No. 09-497

IN THE

# Supreme Court of the United States

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

v.

ANTONIO JACKSON,
*Respondent.*

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

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae*. The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.[1]

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to 42 U.S.C. § 1981 and other federal employment-related laws and regulations. Some of them have contracts with their employees requiring arbitration of employment-related claims and disputes.

Thus, the issues presented in this case are extremely important to the nationwide consistency that EEAC represents. The decision below held that when a plaintiff opposes a motion to compel arbitration by challenging the arbitration agreement as unconscionable, the court must decide the question of arbitrability even though the agreement provides otherwise. This conclusion not only runs counter to this Court's prior pronouncements, but also threatens the acknowledged benefits of arbitration as a fair, efficient, and effective means of resolving employment disputes.

Because of its interest in the subject, EEAC has filed *amicus curiae* briefs in a number of cases in this Court supporting the enforceability of arbitration

agreements.[2] EEAC thus has an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

## STATEMENT OF THE CASE

When Rent-A-Center, West, Inc. (Rent-A-Center) hired Antonio Jackson, he signed a mandatory arbitration agreement as a condition of employment. Pet. App. 8a. The agreement provided that the parties agreed to submit to arbitration any and all claims arising from Jackson's employment, including claims of employment discrimination. Pet. App. 8a-9a. It also contained the following provision:

> [T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable.

Pet. App. 9a.

Several years later, Jackson sued Rent-A-Center in federal court, accusing the company of race discrimination and retaliation in violation of 42 U.S.C. § 1981. Pet. App. 8a. Rent-A-Center moved to dismiss and to compel arbitration pursuant to the agreement.

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[2] *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, __ U.S. __, 129 S. Ct. 1456 (2009); *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

*Id*. Jackson opposed the motion, contending that the arbitration agreement was unconscionable and therefore unenforceable. Pet. App. 9a. Jackson argued that the agreement was a non-negotiable form contract offered to him on a "take it or leave it" basis, and thus was procedurally unconscionable. *Id*. He also contended that the agreement contained one-sided coverage and discovery provisions and required that the arbitrator's fee be shared equally, rendering it substantively unconscionable as well. *Id.*

The district court granted the motion. It found that the arbitration agreement "clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable" and held that "the question of arbitrability is for the arbitrator." *Id*. The district court also ruled that Jackson had failed to show that the agreement was substantively unconscionable in any event. Pet. App. 9a-10a. Jackson appealed to the Ninth Circuit.

The Ninth Circuit panel majority acknowledged that the arbitration agreement states unequivocally that questions of validity are to be decided by the arbitrator. Pet. App. 9a. Nevertheless, it held that the mere allegation by Jackson that the agreement was unconscionable required the issue be resolved by a court rather than an arbitrator. Pet. App. 11a. It held that "where a party specifically challenges arbitration provisions as unconscionable that hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine . . . even where the agreement's express terms delegate that determination to the arbitrator." *Id*.

Judge Hall dissented. She began by pointing out that this case "concerns an arbitration agreement more favorable to the employee than most this court sees" and in that respect "was not even a run-of-the-mill arbitration agreement." Pet. App. 21a & n.1 (Hall, J., dissenting). She observed that Jackson's unconscionability claims "also are vaguer than most." Pet. App. 21a & n.2. She pointed out that the majority's holding is contrary to the federal policy favoring arbitration and is inconsistent with a long line of this Court's decisions, including *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Pet. App. 22a-24a. She also expressed her well-founded concern that the majority's holding "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even* when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a.

Rent-A-Center filed a petition for a writ of certiorari, which this Court granted on January 15, 2010.

## SUMMARY OF ARGUMENT

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). "'The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds, Inc. v.*

*Byrd*, 470 U.S. 213, 221 (1985)). Thus, the federal policy favoring arbitration, grounded in the principle that an agreement between the parties should be enforced, mandates that doubts be resolved in favor of arbitration.

