In the Supreme Court of Pennsylvania
Eastern District

58 EAP 2024

SHANNON CHILUTTI and KEITH CHILUTTI, husband and wife,
Appellees,

v.

UBER TECHNOLOGIES, INC., GEGEN LLC, RAISER-PA, LLC, RAISER, LLC, SARA'S CAR CARE, INC., MOHAMMED BASHEIR,
Appellants.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, PUBLIC JUSTICE, COMMUNITY LEGAL SERVICES, LEGAL AID OF SOUTHEASTERN PENNSYLVANIA, NEIGHBORHOOD LEGAL SERVICES, SUMMIT LEGAL AID, PENNSYLVANIA LEGAL AID NETWORK, AND PHILADELPHIA LEGAL ASSISTANCE IN SUPPORT OF APPELLEES

Appeal from the Order of the Superior Court en banc *entered on July 19, 2023 at No. 1023 EDA 2021 reversing and remanding the Order of the Philadelphia County Court of Common Pleas at No. 200900764, entered on April 26, 2021*.

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PRELIMINARY STATEMENT

Longstanding common law principles have always required that before a person can contractually agree to waive their constitutional rights, the waiver must be knowing, intelligent, and voluntary. This appeal calls on the Court to reaffirm this generally applicable rule in the context of an agreement to arbitrate.

Uber would have this Court create an arbitration-specific exception to this generally applicable rule, affording special treatment to arbitration agreements that would allow a waiver of any constitutional right with the inadvertent click of a button. The Superior Court's *en banc* ruling properly puts arbitration contracts on equal footing as other contracts by subjecting them to the same rules governing waiver. Anything less than that would afford arbitration agreements "super contract" status, allowing companies like Uber to force a forfeiture of a consumer's constitutional rights without meeting their historically-recognized burden of demonstrating a knowing and intelligent waiver.

Moreover, the Superior Court correctly held that the collateral order doctrine applies. Absent the doctrine, consumers in Pennsylvania risk forever losing their constitutional right to a jury trial.

The judgment of the Superior Court should be affirmed.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are non-profit consumer advocacy and legal services organizations dedicated to consumer protection and committed to advancing and protecting the interests of consumers. *Amici* have a special interest and expertise in ensuring the proper interpretation of state and federal law related to arbitration in consumer matters. They are identified and described in detail in Appendix A, attached hereto.

LEGAL ARGUMENT

I. The Superior Court properly applied Pennsylvania's longstanding and generally applicable principles of contract law, which require a knowing, intelligent, and voluntary waiver of a constitutional right.

Whether two parties have agreed to arbitrate "is a matter of contract[.]" *Coinbase, Inc. v. Suski*, 602 U.S. 143, 147 (2024). Stated otherwise, "[a]rbitration cannot be compelled in the absence of an express agreement to arbitrate." *Bair v. Manor Care of Elizabethtown, PA, LLC*, 108 A.3d 94, 96 (Pa. Super. Ct. 2015). Thus, the "threshold" question any court reviewing a purported agreement to arbitrate must decide is "whether there is a valid agreement to arbitrate." *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 654, 660–61 (Pa. Super. Ct. 2013).

In deciding this threshold question, a court applies "ordinary state-law principles that govern the formation of contracts[.]" *Id.* at 654; *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (same). And while some decisions have referenced a policy favoring arbitration, more recently the U.S. Supreme Court unanimously clarified that "a court may not devise novel rules to favor arbitration over litigation," because "[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 412 (2022). "The policy is to make arbitration agreements as enforceable as other contracts, but not more so." *Id.* (cleaned up).

"The touchstone of *any* valid contract is mutual assent and consideration." *Bair*, 108 A.3d at 96 (emphasis added). For there to be mutual assent, the proposed terms must be "fully communicated," including the terms of any arbitration provision. *Quiles v. Fin'l Exchange Co.*, 879 A.2d 281, 288 (Pa. Super. Ct. 2005). And, under general principles of Pennsylvania contract law, when a contractual term purports to waive a constitutional right, that waiver must be "knowing, intelligent and voluntary." *Chester Hous. Auth. v. Polaha*, 173 A.3d 1240, 1250 (Pa. Commw. Ct. 2017) (citing *Com. v. Goodwin*, 333 A.2d 892, 894 (Pa. 1975)).

