

No. 09-497

IN THE
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

**On Writ Certiorari to the United States Court
of Appeals for the Ninth Circuit**

**BRIEF OF THE AMERICAN ASSOCIATION
FOR JUSTICE AND AARP AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Association for Justice (“AAJ”) is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. AAJ is committed to the ideal of access to justice for all Americans for redress of grievances. AAJ is concerned that one-sided mandatory arbitration “agreements” are increasingly being drafted into consumers’ and workers’ contracts. These provisions are often so onerous that they not only shut wronged individuals out of the courts, they immunize the drafters from any accountability at all. AAJ believes that judicial review for unconscionability is essential to protect ordinary Americans’ access to justice.

AARP is a non-partisan, non-profit organization dedicated to addressing the needs and interests of people aged 50 and older. As the largest membership organization serving older people, AARP supports laws and public policies designed to protect and preserve the legal means to seek redress when older persons are harmed in the consumer and employment marketplace. AARP advocates for improved access to the civil justice system for people with small claims or seeking to enforce important civil and statutory rights, and supports the availability of the full range of enforcement tools for consumer protections and employment rights.

Letters from counsel for all parties evidencing their consent to the timely filing of *amicus curiae* briefs have been filed with the Court.¹

SUMMARY OF THE ARGUMENT

1. Petitioner’s primary contention—that the drafters of arbitration provisions are guaranteed and entitled to have them enforced “as written”—is not and should not be the law.

To the contrary, courts historically have sought to avoid unjust results dictated by egregiously one-sided contracts. Courts sitting in equity developed the doctrine of unconscionability, which was readily adopted by American courts, as reflected in the Uniform Commercial Code and, more broadly, in the Restatement (Second) of Contracts.

The doctrine that equity will not enforce an unconscionable contract has generally served the function of a safety valve in the law of contracts. It provides a tool for courts to decline to enforce unjust contracts without distorting contract law or undermining its predictability.

Congress explicitly adopted the unconscionability doctrine with respect to arbitration agreements. Section 2 of the Federal Arbitration Act (“FAA”) mandates enforcement of such agreements, “save upon such grounds as exist at law or in equity for the revocation of any contract.” Section 2 is

¹Pursuant to Rule 37.6, *Amici* disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amici Curiae*, their members, or counsel make a monetary contribution to its preparation.

essentially an equal protection guarantee for arbitration agreements, according them the same enforceability as other contracts, but not more. As this Court has repeatedly made clear, such agreements may be held unenforceable if unconscionable under state law.

This “safety valve” function has become vastly more important as standardized contracts of adhesion have become ubiquitous. The notion that such contracts express the “agreement” of the parties is a legal fiction. Nevertheless, the law recognizes that such standardized forms are essential to the efficient operation of a mass-market economy. The fact that courts can refuse enforcement if the drafting party has abused its power by imposing egregiously unfair terms helps foster acceptance of the use of standard form contracts. The unconscionability doctrine provides an assurance of basic due process for individuals who must accept such contracts.

This Court has repeatedly stated, and Petitioner agrees, that the decision whether an agreement to arbitrate is unconscionable is generally for the court. “Arbitrability” decisions that involve ascertaining the meaning or scope of the agreement may be assigned by the parties to the arbitrator. But this Court has never suggested that whether an agreement to arbitrate is unconscionable, a question that requires application of the state’s general law of contracts, may be turned over to the arbitrator. That decision is in fact closely related to the gateway question of whether the parties actually agreed to a contract, a question that is indisputably for the court. Yet, Petitioner asks this Court to allow the

drafting party to strip the courts of jurisdiction to decide unconscionability.

2. Petitioner's proposal that the drafting party be allowed to make the arbitrator the sole judge of whether an arbitration clause is unconscionable is wholly unworkable.

There are currently "millions" of contracts that, like the contract in this case, give the unconscionability decision to the arbitrator, and Petitioner asserts that arbitrators are "fully capable" of making that determination. Yet, Petitioner is unable to point to a single instance in which an arbitrator ruled an arbitration agreement unconscionable and therefore unenforceable.

This is hardly surprising. Courts hold arbitration agreements unconscionable not because they require the worker or consumer to arbitrate their claims, but because they make it impossible to do so. Corporate drafters of such agreements require the individual's claims be submitted to arbitration, but attach such onerous conditions to the arbitration that no rational consumer or employee can vindicate his or her rights there. Such conditions include prohibitively high fees, requiring the arbitration be conducted in a distant location, restrictions on the damages that the individual can recover, drastically shortened limitations periods, and prohibitions against aggregating small claims into a class arbitration.

These provisions were held unconscionable precisely because they prevented the worker or consumer from utilizing arbitration. If the unconscionability decision were the responsibility of

the arbitrator, that decision would not be made: The unconscionable feature of the agreement is one that prevents the individual from going to arbitration. Petitioner's proposal is essentially a Maytag repairman scenario: The arbitrator may be the designated decider, but no one is going to call.

Petitioner's plan is unworkable even if it is assumed that some unconscionability challenges are placed before the arbitrator. The arbitrator would be placed in an untenable position of conflict of interest. The arbitrator would face a choice of whether to proceed with the arbitration despite its unconscionable features or rule the agreement unenforceable and thereby deprive himself of substantial arbitration fees.

