IN THE SUPREME COURT OF NEW JERSEY
Docket No. 082509

AMY SKUSE, Plaintiff-Respondent, v. PFIZER, INC., JOHN D. WITZIG, PAUL MANGEOT, and CONNIE CORBETT, Defendants-Petitioners.	Civil Action On Appeal from: Superior Court of New Jersey, APPELLATE DIVISION Docket No.: A-3027-17T4 Sat Below: Hon. Jack M. Sabatino, P.J.A.D. Hon. Michael J. Haas, J.A.D. Hon. Stephanie A. Mitterhoff, J.A.D.

BRIEF FOR AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 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. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community, including in this Court.

The Chamber's members and the business community more broadly regularly rely on arbitration agreements in their contractual relationships, including with their employees. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the policy reflected in the Federal Arbitration Act ("FAA"), many of the Chamber's members, including those located in or that do substantial business in New Jersey, have structured contractual relationships around the use of arbitra-

[1] No counsel for any party authored this brief in whole or in part. No other entity or person, aside from the Chamber, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

tion to resolve disputes.

The Chamber therefore has a strong interest in reversal of the Appellate Division's refusal to compel arbitration. As explained below, the Appellate Division imposed novel and ad hoc barriers to the formation of the electronic arbitration agreement in this case that do not apply to the formation of contracts in general under New Jersey law, in violation of the FAA's mandate that arbitration agreements be placed on equal footing with other contracts.

PRELIMINARY STATEMENT

The plaintiff in this case agreed to arbitrate, manifesting assent under ordinary principles of New Jersey contract law. First, she clicked a box to "acknowledge" the terms of the arbitration agreement at the bottom of a slide—part of an online presentation—that states: "I understand that I must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment." Second, she continued her employment with Pfizer for thirteen months after receiving notice of the arbitration agreement, where the same slide provides that by continuing employment for sixty days after receipt of the agreement, the employee "will be deemed to have consented to, ratified and accepted this Agreement through my . . . continued employment with the Company."

The trial court judge recognized that this process created

an enforceable agreement to arbitrate and compelled arbitration. But the Appellate Division reversed. On the first point, the Appellate Division nitpicked the content of Pfizer's slides, concluding that the language on the slide accompanying the click box must use the word "agree" or "agreement" and that the word "acknowledge" is inadequate as a matter of law. That newly minted magic-words test finds no support in this Court's jurisprudence or in generally applicable principles of New Jersey contract law. On the second point, the Appellate Division misapplied this Court's precedents in concluding that continued employment is inadequate as a matter of law to manifest assent to an arbitration agreement.

By imposing these novel barriers to the formation of arbitration agreements, the Appellate Division's holdings run headlong into the FAA and flatly contradict its mandate to place arbitration provisions on equal footing with other types of contracts. Moreover, accepting the types of ad hoc barriers imposed by the Appellate Division would create considerable uncertainty over the formation of electronic contracts, imposing substantial and unwarranted costs on businesses—costs that will be passed along to consumers and employees without any corresponding benefit.

This Court should reverse the ruling below and clarify that (1) assent to an arbitration agreement by clicking on an elec-

tronic button or box is a valid method of contract formation, regardless of whether the employer uses a specific word in or next to the click box; and (2) an employee may agree to an arbitration provision by continuing employment, where, as here, the provision clearly states that continuing employment will indicate assent.

ARGUMENT

I. THE FAA REQUIRES STATES TO PLACE AGREEMENTS TO ARBITRATE ON EQUAL FOOTING WITH OTHER CONTRACTS.

Congress enacted the FAA to "reverse longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." EEOC v. Waffle House, Inc., 534 U.S. 279, 289 2002) (quotation marks omitted); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (the FAA "seeks broadly to overcome judicial hostility to arbitration agreements"). The FAA thus embodies an "emphatic federal policy in favor of arbitral dispute resolution." Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012) (quoting KPMG LLP v. Cocchi, 565 U.S. 18, 21 (2011)) (quotation marks omitted).

