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SUPREME COURT OF PENNSYLVANIA

Natalie Pierce, individually and on behalf of all others similarly situated, *Respondent,* v. Empower Finance, Inc., *Petitioner.*	128 WAL 2026

Application for Leave to File Amicus Brief in Support of Empower Finance, Inc.'s Petition for Allowance of Appeal

The Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry (the "Amici") request leave under Pa.R.A.P. 531(b)(1) to file the attached amicus brief in support of Empower Finance, Inc.'s Petition for Allowance of Appeal.

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 over 13,000 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 improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Amici and their members have a particular interest in the issues raised in Empower Finance's Petition for Allowance of Appeal because the Amici's members have structured millions of online contractual relationships around arbitration agreements. The judicial standards for enforcing those agreements in Pennsylvania are thus of critical significance to the Amici's members.

As the Amici explain in the proposed amicus brief, e-commerce is a vital part of the nation's and Pennsylvania's economies. Yet, the Superior Court's precedential opinion in this case and in the prior cases on the same issue—*Duffy v. Tatum*, 354 A.3d 14 (Pa. Super. 2026), and *Chilutti v. Uber Technologies, Inc.*, 300 A.3d 430 (Pa. Super. 2023) (en banc), *rev'd on other grounds*, 349 A.3d 826 (Pa. 2026)—imposed new standards for arbitration agreements in online contracts. Those new standards create substantial uncertainty and operational difficulty for every business using e-commerce in Pennsylvania. In addition, as the Amici explain in the proposed amicus brief, the Superior Court's new rules for arbitration agreements run afoul of the Federal Arbitration Act and binding precedent from the United States Supreme Court. The conflict between the new rule espoused by the Superior Court and binding precedent creates further uncertainty for the business community. This Court should grant review to resolve those conflicts and to put the law in Pennsylvania back in conformance with federal law.

Accordingly, the Amici request leave to file the attached amicus brief in support of Empower Finance, Inc.'s Petition for Allowance of Appeal.

Respectfully submitted,

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June 1, 2026

SUPREME COURT OF PENNSYLVANIA

128 WAL 2026

NATALIE PIERCE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED
Respondent

v.

EMPOWER FINANCE INC.
Petitioner

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 May 1, 2026 Order of the Superior Court, 609 WDA 2025, affirming the Order of the Court of Common Pleas of Allegheny County, dated April 17, 2025, Civil Division at No. GD 24-012584

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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 over 13,000 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.

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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.

The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an 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 the amici and their members.

ARGUMENT

Mere months after this Court vacated on jurisdictional grounds the Superior Court's *en banc* decision in *Chilutti v. Uber Technologies, Inc.*, 300 A.3d 430 (Pa. Super. 2023) ("*Chilutti I*"), the Superior Court readopted the heightened standard for enforcing online arbitration agreements that it imposed in *Chilutti I* and reinforced its profoundly negative view of arbitration agreements more generally.

Six weeks after this Court vacated *Chilutti I*, the Superior Court "borrow[ed] substantially" from its purportedly "well-founded *en banc* decision in *Chilutti*" and concluded that "our state constitution provides greater protection of the right to a jury trial, consistent with [the] *en*

banc decision in *Chilutti*." *Duffy v. Tatum*, 354 A.3d 14, 19 n.2 (Pa. Super. 2026). The Superior Court then readopted nearly verbatim its reasoning and holding from *Chilutti I*, imposing (again) "a strict burden of proof . . . to demonstrate a person's unambiguous manifestation of assent to arbitration." *Id.* at 24.

Two months later, the Superior Court left no doubt that the heightened standard it announced in *Chilutti I* and reimposed in *Duffy* for enforcing online arbitration agreements is alive and well. In this case, the Superior Court refused to enforce an arbitration agreement because it was "bound here to apply standards first articulated in *Chilutti I* and then expressly adopted in our precedential opinion in *Duffy*." (*Pierce v. Empower Finance, Inc.*, Superior Court Opinion ("Op.") at 13-14.)

This Court should grant review to address the merits-related issues that it did not address when it vacated *Chilutti I* on jurisdictional grounds in *Chilutti v. Uber Technologies, Inc.*, 349 A.3d 826 (Pa. 2026) ("*Chilutti II*"). In *Chilutti I*, *Duffy*, and this case, the Superior Court has answered questions of enormous importance in a way that will have significant, problematic consequences for businesses in this

Commonwealth and around the country. With over a trillion dollars of revenue generated through e-commerce yearly in the United States and with the growing prevalence of transactions conducted on smartphones, the Superior Court's demonstrated hostility towards online arbitration agreements warrants this Court's review.

