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SUPREME COURT OF PENNSYLVANIA

58 EAP 2024

SHANNON CHILUTTI AND KEITH CHILUTTI, H/W
*Appellees*

v.

UBER TECHNOLOGIES, INC., GEGEN LLC, RAISER-PA, LLC, RAISER, LLC, SARAH'S CAR CARE, INC., AND MOHAMMED BASHEIR
*Appellants*

# AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF APPELLANTS

Appeal from the July 19, 2023 Order of the *En Banc* Superior Court, 1023 EDA 2021, reversing the Order of the Court of Common Pleas of Philadelphia, dated April 26, 2021, at September Term 2020, No. 764

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## STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Pennsylvania Chamber of Business and Industry is the largest broad-based business association in Pennsylvania. It has close to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an

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[1] No party's counsel authored this brief in whole or in part, and no person or entity, other than the amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Amici's members have structured millions of online contractual relationships around arbitration agreements. The judicial standards for enforcing those agreements are thus of critical significance to amici's members.

## ARGUMENT

### I. The Superior Court Lacked Appellate Jurisdiction Over the Order Compelling Arbitration and Staying Proceedings.

#### A. The Superior Court impermissibly overruled the General Assembly's limitation on appealability.

When the General Assembly enacted 42 Pa.C.S. § 7320 in 1980, it made a policy choice to permit interlocutory appeals as of right from orders denying applications to compel arbitration but *not* from orders compelling arbitration and staying proceedings pending the result of that arbitration. The General Assembly made the same choice in 2018 when it enacted the Revised Uniform Arbitration Act. *See* 42 Pa.C.S. § 7321.29(a). Indeed, by limiting the appealability *only* to orders denying motions to compel arbitration, the General Assembly has implicitly prohibited appeals from orders compelling arbitration. *See Thompson v. Thompson*, 223 A.3d 1272, 1277 (Pa. 2020) (explaining that "[u]nder the doctrine of *expressio unius est exclusio alterius*, the

inclusion of a specific matter in a statute implies the exclusion of other matters," and that "as a matter of statutory interpretation, although one is admonished to listen attentively to what a statute says; one must also listen attentively to what it does not say" (quotations omitted)).

The General Assembly's policy decision mirrors the decision made by Congress under the Federal Arbitration Act (the "FAA"). Under the FAA, appeals as of right can be taken only from orders denying motions to compel arbitration. 9 U.S.C. § 16(a)(1)(A). Congress made this choice to facilitate moving "the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). Indeed, Congress limited appeals as of right in order "to prevent parties from frustrating arbitration through lengthy preliminary appeals." *Stedor Enter., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991).

The Superior Court's *en banc* decision impermissibly overrules those legislative choices and drastically departs from the federal model. It permits interlocutory appeals as of right from *every* decision on a motion to compel common-law arbitration, no matter the outcome. That result is in deep tension with the constitutional "right of the General Assembly to determine the jurisdiction of any court." Pa. Const. art. V, § 10(c). It also contravenes this Court's clear precedent that orders compelling arbitration and staying proceedings are interlocutory and,

absent an exception, are non-appealable. *See Maleski v. Mutual Fire, Marine & Inland Ins. Co.*, 633 A.2d 1143, 1145-46 (Pa. 1993) (quashing appeal of order compelling arbitration because parties are not "forced out of court").

### B. The Superior Court incorrectly expanded the collateral-order doctrine.

Evading the General Assembly's policy decision and this Court's precedent, the Superior Court incorrectly held that the order compelling arbitration and staying proceedings pending that arbitration is appealable under the collateral-order doctrine. A collateral order is one that: (1) is "separable from and collateral to the main cause of action"; (2) involves a right that is "too important to be denied review"; and (3) presents a question that, "if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa.R.A.P. 313(b). Each of Rule 313(b)'s three elements must be "clearly present before collateral appellate review is allowed." *Rae v. Pa. Funeral Directors Ass'n*, 977 A.2d 1121, 1126 (Pa. 2009). And this Court has cautioned that Rule 313 must be construed narrowly to "avoid[] undue corrosion of the final order rule," "prevent[] delay resulting from piecemeal review of trial court decisions," and ensure that the process for seeking permission to appeal an interlocutory order under Rule 312 is not undermined. *See Commonwealth v. Pownall*, 278 A.3d 885, 903 (Pa. 2022). Otherwise, if

courts routinely create *ad hoc* exceptions to finality based on Rule 313, then almost every order can become "collateral" and appealable. The preference for finality would be rendered a nullity.

This case shows the danger of that approach because the second and third elements of the collateral-order doctrine are unsatisfied. Plaintiffs' argument to the contrary—which the *en banc* Superior Court adopted—flips the policies behind arbitration on their head.