"A waiver is knowing and intelligent if the right holder is aware of both the nature of the right and the risk of forfeiting it." *Id.* at 1250–51. For a "waiver to be voluntary, it must be 'an intentional relinquishment or abandonment of a known right.'" *Id.* at 1250; *see also Neely v. J. A. Young & Co.*, 181 A.2d 915, 917 (Pa. Super. Ct. 1962) ("To make proof of waiver of a legal right there must be clear, unequivocal and decisive action of the party with knowledge of such right showing a purpose to surrender such right on his part."). This Court has long presumed that a constitutional right is *not* waived. *See Appeal of Pusey*, 83 Pa. 67, 70 (1877) ("a jury trial, as a constitutional right secured to a party, is never presumed to be waived, unless in a clear case"); *Com. v. Monica*, 597 A.2d 600, 603 (Pa. 1991) ("the presumption must always be against the waiver of a constitutional right").

The requirement for a knowing waiver of constitutional rights, including by agreement, has long been part of the fabric of our common law. *See, e.g.*, *Com. v. Barnette*, 285 A.2d 141, 142 (Pa. 1971) ("The waiver of a constitutional right must be made knowingly and intelligently."). In *Com. v. Williams*, 312 A.2d 597 (Pa. 1973), this Court held that the "signed waiver" was ineffective to constitute a knowing and intelligent waiver of the right to a jury trial, as the trial court did not conduct a proper colloquy to ensure that appellant "knew the essential ingredients of a jury trial which are necessary to understand the significance of the right he was waiving." *Id.* at 599–600. In *Com. v. Mamon*, 297 A.2d 471 (Pa. 1972), this Court held that "[m]erely signing a consent form prepared prior to the interrogation will not usually suffice to prove a valid waiver" of constitutional rights against unreasonable searches and seizures. *Id.* at 475.

The Superior Court examined waiver of right to trial by jury in the civil context, focusing on confessions of judgment between commercial parties. Even there, where contracting business parties generally enjoy egality in bargaining power, there must be "no doubt" the signing party was conscious of the fact of the waiver. Appx. A at 18. Language must be explicit, strictly construed, conspicuous in all caps, and proximate to the executing party's signature. Appx. A at 18. *See, e.g.*, *Graystone Bank v. Grove Estates, LP.*, 58 A.3d 1277 (Pa. Super. Ct. 2012) (collecting and evaluating cases). If such "strict" standards apply to commercial

contracts between sophisticated businesses, they, at the very least, should apply to the "take-it-or-leave-it" contracts of adhesion consumers and employees face in the marketplace.

Applying these case-neutral, settled rules of waiver and assent in the context of arbitration, there is mutual assent only if a consumer or other signatory knowingly and voluntarily waives their constitutional right to sue in court,[1] have a jury resolve their claims,[2] and petition the government for redress of grievances.[3] And to satisfy those requirements, the proposed terms must at the very least have been "fully communicated." *Quiles*, 879 A.2d at 288. This must be done in a "clear and unmistakable manner." *Id.* at 287; *Emmaus Mun. Auth. v. Eltz*, 204 A.2d 926, 927 (Pa. 1964). Otherwise, a party is "unable to knowingly and voluntarily waive all other means of dispute resolution." *Quiles*, 879 A.2d at 286 (*citing Leodori v. CIGNA*, 814 A.2d 1098, 1105 (N.J. 2003)).

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[1] Pa. Const. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.").

[2] Pa. Const. art. I, § 6 ("Trial by jury shall be as heretofore, and the right thereof remain inviolate.").

[3] Pa. Const. art. I, § 20 ("The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.").

These well-established principles of waiver clearly form the foundation of the Superior Court's decision below. *See* Appx. A at 20 ("a waiver must be clearly described and understood to be giving up a constitutional right to a jury trial"). Indeed, the Superior Court acknowledged that the rule requiring an explicit waiver of the constitutional right to a jury trial applies not just to arbitration clauses, but also to confessions of judgment and criminal proceedings. *Id.* In other words, the Superior Court merely applied these longstanding waiver rules to an agreement to arbitrate, finding that Uber failed to demonstrate that the consumer plaintiffs were "fully informed" of their constitutional right to a jury trial such that they could waive that time-honored right under established principles of waiver. Appx. A at 33-34.

This rule that an effective waiver of constitutional rights must be "knowing" and "intelligent" is not unique to our Commonwealth. The Supreme Court of New Jersey has recognized in the arbitration context that "[a]n effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A.3d 306, 313 (N.J. 2014), *cert. denied*, 576 U.S. 1004 (2015). In *Atalese*, a contract for debt-adjustment contained a paragraph that would refer all disputes to arbitration. *Atalese*, 99 A.3d at 310. The arbitration provision did not provide "any explanation that plaintiff is waiving her right to seek relief in court for a breach of her statutory rights," and no explanation of "what arbitration is." *Id.* at 315. When the consumer sued for breach of contract

and violation of several consumer protection statutes, the trial court granted the motion to compel arbitration and the intermediate appellate court affirmed. *Id.* at 310. The New Jersey Supreme Court reversed. In a unanimous decision, the court recognized that "any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms." *Id.* at 313 (cleaned up).