Section 2 of the FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the United States Supreme Court has noted, "the judicial hostility towards arbitration that prompted the FAA had manifest-

ed itself in 'a great variety' of 'devices and formulas.'" AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 342 (2011) (quoting Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959)). Accordingly, Section 2's savings clause prohibits courts from invalidating arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Concepcion, 563 U.S. at 339 (citing Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). "[T]his means that the saving clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'" Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018) (quoting Concepcion, 563 U.S. at 344). Put another way, the FAA preempts not only laws that outright prohibit arbitration agreements, but also "any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017).

In Kindred, the U.S. Supreme Court determined that a Kentucky state-law that a general power of attorney "could not entitle a representative to enter into an arbitration agreement without specifically saying so" was one such rule. Id. at 1426. The Kentucky court justified that rule as "safeguard[ing] a person's

'right to access the courts and to trial by jury.'" Id. at 1427. In rejecting the Kentucky rule, the U.S. Supreme Court observed that it "did exactly what Concepcion barred: adopt 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 1427. "Such a rule is too tailor-made to arbitration agreements-subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatments." Id.

II. THE DECISION BELOW IMPERMISSIBLY IMPOSED HEIGHTENED REQUIREMENTS ON ASSENT TO ARBITRATION AGREEMENTS.

The Appellate Division here did precisely what the FAA prohibits. The court erred by subjecting the arbitration provision at issue to more stringent standards of assent than New Jersey law applies to all other contracts. This Court should correct that error and make clear that courts may not make it harder to form or enforce arbitration agreements than other types of contracts.

A. Plaintiff's Click Of A Box To Acknowledge The Contractual Terms Plus Continued Employment Manifested Her Assent To Those Terms.

Pfizer, like many employers in the digital age, uses an electronic, computer-based platform to enter into contracts with its employees. One of those contracts is the company's "Mutual Arbitration and Class Waiver Agreement." Pfizer required its employees (including Plaintiff) to review a series of slides high-

lighting the key features of the arbitration agreement. Skuse v. Pfizer, Inc., 457 N.J. Super. 539, 557 (App. Div. 2019). As the Appellate Division recognized, the slides that presented the company's arbitration policy repeatedly referenced the contractual nature of the arbitration agreement.

For example, the first two sentences of the first slide stated: "As a condition of your employment with Pfizer, you and Pfizer agree to individual arbitration as the exclusive means of resolving certain disputes relating to your employment. This agreement is contained in the Mutual Arbitration and Class Waiver Agreement." Id. at 547 (emphasis the court's). The second slide instructed the employee to click a link "to review the Agreement," informed the employee that she "may print the Agreement and retain for your records," and further instructed the employee to "close the window and return to this page" after "reviewing the [A]greement." Id. The third slide contained a box at the bottom with an arrow pointing to the text above it and the words "CLICK HERE to acknowledge." Id. (emphasis the court's). The beginning of the third slide states: "I understand that I must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment." Id. (emphasis the court's).

Notwithstanding all of the language it emphasized in the slides—including the slides' use of the words "agree" or "agreement" at least six times—the Appellate Division concluded that

Plaintiff's click of the box did not manifest her assent to the arbitration agreement. The Appellate Division's main complaint with Pfizer's process was that "[t]he four-word click box on the module's third page selectively uses the verb 'acknowledge' and does not use the verb 'agree.'" Skuse, 457 N.J. Super. at 558. The Appellate Division concluded that it was not enough that "other portions of the slides do contain and repeat the words agree and agreement" or that the Agreement itself used those words—according to the court, the only words that matter are those in the click box. Id. at 558-59.

That singular focus on the language of the click box was wrong. The Appellate Division justified its approach by speculating that "people frequently skim (or scroll through without reading) written material sent to them digitally" and "also are prone to bypass links to other documents without meticulously opening and reading the contents of those links." Skuse, 457 N.J. Super. at 556. The court further speculated that "[s]ome employees surely will skip to the click box at the end of the presentation without paying close or any attention to the verbiage that preceded it." Id. at 559.