### 1. Plaintiffs cannot show that the issue on appeal is sufficiently important.

This Court has held that the second element of the collateral-order doctrine is satisfied "if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by the final judgment rule." *Geniviva v. Frisk*, 725 A.2d 1209, 1213 (Pa. 1999). However, "it is not sufficient that the issue be important to the particular parties." *Id.* at 1214. Instead, the issue "must involve rights deeply rooted in public policy going beyond the particular litigation at hand." *Id.*

As an initial matter, the Superior Court incorrectly characterized the Plaintiffs' interest in this appeal as involving the constitutional right to a jury trial. (Majority Op. 8 n.10.) But this framing is too broad. The issue on appeal is not about the general contours of the jury-trial

right. Rather, the appeal is about online contract formation and whether Plaintiffs assented to the arbitration provision. Questions of contract formation between private parties clearly do not present the kind of significant interests that would justify an interlocutory appeal.

Even under the Superior Court's framing, this appeal does not present the kind of "rights deeply rooted in public policy going beyond the particular litigation at hand" that justifies an interlocutory appeal. *Geniviva*, 725 A.2d at 1213. The cases where courts have found the second element of Rule 313 to be satisfied show just how high that burden is. For example, in *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 346 (Pa. Cmwlth. 2015), the Commonwealth Court found that the elements of the collateral-order doctrine were satisfied because the appeal involved "whether and to what extent the Commonwealth surrendered its sovereign rights to take part in litigation" over a dispute. Because the Commonwealth's "inherent sovereign power" was involved, the appeal was important not only to the parties but "to the public at large because the sovereign power in our government belongs to the people." *Id.*

The Commonwealth Court's opinion in *Gilyard v. Redevelopment Authority of Philadelphia*, 780 A.2d 793 (Pa. Cmwlth. 2001), also set the standard very high. In that case, the "importance" element was met because there was a statutory provision barring arbitration in eminent

domain proceedings. Because the trial court's decision compelling arbitration would have mooted that statute, the Commonwealth Court concluded that the issue was too important to be denied interlocutory review. *See Philip Morris*, 128 A.3d at 345 (describing reasoning in *Gilyard*).

Even the Superior Court's decision in *United Services Automobile Association v. Shears*, 692 A.2d 161 (Pa. Super. 1997) (*en banc*), shows the high burden for proving the "importance" element of Rule 313.[2] There, the trial court recognized a new tort and then compelled arbitration on the question whether USAA committed that newly created tort. *Id.* at 163. The appeal presented an important question because "the only way [the claimant] could arbitrate his claim was if the court created a cause of action for him." *Id.* at 163, 165. Given those unique circumstances, it is not surprising that *Shears* has not been applied or extended to allow for interlocutory appeals of typical questions in connection with compelling arbitration. *See, e.g.*, *Rosy v. Nat'l Grange Mut. Ins. Co.*, 771 A.2d 60, 62 (Pa. Super. 2001) (declining to apply *Shears* to allow for interlocutory appeal); *Campbell v. Fitzgerald Motors Inc.*, 707 A.2d 1167, 1168 (Pa. Super. 1998) (same).

[2] Alternatively, to the extent the Court determines *Shears* cannot be distinguished, it should overrule *Shears* for the reasons stated in Judge Ford Elliott's dissent.

Here, by contrast, the issue of Plaintiffs' right to a jury trial is only specific to Plaintiffs. They raise a routine dispute about assent to an arbitration provision that does not involve extenuating circumstances such as a sovereign's power, the mooting of a statute, or the creation of a new tort. And because Plaintiffs cannot tie their purely private dispute to broader policy issues, Plaintiffs cannot satisfy the second element of the collateral-order doctrine.

Moreover, the interest in efficiency—which underpins the reasons for including arbitration clauses in contracts in the first place and is also the basis for limiting interlocutory appeals under Rule 313—far outweighs the Plaintiffs' interest here in having particular questions of mutual assent settled through an interlocutory appeal. Plaintiffs are concerned about the burden of having to undergo an arbitration before being able to take an appeal from an order compelling them to arbitrate. But that concern must be balanced against the important public policy in favor of efficiently enforcing arbitration agreements.

Both Congress and the General Assembly have adopted a "liberal policy favoring arbitration." *Provenzano v. Ohio Valley Gen. Hosp.*, 121 A.3d 1085, 1096 (Pa. Super. 2015). In enacting the FAA, Congress aimed to "facilitate a just and speedy resolution of controversies that is not subject to delay and/or obstruction in the courts." *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 120 (Pa. 2007). The same preference for

speedy resolution of disputes has been imported into Pennsylvania law. *See Provenzano*, 121 A.3d at 1096 n.2.

Similarly, the U.S. Supreme Court has repeatedly recognized the "real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). Those benefits include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 185 (2019). And the General Assembly has already prioritized the efficiency of arbitration over litigating questions of mutual assent by allowing interlocutory appeals only from orders denying motions to compel arbitration. 42 Pa.C.S. § 7321.29(a).

