NO. 14-0772

IN THE SUPREME COURT OF TEXAS
AT AUSTIN, TEXAS

IN RE GEORGE HELLE, III

RELATOR

Original Proceeding from Cause No. 2014-10162 in the
165th Judicial District Court of Harris County, Texas
(Hon. Jeff Shadwick, Presiding)

CORRECTED BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC. AND PUBLIC JUSTICE, PC IN SUPPORT OF RELATOR

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASES

TEXAS CASES

CASES FROM OTHER STATES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

RULE 11 DISCLOSURE

Under Texas Rule of Appellate Procedure 11, Public Citizen, Inc. and Public Justice, PC state that they are submitting this brief as amici curiae in support of Relator, George Helle, III, that this brief was not authored in whole or in part by counsel for any party, and that no fee has been paid or will be paid for the preparation of this brief.

STATEMENT OF THE CASE

Amici curiae Public Citizen, Inc. and Public Justice, PC adopt the statement of the case as set forth in Relator George Helle, III's brief on the merits in support of the petition for writ of mandamus.

ISSUES PRESENTED

In this brief, amici curiae Public Citizen and Public Justice address the second, third and fourth issues presented in the Petition for Review:

2. Did the Respondent abuse his discretion when he compelled Helle to arbitrate in the absence of a written, signed agreement?

3. Do Helle's constitutional rights permit mandamus review in cases where the undisputed testimony demonstrates that there was no agreement to arbitrate and the movant fails to prove the existence of a written, signed agreement to arbitrate?

4. Does Helle have a due process right to appellate review, under these circumstances, when the Respondent stayed, rather than dismissed, the case?

INTEREST OF AMICI PUBLIC CITIZEN AND PUBLIC JUSTICE

Amici curiae Public Citizen, Inc. and Public Justice, PC are national non-profit organizations that, among other things, work to defend the rights of consumers and the public generally to access a transparent and open court system where the facts of a dispute are weighed by juries, the law is determined by impartial judges, and the parties may seek appellate review.

Founded in 1971, Public Citizen is a non-profit consumer advocacy organization with more than 300,000 members and supporters nationwide. Public Citizen advocates before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen frequently appears as amicus curiae to support judicial enforcement of constitutional and legislative limits on arbitration. Public Citizen has also published numerous articles and reports on the issue of arbitration, including *Forced Arbitration: Unfair and Everywhere* (Sept. 2009)[1] and *The Costs of Arbitration* (Apr. 2002),[2] that document the increased use of arbitration in contracts and the resulting heavy costs that consumers bear. Because compelling arbitration *not* provided for by contract deprives all parties, including consumers, of the benefit of the bargain they made, Public Citizen is

[1] *Available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf.

[2] *Available at* http://www.citizen.org/documents/ACF110A.pdf.

acutely interested in the issues posed by this case.

Public Justice is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to pursuing justice for the victims of corporate and governmental abuse. Public Justice prosecutes cases designed to advance consumers' and victims' rights, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. To further its goal of defending access to justice for consumers, employees, and other persons, Public Justice has initiated a special project devoted to fighting abuses of mandatory arbitration. Public Justice attorneys have testified in both houses of Congress and more than half a dozen state legislatures, as well as before numerous regulatory bodies, have litigated challenges to unconsented-to or abusive arbitration clauses in more than a dozen state high courts and ten of the federal circuit courts of appeal, and have appeared at more than 100 Continuing Legal Education Programs on issues relating to arbitration.

STATEMENT OF FACTS

In this case, the district court granted a motion to compel arbitration even though no written, signed arbitration agreement existed. Amici adopt the facts set forth in the Relator's brief on the merits. To the extent that specific facts are relevant to amici's arguments, they are discussed in the Argument section below.

SUMMARY OF ARGUMENT

This Court should hold that the Texas appellate courts may grant mandamus review of trial courts' orders compelling arbitration, at least where there is a genuine dispute as to whether a written agreement to arbitrate even exists.

Through previous case law, this Court had fashioned a delicate balance that referred to arbitration the vast bulk of cases where the trial court determined arbitration clauses governed, but ensured pre-arbitration judicial review in those unusual cases where the trial court "clearly abused its discretion" and the "benefits of mandamus outweigh[ed] the detriments such that an appellate remedy [wa]s inadequate." *In re Poly-America, L.P.*, 262 S.W.3d 337, 346-47 (Tex. 2008). Then, in *In re Gulf Exploration, LLC*, 289 S.W.3d 836 (Tex. 2009), this Court greatly limited mandamus review of orders compelling arbitration in the name of uniformity with the federal courts' interpretation of the Federal Arbitration Act ("FAA") and with other state courts' application of the Uniform Arbitration Act ("UAA") after *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). *Gulf Exploration*, 289 S.W.3d at 839-42. Yet *Gulf Exploration* went further than the federal courts, which have not ruled out mandamus review of orders compelling arbitration. And most states applying the UAA, even after *Green Tree*, treat orders compelling arbitration either as final appealable judgments or as

orders subject to interlocutory appeal, or at least allow the possibility of mandamus or similar discretionary review.

To advance the Texas Arbitration Act's ("TAA") goal of uniformity, Tex. Civ. Prac. & Rem. Code § 171.003, this Court should not entirely eliminate mandamus review of orders compelling arbitration—at least in rare cases where the parties genuinely dispute the existence of an arbitration agreement. An exception for such cases is necessary because, where the parties have not agreed in writing to arbitrate, an order compelling arbitration violates the TAA or FAA—whichever is applicable—and the Texas Constitution. It is well settled under both statutes that arbitration is a matter of contract only and that a party cannot be compelled to arbitrate if he has not agreed to do so. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737-38 (Tex. 2005). A court that compels arbitration absent such an agreement therefore acts in the complete absence of authority.

The issue becomes one of constitutional significance in cases like this, where the party challenging arbitration has demanded a jury trial. The Texas Constitution provides that "[t]he right of trial by jury shall remain inviolate." Tex. Const. art. I, § 15; *see* also art. V, § 10. As this Court has recognized in interpreting article I, section 15 and article V, section 10, and the U.S. Supreme Court has held in relation to the Seventh Amendment, "the significance of the issue—protection of the right to jury trial—convinces us that the circumstances are exceptional and

mandamus review is justified." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 209 (Tex. 2009); *see, e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 511 (1959) ("[T]he right to grant mandamus to require jury trial where it has been improperly denied is settled."). This case presents a paradigmatic example of why mandamus review is necessary to ensure the existence of a valid arbitration agreement—a signed, written arbitration agreement plays an important role in ensuring that there is a "voluntary, knowing, and intelligent" waiver of the constitutional right to a jury. *See In re The Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132, 135 (Tex. 2004).