This Court has created a narrow exception to that broad federal policy, a general rule that *"[u]nless the parties clearly and unmistakably provide otherwise*," where certain "gateway" issues arise that the parties likely would have believed would be resolved by the court rather than by the arbitrator, those issues are for the court. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83 (2002) (quoting *AT&T Techs., Inc. v. Communs. Workers of Am*., 475 U.S. 643, 656 (1986)) (emphasis added); s*ee also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Thus, according to the Court's clear language, that narrow exception does not apply where the parties have clearly and unmistakably agreed to arbitrate arbitrability. *Terminix Int'l Co. v. Palmer Ranch L.P*., 432 F.3d 1327 (11th Cir. 2005); *Bailey v. Ameriquest Mortgage Co*., 346 F.3d 821 (8th Cir. 2003); *Bell v. Cendant Corp*., 293 F.3d 563 (2d Cir. 2002); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). Moreover, mere allegations of procedural differences between the courtroom and an arbitral forum, such as the discovery limitations and fee-splitting provisions cited by Respondent as rendering his agreement procedurally unconscionable, are not valid challenges to arbitrability.

Requiring a court to deny arbitration and decide arbitrability even though the parties have agreed otherwise would have the unfortunate consequence of putting the parties in court, "litigating whether or not they should be litigating," *Terminix*, 432 F.3d at

1329 (citation omitted), in nearly every case. Such a result would defeat the practical purposes of arbitration, and erase its considerable benefits.

As this Court noted in *Circuit City Stores, Inc. v. Adams*, there are "real benefits to the enforcement of arbitration provisions." 532 U.S. 105, 122-23 (2001). In particular, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation . . . ." *Id*. at 123. Thus, arbitration can make justice available to those for whom the justice system is infeasible. When the parties clearly and unmistakably have agreed that an arbitrator would rule on arbitrability, overriding the benefits of arbitration and requiring the parties to litigate over litigating seems particularly inappropriate.

## ARGUMENT

### I. WHERE AN ARBITRATION AGREEMENT "CLEARLY AND UNMISTAKABLY" COMMITS TO THE ARBITRATOR THE QUESTION OF THE AGREEMENT'S VALIDITY, THAT ISSUE IS FOR THE ARBITRATOR

This Court has stated that *"[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs., Inc. v. Communs. Workers of Am*., 475 U.S. 643, 656 (1986) (emphasis added); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). It follows that when the parties "clearly and unmistakably provide" that the question is for the arbitrator, then the question is to be decided by the

arbitrator, not the court. For this reason, the decision below must be reversed.

### A. The Federal Arbitration Act Requires Courts To Order Arbitration Of Those Issues Which The Parties Have Agreed To Arbitrate

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, "declares as a matter of federal law that arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) (quoting 9 U.S.C. § 2). This language "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . ." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 24-25 (footnote omitted). Indeed, "'[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered,' a concern which 'requires that [courts] rigorously enforce agreements to arbitrate.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Thus, "[b]y its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter*

*Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (citations omitted).

### B. When It Is Clear And Unmistakable That The Parties Have Agreed To Have The Arbitrator Decide Arbitrability Questions, That Agreement Must Be Enforced

Against this backdrop, this Court has decided several cases dealing with the issue of whether and when the question of arbitrability itself is one for arbitration. *AT&T Techs., Inc. v. Communs. Workers of Am.*, 475 U.S. 643 (1986); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Once again, the ultimate focus is on the agreement of the parties. If they have agreed to arbitrate arbitrability, then all questions of arbitrability are for the arbitrator.