Rejecting the same misplaced argument that Uber advances here, the New Jersey Supreme Court found that "Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law[.]" *Id.* Rather the waiver must be clear and unmistakable before a party will be found to have given up his "time-honored right to sue." *Id.* at 314. Without "clear and unambiguous language that the plaintiff is waiving her right to sue or go to court to secure relief," there can be no mutual assent to waive the right to proceed in court. *Id.* at 315.[4]

Peppered throughout the brief of amicus Chamber of Commerce is the *parade-of-horribles* it claims will occur if a proper, fully-informed waiver of the constitutional right to trial by jury is required. *See* Chamber Amicus Br. at pp. 16–20. Of course, assertions that cases will "clog up the courts" or that consumers will lose the considerable "benefits" of arbitration are mere speculation. Neither provides

[4] Notably, the United States Supreme Court denied *certiorari*. *U.S. Legal Services Group, L.P. v. Atalese*, 576 U.S. 1004 (2015).

a basis to upset the constitutional command that the right to trial by jury "remain inviolate." Pa. Const. art. 1, § 6. Moreover, in the eighteen months since the Superior Court's ruling, the Chamber has been able to point to only two challenges. Br. at 16-17. As to the professed benefits of forced arbitration, any consumer, employee, or injured passenger should still be able to secure all the "benefits" that arbitration has to offer by knowingly and voluntarily waiving their right to jury trial after being clearly and conspicuously informed.

Neither Uber nor its *amici* have offered this Court any principled basis to distinguish online click-agreement waivers of constitutional rights from such waivers in other civil settings. Surely Uber could not contend that a confession of judgment would be adequate if buried and inconspicuous simply because assent is by click rather than by ink signature. Confessions of judgment are a staple of commercial transactions in Pennsylvania. There have been no reports of a mass-exodus of business from Pennsylvania's robust commercial marketplace since this Court established the rules for demonstrating assent to a jury trial waiver. None of the data presented establishes that there will be some mass exodus from the consumer marketplace if the similar disclosure rule established by Superior Court *en*

banc applies to arbitration.[5] To be sure, Pennsylvania's consumers are in no less need of protection than its commercial businesses.

II. This Court should affirm the Superior Court's recognition that Pennsylvania's longstanding rule that any contractual waiver of a constitutional right be knowing and intelligent applies in the context of an arbitration agreement – just as it applies in the context of any other contract.

Uber contends that the Superior Court's application of the Commonwealth's well-established rule on contractual waivers of constitutional rights violates the Federal Arbitration Act ("FAA") because, it says, the Superior Court's ruling discriminates on its face against arbitration by requiring a "stricter burden of proof." But, as explained above, the Superior Court merely applied the longstanding and generally applicable requirement that any contractual waiver of a constitutional right be knowing and intelligent to the specific context of arbitration, and "[h]igh standards of proof are *always* required where a waiver of constitutional rights is involved." *Com. v. Collins*, 259 A.2d 160, 163 (Pa. 1969) (emphasis added).

Stated otherwise, the "stricter" or "high standard of proof" Uber complains about is simply that a waiver of constitutional rights be done "knowingly" and

[5] The Chamber's dire prediction of business flight if basic legal rights are preserved is thin. Apparently, businesses did not flee New Jersey in the ten years since its Supreme Court in *Atalese* required prominent disclosure for a waiver to be effective. Gross Domestic Product in the Retail sector has nearly doubled. *See* Federal Reserve Bank of St. Louis, FRED Gross Domestic Product: Retail Trade in New Jersey https://fred.stlouisfed.org/series/NJRETAILNQGSP.

"intelligently." But this is a feature of all agreements that purport to waive constitutional rights. These rules apply with like force in both criminal and civil proceedings. Appx. at 2, n.2. *Com. v. Wideman*, 334 A.2d 594, 597 (Pa. 1975); *Bruckshaw v. Frankford Hosp. of City of Phila.*, 58 A.3d 102, 109 (Pa. 2012) ("the constitutional right to a jury trial, as set forth in Pa. Const. art. 1, § 6, does not differentiate between civil cases and criminal cases.").