Finally, providing for mandamus review in rare cases where the parties have a genuine dispute as to the existence of an arbitration agreement will not unduly expand the availability of mandamus review but will greatly reduce needless expense and delays in those cases. Although "mere[]" expense and delay alone cannot justify mandamus, these considerable burdens certainly weigh in favor of mandamus. *Prudential*, 148 S.W.3d at 136-38 (noting that "the word 'merely' carries heavy freight" and that even expense and delay alone can merit mandamus at a certain point); *see In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 466-69 (Tex. 2008) (holding that expense and burden weighed in favor of mandamus). In many cases, trial courts have compelled arbitration, only to have appellate courts determine afterward that the parties had never entered into an agreement to

arbitrate. If these errors cannot be quickly corrected by pre-arbitration appeal, then a party who has not agreed to arbitrate will be forced to incur the great expense of arbitration and considerable delay, in violation of the TAA or the FAA, as well as the Texas Constitution.

BACKGROUND

Neither the FAA, the TAA, nor the UAA explicitly permits appeals from orders compelling arbitration, but each provides that appeals "may" be taken from orders denying or staying arbitration. *See* 9 U.S.C. § 16(a); Tex. Civ. Prac. & Rem. Code § 171.098(a); UAA § 28. The FAA also provides that an appeal may be taken from "a final decision with respect to an arbitration," but it forbids appeals as a matter of right from interlocutory orders directing that arbitrations proceed and staying judicial proceedings pending arbitration. 9 U.S.C. § 16(a)(3), (b). The TAA contains no corresponding provision precluding appeals of orders compelling arbitration and staying litigation; it provides generally that in addition to the orders it specifically enumerates, an appeal may be taken from any judgment or decree entered under the Act. Tex. Civ. Prac. & Rem. Code § 171.098(a).

In *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992), a case decided before enactment of the current version of the TAA, this Court determined that a party could take an interlocutory appeal of an order denying arbitration under the TAA and simultaneously seek mandamus review of an order denying

arbitration to the extent the party invoked rights to enforce an arbitration agreement under the FAA. The Court extended its holding concerning mandamus review to orders compelling arbitration two years later in *Freis v. Canales*, 877 S.W.2d 283 (Tex. 1994) (per curiam). The Court reasoned that "a party who is compelled to arbitrate without having agreed to do so will have lost its right to have the dispute resolved by litigation," and "has no adequate remedy by appeal." *Id*. at 284.

The U.S. Supreme Court addressed the FAA appeals provision in 2000, in *Green Tree*, which held that under the FAA, an order compelling arbitration and dismissing all claims was an appealable "final decision" under 9 U.S.C. § 16(a)(3), because the decision "end[ed] the litigation on the merits and le[ft] nothing more for the court to do but execute the judgment." *Green Tree*, 531 U.S. at 86. The Supreme Court indicated, however, that "[h]ad the District Court entered a stay instead of a dismissal in this case, that order would not be appealable." *Id.* at 87 n.2.

Three years later, in *Apache Bohai Corp. v. Texaco China, B.V.*, 330 F.3d 307 (5th Cir. 2003), the Fifth Circuit addressed *Green Tree* and its impact on the availability of mandamus review of orders compelling arbitration. In that case, Texaco brought a motion to compel arbitration, and the district court granted the motion and stayed the litigation. *Id.* at 308-09. Apache Bohai appealed this order

and also filed a conditional petition for writ of mandamus directing the district court to vacate its order and enter final judgment. *Id.* at 308. Because the district court's order compelling arbitration had stayed the case instead of dismissing it, the court held that the order was not a "final decision" under *Green Tree*, and the case could not be appealed. *Id.* at 309-10. The court recognized, however, that mandamus review of an order staying litigation and compelling arbitration would be appropriate in some cases. *Id.* at 310-11. But the standard for mandamus was high: "The district court must have committed a 'clear abuse of discretion' or engaged in 'conduct amounting to the usurpation of power.'" *Id.* at 310 (quoting *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989)). Apache Bohai had not met this standard because its writ petition only challenged the district court's decision to stay the case instead of dismissing it and was unable to "show clearly and indisputably that the district court did not have the discretion to stay the proceedings pending arbitration." *Id.* at 310-11.

For several years after *Green Tree* and *Apache Bohai*, this Court continued to hold that mandamus review of orders compelling arbitration was appropriate in exceptional cases where the party seeking review could carry the burden of showing clearly that the trial court abused its discretion in ordering arbitration. *E.g.*, *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 483 (Tex. 2001) (citing *Freis*); *see also In re Palacios*, 221 S.W.3d 564, 565 (Tex. 2006) (per

curiam) (holding relator had not met burden under *Apache Bohai* standard for mandamus review); *Poly-America*, 262 S.W.3d at 346-47. The Court's decision in *Gulf Exploration*, however, marked a significant change. In an expressed effort to prevent litigants from making excessive use of the *Apache Bohai* exception—that mandamus review would be available if a petitioner could show "clearly and indisputably" that the trial court abused its discretion—the Court substantially limited mandamus review of orders compelling arbitration. *Gulf Exploration*, 289 S.W.3d at 838-39, 841. First, the Court interpreted *Apache Bohai* as only allowing mandamus when the trial court abused its discretion in staying, rather than dismissing, the case pending arbitration, and not when the abuse of discretion lay in determining that the case was subject to arbitration. *Id.* at 841. Then it held under Texas law that "'[a]n order compelling arbitration *must* include a stay' of the underlying litigation," making invocation of the *Apache Bohai* "exception" all but impossible. *Id.* at 840-41 (quoting Tex. Civ. Prac. & Rem. Code § 171.021(c)). The Court reasoned that a post-arbitration appeal from an order confirming or vacating the arbitration award was an adequate remedy in most cases for an erroneous decision to compel arbitration. *Id*. at 842. The Court noted, however, that mandamus review of orders compelling arbitration might survive where the requirements of an arbitration agreement threaten to undermine a statutory scheme or a legislative or constitutional mandate. *Id.* at 843. The Court held that in the case

before it, there were no legislative mandates counterbalancing arbitration because the agreement placed no limits on the constitutional or statutory rights of the party that objected to arbitration, "other than the right to a jury trial that it expressly waived by agreeing to arbitration in the first place." *Id*.

ARGUMENT

Gulf Exploration, if taken to its extremes, would nearly eliminate the ability of a party to seek mandamus review of an order compelling arbitration—even in the rare case where a party has established a genuine dispute about the existence of an arbitration agreement. This Court should make clear that at least in the rare circumstance of a genuine dispute about the existence of an arbitration agreement, mandamus is appropriate. Otherwise, in its attempt to prevent a "standard allowing mandamus almost always," this Court will have "adopt[ed] a standard allowing it almost never." *See McAllen Med. Ctr.*, 275 S.W.3d at 468.

I. Eliminating Mandamus Review of Orders Compelling Arbitration Is Not Required to Maintain Uniformity with Federal Law.

In *Gulf Exploration*, this Court significantly altered its precedent allowing mandamus review from trial-court orders compelling arbitration. In 1994, the proposition that a party could seek mandamus review of an order compelling arbitration was so uncontroversial that this Court decided the question without oral argument and issued a per curiam decision. *Freis*, 877 S.W.2d at 284. Mandamus

was appropriate, the Court reasoned, because otherwise a party would have no adequate remedy by appeal. *Id.*

In departing from this principle, *Gulf Exploration*, 289 S.W.3d at 841-42, cited the U.S. Supreme Court's intervening decision in *Green Tree*. *Green Tree*, however, merely indicated that interlocutory appeals of orders compelling arbitration are unavailable in the federal court system under §16(b) of the FAA when a trial court stays a case pending arbitration rather than dismissing it. 531 U.S. at 86-87 & n.2. *Green Tree* said nothing about mandamus review.