In *AT&T Technologies, Inc. v. Communications Workers of America*, which arose in the context of labor arbitration under a collective-bargaining agreement, this Court articulated a general rule "that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." 475 U.S. 643, 649 (1986) (citation omitted). Based on the principle that a party can be compelled to arbitrate only those issues he has agreed to arbitrate, this Court concluded that "*[u]nless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (citation omitted) (emphasis added). *Cf. United Steel-*

*workers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960) ("Where the assertion by the claimant is that the parties excluded from court determination not merely the decision of the merits of the grievance but also the question of its arbitrability, vesting power to make both decisions in the arbitrator, *the claimant must bear the burden of a clear demonstration of that purpose*") (emphasis added). Thus, even as it created the general rule that questions of arbitrability are for the court to decide, the Court also emphasized that parties could, by contract, avoid the general rule by "clearly and unmistakably" consigning those issues to the arbitrator.

Later, in *First Options of Chicago, Inc. v. Kaplan*, dealing with the appropriate standard of review of a decision on arbitrability, this Court reiterated the general rule and its limitations, stating that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence that they did so*." 514 U.S. 938, 944 (1995) (quoting *AT&T Technologies*, 75 U.S. at 649) (emphasis added). Here too, then, the Court reserved applicability of the general rule for situations in which the parties had not agreed to place questions of arbitrability in the hands of the arbitrator. As this Court said in *First Options*:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?

514 U.S. at 943 (citations omitted). It follows that where there is clear and unmistakable evidence

that the parties agreed to arbitrate arbitrability, the general rule does not apply, and courts can and should enforce the agreement of the parties.

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court highlighted the extreme narrowness of the general rule that courts decide some arbitrability questions unless the parties have agreed otherwise. There, the Court characterized the general rule as an exception to "the liberal federal policy favoring arbitration agreements." *Id.* at 83 (citations and internal quotation omitted). It noted that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Id.* (quoting *AT&T Technologies* and citing *First Options*). The Court pointed out, however, that not every question of arbitrability is even subject to the general rule, but only some of those "gateway" issues that parties "would likely have expected a court to have decided" and "are not likely to have thought that they had agreed that an arbitrator would do so . . . ." *Id.* at 83-84. Applying this rule, this Court concluded that the question of the applicability of a National Association of Securities Dealers procedural rule was for the arbitrator to decide.[3]

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[3] In *PacifiCare Health Systems, Inc. v. Book,* 538 U.S. 401 (2003), this Court rejected a contention that a dispute should not go to arbitration merely because the potential plaintiffs contended that their arbitration agreement was unenforceable because it appeared to preclude an award of treble damages to which the plaintiffs might be entitled under the federal statute in question, thereby denying them "meaningful relief" under that statute. In so doing, this Court reiterated that not every

The Court again emphasized the narrowness of the general rule in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), holding that the question of whether an arbitration may proceed on a class-wide basis where the underlying arbitration agreement is unclear as to the availability of such procedures is for the arbitrator, not a court, to decide. Here again, the Court was careful to point out that the general rule applies only where the parties have not agreed to arbitrate the issue. The Court said, "[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (*in the absence of 'clear and unmistakable' evidence to the contrary*)." *Id*. at 452 (emphasis added).

From this line of cases there arise several constant themes. First, the federal policy favoring arbitration, grounded in the principle that an agreement between the parties should be enforced, mandates that doubts be resolved in favor of arbitration. Second, there is a narrow exception to that principle, a general rule that where certain "gateway" issues arise that the parties likely would have believed would be resolved by the court rather than by the arbitrator, those issues are for the court. Third, the exception does not apply where the parties have clearly and unmistakably agreed to arbitrate those issues.

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question of arbitrability, and indeed not even every "gateway" question, is for a court to decide under the narrow general rule. Rather, the rule applies only in those few situations when the parties likely would have expected the court, not the arbitrator, to decide the question. *Id.* at 407 n.2 (citing *Howsam*). This Court concluded that the remedies question was not the kind that falls within the exception.