There are no factual findings (let alone any facts) to support the Appellate Division's conjuring about what people "frequently" or "surely will" do. It is also irrelevant in this case, which is about whether an individual employee assented to arbi-

tration, what some other people might or would do. And the Appellate Division is no place to attempt to develop a factual record in any event.

But even overlooking all of those shortcomings, there are at least two problems with the legal sufficiency of the court's speculation. First, and perhaps most fundamental, it ignores that parties have a duty to read contracts, and the failure to read before signing (or clicking or otherwise indicating assent) to accept an agreement does not excuse a party from being bound by its terms. Indeed, New Jersey courts routinely enforce contracts regardless of whether the plaintiff actually chose to read the contract. See, e.g., Riverside Chiropractic Grp. v. Mercury Ins. Co., 404 N.J. Super. 228 (App. Div. 2008) ("As a general rule, 'one who does not choose to read a contract before signing it cannot later relieve himself of its burdens.'") (quoting Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 386 (1960)). As one federal district court put it in rejecting the employees' argument that a contract was not formed unless they were required to review the contractual terms available by clicking a hyperlink, "to hold otherwise would contravene the well settled principle that a failure to read a contract will not excuse a party who signs it, nor will the party's ignorance of its obligation." ADP, LLC v. Lynch, No. 16-1053, 2016 WL 3574328, at *5 (D.N.J. June 30, 2016) (alterations and quotation marks omitted).

Second, the Appellate Division's premise that electronic contracting requires heightened levels of notice and assent is irreconcilable with courts' repeated pronouncements that there are no separate rules of the road for online contract formation. As courts have long recognized, "[w]hile new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract." Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004); accord, e.g., James v. Global Tel*Link Corp., No. 13-4989, 2016 WL 589676, at *5 (D.N.J. Feb. 11, 2016). Consistent with that principle, courts routinely enforce electronic contract formation processes in which the full text of the terms are available by hyperlink, and the consumer or employee clicks a button or box "to affirmatively manifest her assent to the terms of contract." ADP, 2016 WL 3574328, at *4; see also id. (noting that "[n]umerous courts, including courts in the Third Circuit, have enforced" such agreements, including those "that did not physically require the signatory to actually review the terms before assenting to them") (citing James, 2016 WL 589676, at *5 (collecting cases); Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 834 (S.D.N.Y. 2012)).

Next, the Appellate Division's insistence that a click box must itself use the words "agree" or "agreement" is inconsistent with the decisions from this Court on which the Appellate Divi-

sion relied, which state that "[n]o particular form of words is necessary" to establish knowing assent to an arbitration agreement. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 444 (2014). As this Court recently reiterated, "the decision [in Atalese] imposes no talismanic recitations" on how "a meeting of the minds can be accomplished." Kernahan v. Home Warranty Administrator of Fla., Inc., 236 N.J. 301, 320 (2019). Particularly in light of the repeated references to the "Agreement" throughout the slides—including a statement on the slide containing the click box that "I understand that I must agree to the Mutual Arbitration and Class Waiver Agreement as a condition of my employment"—there can be little doubt that the slides as a whole informed employees that the arbitration agreement is contractual in nature and that clicking the button manifested assent to those contractual terms.

Notably, the federal court in ADP rejected "as a distinction without difference" the precise argument that the Appellate Division endorsed here. ADP, 2016 WL 3574328, at *5. The employees in ADP argued that "mutual assent was lacking because the acknowledgment box did not state 'I agree to the terms of the grant documents'; rather, it merely required [the employees] to acknowledge that they had 'read' those documents." Id. (emphasis added). That is because there is no legal difference between "acknowledging" contractual terms to which one is required to agree

and using the word "agree" on the button itself.

