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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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF APPELLEES

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

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[1] No one other than the amici, their members, and their counsel paid for or authored this brief, in whole or in part.

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

I. Finding Appellate Jurisdiction in this Case Would Overrule the General Assembly by Creating a Right to Appeal *Every* Decision on a Motion to Compel Arbitration.

Pennsylvania law is clear 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"). In fact, 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).

Plaintiffs seek to evade that policy decision by invoking the collateral order doctrine. But interpreting the collateral order doctrine to encompass appeals from orders granting motions to compel arbitration would overrule the General Assembly's express legislative choice. 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).

If this Court were to hold that the collateral order doctrine applies in this case, it would open the floodgates to numerous, fact-dependent interlocutory appeals. Allowing interlocutory appeals of orders granting motions to compel arbitration would not only contravene the preference for appeals from final orders, it would also defeat the very purpose of arbitration—bringing disputes to a speedy, cost-efficient resolution.

More importantly, as Judge Stabile recognized in his dissent from the now-vacated panel decision, the elements of the collateral order doctrine simply are not satisfied here. Rule 313 of the Pennsylvania Rules of Appellate Procedure allows appeals as of right from collateral orders. 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).

In appeals from orders granting a motion to compel arbitration such as this one, the second and third prongs of the collateral order

doctrine are unsatisfied. Plaintiffs' argument to the contrary flips the policies behind arbitration on their head.

A. The policy questions underlying the "importance" prong of the collateral order doctrine weigh strongly against appellate jurisdiction.

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

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

Both Congress and the General Assembly have adopted a "liberal policy favoring arbitration." *Provenzano v. Ohio Valley Gen. Hosp.*, 121

A.3d 1085, 1096 (Pa. Super. 2015). In enacting the Federal Arbitration Act (the "FAA"), Congress aimed to "facilitate a just and speedy resolution of controversies that is not subject to delay and/or obstruction in the courts." *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 120 (Pa. 2007). The same preference for speedy resolution of disputes has been imported into Pennsylvania law. *See Provenzano*, 121 A.3d at 1096 n.2.

Similarly, the U.S. Supreme Court has repeatedly recognized the "real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001). Those benefits include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019). And the General Assembly has already prioritized the efficiency of arbitration over litigating questions of mutual assent by allowing interlocutory appeals only from orders denying motions to compel arbitration. 42 Pa.C.S. § 7321.29(a).

Data supports the General Assembly's prioritization of efficiency and the conclusion that arbitration provides "just and speedy resolution[s] of controversies." *Salley*, 925 A.2d at 120. A study comparing 67,119 consumer and employment arbitrations with 261,369 consumer and employment federal lawsuits terminated between 2014 and 2021 revealed that arbitration is, on average, a speedier method of resolving disputes. *See* Nam D. Pham, Ph.D. & Mary Donovan, "Fairer,

Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration," ndp analytics, at 4 (March 2022).[2] For cases resolved in favor of the claimants, the average consumer arbitration took 321 days to reach resolution. *Id.* at 15. The median time, at 265 days, was significantly shorter. *Id.* Even the longest 10% of cases reached resolution in 558 days. Litigation in court took substantially longer, with an average of 439 days, a median of 315 days, and the top 10% taking an average of 919 days.

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

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

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

By engrafting appeals from orders compelling arbitration into the collateral order doctrine, this Court would upset parties' expectations

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

when agreeing to arbitration clauses. *Every* case involving the enforceability of an arbitration clause could immediately be appealed to this Court, immensely slowing down the arbitration of disputes while simultaneously bogging this Court down in appeals that raise factual questions about whether parties assented to an arbitration provision.

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

This case is unlike the decisions Plaintiffs cite that involved actual issues of public importance. For example, in *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 346 (Pa. Cmwlth. 2015), the Commonwealth Court found that the elements of the collateral order doctrine were satisfied because the appeal involved "whether and to

what extent the Commonwealth surrendered its sovereign rights to take part in litigation" over a dispute. Because the Commonwealth's "inherent sovereign power" was involved, the appeal was important not only to the parties but "to the public at large because the sovereign power in our government belongs to the people." *Id.*

The Commonwealth Court's opinion in *Gilyard v. Redevelopment Authority of Philadelphia*, 780 A.2d 793 (Pa. Cmwlth. 2001), also invoked by Plaintiffs, is similarly unsupportive of Plaintiffs' position. In that case, the "importance" prong was met because there was a statutory provision barring arbitration in eminent domain proceedings. Because the trial court's decision compelling arbitration would have mooted that statute, the Commonwealth Court concluded that the issue was too important to be denied interlocutory review. *See Philip Morris*, 128 A.3d at 345 (describing reasoning in *Gilyard*).

