No. 23-3177

In the United States Court of Appeals
for the Third Circuit

CHARLES ADLER, ET AL.,
Plaintiffs-Appellants,

v.

GRUMA CORP.,
Defendant-Appellee.

On Appeal from the U.S. District Court for the District of New Jersey,
Case No. 3:22-cv-06598-RK-DEA (Honorable Robert Kirsch)

APPELLANTS' OPENING BRIEF

Hannah M. Kieschnick
PUBLIC JUSTICE
475 14th St., Ste. 610
Oakland, CA 94612
(510) 622-8150
hkieschnick@publicjustice.net

Shelby Leighton
PUBLIC JUSTICE
1620 L St. NW, Ste. 630
Washington, DC 20036
(202) 797-8600
sleighton@publicjustice.net

Stephen J. Brown
Susan E. Galvão
David Chen
BLEAKLEY PLATT & SCHMIDT, LLP
One North Lexington Ave.
White Plains, NY 10601
(914) 949-2700
sbrown@bpslaw.com
sgalvao@bpslaw.com
dchen@bpslaw.com

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure and Third Circuit Rule 26.1, the undersigned certifies that there is no publicly traded company or corporation with an interest in the outcome of the case that has not already been disclosed to this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Charles Adler and his son Grant worked as distributors for Gruma Corporation, one of the world's largest tortilla and corn flour producers. Gruma uses a network of distributors to transport its popular products—such as Mission Foods tortillas—across state lines from its manufacturing facilities to regional warehouses and distribution centers to grocery and other retail stores. The Adlers were responsible for the last leg of that journey in Central New Jersey.

That is, until they and other distributors grew frustrated by their pay and working conditions and met with legal counsel to discuss their rights. Gruma immediately terminated its longstanding employment agreement (called a "Store Door Distribution Agreement," or SDDA) with the Adlers' company, as well as its agreements with the other distributors who attended the meeting. The Adlers then sued in federal court to challenge their termination and recover unpaid wages and other payments they were owed under New Jersey and federal law. In response, Gruma moved to compel arbitration under an arbitration provision in the SDDA that only the Adlers' company, and not the Adlers themselves, had signed. The district court compelled arbitration and dismissed the case.

At every turn, the district court departed from well-established precedent. Most fundamentally, the district court ignored the directive from the Supreme Court and this Court that it begin by confirming whether it had authority to compel

arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*. Instead, it seems to have just assumed that it did. It did not: Because the Adlers are transportation workers engaged in interstate commerce, the SDDA is exempt from the FAA.

But even if the court did have authority under either the FAA or state law to compel arbitration, it muddled the remainder of its analysis too. Its decision to apply Texas rather than New Jersey contract law cannot be squared with the requirement that a choice-of-law analysis consider not just the parties' contacts with the respective states, but also those states' fundamental public policies. And the court mistakenly found that the Adlers can be bound by an arbitration provision in a contract they did not sign.

The district court ended by reaching an argument it should not have and ignoring an argument it needed to address. Although Gruma waived its rights under a provision in the SDDA that delegates to the arbitrator questions of enforceability, the district court faulted the Adlers for not challenging that provision and then enforced it *sua sponte*. And in compelling arbitration, the court entirely ignored the Adlers' dispositive argument that their statutory claims did not fall within the scope of the SDDA's arbitration provision at all.

The district court's decision obscures what is simple. It did not have authority to compel arbitration under either the FAA or any state arbitration act,

and the parties did not form a valid arbitration agreement that can be enforced against the Adlers or applied to their statutory claims. The Adlers' claims belong in court, not arbitration, and this Court should reverse.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction over this action under 28 U.S.C. § 1331 because the Adlers brought federal claims under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201, and supplemental jurisdiction under 28 U.S.C. § 1367 because the Adlers brought related claims under New Jersey law.

The district court granted Gruma's motion to compel arbitration and dismiss this action on November 13, 2023. Joint Appendix (JA) 7-8. The Adlers timely appealed on December 8, 2023. JA6; Fed. R. App. P. 4. Because the district court's order dismissed the complaint, JA7-8, it was a final, appealable order and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in failing to consider whether the Adlers are transportation workers engaged in interstate commerce under § 1 of the FAA, and in failing to confirm that it had authority to compel arbitration before doing so. *See* JA28 n.8; ECF 14, Opp. to Mot. to Dismiss & to Compel Arb. (Opp.), 25-26; ECF 15, Reply, 13-14.

2. Whether the district court erred in concluding that, under New Jersey's choice-of-law rules, Texas and not New Jersey law applies to the distribution agreement and its arbitration provision. *See* JA13-21; ECF 7-1, Mot. to Dismiss & Compel Arb. (Mot.), 10-15; Opp. 7-11; Reply 2-7.

3. Whether the district court erred in holding that a valid arbitration agreement was formed between Gruma and the individual Adlers, even though Charles and Grant did not sign the distribution agreement. *See* JA23-24; Mot. 20-30; Opp. 21; Reply 10-11.

4. Whether the district court erred in holding that the enforceability of the arbitration provision was a question for the arbitrator, not the court, to decide, even though Gruma waived its rights under the delegation clause by choosing not to invoke it in the district court. *See* JA24-28; *see generally* Mot. & Reply.

5. Whether the district court erred in not addressing the Adlers' argument that their statutory claims fall outside the scope of the arbitration provision. *See* Mot. 19-20; Opp. 16-22; Reply 8-10; *see generally* JA9-29.

RELATED CASES AND PROCEEDINGS

There are no related cases and there have been no prior appeals in this case.

STATEMENT OF THE CASE

I. Factual Background

A. Gruma uses distributors to deliver its products around the country.

Gruma is one of the world's largest tortilla and corn flour producers. JA31 ¶ 2. The company uses a "store door distribution system" to transport its products from its manufacturing facilities onto store shelves around the country. JA31-32 ¶ 5; JA41 ¶ 34; JA76. Under this system, Gruma contracts with distributors, who must purchase the right to operate a distribution route in a defined geographic territory. JA41 ¶ 35. These distributors transport Gruma's products from manufacturing facilities, warehouses, and distribution centers to grocery stores and other large retailers in every state.

B. Gruma and C. M. Adler, LLC enter into a "Store Door Distribution Agreement."

Charles Adler and his son Grant are the individual plaintiffs in this case. In 2014, Charles formed C. M. Adler, LLC, the third plaintiff,[1] for the sole purpose of purchasing and operating one of Gruma's distributor routes in Central New Jersey. JA41-42 ¶¶ 34-37; JA121-22 ¶ 6. At that time, Gruma maintained a warehouse and distribution center in Elizabeth, New Jersey. JA122-23 ¶ 15. The Gruma

[1] This brief refers to the three plaintiffs collectively as "the Adlers" and to Charles and Grant Adler as the "individual Adlers."

employees who oversaw the Adlers' route worked out of that warehouse, including then-district manager, Shawn Conlon. JA122-23 ¶¶ 14-16, 18. To purchase a distribution route, Charles and his mother Mary, who was the LLC's CFO, met with Mr. Conlon in New Jersey. JA123 ¶ 18. Mr. Conlon presented Charles and Mary, who were not represented by an attorney, with a prepared SDDA between Gruma and C. M. Adler, LLC, which he described as a "basic contract," and told them to sign. JA123 ¶¶ 18-19, 22-23. Neither Charles nor Mary had seen the SDDA before, and Mr. Conlon did not explain the terms or that it contained an arbitration provision. JA123 ¶¶ 20-22. Mary signed as C. M. Adler, LLC's CFO, JA99; JA123 ¶ 17, and Charles gave the manager a deposit, JA123 ¶ 23. In 2016, Charles's son Grant joined the family business to work as a distributor for Gruma, too. JA122 ¶ 9.

C. The Adlers sold and delivered Gruma products along their route in Central New Jersey.

The Adlers leased warehouse space in New Jersey to receive shipments of Gruma's tortillas and other products from a manufacturing plant in Mountaintop, Pennsylvania. JA122 ¶¶ 11-12; JA123-24 ¶¶ 24, 26; JA77 ¶ 1(c). A "large component" of the Adlers' work was transporting these products to their final destinations: retail stores in the Trenton area. JA124 ¶ 25. They would load the shipments onto their trucks, transport the products to customers, make sales,

unload the products, and help customers put them on shelves and displays. JA123 ¶ 24. The Adlers performed this work exclusively for Gruma. JA42 ¶ 41.

