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IN THE SUPREME COURT OF PENNSYLVANIA

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58 EAP 2024

Shannon Chilutti and Keith Chilutti,
Appellees

v.

Uber Technologies, Inc., Gegan LLC, Raiser-PA, LLC, and Raiser, LLC,
Appellants

BRIEF OF *AMICI CURIAE* THE AMERICAN ASSOCIATION FOR JUSTICE AND THE PENNSYLVANIA ASSOCIATION FOR JUSTICE IN SUPPORT OF APPELLEES SHANNON AND KEITH CHILUTTI

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

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STATEMENT OF INTEREST OF AMICI CURIAE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions across the nation, including in Pennsylvania. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The Pennsylvania Association for Justice ("PAJ"), formerly Pennsylvania Trial Lawyers Association, is a non-profit organization with a membership of 2,000 women and men of the trial bar of the Commonwealth of Pennsylvania. For nearly 50 years, PAJ has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. Through its Amicus Curiae Committee, PAJ strives to maintain a high profile in Commonwealth and Federal Courts by promoting, through advocacy, the rights of individuals and the goals of its membership.

No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel made a monetary contribution intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court should affirm the Superior Court's ruling, and find that the Chiluttis did not knowingly and voluntarily assent to waive their right to a jury trial, for at least two reasons.

First, fundamental constitutional rights, including the right to a jury trial, cannot be waived absent clear evidence of knowing and voluntary assent. Both the United States and Pennsylvania Constitutions prohibit such waivers without explicit understanding and agreement. The Superior Court correctly applied this principle and found no evidence that the Chiluttis knowingly waived their fundamental constitutional right to a jury trial when they were presented with Uber's online agreement. The Federal Arbitration Act (FAA) does not preempt the knowing and voluntary assent standard because that standard treats arbitration agreements no differently than any other contracts that purport to waive a fundamental constitutional right. Ensuring clear and knowing waivers does not discriminate against arbitration contracts. Instead, it upholds fundamental protections that apply equally to all constitutional rights, including the right to a jury trial. This Court should affirm the Superior Court's holding for this reason alone.

Second, courts should not find that legal rights that have been granted by democratically elected legislatures have been waived unless consumers

knowingly agreed to waive those rights. Today, almost every online transaction includes a contract with boilerplate terms that limit or destroy the default legal rights that legislatures have passed to resolve disputes, assess damages, and apportion liability. Such boilerplate terms are unnecessary to facilitate transactions and are only included in online agreements to destroy or limit consumers' legal rights for the benefit of the corporation. Consumers are never presented these terms (because they are hidden in hyperlinks), cannot understand these terms (because they are drafted in a way that exceeds the reading level of most consumers), and cannot take the time to read these terms to discover whether their rights are being waived (because boilerplate terms are foisted upon consumers every day). Given the reality of modern online consumer contracts, courts should not enforce any waiver of a consumer's default legal rights unless a business can prove the waiver was knowing and voluntary.

The Superior Court's decision accomplishes this modest goal. And the FAA does not preempt it—because it treats arbitration clauses like any other term that seeks to waive a legal right that a legislature provided for the benefit of a consumer. This Court should affirm the Superior Court's holding for this alternative reason.

For these reasons, and as explained below, the Court should affirm the Superior Court's holding and reject the arguments of Appellant and its *Amici*.

ARGUMENT

I. The Knowing and Voluntary Standard of Assent Applies to Arbitration Contracts Because Such Contracts Waive a Fundamental Constitutional Right.

The right to a jury trial is a fundamental right safeguarded by the Pennsylvania Constitution, which means it cannot be waived absent knowing and voluntary assent. The Superior Court's holding correctly applied the knowing and voluntary standard in this case. And the FAA cannot preempt that standard because the United States Constitution treats the right to a jury trial as a fundamental constitutional right, and—like the Pennsylvania Constitution—only permits waiver of this right if a waiver is accompanied by knowing and voluntary assent. Accordingly, the Superior Court was correct in concluding that the Chiluttis did not assent to arbitrate their claims, as the evidence failed to show that the Chiluttis knowingly waived their fundamental constitutional right to a jury trial.