Data supports the General Assembly's prioritization of efficiency and the conclusion that arbitration provides "just and speedy resolution[s] of controversies." *Salley*, 925 A.2d at 120. A study comparing 67,119 consumer and employment arbitrations with 261,369 consumer and employment federal lawsuits terminated between 2014 and 2021 revealed that arbitration is, on average, a speedier method of resolving disputes. *See* Nam D. Pham, Ph.D. & Mary Donovan, "Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration," ndp analytics, at 4 (March 2022).[3] For cases

[3] https://instituteforlegalreform.com/wp-content/uploads/2022/03/FINAL-ndp-Consumer-and-Employment-Arbitration-Paper-2022.pdf.

resolved in favor of the claimants, the average consumer arbitration took 321 days to reach resolution. *Id.* at 15. The median time, at 265 days, was significantly shorter. *Id.* Even the longest 10% of cases reached resolution in 558 days. Litigation in court took substantially longer, with an average of 439 days, a median of 315 days, and the top 10% taking an average of 919 days.

**Table 8.**
**During 2014-21, it took consumer-claimants an average of 321 days to prevail in arbitration compared to litigation**

| | Consumer Arbitrations | Consumer Litigations |
|---|---|---|
| Mean | 321 | 439 |
| Median | 265 | 315 |
| 90th Percentile | 558 | 919 |

In other words, the average arbitration was nearly 27% faster than litigation, the median arbitration was nearly 16% faster than litigation, and the longest 10% of cases were resolved over 39% faster in arbitration as compared to litigation. *Id.*

By engrafting appeals from orders compelling arbitration and staying proceedings into the collateral-order doctrine, the Superior Court upset parties' expectations when agreeing to arbitration clauses. Under the Superior Court's decision, *every* case granting a motion to compel arbitration and staying the court case pending the results of

that arbitration could immediately be appealed,[4] immensely slowing down the arbitration of disputes while simultaneously bogging down the Superior Court (and occasionally the Commonwealth Court) in appeals that raise factual questions about whether parties assented to an arbitration provision.

This influx of new cases is not speculative. Plaintiffs themselves acknowledged that "thousands of other Pennsylvanians . . . have registered to utilize Uber's services." (Pls.' Superior Ct. Opening Br. 28.) Any dispute between Uber and these thousands of users may raise questions of mutual assent to an arbitration provision that could turn into an interlocutory appeal to the Superior Court. Further, as Plaintiffs recognize, "online user agreements . . . are increasingly more prevalent in today's modern society." (*Id.*) Parties seeking to escape arbitration agreements in each of those online user agreements could similarly file interlocutory appeals. The effect on the parties and on the efficiency of Pennsylvania's intermediate appellate courts would be immense, undoing the precise benefits of arbitration: achieving just and speedy resolutions to disputes.

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[4] Orders denying motions to compel arbitration are appealable independent of the collateral-order doctrine because they are specifically authorized by statute. *See* 42 Pa.C.S. §§ 7320, 7321.29(a); Pennsylvania Rule of Appellate Procedure 311(a)(8).

### 2. The right to a jury trial will not be irreparably lost if forced to wait until a final judgment.

The *en banc* Superior Court also incorrectly held that Plaintiffs cannot vindicate their right to a jury trial on appeal from final judgment and that the order compelling arbitration—and staying court proceedings pending the results of arbitration—puts them "out of court." (Majority Op. 11.) But as this Court recognized, "an order compelling arbitration forces the parties into, rather than out of, court." *Maleski*, 633 A.2d at 1145. The Superior Court was simply incorrect that the trial court's order puts Plaintiffs "out of court."

Further, the Superior Court was wrong to conclude that Plaintiffs cannot question the validity of the arbitration provision or their assent to that provision on appeal from a final order. (Majority Op. 10-13.) As Judge Stabile, joined by Judge Olson and Judge Sullivan, recognized in a dissent, a party cannot be forced to arbitrate absent an agreement to do so. (*See* Stabile Dissent 8 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).) If, on appeal from a final judgment enforcing an arbitration award, the appellate court were to find that there was no agreement to arbitrate and Plaintiffs did so only because they were compelled by the trial court's order, the arbitration award could be vacated. *See Civan v. Windermere Farms, Inc.*, 180 A.3d 489, 499 (Pa. Super. 2018) (holding that "the narrow standard of review derived from section 7341 is not applicable when reviewing a petition to

vacate based upon a claim that the parties do not have a valid agreement to arbitrate"). And, as Judge Stabile recognized, the Court could also vacate the award based on the lack of agreement to arbitrate because the resulting award was "unjust, inequitable, or unconscionable." (Stabile Dissent 8 (quoting *Sage v. Greenspan*, 765 A.2d 1139, 1141 (Pa. Super. 2000)).)

In other words, contrary to the Superior Court's holding, Plaintiffs could still vindicate their right to a jury trial if it were later determined that they had not agreed to arbitration or that Uber's arbitration provision was invalid under Pennsylvania law. If that were to occur, Plaintiffs, at most, would "have been required to participate in an unnecessary arbitration." *Brennan v. Gen. Acc. Fire & Life Assur. Corp.*, 453 A.2d 356, 358 (Pa. Super. 1984). That result, however, is no different from the situation "where a party is required to go to trial after a court erroneously refuses to sustain a demurrer to a complaint." *Id.* That burden, alone, is insufficient to satisfy the third element of the collateral-order doctrine.

