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 PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act (FAA) is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Rent-a-Center, West, Inc.[1] PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases involving the Federal Arbitration Act and contractual arbitration in general, including *AT&T Mobility v. Concepcion*, Docket No. 09-893; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, Docket No. 08-1198; *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Preston v. Ferrer*, 552 U.S. 346 (2008); *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008), and *Cingular Wireless, LLC v. Mendoza*, 547 U.S. 1188 (2006).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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.

INTRODUCTION

The purpose behind the Federal Arbitration Act (FAA) is to preserve and promote the right to contractual choice. It is not to impose on contracting parties a means of dispute resolution unrelated to, or possibly contrary to, their actual preferences. In this case, the parties clearly and unmistakably agreed that an arbitrator had the "exclusive" authority to resolve all disputes arising out of their employment relationship, including such gateway issues as whether the contract itself is unconscionable. *Jackson v. Rent-a-Center West Inc.*, 581 F.3d 912 (9th Cir. 2009) ("Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator."). Under the federal substantive law of arbitration, as enunciated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), this clear and unmistakable agreement must be enforced. Because the Ninth Circuit in this case refused to do so, the decision below should be reversed.

I

A MERE ALLEGATION OF UNCONSCIONABILITY SHOULD NOT REMOVE THE ARBITRABILITY QUESTION FROM THE ARBITRATOR

As this Court has recognized, parties' freedom to contract is the foundation of arbitration agreements:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which

> transcends the parties. He is rather part of a system of self-government created by and confined to the parties.

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) (citation omitted). The FAA, as the statute embodying this stance, "establishes that, as a matter of federal law, any doubts concerning the scope of arbitral 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." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Thus, in *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), the Court held that the FAA allows "the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself," because this is consistent with the Act's "primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." Because arbitration is a matter of contract, the parties to a dispute "are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted." *Id.* The FAA wisely *fosters*, but does not *dictate* agreements between private parties.

A. The FAA Creates Federal Substantive Law of Which the Rule of *First Options* Is a Part

Southland Corp. v. Keating held that the FAA is preemptive federal substantive law that applies in both state and federal courts to the exclusion of any conflicting state law. 465 U.S. 1, 10-17 (1984) (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32). The Court therefore invalidated a California statute which the California Supreme Court had interpreted as barring arbitration of franchise disputes. *Southland Corp.*, 465 U.S. at 10-17. This holding has since been reaffirmed and extended. *See, e.g.*, *Preston v. Ferrer*, 532 U.S. at 353 n.2 (refusing invitation to overrule *Southland*); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (same).

In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), this Court noted that the doctrine of separability is a rule of substantive federal law that applies in state courts as well as in federal courts. *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458-60 (2003) (Rehnquist, C.J., dissenting) (stating that the South Carolina Supreme Court's ruling allowing class arbitration was so wrong as a matter of contract interpretation that it was implicitly preempted by federal law.)[2] In *First Options*,

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[2] "[T]here is no substantive right to a class remedy; a class action is a procedural device." *Blaz v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004); *see also Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) (referring to class action as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only"); *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) (referring to a certified class action as merely a "procedural device aggregating multiple persons' claims" that (continued...)

this Court developed a simple test to determine whether a court or the arbitrator should determine the arbitrability of the dispute: Does the contract send the issue to the arbitrator? 514 U.S. at 943 ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances." (internal citations omitted)). If the "clear and unmistakable" language of the contract states that the arbitrator has authority to determine arbitrability, then the court's only function is to send the matter to arbitration for resolution.

