SUPERIOR COURT OF PENNSYLVANIA

1023 EDA 2021

SHANNON CHILUTTI AND KEITH CHILUTTI, H/W
Appellants

v.

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

AMICUS BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND PENNSYLVANIA CHAMBER FOR BUSINESS AND INDUSTRY IN SUPPORT OF APPELLEES' APPLICATION FOR REARGUMENT OR REARGUMENT *EN BANC*

Appeal from 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

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 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 panel's 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 reconsideration or reargument *en banc* for four reasons.

First, the panel's new, heightened standard under Pennsylvania law for the enforceability of arbitration clauses in online agreements 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).[1] 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).[2]

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

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

Pennsylvania businesses will 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.[3] 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.[4]

Because the businesses involved in these online transactions frequently rely on terms and conditions that contain arbitration clauses, the stakes of this appeal are significant. In announcing a new, heightened standard for the enforceability of arbitration clauses in this context, the panel's decision calls into question the enforceability of countless arbitration agreements created online in reliance on existing precedent. If the Court is to effect such a sea change in Pennsylvania law, it should do so after consideration *en banc*, not through a divided panel decision.

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

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

Second, the Court should grant reconsideration or reargument *en banc* in light of the disruptive uncertainty that the panel's decision will introduce into the marketplace. According to the panel'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. 29.) On top of that vague standard, the panel's 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.

(Maj. Op. 30.) This holding would force businesses nationwide to tailor their websites to accommodate the specific drafting preferences of two judges. If this Court is to impose such disruptive requirements, it should do so only after review *en banc*.

Third, the Court should grant reconsideration or reargument *en banc* because the panel entirely failed to consider the impact of the Federal Arbitration Act ("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) (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 Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (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).

The panel's decision plainly violates these principles. Although the panel 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. 30.) In other words, the panel majority 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 Ctrs.*, 137 S. Ct. at 1425.

It makes no difference that the panel majority relied on the right to a jury trial made "inviolate" by the 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." 137 S. Ct. at 1426 (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 1427; *see also Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 509 (Pa. 2016) (noting that the Supreme Court "was unsympathetic to the state court's concern for the right to a jury trial").

The panel's analysis did not address the FAA in any way. By expressly announcing "a stricter burden of proof" for online agreements

to arbitrate than other online agreements, the panel majority made the same mistake as the Kentucky Supreme Court in *Kindred Nursing Centers*. The Court should grant reconsideration or reargument *en banc* to consider whether the panel's decision can coexist with federal law.

Finally, the Court should grant reargument *en banc* to address the panel's holding that an order compelling arbitration and staying proceedings is immediately appealable. 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 panel's decision effectively overrules those legislative choices by permitting interlocutory appeals 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). This Court should grant reargument *en banc* to address that constitutional problem and to consider, as a full Court, whether to adopt a rule that will dramatically increase the number of interlocutory appeals from motions to compel arbitration.

CONCLUSION

The Court should grant the application for reargument.

Respectfully submitted,

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October 26, 2022

CERTIFICATES OF COMPLIANCE

1. I certify that this document complies with the word limit of Pa.R.A.P. 531(b)(3) and Pa.R.A.P. 2544(c) because, excluding the parts of the document exempted by Pa.R.A.P. 2544(c), this document contains 1,499 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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