It is a fundamental principle, which this Court has repeatedly upheld, that due process guarantees a neutral decisionmaker and does not permit a judge to decide a case in which he or she has a direct, personal, substantial pecuniary interest. Petitioner's proposal blatantly offends this principle. The financial interest of the arbitrator will always be aligned with the drafter of the arbitration agreement and against the interest of the individual, the victim of the unconscionable contract.

To reject this role for arbitrators is no indicator of hostility toward arbitration. Historically, the law has not even inquired as to whether a judge with financial interest in a case harbored actual bias. Even assuming such a decisionmaker were fully capable of ignoring his or her own financial stake in the matter, the law does not permit a self-interested decisionmaker. This Court should reject such a flawed proposal and maintain the role of the neutral

and disinterested judge as the decisionmaker on the question of whether an arbitration agreement is unconscionable.

ARGUMENT

I. THE UNCONSCIONABILITY DOCTRINE SUPPORTS THE ENFORCEMENT OF CONTRACT RIGHTS BY ALLOWING COURTS TO REFUSE ENFORCEMENT OF EGREGIOUSLY UNJUST CONTRACTUAL PROVISIONS OBTAINED BY PARTIES WIELDING GREAT ECONOMIC POWER.

This case highlights the important role courts have played in preserving freedom of contract which is so important to this country's economic vitality. The doctrine of unconscionability is neither recent nor hostile to the private right of contract. Common law courts have employed this equitable doctrine throughout this country's history as an important tool in preserving the sanctity of contract rights. Courts' identification of and refusal to enforce unconscionable arbitration provisions fosters fairer and more readily accepted arbitration practices.

A. The Law Does Not Guarantee Enforcement of Contracts "As Written," But Has Historically Provided Courts a Safety Valve to Deny Enforcement of Unjust and Unconscionable Provisions.

The cornerstone of Petitioner's case is that arbitration agreements must be "enforced as written." Pet'r Br. 14. This, Petitioner asserts, is "the

central purpose of the FAA.” *Id.* at 17 & 21. Indeed, the only role Petitioner sees for the federal courts is “guaranteeing the enforcement of private contractual arrangements,” such as the arbitration agreement in this case, without question. *Id.* at 15.

This is not, has never been, and should not become the law.

Professor Samuel Williston wrote in his authoritative treatise on the eve of enactment of the Federal Arbitration Act in an era when freedom of contract was held in the highest esteem:

When it is now said that courts “will neither make nor modify contracts, nor dispense with their performance,” if it is meant that such power will not be exercised except in accordance with legal principles, the statement is sound; but if the meaning is that parties to contracts are always liable in accordance with their terms, it is far too narrow a limitation of the functions of the common law [C]ourts have wisely imposed obligations on parties to contracts which they never agreed to assume; and . . . have modified contracts or dispensed with their performance, simply because justice required it.

3 Samuel Williston, WILLISTON ON CONTRACTS 3281-82 (1920) (footnotes omitted).²

Professor Richard Epstein, in an article widely cited for its call for the enforcement of contracts according to their terms, adds this important qualification:

[T]he principle of freedom of contract, which was central to the classical common law . . . does not require a court to enforce every contract brought before it. The doctrine of unconscionability . . . can, if wisely applied, allow the courts to . . . improve the general administration of the contract law.

Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293, 315 (1975).

The unconscionability doctrine has deep roots. *See generally* Dando B. Cellini & Barry L. Wertz, *Unconscionable Contract Provisions: A History of Unenforceability from Roman Law to the UCC*, 42 Tul. L. Rev. 193 (1967-68). The law courts at common law, though committed to enforcing contracts as drafted, often “prevented unconscionable results

² Professor Arthur Corbin, who collaborated with Williston on the Restatement of Contracts but with whom he often held diametrically opposed views, agreed that the law does not and cannot guarantee enforcement of contracts as written. A court will hold the parties to an unwritten implied promise of “good faith,” recognizing that “its duty to the spirit of the bargain is higher than its duty to the technicalities of the language.” Arthur L. Corbin, CORBIN ON CONTRACTS § 570 (Kaufman Supp. 1984).

through strict interpretation of unconscionable clauses and manipulation of conventional concepts of contract law.” *Id.* at 197. They also employed findings of fraud, duress, and lack of mutual assent as “imaginative flanking devices” to avoid an unjust result. John D. Calamari & Joseph M. Perillo, *THE LAW OF CONTRACTS* 820 (2d ed. 1977). In fact, “common law courts exercised much discretion in this area.” Cellini & Wertz, *supra*, at 198.

These tactics may have achieved just results in particular cases, but were highly unpredictable and harmful to the law’s development generally. As Professor Karl Llewellyn remarked in this regard, “[c]overt tools are never reliable tools.” Karl N. Llewellyn, *THE COMMON LAW TRADITION* 365 (1960).

It fell to equity courts to develop the means to address this problem directly. As Chief Justice Stone noted, the concept of unconscionability underlies “practically the whole content of the law of equity.” Harlan F. Stone, *Book Review*, 12 *Colum. L. Rev.* 756, 756 (1912). The doctrine, as developed by the English courts, was readily adopted in this country. *See Restatement (Second) of Contracts* § 208, comment b (1981).

