SUPREME COURT OF PENNSYLVANIA

257 EAL 2023

SHANNON CHILUTTI AND KEITH CHILUTTI, H/W
Respondents

v.

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

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PETITION FOR ALLOWANCE OF APPEAL

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.

The 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 the amici's members.

ARGUMENT

The Superior Court's *en banc* decision answered questions of enormous importance and did so in a way that will have significant, problematic consequences for businesses in this Commonwealth and around the country. It warrants this Court's review for three reasons.

I. The Superior Court's Creation of a Right to Appeal *Every* Decision on a Motion to Compel Arbitration Significantly Impacts the Commonwealth's Business Community.

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. 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).

The Superior Court's *en banc* decision effectively overrules those legislative choices. 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 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").

By holding that the collateral order doctrine applies in this case, the Superior Court has opened the floodgates to numerous, fact-dependent interlocutory appeals. Allowing appeals as of right from orders granting motions to compel arbitration contravenes the preference for appeals from final orders. *See Commonwealth v. Pownall*, 278 A.3d 885, 903 (Pa. 2022) (explaining 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). This Court should grant review to consider whether to adopt a rule that will dramatically increase the number of interlocutory appeals.

This Court's review is also required to consider and clarify when, if ever, the elements of the collateral order doctrine can be satisfied by

an order compelling arbitration. 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 prongs must be "clearly present before collateral appellate review is allowed." *Rae v. Pa. Funeral Directors Ass'n*, 977 A.2d 1121, 1126 (Pa. 2009).

The *en banc* Superior Court was deeply divided on Rule 313's applicability. Six judges found that the collateral order doctrine allowed immediate appellate review, and three would have found no appellate jurisdiction. Clearly, this issue is ripe for this Court's consideration.

Moreover, Judge Stabile, in his dissent, had the much better approach to the collateral doctrine. In holding that the order compelling arbitration satisfies the collateral order doctrine's third prong, the Superior Court held that Plaintiffs cannot vindicate their right to a jury trial on appeal from final judgment and that the order compelling arbitration puts them "out of court." (Maj. Op. 10-13.) But an order compelling arbitration only stays the case in the trial court, thus preserving the trial court's jurisdiction. *See* 42 Pa.C.S. § 7304(d); *Maleski*, 633 A.2d at 1145. Therefore, 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's opinion is at odds with this Court's precedent.

The Superior Court majority held that the third element is satisfied because plaintiffs cannot question the validity of the arbitration provision or their assent to that provision on appeal from a final order. (Maj. Op. 10-13.) However, as Judge Stabile recognized in his dissent, a party cannot be forced to arbitrate absent an agreement to do so. (*See* Op., Stabile, J., dissenting, at 8 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).) Accordingly, a court can always vacate an arbitration award if it finds during enforcement proceedings that there was no agreement to arbitrate and the plaintiffs did so only because they were compelled by the trial court's original order. *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." (Op., Stabile, J., dissenting, at 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). This Court should allow this appeal to determine whether this burden, alone, is sufficient to satisfy the third element of the collateral order doctrine.

This Court should also fully scrutinize the Superior Court's decision instead of permitting it to adopt a rule that would put Pennsylvania at odds with the federal court system. Under the Federal Arbitration Act (the "FAA"), appeals as of right can only be taken 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). 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). In all these cases, 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 grant review to consider carefully whether to depart so significantly from the federal system and existing precedent in a way that drastically undercuts the bargain that parties strike when incorporating an arbitration clause into their contracts.

II. The Superior Court's New, Heightened Standard for the Enforceability of Arbitration Agreements Raises Questions of Enormous Importance for Businesses in Pennsylvania.

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." (Maj. Op. 33.) The Court should consider whether the

Superior Court's new, heightened standard should become a mainstay of Pennsylvania law for two reasons.