Indeed, no federal court of appeals has interpreted *Green Tree* as prohibiting mandamus review. The Fifth, Eighth, and Ninth Circuits all have specifically indicated that mandamus review is available for orders compelling arbitration when the mandamus standard is satisfied. *See Douglas v. U.S. Dist. Court for Cent. Dist. of Cali.*, 495 F.3d 1062, 1065-69 (9th Cir. 2007) (per curiam) (holding mandamus appropriate and vacating order compelling arbitration); *Apache Bohai Corp.*, 330 F.3d at 310-11 (holding mandamus review available if party shows "clearly and indisputably" that district court "committed a 'clear abuse of discretion' or engaged in 'conduct amounting to the usurpation of power,'" but holding standard not met); *Manion v. Nagin*, 255 F.3d 535, 539-40 & n.4 (8th Cir. 2001) (citing *Green Tree* for the proposition that interlocutory appeal of order

compelling arbitration was not available and holding party had not met mandamus standard).

This Court also addressed the issue of mandamus review of trial-court orders compelling arbitration several times after *Green Tree* and recognized that "[m]andamus is the proper means for reviewing an order compelling arbitration." *E.g.*, *Am. Homestar*, 50 S.W.3d at 483; *see also Palacios*, 221 S.W.3d at 565-66 (discussing *Apache Bohai* and noting that mandamus review of an order staying a case for arbitration was not precluded in the Fifth Circuit after *Green Tree*). In *Poly-America*, the Court fully analyzed federal and state case law after *Green Tree* and concluded that mandamus review of an order compelling arbitration would be permitted in federal court and should continue to be available in Texas courts; otherwise, "[i]f such review were categorically unavailable . . . , development of the law [regarding validity of arbitration agreements] would be substantially hindered if not precluded altogether." 262 S.W.3d at 345-47. Because mandamus review of orders staying litigation and compelling arbitration would not be precluded in the federal courts, this Court can permit mandamus review where there is a genuine dispute as to the existence of an arbitration agreement and still maintain uniformity with federal law.

II. The Interest in Uniformity with Other States Would Be Served by Allowing Mandamus Review at Least in Some Circumstances.

The Texas Arbitration Act must be "construed to effect its purpose and make uniform the construction of other states' law applicable to an arbitration." Tex. Civ. Prac. & Rem. Code § 171.003. Recognizing this principle, *Gulf Exploration* heavily relied on other states' laws to justify its holding prohibiting the use of mandamus to review orders compelling arbitration. 289 S.W.3d at 839-40 & nn.9-13. However, if construed to preclude mandamus review altogether, *Gulf Exploration*'s holding would depart from the majority rule among state courts.

Even after *Green Tree*, most states to address the question have decided that appeal as a matter of right (whether considered appeal of a final order or an interlocutory appeal) is appropriate *both* from orders denying arbitration *and* orders compelling arbitration under the UAA. And of the states that prohibit appeal from orders compelling arbitration when a case is stayed, most allow review of such orders through mandamus procedures. The number of states allowing some review of orders compelling arbitration has grown after *Gulf Exploration*, widening the gap between Texas and the majority of states under the UAA.

A. Many States Permit Immediate Appeal of Orders Staying Litigation and Compelling Arbitration After *Green Tree*.

A super-majority of states allow review of orders compelling arbitration immediately by final appeal, interlocutory appeal, or mandamus. *See* Relator's Br.

at 35-36 & nn.8-10. Even after *Green Tree*, the overwhelming majority of states to address the question have held that orders compelling arbitration are reviewable prior to arbitration. Since *Green Tree*, at least eight state supreme courts have held that orders compelling arbitration are immediately appealable as "final judgments" or "final orders" under their general appeal statutes similar to Tex. Civ. Prac. & Rem. Code § 51.012 ("In a civil case in which the judgment or amount in controversy exceeds $250, exclusive of interest and costs, a person may take an appeal or writ of error to the court of appeals from a final judgment of the district or county court.").[3] The intermediate appellate courts of another three states have

[3] *See McGibbon v. Farmers Ins. Exch.*, 345 P.3d 550, 551 (Utah 2015) (an order compelling arbitration is a "final order" under Utah's general appellate rule "because it effectively end[s] the controversy between the parties and [leaves] no claims pending before the district court" (quoting *Zions Mgmt. Servs. v. Record*, 305 P.3d 1062, 1069 (Utah 2013))); *Cnty. of Haw. v. UNIDEV, LLC*, 301 P.3d 588, 590, 600-01 (Haw. 2013) (UAA list of appealable orders is not exclusive; appeal may be taken under general appeal statute as order compelling arbitration is final order); *Kremer v. Rural Cmty. Ins. Co.*, 788 N.W.2d 538, 545-49 (Neb. 2010) (although UAA statute is "silent" on appeals from orders compelling arbitration, Nebraska general appeals statute would treat the order as a final order even though trial court stayed litigation instead of dismissing it); *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1032-34 (Miss. 2010) (en banc) (regardless of whether a case is stayed or dismissed when arbitration was ordered, "an order compelling arbitration which disposes of all the issues before the trial court or orders the entire controversy to be arbitrated is a final decision, and therefore, immediately appealable" under general appellate rule); *Wein v. Morris*, 944 A.2d 642, 649-51 (N.J. 2008) (holding order compelling arbitration is final order appealable as of right, regardless of whether action is stayed or dismissed, and exercising rule-making authority to explicitly add order compelling arbitration to list of final appealable orders under general appellate rule); *Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 160 P.3d 936, 943 (Okla. 2007) (discussing *Green Tree* and holding order compelling arbitration and staying litigation was final appealable order); *Iowa Mgmt. & Consultants, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 656 N.W.2d 167, 170 (Iowa 2003) (order compelling arbitration was final and appealable because "it finally resolved all issues in the proceeding before the court" even though Iowa has adopted UAA section regarding appeals); *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620, 624-25 (Md. 2001) (although FAA

reached the same conclusion.[4] Three state supreme courts and the intermediate appellate courts of another two states have determined that interlocutory appeals are available as a matter of right or by permission after an order compelling arbitration.[5]

Although *Gulf Exploration* stated that "most Uniform Act states follow *Green Tree* in allowing review if the order dismisses the case but not if it stays it," 289 S.W.3d at 840, most state courts have by now held that neither *Green Tree* nor the text of the UAA prevents immediate appeal of orders compelling arbitration even if the trial court chooses to stay the litigation. They have recognized that *Green Tree*'s interpretation of the FAA cannot determine or preempt the states' interpretation of their procedural rules. *See, e.g.*, *Kremer*, 788 N.W.2d at 547.