The case before the Court is one in which the narrow exception does not apply. The arbitration agreement in question indeed clearly and unmistakably assigns questions of arbitrability to the arbitrator, as the court below acknowledged. Pet. App. 13a. ("In contrast to *First Options*, we are not presented with 'silence or ambiguity on the who should decide the arbitrability point.' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator"). Under this Court's decisions that is where the inquiry ends.[4]

### C. This Court Should Confirm The Conclusion Of The Courts Of Appeals For The First, Second, Eighth And Eleventh Circuits That The Narrow Rule Sending Some Arbitrability Questions To Court Does Not Apply When The Parties Have Agreed To Arbitrate Them

The First, Second, Eighth and Eleventh Circuits already have concluded that the general rule consigning some questions of arbitrability to the

[4] The court below misapplied this Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In *Buckeye Check Cashing*, this Court held that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449. *Buckeye* does not, however, stand for the proposition that where a challenge is made to a stand-alone arbitration agreement, the issue of the validity of the agreement is for the court. In any event, the Court in *Buckeye* was not presented with a situation in which the arbitration agreement clearly and unmistakably delegated questions of arbitrability to the arbitrator.

court does not apply when the parties have agreed otherwise, and in that case, the parties' agreement should be enforced. In *Apollo Computer, Inc. v. Berg*, the First Circuit said that "[p]arties may, however, agree to allow the arbitrator to decide both whether a particular dispute is arbitrable as well as the merits of the dispute." 886 F.2d 469, 473 (1st Cir. 1989). The court then held that where the agreement incorporated the arbitration rules of the International Chamber of Commerce, which included a provision allowing the arbitrator to determine her own jurisdiction, the agreement "clearly and unmistakably" allowed the arbitrator to determine whether an agreement to arbitrate existed, even though absent such an agreement, the question would be for the court.[5]

The Second Circuit in *Bell v. Cendant Corp.*, relying on *First Options*, likewise concluded that arbitrability issues go to the arbitrator "if 'there is clear and unmistakable evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." 293 F.3d 563, 566 (2d Cir. 2002) (citation omitted). The court

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[5] The First Circuit's later opinion in *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009), relied on by the court below, does not undermine its conclusion in *Apollo*. In *Awuah*, as Judge Hall explained in her dissent to the Ninth Circuit's opinion, the First Circuit would have sent the arbitrability issues to the arbitrator had the question simply been one of unconscionability. Pet. App. 23a. (Hall, J., dissenting). Under *Awuah*, "even if an agreement was alleged to be unconscionable, enforcement of the parties' agreement to send that question to arbitration would still be proper unless the party resisting arbitration met the 'high' burden of showing that the arbitration was an illusory remedy." *Id.* at n.4.

then ruled that such evidence indeed was present, so that the question should go to the arbitrator. Later, relying on *Bell* and *Apollo*, the Second Circuit similarly ruled in *Contec Corp. v. Remote Solution Co*., that the arbitration clause in question, which incorporated the Commercial Arbitration Rules of the American Arbitration Association (AAA), including a rule giving the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," was "clear and unmistakable evidence" that the parties had agreed to arbitrate the question of arbitrability. 398 F.3d 205, 208 (2d Cir. 2005).

In *Bailey v. Ameriquest Mortgage Co*., 346 F.3d 821 (8th Cir. 2003), the district court had ruled that an arbitration agreement was unenforceable as to the plaintiffs' overtime compensation claims because it found some terms of the agreement to be inconsistent with some of the plaintiffs' procedural and remedial rights under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219. The Eighth Circuit determined that in *AT&T Technologies*, this Court "adopted the rule that issues of arbitrability are to be decided by the arbitrator in the first instance if the agreement to arbitrate 'clearly and unmistakably' so provides." *Bailey* at 824. Concluding that "[i]n this case, the Arbitration Agreement clearly and unmistakably left the issues addressed by the district court to the arbitrators in the first instance," *id*., the Eighth Circuit said that the district court should not have ruled on the arbitrability question, which should go to arbitration. *See also Fallo v. High-Tech Inst*., 559 F.3d 874, 877 (8th Cir. 2009) (applying this Court's decisions in *AT&T Technologies* and *First Options* to conclude correctly that its task was to "determine

whether the parties to the enrollment agreement 'clearly and unmistakably' intended for an arbitrator to determine the question of arbitrability").