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

In its decisions in *Duffy* and this case, 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[,] a strict burden of proof is necessary to demonstrate a person's unambiguous manifestation of assent to arbitration." *Duffy*, 354 A.3d at 24. (*See also* Op. 12.) 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 to businesses. As the Superior Court observed, online users routinely enter into contracts with arbitration clauses that "cover a wide spectrum from

long-term binding contracts such as mortgage loans to consumer sales, to registration for food delivery or ride share services." *Duffy*, 354 A.3d at 23. These online contracts result in trillions of dollars of transactions conducted online annually. For example, in the first quarter of 2026, e-commerce sales accounted for 16.8% of total sales in the United States and amounted to $302.3 billion in revenue. *See* U.S. Census Bureau News, *Quarterly Retail E-Commerce Sales 1st Quarter* 2026, at 1 (May 18, 2026).[2] And the volume of online commerce is increasing. The estimated value of all retail e-commerce transactions for the first quarter of 2026 was almost 10% higher than for the same quarter of 2025. *Id.* The growth in online sales significantly outpaced the total growth in retail sales. *Id.* The trend is the same across the globe, with experts predicting that 22.6% of all retail sales, which translates to $7.9 trillion in revenue, will be conducted online in 2027. *See* Kristy Snyder, *35 Top E-Commerce Statistics*, Forbes (May 1, 2026).[3]

The service industry is also increasingly using e-commerce. Around $1.77 trillion was transacted online in 2022—the most recent

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

[3] https://www.forbes.com/advisor/business/ecommerce-statistics/

year for which data is fully available—in this sector. *See* U.S. Census Bureau, *E-Stats 2022: Measuring the Electronic Economy* (Mar. 26, 2025).[4] Like in other sectors, the volume of e-commerce for the service industry is increasing, with 2022's data showing a marked increase from the $1.36 trillion conducted online just two years earlier. *See* U.S. Census Bureau, *E-Commerce Activity Across Sectors: 2020 and 2021* (May 25, 2023).[5]

Much of this e-commerce is transacted on smartphones. According to the Pew Research Center, 76% of adults in the United States used their smartphones to make purchases in 2022. *See* Michelle Faverio and Monica Anderson, *For shopping, phones are common and influencers have become a factor—especially for young adults*, Pew Research Center (November 21, 2022).[6] Roughly a third of American adults made purchases at least weekly on their devices. *Id.*

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[4] https://www.census.gov/library/visualizations/2025/econ/e-commerce-activity-across-sectors-2021-2022.html

[5] https://www.census.gov/library/visualizations/interactive/e-commerce-activity-across-sectors-2020-2021.html

[6] https://www.pewresearch.org/short-reads/2022/11/21/for-shopping-phones-are-common-and-influencers-have-become-a-factor-especially-for-young-adults/

E-commerce is especially important in Pennsylvania. Consumers in Pennsylvania are 7.74% more likely than the average American to make weekly online purchases. *See* Capital One Shopping Research, *Online Shopping Statistics by State* (Feb. 18, 2026).[7] Pennsylvania businesses were estimated to generate upwards of $80 billion in revenue through e-commerce and mail ordering in 2022 and $94.5 billion by 2024. *See* Statista Research Department, *Industry Revenue of "Electronic Shopping and Mail-Order Houses" in Pennsylvania 2012-2024* (Feb. 19, 2026).[8] That is not only an important source of revenue for these businesses, but also an important source of tax revenue for the Commonwealth and its municipalities. 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] That number increased to approximately $2.71 billion in 2026. *See* Capital

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[7] https://capitaloneshopping.com/research/online-shopping-statistics-by-state/

[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/

One Shopping Research, *supra*. In fact, e-commerce is so important to Pennsylvania's economy that the government has launched targeted initiatives to help local businesses launch e-commerce platforms. *See* Pennsylvania Business One-Stop Shop, *eCommerce*.[10]

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 introduces into the marketplace. According to the Superior Court, the enforceability of online arbitration agreements now turns, not on the overall objective evidence of notice and assent, but on judges' subjective perspectives on web page layout, font size, and font color. *Duffy*, 354 A.3d at 24-25. On

[10] https://business.pa.gov/grow/ecommerce/

top of that vague and subjective standard, the Superior Court now mandates two uniquely specific requirements:

> (1) explicitly stating on the registration website and application screens that a consumer is waiving a right to a jury trial when the person agrees to the seller's terms of service and the registration cannot be completed until the person is fully informed of that waiver; and (2) when the agreements are available for viewing after a user has clicked on a hyperlink, the waiver should not be hidden in the middle of the document but should appear prominently in bold, capitalized text.