This Court's rulings on waiver of constitutional rights demonstrate that the prerequisites for an effective waiver depend on whether, under the totality of the circumstances, there is a full appreciation of the right being waived, and the consequences. For example, in the context of reviewing a purported waiver of the constitutional right to counsel, this Court has explained that "[t]o ensure that a waiver is knowing, voluntary, and intelligent, the trial court must conduct a 'probing colloquy,' which is a searching and formal inquiry as to whether the defendant is aware both of the right to counsel *and of the significance and consequences of waiving that right*." *Com. v. Spotz*, 18 A.3d 244, 263 (Pa. 2011) (emphasis added). Similarly, the waiver of the constitutional right to be present at trial requires a detailed inquiry to ensure the waiving party understands "the *consequences* of waiving his right to be present during his trial, particularly those rights which the

Appellant would forfeit should he choose to absent himself from the trial proceedings." *Com. v. Vega*, 719 A.2d 227, 231 (Pa. 1998) (emphasis added).[6]

Accordingly, when the Superior Court ruled that binding arbitration must be defined, and that 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," the Superior Court was merely attempting to put Uber's waiver on equal footing with other waivers of constitutional rights. That is, the Superior Court clearly appreciated that a typical consumer would not understand that the "significance and consequences," *Spotz*, 18 A.3d at 263, of agreeing to arbitrate means waiving their constitutional right to a jury trial without an explanation of what "binding arbitration" is. Indeed, a 2023 survey of consumers revealed that "**less than 1%** of respondents correctly understood the full significance of the arbitration agreement," as they held the incorrect belief that in arbitration, they have the right to a jury, the right to access the public courts, and the right to appeal a decision based on a legal

[6] The U.S. Court of Appeals for the Third Circuit has acknowledged a very similar prerequisite under New Jersey law in *James v. Glob. TelLink Corp*, 852 F.3d 262 (3d Cir. 2017). There, the Third Circuit explained that "[b]ecause arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." *Id.* at 265 (quoting *Atalese*, 99 A.3d at 313).

error.[7] The Superior Court's rule as to how a drafting party might ensure a knowing and intelligent waiver correctly accounted for this practical reality.

Uber, however, would have this Court hold that the waiver of the constitutional right to a jury trial can be accomplished by an arbitration agreement without any explanation of what arbitration is, and without specifying that arbitration entails the waiver of the constitutional right to a jury trial. In Uber's view, it would be enough that the contract states, "You agree to arbitrate all claims." But, without an explanation of the consequences of agreeing to arbitration, how else would the typical consumer be properly apprised that they are waiving their constitutional rights? The generally applicable requirement of a knowing and intelligent waiver of constitutional rights demands more for a waiver to be effective. So, in claiming that more is *not* required, Uber seeks what would amount to an arbitration-specific exception to Commonwealth law, effectively a rule that treats arbitration agreements as "super contracts" that force a waiver of constitutional rights without the historically strict burden of demonstrating knowing and intelligent waiver.[8] Such an

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[7] Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*. PLoS ONE 19(2): e0296179 (2024), *available at* https://doi.org/10.1371/journal.pone.0296179 (emphasis added).

[8] Richard Frankel, *The Arbitration Clause as Super Contract*, 91 WASH. U. L. REV. 531 (2014) (observing that courts have improperly created special rules favoring enforcement of arbitration contracts above other contracts).

exception would clash with the FAA's policy "to make arbitration agreements as enforceable as other contracts, but not more so." *Morgan*, 596 U.S. at 418.

The cases relied upon by Uber merely underscore it was the Superior Court that applied generally applicable law, and that *Uber* is the party that singles arbitration out for unique treatment. For example, in *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246 (2017), the Kentucky Supreme Court had created a "clear-statement rule" requiring an explicit statement before an attorney-in-fact could forgo court for arbitration on behalf of another, but critically, the rule did not apply generally to all contracts. *Id.* at 252–53. The U.S. Supreme Court observed that this new rule requiring that a power of attorney have specific authorization was not generally applicable because Kentucky courts had never applied such a rule in the context of other constitutional rights. *Id.* at 253.

Crucially, the Court disclaimed the notion that state courts are "precluded from announcing a new, generally applicable rule of law in an arbitration case." *Id.* at 254 n.2. The Kentucky Supreme Court's new rule, however, singled out arbitration because it did not apply to all constitutional rights; it was a novel rule myopically focused only on the right to a jury trial. *Id.* at 252. Indeed, the Kentucky Supreme Court based its ruling on the view that "[t]he framers . . . recognized that right [to a jury trial] and that right alone as a divine God-given right when they made it the *only* thing that must be held sacred and inviolate." *Id.* (cleaned up). By contrast,

here, the Superior Court applied the generally applicable waiver doctrine that has long conditioned the relinquishment of any and all constitutional rights on a knowing and intelligent waiver. *See, e.g.*, *Barnette*, 285 A.2d at 142 ("The waiver of a constitutional right must be made knowingly and intelligently.").

Uber makes the same mistake when relying on *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996). There, the Montana legislature passed a law requiring that arbitration contracts specifically, *but not other contracts*, must have a special notice on the first page to be enforceable. *Id.* at 683. In other words, the Montana legislature did not impose a generally applicable rule to the new context of arbitration, as is the case here, but instead fashioned a law that applied only to arbitration contracts specifically, rendering it impermissible under the FAA. *Id.* at 687.

