AMY SKUSE, Plaintiff, v. PFIZER, INC., JOHN D. WITZIG, PAUL MANGEOT, and CONNIE CORBETT, Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO. 082509 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION App. Div. Docket No. A-3027-17T4 Sat Below: Hon. Jack M. Sabatino, J.A.C. Hon. Michael J. Haas, J.A.C. Hon. Stephanie Ann Mitterhoff, J.A.C.

BRIEF OF AMICI CURIAE NEW JERSEY BUSINESS & INDUSTRY ASSOCIATION, COMMERCE AND INDUSTRY ASSOCIATION OF NEW JERSEY, AND NEW JERSEY CHAMBER OF COMMERCE IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE

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PRELIMINARY STATEMENT

Proposed Amici Curiae New Jersey Business & Industry Association ("NJBIA"), Commerce and Industry Association of New Jersey ("CIANJ") and New Jersey Chamber of Commerce ("NJ Chamber") submit this brief in support of their motion for leave to appear as Amici Curiae.

This case concerns an issue of public importance to New Jersey's business community that this Court has not yet considered: whether an employer can obtain an employee's assent to the terms of an arbitration agreement by continued employment where the employee electronically acknowledged that by continuing her employment after 60 days, the "Agreement will be effective, and [she would] be deemed to have consented to, ratified and accepted this Agreement through [her] acceptance of and/or continued employment with the Company." (Da12). The Appellate Division's decision creates undeniable hurdles to the formation and enforcement of arbitration agreements in the employment context, and directly contravenes the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, and federal and state court precedent. The FAA requires that arbitration agreements be placed on equal footing with all other contracts. It further directs that arbitration agreements cannot be rendered unenforceable on grounds that relate to the inherent

characteristic of arbitration -- namely, a waiver of the right to a jury trial.

Here, in refusing to enforce the arbitration agreement at issue, the Appellate Division established two improper requirements that warrant this Court's intervention: (1) employers must obtain an employee's unmistakable, explicit assent to a waiver of his or her right to a jury trial; and (2) employers must use the words "agree" or "agreement" in close proximity to the box that an employee electronically clicks to confirm receipt of and agreement to that waiver. These unique requirements established by the lower court for enforcing arbitration agreements place improper and extreme burdens on employers in this State.

The Court should take this opportunity to reinforce the FAA's mandate of placing arbitration agreements on equal footing with all other contracts, and reverse the Appellate Division's decision.

STATEMENT OF INTEREST

Proposed Amici Curiae NJBIA, CIANJ, and NJ Chamber have a strong interest in this case because each are comprised of members of New Jersey's business community, who use arbitration provisions in their consumer contracts on a regular basis.

Founded in 1910, NJBIA is the nation's largest single state-wide organization of employers, with more than 19,000 member companies reflecting all industries and representing every region of New Jersey. Its membership ranges from most of the 100 largest employers in New Jersey to thousands of small and medium-sized employers from every sector of the economy. Its mission is to provide information, service, and advocacy for its members to build a more prosperous New Jersey. As a group, NJBIA's members employ over one million people. One of its goals is to advance business prosperity within the State, which includes the reduction of unwarranted litigation burdens. See New Jersey Business & Industry Association, About NJBIA, https://www.njbia.org/about/.

Since its founding in 1927, CIANJ has been dedicated to leading free enterprise advocacy to provide an economic climate that fosters business potential through education, legislative vigilance, and membership interaction. CIANJ's primary objective is to make New Jersey a better place to live, work, and do business. CIANJ's nearly 1,000 members consist of

Fortune 100 companies and sole proprietors representing a variety of enterprises and industries. See Commerce and Industry Association of New Jersey, About Us, http://www.cianj.org/about-us/.

NJ Chamber is an advocacy organization for business that actively supports legislation and regulation that will lead to economic growth, an improvement in the State's business climate, and job creation. Members of NJ Chamber are comprised of every industry that does business in the State, and include some of New Jersey's most prestigious and innovative companies. See New Jersey Chamber of Commerce, About the New Jersey Chamber of Commerce, https://njchamber.com/about.

Many of the proposed amici's members utilize arbitration agreements in their contracts. Using arbitration provides businesses and consumers/employees alike with a less expensive and faster method by which to resolve disputes, as compared with the often costly, time consuming, and burdensome process of litigation. Like other contract provisions, arbitration clauses are crafted based upon considerations of fairness, utility, and practicality. The FAA was created to support and protect arbitration because of the many benefits it provides to consumers, businesses and the economy as a whole.