Although the SDDA labels distributors like the Adlers as "independent sales and distribution contractors," JA91 ¶ 11, Gruma exercises significant control over their work. For example, Gruma distributors may sell only the products Gruma approves, JA85 ¶ 7(c); JA44 ¶ 49; JA48 ¶ 58(m), and only to Gruma-approved "Eligible Customers" within their specific territory, JA81 ¶ 2(a); JA43 ¶ 48; JA47 ¶ 58(i). Gruma also requires distributors to lease from Gruma handheld devices and accounting software to handle all aspects of purchasing, invoicing, and selling Gruma products. JA86 ¶ 7(g); JA107; JA44 ¶ 52; JA46-47 ¶¶ 58(f), 58(g). The company uses these devices to fix standard prices and to monitor distributors' compliance with its pricing and invoicing requirements. JA45 ¶ 53; JA46 ¶ 58(b). It also regularly requires distributors to offer special deals to Gruma's customers, using Gruma's promotional aids, again at prices it sets. JA47 ¶ 58(k); JA77 ¶ 1(b)(iv); JA84 ¶ 5(a). In addition, Gruma's district managers regularly inspect and approve distributors' delivery trucks and warehouses, JA38 ¶ 24; JA46 ¶ 58(e); JA85 ¶ 7(d); JA87 ¶ 8(c), and regularly meet with customers to check up on distributors' performance, JA48 ¶ 58(n).

Being a distributor for Gruma is hard work for not all that much pay. Gruma paid C. M. Adler, LLC an average of approximately $104,000 per year between

2016 and 2021. *See* JA115-20. Out of that amount, the Adlers had to pay the costs and expenses associated with distribution, like leasing the warehouse, maintaining delivery trucks, paying for tolls and gas, leasing Gruma's handheld devices, and bearing the cost of unusable product, leaving little take-home pay for Charles or Grant. JA124 ¶ 29; JA37 ¶ 22; JA40 ¶ 32.

D. Gruma terminated C. M. Adler, LLC's contract after the Adlers organized with other distributors to discuss their legal rights.

In May 2022, frustrated by Gruma's pricing and labor practices, the Adlers and other distributors met with legal counsel at the Adlers' warehouse to discuss their rights under federal and state labor laws. JA49-50 ¶¶ 61-63; JA125 ¶¶ 30-32. Gruma found out about the meeting, however, and swiftly and unilaterally terminated the SDDA with C. M. Adler, LLC. JA50 ¶¶ 64-65; JA125 ¶¶ 33-34. Gruma also terminated the contracts of at least four of the other distributors who met with legal counsel. JA51 ¶ 73; JA125 ¶ 35.

II. Procedural Background

A. The Adlers filed this lawsuit to challenge Gruma's labor practices.

In the wake of the termination, Charles, Grant, and C. M. Adler, LLC filed this lawsuit. The complaint includes causes of action for violations of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*; the New Jersey Wage Payment Law (NJWPL), § N.J.S.A. 34:11-4:1, *et seq.*; the New Jersey Wage and Hour Law (NJWHL), N.J.S.A. § 34:11-56a, *et seq.*; and the New Jersey Franchise

Practices Act (NJFPA), N.J.S.A. § 56:10-1, *et seq.*; as well as claims for rescission, unjust enrichment, and breach of the covenant of good faith and fair dealing under New Jersey law. JA52-73 ¶¶ 79-198. Among other things, they claim Gruma misclassified the individual Adlers as independent contractors instead of employees or franchisees, and that, as a result, it owes the Adlers wages, overtime, and reimbursements. JA41-49 ¶¶ 34-60. They also claim to have been unlawfully terminated in retaliation for engaging in protected activity—organizing and meeting with legal counsel to discuss their rights. JA49-52 ¶¶ 61-75.

B. Gruma moved to compel arbitration.

Gruma moved to dismiss the complaint and compel arbitration under the FAA and the Texas Arbitration Act (TAA), Tex. Civ. Prac. & Rem. Code § 171.021. The company asked the district court to enforce the SDDA's arbitration provision, which covers:

> any and all other claims and causes of action arising out of or relating to this Agreement (including, without limitation, matters relating to this Subsection 15(i) regarding arbitration, matters relating to performance, breach, interpretation, meaning, construction, or enforceability of all or any part of this Agreement, and all claims for rescission or fraud in the inducement of this Agreement).

JA96 ¶ 15(i)(ii). The SDDA also contains a "governing law" provision:

> This Agreement shall be governed by and construed in accordance with the laws of the State of Texas. The Federal Arbitration Act, 9 U.S.C. § 1 et seq. shall also apply as needed to uphold the validity or enforceability of the arbitration provisions of this Agreement.

JA98 ¶ 15(k). Relying on these provisions, Gruma argued that the court should compel arbitration under federal or Texas law for two reasons.

First, applying both the FAA and TAA, Gruma asked the district court to hold that the Adlers' claims fell within the scope of the arbitration provision and that it was otherwise enforceable. Mot. 15-20. Second, Gruma relied on a "direct benefits" equitable estoppel theory under federal and Texas law to argue that the arbitration provision should not only apply to C. M. Adler, LLC, but also to Charles and Grant, who had not signed the SDDA, because, Gruma said, their statutory claims depended on that contract. *Id.* 20-30.

The Adlers opposed. They argued that the SDDA was exempt from the FAA as a contract of employment for transportation workers engaged in interstate commerce. Opp. 25-26. They also argued that New Jersey law should apply to the arbitration provision because applying Texas law would be contrary to New Jersey's fundamental policies, particularly because they are New Jersey citizens seeking to vindicate their rights under New Jersey law based on conduct that took place in New Jersey. *Id.* 7-11. And they offered several reasons why the parties had not formed a valid arbitration agreement, including that Charles and Grant had not signed the SDDA, and that the arbitration provision did not comply with New Jersey's clear-notice requirement for waiving the right of access to court. *Id.* 12-16, 21. They further explained that, even if a valid agreement were formed, their

statutory claims did not fall within the scope of that agreement, *id.* 16-22, and it was unenforceable because it was unconscionable and violated New Jersey's protections for franchisees, *id.* 22-25, 26-27.

In its reply, Gruma reiterated that under federal and Texas law, the parties, including Charles and Grant, formed a valid and enforceable arbitration agreement that covered statutory claims. Reply 2-13. Gruma also claimed that § 1 of the FAA did not apply because the individual Adlers' "transport of goods" was "incident[al]" to other work they performed. *Id.* 13-14.

C. The district court granted the motion and compelled arbitration.

The district court granted Gruma's motion, compelled arbitration, and dismissed. The court did not decide whether it had the authority to do so under the FAA, or whether, as the Adlers had argued, the SDDA was exempt from the FAA under its transportation-worker exemption. JA28 n.8. Instead, the district court said that whether the exemption applied was an "issue[] pertaining to arbitrability" to "be decided by an arbitrator." *Id.*

Skipping this threshold question, the court started with which state's contract law should govern the formation and enforceability of the arbitration agreement under choice-of-law principles. The court concluded that Texas law applied because—although the case was brought by New Jersey citizens under New Jersey law based on conduct that occurred in New Jersey—Gruma was headquartered in

Texas. JA18-19. On balance, therefore, New Jersey did not have a "materially greater interest" in its laws being applied. JA19. Although the Adlers offered multiple ways in which applying Texas law would offend New Jersey's public policies, the court considered, and rejected, only one: New Jersey's requirement that waivers of the right to bring statutory claims in court be clear and unambiguous. JA19-21.

Then, applying case law interpreting the FAA despite not having ruled on its application, the court turned to whether the parties had formed a valid arbitration agreement. It said yes, reasoning that the provision could be enforced against the individual Adlers as non-signatories under the arbitration-specific doctrine of direct-benefits estoppel. The court accepted Gruma's arguments that the individual Adlers benefited from the SDDA during the performance of the contract and that their statutory claims were "based on the SDDA." JA23-24.

Rather than consider questions of scope and enforcement next, the court concluded that, under Fifth Circuit precedent interpreting the FAA, that the SDDA delegated to the arbitrator all enforceability questions. JA24-28. The district court took this step even though Gruma never invoked the agreement's delegation clause and instead asked *the court* to decide enforceability. Even so, and overlooking the Adlers' scope argument entirely, the court ordered arbitration. JA28.

The Adlers timely appealed. JA6.

SUMMARY OF THE ARGUMENT

The district court committed five independent legal errors, each of which is grounds for reversal.

First, the district court erred in skipping the Adlers' threshold argument that the SDDA is not subject to the FAA as a contract of employment for transportation workers engaged in interstate commerce. Under binding Supreme Court precedent, the application of the FAA's transportation-worker exemption is a question for a court, not an arbitrator, that must be decided first because it goes to the court's authority to compel arbitration. Had the district court engaged in that analysis, it would have been clear: The Adlers are, as a matter of law, exempt from the FAA. And while Gruma alternatively asked the court to compel arbitration under the TAA, there is no evidence the court did so. If it had, that would have been error for the simple reason that the SDDA provides that arbitration issues will be governed by only the FAA, not Texas law.