A. Arbitration contracts amount to jury trial waivers, which means the knowing and voluntary standard applies to prove assent.

The right to a jury trial is safeguarded by the Pennsylvania Constitution. *See* Pa. Const., art. I, § 6 ("Trial by jury shall be as heretofore, and the right thereof remain inviolate.").

This Court has recognized that the right to a jury trial is a fundamental constitutional right. *See Commw. v. O'Donnell*, 740 A.2d 198, 212 (Pa. 1999) (citing *Commw. v. Stokes*, 299 A.2d 272, 273 (Pa. 1973)).

Fundamental constitutional rights, like the right to a jury trial, cannot be waived unless the wavier is "knowing" and "voluntary." *See Commw. v. Vega*, 719 A.2d 227, 230 (Pa. 1998). Unlike the "mutual assent" standard, which applies to typical contracts and authorizes courts to presume assent based on a party's constructive knowledge, *see, e.g.*, *Sellers v. JustAnswer LLC*, 289 Cal. Rptr. 3d 1, 13 (Cal. Ct. App. 2021), the knowing and voluntary assent standard: (i) requires a stricter burden of proof to establish assent to the waiver of a fundamental right; (ii) prohibits courts from assuming a waiver occurred; and (iii) requires proof that the waiving party had actual knowledge that they were agreeing to waive a fundamental right by proceeding with a transaction. *See Vega*, 719 A.2d at 230.

By their nature, arbitration clauses waive the right to a jury trial, which means the knowing and voluntary assent standard applies. In fact, arbitration contracts entail a far greater surrender of rights than regular jury trial waivers because submitting a case to arbitration "involves a greater compromise of procedural protections than does the waiver of the right to a trial by jury" on its own. *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838 (10th Cir.

1988). Indeed, arbitral proceedings often occur in secret, limit or entirely prohibit discovery, prohibit class actions or joint litigation, require private arbitrators (who are paid by the corporation being sued) to hear and decide disputes, and deprive parties of the right to appeal adverse awards. Given these facts, it would be illogical (and unjust) to impose a lesser standard of assent for arbitration agreements than for jury trial waivers alone. *See Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 223 (3d Cir. 2007) (italics omitted) ("[S]ome commentators consider it curious that courts apply a presumption in *favor* of an arbitration clause but *against* a mere jury waiver provision.").

The Superior Court's holding should be affirmed because that holding correctly applied the knowing and voluntary assent standard. The waiver of the Chiluttis' right to a jury trial was hidden in a hyperlink, which the Chiluttis never saw, clicked, or reviewed. *See* App. A, pp. 25, 27. And there was no indication on any of the screens that were presented to the Chiluttis that they were waiving their right to a jury trial. *Id.*, pp. 24-25. As a result, there was no evidence to prove that the Chiluttis knowingly and voluntarily waived their right to a jury trial. To provide instruction to online businesses, the Superior Court held that they could ensure a knowing and voluntary waiver of the right to a jury trial—or any other fundamental constitutional right—by stating on

their websites and apps that consumers are waiving their right to a jury trial by proceeding with a transaction. *Id.*, pp. 33-34. Because this test ensures a consumer's waiver of their fundamental constitutional rights is knowing and voluntary, it properly applied the knowing and voluntary assent standard to determine whether a fundamental constitutional right has been waived. As a result, this Court should affirm the Superior Court's holding.

B. The FAA cannot preempt the knowing and voluntary standard because that standard is consistent with the United States Constitution.

Identical to Pennsylvania's Constitution, the United States Constitution safeguards the right to a jury trial. *See* U.S. Const., amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

And, identical to this Court, virtually every federal court that considered the question agrees that the right to a jury trial is a fundamental constitutional right. *See Nat'l Equip. Rental Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) ("It is elementary that the Seventh Amendment right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally."); *Tracinda Corp.*, 502 F.3d at 222 ("To be valid, a [Seventh