Section 2-302 of the Uniform Commercial Code incorporated the doctrine of unconscionability into the law of sales. Professor Llewellyn, the U.C.C.’s primary author, viewed the doctrine as “a safety valve” that allowed courts “to make the entire system more predictable.” Curtis Nyquist, *Llewellyn’s Code As a Reflection of Legal Consciousness*, 40 *New Eng. L. Rev.* 419, 433 (2006).

The American Law Institute incorporated the U.C.C. formulation of the doctrine into its restatement of general contract law:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Restatement (Second) of Contracts § 208.

It thus became widely accepted as a general principle, that, as one state court declared, unconscionability serves an important function as a “safety valve in our law of contracts,” allowing courts “to refuse enforcement of a contract . . . when such enforcement would not be in keeping with the basic function of any court—the administration of justice.” *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. Dist. Ct. App. 1982), quoting John E. Murray, Jr., *Unconscionability: Unconscionability*, 31 U. Pitt. L. Rev. 1, 2 (1969). See also Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 San Diego L. Rev. 609, 609 (2009) (Unconscionability also acts as a “safety valve” by calling attention “to the presence of social evils requiring action.”).³

³ In addition, and not insignificantly, allowing courts to refuse enforcement of egregiously unfair arbitration clauses operates “as a sort of safety valve that makes arbitration

Congress did not depart from this general principle when it enacted the Federal Arbitration Act, but instead explicitly made state unconscionability law applicable to agreements to arbitrate:

[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added).

Essentially, section 2 serves as an equal protection guarantee for arbitration agreements by placing them “upon the same footing as other contracts.” *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989). They are subject to general state law contract defenses, including “claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). In short, Congress intended “to make arbitration

politically sustainable,” providing “an outlet to relieve pressure on the system and avert the truly intolerable outcomes that might provoke legislative action.” Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1488 (2008).

agreements as enforceable as other contracts, but not more so.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Consequently, this Court has made clear, “generally applicable contract defenses, such as fraud, duress, or *unconscionability*, may be applied to invalidate arbitration agreements without contravening § 2.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996). (emphasis added).

B. Widespread Use of Standard Form Contracts Makes Judicial Review for Unconscionability Even More Essential.

Petitioner strives mightily to uphold the pretense that the contract in this case was a negotiated agreement and ought to be enforceable as such. “[H]aving made the bargain to arbitrate,” Petitioner insists, “the party should be held to it.” Pet’r Br. 17, borrowing a phrase this Court used in *Mitsubishi Motors*, 473 U.S. at 628, where the parties were substantial commercial enterprises who undoubtedly did negotiate their contractual rights.

This is most assuredly not the case for most consumers and employees. Overwhelmingly, they are presented with standardized form contracts. The corporate entity whose legal department drafted the document does not expect the consumer or employee to read it or to understand its import. It certainly does not allow negotiation or alteration. The weaker party’s only option is to reject the entire transaction and take his or her business to another corporation

whose paperwork is similarly one-sided.⁴ As portrayed in one widely-quoted description:

The consumer's experience of modern commercial life is one not of freedom in the full sense posited by traditional contract law, but rather one of submission to organizational domination, leavened by the ability to choose the organization by which he will be dominated.

Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1229 (1983).

Standardized agreements are nevertheless generally enforced, regardless of whether either party knew or understood their contents. Restatement (Second) of Contracts § 211(2). The law recognizes that such agreements are “essential to a system of mass production and distribution.” *Id.*, comment a. Thus, “a party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read” it. *Id.*, comment b.

Despite their advantages, the general law of contracts recognizes that such one-sided contracts present an “obvious danger of overreaching” and are therefore subject “to the power of the court to refuse to enforce an unconscionable contract or term.” *Id.*,

⁴ *Amicus* Equal Employment Advisory Council (“EEAC”) does not even attempt to disguise the lack of any real bargaining power for employees or consumers: “Like any prospective party to a contract, Respondent could have voted with his feet.” EEAC Br. 17.

comment c. *See also* Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 Wash. U. L.Q. 289, 312-13 (1997) (“Unconscionability is a safety valve that guards against outrageous terms” in standard form contracts).

This Court as well has recognized the importance of the doctrine of unconscionability in this context, holding that arbitration provisions in adhesive contracts may be enforced against consumers precisely because section 2 “gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision” under general contract law principles. *Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

Thus, neither the FAA nor the law of contracts generally entitles a party to enforcement of a standardized contract as written, no matter how unfair its terms. The “intent of the parties” expressed in the writing, though a legal fiction, is enforceable so long as the drafting party has not abused that position by inserting provisions that violate the policy of basic fairness that underlies contract law. As Justice O’Connor explained,

Our legal system has decided to allow private parties to invoke the coercive power of the State in the effort to enforce those (and only those) private agreements that conform to rules set by those state policies known collectively as “contract law.” Courts cannot enforce private agreements without reference to those policies, because those policies define the role of courts in deciding

disputes concerning private
agreements.

American Airlines, Inc. v. Wolens, 513 U.S. 219, 250 (1995) (O'Connor, J., dissenting in part).

In short, if section 2 of the FAA acts as an equal protection guarantee for those who insist upon drafting arbitration agreements in consumer and employment contracts, then the doctrine of unconscionability, as applied by the courts, serves as a guarantee of due process for the consumers and employees who must accept such provisions.