Indeed, courts consider a variety of similar phrases to be equivalent to "agree" in the context of an electronic transaction. In one recent case, for example, the court held that the plaintiff consented to arbitration by "check[ing] a box acknowledging that he had read the Arbitration Agreement"—expressly rejecting the plaintiff's argument "that electronically checking a box acknowledging the Arbitration Agreement 'is not the same as agreeing to the terms of an agreement.'" Furlough v. Capstone Logistics, LLC, No. 18-2990, 2019 WL 2076723, at *6 (N.D. Cal. May 10, 2019). In another case, the court held that the user assented to the agreement by clicking a "PLACE ORDER" button near a hyperlink to the full terms and an acknowledgement that by clicking the button the user "ha[s] read and understand[s] the" terms. Crawford v. Beachbody, LLC, No. 14-1583, 2014 WL 6606563, at *1 (S.D. Cal. Nov. 5, 2014).

As the Appellate Division acknowledged, "sometimes the word 'acknowledge' might be considered a synonym of the word 'agree'," but the court concluded that "acknowledge" might also "mean simply to 'recognize' the existence of something." Skuse, 457 N.J. Super. at 559 n.7 (quoting Merriam-Webster's Collegiate Dictionary 11 (11th ed. 2003)). But in the context of the presentation of a contract, in slides replete with the terms "agree" and "agreement," it is implausible that an employee would think that

clicking on the box would only acknowledge the existence of the contractual terms without having to agree to them.

B. Plaintiff Agreed To The Arbitration Provision By Continuing Her Employment With Pfizer For Thirteen Months After Receiving The Agreement.

Plaintiff clearly and unmistakably agreed to submit to binding arbitration by continuing her employment with Pfizer for thirteen months after the company introduced the arbitration agreement. The same slide containing the click box explained that even if an employee did not click on the box, if the employee "continue[d] working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this agreement, this Agreement will be effective, and I will be deemed to have consented to, ratified and accepted this Agreement" through "continued employment with the Company." Skuse, 457 N.J. Super. at 548 (emphasis the court's).

By concluding that continued employment cannot as a matter of law manifest an employee's assent to an arbitration agreement, the Appellate Division misapplied this Court's precedents and ran afoul of the FAA's equal-footing principle.

1. New Jersey law permits assent by conduct.

"If parties agree on essential terms and manifest an intention to be bound by those terms, they have created an enforceable contract." Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992). Under New Jersey Law, "[t]he manifestation of mutual as-

sent is usually had by an offer and an acceptance either in words or by conduct." Johnson & Johnson v. Charmley Drug. Co., 11 N.J. 526, 538 (1953); see also Weichert, 128 N.J. at 435 ("An offeree may manifest assent to the terms of an offer through words, creating an express contract, or by conduct, creating a contract implied-in-fact."); Restatement (Second) of Contracts § 19(1) (1981). "Accordingly, where an offeree gives no indication that he or she objects to any of the offer's essential terms, and passively accepts the benefits of an offeror's performance, the offeree has impliedly manifested his or her unconditional assent to the terms of the offer." Weichert, 128 N.J. at 436-37.

In the employment context in particular, New Jersey courts have repeatedly recognized that an employer's policies can be unilateral contracts that an employee accepts by continuing his or her employment. See, e.g., Mita v. Chubb Computer Servs., Inc., 337 N.J. Super. 517, 527 (App. Div. 2011) (holding that where an employee manual "sets forth the conditions for employment[,] . . . the employee, by continuing to work, accepts the employer's offer and the requisite conditions of employment"); Witkowski v. Thomas J. Lipton, 136 N.J. 385, 391 (1994) (holding that an employee manual "constitute[s], in effect, a unilateral offer to contract that an employee may accept through continued employment"); see also McQuitty v. General Dynamics Corp., 204 N.J. Super. 514 (App. Div. 1985) ("Published employment policies

when circulated generally to employees amount to an offer which an employee accepts by performance.”).