Even this Court's decision in *United Services Automobile Association v. Shears*, 692 A.2d 161 (Pa. Super. 1997) (*en banc*), is inapposite.[3] There, the trial court recognized a new tort and then compelled arbitration on the question whether USAA committed that newly created tort. *Id.* at 163. The appeal presented an important question because "the only way [the claimant] could arbitrate his claim

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

was if the court created a cause of action for him." *Id.* at 163, 165. Given those unique circumstances, it is not surprising that *Shears* has not been applied or extended to allow for interlocutory appeals of typical questions in connection with compelling arbitration. *See, e.g.*, *Rosy v. Nat'l Grange Mut. Ins. Co.*, 771 A.2d 60, 62 (Pa. Super. 2001) (declining to apply *Shears* to allow for interlocutory appeal); *Campbell v. Fitzgerald Motors Inc.*, 707 A.2d 1167, 1168 (Pa. Super. 1998) (same).

Plaintiffs fail to point to any case allowing immediate, interlocutory appeals from routine disputes about assent to an arbitration provision that did not *also* involve extenuating circumstances such a sovereign's power, the mooting of a statute, or the creation of a new tort. And without this crucial element, Plaintiffs cannot satisfy the second prong of the collateral order doctrine.

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

In claiming to satisfy the collateral order doctrine's third prong, Plaintiffs argue that they cannot vindicate their right to a jury trial on appeal from final judgment and that the order compelling arbitration puts them "out of court." But as the Supreme Court recognized, "an order compelling arbitration forces the parties into, rather than out of, court." *Maleski*, 633 A.2d at 1145. Plaintiffs are simply incorrect that the trial court's order puts them "out of court."

Further, it is inaccurate to claim that Plaintiffs cannot question the validity of the arbitration provision or their assent to that provision on appeal from a final order. As Judge Stabile recognized in his dissent from the panel's now-vacated decision, a party cannot be forced to arbitrate absent an agreement to do so. (*See* Op., Stabile, J., dissenting, at 6 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).) If, on appeal from a final judgment enforcing an arbitration award, this Court were to find that there was no agreement to arbitrate and Plaintiffs did so only because they were compelled by the trial court's order, this Court could vacate the arbitration award. *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 6 (quoting *Sage v. Greenspan*, 765 A.2d 1139, 1141 (Pa. Super. 2000)).) Therefore, Plaintiffs could still vindicate their right to a jury trial if it were later to be determined that they did not agree to arbitration or that Uber's arbitration provision was invalid under Pennsylvania law.

If that were to occur, Plaintiffs, at most, would "have been required to participate in an unnecessary arbitration." *Brennan v. Gen. Acc. Fire & Life Assur. Corp.*, 453 A.2d 356, 358 (Pa. Super. 1984). That result, however, is no different from the situation "where a party is required to go to trial after a court erroneously refuses to sustain a demurrer to a complaint." *Id.* Such claimed errors—including Plaintiffs'—can be raised on appeal from a final judgment.

Allowing interlocutory appeals from orders compelling arbitration would also put Pennsylvania at odds with the federal court system. Under 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. *Al Rushaid v. Nat'l Oilwell Varco, Inc.*, 814 F.3d 300, 304 (5th Cir. 2016). 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 not depart so drastically from the federal system and its own precedent by adopting Plaintiffs' proposed rule. To do so would undercut the very bargain that parties strike when incorporating an arbitration clause into their contracts.

II. This Court Should Refuse Plaintiffs' Invitation to Subject Arbitration Provisions to Heightened Scrutiny.

Plaintiffs also argue that this Court should adopt the panel's prior decision, which adopted a heightened standard under Pennsylvania law for the enforceability of arbitration clauses in online agreements. This Court should decline Plaintiffs' invitation because it would upend the reasonable expectations of thousands of businesses and individuals in the Commonwealth and would contravene settled federal and state law.

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

Plaintiffs' suggestion that this Court adopt a heightened standard for finding assent to arbitration provisions in online consumer contracts would set a dangerous precedent. Indeed, were the Court to adopt such a rule, it would cast doubt on the numerous online arbitration agreements already in existence and that are already relied upon by businesses and consumers alike. 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).[4] 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).[5]

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.[6] 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

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

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

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

fiscal year. Don Davis, *How Pennsylvania Reaped an Online Sales Tax Windfall*, Digital Commerce 360, Aug. 5, 2021.[7]

Because the businesses involved in these online transactions frequently rely on terms and conditions that contain arbitration clauses, the stakes of this appeal for the business community are significant. If this Court were to reach any decision calling into question the standard types of click-wrap or browse-wrap used in online consumer contracts across the country, the Court would cast doubt on the enforceability of countless arbitration agreements created online in reliance on existing precedent.

Moreover, litigation will likely continue over the question whether the Court's new rule can be enforced under the FAA. The issue may progress to the Pennsylvania Supreme Court and the U.S. Supreme Court after that. Indeed, the U.S. Supreme Court has not been shy about issuing *per curiam* decisions reversing state court decisions that adopt rules hostile to arbitration. *See, e.g.*, *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17 (2012). While this litigation continues, uncertainty over the enforceability of arbitration clauses will pervade the business community operating in Pennsylvania. Numerous, piece-meal

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

challenges may be brought regarding the font sizes, locations, and format of arbitration provisions in all sorts of online consumer contracts, clogging up the courts. Such litigation threatens to undo the central reason that many businesses seek arbitration in the first place—to reach a just and speedy resolution of claims.