In this case, this Court is asked whether courts shall continue to play that role. Petitioner contends that corporate draftsmen can deprive the courts of any authority to do so simply by inserting the words used by Rent-A-Center in this case into any standardized, unread arbitration “agreement.”

C. This Court Has Properly Assigned the Question Whether an Arbitration Agreement Is Unconscionable to Judicial Determination.

Amici agree with Respondent that such a ruling would be inconsistent with the FAA and with the precedents of this Court. As Petitioner concedes, “gateway” questions of arbitrability “would normally be decided by the court.” Pet’r Br. 21. Petitioner insists, however, that this Court in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), created an exception whereby the party drafting the contract

can strip the court of any authority to decide unconscionability in favor of the arbitrator simply by inserting language indicating that “the parties clearly and unmistakably [so] provide.” Pet’r Br. 23.

No such “exception” can be derived from a fair reading of those two cases. Neither case involved unconscionability, but rather “arbitrability.” And while arbitrability can be used to refer to whether an arbitration agreement is enforceable under state law, the Court in these two cases made clear it was using the term in a narrower sense—a determination regarding the scope and interpretation of the contract at issue.

In *AT&T* the Court defined “question of arbitrability” as “whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance.” 475 U.S. at 649. In *First Options* the Court stated that the arbitrator is to decide arbitrability if there is “clear and unmistakable” evidence that the parties so agreed. But the Court made clear in the next sentence that “arbitrability” meant “whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.” 514 U.S. at 944-45. In each instance, the Court merely restated its long-held view that questions of contract interpretation are questions that “[a]rbitrators are well suited to answer.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453 (2003).

Unconscionability, by contrast, is not a question resolved by interpreting the agreement, but rather by applying the principles embedded in the state’s general law of contracts. This Court has explicitly stated that such questions of law—

”whether legal constraints external to the parties’ agreement foreclosed the arbitration of [a party’s] claims”—are for the court to decide. *Mitsubishi Motors*, 473 U.S. at 628.

Secondly, a challenge to the enforceability of a contract due to procedural and substantive unconscionability can—and very often is—viewed as an assertion that the consumer or worker should not be deemed to have agreed to the provision at all.

Petitioner appears to concede that an allegation of fraud in the making of an arbitration agreement is always a question for the Court. Pet’r Br. 25, citing *Prima Paint Corp.* See also *Mitsubishi Motors*, at 626 (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”).

Petitioner, however, would apply a different rule to an allegation of unconscionability: Whether the parties made an agreement must be decided by the court; whether an agreement is valid and enforceable may be assigned to the arbitrator. Pet’r Br. 25-26 n.9.

This distinction between lack of intent and lack of fairness is a false dichotomy. It stems from a false view of unconscionability as a matter of courts assuming “the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable.” Chamber Br. 14.

In fact, a finding that a provision buried in a standard contract, presented to the inexperienced

consumer or employee on a take-it-or-leave-it basis is procedurally and substantively unconscionable is essentially a finding that the consumer or employee did not agree to the provision. Rather than demand the weaker party bear the burden of proving lack of assent, the court can make its decision based on the contract language, construed against the drafter, and the surrounding circumstances.

Professor Epstein, no strong supporter of the doctrine, explains: “The doctrine of unconscionability, properly conceived and applied, . . . protects against fraud, duress and incompetence, without demanding specific proof of any of them,” looking instead to the content of the contract and the positions of the parties. Epstein, *Unconscionability, supra*, at 302.

As Justice O’Connor has pointed out, “the unconscionability doctrine [is] far from being a purely ‘policy-oriented’ doctrine that courts impose over the will of the parties.” *American Airlines*, 513 U.S. at 249. Rather, “a determination that a contract is ‘unconscionable’ may in fact be a determination that one party did not intend to agree to the terms of the contract.” *Id.*

A recent example can be found in the New York Court of Appeals decision in *Schreiber v. K-Sea Transportation Corp.*, 879 N.E.2d 733 (N.Y. 2007). A shipowner sought to compel arbitration of an injured seaman’s Jones Act claim. The American Arbitration Association (“AAA”) filing fee was \$10,000 of which the seaman’s share under the arbitration agreement was \$9,250. The Court of Appeal stated that the fee was “so far in excess of what most seamen can afford [that] a factfinder might conclude that K-Sea

deceived Schreiber into signing.” *Id.*, 879 N.E.2d at 739.

In sum, this Court has created no exception to the rule that gateway decisions that are matters of contract law, as distinguished from contract interpretation, are judicial decisions. Nor is any such exception warranted. Decisions regarding unconscionability largely overlap with decisions regarding lack of intent to contract, which are indisputably judicial decisions.

II. ALLOWING THE PARTIES TO ASSIGN THE DETERMINATION OF WHETHER AN ARBITRATION PROVISION IS UNCONSCIONABLE IS UNWORKABLE.

Not only is the regime proposed by Petitioner at odds with section 2 of the FAA and with the precedents of this Court, it is also entirely unworkable. This is not an instance where the party retains substantive rights and “only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors*, 473 U.S. at 628. Unconscionable arbitration agreements often shut the individual out of both the courthouse and the arbitrator’s office. Any right to have unconscionability be decided by the arbitrator is illusory.