For the same reasons, the collateral-order doctrine does not create a mechanism for obtaining interlocutory review of decisions compelling arbitration in federal court. *See Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016) (remarking that the appellants "cite no case where a court has used the collateral order doctrine to exercise

jurisdiction over an interlocutory order compelling arbitration," and joining the Sixth, Ninth, and Eleventh Circuits in recognizing that the collateral-order doctrine does not apply). Parties opposing arbitration can still seek to challenge the order compelling arbitration in an appeal from a final judgment confirming the arbitration award.

This Court should not depart so drastically from the federal system and its own precedent by adopting Plaintiffs' and the Superior Court's rule. To do so would undercut the very bargain that parties strike when incorporating an arbitration clause into their contracts.

## II. This Court Should Reject the Superior Court's New, Heightened Standard for the Enforceability of Online Arbitration Agreements.

In its *en banc* decision, the Superior Court expressly stated that, "because the constitutional right to a jury trial should be afforded the greatest protection under the courts of this Commonwealth," for online arbitration agreements, "a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration." (Majority Op. 33.) Moreover, according to the Superior Court majority, the enforceability of an online arbitration agreement will not turn on overall objective evidence of notice and assent, but on judges' subjective perspectives on web page layout, font size, and font color. (Majority Op. 32-33.) On top of that vague standard, the majority opinion layers a mandate for uniquely specific language:

> (1) explicitly stating on the registration websites and application screens that a consumer is waiving a right to a jury trial when they agree to the company's "terms and conditions," and the registration process cannot be completed until the consumer is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on the hyperlink, the waiver should not be hidden in the "terms and conditions" provision but should appear at the top of the first page in bold, capitalized text.

(Majority Op. 33-34.) The majority opinion also appears to require businesses to define the term "arbitration" (or at least to supply a link to a definition of that term), provide an explanation of the differences between binding and non-binding arbitration, and specifically state "in an explicit and upfront manner that [users] were giving up a constitutional right to seek damages through a jury trial proceeding." (Majority Op. 34-34.)

This Court should overrule this new, higher burden for proving the enforceability of online arbitration agreements. This new standard would upend the reasonable expectations of thousands of businesses and individuals in the Commonwealth and contravene settled federal and state law.

### A. This Court should not upend thousands of arbitration agreements already in existence by adopting new arbitration-specific requirements.

The Superior Court's heightened standard for finding assent to arbitration provisions in online consumer contracts sets a dangerous precedent. Indeed, as a result of the majority's opinion, numerous online arbitration agreements already in existence and that are already relied upon by businesses and consumers alike have been cast into doubt or found unenforceable. For example, in *Shainline v. Tri County Area Federal Credit Union*, No. 2022-16043, 2023 WL 11662407, at *1-2 (C.P. Montgomery Oct. 16, 2023), the trial court refused to enforce an arbitration provision where a new customer agreed to arbitrate disputes when he applied online for an account with a local federal credit union and clicked the box agreeing to the credit union's terms and conditions (including arbitration). The court found the agreement to arbitrate invalid because the arbitration provision was on the second page of an 11-page document, below a heading that was formatted in the same way as all other headings in the agreement, and because it did not define the word "arbitration." *Id.*

Similarly, in *Cobb v. Tesla, Inc.*, No. 231202254, slip op. 4 (C.P. Phila. Sept. 26, 2024) (attached as Exhibit A), the trial court extended the Superior Court's decision in this case to employment agreements, holding that an arbitration provision in an employment agreement that

was signed online was invalid because the arbitration provision: (1) is on the second of four pages; (2) is in the same size and color as other parts of the agreement; (3) "is in small font, is not underlined, capitalized or bolded, and is not set off with a heading or in a different color"; (4) "fails to define arbitration, contains no link to a definition of arbitration, and fails to explain the difference between binding and non-binding arbitration"; and (5) "fails to explicitly state that [the plaintiff] is waiving her constitutional right to a jury trial by agreeing to the terms of her employment with Tesla." *Id.* at 4.

As these two cases show, the Superior Court's opinion has already disrupted the traditional expectations of businesses that conduct operations online in Pennsylvania. This disruption is detrimental to Pennsylvania's business community and, ultimately, its consumers.

Trillions of dollars of business are transacted annually online. In 2023, U.S. retailers sold $1.119 trillion through e-commerce, representing 22% of all retail sales. *See* Abbas Haleem, *US ecommerce sales reached $1.119 trillion in 2023*, Digital Commerce 360, Feb. 26, 2024.[5] And the volume of online commerce is increasing. In the second quarter of 2024, U.S. retail e-commerce sales totaled $291.6 billion, an increase of 1.3% from the first quarter of 2024 and 6.7% from the prior year. *See* U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales:*

[5] https://www.digitalcommerce360.com/article/us-ecommerce-sales/.