Amendment] jury waiver must be made knowingly and voluntarily based on the facts of the case."); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 833 (4th Cir. 1986) ("[W]e agree with those courts that have held that the party seeking enforcement of the [Seventh Amendment jury] waiver must prove that consent was both voluntary and informed."); *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 420 (6th Cir. 2011) ("[T]his court must ask whether [a Seventh Amendment] waiver was knowing and voluntary."); *Palmer v. Valdez*, 560 F.3d 965, 968 (9th Cir. 2009) ("A valid [jury] waiver in a civil trial must be made knowingly and voluntarily based on the facts of the case."); *Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 F. App'x 820, 823 (11th Cir. 2006) ("A party may validly waive its Seventh Amendment right to a jury trial so long as the waiver is knowing and voluntary."); *but see IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 993 (7th Cir. 2008) (where parties are sophisticated, no federal requirement that bench-trial agreements be supported by evidence of voluntariness "beyond what is required to make the rest of the contract legally effective").

On top of that, the United States Supreme Court, identical to this Court, has held courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights[.]" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quotation marks omitted). This presumption mandates that a waiver

of any fundamental right must be accompanied by "knowing" and "voluntary" assent. *See Brady v. U.S.*, 397 U.S. 742, 748 (1970).

Because the United States Constitution does not permit the waiver of a jury trial absent knowing and voluntary assent, the FAA cannot do so either —or the FAA would be unconstitutional. *See U.S. v. Adams*, 914 F.3d 602, 605 (8th Cir. 2019) (quoting *U.S. v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010)) (recognizing that a statute may be unconstitutional if "its application to a particular person under particular circumstances deprived that person of a constitutional right").

Some courts have found that the FAA permits jury trial waivers that are not knowing or voluntary because the right to a jury trial "vanishes" if a party agrees to arbitrate their claims in an arbitral forum. *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1371 (11th Cir. 2005) (quoting *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002)).

To the extent these holdings were ever correct, they have since been overruled because the "substance of the suit" is what matters to determine if the right to a jury trial exists, "not where it is brought, who brings it, or how it is labeled." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2136 (2024). If a claim is "legal in nature," the right to a jury trial exists. *Id.* at 2128 (quoting *Granfinanciera,*

S.A. v. Nordberg, 492 U.S. 33, 53 (1989)).[1] This right cannot be "conjure[d] away" by a statute, like the FAA. *Id.* at 2136 (quoting *Granfinanciera*, 492 U.S. at 52). After *Jarkesy*, the only way a legal claim can be siphoned away from a jury is if both parties to the claim knowingly and voluntarily waive their constitutional right to a jury trial.[2]

These holdings are also misplaced because the FAA does not permit courts to "devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218-21 (1985)). Applying a lesser standard to a jury trial waiver contained in an arbitration agreement than to a jury trial waiver contained in another agreement, as was done in *Am. Heritage* and *Caley*, plainly violates this rule.

An arbitration agreement is no different than a jury trial waiver, which means it must be the product of "knowing" and "voluntary" assent. Because

[1] The Chiluttis' claim for money damages is "legal in nature." *Jarkesy*, 144 S. Ct. at 2129 (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993)).

[2] The FAA's principal drafter, Julius Cohen, believed this to be true, as he considered the constitutional right to a jury trial when drafting the FAA and testified that the FAA was constitutional because it was consistent with the waiver analysis that applies to fundamental constitutional rights. *See* Steven Becker, *Arbitration as Seventh Amendment Waiver*, 36 LOYOLA CONSUMER L. REV. 1, 15 n. 73 (2023) (quoting Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 17 (1924)).

this requirement is mandated by the Pennsylvania Constitution and the United States Constitution, the FAA cannot preempt it.

II. The Knowing and Voluntary Standard of Assent Applies to Arbitration Contracts Because Such Contracts Waive Legal Rights.

In the past, legal rights were "derive[d] from the democratic process, reflect[ed] community values, and balance[d] varying perspectives." Andrea J. Boyack, *The Shape of Consumer Contracts*, 101 DENVER L. REV. 1, 52 (2023) (citing MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)).

In present day, legal rights are imposed by an "empire of forms," which are forced upon consumers daily. David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1368 (2023). This empire "amounts to an exercise of unofficial government of some by others, via private law." Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931). And it has allowed "powerful industrial and commercial overlords . . . to impose a new feudal order of their own making upon" every aspect of modern life. Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions*, 43 COLUMBIA L. REV. 629, 640 (1943).