Second, the district court erred in concluding that Texas contract law applies to the SDDA's arbitration provision. This Court has held that New Jersey's choice-of-law rules require courts to consider the states' respective public policies, and the district court failed to meaningfully account for New Jersey's interests in this matter. Those interests are profound, not only because the gravamen of this suit takes place in New Jersey, but also because applying Texas law would offend New

Jersey's fundamental public policies regarding contractual waivers of constitutional and statutory rights and arbitration clauses in franchise agreements.

Third, the district court erred in concluding that, under direct-benefits estoppel, the individual Adlers are bound by an arbitration provision they did not sign. Because direct-benefits estoppel deviates from the requirements for equitable estoppel outside the arbitration context, it runs headlong into Supreme Court precedent holding that the FAA prohibits courts from applying arbitration-specific rules. But even if direct-benefits estoppel remains good law in Texas, the court mistakenly applied it to the Adlers, who do not seek to enforce or directly benefit from the SDDA and instead bring mostly statutory claims.

Fourth, the district court, not an arbitrator, should have decided whether the arbitration provision in the SDDA was enforceable. The court held that enforceability should be decided by an arbitrator because the SDDA contained a provision (the "delegation clause") delegating enforceability to the arbitrator. But Gruma waived its rights under that provision by failing to invoke it and instead arguing enforceability to the court. The court was bound by that waiver and got it backwards when it faulted the *Adlers* for not specifically challenging the contractual provision *Gruma* failed to raise. The district court compounded that error by misinterpreting FAA case law (again, without having confirmed the FAA

even applies) to require that the Adlers challenge the delegation clause on different grounds than their challenge to the arbitration agreement as a whole.

Fifth, the district court ignored entirely the Adlers' argument about scope. The court should not have compelled arbitration without deciding whether the Adlers' statutory claims are within the arbitration agreement's scope, as the plain text of that agreement extends only to contractual claims.

ARGUMENT[2]

I. The district court erred in compelling arbitration without confirming it had statutory authority to do so.

The district court committed reversible error when it failed to address one of the Adler's primary arguments against Gruma's motion to compel: that the SDDA is exempt from the FAA because the Adlers are drivers responsible for the last leg of the interstate journey of Gruma's products from its plant in Pennsylvania to store shelves in New Jersey. *See* 9 U.S.C. § 1. The court held that the application of the FAA exemption was an "issue[] pertaining to arbitrability" to "be decided by an arbitrator," JA28 n.8, and then compelled arbitration. That was doubly wrong. First, case law from the Supreme Court and this Circuit require the court, not an arbitrator, to decide whether the FAA exemption applies. Second, even if state law

[2] This Court reviews *de novo* an order granting a motion to dismiss and compel arbitration. *Harper v. Amazon Servs., Inc.*, 12 F.4th 287, 292 n.3 (3d Cir. 2021).

can provide independent authority to compel arbitration, this Circuit requires a court to address the FAA exemption and whether the FAA applies *before* considering applicable state law. The district court did not. And in any event, the SDDA specifies no state arbitration law to apply in the absence of the FAA. Because the court lacked statutory authority to compel arbitration, its decision should be reversed.

A. The district court, not an arbitrator, was required to decide whether the FAA exemption applies.

The FAA requires courts to enforce private arbitration agreements. But although broad, the FAA is not unbounded. Section 1 of the Act exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1, which the Supreme Court has interpreted to exempt "only contracts of employment of transportation workers," *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Here, the Adlers argued that the SDDA was exempt under § 1 of the FAA because they are transportation workers engaged in moving Gruma products in the continuous stream of interstate commerce. The court relegated that argument to a footnote, holding that it was for the arbitrator to address. JA28 n.8. That was error.

The Supreme Court and this Court have squarely held that the application of § 1 is "an antecedent statutory question" for *a court*, not an arbitrator, to decide—even in the presence of a delegation clause. *New Prime Inc. v. Oliveira*, 586 U.S.

__, 139 S. Ct. 532, 537-38 (2019); *Singh v. Uber Techs. Inc.*, 939 F.3d 210, 215 (3d Cir. 2019) (under *New Prime*, "courts must be the ones to determine whether an agreement is excluded from FAA coverage even where there is a delegation clause"). This is because, if the FAA does not apply because the contract in question is exempt under § 1, the court lacks the authority under § 4 of the FAA to compel arbitration of any dispute, including ones about "arbitrability." *New Prime*, 139 S. Ct. at 537-38. Because the court violated the clear rule that it could not delegate this threshold question to the arbitrator, its decision should be reversed.

B. The court erred by compelling arbitration without first addressing whether the FAA exemption applied, which it does.

Instead of addressing the Adlers' § 1 argument, the district court appears to have just assumed the FAA applied. Although Gruma moved to compel arbitration under both the FAA and the TAA, the court relied only on cases interpreting the FAA (albeit mostly Fifth Circuit cases rather than this Court's precedent). *See, e.g.*, JA25 (citing *Maravilla v. Gruma Corp.*, 783 F. App'x 392, 395 (5th Cir. 2019) (per curiam)). Even the Texas Supreme Court case the district court cited for what "a party seeking to compel arbitration must establish" "[i]n Texas" involved an arbitration agreement subject to the FAA, not the TAA. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001) (cited at JA21). But even if the district court did rely on the TAA as an independent source of authority, the district court's

failure to first address the FAA exemption before applying state arbitration law was reversible error.

Because application of the § 1 exemption affects its authority to compel arbitration, a court must follow a specific order of operations should the party resisting arbitration argue, as here, that the FAA does not apply. *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287, 293-94 (3d Cir. 2021). The court must start by evaluating "in the first instance" the transportation-worker exemption under § 1 and whether the FAA applies. *Id.* at 293, 296 n.8. Only in the rare instance in which the answer at step one is "murky" and requires discovery is the court to assume the FAA does not apply and consider next whether "any applicable state law" requires arbitration. *Id.* at 296. Finally, if the answer at the second step is "no," the court then must resolve the application of the FAA, including by ordering discovery. *Id.* If the FAA does not apply and there is no applicable state law, the court lacks authority to compel arbitration.

The district court failed to follow this sequence. By leaving § 1's application to the arbitrator, it skipped the first step and ignored *Harper*'s mandate that "whether § 1's exclusion applies is a threshold inquiry." 12 F.4th at 293; *see also Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1353 (11th Cir. 2021) (court "would only look to state arbitration law *after* [it] decided the federal issue of whether the transportation worker exemption applied to the drivers") (emphasis in original).

Starting with the FAA makes sense. The FAA automatically applies to contracts that fall within its scope, except as narrowed by § 1's exemption. *See Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1303 (11th Cir. 2014) (explaining that "a court must resolve arbitration disputes according to the FAA" if it applies). Thus, parties to such contracts cannot "'opt out' of FAA coverage in its entirety." *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 288 (3d Cir. 2010). And because the FAA will preempt inconsistent state laws, it is necessary to know before compelling arbitration under state law whether the FAA applies. For example, an arbitration provision that prohibits class actions would be enforceable under the FAA should it apply, *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011), but may not be enforceable under state law should the FAA not apply, *see, e.g.*, *Pace v. Hamilton Cove*, 295 A.3d 1251, 1257-58 (N.J. Super Ct. App. Div. 2023). Or, as another example, state law may not apply "the same pro-arbitration interpretive rule" to an arbitration agreement's scope that courts have applied under the FAA. *See Calderon v. Sixt Rent a Car, LLC*, 5 F.4th 1204, 1213-14 (11th Cir. 2021) (deciding FAA's applicability before addressing scope).

Had the court followed *Harper*'s directive to first address whether § 1 applies, it would have been clear the question is not "murky" at all: Because the Adlers are transportation workers engaged in interstate commerce, the SDDA is

exempt from the FAA. Whether § 1 applies is a "question of law that typically can be resolved without facts outside the well-pleaded complaint." *Harper*, 12 F.4th at 293. And here, the Adlers have offered not just their complaint but also an unrebutted declaration from Charles about the nature of the Adlers' work. *See* JA121-26.

Both the Supreme Court and this Court have held that workers need not themselves cross state lines to be considered transportation workers engaged in interstate commerce under § 1 of the FAA, so long as they "play a direct and necessary role in the free flow of goods across borders." *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (internal quotation marks omitted); *Harper*, 12 F.4th at 293 (§ 1 applies to the contracts of workers engaged in interstate commerce "or in work so closely related thereto as to be in practical effect part of it" (internal quotation marks omitted)).

Courts of appeal widely agree that last-leg drivers like the Adlers fit that definition. For example, *Canales v. CK Sales Co., LLC*, 67 F.4th 38, 40-41 (1st Cir. 2023), involved distributors for a nationwide baked-goods company that, like Gruma, "uses a 'direct-store-delivery' system." The First Circuit concluded that the distributors were exempt transportation workers under § 1 because, like the Adlers, they would pick up from a warehouse baked goods the company had shipped across state lines and deliver them to stores in their territory. *Id.* at 41, 46.