Id. at 24. And the Superior Court requires that businesses must define the term "arbitration" within the agreement. *Id.* at 25.

The Superior Court applied these standards in this case to hold that the arbitration agreement at issue was unenforceable because "Empower's application screens did not explicitly state that Pierce would be waiving the right to a jury trial by agreeing to Empower's 'terms and conditions,' or that the registration process could not be completed until the consumer is fully informed of that waiver." (Op. 14.) That holding—along with the Superior Court's prior precedent in *Duffy*—will force businesses nationwide to tailor their websites to accommodate the specific drafting preferences of a randomly selected

panel of Superior Court judges. If Pennsylvania is to impose such disruptive requirements (even though those requirements are squarely preempted by federal law, as discussed below), it should do so only after this Court has had an opportunity to consider the issue.

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

This Court should also grant review because the Superior Court entirely failed to consider or appreciate the impact of the Federal Arbitration Act ("FAA") on its analysis. The opinions in *Chilutti I* and *Duffy* expressly created "a stricter burden of proof" for "demonstrat[ing] a party's unambiguous manifestation of assent to arbitration." *Chilutti I*, 300 A.3d at 449-50; *see also Duffy*, 354 A.3d at 24 (requiring a "strict burden of proof"). But the U.S. Supreme Court has clearly held that the FAA preempts such a heightened standard for waiving "the right to go to court and receive a jury trial" because such a waiver is "the primary characteristic of an arbitration agreement." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 252 (2017). 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, 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 has repeatedly ignored these clear mandates. In *Duffy*, the Superior Court considered the enforceability of an arbitration provision contained in a hyperlinked Terms of Service Agreement, where the customer was required to check a box with the disclaimer that, "By checking this box I accept the Dolly Terms of Service." *Duffy*, 354 A.3d at 17. Although the court recognized that Duffy clicked that box, it held that the checkmark did not satisfy the "strict burden of proof" that "is necessary to demonstrate a person's unambiguous manifestation of assent to arbitration." *Id.* at 24-25. More was required in the specific context of an online arbitration agreement. *Id.* at 25.

Based on the holding in *Duffy*, the Superior Court in this case held that Empower Finance's arbitration agreement was unenforceable because the sign-up screen "did not explicitly state that Pierce would be waiving the right to a jury trial by agreeing to Empower's 'terms and conditions,' or that the registration process could not be completed until the consumer is fully informed of that waiver." (Op. 14.) Once again, the Superior Court failed to put an agreement to arbitrate on the same footing as other online agreements. This is precisely what the FAA and U.S. Supreme Court precedent forbid.

The Superior Court's holdings in *Duffy* and this case also cannot be squared with the U.S. Supreme Court decision in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). There, the Court invalidated a Montana statute that required any contract with an arbitration clause to include a notice that the contract is subject to arbitration on the first page of the contract, "typed in underlined capital letters." *Id.* at 684. The FAA preempted the Montana law because it "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Id.* at 687.

The Superior Court's new notice rule for online arbitration agreements in Pennsylvania suffers from the same infirmity.

It makes no difference that the Superior Court relied on the right to a jury trial under 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 provide[d]." 581 U.S. at 250 (second alteration in original) (quotations omitted). The U.S. Supreme Court reversed, holding that the Kentucky Supreme Court 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 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 Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)).

The Superior Court did not address the FAA, *Kindred Nursing*, or this Court's decision in *Taylor* in any meaningful way in *Duffy* or in this case. In fact, the Superior Court's opinion in this case does not mention the FAA at all.[11] By expressly announcing "a strict burden of proof" for online agreements to arbitrate, when compared to other online agreements, the Superior Court made the same mistake as the Kentucky Supreme Court in *Kindred Nursing*.

Particularly because the Superior Court did not engage with the FAA whatsoever before changing Pennsylvania law, the Court should grant review to ensure that Pennsylvania law does not conflict with the FAA.

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[11] The Superior Court addressed the FAA in cursory fashion in *Chilutti I*, declaring that "the FAA is not pertinent because the parties never agreed to arbitrate at the outset." *Chilutti I*, 300 A.3d at 450 n.26. But the Superior Court found that there was no agreement to arbitrate only *after* applying its new, heightened standard for assent to arbitration, in violation of the FAA. Thus, to the extent the opinion in *Duffy* adopted the reasoning of *Chilutti I*, it still failed to address the FAA problem.

CONCLUSION

For the foregoing reasons, the Chamber of Commerce of the United States of America and the Pennsylvania Chamber of Business and Industry request that the Court grant the Petition for Allowance of Appeal.

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June 1, 2026

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. 1115(g), this document contains 2,832 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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