A. Unconscionable Arbitration Provisions Frequently Discourage or Prevent the Weaker Party from Proceeding to Arbitration.

Petitioner urges this Court to hold that the party drafting an arbitration agreement can strip the court of authority to review the agreement for unconscionability and instead confer that authority on the arbitrator.

Petitioner is confident that arbitrators are “fully capable” of fairly deciding whether an arbitration agreement is unconscionable. Pet’r Br. 34. In Petitioner’s view, such “garden variety” unconscionability claims are easily decided by courts, and “[t]here is no reason why an arbitrator could not do likewise.” *Id.* at 35. Yet, Petitioner cannot point to a single instance in which an arbitrator has done so. Nor has any of Petitioner’s supporting *amici* identified a single instance where an arbitrator has ruled that an agreement to arbitrate is unenforceable as unconscionable.⁵

This is not at all surprising. Arbitrators’ capability to make unconscionability decisions is a moot point if individuals cannot go to arbitration precisely because of the unconscionable features of

⁵ The Chamber of Commerce found 61 Westlaw-reported decisions involving unconscionability challenges to arbitration agreements over five years, 25 of which succeeded. Chamber Br. 17-18 nn.6 & 8. According to the Chamber, “millions of contracts” designate the arbitrator as the decider of questions of enforceability. Chamber Br. 10. The Chamber does not indicate that a single arbitrator has resolved that question in favor of the employee or consumer.

their arbitration agreements. Many arbitration agreements are held unconscionable because they are designed to make it difficult—if not economically irrational—for individuals to pursue their claims at all. The aim of the drafter of the agreement is not to move disputes from the judicial to the arbitral forum, but rather to give the drafter immunity from accountability in any forum. It does so by making arbitration so expensive, onerous or of such limited benefit that no rational person would pursue it. As one federal district judge stated:

It is not just that AT&T wants to litigate in the forum of its choice—arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable.

Ting v. AT&T, 182 F. Supp. 2d 902, 939 (N.D. Cal. 2002), *aff'd in part* 319 F.3d 1126 (9th Cir.), *cert. denied* 540 U.S. 811 (2003).

Judicial review of such unconscionable arbitration provisions is not indicative of hostility toward arbitration. Rather, the court seeks to protect access to the arbitral forum by inquiring,

whether the arbitration regime here is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses. . . . [I]f the remedy is truly illusory, a court should not order arbitration at all but decide the entire dispute itself.

Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 13 (1st Cir. 2009).

The “right” to have an arbitrator determine whether an arbitration agreement is unconscionable is a hollow right indeed if the provision is unconscionable precisely because it prevents the party from going to arbitration. Corporations seeking to insulate themselves from liability to their customers or employees have drafted mandatory arbitration “agreements” in a variety of ways that render arbitration a “truly illusory” remedy.

1. High Arbitration Costs

This Court has observed that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.” *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

A typical arbitration requires an up-front payment from the parties of a filing fee to a designated arbitration provider, such as the AAA, which was named in the Rent-a-Center agreement here. Those fees can be substantial, even prohibitive for individuals with modest claims. For example, in one case, a plaintiff pursuing an employment discrimination claim “was required to pay an initial, non-refundable filing fee of \$500 to the American Arbitration Association, an additional filing fee of \$2,750, a case-filing fee of \$1,000, an additional charge of \$150 for each day of the hearing and half the cost of an arbitrator.” *Spinetti v. Serv. Corp. Int’l*, 324 F.3d 212, 217 (3d Cir. 2003).

In *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W.Va. 2002), plaintiff alleged that a jewelry retailer fraudulently added the cost of life and property insurance to the amount charged for jewelry purchases. The store sought to enforce an arbitration agreement making the customer responsible for “a \$500 minimum, non-refundable administrative fee; a \$150 daily hearing fee; a \$150 daily room rental fee; . . . processing fees, reporting service fees, and possible postponement fees.” *Id.* at 282. *See also Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (requirement that mobile home purchaser pay filing fee of \$2,000, plus share of arbitrators’ fees, to resolve \$1,500 claim was unconscionable); *Phillips v. Associates Home Equity Serv., Inc.*, 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001) (\$4,000 filing fee for arbitration of plaintiff’s Truth in Lending Act claim “would effectively preclude her from vindicating her federal statutory rights.”).

In addition to the filing fee, the parties are responsible for compensating the individual arbitrator hearing the case. Arbitrators require payment in advance, and rates of \$1,800 per day or more are not unusual. *See, e.g., Spinetti*, 324 F.3d at 217 (“a mid-range arbitrator in Western Pennsylvania charges approximately \$250 an hour with a \$2,000-per-day minimum”); *Phillips*, 179 F. Supp. 2d at 846 (arbitrators in the Chicago area are compensated up to \$5,000 per day with an average of \$1,800 per day); *Ting*, 182 F. Supp. 2d at 917 (noting that AAA arbitrators on the Commercial Panel in Northern California were paid an average of \$1,899 per day, with some arbitrators charging almost double that amount); Reginald Alleyne, *Statutory*

Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum, 13 Hofstra Lab. L.J. 381, 410 n.189 (1996) (reporting that JAMS/Endispute arbitrators charged, at that time, an average of \$400 per hour).⁶ These charges apply not only to hearing time, but to time expended on motions and discovery rulings, “study time,” and travel time. *See Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 897, 894 (W.D. Va. 2001).