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does not list orders compelling arbitration as appealable, order was appealable as final order under Maryland's general appeals statute).

[4] *Sisneros v. Citadel Broad. Co.*, 142 P.3d 34, 38 (N.M. Ct. App. 2006); *Salomon Smith Barney, Inc. v. Cotrone*, 841 A.2d 1199, 1201 (Conn. App. Ct. 2004); *N. Ind. Commuter Transp. Dist. v. Chi. Southshore & S. Bend R.R.*, 793 N.E.2d 1133, 1135 (Ind. Ct. App. 2003).

[5] *See Johnson v. Kindred Healthcare, Inc.*, 2 N.E.3d 849, 852 (Mass. 2014) (reviewing order compelling arbitration de novo after granting interlocutory appeal); *Salsitz v. Kreiss*, 761 N.E.2d 724, 730 (Ill. 2001) ("An order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal [under general court of appeals rule]."); *Cecere v. Aetna Ins. Co.*, 766 A.2d 696, 697 (N.H. 2001) (reviewing trial court's order compelling arbitration and choice-of-law analysis on appeal); *Davidson v. A.G. Edwards & Sons, Inc.*, 748 S.E.2d 300, 302 (Ga. Ct. App. 2013) (reviewing order compelling arbitration de novo after granting interlocutory appeal); *Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C.*, 742 N.W.2d 409, 415 (Mich. Ct. App. 2007) (reviewing order compelling arbitration de novo in pre-arbitration appeal).

This tally does not include the several states that have adopted statutes providing for immediate appeal of orders compelling arbitration. *See, e.g.*, *Parker v. K & L Gates, LLP*, 76 A.3d 859, 864 (D.C. 2013) (discussing DC statute).

Rather, the question of appellate jurisdiction over arbitration decisions within state judicial systems depends on state statutes. And although the UAA section governing appeals (codified in Texas at Tex. Civ. Prac. & Rem. Code § 171.098) states that a party "may" appeal from an order a motion to compel arbitration or staying arbitration, it is silent as to whether a party may immediately appeal from an order compelling arbitration. *See, e..g.*, *Kremer*, 788 N.W.2d at 545-46. "[N]othing in the text of [the UAA statute] indicates that its list of appealable orders is exclusive. To the contrary, the plain meaning of the text demonstrates that [the UAA section governing appeals] may be read in conjunction with the general appeals statute . . . ." *Cnty. of Haw.*, 301 P.3d at 590, 600; *see, e.g.*, *Kremer*, 788 N.W.2d at 547-48; *Okla. Oncology*, 160 P.3d at 943 & n.11 (distinguishing *Green Tree* because state arbitration statutes do not contain the equivalent of 9 U.S.C. § 16(b)(2), which expressly precludes interlocutory appeals of orders compelling arbitration).

Focusing on finality, state courts have determined that an order staying litigation and requiring all claims in the lawsuit to proceed in arbitration is just as "final" as an order compelling arbitration and dismissing the suit. *See, e.g.*, *Sawyers*, 26 So. 2d at 1033 (reasoning that the "crux" of *Green Tree*'s logic is not the stay/dismissal distinction but the "well-established meaning of 'final decision'" as "one that 'ends the litigation on the merits and leaves nothing more for the court

to do but execute the judgment'"); *Kremer*, 788 N.W.2d at 548; *Wein*, 944 A.2d at 650. When the entire complaint is referred to arbitration, regardless of whether a trial court stays or dismisses the case, "the order has the same effect: The parties cannot litigate their dispute in state courts because by enforcing the arbitration agreement, the order divests the court of jurisdiction to hear their dispute." *Kremer*, 788 N.W.2d at 548; *see Sawyers*, 26 So. 2d at 1033-34; *Okla. Oncology*, 160 P.3d at 943 (the order compelling arbitration and staying trial-court proceedings was a final order; by sending "'all claims raised by Plaintiff' to arbitration[, it] reached the whole controversy and left nothing pending before the district court"). And the need to supervise compliance with the arbitration, or to enforce, vacate, or modify an award after arbitration, does not defeat finality. *Compare Sawyers*, 26 So. 2d at 1033 (an appeal is not interlocutory where "the trial court has nothing left to do but supervise compliance with an order for arbitration or enforce an arbitration award"), *with Gulf Exploration*, 289 S.W.3d at 841 (noting that a court may need "to replace an arbitrator, compel attendance of witnesses, or direct arbitrators to proceed promptly" during arbitration or to review an arbitration award afterward). Any other approach would create uncertainty and inconsistency within the court system. *See, e.g.*, *Wein*, 944 A.2d at 650-51.

In short, many courts have recognized that *Green Tree* did not fundamentally alter the legal landscape for state judicial systems, creating a hard

line distinction between orders compelling arbitration that dismiss a case—where immediate appeal would be permitted—and those that stay a case—where appeal would be delayed until after arbitration. These courts instead hold that a decision compelling arbitration and staying litigation is a "final order," which is immediately appealable under general state appeals statutes or court rules. *See, e.g.*, *Cnty. of Haw.*, 301 P.3d at 590, 592 n.9, 600-02; *Kremer*, 788 N.W.2d at 546-49; *Sawyers*, 26 So. 3d at 1032-34; *Wein*, 944 A.2d at 649-51; *Okla. Oncology*, 160 P.3d at 942-43.

B. Other States Permit Mandamus Review of Orders That Stay Litigation and Compel Arbitration.

Even among states that do not permit appeal from orders compelling arbitration, most do not share *Gulf Exploration*'s view that mandamus procedures must be limited after *Green Tree* to maintain consistency with federal law. *See Gulf Exploration*, 289 S.W.3d at 842. *Green Tree* did not discuss mandamus at all, and because mandamus is an extraordinary remedy to be used when appeal is *not* available, whether appeal is allowed should not dictate whether mandamus is appropriate. For that reason, many UAA states that have not decided whether a party may appeal an order compelling arbitration, and several that have specifically rejected the availability of appeal, still allow review through mandamus or other

extraordinary writ—including at least six state supreme courts[6] and intermediate appellate courts in two other states.[7]

Gulf Exploration cited four cases in support of the proposition that a few UAA states do not review any orders compelling arbitration, *see* 289 S.W.3d at

[6] *See, e.g.*, *Leavitt v. Beverly Enters., Inc.*, 784 N.W.2d 683, 692 (Wis. 2010) (providing for review but not deciding whether review of trial court order compelling arbitration is by permissive appeal or appeal as of right); *McGraw v. Am. Tobacco Co.*, 681 S.E.2d 96, 104-06 (W. Va. 2009) (order compelling arbitration was not subject to direct appellate review where case was stayed rather than dismissed; instead, the West Virginia high court "has traditionally addressed challenges to orders compelling arbitration in proceedings seeking writs of prohibition"); *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 454-56 (Ky. 2009) (although order compelling arbitration is ordinarily not appealable, it can be reviewed under rare circumstances by writ of prohibition); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. 2006) (en banc) (granting alternative writ of mandamus in order to review validity of arbitration agreement); *Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 758-59 (Wash. 2004) (en banc) (granting discretionary review to examine de novo whether arbitration agreement was unconscionable); *Burch v. Second Judicial Dist. Court*, 49 P.3d 647, 649 (Nev. 2002) (recognizing that "[b]ecause an order compelling arbitration is not directly appealable, the [plaintiffs] appropriately seek writ relief from this court" and granting the writ because arbitration agreement was unenforceable).