First, the standard that applies to enforce online arbitration agreements in Pennsylvania is of enormous importance. Trillions of dollars of business are transacted annually online. In 2019, U.S. retailers sold $578.5 billion through e-commerce. *See* U.S. Dep't of Commerce, *E-Stats 2019: Measuring the Electronic Economy*, at 1 (Aug. 5, 2021).[2] For service industries, revenue from electronic sources exceeded $1.29 trillion. *See id*. And the volume of online commerce is increasing. In the second quarter of 2022, U.S. retail e-commerce sales totaled $257 billion, an increase of 2.7% from the first quarter of 2022 and 6.8% from the prior year. *See* U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales: 2nd Quarter 2022*, at 1 (Aug. 5, 2022).[3]

Pennsylvania businesses were estimated to generate upwards of $80 billion in revenue through e-commerce and mail ordering in 2022. *See* Statista Research Department, *Industry Revenue of "Electronic Shopping and Mail-Order Houses" in Pennsylvania 2012-2024,* Sept. 30, 2021.[4] That is not only an important source of revenue for these

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[2] https://www.census.gov/content/dam/Census/library/publications/2019/econ/e19-estats_3.pdf.

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

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

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.[5]

Because the businesses involved in these online transactions frequently rely on terms and conditions that contain arbitration clauses, the stakes of this case are significant. In announcing a new, heightened standard for the enforceability of arbitration clauses in this context, the Superior Court's decision calls into question the enforceability of countless arbitration agreements created online in reliance on existing precedent. Such a massive sea change in Pennsylvania law deserves review by this Court.

Second, the Court should grant review in light of the disruptive uncertainty that the Superior Court's decision will introduce into the marketplace. According to the Superior Court's majority opinion, whether an online arbitration agreement may be enforced will now turn, not on the overall objective evidence of notice and assent, but on judges' subjective perspectives on web page layout, font size, and font color. (Maj. Op. 32-33.) On top of that vague standard, the majority opinion layers a mandate for uniquely specific language:

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

> (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.

(Maj. 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." (Maj. Op. 34-34.)

This holding would force businesses nationwide to tailor their websites to accommodate the specific drafting preferences of a random selection of Superior Court judges. If Pennsylvania is to impose such disruptive requirements, it should do so only after this Court has had an opportunity to consider the issue.

III. The Superior Court's New, Heightened Standard for the Enforceability of Arbitration Agreements Is Obviously Preempted by the FAA and Contrary to U.S. Supreme Court Precedent.

This Court should also grant review because the *en banc* Superior Court entirely failed to consider or appreciate the impact of the FAA on its analysis. The majority imposed "a stricter burden of proof" for "demonstrat[ing] a party's unambiguous manifestation of assent to arbitration." (Maj. Op. 33.) But the U.S. Supreme Court has clearly held that the FAA preempts such a heightened "clear-statement rule" for waiving "the right to go to court and receive a jury trial" because such waiver is "the primary characteristic of an arbitration agreement." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017). State courts "must enforce the Federal Arbitration Act," yet the Superior Court's heightened standard is blatantly "inconsistent with clear instruction in the precedents of [the U.S. Supreme] Court." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530, 532 (2012) (per curiam).

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) (quotations omitted). 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*, 581 U.S. at 251 (quotations omitted).

"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 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) (citation omitted).

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 thus "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." (Maj. 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 the Superior Court majority relied on the right to a jury trial made "inviolate" by the Article I, section 6 of the Pennsylvania Constitution. In *Kindred Nursing*, 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. The Superior Court's decision entirely ignored and blatantly contradicts *Kindred Nursing*.

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).

The Superior Court did not address the FAA, *Kindred Nursing*, or this Court's decision in *Taylor* in any meaningful way. Instead, it declared that "the FAA is not pertinent because the parties never agreed to arbitrate at the outset." (Maj. 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 to arbitrate than other online agreements, the majority made the same mistake as the Kentucky Supreme Court in *Kindred Nursing*, even though the U.S. Supreme Court has been clear 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 grant review to ensure that Pennsylvania law does not conflict with the FAA.

CONCLUSION

For the foregoing reasons, the Court grant the Petition for Allowance of Appeal.

Respectfully submitted,

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August 18, 2023

CERTIFICATES OF COMPLIANCE

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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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