Perhaps most importantly, the actual cost of going to arbitration is unknown to the consumer or employee at the outset. He or she is required to pay a share of the arbitrator costs in advance as the arbitration progresses. This has a chilling effect on the individual’s ability to vindicate important legal rights.

The arbitrators’ fees typically come to a much larger total than the filing fees. The First Circuit recently noted that some arbitrations of franchise disputes have reportedly cost \$100,000 and \$150,000 (for one arbitrator) and \$300,000 and \$400,000 (for a three-person arbitration panel). *Awuah*, 554 F.3d at 12.

Fees are less for smaller and simpler claims, but may still be set at a level that discourages most persons with modest but valid claims. One court, for example, estimated the arbitrators’ fees in a typical employment discrimination case to be \$3,750 to

⁶ It has been estimated that a typical employment discrimination case averages between fifteen to forty hours of arbitrator time. *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 n.5 (10th Cir. 1999).

\$14,000. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1480 n.8 (D.C. Cir. 1997).

The inescapable conclusion is that the drafters of such provisions are not seeking an inexpensive forum; their aim is to make arbitration too expensive for consumers and employees to use. As one court noted in a case where a borrower against whom a claim has been brought could obtain a hearing only upon prepayment of a minimum \$98 filing fee and \$750 arbitrator fee, given the relatively small amounts at issue, “the procedure seems designed to discourage borrowers from responding at all.” *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (Cal. Ct. App. 1993). That is certainly the only conclusion that can be drawn from an arbitration process that leaves a victorious consumer worse off than one who simply stays home. *See, e.g., Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571 (N.Y. App. Div. 1998) (\$2,000 non-refundable registration fee to arbitrate personal computer claims generally valued at less than \$1,000 held unconscionable); *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 860 (Mo. 2006) (where homebuyers made claims for misrepresentation and defective workmanship, arbitration provision that required purchasers to pay all arbitration fees was unconscionable; “the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress.”

In *Gilmer v. Interstate/Johnson Levine Corp.*, this Court held that agreements requiring arbitration of employment claims are enforceable under the FAA, based on the assumption that a person does not forgo any substantive rights

provided by the statute; they are simply resolved in an alternate forum. 500 U.S. at 26.

As the Tenth Circuit pointed out, “This supposition, falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.” *Shankle*, 163 F.3d at 1234. An arbitration agreement “that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum.” *Id.* Prohibitive costs, as the Idaho Supreme Court has pointed out, “turns the purposes of arbitration upside down. It is an expensive alternative to litigation that precludes the [weaker party] from pursuing the claim.” *Murphy v. Mid-West Nat’l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003).

The consumer or employee faced with unaffordably large arbitration costs would be prevented by those same costs from seeking a hearing and decision by the arbitrator on the question of unconscionability.

2. Distant forum

Another device used to discourage individuals from invoking their arbitral rights is to require that the arbitration take place in a distant location.

For example, in *Bolter v. Superior Court (Harris Research, Inc., r/p/i)*, 104 Cal. Rptr. 2d 888 (Cal. Ct. App. 2001), where defendant Harris was a large international corporation and plaintiffs were small “Mom and Pop” franchisees located in California, the court held unconscionable an

arbitration clause that required arbitration in Utah. The court pointed out that the provision “requires franchisees wishing to resolve any dispute to close down their shops, pay for airfare and accommodations in Utah, and . . . [hire] counsel familiar with Utah law. *Id.* at 909. The court suggested that “Harris understood those terms would effectively preclude its franchisees from ever raising any claims against it, knowing the increased costs and burden on their small businesses would be prohibitive.” *Id.* at 910.

Similar decisions finding unconscionable a requirement that the individual travel to a distant arbitral forum include: *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (*en banc*) (requirement that individual travel from California to Boston to arbitrate); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007) (requirement that Pennsylvania consumer’s claim be arbitrated in California was “yet one more means by which the arbitration clause serves to shield [Linden] from liability instead of providing a neutral forum in which to arbitrate disputes”); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364, 2001 WL 112107, at *3 (2001) (requirement that consumer who had purchased used car in Virginia travel to Los Angeles for arbitration unconscionably “effectively eliminates any remedy for consumers.”); *Casarotto v. Lombardi*, 901 P.2d 596, 597 (Mont. 1995), *rev’d on other grounds sub nom. Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (franchise agreement required Montana residents to arbitrate in Connecticut).

3. Limitations on remedies

Companies can also preclude their customers or employees pursuing their arbitration rights by drafting provisions which so limit remedies that even a successful arbitration outcome does not outweigh the cost of pursuing the claim. For example, in *O'Donoghue v. Smythe, Cramer Co.*, No. 80453, 2002 WL 1454074, at *5 (Ohio Ct. App. July 3, 2002), homebuyers alleged that defendant inspector failed to disclose latent defects. The court held the arbitration agreement unconscionable and unenforceable where the arbitration fee was at least \$500, but the agreement limited recoverable damages to \$265.

Some arbitration agreements prohibit the arbitrator from awarding punitive damages. Although punitive damages may not be unlimited in amount, this Court has recognized that in some circumstances where provable compensatory damages are small, "punitive damages may be the only significant remedy available." *Carlson v. Green*, 446 U.S. 14, 22 n.9 (1980).