The Eleventh Circuit agrees. In *Terminix International Co. v. Palmer Ranch L.P.*, the Eleventh Circuit held that because the arbitration agreement incorporated an AAA rule providing that "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement," "the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." 432 F.3d 1327, 1332 (11th Cir. 2005) (citation and internal quotation omitted).

The First, Second, Eighth and Eleventh Circuits, unlike the Ninth,[6] have reached the conclusion that follows logically from this Court's decisions in *AT&T Technologies*, *First Options*, and those that follow. We respectfully submit that this Court should follow that course as well.

### D. Mere Allegations Of Unconscionability Do Not Justify Removing Arbitrability Issues From The Arbitrator In The Face Of A Clear And Unmistakable Agreement

This Court already has rejected the notion that mere allegations of procedural differences between

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[6] The U.S. Court of Appeals for the Federal Circuit, while also recognizing that questions of arbitrability are for the arbitrator where the parties "clearly and unmistakably" have so agreed, has added another hurdle—that the district court also must "perform a second, more limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1373 (Fed. Cir. 2006), apparently a peculiarity of California law.

the courtroom and an arbitral forum, such as the discovery limitations and fee-splitting provisions cited by Respondent as rendering his agreement procedurally unconscionable, are valid challenges to arbitrability. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (rejecting "a host of challenges to the adequacy of arbitration procedures"). Even where a party challenging arbitration contends that the arbitral form is inaccessible due to its cost, this Court has ordered arbitration absent an actual showing that arbitration would be prohibitively expensive. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

Similarly, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer*, 500 U.S. at 33. As the Court observed in *Gilmer*, relationships often involve some degree of difference in bargaining power. *Id.* Indeed, more often than not, one party to a contract will have more bargaining power than the other. In residential mortgages and other forms of consumer loan obligations, the lender usually is a commercial entity and the borrower an individual. In residential leases and other non-commercial real estate transactions, the lessor or seller typically owns real estate and the lessee or buyer does not. Likewise, for all but the smallest businesses, an employer typically is an entity while the prospective employee is an individual.

The Ninth Circuit's characterization of such a relationship as involving "grossly unequal bargaining power," Pet. App. 16a, is a significant exaggeration. Like any prospective party to a contract, Respondent *could* have voted with his feet. Just as a lender

wants to lend, a lessor wants to lease, and a seller wants to sell, an employer wants to hire, because there is money to be made in the transaction. Like any prospective borrower, lessee, buyer, or employee, Respondent had a substantial bargaining chip to give or withhold at his own discretion. Just as a borrower who dislikes the prospective terms of a mortgage, a lessee who chafes at the terms of a lease, or a buyer who finds the terms of an offer objectionable may take his business elsewhere, Respondent could have chosen not to work for Rent-A-Center under the terms offered.

Accordingly, Respondent's contention that his arbitration agreement is unenforceable because, as the Ninth Circuit put it, "he did not meaningfully assent to the agreement," Pet. App. 15a, due to an inequality in bargaining power, is insufficient to override the fact that he did indeed agree to arbitrate any employment claims against Rent-A-Center, including issues of arbitrability. While the Ninth Circuit's opinion below is not obviously "littered with . . . overt hostility to the enforcement of arbitration agreements . . . ," *14 Penn Plaza*, 129 S. Ct. at 1470 (footnote omitted), the very holding evidences precisely "the old judicial hostility to arbitration," *Rodriguez de Quijas*, 490 U.S. at 480 (citation and internal quotation omitted), that this Court has rejected in *Rodriguez de Quijas*, *Gilmer*, and subsequent cases.