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

By adopting a new rule that, at a minimum, calls into question the enforceability of thousands of arbitration agreements already in existence in online consumer contracts, this Court would upset a system that businesses and consumers alike have relied on and which continues to benefit all involved. Casting doubt on the validity of

arbitration agreements would also force more cases into court, further burdening the judicial system. To avoid this undesirable result, this Court should decline to adopt any heightened standard for determining the enforceability of arbitration provisions in online consumer contracts.

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

In addition to being bad policy, any heightened standards imposed by this Court for proving assent to arbitration would be preempted by the FAA—a law that that clearly applies to Uber's contracts with its users and to the vast majority of (if not all) online consumer contracts.

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*, 581 U.S. 246, 251 (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 similarly applies to judicial rules that "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding" not to enforce the agreement. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (citation omitted).

Seeking to avoid the preemptive effect of the FAA, the Pennsylvania Association for Justice filed an amicus brief in support of Plaintiffs arguing that the FAA does not apply to Uber's contracts. As an initial matter, Plaintiffs do not make such an argument, and amici cannot raise new arguments that were not raised by the parties themselves. *Stilp v. Commonwealth*, 905 A.2d 918, 928 n.14 (Pa. 2006); Pa.R.A.P. 513(a).

Regardless, the Pennsylvania Association for Justice is also incorrect. The FAA applies to every "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction." 9 U.S.C. § 2. The phrase "involving commerce" has been interpreted to invoke the "broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

Uber's contract with Plaintiffs clearly "involve[s] commerce" under this broad standard. *See id.* at 57 (holding that even debt-restructuring agreements entered into in Alabama by Alabama residents satisfied the "involving commerce" requirement of the FAA). Uber is a California company, Plaintiffs are Pennsylvania residents, and the contract between them was entered into over the internet. Based on that contract, Uber provided services to Plaintiffs in exchange for payment (again, made over the internet). This transaction clearly "involve[s] commerce." 9 U.S.C. § 2.

The only exception to the FAA is for "'contracts of employment' of three categories of workers: 'seamen,' 'railroad employees,' and a residual category comprising 'any other class of workers engaged in foreign or interstate commerce.'" *In re Grice*, 974 F.3d 950, 953-54 (9th Cir. 2020) (quoting 9 U.S.C. § 1). The last group—"any other class of workers engaged in foreign or interstate commerce"—is narrowly construed, and the phrase "engaged in commerce" as used in § 1's exception is "narrower than the more open-ended formulations 'affecting commerce' and 'involving commerce'" used for other sections of the FAA, such as § 2. *Circuit City Stores*, 532 U.S. at 118.

Uber's contract with the Plaintiffs does not fit within that narrow exception to the FAA under § 1. First, Plaintiffs were not employees of Uber. They were consumers of Uber's services. Second, even Uber's

drivers do not fall within the exception to the FAA. In fact, the case on which the Pennsylvania Association for Justice relies, *Capriole v. Uber Technologies*, 7 F.4th 854, 863 (9th Cir. 2021), expressly found that Uber's drivers were *subject* to the FAA, not exempt from its application under § 1. The FAA therefore applies. And because the FAA applies, this Court cannot require more to prove assent to an arbitration agreement than it would for any other contract provision. *See Kindred Nursing Ctrs.*, 581 U.S. at 248, 251-52.

It makes no difference that Plaintiffs invoke their 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." 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 Pennsylvania Supreme Court has similarly acknowledged that the U.S. Supreme Court is "unsympathetic to [a] state court's concern for the right to a jury trial" when addressing arbitration

provisions. *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 509 (Pa. 2016). The Court explained that it was obligated to "consider questions of arbitrability with a 'healthy regard for the federal policy favoring arbitration,'" and that it was bound to compel arbitration of claims subject to an arbitration agreement. *Id.* (quoting *Moses H. Cone*, 460 U.S. at 20).

By arguing that the Court should adopt a stricter burden of proof for online agreements to arbitrate than other online agreements, Plaintiffs are inviting this Court to make the same mistake as the Kentucky Supreme Court in *Kindred Nursing Centers*. Indeed, Plaintiffs advocate for a rule specific to arbitration provisions, even though the 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).

Such an outcome would contravene the U.S. Supreme Court's clear precedent instructing "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." *Taylor*, 147 A.3d at 504. The *en banc* Court should reject any invitation to adopt a new, arbitration-specific rule.

CONCLUSION

For the foregoing reasons, the Court should quash the appeal or, in the alternative, affirm the trial court's order compelling arbitration.

Respectfully submitted,

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February 7, 2023

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 4,321 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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