B. Allowing a Mere Assertion of Unconscionability To Defeat Arbitration Undermines the Federal Policy Favoring Arbitration in All Contexts

Noting that "as a matter of federal arbitration law, a court may not compel arbitration until it is 'satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,'" *Jackson*, 581 F.3d at 916 (citation omitted), the court below held, "that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold

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[2] (...continued)
"does not entitle anyone to *be* in litigation").

question of unconscionability is for the court." *Id.* at 917. This sweeping language contradicts federal law and would apply to every type of contract, in any context. Even if this Court were inclined to base a paternalistic ruling on the presumed gap of sophistication between employers and employees (which, as argued below, is neither necessary nor warranted), the rule announced below is vastly overbroad to serve that purpose.

A rule that the mere assertion of unconscionability moves a dispute out of arbitration and into court could just as easily void arbitration contracts between two businesses, or other equally sophisticated parties, in conflict with the generally sanctioned approach. *See*, *e.g.*, *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (Upholding a private contractual agreement not to sue in any court other than the High Court of Justice in London where this choice "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (involving an international business deal between sophisticated executives and approving an agreement waiving review of an arbitrator's decision); *China Resource Prods. U.S.A., Ltd. v. Fayda Int'l, Inc.*, 747 F. Supp. 1101, 1107 (D. Del. 1990) (upholding an arbitration in China due to sophistication of parties); *Tenn. Imports, Inc. v. Filippi*, 745 F. Supp. 1314, 1326-28 (M.D. Tenn. 1990) (finding arbitration in Italy for American company not unconscionable, because the American company was a sophisticated business with international experience and could not show any unfair lack of bargaining power).

This general approach should prevail even in employment disputes, which may well involve highly sophisticated executives in conflict with their companies. "So long as something qualifies as 'arbitration' in the United States, the governing law does not meaningfully distinguish arbitrations between commercially sophisticated parties and arbitrations between parties with distinctly different bargaining positions." Peter B. Rutledge, *Arbitration and Article III*, 61 Vand. L. Rev. 1189, 1233 (2008).[3] *See also* Christopher R. Drahozal, *Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System*, 9 Kan. J.L. & Pub. Pol'y, 578, 587-88 (2000) ("[C]ourts that decide not to enforce arbitration agreements . . . can impose costs on the parties. Courts can't just hold something unconscionable without consequences. Given that sophisticated parties find these arbitration agreements beneficial, it seems to me that there is

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[3] Nor should courts attempt to make such a distinction. Such a regime

> would wreak havoc as courts would be forced to decide which of the two "boxes" a particular arrangement fell under. Nor could one be assured that courts could easily and fairly classify contracts as among "sophisticated" parties versus "unsophisticated" parties. An arbitration agreement between General Electric and a Hungarian start-up company may reflect a far greater relative inequality in bargaining power than, for example, a contract between a local merchant and a sophisticated investor. Thus, at best, the consumer-contract criticism would yield a world that is over-inclusive and under-inclusive. At worst, it would yield an uncertain world in which neither courts nor parties could be certain whether a particular agreement qualified for commercially sophisticated treatment.

Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 Ga. L. Rev. 151, 198 (2004).

evidence that they may be beneficial to unsophisticated parties as well.")

The decision below, which undermines the ability of parties to tailor their agreements in all contexts, may be particularly onerous to commercial enterprises and other conducting transactions in cyberspace. Private arbitration systems are favored for business over the Internet because the arbitrations tend to be less time-consuming and more responsive to the needs of the consumers themselves; the judges tend to be more expert in the relevant trade; and the parties themselves can decide upon the terms for dispute resolution. *See* Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 Santa Clara L. Rev. 837, 838 (2001) (discussing development of alternative forms of dispute resolution solely for cyberspace).

C. Public Policy Supports Arbitration in the Employment Context

Regardless of the relative sophistication of employers and employees, from a policy standpoint, there is nothing inherently wrong with an employer requiring arbitration of work-related disputes. The Federal Arbitration Act, which reflects congressional policy favoring arbitration, requires this outlook. *Buckeye Check Cashing,* 546 U.S. at 443.[4] People have no fundamental right to work for a specific employer. *See Vance v. Bradley*, 440 U.S. 93, 96-97 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976);

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[4] As the Seventh Circuit concluded: "The cry of 'unconscionable!' just repackages the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

California Gillnetters Ass'n v. Department of Fish & Game, 39 Cal. App. 4th 1145, 1155 (1995) ("[T]here is no fundamental right to work for a particular employer, public or private."). Thus, in looking for a job, applicants will consider the various perceived benefits and burdens of each particular employment opportunity.