These benefits, however, are jeopardized by state law that imposes stricter standards for the creation and enforcement of

arbitration agreements than are required for all other contracts. The proposed Amici, therefore, have a strong interest in advocating for this Court's intervention to ensure that the Appellate Division's ruling, which runs contrary to the FAA and established federal and state law, is corrected. The appellate panel's decision has the effect of establishing an additional burden to arbitration agreement formation that does not apply to all other types of contracts. As such, this Court should intervene.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The proposed Amici Curiae adopt and incorporate by reference the Procedural History and Statement of Facts set forth in the briefs of defendants-petitioners in their petition to this Court for certification.

LEGAL ARGUMENT

I. The Heightened Requirement For Establishing Mutual Assent To Arbitration That Was Established By The Appellate Division Below Violates The FAA And United States Supreme Court Precedent

The Appellate Division improperly found that the subject arbitration agreement was not enforceable because Defendant employer failed to adequately ensure that the employee explicitly and unmistakably assented to its terms. Such assurances, according to the panel, are required when dealing with contracts that waive an employee's statutory rights. By so holding, the Appellate Division violated the primary edict of

the FAA -- that arbitration agreements shall not be subject to different or more stringent requirements than all other contracts. If not reversed, the lower court's ruling will severely impede the ability of large businesses to enter into arbitration agreements with their employees, and flood the judicial system with cases where otherwise valid agreements will be overturned.

In 1925, Congress enacted the FAA[1] "to place arbitration agreements upon the same footing as other contracts" and to end the "longstanding judicial hostility" American courts adopted up to that point against arbitration agreements. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26, 36 (1991) (citation omitted). To achieve that purpose, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of **any** contract." 9 U.S.C. § 2 (emphasis added). Accordingly, arbitration agreements can be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,'" that would serve to negate all contract types, "but not by defenses that apply only to arbitration or that derive their meaning from the fact that an

[1] The New Jersey Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32, is substantially similar to its federal counterpart.

agreement to arbitrate is at issue." AT&T Mobility LLC Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742, 751 (2011).

In Kindred Nursing, the United States Supreme Court reaffirmed the FAA's guiding principle that arbitration agreements cannot be subject to unequal and more burdensome requirements than other contracts. In that case, two individuals held power-of-attorney for respective loved ones and entered into separate arbitration agreements with the defendant nursing home on their behalf. Kindred Nursing Centers Ltd. P'ship v. Clark, 581 U.S. ___, 137 S. Ct. 1421, 1425, 197 L. Ed. 2d 806, 810-811 (2017). The Kentucky Supreme Court found that the underlying power-of-attorney designations lacked specific and express language authorizing them to enter such an agreement for another individual. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 330 (Ky. 2015). Therefore, the subsequently executed arbitration agreements lacked mutual assent and were unenforceable. Id. In its analysis, the Kentucky Court noted that arbitration agreements take away "the right of trial by jury, which is the only thing that our Constitution commands us to 'hold sacred.'" Id. at 328 (emphasis in original) (citing Ky. Const. § 7). Thus, "the power to waive generally such fundamental constitutional rights must be unambiguously

expressed in the text of the power-of-attorney document in order for the authority to be vested." Id.

Perhaps recognizing the inherent conflict of its ruling with the FAA, the Kentucky Court emphasized that the subject arbitration agreements were ultimately rendered unenforceable due to a lack of mutual assent, which is a "specific and concise ground[]" that exists at law or equity and is "applicable to the formation of contracts generally." Id. at 328-29. The Court also reasoned that a power-of-attorney needs explicit authority to execute *any* contract where a fundamental right is being waived and therefore, the court's new requirement did not solely target arbitration agreements.[2] Id.

Critically, however, the United States Supreme Court was not persuaded by that justification, and found that Kentucky's clear statement requirement impermissibly "single[d] out arbitration agreements for disfavored treatment" in violation of the FAA. Kindred Nursing, 581 U.S. at ___, 137 S. Ct. at 1425, 197 L. Ed. 2d at 810. According to the United States Supreme Court, the FAA not only preempts state rules that discriminate against arbitration agreements on their face, but also

[2] The Court explained, for example, that it would not infer that a power-of-attorney, without such clear language, had the authority to waive a person's right to worship freely, put her child up for adoption, or consent to an arranged marriage. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 328 (Ky. 2015), rev'd in part, 581 U.S. ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017)

"displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." Id. at ___, 137 S. Ct. at 1426, 197 L. Ed. 2d at 812. "Such a law might avoid referring to arbitration by name", but nevertheless relies "on the uniqueness of an agreement to arbitrate as [its] basis -- and thereby violate[s] the FAA." Id. (internal quotation marks omitted).