[7] California appellate courts appear to all agree that, although immediate appeal of orders compelling arbitration is unavailable, courts should allow review by mandamus. *See, e.g.*, *Elijahjuan v. Superior Court*, 147 Cal. Rptr. 3d 857, 859, 864 (Cal. 2d Dist. Ct. App. 2012) (treating appeal from nonappealable order as petition for writ of mandate, granting the petition and ordering trial court to vacate order compelling arbitration because the parties had not agreed to arbitrate the case); *Phillips v. Sprint PCS*, 147 Cal. Rptr. 3d 274, 280-81 (Cal. 1st Dist. Ct. App. 2012) (treating appeal as petition for writ of mandate and granting writ to avoid "a significant waste of time and judicial resources"); *Parada v. Superior Court*, 98 Cal. Rptr. 3d 743, 754, 770 (Cal. 4th Dist. Ct. App. 2009) (granting petition for writ of mandate and ordering trial court to vacate order compelling arbitration because "the high cost of arbitrating before a three-judge panel at JAMS and the amount of time necessary to complete arbitration justify reviewing the order compelling arbitration by writ of mandate. 'Writ review is the appropriate way to review the challenged order and avoid having parties try a case in a forum where they do not belong, only to have to do it all over again in the appropriate forum.'"). Louisiana appellate courts also hold that orders compelling arbitration are not subject to immediate appeal, but appeals may be converted to applications for supervisory writ under appropriate circumstances. *See Barham, Warner & Bellamy, L.L.C. v. Strategic Alliance Partners*, 40 So. 3d 1149, 1151-52 (La. Ct. App. 2010).

839-40 & n.12, but three of these states do allow review by writ of mandamus, and the fourth appears not to have addressed the question.[8] Texas appears to be alone in the degree to which it currently curtails mandamus review of orders compelling arbitration.

C. Appellate Review of Orders Compelling Arbitration Has Increased Since *Gulf Exploration*.

The tide toward allowing review of orders compelling arbitration has turned even further since *Gulf Exploration*. Of the eleven states the Court cited for the proposition that "most Uniform Act states follow *Green Tree* in allowing review if the order dismisses the case but not if it stays it," *Gulf Exploration*, 289 S.W.3d at 840 & n.13, over half have since explicitly allowed for mandamus review or now allow for direct appeal of orders compelling arbitration. *See, e.g.*, *Sawyers*, 26 So. 3d at 1031-34 (en banc case overruling case cited in *Gulf Exploration*, *Banks v.*

[8] *See Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 586 S.E.2d 581, 584 (S.C. 2003) (cited in *Gulf Exploration* and holding that orders compelling arbitration are not immediately appealable, but reviewing merits of the case nonetheless "because appellant's issues are capable of repetition and need to be addressed"); *Cardiff Equities, Inc. v. Superior Court*, 83 Cal. Rptr. 3d 699, 709 (Cal. 2d Dist. Ct. App. 2008) (cited in *Gulf Exploration* and holding that order compelling arbitration is not directly appealable; court had discretion to review order under writ of mandate but declined to do so); *see also* California cases cited *supra* note 7 (granting writ of mandate to review orders compelling arbitration). *Compare Braden v. JF Enters.*, 274 S.W.3d 564, 565 (Mo. Ct. App. 2008) (cited in *Gulf Exploration* and holding order compelling arbitration not appealable but not addressing writ of mandamus), *with State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. 2006) (en banc) (granting alternative writ of mandamus in order to review validity of arbitration agreement).

City Fin. Co., 825 So. 2d 642, 647-48 (Miss. 2002), and holding an order compelling arbitration and staying the case is a final, appealable order).[9]

Thus, in curtailing almost all review of orders compelling arbitration, *Gulf Exploration* goes further than most courts interpreting the UAA. Applying *Gulf Exploration* to prohibit mandamus review even where there is a substantial question as to the existence of an arbitration agreement would cut off pre-arbitration appellate review of orders compelling arbitration in the circumstances most clearly justifying such review, further contributing to disuniformity among the states.

[9] *Compare Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 547 n.2 (Ky. 2008) (cited in *Gulf Exploration*), *with Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 454-57 (Ky. 2009) (allowing review in limited circumstances by writ of prohibition, granting writ to prohibit arbitration and lift stay on case); *compare Commonwealth v. Philip Morris Inc.*, 864 N.E.2d 505, 511 & n.9 (Mass. 2007) (cited in *Gulf Exploration* and providing for direct appellate review of order compelling arbitration and dismissing litigation but not addressing appellate review when case is stayed), *with Johnson v. Kindred Healthcare, Inc.*, 2 N.E.3d 849, 852 (Mass. 2014) (reviewing order compelling arbitration and staying litigation de novo after granting interlocutory appeal); *compare State ex rel. Bruning v. R.J. Reynolds Tobacco Co.*, 746 N.W.2d 672, 678 (Neb. 2008) (cited in *Gulf Exploration*), *with Kremer v. Rural Cmty. Ins. Co*., 788 N.W.2d 538, 546-50 (Neb. 2010) (limiting *Bruning* and holding orders compelling arbitration are final orders that are directly appealable regardless of whether case is stayed); *compare Edward Family Ltd. v. Brown*, 140 P.3d 525, 529 (N.M. Ct. App. 2006) (cited in *Gulf Exploration*), *with Sisneros v. Citadel Broad. Co.*, 142 P.3d 34, 38 (N.M. 2006) (order compelling arbitration is final, appealable order); *compare Powell v. Cannon*, 179 P.3d 799, 806-07 (Utah 2008) (cited in *Gulf Exploration*), *with McGibbon v. Farmers Ins. Exch.*, 345 P.3d 550, 551 (Utah 2015) (an order compelling arbitration is a "final order" under Utah general appellate rule "because it effectively end[s] the controversy between the parties and [leaves] no claims pending before the district court").

III. Mandamus Should Be Available When a Trial Court Compels Arbitration in the Absence of an Arbitration Agreement.

Immediate review is necessary when a trial court compels arbitration in the face of a showing that there is no written arbitration agreement between the parties at all. Compelling a party to arbitrate when he has never entered into an arbitration agreement clearly exceeds a judge's authority under the TAA and the FAA, and thus falls within the traditional ambit of mandamus review. Moreover, a post-arbitration appeal is not an adequate remedy for a party forced to arbitrate in the absence of any agreement to do so. Finally, when a party who has not agreed to arbitrate is forced to do so, he is denied his right to a jury trial under the Texas Constitution. Even *Gulf Exploration* recognized that where constitutional or legislative mandates conflict with the policy favoring arbitration, "mandamus 'may be essential to preserve important substantive and procedural rights from impairment or loss.'" 289 S.W.3d at 843.