When contemplating where to work, people have to consider all manner of trade-offs. Some employers offer shifts that start very early in the morning, on weekends, or extend quite late at night.[5] Employers may require workers to wear uniforms[6] or costumes, refrain from certain personal adornments,[7] or stick to

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[5] *See, e.g.*, *Opuku-Boateng v. State of Cal.*, 95 F.3d 1461, 1465 (9th Cir. 1996) ("[A]ll employees were required to work 'an equal number of undesirable weekend, holiday, and night shifts.' "); *N.L.R.B. v. Or. Steel Mills, Inc.*, 47 F.3d 1536, 1540 (9th Cir. 1995) ("Stores clerks are required to work both nights and weekends.").

[6] *See, e.g.*, *I.N.S. v. Fed. Labor Relations Auth.*, 855 F.2d 1454, 1464 (9th Cir. 1988) (holding that I.N.S. employees *are* required to wear uniforms and could be forbidden to wear union insignia pins (or any other adornment) on those uniforms); *Dawson v. State of Nevada*, 825 P.2d 593, 596 (Nev. 1992) (identifying crime victim because she "wore a blue Stop 'N' Go shirt as part of her work uniform").

[7] *See Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 135-36 (1st Cir. 2004), *cert. denied*, 545 U.S. 1131 (2005) (finding that it would constitute an undue hardship to require Costco to modify its no-facial-jewelry policy as a reasonable accommodation for an employee who claimed membership in the Church of Body Modification, given Costco's determination that facial piercings detract from the "neat, clean and professional image" that it aimed to cultivate).

a script when speaking to customers.[8] Some employers demand a heavy travel schedule or require workers to report for duty on holidays. And of course, Nevada's casinos offer round-the-clock employment.[9] Potential workers weigh the trade-offs of various places of employment every day, accepting some offers and declining others.[10] A job applicant who disdains arbitration as a dispute resolution mechanism can look for work with employers who do not make arbitration a requirement of employment. *See Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc.*, 89 Cal. App. 4th 1042, 1056 (2001) (noting that plaintiff could take his business elsewhere if he did not like the contract terms one vendor provided).

Class action arbitration waivers have been adopted by some companies, but they are far from universal. A recent study bears this out. Professors Eisenberg and Miller studied contracts made by 2,858 publicly held companies during a seven-month period in 2002, including 111 specifically identified

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[8] Scripted communications are standard practice in the telecommunications industry. *See* Patrick E. Michela, Comment, *"You May Have Already Won...": Telemarketing Fraud and the Need for a Federal Legislative Solution*, 21 Pepp. L. Rev. 553, 560 (1994).

[9] *See* Fredrick Preis, Jr., *et al.*, *Employment in Gaming: Recent Discrimination Issues*, 8 Gaming L. Rev. 89 (2004) ("The gaming industry provides a unique employment experience. It is an industry that never sleeps. Employees are working 24 hours a day, 365 days a year.").

[10] The State of Nevada facilitates such comparisons by providing a wealth of career opportunity information online. *See* State of Nevada Workforce Informer, *Nevada Career Information System*, *available at* http://www.nevadaworkforce.com/cgi/career/?PAGEID=3&SUBID=158 (last visited Feb. 23, 2010).