Thus, the Kentucky Court erred by creating a special requirement aimed towards safeguarding the "sacred" right to a trial by jury because it essentially "adopt[ed] a legal rule [that] hing[ed] on the primary characteristic of an arbitration agreement." Id. at ___, 137 S. Ct. at 1427, 197 L. Ed. 2d at 812 (citing Concepcion, 563 U.S. at 341-42, 131 S. Ct. at 1746-47, 179 L. Ed. 2d at 742). Indeed, such a rule "is too tailor-made to arbitration agreements -- subjecting them, by virtue of their defining trait, to uncommon barriers -- to survive the FAA's edict against singling out those contracts for disfavored treatment." Id. Looked at practically, Kentucky's "clear-statement" requirement imposed a special impediment to the ability to enter into arbitration agreements, a consequence that contravenes the FAA's primary objective to place those agreements "on equal footing with all other contracts." Id. at ___, 137 S. Ct. at 1429, 197 L. Ed. 2d at 814.

Here, the Appellate Division committed the same error that the Kentucky Supreme Court did in Kindred Nursing by requiring a more exacting and clear manifestation of assent in order for arbitration agreements to be found enforceable solely because such agreements have the consequence of waiving a fundamental right. Indeed, the Appellate Division below repeatedly emphasized that the subject agreement concerned "the important context of an employer soliciting a waiver of an employee's statutory rights." Because an individual's right to a jury trial was at stake, the appellate panel held that employers must "substantiate an employee's 'explicit, affirmative agreement that unmistakably reflects the employee's assent' to a binding arbitration policy" in order for it to be enforceable. In other words, the Appellate Division created a special rule based on the primary characteristic of arbitration agreements, and thereby subjects them to uncommon barriers not shared by **all** other contracts. Not only is this more burdensome requirement not applicable to **all** other contracts under New Jersey law, as the FAA requires, but it also directly mirrors that which was overturned by the United States Supreme Court in Kindred Nursing. The Appellate Division's decision should therefore be reversed by this Court.

Moreover, to satisfactorily ensure that an employee assents to the terms of an arbitration agreement, the Appellate Division

held that employers must use the phrase "agree" or "agreement" in acknowledgment forms within close proximity to the signature block (in this case the "click box"). This requirement is impermissible for two reasons. First, it is well-established that contracts do not need magic words to be rendered enforceable. See, e.g., Ass'n. Group Life, Inc. v. Catholic War Veterans, 120 N.J. Super. 85, 95 (App. Div. 1971) (permitting acceptance of contract by performance). By requiring employers to use specific language in this context only, the Appellate Division is creating a discriminatory rule against arbitration agreements that does not apply to all contracts.

Second, the Appellate Division's holding violates United States Supreme Court Precedent. By directing employers to use certain language near the signature block, the Appellate Division essentially imitated the "clear statement rule" enunciated by the Kentucky Supreme Court in Kindred Nursing, which was later reversed on appeal. Moreover, the Appellate Division's demand for specific language essentially creates an improper notice requirement that only applies to arbitration agreements and therefore violates the FAA. In Doctor's Assocs. v. Casarotto, the United States Supreme Court was tasked with determining whether the FAA preempted a Montana State law that rendered arbitration provisions unenforceable unless there was notice in underlined capital letters on the first page of the

agreement explaining that the contract is subject to arbitration. 517 U.S. 681, 683, 116 S. Ct. 1652, 1654, 134 L. Ed. 2d 902, 906 (1996). Again, the Court explained that "state law may be applied [to negate an arbitration provision] 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally'"; however, "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." Id. at 686-87, 116 S. Ct. at 1656, 134 L. Ed. 2d at 908-09 (emphasis in original). Applying these principles, the Supreme Court found that Montana's law "directly conflict[ed] with § 2 [of the FAA] because the [] law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." Id. at 687, 116 S. Ct. at 1655, 134 L. Ed. 2d at 909 (emphasis added); Concepcion, 563 U.S. at 339, 131 S. Ct. at 1745, 179 L. Ed. 2d at 751 (holding that "courts must place arbitration agreements on equal footing with other contracts . . . and enforce them according to their terms"). The Appellate Division's requirement that the words "agree" or "agreement" be used within or in close proximity to the signature block is a special rule not applicable to other contract types and, in light of Kindred Nursing and Casorotto, directly violates the FAA.

CONCLUSION

For the foregoing reasons, proposed Amici Curiae NJBIA, NJCJI, and NJ Chamber respectfully request that this Court grant them leave to appear as Amici Curiae, and reverse the Appellate Division's decision.

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