A. Compelling a Party to Arbitrate Absent an Agreement Violates the TAA and FAA.

Mandatory arbitration under the FAA and TAA is a matter of contract. *Kellogg Brown & Root*, 166 S.W.3d at 738. Under either statute, a party cannot be required to arbitrate when he has not agreed to do so: "Arbitration under the [FAA and TAA] is a matter of consent, not coercion . . . ." *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79 (1989)).

A party seeking to compel arbitration must always establish, as a threshold matter, the existence of an arbitration agreement. *See id.* at 737. Because the arbitration statutes do not apply unless the parties have entered into an arbitration agreement, the *existence* of the contract—as opposed to its scope or validity—is always a matter for a court to determine, not an arbitrator. *Id.*; *see Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010); *Will-Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 212, 219 (5th Cir. 2003). A presumption in favor of arbitration does not apply until the party seeking to compel arbitration proves that a valid, signed arbitration agreement exists. *Kellogg Brown & Root*, 166 S.W.3d at 737; *see In re Rubiola*, 334 S.W.3d 220, 224 (Tex. 2011) (holding that "existence of a valid arbitration clause . . . [is] a gateway matter for the court to decide" and recognizing that generally "parties must sign arbitration agreements before being bound by them"). Therefore, a trial court's order compelling arbitration in the absence of an agreement to arbitrate violates the TAA or the FAA, whichever is applicable.

Moreover, because a trial judge has no authority to order arbitration in the absence of an agreement, federal and state courts generally provide for immediate appeal or mandamus review where there is a genuine dispute about the existence of an arbitration agreement. In these circumstances, the general policy against delaying arbitration is outweighed by "the more fundamental principle that a party

who has not agreed to arbitrate a particular dispute cannot be compelled to arbitrate it." *Wells*, 768 A.2d at 629; *see Douglas*, 495 F.3d at 1065-69 (granting plaintiff's petition for writ of mandamus where there was no agreement to arbitrate; the district court's decision to hold the plaintiff bound to arbitrate absent agreement "reflect[ed] fundamental misapplications of contract law and [went] to the heart of [the plaintiff's] claim").[10]

[10] *See also, e.g.*, *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565-66, 569-70 (9th Cir. 2014) (because a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" and internet radio provider had failed to prove an agreement to arbitrate by a preponderance of the evidence, the district court erred in compelling arbitration); *Hergenreder v. Bickford Senior Living Grp., LLC*, 656 F.3d 411, 417-18, 421 (6th Cir. 2011) (employee handbook referring to a separate document containing an arbitration clause was insufficient to constitute contract binding the employee; reversing order compelling arbitration and remanding); *Will-Drill Res.*, 352 F.3d at 212, 218-220 (district court incorrectly concluded that resolution of fundamental contract formation questions were for the arbitrator to decide; when a party attacks the very existence of an agreement as opposed to its continued validity or enforcement—even if there is a signed, written agreement—the courts must *first* resolve that dispute; vacating order compelling arbitration and remanding for determination of whether a contract was formed); *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1073-74, 1077-78 (5th Cir. 2002) ("federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties"; trial court erred in compelling the children to arbitrate because the children were not signatories to, or third-party beneficiaries of, the arbitration agreement); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1128, 1131-32 (7th Cir. 1997) (because obligation to arbitrate claims was imposed only on employee and there was no other consideration from employer to support this obligation, there was no binding agreement to arbitrate; reversing order compelling arbitration and remanding); *Kremer*, 788 N.W.2d at 549 ("[A]n order compelling arbitration diminish[es] a party's claim that he is entitled to litigate in court. These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do."); *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 657, 662, 668 (Md. 2003) (holding that it is the role of the courts to determine whether an arbitration agreement exists; because the mandatory arbitration policy in the employment contract could be altered by employer at any time, it was not fully binding on employer and was therefore illusory; reversing order compelling arbitration and remanding); *Mendivil v. Zanios Foods, Inc.*, 357 S.W.3d 827, 832-33 (Tex. App.-El Paso 2012) (because mandatory arbitration in employment contract was binding on employee only, agreement was unsupported by consideration and was therefore illusory; reversing order compelling arbitration and remanding); *Sisneros*, 142 P.3d at 36, 38 (district court's order

B. Where the Parties Have Not Agreed to Arbitrate, a Post-Arbitration Appeal Is Not an Adequate Remedy.

Because an arbitral panel has no authority to hear a dispute in the absence of an arbitration agreement, ordering a party to arbitrate when he has not consented to do so compels the very injury the party seeks to avoid and renders post-arbitration appeal an inadequate remedy. This Court has rejected an overly technical definition of "adequate." Although mandamus cannot be used every time an appeal would be more costly or involve more delay, it also is not limited to cases where there is literally "no other legal operative remedy." *McAllen Med. Ctr.*, 275 S.W.3d at 467-68 (quoting *Bradley v. McCrabb*, Dallam 504, 506-07, 1843 WL 3916 (Tex. 1843)). Put simply, the word "adequate" is "a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts." *Prudential*, 148 S.W.3d at 136.

The inadequacy standard is satisfied most frequently in cases where the trial court's ruling by itself—"regardless of the outcome—would defeat the substantive

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compelling arbitration was final, appealable order; because questions of material fact exist[ed] as to whether the parties had agreed to arbitrate, the plaintiff could not "be forced to arbitrate unless and until the fact finder resolve[d] these disputes"); *Banner Entm't, Inc. v. Superior Court*, 62 Cal. App. 4th 348, 351, 360-62 (Cal. 2d Dist. Ct. App. 1998) (because no evidence was proffered that showed the parties negotiated or agreed to arbitrate disputes as part of alleged oral contract, granting writ and remanding to trial court to vacate order compelling arbitration); *see also Freis*, 877 S.W.2d at 284 ("party who is compelled to arbitrate without having agreed to do so will have lost its right to have the dispute resolved by litigation" and has no adequate remedy by appeal).

right involved." *McAllen Med. Ctr.*, 275 S.W.3d at 465. This Court has held mandamus appropriate where a trial court has denied a motion to compel arbitration, or granted a jury trial despite a contractual waiver, recognizing that "even if the refusal were eventually corrected on appeal [after trial], the party seeking arbitration [or a non-jury trial] 'would be deprived of the benefits of the [bargain] it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated.'" *Prudential*, 148 S.W.3d at 138 (quoting *Jack B. Anglin Co.*, 842 S.W.2d at 272-73). Like forcing a party to undergo a jury trial despite the arbitration agreement in *Jack B. Anglin Co.* or the contractual waiver in *Prudential*, forcing a party to arbitrate despite the lack of an agreement to do so *might* eventually be corrected on appeal after arbitration. But as in those cases, even if the party forced to arbitrate could ultimately obtain vacatur of the resulting award based on the fact that there was no arbitration agreement, it would already have lost a part of its right to litigate in the court system by being forced to engage in a procedure with higher costs and fewer rights and protections than it had agreed to. *Freis*, 877 S.W.2d at 284 ("[A] party who is compelled to arbitrate without having agreed to do so will have lost its right to have the dispute resolved by litigation. Accordingly, such a party has no adequate remedy by appeal."); *Prudential*, 148 S.W.3d at 138-39.