"employment contracts." Theodore Eisenberg and Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Contracts of Publicly-Held Companies*, 56 DePaul L. Rev. 335, 348 (2007). Of the grand total, about 89% do *not* mandate arbitration, *id.* at 350, and about 63% of the employment contracts did *not* mandate arbitration. *Id*. Even when looking specifically at California, which the authors note has a higher rate of arbitration than New York or Delaware (the other two states most commonly identified in choice-of-law clauses), the number of contracts containing arbitration clauses still is only about 24%. *Id*. at 358. Parsing still further, the authors found that approximately 46% of employment contracts in California had arbitration clauses. *Id*. at 361. This is higher than most to be sure, but still fewer than half.[11] Thus, a potential employee who greatly values the ability to resolve disputes in court should apply to those companies who share his values on this point.

Courts must view the availability of arbitral remedies neutrally, because individual job applicants may perceive arbitration (or other alternative dispute resolution procedures) favorably or unfavorably. *See* Ellis B. Murov and Beverly A. Aloisio, *Arbitration of Employment Disputes Before and After Circuit City*,

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[11] The variability of employment contracts echoes the proliferation of credit cards, many of which also require arbitration of disputes. In that context, the New York Supreme Court noted: "[I]n this day and age when credit cards are rather easily available from any of a number of issuers, the fact that the customer who elected not to accept the Arbitration Agreement would have to terminate his/her account, would not be grounds for concern." *Johnson v. Chase Manhattan Bank USA, N.A.*, 2 Misc. 3d 1003(A), 784 N.Y.S.2d 921 (2004).

17 Lab. Law. 327, 343 and n.151 (2001) (noting that both employers and unions representing workers under collective bargaining agreements are repeat players in arbitration, thus equalizing concerns about bias); *see also* Thomas J. Stipanowich, *The Multi-door Contract and Other Possibilities*, 13 Ohio St. J. on Disp. Resol. 303, 339 (1998) (Reporting study of construction industry arbitration, that "[w]hen it came to perceived fairness in decisionmaking, arbitrators generally compared favorably with judges and juries. On average, moreover, arbitration was a speedier means of dispute resolution than either jury trial or bench trial, and somewhat less costly overall.") (internal citations omitted). In this way, an arbitration requirement is no different than many other job requirements that impact individual preferences, and even legally protected rights. This Court should affirm that arbitration is an accepted method of alternative dispute resolution, and it is not unconscionable for employers and workers to use it.

II

THE NINTH CIRCUIT DECISION IS BASED ON ILLEGITIMATE SUSPICION OF ARBITRATION AS A METHOD OF RESOLVING DISPUTES

The decision below treats a claim of unconscionability less as an allegation than an incantation—the mere utterance of the word and poof! the contract terms disappear. This has a wide-ranging impact, because where unconscionability challenges once appeared in fewer than 1% of all arbitration-related cases, more recently they have appeared in 15-20% of all cases involving arbitration. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging*

and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. Rev. 1420, 1441 (2008). In no other context is a mere allegation, devoid of evidence, sufficient to dramatically alter the course of dispute resolution. *See, e.g.*, *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987) (Upholding dismissal of Jones Act claim, noting that "if a defendant files a "speaking motion" to dismiss for lack of subject matter jurisdiction, as appellees did here, the plaintiff 'cannot rest on the mere assertion that factual issues can exist.' He must come forward with evidence outside his pleadings to support his jurisdictional allegation.") (citation omitted); *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 66 (3d Cir. 1984) ("[I]n establishing in personam jurisdiction, Time Share had a burden of proof to sustain, and thus mere affidavits which parrot and do no more than restate plaintiff's allegations without identification of particular defendants and without factual content do not end the inquiry. Here, we find that Time Share's affidavit simply failed to prove any defendant's contacts with the forum state.").