Therefore, the Ninth Circuit's holding is simply untenable under this Court's decisions, which have been applied correctly by other courts of appeals, and thus should be reversed.

## II. COMPELLING LITIGATION OVER ARBITRABILITY EVERY TIME A PARTY SEEKING TO AVOID ARBITRATION CLAIMS UNCONSCIONABILITY WOULD OBLITERATE THE MANY BENEFITS THAT ARBITRATION OFFERS

### A. Requiring Courts To Rule On Allegations Of Unconscionability Even Where The Parties Have Agreed To Arbitrate Would Guarantee Litigating Over Litigating In Every Case

Were the decision below permitted to stand, the unfortunate consequence would be to require trial courts to wrest issues of arbitrability away from the arbitrator, despite clear and unmistakable evidence that the parties intended to arbitrate those issues, any and every time a party seeking to avoid arbitration claims that the arbitration provisions are unconscionable. As a practical matter, such a challenge could, and probably would, be articulated in nearly every case. As Judge Hall said in her dissent, the instant case involves "an arbitration agreement more favorable than most and unconscionability allegations that are thinner than most," Pet. App. 21a-22a (Hall, J., dissenting). It is predictable, then, that with an exercise of legal creativity, some fault could be found in nearly every arbitration agreement sufficient to raise a claim of unconscionability.

Thus, the effect of the decision below is to expand the narrow exception this Court has created to a magnitude that quite engulfs the policy favoring arbitration. In each case in which an employer seeks—as Rent-A-Center did here—to enforce an arbitration agreement that clearly and unmistakably consigns

issues of arbitrability to the arbitrator, the language of the agreement would be overpowered solely by a mere allegation of unconscionability. The parties would be in court, "litigating whether or not they should be litigating," *Terminix*, 432 F.3d at 1329 (citation omitted), in every case. As Judge Hall observed in her dissent to the decision below, the Ninth Circuit majority's holding "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even* when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a (Hall, J., dissenting).

### B. Litigating Over Litigating, Prior To Arbitration, Defeats The Practical Purposes Of Arbitration And Erases Its Considerable Benefits

As Judge Hall foresaw, a rule requiring courts to decide questions of arbitrability would send every case in which a party opposes arbitration to court, there to plead his case of unconscionability, however thin, in a "mini-trial," despite the fact that he agreed to arbitrate such issues. Such a result undermines not only the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but also the significant advantages that arbitration of employment disputes offers to both employers and employees—prompt and efficient, and hence less costly and disruptive, resolution. As this Court noted in *Circuit City Stores, Inc. v. Adams*, there are "real benefits to the enforcement of arbitration provisions." 532 U.S. 105, 122-23 (2001). In

particular, arbitration allows employees to "'trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'" *14 Penn Plaza v. Pyett*, __ U.S. __, 129 S. Ct. 1456, 1471 (2009) (quoting *Mitsubishi Motors*, 473 U.S. at 628).

One significant benefit is the reduction of cost, making arbitration affordable where litigation may not be. "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc.*, 532 U.S. at 123. Indeed, parties generally favor arbitration precisely because of the economics of dispute resolution. *14 Penn Plaza*, 129 S. Ct. at 1464.

The relative speed with which arbitrations are conducted compared to litigation also benefits both parties to an employment dispute, but particularly the employee, who typically can less afford a lengthy battle:

> Most employees simply cannot afford to pay the attorney's fees and costs that it takes to litigate a case for several years. Even when an employee is able to engage an attorney on a contingency fee basis . . . the employee nonetheless often must pay for litigation expenses, and put working and personal life on hold until the litigation is complete.

Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Cornell Univ. Press, 1997) at 153-54. Indeed, "[b]y reducing the costs, private arbitration holds the potential for

bringing justice to many to whom it is currently denied." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Human Rights L. Rev. 29, 63 (1998).