This is also the case in the arbitral forum. For example, the consumer who has been defrauded of a relatively small amount and who is limited to recovering only that amount has no incentive to undertake the effort and expense of arbitrating her claim. In *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999), where a cellular telephone customer alleged that defendant overcharged for long distance service, the court held the company's arbitration provision unconscionable. "The arbitration clause expressly limits Powertel's liability to actual damages, thereby precluding the

possibility that Powertel will ever be exposed to punitive damages, no matter how outrageous its conduct might be.” *Id.* at 576. *See also Bellsouth Mobility, LLC v. Christopher*, 819 So. 2d 171, 173 (Fla. Dist. Ct. App. 2002) (same).

The unconscionable aspect of such limits on recoverable damages is not that they reduce recoveries in arbitration, but that they preclude individuals from arbitrating their claims at all.

4. Limited Discovery

The arbitration agreement drafted by Rent-A-Center provides that, “Each party shall have the right to take the deposition of one individual and any expert witness designated by another party.” As the California Court of Appeal recently stated, such a limitation may appear even-handed, but in reality tips the scales dramatically in favor of the defendant in employment cases.

This is because the employer already has in its possession many of the documents relevant to an employment discrimination case as well as having in its employ many of the relevant witnesses. . . . [These limits on discovery] work to curtail the employee’s ability to substantiate any claim against [the employer].

Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 486-87 (Cal. Ct. App.), *rev. denied*, No. A114848, 2008 Cal LEXIS 12259 (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 1048 (2009) (internal quotes and citations omitted). *See also Hamerick v. Aqua*

Glass, Inc., 2008 WL 2853881, at *3 (D. Or. 2008) (arbitration limiting each side to one deposition was impermissibly one-sided in favor of the employer); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538 (E.D. Pa. 2006) (same); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (same).

5. Short Limitations Periods

Prescribing an unreasonably short period within which an arbitration claim must be filed is another device used to prevent individuals, particularly employees with discrimination claims, from utilizing arbitration. For example, the Third Circuit in *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 266 (3d Cir. 2003), found that a contract requirement that employee alleging discrimination file an arbitration claim within 30 days of the event was unconscionable. *See also Nyulassy v. Lockheed Martin Corp.*, 16 Cal. Rptr. 3d 296, 307 (Cal. Ct. App. 2004) (provision that required employee claims, ordinarily governed by four-year statute of limitations, be filed within 180 days unconscionable).

6. Class Action Waivers

Class actions represent an efficient means of adjudicating numerous similar claims that may involve important legal rights but do not result in sufficient monetary awards to warrant their individual adjudication. As this Court has stated, “[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” *Amchem Prods., Inc. v. Windsor*, 521

U.S. 591, 617 (1997) (internal quotation omitted). *Cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) (“No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount”).

The same holds true in the arbitral forum where claims of modest amount cannot realistically be adjudicated unless they can be aggregated with a sufficient number of other similar claims to justify the expense of arbitration. Realizing this, corporations anticipating the possibility of many small-amount consumer claims have drafted arbitration provisions that require consumers to arbitrate their claims one at a time and waive any right to aggregate claims or join in a class. The result is not a flood of small individual arbitrations. Instead, the result is that no claims are brought and the company has succeeded in insulating itself from any accountability. For example in *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007), where a cable operator allegedly levied \$600,000 in fraudulent charges, at ten dollars per subscriber, the Eleventh Circuit held the arbitration provision’s prohibition on class actions unconscionable:

Without the benefit of a class action mechanism, the subscribers would effectively be precluded from suing Comcast . . . The cost of vindicating an individual subscriber’s claim, when compared to his or her potential recovery, is too great. . . . This will allow Comcast to engage in unchecked market behavior that may be unlawful. Corporations should not be permitted to use class action waivers as a means to

exculpate themselves from liability for small-value claims.

Id. at 1224. The First Circuit held the same type of provision unenforceable in *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006), stating, “Comcast [would] be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law.” *Id.* at 61.

Other courts have held such arbitration provisions unconscionable under similar reasoning. *See, e.g., Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009) (class action waiver in credit card agreement held unconscionable); *Fensterstock v. Educ. Fin. Partners*, 618 F. Supp. 2d 276 (S.D.N.Y. 2009) (class action waiver in student loan agreement held unconscionable); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. Super. Ct. 2005) (class-arbitration waiver in consumer credit contract held unconscionable); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003) (holding that a class arbitration waiver in a phone service contract held unconscionable).

* * *

The salient feature of these provisions held unconscionable by federal and state courts is not any judicial hostility toward arbitration or suspicion that the consumer or employee will be treated unfairly in the arbitral forum. In each instance, the arbitration provision was ruled unconscionable because the provision *itself* was hostile to arbitration. These are provisions that were designed to keep individuals out of the arbitral forum by placing difficult or impossible barriers in their way.

To propose that arbitrators rather than courts make such determinations is, essentially, to offer a Maytag repairman scenario: He may be the designated decider of arbitrability, but no one is likely to call.

B. Arbitrators Who Are Presented With Unconscionability Challenges Will Be Placed in an Untenable Position of Conflict of Interest.