C. Compelling a Party to Arbitrate in the Absence of an Agreement Violates the Texas Constitutional Right to a Jury Trial.

Protecting a party's right to a judicial forum through mandamus is critically important because the right involved is constitutional rather than statutory or contractual. Texas's Constitution holds "inviolate" the right to a jury trial, Tex. Const. art. I, § 15, and a party cannot be deprived of this right without his consent. *See, e.g.*, *Prudential*, 148 S.W.3d at 132; *see also Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997) ("We have long recognized that the Texas Constitution confers an exceptionally broad jury trial right upon litigants. And we have warned that courts must not lightly deprive our people of this right by taking an issue away from the jury." (citing Tex. Const. art. I, § 15, art. V, § 10, and *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291-93 (Tex. 1975))). Because the plaintiff here demanded a jury trial, which arbitration would prevent, his invocation of mandamus is directly aimed at protecting his constitutional right to a jury. *See* Tex. Const. art. V, § 10 ("In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury . . . .").

This Court has recognized that compelling arbitration where the parties have not agreed to it improperly overrides a party's right to a jury trial: "[T]he right to a jury trial is not discretionary. . . . If the parties have not agreed to arbitration, no trial court has discretion to make them go." *In re Merrill Lynch Trust Co. FSB*, 235

S.W.3d 185, 193 (Tex. 2007). The connection is clear: waiver of a constitutional right—including the right to jury trial—must be "voluntary, knowing, and intelligent, with full awareness of the legal consequences." *Prudential*, 148 S.W.3d at 132. And if the parties have not agreed to arbitrate, the party did not voluntarily waive the right to jury trial. *See id.* (an agreement to arbitrate constitutes a waiver of the right to jury trial); *see also Beacon Theatres*, 359 U.S. at 510 ("[T]his (jury) right cannot be dispensed with, except by the assent of the parties entitled to it . . . .").[11] The legislature's preference for arbitration expressed in the TAA, *see Gulf Exploration*, 289 S.W.3d at 838, cannot and does not change the analysis. *See* Tex. Const. art. I, § 15, art. V, § 10; *see also* Tex. Const. art. I, § 15, interpretive cmt. ("Section 15 further grants to the legislature the power to regulate the right of trial by jury, and to maintain its purity and efficiency. *The clause does not permit reduction of the right*." (emphasis added)); *see also Granger v. Folk*, 931 S.W.2d 390, 393 (Tex. App.-Beaumont 1996) ("Restrictions placed on the right to a jury trial will be subjected to the utmost scrutiny.").

Both this Court in looking to the Texas Constitution and the federal courts looking to the Seventh Amendment have "emphasize[d] the responsibility of [courts] to grant mandamus where necessary to protect the constitutional right to trial by jury." *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472 (1962); *see Beacon*

[11] The FAA itself has long recognized that it is for a jury to determine whether an agreement to arbitrate exists. 9 U.S.C. § 4.

Theatres, 359 U.S. at 511; *Allegheny Int'l, Inc. v. Allegheny Ludlum Steel Corp.*, 920 F.2d 1127, 1133-34 (3d Cir. 1990) (holding that "the orders at issue implicate[d] the constitutional right to trial by jury," and thus there was "ample authority" to consider the appeal through mandamus and discussing an "impressive progeny" of U.S. court of appeals cases so holding); *Columbia Med. Ctr.*, 290 S.W.3d at 209 (mandamus warranted to protect the right to jury trial); *Prudential*, 148 S.W.3d at 138-39 & n.66 (recognizing "the denial of trial by jury is [] reviewable by mandamus" and citing Texas cases).

In fact, *Gulf Exploration* itself implied that the lack of an arbitration agreement would create a counterbalancing constitutional mandate that would present that "rare case[]" when mandamus would be warranted. 289 S.W.3d at 843. The Court held that mandamus may be "essential" when arbitration would threaten constitutional rights or undermine a statutory scheme but noted that the only constitutional right implicated in the case was "the right to a jury trial." *Id.* However, the Court held the arbitration agreement—the existence of which was undisputed there—necessarily waived that right. *Id.* Conversely, without an agreement to arbitrate, there is no waiver of this important constitutional right and mandamus should issue.

This Court should make clear that *Gulf Exploration* does not depart from this long line of state and federal cases ensuring that the writ of mandamus is

available to protect the right to a jury trial: It should allow mandamus review of orders compelling arbitration when a party has made a showing that he did not enter into a written arbitration agreement but the court has nonetheless compelled arbitration.

IV. Practical Considerations Support Mandamus Review of Orders Compelling Litigation Where There Is a Genuine Dispute About the Existence of an Arbitration Agreement.

Mandamus review of orders compelling litigation where there is a genuine dispute about the existence of an arbitration agreement will not unduly expand mandamus review and will avoid needless expense and delay in these rare cases.

Gulf Exploration expressed concern that "reviewing all arbitration orders to see if they comply with an exception 'would inevitably frustrate [the legislature's] intent to move the parties . . . out of court and into arbitration as quickly and easily as possible.'" 289 S.W.3d at 838. But providing for mandamus review only in the rare cases where there is a genuine dispute about the existence of an arbitration agreement will not pose this risk. As discussed above, unlike questions of the agreement's scope or continuing validity, the question of *existence* of the agreement is for the court, implicates the jury trial right, and arises *prior* to the presumption in favor of arbitration, as the court lacks authority to compel arbitration in the absence of an agreement. The question also arises far less frequently than other types of challenges to arbitration. For instance, allowing

mandamus review in this category of cases would not have altered the decision denying mandamus review in *Green Tree*, *Apache Bohai*, or *Gulf Exploration*—as the parties did not dispute the existence of the arbitration agreements at issue.[12]

Providing for mandamus review in this category of cases would eliminate significant and needless burdens, expense, and delay. Because parties in these cases dispute that they agreed to arbitrate at all, requiring them to arbitrate before appealing compels them to undergo the very injury they are challenging. And if forced to arbitrate before appealing, parties may suffer very significant expense and delay before they can vindicate their right to litigate in court.