As the empire of forms has risen, our legal rights have been destroyed. The forms that built this empire include terms that destroy our ability to use the dispute resolution procedures legislatures created (*e.g.*, jury trial waivers, class action waivers, forum selection clauses, arbitration clauses), impair our ability to obtain relief for conduct legislatures prohibited (*e.g.*, choice-of-law clauses, warranty disclaimers, exculpatory clauses, damage caps, statute of limitation modifications, privacy waivers), and allow companies to unilaterally modify contracts for their benefit. *See* Andrea J. Boyack, *Abuse of Contract: Boilerplate Erasure of Consumer Counterparty Rights*, 111 IOWA L. REV. at 7 (forthcoming 2025), https://ssrn.com/abstract=4756735. Every modern consumer contract has one or more of these terms. *Id.* at 21. And the only two corporations—Uber and Lyft—that operate in the business sector at issue in this appeal—ride sharing—include such terms, and mandate arbitration. *See U.S. Terms of Use*, Uber, https://www.uber.com/legal/en/document/?name=general-terms-of-use&country=united-states&lang=en (last modified Aug. 19, 2024); *Lyft Terms of Service*, Lyft, https://www.lyft.com/terms (last modified Dec. 13, 2024); Michal Kaczmarski, *Uber vs. Lyft: Who's Tops in the Battle of U.S. Rideshare Companies*, BLOOMBERG (Apr. 15, 2024), https://secondmeasure.com/datapoints/rideshare-industry-overview/.

Given the ubiquity of boilerplate terms that demolish the legal rights of consumers, including the once-respected right to a jury trial, close to all legal rights that democratically elected legislatures have enacted for the benefit of the people have been destroyed.

Consumers are largely unaware that their rights have been taken from them because modern consumer contracts are dense and incomprehensible (which means consumers cannot understand them),[3] are foisted on consumers with virtually every click of a button on a website or an app (which means it is practically impossible to read each contract),[4] and are hidden in

[3] *See* Uri Benoliel, *The Duty to Read the Unreadable*, BOSTON COL. L. REV. 2255, 2275, 2278-79 (2019) (finding 99.6% of 500 online consumer contracts were written at a reading level above that of the average consumer); Kevin Litman-Navarro, *We Read 150 Privacy Policies. They Were an Incomprehensible Disaster*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html (finding vast majority of 150 online contracts exceeded the reading level necessary to complete college, and that some contracts were more difficult to read than Immanual Kant's *Critique of Pure Reason*).

[4] *See* Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC (Mar. 1, 2012), https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/ (finding average reader must spend 76 8-hour work days to read every contract foisted upon them in a given year); David Berreby, *Click to Agree with What? No One Reads Terms of Service, Studies Confirm*, THE GUARDIAN (Mar. 3, 2017), https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print (finding same task would take 250 hours each year).

hyperlinks and never presented for consumers to sign (which means consumers never see the contracts that are forced upon them).[5]

Academics overwhelmingly agree that there is "something rotten at the heart" of this system, which has allowed businesses to make their own laws, and has resulted in the wholesale destruction of bedrock legal rights without consumers' knowledge. *See* Wayne R. Barnes, *Shifting Towards Boilerplate Regulation*, 79 U. MIAMI L. REV. 1, 7 (2024).

The Superior Court's holding is a long overdue first step in attempting to cut the rot from this system. *See id.* at 22-37 (identifying various proposals to address the issue). That holding simply requires businesses to prove that consumers knowingly and voluntarily waived their legal rights. The knowing and voluntary standard of assent is already applied to other contract terms, and there is no reason it should not be applied here. Moreover, that standard is not preempted by the FAA—because it does not discriminate against arbitration agreements and treats them the same as any other provision that

[5] *See* Yannis Bakos, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014) (finding 0.2% of consumers reviewed terms for more than one second); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts"*, 78 U. CHI. L. REV. 165, 179-81 (2011) (finding enhanced disclosure of online terms through use of "clickwrap" agreement increased chances consumers would read online terms by only 0.36%, as compared to a "browsewrap" contract).

purports to waive the legal rights of consumers. This Court should affirm the Superior Court's holding to ensure consumers understand the legal import of clicking buttons on a phone or a computer screen. The current situation, where consumers unwittingly waive legal rights by the click of a button, "does not facilitate efficient and empowering contracts"—it only "facilitates private commercial dictatorships." Boyack, *Consumer Contracts*, *supra*, at 28. This Court can affirm the Superior Court's holding on this alternative basis.