In particular, arbitration offers lower-level employees an opportunity to bring forth claims that would not be economically viable to pursue in court. "The empirical evidence suggests that arbitration may be a more accessible forum than court for lower income employees and consumers with small claims." Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 840 (2008). As one commentator observed:

> The time and cost of pursuing a claim through traditional methods of litigation present the most glaring and formidable obstacles to relief for employment discrimination victims. While it might not make a difference to the upper level managerial worker who can afford the services of an expensive lawyer, and who can withstand the grueling process of litigation, those employees who are less financially sound are chronically unable to attract the services of a quality lawyer. For example, experienced litigators maintain that good plaintiff's attorneys will accept only one in a hundred discrimination claimants who seek their help. For those claimants who are denied the services because of their financial situation, the simpler, cheaper process of arbitration is the most feasible recourse.

Craig Hanlon, *Reason Over Rhetoric: The Case for Enforcing Pre-Dispute Agreements to Arbitrate Employment Discrimination Claims*, 5 Cardozo J. Conflict Resol. 1 (2003). Similarly:

> The vast majority of ordinary, lower- and middle-income employees (essentially, those making less than $60,000 a year) cannot get access to the courts to vindicate their contractual and statutory rights. Most lawyers will not find their cases worth the time and expense. Their only practical hope is the generally cheaper, faster, and more informal process of arbitration. If that is so-called mandatory arbitration, so be it. There is no viable alternative.

Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 810 (2008). As a practical matter, "[a]rbitration thus provides access to a forum for adjudicating employment disputes for employees whom the litigation system has failed." Bales, *supra*, at 159 (footnote omitted).

One element of the cost factor is efficiency. The speed with which most disputes are resolved through arbitration far outpaces the judicial system. The federal district courts take an average of 33.1 months to complete a civil case through jury trial. Admin. Office of the U.S. Courts, Fed. Judicial Caseload Statistics, Table C-5 (Apr. 1, 2008 - Mar. 31, 2009).[7] In contrast, according to the National Arbitration Forum, the "average length of [an arbitration] from filing to award was 4.35 months for claims brought by consumers against businesses and 5.6 months for claims brought by businesses against consumers."

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[7] *available at* http://www.uscourts.gov/caseload2009/tables/C05Mar09.pdf

Nat'l Arbitration Forum, *The Benefits of Arbitration* (Sept. 2007 & Supp. Apr. 2009).[8]

In addition to reducing the costs and the amount of time within which their disputes are likely to be heard, arbitration provides employees with a much better chance of having their "day in court" than does a judicial proceeding. Of course, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). *See also 14 Penn Plaza* ("[t]he decision to resolve . . . claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace . . . discrimination; it waives only the right to seek relief from a court in the first instance"). 129 S. Ct. at 1469. Thus, an employee who arbitrates his employment-related claims retains all of the substantive rights he would have had if he had gone to court instead.

Indeed, not only are an employee's chances of getting a hearing better in arbitration, but his chances of success appear to be better as well. "All of the studies find that employees prevail more often in arbitration than they do in court. And while successful plaintiffs receive less in arbitration than in court, plaintiffs as a whole recover more." *Maltby*, *supra*, at 54.

Accordingly, as this Court has recognized on numerous occasions, arbitration offers to its participants a dispute resolution mechanism that, on balance, can make it quite preferable to the judicial

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[8] *available at* http://www.adrforum.com/main.aspx?itemID=1293&hideBar=False&navID=6&news=3#Time

system. Burdening this cost-effective, streamlined system with a pre-arbitration mini-trial on arbitrability in every case would eradicate its benefits. When the parties clearly and unmistakably have agreed that an arbitrator would rule on arbitrability, adding that burden seems particularly inappropriate.

## CONCLUSION

For the foregoing reasons, the *amicus curiae* Equal Employment Advisory Council respectfully submits that the decision of the court of appeals should be reversed.

Respectfully submitted,

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