2. Plaintiff’s continued employment constituted assent to the arbitration agreement.

In this case, Pfizer repeatedly informed plaintiff that her continued employment would bind her to the terms of the arbitration agreement. Plaintiff affirmatively acknowledged the terms of the arbitration agreement and then chose to remain employed by Pfizer for thirteen months. As the trial court correctly recognized, “[i]n light of the text on the slides and plaintiff’s action or inaction, plaintiff’s apparent intent was to be bound by this agreement.” Skuse, 457 N.J. Super. at 550.

The Appellate Division rejected this conclusion, instead insisting that the sixty-day provision was “an attempt to bypass the evidential requirements of Leodori, so that employees who do not communicate their voluntary agreement to the arbitration policy will be imagined to have provided such agreement if they keep reporting to work for longer than two months.” Id. at 563.

But the court’s reliance on Leodori was misplaced. In Leodori, the employer’s “own documents contemplated [the employee’s] signature as a concrete manifestation of his assent.” Leodori v. Cigna Corp., 175 N.J. 293, 306 (2003). Thus, continued employment could not substitute for that signature in the absence of any alternative means of assent “reflected in the text of the agreement.” Id. at 300 (quotation marks omitted). Here, by con-

trast, "the text of the agreement" expressly "reflect[s]" that continued employment constitutes assent. Plaintiff therefore manifested her assent to the arbitration agreement by remaining employed for thirteen months after Pfizer introduced the policy. In light of the agreement's terms, plaintiff's continued employment constitutes a clear and unmistakable agreement to be bound. See Jaworski v. Ernst & Young U.S. LLP, 441 N.J. Super. 464, 474 (App. Div. 2015) (citing Martindale v. Sandvik, Inc., 173 N.J. 76, 88-89 (2002)).

In Jaworski, the Appellate Division enforced an arbitration agreement that read, in relevant part, "[a]n employee indicates his or her agreement to the Program and is bound by its terms and conditions by beginning or continuing employment with [defendant] after [a particular date]." Id. The court held that because of this express language in the arbitration provision, the plaintiff's continued employment "manifest[ed] his intent to be bound pursuant to the unambiguous and specifically-emphasized terms of the [arbitration] [p]rogram." Id.

The court below attempted to distinguish Jaworski by emphasizing that the plaintiff in that case had previously signed an employment agreement that contained an earlier iteration of the arbitration policy. Skuse, 457 N.J. Super. at 562. But that distinction had no relevance to the enforceability of the arbitration agreement at issue in Jaworski, which was based on the gen-

eral principle of New Jersey law that assent may be manifested by performance—and in particular by "'continued employment'" after receiving notice of contractual terms governing the employment relationship. 441 N.J. Super. at 474 (quoting Martindale, 173 N.J. at 88-89); see also pages 13-15, supra.

Consistent with that widely recognized common-law rule, under the FAA, arbitration agreements need only be written, not signed, in order to be enforceable—as every federal court of appeals to consider the issue has held. See, e.g., Seawright v. Amer. Gen. Fin. Servs., 507 F.3d 967, 978 (6th Cir. 2007) ("[A]rbitration agreements under the FAA need to be written, but not necessarily signed."); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005) ("[W]hile the FAA requires that the arbitration agreement be in writing, it does not require that it be signed by the parties."); Tinder v. Pinkerton Sec., 305 F.3d 728, 736 (7th Cir. 2002) ("Although § 3 of the FAA requires arbitration agreements to be written, it does not require them to be signed."); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987).

Jaworski's recognition that an employee can assent to an arbitration agreement by continuing employment after being presented with an agreement is consistent with a number of federal district court opinions that have enforced arbitration provisions based on a plaintiff's decision to continue his or her employ-

ment. See, e.g., Fields v. Morgan Tire & Auto, Inc., No. 07-2715, 2008 U.S. Dist. LEXIS 21788 (D.N.J. Mar. 18, 2008); Bourgeois v. Nordstrom, Inc., No. 11-2442, 2012 WL 42917, *1-3 (D.N.J. Jan. 9, 2012).[2]

In Fields, the plaintiff was presented with a document describing his employer's new dispute resolution program, which stated that "[a]ll persons who apply for employment, accept employment, continue working for, or accept any promotions, pay increases, bonuses, or any other benefits of employment . . . agree to resolve all such disputes through the mediation and binding arbitration process described herein instead of through the court system." Fields, 2008 U.S. Dist. LEXIS at *2. He then "signed an acknowledgment attesting that he received and had the opportunity to review the EDR Plan." Id. at *3. The court held that a valid agreement to arbitrate existed because plaintiff had signed the acknowledgment form and because he continued his employment. Id.