III. Longstanding fundamental contract principles apply to new forms of contracting.

The age of electronic contracting should not cause this Court to abandon fundamental contract principles that have existed long before the advent of this new technology. As recently observed by the U.S. Court of Appeals for the Fourth Circuit: "there is no question that the digital age has changed the nature of contract formation. The fundamental principles of contract law continue to apply; the 'trick' is that now they must be applied to a new form of contracting." *Marshall v. Georgetown Mem'l Hosp.*, 112 F.4th 211, 218 (4th Cir. 2024) (cleaned up).

The general rules of contract law about waiver of constitutional rights reiterated by the Superior Court have existed for generations. Deviating from these rules to carve out an exception for arbitration would find no support in U.S. Supreme Court precedent as set forth above; to the contrary, it would conflict with the U.S. Supreme Court's mandate that arbitration agreements be treated just like any other agreement. Narrowing the Superior Court's ruling to apply only to "click wrap" or "browse wrap" agreements (or paper contracts or ride-share contracts, etc.) would be no different, and would guarantee that the next new development in contracting technology will lead to further litigation and another trip to this Court. The Superior Court's reiteration of these foundational rules of Pennsylvania contract law should apply to all contracts, no matter the form or context.

Uber reaches back nearly 200 years to cite cases for the proposition "I didn't read the contract" is no defense to contract formation. Uber Br. at 42-43. But the "'duty-to-read' rule has always excepted cases in which the writing does not appear to be a contract and the terms are not called to the attention of the recipient." *Marshall*, 112 F.4th at 220 (citing cases). Regarding modern contracts on cell phones, "the duty to read does not morph into a duty to ferret out contract provisions when they are contained in inconspicuous hyperlinks or can be found only by scrolling down through additional screens." *Id.* (cleaned up). A contracting party's choice not to read the terms displayed in a written contract he signs is fundamentally

different from the Uber click agreement where the terms – including a jury trial waiver – are not readily visible or accessible. *See id.* at 218–19. The rule of law articulated by the Superior Court *en banc* requires all contracts involving waiver of constitutional rights to be clear and conspicuous. This includes contracts (no matter their form) that include arbitration clauses, which must be subject to the same rule as other contracts – no more, no less.

IV. The Collateral Order Doctrine plays an important role in protecting consumers against overreaching uses of arbitration.

This Court has jurisdiction under the collateral order doctrine. Under that doctrine, an order is immediately appealable (1) when it is "separable from and collateral to the main cause of action," (2) "where the right involved is too important to be denied review," and (3) "the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost." Pa. R. App. P. 313(b). Here, there is no dispute that an order compelling arbitration satisfies the first two requirements: an arbitration order is, by definition, "collateral to the basic liability question" and, as demonstrated above, implicates the most fundamental of constitutional rights of access to court and to a jury of one's peers that are "too important to be denied review." *See Pugar v. Greco*, 394 A.2d 542, 545 (Pa. 1978). Instead, Uber claims the *en banc* majority should not have exercised jurisdiction because the Chiluttis' claim that they did not agree to arbitrate will not be "irreparably lost." Uber is wrong for two reasons.

First, as the *en banc* majority held (at Appx. A at 9-12), Pennsylvania law does not clearly authorize an appeal *after* an arbitration award on the threshold question of whether an agreement to arbitrate was formed in the first place. The *en banc* majority held that where, as here, a trial court's enforcement of an alleged agreement requires common law arbitration, post-arbitration review of an award is limited to assessing whether there was fraud, misconduct, or other irregularity, rather than whether there was legal error in finding an agreement to arbitrate, so that there is no effective post-arbitration appeal right on the threshold question of formation. Appx. A at 9-12. In this setting, the majority held that the collateral order doctrine provides an essential protection of a party's asserted constitutional right to proceed in court. *Id.* at 12-13.

The *en banc* majority's holding is correct. The common law arbitration statute, 42 Pa. C.S.A. §§ 7341-42, does not clearly provide a post-arbitration right to appeal an order *compelling* arbitration. And while it does incorporate the arbitration statute's appeal provisions, 42 Pa. C.S.A. § 7342(a), those provisions permit appeals from orders "confirming or denying confirmation of an award" or "vacating an award without directing a rehearing," 42 Pa. C.S.A. § 7321.29(a)(3) and (6). Importantly, none of these provisions authorizes an appeal from an order *denying vacatur*. So, in practical terms, if the Chiluttis are forced to arbitrate, do so, and then seek to vacate an award on the ground that they never agreed to arbitrate,

the order denying vacatur on this formation ground would not be clearly appealable without at least "jumping over . . . extremely high hurdles." Appx. A at 11.