*2nd Quarter 2022*, at 1 (Aug. 19, 2024).[6] Those trends are expected to continue, with increasing amounts of e-commerce being conducted on mobile devices. *See* Kristy Snyder, *35 E-Commerce Statistics of 2024*, Forbes Advisor (Mar. 28, 2024).[7]

Pennsylvania businesses will generate upwards of $94.5 billion in revenue through e-commerce and mail ordering in 2024. *See* Statista Research Department, *Industry Revenue of "Electronic Shopping and Mail-Order Houses" in Pennsylvania 2012-2024,* December 21, 2023.[8] That is not only an important source of revenue for these businesses, it is also an important source of tax revenue. Sales by online retailers generated $1.362 billion in tax revenue for the Commonwealth in the 2020-21 fiscal year. Don Davis, *How Pennsylvania Reaped an Online Sales Tax Windfall*, Digital Commerce 360, Aug. 5, 2021.[9] Pennsylvania's tax revenue from these sources has likely increased as a result of the overall boom in e-commerce.[10]

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[6] https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

[7] https://www.forbes.com/advisor/business/ecommerce-statistics/#sources_section.

[8] https://www.statista.com/forecasts/1206105/electronic-shopping-and-mail-order-houses-revenue-in-pennsylvania.

[9] https://www.digitalcommerce360.com/2021/08/05/how-pennsylvania-reaped-an-online-sales-tax-windfall/.

[10] Pennsylvania has also benefited from the boom in e-commerce in another important way. The Lehigh Valley has become a key base for warehouses serving the booming e-commerce market in New York. *See*

Because the businesses involved in these online transactions frequently rely on terms and conditions that contain arbitration clauses, the stakes of this appeal for the business community are significant. Unless this Court reverses the Superior Court's decision, the enforceability of the standard types of click-wrap or browse-wrap used in online consumer contracts across the country would be called into question. Alternatively, companies will be forced to create Pennsylvania-specific websites and forms. For smaller companies outside the Commonwealth, they may decide that the burdens of operating in Pennsylvania are too high and avoid selling to Pennsylvanians altogether.

Uncertainty over the enforceability of arbitration clauses will pervade the business community operating in Pennsylvania. Numerous, piece-meal challenges may be brought regarding the font sizes, locations, and format of arbitration provisions in all sorts of online consumer contracts, clogging up the courts. Such litigation threatens to undo the central reason that many businesses seek arbitration in the first place—to reach a just and speedy resolution of claims.

Consumers will suffer as well, as they, too, benefit from faster resolution through arbitration. The data also reveals that consumers

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Michael Corkery, *A New Crop in Pennsylvania: Warehouses*, New York Times (May 26, 2021). These warehouses have fueled increased employment and wages, especially for unskilled workers. *Id.*

are more likely to prevail in arbitration than in litigation and that, when they do, the consumers receive higher awards on average. *See* "Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration," at 11-13. In fact, consumers win approximately 41.7% of cases decided on the merits in arbitration, as compared to 29.3% of cases brought in federal court. *Id.* at 11. When consumers win in arbitration, they win an average award of $79,945 and a median award of $20,356. *Id.* at 13. In litigation, however, consumers win an average award of $71,354 and a median award of $6,669. *Id.*

By adopting the Superior Court's new rule that, at a minimum, calls into question the enforceability of thousands of arbitration agreements already in existence in online consumer contracts, this Court would upset a system that businesses and consumers alike have relied on and which continues to benefit all involved. Casting doubt on the validity of arbitration agreements would also force more cases into court, further burdening the judicial system. To avoid this undesirable result, this Court should reject any heightened standard for determining the enforceability of arbitration provisions in online contracts and reverse the Superior Court's decision.

### B. The Federal Arbitration Act preempts any heightened requirements for arbitration agreements.

In addition to being bad policy, any heightened standards imposed by this Court for proving assent to arbitration is preempted by the FAA—a law that that clearly applies to Uber's contracts with its users and to the vast majority of (if not all) online consumer contracts. Indeed, the U.S. Supreme Court has not been shy about issuing *per curiam* decisions reversing state court decisions that adopt rules hostile to arbitration. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012). Yet, the *en banc* Superior Court entirely failed to consider or appreciate the impact of the FAA on its analysis.

The FAA "was designed to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and place such agreements upon the same footing as other contracts." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989). It "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017).

"The FAA thus preempts any state rule discriminating on its face against arbitration" and "also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* The FAA's preemptive force similarly applies to judicial rules that "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding" not to enforce the agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). For purposes of this equal-treatment rule, there is no "distinction between contract formation and contract enforcement." *Kindred Nursing*, 581 U.S. at 254. "A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made." *Id.* at 254-55.

The Superior Court's decision "flouted the FAA's command to place [arbitration] agreements on an equal footing with all other contracts." *Id.* at 255-56. Although the majority recognized that Plaintiffs agreed to Uber's terms and conditions when they created online accounts, it held that "a stricter burden of proof is necessary to demonstrate a party's unambiguous manifestation of assent to arbitration." (Majority Op. 33.) The majority thus expressly adopted a higher standard for the formation of an agreement to arbitrate than would apply to the formation of any other online agreement. "Because

that rule singles out arbitration agreements for disfavored treatment, . . . it violates the FAA." *Kindred Nursing*, 581 U.S. at 248.