Although expense and delay are generally not alone sufficient to warrant mandamus, they weigh in favor of mandamus review. *McAllen Med. Ctr.*, 275 S.W.3d at 467-69; *Prudential*, 148 S.W.3d at 136-37 (noting that even expense and delay alone can merit mandamus at a certain point). And they deserve particular weight when a party is threatened with having to litigate an entire case in an improper forum, with the wrong decision-maker, or to litigate twice—exactly the risks faced by a party who is forced to arbitrate even though it never entered into an arbitration agreement. *See Columbia Med. Ctr.*, 290 S.W.3d at 209-210 (holding

[12] *See Green Tree*, 531 U.S. at 82 (whether an arbitration agreement that does not mention costs and fees is unenforceable); *Apache Bohai*, 330 F.3d at 308-09 (challenging district court's failure to dismiss the case); *Gulf Exploration*, 289 S.W.3d at 843 (the court of appeals believed wells were "outside the parties' area of mutual interest, and thus not within the scope of the arbitration clause").

mandamus proper where a court improperly and without explanation denied a jury trial); *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008) (where trial court error "would inevitably result in considerable expense to taxpayers and defendants, requiring defendants to proceed to trial in the wrong county is not an adequate remedy"); *Prudential*, 148 S.W.3d at 136, 138-39 (mandamus proper where court improperly denied a non-jury trial). In such cases, mandamus review is necessary to "spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings." *Prudential*, 148 S.W.3d at 136.[13]

The expense and delay entailed when a party can appeal arbitrability only after being forced to arbitrate are enormous. As a report by amicus Public Citizen has documented, arbitration forum costs alone can be up to 5000 percent higher than the costs to litigate in court. *See* The Costs of Arbitration, *supra* note 2, at 1. Because parties are usually required to pay half of the arbitrators' fees and face higher upfront filing fees in arbitration, these increased costs can be prohibitively

[13] Although this Court has emphasized expense and waste of resources suffered by the public court system as well as the parties in some of its mandamus cases, *compare* Resp. to Pet. at 20 (arguing only public waste counts), *with Team Rocket*, 256 S.W.3d at 262 (considering waste to both the parties and the public), that does not mean inefficiency and waste should be disregarded in this case because it will primarily be borne by the plaintiff. The Court has stated that the burden of expense and delay to a particular party weighs in favor of mandamus. *See, e.g.*, *McAllen Med. Ctr.*, 275 S.W.3d at 467 ("Unquestionably, *the hospital* could have avoided significant expense and delay had the trial court followed the law as set out in the statute; unquestionably, *the hospital* will continue to incur costs and delay in the future if we deny relief today. Accordingly, we hold *the hospital* has shown it has no adequate remedy by appeal." (emphases added)).

expensive and prevent consumers or other parties from making a claim at all. *See id.* at 1, 40-58. When a trial court erroneously compels arbitration in the absence of any agreement, the plaintiff may be forced to abandon the claim altogether if mandamus review is unavailable, and the appellate courts will never have the opportunity to review whether the parties agreed to arbitrate.

Moreover, forcing a plaintiff to arbitrate before appealing may needlessly delay justice for the plaintiff for years, whereas an appellate decision could have been made in a matter of months. Where the mandamus inquiry is limited to the simple question of whether there was a written arbitration agreement between the parties, mandamus may be handled expeditiously with little delay to the case. As *Gulf Exploration* pointed out, Texas rules allow an appellate court to summarily deny mandamus relief in cases that lack meritorious claims without opinion and without waiting for a response from the opposing party. 289 S.W.3d at 843.

Perry Homes v. Cull, 258 S.W.3d 580 (Tex. 2008), provides a telling example of the delay that can be incurred when an appellate court refuses review until after arbitration. In that case, the trial court ordered arbitration in December 2001, and the court of appeals and this Court denied mandamus review without opinion in April and May 2002, respectively. *Id.* at 585 & n.5. The plaintiffs were awarded damages after a year in arbitration. *Id.* at 585. The defendants moved to vacate the award, the trial court overruled the objection, the court of appeals

affirmed, and this Court granted the defendants' petition to consider whether the arbitration award should be set aside. *Id.* The Court issued its opinion vacating the arbitration award and ordering that litigation proceed in the courts in May 2008 and denied rehearing in August 2008—well over six years after mandamus was originally denied. *See generally Perry Homes*, 258 S.W.3d 580.

Although *Perry Homes* was the unusual case in which *plaintiffs* sought arbitration and the *defendant* objected on the ground that the plaintiffs had waived arbitration by substantially invoking the litigation process, these timelines easily could apply to cases like this one. Although cases involving the complete absence of an arbitration agreement are atypical, in a substantial number of reported cases, trial courts ordered arbitration, but appellate courts later determined that there was no agreement to arbitrate.[14] If immediate appeal or mandamus were unavailable to allow correction of those errors, parties who never had agreed to arbitrate and to waive the right to litigate before a jury would be forced into arbitration with the attendant increased expenses and years of delay.[15]

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[14] *See, e.g.*, *Knutson*, 771 F.3d at 565-66, 569-70; *Hergenreder*, 656 F.3d at 417-18, 421; *Douglas*, 495 F.3d at 1065-69; *Will-Drill Res.*, 352 F.3d at 212, 220 (remanding to determine if there was an agreement to arbitrate); *Fleetwood Enters.*, 280 F.3d at 1073-74; *Gibson*, 121 F.3d at 1128, 1131-32; *Cheek*, 835 A.2d at 657, 662, 668; *Mendivil*, 357 S.W.3d at 832-33; *Sisneros*, 142 P.3d at 36, 38 (remanding due to questions of material fact as to agreement's existence); *Banner Entm't*, 62 Cal. App. 4th at 351, 361-62; *see also Freis*, 877 S.W.2d at 284.

[15] *See also Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 959, 962-964 (9th Cir. 2007) (district court incorrectly concluded that resolution of fundamental contract formation questions were for arbitrator to decide; appellate court reversed after arbitration, nearly five years after order

CONCLUSION

Postponing the fundamental question of the existence of an agreement to arbitrate until after arbitration, is inefficient, illogical, and violates the FAA, the TAA, and the Texas Constitution. This Court should make clear that such a result is not required by Texas law or the Court's decision in *Gulf Exploration*. The writ of mandamus should be granted requiring the Respondent to vacate the order compelling arbitration with directions to allow the case to proceed.

Respectfully submitted,

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compelling arbitration); *Lee v. Red Lobster Inns of Am., Inc.*, 92 F. App'x 158, 158-159 (6th Cir. 2004) (appellate court reversed order compelling arbitration because no binding arbitration agreement after arbitration and 4.5 years after order compelling arbitration).

CERTIFICATION OF COMPLIANCE WITH LENGTH RESTRICTIONS

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), I certify that I have reviewed the foregoing Brief of Amici Curiae Public Citizen and Public Justice. Excluding the items listed in Texas Rule of Appellate Procedure 9.4(i)(1), this petition has 9,714 words, which is less than the maximum of 15,000 words permitted by Rule 9.4(i)(2)(B).

/s/ David A. Kahne
David A. Kahne

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was originally served electronically and via e-mail and U.S. certified mail upon the following counsel for Relator and Real Parties in Interest, via U.S. certified mail on the Respondent, and via U.S. certified mail on the Texas Attorney General on May 7, 2015. A corrected version of this brief, which was modified only by removing the names of the attorneys employed by Amici and who are not admitted to practice in Texas from the cover page and signature block, was served electronically and via e-mail and U.S. certified mail upon the following counsel for Relator and Real Parties in Interest, via U.S. certified mail on the Respondent, and via U.S. certified mail on the Texas Attorney General on May 12, 2015.

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