Uber argues otherwise, contending that "claims of constitutional violations can be vindicated on final-judgment appeal[,]" Uber Brief at 26, but the authority it cites does not show that the Chiluttis can appeal an order denying vacatur on the grounds that the court should not have ordered arbitration in the first place.[9] As a result, if the Chiluttis are not permitted to appeal the threshold question of formation now, their claim that they did not mutually assent to waive their constitutional rights and arbitrate "will be irreparably lost."[10]

Judge Stabile dissented, contending that even if review following a common law arbitration is "very limited," Appx. B at 7-8, a "court *could* properly vacate an award based on either the lack of an agreement to arbitrate or a finding that the resulting award was "unjust, inequitable or unconscionable." *Id.* at 8 (quoting *Civan*,

[9] *See Civan v. Windermere Farms, Inc.*, 180 A.3d 489, 492-93 (Pa. Super. Ct. 2018) (permitting appeal from order *granting* vacatur based on absence of agreement to arbitrate); *Del Ciotto v. Penn. Hosp. of the Univ. of Penn. Health Sys.*, 177 A.3d 335, 346-49 (Pa. Super. Ct. 2017) (permitting appeal from order *confirming* arbitration award over opponent's denial of agreement to arbitrate); *Carr v. First Commonwealth Bank*, No. 1130 WDA 2021, No. 1180 WDA 2021, 2023 WL 1794264, at *2 (Pa. Super. Ct. April 14, 2023) (appeals from order confirming in part and vacating in part arbitration award).

[10] For its part, Uber does not dispute that if there is no right of appeal, the Chiluttis' formation claim would be "irreparably lost." Instead, it argues only that there *is* a post-arbitration right of appeal. *See* Brief at 30.

180 A.3d at 499) (emphasis added). *Amici* agree this position has considerable equitable force, and accords with the U.S. Supreme Court's recognition, when applying the FAA, that a court may order arbitration only where parties agreed to it and that a court, not an arbitrator, must decide "whether the [arbitration] clause was agreed to[.]" *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010). Whether Pennsylvania law provides for an appeal from an order denying this relief, however, is far from clear. Absent clarity on this critical point, Pennsylvania consumers face the prospect of being bound by unreviewable findings of waiver of their fundamental constitutional rights.

Second, even if Pennsylvania law could arguably be read as authorizing such an appeal, the collateral order doctrine still applies here. Both Uber and the dissent below advance an unduly formalistic interpretation of the doctrine that even a theoretical post-judgment right of appeal categorically means the claim will not be "irreparably lost." *See* Uber Brief at 26 ("Claims are ***not*** irreparably lost if there is a possibility for full relief on post-judgment appeal."); *see also* Appx. B at 8 (similar). To the contrary, this Court's precedent makes clear that the collateral order doctrine, and particularly the third "irreparably lost" requirement, is functional and fact-specific. As this Court explained in *Pugar*:

> Whether an order is final and appealable cannot necessarily be ascertained from the face of a decree alone, nor simply from the technical effect of the adjudication.

> The finality of an order is a judicial conclusion which can be reached only after an examination of its ramifications.

Pugar, 394 A.2d at 545 (quoting *Bell v. Beneficial Consumer Discount Co.*, 348 A.2d 734, 735 (Pa. 1975)). In other words, "if the practical consequence of the order by the trial court is effectively to put an appellant 'out of court' the order will be treated as final." *Id.* (quoting *Ventura v. Skylark Motel, Inc.*, 246 A.2d 353 (Pa. 1968)). That functional inquiry was not satisfied in *Pugar* because the plaintiffs there argued only that they were "unwilling[] to pay costs and fees," not that they could not pay. *Id.* In so holding, however, the Court emphasized that, "[g]iven the fact that appellants' claim is based upon their unwillingness to pay costs and fees, *and not upon their inability to pay them*, appellants must litigate the negligence claim before pursuing appellate review . . . ." *Id.* at 546 (emphasis added).

Cases have applied *Pugar*'s functional approach to the "irreparably lost" requirement, concluding that a collateral order appeal is necessary where an order requiring the payment of procedural fees or costs does effectively prevent a party from proceeding. For example, in *Grant v. Blaine*, 868 A.2d 400 (Pa. 2005), the Court held that a trial court's order denying a prison-inmate plaintiff *in forma pauperis* status satisfied the irreparable loss requirement for an immediate collateral order appeal, holding that:

> A litigant who is denied the ability to bring a cause of action due to his true inability to pay the costs is effectively put out of court. Because such a denial may

> close the courthouse door to litigants, they must be permitted to appeal the denial of *in forma pauperis* status. In accordance with this Court's analysis in *Pugar*, looking at the trial court's order, and determining the "practical consequence . . . is effectively to put an appellant out of court," we hold an order denying *in forma pauperis* status is a final, appealable order.