Likewise, the Ninth Circuit held that the exemption applied to contracts of Domino's distributors who transported ingredients from the franchisor's supply center to franchisee stores because the ingredients' "entire journey represented one continuous stream of commerce." *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135, 1137-38 (9th Cir. 2023); *see also, e.g.*, *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904, 915-16 (9th Cir. 2020) (Amazon "flex" drivers engaged in interstate commerce by transporting packages coming from out of state); *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 26 (1st Cir. 2020) (same). In short, last-leg drivers play a "direct and necessary role" in the flow of goods across state lines because, without these drivers making deliveries from warehouses to customers, the interstate journeys of these goods would be incomplete.

Like the distributors in *Canales* and *Carmona*, the Adlers played a direct and necessary role in the flow of Gruma's products in interstate commerce. It is undisputed that the Gruma products the Adlers transported came to New Jersey from a Gruma facility in Pennsylvania. JA124 ¶ 26; JA77 ¶ 1(c). It is also undisputed that the Adlers transported these products from their warehouse to the products' final destinations: retail stores in New Jersey. Instead, Gruma's main argument below was that the Adlers *also* did non-transportation work. Reply 14. But it is undisputed that the Adlers spent a "large component" of their time transporting Gruma goods, JA124 ¶ 25, and that's sufficient for § 1. *See Saxon*,

596 U.S. at 456 (relying on "uncontroverted declaration" that cargo ramp supervisor "frequently" filled in for supervisees loading and unloading cargo, even though she also had other job responsibilities, to conclude that supervisor was exempt under § 1).

This Court is well-positioned to decide based on the record before it, including Charles's unrebutted declaration, that the Adlers are, as a matter of law, transportation workers engaged in interstate commerce. As such, the district court lacked authority under the FAA to compel arbitration of this dispute and its decision should be reversed.

C. The district court could not have compelled arbitration under state law because the agreement does not authorize it to do so.

Under *Harper*, the district court could not have evaluated whether to compel arbitration under state law without finding either that the § 1 exemption applies (it does), or that its application is "murky" (it is not). The district court did neither. *Supra* Part I(B). But even if the district court had recognized that § 1 was a question for the court *and* properly followed the first step as outlined in *Harper*—either concluding or assuming the FAA did not apply—it *still* committed reversible error under *Harper* by not then analyzing whether the agreement gave it authority to compel arbitration under the TAA. 12 F.4th at 295. The agreement does not. While this Court has recognized that a federal court can compel arbitration under state law, *see, e.g.*, *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 596 (3d Cir.

2004), the arbitration agreement must provide some "applicable state law" to do so, *Harper*, 12 F.4th at 296. Because the SDDA does not specify any state law, Texas or otherwise, to govern the enforcement of the arbitration agreement, it was error for the court to effectively rewrite the agreement and compel arbitration.

Determining whether there is any applicable state law under which to compel arbitration starts with the "fundamental principle that arbitration is a matter of contract," and an arbitration agreement may be enforced only so far as its terms go. *Concepcion*, 563 U.S. at 339; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). The SDDA's governing-law provision distinguishes between the substantive law governing the "Agreement" overall ("the laws of the State of Texas"), and the law governing the "validity or enforceability of the arbitration provisions of this Agreement" specifically (the "Federal Arbitration Act"). JA98 ¶ 15(k). So, per the text, Texas law applies to the former, and the FAA applies to the latter.

Had the parties intended the TAA to provide an alternative ground for compelling arbitration if the FAA did not apply, the SDDA would have said so. A general choice-of-law provision like the SDDA's reference to Texas is not sufficient to invoke a state's particular arbitral code rather than its substantive law. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-64 (1995). In

Mastrobuono, the Supreme Court held that a provision stating that the agreement "shall be governed by the laws of the State of New York" meant only "to encompass substantive principles" of New York contract law and did not also "incorporate[] 'New York law relating to arbitration.'" *Id.* The Supreme Court distinguished that sentence from the next, which did specifically refer to the rules that governed arbitration, explaining that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other." *Id.* at 64; *see also Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 711 (3d Cir. 2009) (rejecting plaintiffs' argument that generic Delaware choice-of-law provision meant that Delaware Uniform Arbitration Act, rather than FAA, governed arbitration agreement).

So, while parties may be able to include state arbitration law as a contingency, they must do so explicitly. That's what the parties did in *Palcko*. The choice-of-law provision in that contract read: "To the extent that the [FAA] is inapplicable, Washington law pertaining to agreements to arbitrate shall apply." *Palcko*, 372 F.3d at 590. The SDDA's mere reference to Texas law, by contrast, is not sufficient to invoke Texas's *arbitration* law as a contingency.[3]

[3] The phrase "as needed" does not change this. *See* JA98 ¶ 15(k). Rather, that phrase merely reflects that the FAA is the law chosen to govern should a particular eventuality—questions about arbitration—arise. This phrase can't mean that the FAA applies only if state law doesn't because, as explained, the FAA is the

Thus, because the parties specified the FAA—and only the FAA—as the law governing the "validity or enforceability of the arbitration provisions," JA98 ¶ 15(k), the district court could not rewrite the governing-law provision and compel arbitration pursuant to the TAA. *See Singh*, 939 F.3d at 214 (arbitration agreements are enforced "according to their terms"). Instead, "there is no law that governs the arbitration provision," and therefore, "no valid arbitration agreement." *Rittman*, 971 F.3d at 921; *see id.* at 920 (interpreting text of agreement to preclude application of Washington arbitration law should the FAA not apply).

That approach is consistent with this Court's statement in *Harper* that, when the parties "have an agreement to arbitrate," "*some* law must" govern that agreement in the absence of the FAA. 12 F.4th at 294 (emphasis in original). While it is true that "some law" must apply to the formation and interpretation of the parties' contract, it does not follow that there is necessarily a statute that—in the absence of the FAA—confers on a federal court the power to order specific performance of that contract (*i.e.*, compel arbitration). Indeed, that was the whole reason the FAA was enacted: to confer on federal courts the power, which they otherwise lacked, to award the equitable remedy of compelling arbitration. *See Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 n.3 (2022).

---

starting point for questions of arbitration, not a backup for state law. S*upra* Part I(B).

Harper recognized as much, holding only that the district court should have considered whether, under the parties' agreement, Washington law provided an independent basis for compelling arbitration, not that it necessarily did so. *See id.* at 295 (acknowledging that the parties may not "have an agreement to arbitrate under state law at all"); *see also id.* at 295 n.6 (noting that courts had reached different conclusions as to whether, in the absence of the FAA, Washington law provided an independent basis to compel arbitration under the contract at issue). The district court here made the same reversible error as the district court in *Harper*: It failed to address whether, under the parties' agreement, state law gave it an independent basis to compel arbitration. But, had the court addressed the issue, it should have concluded that the SDDA did *not* provide an independent basis to compel arbitration under state law, and certainly not Texas law, *see infra* Part II.

***

This Court should conclude that the FAA does not apply as a matter of law because the Adlers are transportation workers engaged in interstate commerce under § 1 and reverse because, without the FAA or any applicable state law, the district court lacked the authority to compel arbitration.

II. The district court erred in applying Texas rather than New Jersey law.

Should the Court agree that the SDDA selects the FAA to the exclusion of state arbitration law and is exempt from the FAA, it should reverse without

addressing the district court's other errors. But if the Court holds either that the FAA applies or that it is not the exclusive source of the district court's authority to compel arbitration, it should conclude that the district court erroneously held that Texas, not New Jersey, law applied to the arbitration agreement.

As the forum state, New Jersey's choice-of-law rules apply. *See Osborn v. Griffin*, 865 F.3d 417, 443 (6th Cir. 2017) ("Federal courts exercising supplemental jurisdiction must apply the forum state's choice of law rules to select the applicable state substantive law."). And under those rules, New Jersey has a materially greater interest than Texas in its fundamental policies being applied here, where New Jersey residents seek to vindicate their rights under New Jersey law for violations that occurred in New Jersey.

New Jersey courts uphold a provision that selects a particular state's laws to govern the contract *unless* those laws "violate New Jersey's public policy." *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 614 A.2d 124, 133 (N.J. 1992). Like many states, New Jersey looks to the Restatement (Second) of Conflict of Laws (1971) § 187 to guide this analysis. *Id.* As relevant here, that section overrides a contractual choice of law when:

> application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2)(b). It is undisputed that, in the absence of the governing-law provision in the SDDA, New Jersey law would apply. *See generally* Mot. 10-15. The parties dispute only whether application of Texas law would offend a "fundamental policy" of New Jersey, and which state has a "materially greater interest" in its laws applying to the agreement. In resolving those disputes, the district court engaged in an unduly narrow analysis of the states' respective interests by focusing solely on the parties' contacts with New Jersey and Texas. JA16-19. The district court compounded this error by reluctantly considering, and misconstruing, only one of the Adlers' arguments about New Jersey public policy. JA19-21. Under the correct standard, New Jersey law applies.