It makes no difference that Plaintiffs invoke their right to a jury trial made "inviolate" by Article I, section 6 of the Pennsylvania Constitution. In *Kindred Nursing Centers*, the Kentucky Supreme Court relied on a similar state constitutional provision when it decided that "an agent could deprive her principal of an adjudication by judge or jury [through an arbitration agreement] only if the power of attorney expressly so provided." 581 U.S. at 250 (quotations omitted). The U.S. Supreme Court reversed, holding that the Kentucky Supreme Court had violated the FAA by "adopt[ing] a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 252.

This Court has similarly acknowledged that the U.S. Supreme Court is "unsympathetic to [a] state court's concern for the right to a jury trial" when addressing arbitration provisions. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 509 (Pa. 2016). The Court explained that it was obligated to "consider questions of arbitrability with a 'healthy regard for the federal policy favoring arbitration,'" and that it was bound to compel arbitration of claims subject to an arbitration agreement. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 20).

By adopting a stricter burden of proof for online agreements to arbitrate than other online agreements, the Superior Court made the same mistake as the Kentucky Supreme Court in *Kindred Nursing Centers*. Yet, the Superior Court did not address the FAA, *Kindred Nursing*, or this Court's decision in *Taylor* in any meaningful way. Instead, it simply declared that "the FAA is not pertinent because the parties never agreed to arbitrate at the outset." (Majority Op. 35 n.26.) But the Superior Court only found that there was no agreement to arbitrate *after* applying its new, heightened standard for assent to arbitration in violation of the FAA. By expressly announcing "a stricter burden of proof" for online agreements, the Superior Court ignored the U.S. Supreme Court's pronouncement that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Taylor*, 147 A.3d at 504 (explaining "that courts are obligated to enforce arbitration agreements as they would enforce any other contract, in accordance with their terms, and may not single out arbitration agreements for disparate treatment").

The Court should reverse the Superior Court's judgment and decision to impose a higher standard for assent to an arbitration provision so that Pennsylvania law does not conflict with the FAA.

## CONCLUSION

For the foregoing reasons, the Court should hold that the Superior Court lacked jurisdiction over Plaintiffs' interlocutory appeal. In the alternative, the Court should reverse the judgment of the Superior Court and reinstate the trial court's order compelling arbitration and staying all proceedings pending the result of that arbitration.

Respectfully submitted,

November 6, 2024

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## CERTIFICATES OF COMPLIANCE

1. I certify that this document complies with the word limit of Pa.R.A.P. 531(b)(3) because, excluding the parts of the document exempted by Pa.R.A.P. 2135(b), this document contains 5,252 words.

2. I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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# Exhibit A

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**TRIAL DIVISION – CIVIL**

| | |
|---|---|
| APRIL COBB, on behalf of herself and all others similarly situated | : DECEMBER TERM 2023 |
| | : No. 02254 |
| v. | : CLASS ACTION |
| TESLA, INC. | : COMMERCE PROGRAM<br>: Control No. 24041404 |

**ORDER**

**AND NOW,** this 26th day of September 2024, upon consideration of defendant Tesla, Inc.'s petition to compel arbitration, and the response, and after a hearing, it is **ORDRED** that the petition is **DENIED.**

**BY THE COURT:**

**ABBE F. FLETMAN, J.**

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**TRIAL DIVISION – CIVIL**

| | |
|---|---|
| APRIL COBB, on behalf of herself and all others similarly situated | : DECEMBER TERM 2023 |
| | : No. 02254 |
| **v.** | : CLASS ACTION |
| TESLA, INC. | : COMMERCE PROGRAM<br>: Control No. 24051404 |

**OPINION**

Before the Court is the petition of defendant Tesla, Inc. ("Tesla"), to compel arbitration. For the reasons set forth below, the petition is denied.

**FACTS**

Plaintiff April Cobb began employment as a materials handler at Telsa's Bethlehem, Pennsylvania factory on August 24, 2020. Stipulation of Undisputed Facts ("Stipulation"), Ex. 1 at p. 4, Docket ("Dkt."), 6/20/24. Before starting her job with Tesla, on August 18, 2020, Ms. Cobb signed an agreement (the "Agreement") that set forth the terms of her employment with Tesla. *See id.*, Ex. 1. Tesla presented the Agreement to Ms. Cobb in electronic form, and she made an electronic signature on the Agreement using an electronic device. *Id.* at ¶¶ 3-4. Ms. Cobb no longer works at Tesla. *Id.* at ¶ 7.

The Agreement provided that any disputes arising in connection with her employment would be resolved by binding arbitration. *Id.,* Ex. 1 at p. 2. The provision states that "any and all disputes, claims, or causes of action, in law or equity, arising from or relating to your employment, or the termination of your employment, will be resolved, to the fullest extent permitted by law by final, binding and private arbitration in your city and state of employment

conducted by the Judicial Arbitration and Mediation Services/Endispute, Inc. ('JAMS'), under the then current rules of JAMS for employment disputes. . . ." Stipulation, Ex. 1 at p. 2. The Agreement also provides that "[a]ny claim, dispute, or cause of action between the parties must be brought in a party's individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. . . ." *Id.*

The Agreement does not define arbitration. *See id.* The entire agreement is in small print, and the arbitration provision is not in bold, capital letters, large print or a different color from the rest of the text; nor is it set off with a heading. *See id.* While the provision prohibits bringing any claim or dispute as a class action, it nowhere states that by signing the Agreement Ms. Chilutti is waiving her constitutional right to a jury trial. *See id.*

Tesla suffered a data breach on May 10, 2023, when two former Tesla employees allegedly stole the personal identifying information of Ms. Cobb and other former Tesla employees and shared it with a foreign media outlet. *Id.,* Ex. 2 at p.1 . On August 23, 2023, Tesla sent Ms. Cobb a Notice of Data Incident informing her of the data breach. *See id.,* Ex. 2.