Id. at 402-03 (quoting *Pugar*, 394 A.2d at 544-45) (internal quotation marks omitted); *see also Amrhein v. Amrhein*, 903 A.2d 17, 19 (Pa. Super. Ct. 2006) (permitting collateral appeal from trial court's denial of *in forma pauperis* status in child custody case); *id.* at 23-24 (vacating trial court's order).

Courts look beyond whether there is the theoretical possibility of a right to appeal to consider the "practical consequences" of other barriers too. As just one example, in *Bell*, *supra*, the Court held that an order denying class action certification is an appealable collateral order not only because it literally "puts the class members out of court," 348 A.2d at 736, but also because an immediate appeal furthers the policy served by class actions of enabling parties to vindicate small-value claims:

> By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

Id. at 737 (quoting Charles Alan Wright, *Class Actions*, 47 F.R.D. 169, 170 (1970)) (internal quotation marks and citation omitted).[11] In other words, without a class action, those small-value claims might technically be permitted to proceed, but practically would not.

Similar practical considerations apply in the context of an order compelling arbitration. Case law is replete with examples of corporations including such prohibitive or one-sided terms in their arbitration agreements that effectively foreclose a consumer, worker, or other plaintiff from proceeding even to arbitration to vindicate her rights. *See, e.g.*, *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 227–28 (3d Cir. 2018) (payday lender's arbitration clause requiring consumers to arbitrate before tribal arbitral forum that "does not exist"); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 259-60 (3d Cir. 2003) (oil refinery operator's arbitration clause requiring employees to submit written claim within thirty days of event giving rise to claim; requiring losing employee to pay arbitrator's fees and own attorney fees;

[11] *See also Com. v. Brady*, 508 A.2d 286, 289-91 (Pa. 1986) (reaffirming precedent that a criminal defendant may immediately appeal an order denying dismissal on double jeopardy grounds consistent with the collateral order doctrine, while recognizing an exception where the trial court makes written findings that the motion is frivolous); *Brooks v. Ewing Cole, Inc.*, 259 A.3d 359, 373 (Pa. 2021) (order denying government defendant's sovereign immunity defense is appealable collateral order because "sovereign immunity protects government entities from a lawsuit itself," so that "a sovereign immunity defense is irreparably lost if appellate review of an adverse decision on sovereign immunity is postponed until after final judgment").

and placing limits on damages awarded); *Spinetti v. Service Corp. Int'l*, 324 F.3d 212, 214-15 (3d Cir. 2003) (employer's arbitration clause requiring sales counselor employee to pay half of arbitrators' and arbitration fees and waiving right to recover statutory attorney fees); *Giordano v. Pep Boys—Manny, Moe & Jack, Inc.*, No. 99-CV-1281, 2001 WL 484360, at *2 (E.D. Pa. Mar. 29, 2001) (auto repair company's arbitration clause requiring auto mechanic employees to pay half of arbitrator's fee, forcing employee to pay $2,000 filing fee and $300 to $450 daily arbitrator's fee); *McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004) (tax refund anticipation lender's arbitration clause requiring consumers to pay at least a $50 arbitration filing fee plus any arbitration costs over $1,500 to vindicate a claim challenging $37 overcharges).

If consumers and employees were required to arbitrate first subject to these terms before they could even conceivably bring an appeal of whether they agreed or were required to arbitrate, the appeal right would be hollow and their claims effectively extinguished. This is precisely the type of circumstance to which this Court and other Pennsylvania courts have applied the collateral order doctrine to protect and preserve parties' substantive claims and procedural rights.

This also is the type of circumstance the Superior Court *en banc* majority found to be present here:

> We reiterate there are times when a party is forced out of court because the arbitration provision either failed to

> meet basic contract principles or violated a party's constitutional right to a jury trial – which does not qualify as a fraud, misconduct, corruption, or other irregularity – and where the arbitration award is deemed fair, and therefore unreviewable, even if there was no agreement to arbitrate between the parties, which would result in the irreparable loss to the party. . . . [T]hese situations would allow for review of an order compelling arbitration as a collateral order.

Appx. A at 12 (internal quotation marks omitted). This Court should reject Uber's assertion that the possible availability of a post-arbitration appeal in this setting prohibits an immediate appeal by a party seeking to preserve its constitutional rights.

CONCLUSION

The judgment of the Superior Court should be affirmed.