A. The knowing and voluntary assent standard for waiving default legal rights.

Boilerplate terms that waive legal rights are not necessary to facilitate a consumer transaction or construct the infrastructure of a deal. *Id.* at 52. While it is true that sophisticated parties modify legal defaults in contracts, these modifications are negotiated and often necessary to accomplish the specific goals of a transaction. *See* Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 525 (2008). Modifying legal defaults in the consumer context, by contrast, is a one-sided exercise that does not make the transaction more effective, but rather, serves only to limit or destroy a consumer's default legal rights. *See* Boyack, *Consumer Contracts*, *supra*, at 29 ("Companies carefully

tailor their standard terms and conditions to bolster profits while better protecting themselves from costs.").

Because boilerplate terms are unnecessary in consumer transactions, consumers cannot be reasonably expected to believe that these terms would be included in their contracts. And, as explained above, consumers lack the understanding and practical ability to scour the multitude of agreements that are foisted upon them every day (and year) to determine whether their rights are being waived. *See supra* notes 3-5.

Given these realities, consumers should not be found to have assented to a term that waives a legal right, unless the business can prove: (i) the term was conspicuous; (ii) the importance and import of the term was explained, so the consumer could understand the legal right they were waiving; and (iii) the consumer unambiguously and specifically manifested assent to the term. *See* Warkentine, *supra*, at 473.

Since the Superior Court's holding applied a version of this very rule, it should be affirmed by this Court. The Superior Court's rule required a waiver of the right to a jury trial to be conspicuous—by requiring that term to appear at the top of the contract that governs a transaction. *See* App. A, pp. 33-34. The rule also required the import of the term to be explained—by requiring businesses to inform consumers of the waiver before they can use a website

or mobile app. *Id.* Finally, the rule required a clear manifestation of assent to the term—by requiring businesses to present a screen that includes a button consumers must click to explicitly manifest assent to the waiver. *Id.* This type of structure has been recognized as a best practice for ensuring consumers have knowingly and voluntarily waived their legal rights. *See* Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 134-39 (2022) (proposing similar requirements to ensure consumers knowingly and voluntarily waive their legal rights).

B. The knowing and voluntary assent standard already applies to other contract terms.

The Superior Court's holding is in line with other decisions that already require knowing and voluntary assent for other contract terms.

For example, this Court already requires knowing and voluntary assent for confessed judgment clauses. *See Frantz Tractor Co. v. Wyo. Valley Nursing*, 120 A.2d 303, 305 (Pa. 1956); *Graystone Bank v. Grove Ests., LP*, 58 A.3d 1277, 1283 (Pa. Super. 2012). Indeed, these provisions may not be "foisted upon anyone by implication or by general or nonspecific reference," and may only be enforced when they are the product of knowing and conscious assent. *Frantz Tractor*, 120 A.2d at 305. There is no reason that this knowing and voluntary standard should not be applied to contract terms that waive a consumer's legal rights—like arbitration provisions.

Exculpatory clauses are illustrative as well. Courts find that consumers have "accepted" these clauses only if a business can prove the clause was "in fact brought home to [the consumer] and understood by [the consumer]." Restatement (Second) of Torts, § 496B, Comment C (Am. Law Inst. 2007); *cf. Beck-Hummel v. Ski Shawnee, Inc.*, 902 A.2d 1266, 1274-75 (Pa. Super. 2006). Again, there is no reason that a similar analysis should not be applied to any contract term that purports to waive any default legal right that a legislature has granted a consumer through the democratic process.

These examples demonstrate that courts are well within their power to require knowing and voluntary assent to specific terms when the context of a transaction supports application of that standard. And the Superior Court was correct in applying that standard here because the context of consumer contracting supports application of that standard. *See* Boyack, *Consumer Contracts*, *supra*, at 50 ("[W]illingness to engage in a transaction provides no basis to find a waiver of default legal rights."); *see also* Warkentine, *supra*, at 472 ("[I]t is a fiction to characterize what occurs in the formation stage of a standard form contract as a party's assent to all contract terms. Rather than continuing to perpetuate that fiction, courts should separately analyze a party's assent to particular unbargained-for contract terms in standard form contracts and that party's assent to undertaking a contractual obligation.").