A. Applying Texas law here is contrary to New Jersey public policy.

Applying Texas contract law to the SDDA's arbitration provision would offend three fundamental policies of New Jersey: the requirement that a waiver of the right to have claims heard in court be clear and unambiguous; the presumption against, if not outright prohibition of, arbitration of statutory rights; and the presumption against arbitration clauses in franchise agreements.

1. New Jersey has a fundamental policy of protecting its citizens' right of court access.

New Jersey law mandates that any contractual waiver of rights be "clear and unambiguous." *Atalese v. U.S. Legal Servs. Group, L.P.*, 99 A.3d 306, 315 (N.J. 2014). This requirement applies to arbitration agreements, which necessarily

involve a waiver of the constitutional and statutory rights to have claims and defenses heard in court and by a jury. *Id.* This is an issue of contract formation because there cannot be mutual assent when one party does not have notice of the terms to which they're agreeing, including "surrendering" the "constitutional right of access to the courthouse." *Morgan v. Sanford Brown Inst.*, 137 A.3d 1168, 1171 (N.J. 2016). Ensuring that the "time-honored right to sue" is waived only through clear and unambiguous language is "essential" to New Jersey public policy, particularly in the employment context. *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 670, 673 (N.J. 2001) (internal quotation marks omitted).

While there are no "magic words," an arbitration provision must at least provide notice "that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Atalese*, 99 A.3d at 315. In *Atalese*, the provision failed to do so because it did not explain that the plaintiff was "waiving her right to seek relief in court," did not mention either the "court" or "jury," and did not "explain what arbitration is" or "how arbitration is different from a proceeding in a court of law." *Id.* at 315-16. In contrast, the New Jersey Supreme Court upheld an arbitration provision that emphasized that claims "are subject to arbitration pursuant to the terms of this Agreement and will be resolved by arbitration and NOT by a court or jury. THE PARTIES HEREBY FOREVER WAIVE AND

GIVE UP THE RIGHT TO HAVE A JUDGE OR JURY DECIDE ANY COVERED CLAIMS." *Skuse v. Pfizer, Inc.*, 236 A.3d 939, 943, 951 (N.J. 2020).

The SDDA's arbitration provision is more like the contract in *Atalese* than the contract in *Skuse*. As in *Atalese*, the provision does not explain what arbitration is (except that it could be "quick, inexpensive and binding," JA97 ¶ 15(iv)) or how it differs from a judicial proceeding. The provision certainly does not have the emphasis of that in *Skuse*, let alone the express references to the court, judge, or jury. Therefore, under New Jersey law, the provision does not provide sufficient notice of the waiver of a judicial forum so as to form a valid arbitration agreement.

That would not be the case under Texas law. Unlike in New Jersey, Texas courts distinguish between arbitration agreements and other contractual waivers of the right to bring claims in court and before a jury on the basis that they "implicate significantly different policies and principles." *In re Credit Suisse First Boston Mortg. Capital, LLC*, 257 S.W.3d 486, 492 (Tex. Ct. App. 2008). While Texas courts require that non-arbitration contractual waivers be conspicuous and made knowingly and voluntarily, *id.* at 493, they do not impose such requirements on arbitration agreements on the theory that parties to an arbitration agreement "contractually opt out of the civil justice system altogether." *Id.*; *see also Chambers v. O'Quinn*, 305 S.W.3d 141, 149 (Tex. Ct. App. 2009) (per curiam) (no clear-waiver requirement because parties to arbitration agreements necessarily

waived those rights). As such, applying Texas law to the SDDA's arbitration agreement would frustrate New Jersey's carefully crafted rules around waiver.

2. New Jersey has a fundamental policy against arbitrating statutory claims.

New Jersey also has a fundamental policy against arbitrating statutory claims as reflected both in longstanding and exacting waiver requirements and a recent legislative prohibition on the prospective waiver of any statutory right or remedy.

New Jersey's requirement that waivers be "clear and unambiguous" also applies to whether the parties agreed to arbitrate statutory claims. *Atalese*, 99 A.3d at 313-14; *Garfinkel*, 773 A.2d at 672. As this Court has explained, for the parties to have formed an arbitration agreement under New Jersey law that covers statutory claims, the provisions must do so expressly. *Moon v. Breathless Inc.*, 868 F.3d 209, 214 (3d Cir. 2017). This does not mean an arbitration agreement must "list every imaginable statute by name to effectuate a knowing and voluntary waiver of rights." *Garfinkel*, 773 A.2d at 672. But it must "at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination" and reference "the types of claims included in the waiver," such as "workplace discrimination claims." *Id.* In *Garfinkel*, the arbitration agreement did not waive the plaintiff's right to bring their statutory claims in court because the provision did "not mention, either expressly or by

general reference, statutory claims" and instead referred only to "this Agreement, or the breach thereof," suggesting "the parties intended to arbitrate only those disputes involving . . . the contract itself." *Id.* at 667, 672; *see also Moon*, 868 F.3d at 217-18 (same for arbitration of FLSA, NJWPL, and NJWHL claims).

New Jersey recently reaffirmed its public policy against forced arbitration of statutory claims. In 2019, the legislature enacted a law stating that provisions in employment contracts that waive "any substantive *or procedural* right or remedy relating to a claim of discrimination, retaliation, or harassment" are "against public policy and unenforceable." N.J.S.A. § 10:5-12.7(a) (emphasis added). The law also provides that *any* "right or remedy" under *any* "statute or case law" cannot be prospectively waived. *Id.* § 10:5-12.7(b). This broad prohibition built upon New Jersey's longstanding presumption against arbitration of statutory claims. While previously, New Jersey law imposed exacting limitations on the waiver of the right to bring statutory claims in court, the state has now made clear that waivers of statutory employment rights—including waiver of the right to bring those claims in court—are against public policy, and that, even outside the employment context, prospective waivers of any statutory or common-law rights are invalid.[4]

[4] This state-law prohibition, which would be preempted should the FAA apply, underscores why the district court's failure to address whether the FAA applies is reversible error.

Under New Jersey's waiver requirements, and as confirmed by this 2019 legislation, the SDDA's arbitration provision is contrary to New Jersey public policy. As in *Moon*, the provision includes "a limiting reference to a contract," 868 F.3d at 216: that it covers only disputes "arising out of or relating to this Agreement," JA96 ¶ 15(i)(ii). And while the provision continues, it lists only examples of issues *related to contract disputes*: "matters relating to this Subsection 15(i) regarding arbitration, matters relating to performance, breach, interpretation, meaning, construction, or enforceability of all or any part of this Agreement, and all claims for rescission or fraud in the inducement of this Agreement)." *Id.* Because the contract does not mention statutory claims, it fails to satisfy even New Jersey's previous requirement that a waiver of the right to bring statutory claims in court be explicit.

Texas, by contrast, has no presumption or policy against arbitrating statutory claims. In Texas, an arbitration provision "need not speak directly to employment related disputes for it to mandate arbitration of [employment-related statutory] claims." *Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453, 456 (5th Cir. 1998). Instead, courts focus on whether the arbitration provision is "broad" or "narrow." Provisions that use phrases like "arising out of or relating to the contract" are considered broad. *In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562, 568 (Tex. Ct. App. 2000) (citation omitted). And when a provision is broad, "absent any

express provisions *excluding* a particular grievance from arbitration, only the most forceful evidence of purpose to exclude the claim from arbitration can prevail." *Id.* (citation omitted) (emphasis added); *id.* at 570-71 (statutory claims fell "within the scope of the arbitration clause" covering any claim "arising from or relating to" the contract); *see also Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 854-55 (N.D. Tex. 2014) (employment discrimination claims fell within scope of arbitration agreement covering any claim "arising under or in connection with this [employment] Agreement"). In other words, Texas and New Jersey apply opposite rules: Courts in Texas assume the parties agreed to arbitrate statutory claims unless the agreement expressly indicates otherwise, while courts in New Jersey assume the parties did *not* agree to arbitrate statutory claims unless the agreement expressly says so. Thus, applying Texas law here would frustrate New Jersey's policy, longstanding and recently reaffirmed by statute, against arbitration of statutory rights.

This is the one policy argument the district court did address. But in so doing, the court misunderstood the nature of the Adlers' argument, believing them to argue that the SDDA's arbitration provision was invalid because it waives their ability to bring certain statutory claims in any forum, judicial or arbitral. *See* JA19-20. But the thrust of the Adlers' argument was, and remains, that, unlike Texas, New Jersey has fundamental policies of protecting its citizens' time-honored right

to sue in court and limiting arbitration of statutory claims to specific circumstances. Accordingly, New Jersey imposes exacting requirements for an agreement to waive constitutional and statutory rights to bring claims in court, and the SDDA's provision fails those requirements.

