it's an update - - -

9 JUDGE CANNATARO: Leaving aside - - -

10 MR. KELNER: Yeah.

11 JUDGE CANNATARO: - - - notice and inquiry  
12 notice, just the language itself, if you read it, do you  
13 come to the understanding, after a much thoughtful, you  
14 know, analysis, that you're giving up your right to a  
15 pending lawsuit?

16 MR. KELNER: Even with legal training, it's at  
17 best ambiguous, and that's me with a law degree. We talked  
18 about burdens of carving out represented parties. It would  
19 have been extremely easy to do so.

20 JUDGE CANNATARO: Why is that - - - I'm - - - I'm  
21 looking at - - -

22 MR. KELNER: Sure.

23 JUDGE CANNATARO: - - - the language. And, you  
24 know, counsel spent a lot of time talking about before or  
25 after and how that's - - -



1 MR. KELNER: Yeah.

2 JUDGE CANNATARO: - - - typical language. The -  
3 - - the language that comes before that is whether the  
4 dispute, claim, or controversy occurred or accrued before  
5 or after the date you agreed to the terms. So to me,  
6 that's a - - - it doesn't even mention the accident. It's  
7 not like a person would say, this doesn't apply to  
8 accidents that happened before the date of the agreement.  
9 It actually says claims, controversies, and disputes. That  
10 seems susceptible to only one interpretation if you think  
11 about it.

12 MR. KELNER: Well, I think it's a well settled  
13 principle of New York law that if something is beyond the  
14 realm of expectations for the transaction, that the  
15 contract isn't construed that way. It doesn't say  
16 lawsuits.

17 JUDGE CANNATARO: Why is that beyond the realm of  
18 expectation if that's what it says?

19 MR. KELNER: Well, because, again, you have a  
20 represented party with a pending lawsuit, and it doesn't  
21 specifically refer to lawsuits. It's an update. Just as  
22 to carve outs, I guess, I've - - - I've tried to - - -

23 JUDGE CANNATARO: So - - - so claims,  
24 controversies, and disputes, that's not good enough because  
25 it doesn't say lawsuits?



1 MR. KELNER: In context of inquiry notice for a  
2 layperson, certainly not. And for a lawyer, arguably not.  
3 And as to carving out people who are represented and have  
4 lawsuits, all they had to do was six words, this does not  
5 affect pending lawsuits. And then no term they had here  
6 would have infringed on any pending lawsuit. It was a  
7 conscious choice by Uber that they wanted to go behind the  
8 backs of lawyers for represented parties that clearly  
9 violates the no contact rule. And by its holding here, the  
10 court should affirm the integrity of the judicial process  
11 and not allow corporations with impunity to poach pending  
12 cases from the court without notice to counsel.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. KELNER: Thank you.

15 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Wu v. Uber Technologies, Inc., No. 90 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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