C. The knowing and voluntary assent standard will not burden businesses and is uncomplicated.

Application of the knowing and voluntary assent standard to any term that waives a consumer's legal rights will not unduly burden businesses. For example, if an arbitration provision—or any other term that purports to waive a consumer's legal rights—is truly important to a business, the business can present the consumer with a screen devoted to every legal waiver it believes is necessary, and the business can ensure that the consumer is aware of the importance and import of every legal right they are waiving. *See* Warkentine, *supra*, at 546-47. Businesses that fail to do so are "evidently trying to cheat, and . . . [do] not deserve the certainty that [their] forms could otherwise provide." *Id.* at 546 (quoting W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 28 (1984)).

Perhaps more importantly, applying the knowing and voluntary assent standard is uncomplicated. All a business must do to prove that a consumer waived their legal rights is present a screen that explains that fact, and that requires the consumer to click a button to unambiguously manifest their assent to the waiver.

Finally, the straightforward requirements of the knowing and voluntary assent standard have no negative impacts on market activity. As explained

above, legal waivers in the context of consumer transactions are not necessary components that are negotiated to facilitate the infrastructure of a deal. Instead, they are one-sided terms that consumers lack the ability to read or understand, and that are included in transactions with the purpose of limiting or destroying a consumer's legal rights. *See* Boyack, *Consumer Contracts*, *supra*, at 52. The facilitation of transactions will not suffer if a court finds that a consumer has not assented to a legal waiver—because such terms are not necessary to facilitate transactions. Nor will contracts be filled with holes if a court finds that a consumer has not assented to a legal waiver—because the legislature has already provided defaults for resolving disputes, apportioning liability, and assessing damages. There is no downside to requiring knowing and voluntary assent for legal waivers.

D. The knowing and voluntary assent standard is not preempted by the FAA.

The FAA does not preempt the application of a knowing and voluntary assent standard to arbitration contracts because applying the standard to an arbitration agreement simply places that agreement "upon the same footing as other contracts" that purport to waive a legal right. *Morgan*, 596 U.S. at 418 (quoting *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302 (2010)).

The Superior Court's holding broadly applies to any agreement that seeks to waive a consumer's legal rights, whether that is their right to: bring

claims in court; participate in a class action; file suit in their home forum; bring a claim within the applicable statute of limitations; seek the damages allowed by statute; seek protection of their home state laws; or any of the other many rights that the legislature has granted.

Exempting arbitration contracts from this rule would improperly create a "custom-made rule[] to tilt the playing field in favor of . . . arbitration." *Id.* at 419. The FAA bars such rules, as the policy underlying the FAA "is about treating arbitration contracts like all others, not about fostering arbitration." *Id.* at 418 (citing *Dean Witter*, 470 U.S. at 218-221). Accordingly, the FAA cannot preempt application of the knowing and voluntary standard to arbitration agreements. *See Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 199 A.3d 766, 781-86 (N.J. 2019) (Albin, J., concurring) (concluding that a New Jersey waive-of-rights rule was not preempted by the FAA because the rule generally burdened any term that sought to waive a constitutional or statutory right, regardless of whether that right affected arbitration).

CONCLUSION

The Superior Court correctly applied the knowing and voluntary assent standard to the arbitration agreement in this case. Uber failed to demonstrate that the Chiluttis knowingly waived their constitutional right to a jury trial or any of their legal rights. Affirming this decision protects consumers from unwittingly waiving their constitutional or legal rights, upholds both state and federal constitutional principles, and imposes no unreasonable burden on businesses. For these reasons, the Court should affirm the Superior Court's holding.

Respectfully submitted,

Date: January 6, 2025

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CERTIFICATES OF COMPLIANCE AND SERVICE

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3. I certify that this document has been filed via PACFile, and that all counsel of record have been served with a copy of this document through the Court's electronic filing system.

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