Even if an individual proceeds to arbitration and moves the arbitrator to decide whether the arbitration agreement is unconscionable, Petitioner's plan remains unworkable. The arbitrator in that circumstance is faced with the choice of whether to proceed with the arbitration despite its unconscionable features or rule that the arbitration agreement is unenforceable, thereby depriving himself of thousands of dollars in fees.⁷

A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* As the Chief Justice had occasion recently to point out, "It is well established that a judge may not preside over a case

⁷ This actually greatly underestimates the financial stakes for the arbitrator. The individual is not likely to be in arbitration on a regular basis, but the corporate party is often a "repeat player." An arbitrator's ruling that the corporation's arbitration contract is unconscionable will likely mark the last occasion that arbitrator is permitted to handle an arbitration involving that party.

in which he has a ‘direct, personal, substantial pecuniary interest.’” *Caperton v. A.T. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2263, 2252 (2009) (Roberts, C.J., dissenting), quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

This principle applies no less to arbitrators. Section 10 of the FAA, which authorizes a court to vacate an award due to “evident partiality” of the arbitrator, demonstrates “a desire of Congress to provide not merely for any arbitration but for an impartial one.” *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147 (1968).

The compromised position of the arbitrator was a point of concern to Justice Black in his dissent in *Prima Paint Corp. v. Flood & Conklyn Manufacturing Co.*, which allowed the arbitrator to resolve a claim of fraud in the inducement for the entire contract:

The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I think it raises serious questions of due process to submit to an arbitrator an issue which will determine his compensation.

388 U.S. at 416 (Black, J., dissenting).

This Court has repeatedly made clear that “due process requires a ‘neutral and detached judge

in the first instance.” *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993), quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62 (1972). This command “is no different when a legislature delegates adjudicative functions to a private party.” *Concrete Pipe*, 508 U.S. at 617. “Even appeal and a trial de novo will not cure a failure to provide a neutral and detached adjudicator.” *Ward*, at 61. “These essential constitutional promises,” this Court stated, citing *Concrete Pipe* and *Ward*, “may not be eroded.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

The stringent rule against adjudicatory systems in which the trier has a financial interest in its own decision stretches back 400 years to a decision in *Bonham’s Case*, 8 Co. Rep. 114a, 2 Brownl. 255, 77 Eng. Rep. 647 (C.P. 1610), in which the defendant was fined by the President and Censors of the Royal College of Physicians for practicing medicine without a proper license. Half the fine was given to the Royal College. Presiding judge Sir Edward Coke famously held the proceeding fundamentally unfair.

This Court has rigorously applied that principle, “demonstrating the powerful and independent constitutional interest in fair adjudicative procedure.” *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980). In *Tumey v. Ohio*, 273 U.S. 510 (1927), the village mayor was authorized to try defendants accused of illegally trafficking in liquor and was paid half the fine imposed if the defendant was convicted. The mayor received nothing if the defendant was acquitted. *Id* at 523. This Court held the trial violated due process. The Court cited *Bonham’s Case* for the general rule at common law

“that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject-matter which he was to decide, rendered the decision voidable.” *Id.* at 524.

The test this Court has consistently applied is that due process does not permit the adjudicator to hold a financial interest in the outcome of his decision that “would offer a possible temptation to the average . . . judge . . . which might lead him not to hold the balance nice, clear and true.” *Ward*, at 60, quoting *Tumey*, at 532. Placing the responsibility for making unconscionability decisions on arbitrators does not pass this test.

Petitioner does not even attempt to deny the obvious flaw in its proposal to have the decision to enforce arbitration agreements be made by those who get paid only when arbitration agreements are enforced. Rather, Petitioner dismisses this fundamental objection “because taken to its logical conclusion arbitrators then would be mistrusted when it comes to deciding any dispositive motion.” Pet’r Br. 35.

Of course, in any particular case, the movant of a dispositive motion might be the corporate drafting party to the contract or it might be the individual. If the case presents circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,” *Caperton*, 129 S. Ct. at 2259, then the arbitrator’s decision may well be “mistrusted.”

But the question before this Court is broader. Petitioner asks this Court to give its approval to a

decisionmaking regime in which the movant challenging the arbitration agreement as unconscionable will always be the weaker party and the financial self-interest of the arbitrator will always lie with the stronger party, who drafted the arbitration agreement and seeks to enforce its terms. There is nothing to recommend taking this decision out of the hands of neutral and disinterested courts.

It is not hostility toward arbitration that counsels against placing arbitrators in a position where financial self-interest is an obvious temptation. Petitioner's proposal is unsound even if all arbitrators were assumed to be able to put aside all thoughts of earning substantial fees and to decide unconscionability claims on their merits. This Court has long insisted that "justice must satisfy the appearance of justice," and a presumption of bias attaches, even if this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136.

As this Court explained in *Tumey*:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.

273 U.S. at 532.

This presumption of bias on the part of financially interested judges has its roots in Sir Edward Coke's declaration in *Bonham's Case* that no man shall be judge in his own cause. 77 Eng. Rep. at 652. Indeed, as Judge Kozinski has remarked, the rule of presumed bias "may indeed be the single *oldest* rule in the history of judicial review." *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998).

CONCLUSION

For the foregoing reasons, the circuit court's decision vacating the district court's order compelling arbitration should be affirmed.

Respectfully submitted,

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March 31, 2010