[2] Several federal courts in New Jersey have also found that continued employment and failure to opt out of an arbitration agreement are sufficient to meet the Leodori standard. See, e.g., Descafano v. BJ's Wholesale Club, Inc., No. 15-7883, 2016 WL 1718677, at *3 (D.N.J. Apr. 28, 2016) (holding that the plaintiff "clearly accepted the arbitration agreement here by signing the acknowledgment, failing to return the opt-out form, remaining silent on the matter, and continuing to work [for his employer]"); Jayasundera v. Macy's Logistics & Operations, Dep't of Human Resources, No. 14-7455, 2015 WL 4623508, at *4 (D.N.J. Aug. 3, 2015) ("Defendant made a valid offer to submit Plaintiff's claims to arbitration," and the plaintiff "accepted the terms of the arbitration agreement by electronically signing the [acknowledgment form] and failing to return the 'opt-out Election Form' within thirty days").

at *8-9. In Bourgeois, the plaintiff worked as a salesperson at a Nordstrom store when the company adopted a new dispute resolution program. Bourgeois, 2012 WL 42917, at *1. The plaintiff was informed about the new policy in a meeting, received a "Program Booklet" outlining the policy, and signed an "Acknowledgment Form" that stated she had received a copy of the Program Booklet and that she understood the program would become effective on a certain date in the future. Id. The court held that this process "clearly and unambiguously set forth the intent to arbitrate." Id. at *3.

3. To the extent that Leodori categorically refuses to recognize continued employment as a valid means of assent to an arbitration agreement, it is inconsistent with the FAA.

As explained above, this case is readily distinguishable from Leodori. But to the extent that, as the Appellate Division believed, Leodori stands for the proposition that continued employment can never manifest assent to an arbitration agreement, that proposition is contrary to U.S. Supreme Court precedent.

The FAA "precludes States from singing out arbitration provisions for suspect status" and "require[s] instead that such provisions be placed 'upon the same footing as other contracts.'" Casarotto, 517 U.S. at 682 (citing Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)). This means that arbitration agreements cannot be defeated by a state rule that "hing[es] on the primary characteristic of an arbitration agreement—namely, a waiver of

the right to go to court and receive a jury trial." Kindred, 137 S. Ct. at 1424. Leodori, as interpreted by the decision below, presents just such a rule.

As detailed above (at 14-15), New Jersey courts routinely hold outside of the arbitration context that an employee accepts contractual terms governing her employment by continuing her employment after receiving the terms. To the extent that Leodori is broadly read to mean that an employee can never assent to an arbitration agreement by continued employment because an arbitration agreement involves "a waiver-of-rights"—specifically, the "right to a jury trial" (Leodori, 175 N.J. at 306-07)—that interpretation is squarely foreclosed by Kindred. As the U.S. Supreme Court explained, "a waiver of the right to go to court and receive a jury trial" is the "primary characteristic" of any arbitration agreement. Kindred, 137 S. Ct. at 1427. Accordingly, any state-law rule that makes agreements that waive jury trial or litigation rights harder to form than any other kinds of contracts—precisely the rule at issue in Kindred—does "exactly what Concepcion barred: adopt a legal rule hinging on the primary characteristic of an arbitration agreement" (id.), forcing businesses to obtain extra measures of assent that do not apply to other contractual terms. And such a rule is likewise "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's

edict against singling out those contracts for disfavored treatments." Id. (emphasis added).

Accordingly, the Court should reject the Appellate Division's overbroad interpretation of Leodori.