3. New Jersey has a fundamental policy against arbitration clauses in franchise agreements.

Finally, New Jersey has a fundamental public policy against arbitration clauses in franchise agreements as reflected in the state's Franchise Practices Act (NJFPA), N.J.S.A. § 56:10-1, *et seq.* The New Jersey Supreme Court has held that forum-selection clauses are "presumptively invalid" in franchise agreements "because they fundamentally conflict with the [NJFPA's] basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act." *Kubis & Perszyk Assocs. v. Sun Microsys., Inc.*, 680 A.2d 618, 626 (N.J. 1996). Courts have interpreted *Kubis* and this presumption to apply to *arbitral* forum-selection clauses too, *see, e.g.*, *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998).[5]

[5] Gruma urged the district court to ignore the Adlers' argument under the NJFPA as preempted by the FAA, *see* Reply 14-15, and the court did. But preemption is not a concern if the SDDA is exempt from the FAA, against highlighting why the district court's failure to decide that issue is reversible error.

Gruma cannot overcome the presumption against arbitration clauses in franchise agreements.[6] A franchisor does so by showing that the arbitration requirement "was included in exchange for specific concessions to the franchisee." *Id.* at 627. That simply did not happen when the Adlers were presented with the SDDA and instructed to sign without negotiations. JA123 ¶¶ 18-23. That would not be a problem under Texas law, however. While the NJFPA demonstrates New Jersey's specific commitment to preventing "exploitation" of franchisees "by franchisors with superior economic resources," *Kubis*, 680 A.2d at 628, Texas has not demonstrated a similar commitment. The state does not have a franchise-specific law like the NJFPA and courts regularly enforce arbitration clauses in franchise agreements governed by Texas law. *See, e.g.*, *Saturn Distrib. Corp. v. Paramount Saturn, Ltd.*, 326 F.3d 684, 686-87 (5th Cir. 2003).

B. New Jersey has a materially greater interest in its laws being applied.

The bulk of the district court's analysis explained that neither New Jersey nor Texas had a materially greater interest in its laws being applied. That was also wrong. To determine which state has a "materially greater interest" under § 187 of the Restatement, a court evaluates the parties' "contacts" with each state, the law at

[6] The New Jersey Supreme Court assumed in *Kubis* that the agreement was a franchise agreement subject to the NJFPA to resolve the enforceability of the challenged forum-selection clause. 680 A.2d at 622. The Court should do the same here with respect to the SDDA to determine which states' laws apply.

issue, and the "policy reasons underlying the state's conflicting laws." *Homa v. Am. Express Co.*, 558 F.3d 225, 232 (3d Cir. 2009), *abrogated on other grounds by Concepcion*, 563 U.S. 333 (2011). New Jersey has a materially greater interest in having its laws applied to the SDDA's arbitration provision on all three grounds.

First, the parties have far more contacts with New Jersey. While Gruma is headquartered in Texas, JA111, the SDDA was executed in New Jersey, JA99; JA123 ¶ 18; C. M. Adler, LLC is a New Jersey company, JA121 ¶ 6; the individual Adlers are New Jersey citizens, JA39 ¶¶ 25-26; and they performed all their work for Gruma in New Jersey, JA122 ¶¶ 10-12; JA123 ¶ 24. What is more, Gruma is hardly a stranger to New Jersey, where it owns and operates at least one warehouse and distribution center, another office, and has at least dozens of employees and customers there. JA122-23 ¶¶ 13-16.

Second, the Adlers bring a combination of federal and New Jersey wage and hour and other statutory claims. *See Homa*, 558 F.3d at 232-33 (emphasizing that plaintiff alleged violations of New Jersey law); *Cabela's LLC v. Highby*, 801 F. App'x 48, 49 (3d Cir. 2020) (Nebraska had materially greater interest in its laws applying under § 187 where claims brought by Nebraska citizen based on contract "executed in Nebraska" were "partially based upon Nebraska law").

And third, New Jersey will suffer greater impairment of its policies if Texas law is applied. *See supra* Part II(A). This Court routinely takes into account states'

public policies when evaluating their respective interests in their laws being applied. *See Homa*, 558 F.3d at 232; *Kaneff v. Del. Title Loans, Inc.*, 587 F.3d 616, 624 (3d Cir. 2009) (concluding that Pennsylvania "has a materially greater interest than Delaware" under § 187, based on Pennsylvania's "fundamental policy").

Other Circuits also take into account states' public policies when determining which state has a materially greater interest in its laws being applied. For example, in *Waithaka*, the First Circuit explained that under § 187, "the question of whether [one state] has a 'materially greater interest'" is "subsumed" within the "argument that the fundamental policy" of the forum state "would result in the application of [that state's] laws" over the contract's choice-of-law provision. 966 F.3d at 34-35 (internal quotation marks, citation omitted); *see also Bridge Fund Cap. Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1003 (9th Cir. 2010) (the state with the "materially greater interest" under § 187 is the state which, "in the circumstances presented, will suffer greater impairment of its policies if the other state's law is applied" (internal quotation marks, citation omitted)).

The district court engaged in an unduly truncated analysis under § 187 to conclude that New Jersey does not have a "materially greater interest" than Texas, addressing only the first of the three factors articulated in *Homa*. In particular, the court relied on unpublished district court cases that concluded that neither New

Jersey nor the other state had a "materially greater interest" that would overcome the contractual choice of law. JA15-19. These cases involved a former employer, headquartered in one state, suing a former employee, residing and working in another state, for violating a non-compete clause. *See Diversant, LLC v. Carino*, 2018 WL 1610957, at *3 (D.N.J. Apr. 2, 2018); *Chemetall US Inc. v. Laflamme*, 2016 WL 885309, at *7-8 (D.N.J. Mar. 8, 2016); *Rosenberg v. Hotel Connections, Inc.*, 2022 WL 753445, at *4-5 (D.N.J. Oct. 13, 2022). And each case focused solely on the number of contacts the parties had with the states to quantify those states' interests, without addressing the other factors articulated in *Homa*. Relying on these cases, the district court concluded that it should start and end its analysis by counting the parties' contacts with New Jersey and Texas and, after concluding they were equal, ignore the other aspects of § 187.

This was error. As explained, under this Court's precedent, the "materially greater interest" inquiry under § 187 is not merely an exercise in head counting. It also takes into account the nature of the claims and the states' respective public policy interests. *Homa*, 558 F.3d at 232. And under that inquiry, New Jersey has a greater interest in its laws being applied here.

* * *

As the foregoing makes clear, had the district court properly conducted its choice-of-law analysis, it would have applied New Jersey law to the SDDA's

arbitration provision. And under New Jersey law, the parties did not form a valid and enforceable arbitration provision because the SDDA's provision violates New Jersey's clear-waiver requirements and the presumption against arbitration clauses in franchise agreements. This Court should therefore either reverse the district court's conclusion that Texas law applies and conclude that, under New Jersey law, the SDDA's arbitration provision is not valid or enforceable, or remand for the district court to consider the Adlers' arguments under New Jersey law.

III. The district court erred in holding that the arbitration agreement could be enforced against the individual Adlers even though they did not sign the distribution agreement.

The district court committed an additional reversible legal error by holding that an arbitration agreement was formed between Gruma and the individual Adlers, even though Charles and Grant did not sign the SDDA. The court recognized that the text of the SDDA did not bind Charles and Grant to the agreement. Even so, it relied on "Texas's 'direct benefits' estoppel theory" to hold that they could still be bound by its arbitration provisions because they both "pursued claims . . . based on the SDDA" and "acted as parties to the SDDA during the performance of the agreement." JA23 (citing *Bailey v. HealthSouth Corp.*, 2017 WL 664445, at *5 (E.D. Tex. Jan. 26, 2017), *R&R adopted*, 2017 WL

661964 (E.D. Tex. Feb. 16, 2017)). The district court's analysis was flawed for at least three reasons.[7]

First, in holding that the individual Adlers were bound under Texas's direct-benefits estoppel rule, the district court relied solely on a federal case applying the rule that, under the FAA, there is a "strong presumption in favor of arbitration." *Bailey*, 2017 WL 664445, *3. Since *Bailey* was decided, however, the Supreme Court clarified in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), that there is no such "strong presumption" under the FAA. As the *Morgan* Court explained, the FAA's "policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.'" *Id.* at 418 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967)); *see also id.* ("The federal policy is about treating arbitration contracts like all others, not about fostering arbitration.").