On December 19, 2023, Ms. Cobb filed a class action complaint against Tesla for Negligence (Count I), Breach of Implied Contract (Count II), and Breach of Confidence (Count III). *See* Complaint, Dkt. 12/19/23. Ms. Cobb subsequently filed an amended complaint and, on May 4, 2024, a second amended complaint that named Ms. Cobb as the sole class representative. *See* Second Amended Complaint, Dkt. 5/4/24 at p. 32.

On April 5, 2024, Telsa filed a petition to compel arbitration with Ms. Cobb and sought a stay of further consideration of this action until the arbitration is decided. Petition to Compel Arbitration ("Petition"), Dkt. 4/5/2024 at p. 1. A hearing on Tesla's petition to compel arbitration

was held on June 27, 2024. Neither party presented any witnesses and instead relied on agreed facts filed in a stipulation on June 20, 2024. *See* Stipulation, Dkt., 6/20/24.

## LEGAL STANDARD

To determine whether to compel arbitration, courts apply a two-part test. *See Smay v. E.R. Stuebner, Inc.*, 864 A.2d 1266, 1270 (Pa. Super. 2004). First, courts determine whether there is a "valid agreement to arbitrate." *Id.* Second, courts consider whether the "dispute is within the scope of the agreement," which is a "matter of contract" with the trial court's conclusion taken as "plenary." *Id.* at 1270, 1272-3. Whether an agreement to arbitrate exists and whether a dispute is within the scope of the agreement are questions of law. *See Provenzano v. Ohio Valley Gen. Hosp.*, 121 A.3d 1085, 1095 (Pa. Super. 2015).

## DISCUSSION

### A. There is No Enforceable Arbitration Agreement

Just last year, the Pennsylvania Superior Court addressed the enforceability of an arbitration clause that was accepted electronically and failed to explicitly obtain waiver of a jury trial. In that case, *Chilutti v. Uber Technologies, Inc.*, 300 A.3d 430, 444 (Pa. Super. 2023)(en banc), *allocatur granted,* -- A.3d --, 2024 WL 3947922 (Pa. 2024), a ride-share passenger purportedly entered into an arbitration agreement when, to create an account, she clicked a button that also stated, by doing so, she was agreeing to terms and conditions that included an arbitration provision. Relying on the inviolate right to trial by jury guaranteed by the Constitution of the Commonwealth of Pennsylvania, the Pennsylvania Superior Court held that there was no valid agreement to arbitrate when waiver of the right to a jury trial was not explicitly and conspicuously disclosed and the term "arbitration" was undefined. *Id.* at 450.

As in *Chilutti,* the arbitration provision in the Agreement in this case fails to provide reasonably conspicuous notice of the terms that will bind Ms. Cobb. The arbitration clauses on the second of four pages of the Agreement are in the same size and color as the Agreement's other provisions. *See* Stipulation, Ex. 1. Moreover, the arbitration provision is in small font, is not underlined, capitalized or bolded, and is not set off with a heading or in a different color. *See id.* It is not like Tesla was unable to provide headings or capitalize or bold words or phrases. Indeed, the Tesla, Inc. Employee Non-Disclosure and Inventions Assignment Agreement, which is part of the Agreement, employs all those methods of emphasizing text. *See id.*

Like the contract in *Chilutti*, the Agreement fails to define arbitration, contains no link to a definition of arbitration, and fails to explain the difference between binding and non-binding arbitration. *See id.* Additionally, the Agreement fails to explicitly state that Ms. Cobb is waiving her constitutional right to a jury trial by agreeing to the terms of her employment with Tesla. *See id.* The agreement does even contain the words "jury trial" or "waiver." *See id.* For instance, clause (f) of the arbitration provision states, "Both you and Tesla shall be entitled to all rights and remedies that you or Telsa would be entitled to pursue in a court of law." *Id.* at p. 2. After reading clause (f), any non-lawyer like Ms. Cobb could reasonably believe that she is not relinquishing her constitutional right to a jury trial. *See Chilutti,* 300 A.3d at 450 ("Further, we believe that the term, "arbitration," is ambiguous in that there is nothing to explain its meaning and any non-lawyer subscriber could easily believe that arbitration is simply another step in the litigation process that does not involve relinquishing the constitutional right to a jury trial in its entirety.") Based on the foregoing, Ms. Cobb's waiver of her right to a jury trial was not knowingly and intelligently made and the arbitration provision is unenforceable.