III. ARBITRATION OFFERS REAL AND SUBSTANTIAL BENEFITS TO EMPLOYEES AND BUSINESSES ALIKE.

The U.S. Supreme Court has repeatedly emphasized that there are "real benefits to the enforcement of arbitration provisions" in employment contracts. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122-23 (2001); see also, e.g., 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."). Indeed, the U.S. Supreme Court has been "clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." Circuit City, 532 U.S. at 123 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-32 (1991)). On the contrary, the Court emphasized that the lower costs of arbitration compared to litigation "may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Id.

First, arbitration is often more efficient than litigation, allowing employees to resolve their claims more quickly than they would in court. See, e.g., Nam D. Pham, Ph.D. & Mary Donovan, Fairer, Better, Faster: An Empirical Assessment of Employment Ar-

bitration, NDP Analytics 5, 11–12 (2019), available at https://www.instituteforlegalreform.com/uploads/sites/1/Empirical-Assessment-Employment-Arbitration.pdf ("[E]mployee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days . . . . In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days . . . ."); Michael Delikat & Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, 58 Disp. Resol. J. 56, 58 (Nov. 2003 – Jan. 2004) (reporting findings that arbitration was 33% faster than analogous litigation).

Second, arbitration is typically cheaper than litigation, particularly for the individuals bringing claims. Often, filing fees and attorneys' fees are shifted to the employer, meaning that in many cases, arbitration costs nothing for the individual bringing the claim. See Elizabeth Hill, Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003) (finding that in a sample of AAA arbitration for lower- and middle-income employees from 1999 to 2000, 32% of employees paid nothing for arbitration, and another 29% paid only their attorneys' fees while their employer covered the forum fees). Moreover, arbitration's decreased procedural complexity makes it easier for individuals to present their claims.

These efficiencies allow individuals to bring smaller claims that would otherwise be priced out of court, or to prevail on larger claims without incurring large contingency fees. See Theodore J. St. Antoine, Mandatory Arbitration: Why It's Better Than It Looks, 41 U. Mich. J.L. Reform 783, 791-92 (2008)(explaining that "[i]t will cost a lawyer far less time and effort to take a case to arbitration" and that in some cases "claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum"); see also Hill, supra, at 803-04 (noting that "72% of the employees in this sample who arbitrated pursuant to promulgated agreements [by employers] . . . did not earn enough income to gain access to the courts with an employment-related claim").

Third, outcomes in arbitration are equal to—if not better than—outcomes in litigation. Indeed, a study published earlier this year on behalf of the Chamber's Institute for Legal Reform found that employees were three times more likely to win in arbitration than in court. Pham, supra, at 5-7 (surveying more than 10,000 employment arbitration cases and 90,000 employment litigation cases resolved between 2014 to 2018). The same study found that employees who prevailed in arbitration "won approximately double the monetary award that employees received in cases won in court." Id. at 5-6, 9-10. As another scholar recently found, "there is no evidence that plaintiffs fare significantly better

in litigation [than in arbitration].” Theodore J. St. Antoine, Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017) (quotation marks omitted; alterations in original). Rather, arbitration is generally “favorable to employees as compared with court litigation.” Id.; see also Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 46 (1998). For example, one study of employment arbitration found that employees in the securities industry who arbitrated their disputes were 12% more likely to prevail than those who litigated in federal court, and that the arbitral awards the employees obtained were typically the same as, or larger than, the court awards. See Delikat & Kleiner, supra, at 58. A 2004 report collecting data from a number of employment arbitration studies found that employees were 19% more likely to win in arbitration than in court. See Nat’l Workrights Inst., Employment Arbitration: What Does the Data Show? (2004), available at goo.gl/nAqVXe.

In short, employment arbitration programs confer real and substantial benefits. But if decisions like the one below are allowed to stand, these benefits will be lost—to the detriment of employees, businesses, and the economy as a whole.

CONCLUSION

The Appellate Division's ruling should be reversed.

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Respectfully Submitted,

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