Dated: January 6, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew M. Milz, do hereby certify that I served upon all counsel of record a true and correct copy of this filing by this Court's electronic filing system, pursuant to Pa. R.A.P. 125.

Date: January 6, 2025

/s/ Andrew M. Milz
Andrew M. Milz

CERTIFICATES OF COMPLIANCE

I hereby certify, pursuant to Pa. R.A.P. 2135(a)(1) and 2135(d), that the foregoing brief contains 6,566 words according to the count of Microsoft Word, not exceeding the 7,000-word limit.

I hereby certify, pursuant to Pa. R.A.P. 127, 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.

Date: January 6, 2025

/s/ Andrew M. Milz
Andrew M. Milz

APPENDIX A

IDENTITY OF *AMICI CURIAE*

Amici curiae are non-profit organizations that represent consumers in cases involving mortgage servicing, foreclosure, debt collection, and other consumer rights. *Amici* have a special interest and expertise in ensuring the proper interpretation of state and federal law related to arbitration in consumer matters.

Community Legal Services ("CLS") of Philadelphia provides legal representation to 10,000+ people every year when they are facing some of their most difficult life circumstances such as the threat of losing their home, income, life savings, health care and in some instances even their families. Since its founding in 1966, CLS has provided free civil legal assistance to more than one million low-income Philadelphians, most living below 125% of the federal poverty line. CLS has committed substantial resources to consumer protection on behalf of its low-income clients, many of whom face struggle to assert their constitutional right to access the courts in the face of predatory lending schemes due to binding arbitration agreements, of which they were never made fully aware.

Founded in 1996, **Philadelphia Legal Assistance ("PLA")** provides free legal assistance to low-income Philadelphians in civil matters. PLA attorneys represent consumers in a wide range of matters to preserve their homes and maintain economic security, including mortgage foreclosure, tax foreclosure, debt collection,

payday lending, student loans, and predatory lending schemes.

Neighborhood Legal Services ("NLS") provides free civil legal representation, advice, and education to low-income individuals and families. Over the past 58 years, NLSA has helped over 1.1 million indigent residents and victims of domestic violence of Allegheny, Beaver, Butler and Lawrence Counties in a range of civil legal issues. For over 25 years, NLSA has offered expanded legal services to all senior citizens, regardless of income, in housing and consumer matters and preparing personal care documents like powers of attorney and advance directives. In the past five years, NLSA has handled over 4,600 such cases, of which more than 36% were consumer-related.

The **National Association of Consumer Advocates ("NACA")** is a national nonprofit association of attorneys and consumer advocates committed to representing consumers' interests. Its members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary focus is the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information-sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers.

Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Consumer and Worker Arbitration Provisions (9th ed. 2024) and has particular expertise concerning arbitration and access to justice for consumers. NCLC has conducted numerous trainings on consumer protection laws in more than 20 states and testifies regularly before Congress, federal agencies, and state legislative bodies on consumer protection topics. NCLC frequently appears as amicus curiae in consumer law cases throughout the country.

The **Pennsylvania Legal Aid Network, Inc. ("PLAN")** provides leadership, funding, and support for the availability and quality of civil legal aid. PLAN is the state's coordinated system of civil legal aid for those with nowhere else to turn; providing funding to legal aid providers statewide. It conducts trainings for public interest lawyers and leadership for legal aid providers. PLAN funded programs offer critical legal information, advice, and services through direct representation of low-income individuals and families facing urgent civil legal problems in every Pennsylvania county.

Summit Legal Aid ("Summit") is a regional nonprofit legal services

organization formed in 2023 through a merger of Laurel Legal Services and Southwestern Pennsylvania Legal Aid, programs that have served low-income western Pennsylvanians in ten counties for over 55 years. Summit handles close to 6,000 client matters per year, with over one-quarter of its clients needing consumer protection, debt relief, mortgage foreclosure defense, and representation for other issues facing consumers. Summit has engaged in a variety of legal services related to consumer protection and financial security, with over 90 percent of its clients' households falling within 125 percent of the federal poverty guidelines, which include seniors, veterans, and those with disabilities.

Public Justice is a nonprofit legal advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of consumers, workers, and other people whose civil rights have been violated to seek redress for their injuries in the civil court system. As part of its Access to Justice Project, Public Justice has appeared as counsel of record and as *amicus* in state supreme courts across the country as well as the U.S. Supreme Court. For example, Public Justice served as counsel of record before the U.S. Supreme Court in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), a recent case in which the U.S. Supreme Court addressed the equal-footing principle.

Public Justice has a continued interest in ensuring the proper interpretation both of that principle and the preemptive reach of the FAA.

Amici are interested in this case because of the significant impact it could have on low-income consumers in Pennsylvania. No one other than *amici* has authored or paid for the preparation of this brief.