[7] The court also erred to the extent it suggested that the arbitrator must consider the Adlers' formation argument that the individual Adlers did not sign the SDDA because it went to "the parties' agreement as a whole, not specifically to the parties' agreement to arbitrate." JA23. True, challenges to the validity of the contract as a whole, as opposed to the arbitration clause specifically, go to the arbitrator. *See* JA22 (citing, *inter alia*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 441 n.1 (2006)). But that rule does *not* apply to disputes about contract formation, which need not be specific to the arbitration agreement, *Buckeye*, 546 U.S. at 444 n.1; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, 303-04 (2010); *see also MZM Constr. Co., Inc. v. N.J. Building Laborers Statewide Benefits Fund*, 974 F.3d 386, 399-402 (3d Cir. 2020). And, in any event, *Buckeye* doesn't require a *unique* challenge to the arbitration agreement, just a specific one. Here, the challenge *was* specific because it would apply to the arbitration provision standing alone and did not require reference to other provisions of the SDDA.

Not only is *Bailey* premised on an impermissible presumption, it also articulates an "arbitration-preferring procedural rule[]" that is no longer good law after *Morgan*. *Id.* at 419. The *Morgan* Court explained that "[t]he text of the FAA makes clear that courts are not to create arbitration-specific procedural rules" and that the FAA "is a bar on using custom-made rules[] to tilt the playing field in favor of (or against arbitration)." *Id.* That is precisely what the equitable estoppel rule that *Bailey* and the district court applied does.

Traditionally, under Texas law, "detrimental reliance" is a "central element of [] equitable estoppel[.]" *Gilmartin v. KVTV-Channel 13*, 985 S.W.2d 553, 558 (Tex. Ct. App. 1998); *see Purdin v. Wells Fargo Bank, N.A.*, 2016 WL 1161808, at *5 (N.D. Tex. Mar. 23, 2016) ("In an equitable or promissory estoppel claim [under Texas law], 'reliance is fundamental.'" (citation omitted)); *Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765 (Tex. Ct. App. 1992) ("Ordinarily, estoppel requires a showing of detrimental reliance by the party asserting the theory."). But the version of equitable estoppel from *Bailey* that the district court applied did not require detrimental reliance by Gruma. Instead, that version required only a showing that Charles and Grant benefited in some way from the contract between Gruma and C. M. Adler, LLC. JA23-24. In other words, it applied a different rule because the contract at issue was an arbitration agreement. *See Bailey*, 2017 WL 664445, at *5 (explaining that "direct benefits estoppel" is used to "estop a non-

signatory claimant from simultaneously seeking the benefits of a contract and denying the applicability of *an arbitration provision* under *the contract that contains the arbitration agreement*") (emphases added); *see also In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) (describing "direct benefits estoppel" as "a type of equitable estoppel that federal courts apply in the arbitration context"). That is prohibited by *Morgan*.[8]

Second, even if the FAA does not apply here at all—which the district court erroneously failed to decide, *supra* Part I(B)—it is likely that, following *Morgan*, Texas courts would conclude that the traditional elements of equitable estoppel, including detrimental reliance, apply to arbitration contracts. That is because the direct-benefits estoppel rule adopted by Texas courts is based, not on the common law of estoppel under Texas law, but on federal decisions applying the arbitration-specific direct-benefits rule that are no longer good law after *Morgan*. For example, in one of the earliest Texas cases to adopt and apply the direct-benefits estoppel theory, the Texas Supreme Court relied on "persuasive and well-reasoned

[8] Below, Gruma relied on this Court's decision in *Griswold v. Coventry First LLC*, 762 F.3d 264 (3d Cir. 2014) as support for its direct-benefits estoppel theory. But, like *Bailey*, that decision applied an arbitration-specific rule that dispensed with the detrimental reliance element of equitable estoppel and is no longer good law after *Morgan*. And even if the standard from *Griswold* does still apply, it is clearly met here because, like the plaintiffs in *Griswold*, the Adlers "do not allege breach of the [contract]" and their claims are not "based *directly* on the agreement." *Id.* at 274.

federal precedent" to do so, including cases from the Fourth and Fifth Circuits. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 739-40; *see also In re Weekley Homes, L.P.*, 180 S.W.3d 127, 131 (Tex. 2005) (in applying direct-benefits estoppel rule, Texas Supreme Court was "endeavoring to keep [state law] as consistent as possible with federal law"). *Morgan* has since clarified that those federal cases were wrong to apply an arbitration-specific estoppel rule, thereby destroying the foundation of Texas's rule. Rather than continue to rely on an abrogated federal rule, Texas courts are likely to return to the well-established elements of equitable estoppel for *all* contracts under state law. *See Perry Homes v. Cull*, 258 S.W.3d 580, 594 (Tex. 2008) (citing, *inter alia*, *In re Kellogg Brown & Root, Inc.* and *In re Weekley Homes, L.P.* to emphasize "the importance of keeping federal and state arbitration law consistent").

Indeed, other state courts have rejected a direct-benefits theory of estoppel like the one the district court applied precisely because it impermissibly creates an arbitration-specific rule. *See, e.g.*, *Santich v. VCG Holding Corp.*, 443 P.3d 62, 66 (Colo. 2019) (refusing to "depart from our traditionally defined elements of equitable estoppel to craft an arbitration-specific rule"); *Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 852, 859-60 (N.J. 2013) (rejecting alternative estoppel theory without "evidence of detrimental reliance" because "equitable estoppel is more properly viewed as a shield to prevent injustice rather than a sword to compel

arbitration"); *see also Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 516 (Ill. Ct. App. 2004) (declining to "follow federal decisions" adopting an "expanded interpretation of equitable estoppel"); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 492 (Miss. 2005) (declining to apply "expand[ed]" estoppel theory after confirming that "traditional elements of equitable estoppel" require "detriment or prejudice").

Third, even if some form of direct-benefits estoppel applies here, the district court erred in holding that Charles and Grant sought to benefit from the contract between Gruma and C. M. Adler, LLC. Contrary to the district court's conclusory statement that the Adlers' claims were "based on the SDDA," JA23, Charles and Grant do not in fact seek to enforce the SDDA in this litigation. Nine of their claims are statutory and not based on the contract at all. *See Moon*, 868 F.3d at 218 (worker's wage-and-hour claims relied "solely on her statutory, rather than her contractual, rights to recovery" because she alleged that, notwithstanding her contract, the company violated her labor rights (cleaned up) (internal quotation marks, citation omitted)); *infra* Part V. And while they also bring three common-law claims, those claims do not seek to enforce the SDDA or "derive a direct benefit from" it. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 741. Indeed, one of those claims is for *recission* of the SDDA, not enforcement of it. JA65-66 ¶¶ 155-63. And their other common law claims—for unjust enrichment and

violation of the duty of good faith and fair dealing, JA67 ¶¶ 164-68; JA72-73 ¶¶ 194-98—arise out of the parties' relationship generally, not the contract specifically. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 740 (rejecting argument that, because party's "labor and services were linked inextricably to [the contract]," direct-benefits estoppel should apply to quantum meruit claim).

Moreover, the district court was wrong to conclude that the Adlers had obtained "substantial benefits" from the SDDA solely because they alleged that, as distributors of Gruma products, they were either employees or franchisees of Gruma. JA23-24. As the Texas Supreme Court has explained, "under 'direct benefits estoppel,' a non-signatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, it would have no basis to sue." *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 740. Instead, "a non-signatory should be compelled to arbitrate a claim only if it seeks, *through the claim*, to derive a direct benefit from the contract containing the arbitration provision." *Id.* at 741 (emphasis added). Thus, the relevant question is whether the individual Adlers seek to benefit from the SDDA *in this litigation*, not whether the SDDA created their relationship with Gruma in the first place. Because the individual Adlers do not seek to enforce or benefit from the SDDA, the district court erred in concluding that they can be required to arbitrate under an agreement they did not sign.

IV. The district court erred by enforcing the delegation clause.

Even if a valid arbitration agreement were formed between Gruma and all the plaintiffs (it was not) and even if the court had authority to enforce that agreement under either the FAA or the TAA (it did not), the district court committed reversible legal error by holding that issues about the enforceability of the SDDA's provisions were for the arbitrator, rather than the court, to decide. The court concluded that, because the SDDA includes a provision (the "delegation clause") agreeing to arbitrate questions regarding "the validity and enforceability of the arbitration agreement," only the arbitrator could address the Adlers' challenges to the enforceability of the arbitration provision. JA26. It then concluded that the Adlers had not challenged the enforceability of the delegation clause specifically because their unconscionability argument "pertains to the entire contract, not just the arbitration agreement or the delegation clause." JA27. Both holdings were wrong.

A. Gruma waived its rights under the delegation clause.

The district court erred by enforcing a delegation clause *sua sponte* that Gruma did not seek to enforce. Gruma neither mentioned the delegation clause before the district court nor argued that the arbitrator should decide the enforceability of the SDDA's arbitration provision. To the contrary, it briefed the merits of the Adlers' challenge to the enforceability of the arbitration provision and

asked *the court* to enforce the agreement over that challenge. Reply 11-13. In doing so, it waived any right it had under the SDDA to have enforceability issues decided by an arbitrator.