Tesla cites *Bonilla v. Adecco USA, Inc.*, 2024 WL 945310 (E.D. Pa. Mar. 5, 2024), in support of the contention that "post-*Chilutti* courts applying Pennsylvania law have enforced arbitration agreements without considering whether the agreement contained an express jury trial waiver or the definition of the term 'arbitration.'" Reply in Further Support of Petition to Compel Arbitration ("Def. Reply") at 6, Dkt, 05/06/24. *Bonilla,* a case from the U.S. District Court for the Eastern District of Pennsylvania, does not bind this Court. Furthermore, *Bonilla* applies only federal law, does not cite *Chilutti*, and makes no reference to Pennsylvania's inviolate right to a jury trial, which was recognized even before the right to a jury trial guaranteed by the U.S. Constitution. *See Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen'l Life Ins. Co.,* 515 A.2d 1331, 1336 (Pa. 1986) (*citing* Pa. Const. of 1776, Declaration of Rights, § 11 ("The 1776 Constitution . . . guaranteed the right to jury trial consistent with former practice."))

Consequently, Ms. Cobb's arbitration agreement is not enforceable.

**B. The Federal Arbitration Act does not Preempt Pennsylvania Contract Law**

Tesla argues that the Federal Arbitration Act ("FAA") preempts Pennsylvania law in the underlying case and that Ms. Cobb's erroneous interpretation of *Chilutti* would raise serious concerns under the U.S. Constitution and conflict with U.S. Supreme Court jurisprudence. Def. Reply at 7-8.

The federal policy favoring arbitration, however, "was not intended to render arbitration agreements more enforceable than other contracts and the FAA had not been designed to preempt all state law related to arbitration." *Chilutti,* 300 A.3d at 440 (*quoting Pisano v. Extendicare Homes, Inc.,* 77 A.3d 651, 660-1 (Pa. Super. 2013)). Instead, "addressing the specific issue of whether there is a valid agreement to arbitrate, courts generally should apply

ordinary state-law principles that govern the formation of contracts, but in doing so, must give due regard to the federal policy favoring arbitration." *Id.* To that end, parties to a contract cannot be compelled to arbitrate absent an agreement between them to arbitrate. *See Cumberland-Perry Area Vocational-Tech. Sch. Auth. v. Bogar & Bink*, 396 A.2d 433, 434–35 (Pa. Super. 1978). Moreover, arbitration agreements, although a favored dispute resolution mechanism, cannot be "extended by implication" and are to be "strictly construed." *Id.*

As discussed above, the arbitration clause in the Agreement fails to provide reasonably conspicuous notice of the terms that will bind Ms. Cobb. *See* Stipulation, Ex. 1 at p. 2. Moreover, as discussed earlier, the Agreement fails to define arbitration or to explain the difference between binding and non-binding arbitration. *See id.* Most important, the Agreement fails to explicitly state that Ms. Cobb is relinquishing her constitutional right to a jury trial by agreeing to employment terms with Tesla. *See id.* The Agreement does even contain the terms "waiver" or "jury trial." *See id.* Consequently, after applying general contract principles to the Agreement, this Court concludes that there was insufficient mutual assent to compel arbitration between Ms. Cobb and Tesla and the FAA does not preempt Pennsylvania law in this case.

**C. *Chilutti* Is Not Limited to the Consumer Context**

Finally, Tesla contends that *Chilutti* is inapplicable to the Agreement because, in that case, the defendant was seeking to compel arbitration with a consumer while, in this case, the plaintiff was an employee. Def. Reply at 1-5. Nothing in *Chilutti*, however, limits the decision to the consumer context and there is no reason an employee would be any less entitled to trial by jury than a consumer. As the party seeking to compel arbitration, Tesla of course bears the burden of proving that a valid agreement to arbitrate existed between the parties. *Bair v. Manor Care of Elizabethtown, PA, LLC,* 108 A.3d 94, 97 (Pa. Super 2015). While the evidentiary record on this motion is sparse, consisting merely of a nine-paragraph stipulation, there can be no

doubt that the parties to the Agreement possess unequal bargaining power. Tesla is one of the most well-known corporations in the world and is a large, sophisticated organization[1] whereas Ms. Cobb was a former material handler whose position at Tesla was non-exempt, and she was paid $16.25 per hour. Stipulation, Ex. 1 at p. 1. Tesla presented no evidence that Ms. Cobb was a sophisticated party or that she had any ability to negotiate the terms of the Agreement. To the contrary, she was a nonexempt worker, the Agreement was presented to her electronically, and she signed it using an electronic device. *Id.* at ¶¶ 3-4. These circumstances are much more akin to those presented in *Chilutti* than to a situation where sophisticated parties negotiated a binding agreement and agreed to waive rights to a jury trial and class action status. [2]

**CONCLUSION**

For the foregoing reasons, the petition of defendant Tesla, Inc., to compel arbitration is denied.

**BY THE COURT:**

Abbe F. FL

**ABBE F. FLETMAN, J.**

[1] "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . is generally known within the trial court's territorial jurisdiction. . . ." Pa. R. Evid. 201.

[2] Since the *Chilutti* Court's reasoning renders the arbitration provisions in the parties' Agreement invalid, the Court need not reach the question whether the class action waiver is also unconscionable.