As the Supreme Court explained in *Morgan*, waiver occurs when "a party has intentionally relinquished or abandoned a known right." *White v. Samsung Elecs. Am., Inc.*, 61 F.4th 334, 339 (3d Cir. 2023) (quoting *Morgan*, 596 U.S. at 417) (cleaned up).[9] The waiver inquiry "focuses on the actions of the party who held the right"—not on "prejudice to the party not seeking arbitration." *Id.* (quoting *Morgan*, 596 U.S. at 417) (cleaned up). Here, Gruma waived any right it had to enforce the delegation clause by choosing not to invoke it and instead affirmatively briefing enforceability issues in court. *See United States ex rel. Dorsa v. Miraca Life Scis., Inc.*, 33 F.4th 352, 357 (6th Cir. 2022) ("A party acts inconsistently when it first asks a court to rule on arbitrability and then later argues that an arbitrator must do so."); *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320, 1324 (11th Cir. 2016) ("A delegation clause operates as a defense that the defendant must raise in order to rely upon it."); *In re Checking Acct. Overdraft Litig.*, 754 F.3d 1290, 1298 (11th Cir. 2014) (holding that party waived delegation clause by failing to raise it in motion to compel).

[9] Whether a party has waived its right to arbitrate is a question of federal law. *See id.*; *Morgan*, 596 U.S. at 416 ("The Courts of Appeals . . . have generally resolved cases like this one as a matter of federal law.").

Because Gruma waived its contractual right to enforce the delegation clause, the court erred by enforcing that clause and delegating enforceability to the arbitrator anyway. *See Wood v. Milyard*, 566 U.S. 463, 472-73 (2012) (explaining it would be "an abuse of discretion . . . for a court to override a [party's] deliberate waiver of a [] defense" (internal quotation marks, citation omitted)); *United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023) (explaining that "[a] party's waiver should be enforced," and courts "cannot reach waived arguments"); *see also, e.g.*, *Ytech 180 Units Miami Beach Invs. LLC v. Certain Underwriters at Lloyd's, London*, 359 F. Supp. 3d 1253, 1264 (S.D. Fla. 2019) (explaining that if party "has waived the delegation clause," "the court *must* determine whether the arbitration agreement is enforceable" (emphasis added)).

The district court cited cases regarding delegation clauses, but none involved a clause that was never invoked. In fact, the district court relied on a Fifth Circuit case involving Gruma where Gruma *did* invoke the delegation clause in district court, arguing that the plaintiff's unconscionability challenge was for the arbitrator. *See* Defendant's Second Motion to Dismiss or, in the Alternative, Compel Arbitration, *Maravilla v. Gruma Corp.*, No. 4:18-cv-01309, 2018 WL 11408401 (S.D. Tex. June 5, 2018). That case therefore does not support enforcing the delegation clause here, where Gruma—despite apparently knowing how to invoke its delegation clause if it wanted to—waived its right to do so.

B. The district court erred in holding that the Adlers' unconscionability challenge to the delegation clause must differ from their challenge to the rest of the agreement.

Even if it were proper for the district court to consider the delegation clause, it erred by not considering the Adlers' argument that the entire agreement—including the delegation clause—was unconscionable. To start, the court got it exactly backwards in faulting the Adlers for not specifically challenging the delegation clause in their briefing, even though it was Gruma's burden to invoke the delegation clause as a defense, and it failed to do so. *Supra* Part IV(A). The Adlers could hardly have been expected to challenge the enforceability of a contractual provision that Gruma had not sought to enforce.

Moreover, the district court erred in concluding that, because the Adlers' unconscionability argument applied to the arbitration provision as a whole, it could not also be specific to the delegation clause. The court appears to have relied on the Supreme Court's instruction in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010), that a party must challenge "the delegation provision specifically."[10] But "specifically" does not mean "uniquely." As this Court has held, "[i]n

[10] This is another example of how the district court's erroneous failure to decide whether the FAA applies infected its entire opinion. Suggesting the court thought it could compel arbitration under the FAA, *Rent-A-Center*'s reasoning is grounded squarely in the FAA's text. *See id.* at 71-72. And the court pointed to no analogous rule under Texas law. If the FAA does not apply, however, *Rent-A-Center*'s specific-challenge rule does not apply either.

specifically challenging a delegation clause" under *Rent-A-Center*, "a party may rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 226-27 (3d Cir. 2018).

Here, the delegation clause is procedurally unconscionable for the same reason as the rest of the agreement because the "circumstances surrounding the formation" of the delegation clause were the same as the rest of the agreement. JA27 n.7 (citing *Taylor Morrison of Tex., Inc. v. Skufca*, 650 S.W.3d 660, 678 (Tex. Ct. App. 2021)). Like the agreement as a whole, the delegation clause is a "contract of adhesion" that was presented to the Adlers on a "take-it-or-leave-it" basis. Opp. 23. Likewise, the Adlers' challenge to the arbitration agreement's judicial review provision as substantively unconscionable would apply equally to judicial review of an arbitrator's award on threshold issues of arbitrability as it would to review of an arbitrator's award on the merits. *See id.* 23-24. Thus, because the unconscionability argument applies "specifically" to the delegation clause *and* to the entire agreement, the court erred in holding that it was for the arbitrator to decide.[11]

[11] Oddly, the court addressed unconscionability in dicta after ruling that it was for the arbitrator to decide. JA27-28. If this Court reverses the holding as to the delegation clause, the Adlers reserve the right to continue to press their argument that the arbitration provisions (including the delegation clause) are

V. The district court erred in bypassing the Adlers' arguments that their statutory claims fall outside the scope of the arbitration provision.

A final error warrants reversal. Although the district court recognized that a party seeking to compel arbitration must establish that the "claims fall within the scope of [the arbitration] agreement," JA21, it did not determine whether Gruma met that requirement. This was not because the parties did not brief it. *See* Opp. 16-21; *id.* 22 (The Adlers' statutory claims "fall outside the arbitration provision[.]"); Reply 8-10 (disputing same). Nor was it because the district court thought that issues of scope were subject to the delegation clause. Rather, the court concluded only that the parties delegated to the arbitrator "issues regarding the validity and enforceability of the arbitration agreement." JA26. And a provision's validity or enforceability is distinct from whether it applies to the claims at issue.

The Adlers' scope argument is strong. This Court has construed an arbitration provision with language strikingly similar to the SDDA's as covering only contractual disputes, not statutory wage claims. *See Moon*, 868 F.3d at 217-18; *supra* Part II(A)(2). The Court should similarly conclude that the Adlers'

---

unconscionable. And while the district court's unconscionability analysis focused on Texas law, if New Jersey law applies, the delegation clause would be unenforceable for the same reasons the arbitration agreement is unenforceable—it did not clearly waive the Adlers' rights to proceed in court, and Gruma cannot overcome the presumption against arbitration clauses in franchise agreements.

statutory claims are not subject to arbitration or remand for the district court to address scope in the first instance.

CONCLUSION

For the foregoing reasons, the Adlers respectfully ask this Court to reverse the district court's order compelling arbitration and dismissing the complaint.

Dated: March 25, 2024

Respectfully submitted,

/s/ Hannah M. Kieschnick
Hannah M. Kieschnick
Public Justice
475 14th St., Ste. 610
Oakland, CA 94612
(510) 622-8150
hkieschnick@publicjustice.net

Shelby Leighton
PUBLIC JUSTICE
1620 L St. NW, Ste. 630
Washington, DC 20036
(202) 797-8600
sleighton@publicjustice.net

/s/ Stephen J. Brown
Stephen J. Brown
Susan E. Galvão
David Chen
BLEAKLEY PLATT & SCHMIDT, LLP
One North Lexington Ave.
White Plains, NY 10601
(914) 949-2700
sbrown@bpslaw.com
dchen@bpslaw.com

COMBINED CERTIFICATIONS

Bar Membership. I am a member of the bar of the United States Court of Appeals for the Third Circuit.

Word limit. This document complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B) because it contains 12,793 words as calculated with the word-counting feature of Microsoft Office, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).

Typeface and typestyle. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point font, which is a proportionally spaced typeface.

Identical copies. The text of the electronic brief is identical to the text in the paper copies.

Virus check. The electronic brief has been scanned for viruses with Bitdefender Endpoint Security software. No virus was detected by the software.

Dated: March 25, 2023

/s/ Hannah M. Kieschnick
Hannah M. Kieschnick
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2024, the foregoing was served via the Court's electronic case management system upon all counsel of record.

Dated: March 25, 2023

/s/ Hannah M. Kieschnick
Hannah M. Kieschnick
Counsel for Plaintiffs-Appellants