The decision below nonetheless singles out arbitration contracts as particularly vulnerable to claims of unconscionability, apparently reflecting that the court simply distrusts arbitrators to decide the question, and assuming that an arbitrator would find that the parties agreed to arbitrate. Yet there is no solid basis for this assumption. Parties who have not agreed to arbitrate will not be forced to arbitrate, *First Options*, 514 U.S. at 943-44, and the plain language of the contract in this case is evidence of agreement to arbitrate. Importantly, arbitrating a challenge to the existence of an arbitration agreement does not necessarily keep the parties in arbitration, but rather

establishes the initial venue to address that challenge. *See, e.g.*, *Metal Prods. Workers Union v. Torrington Co.*, 242 F. Supp. 813 (D. Conn. 1965), *aff'd* 358 F.2d 103 (2d Cir. 1966) (court rejected petitioner-union's request to vacate arbitrator's decision that recall of discharged employees was not arbitrable, so as to reopen a grievance involving a particular employee which it would have liked to submit to arbitration); *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 97 F.3d 155, 162 (6th Cir. 1996) (arbitrator initially found that the grievance was "not arbitrable" because there was no enforceable agreement, and that "neither the Company nor the Union intended to be contractually bound"); *In Re E-Systems, Inc.*, 86 Lab. Arb. 441, 446 (1986) (arbitrator held that a grievance filed on behalf of retirees protesting changes in insurance coverage was not arbitrable because retirees are not "employees").

If the arbitrator finds the contract to be unconscionable, then the dispute will not proceed in arbitration. "In all cases the disappointed claimant can go immediately to a court (under § 4 of the FAA) to seek an order compelling arbitration under the terms of what he still believes to be an enforceable arbitration agreement covering the dispute." Alan Scott Rau, "*The Arbitrability Question Itself*," 10 Am. Rev. Int'l Arb. 287, 353 (1999). And arbitrators *do*, in fact, find contracts to be unconscionable in some cases. *See, e.g.*, *Labor Ready Nw., Inc. v. Crawford*, No. 07-1060-HA, 2008 WL 1840749, at *2 (D. Or. 2008) (arbitrator found the arbitration provision contained in an employment application was unconscionable and unenforceable); *see also Bob Schultz Motors, Inc. v.*

Kawasaki Motors Corp., U.S.A., 334 F.3d 721, 722 (8th Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) (arbitrator ruled that the last sentence in the arbitration provision, which awarded costs and fees to the prevailing party, was unconscionable and unenforceable; a ruling upheld in later court proceedings); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 712 (6th Cir.), *cert. denied*, 546 U.S. 1031 (2005) (arbitrator invalidated a provision limiting damages to the amounts actually paid under the contract as unconscionable; a ruling affirmed by the Sixth Circuit Court of Appeals); *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.*, 152 Cal. App. 4th 1300, 1303 (2007) (arbitrator invalidated as unconscionable a limitation on consequential damages, a decision upheld by later review by the court); *Local 345 of Retail Store Employees Union v. Heinrich Motors, Inc.*, 63 N.Y.2d 985, 986-87 (1984) (arbitrator invalidated as unconscionable a provision in a collective bargaining agreement that prohibited retroactive awards); *Smith v. Gateway, Inc.*, No. 03-01-00589-CV, 2002 WL 1728615, at *3 (Tex. App.-Austin 2002, no pet.) (arbitrator found that the terms of the arbitration agreement that limited the remedies available to Smith were unconscionable).

Allowing an arbitrator to determine arbitrability is analogous to litigating subject-matter jurisdiction in federal court under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(1). The district courts exercise at least temporary jurisdiction over the parties, even when a defendant disputes whether the case belongs in federal court at all. *Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir. 1953) (district court has jurisdiction

to determine its own jurisdiction on ground of a federal question, and appellate court has jurisdiction to review and reverse, modify or affirm the district court's decision) (citing 28 U.S.C. § 2106). "A successful defendant will litigate the case out of court, just as a party can arbitrate the case out of arbitration." Stuart M. Widman, *What's Certain Is the Lack of Certainty About Who Decides the Existence of the Arbitration Agreement*, 59-JUL Disp. Resol. J. 54, 58-59 (2004).

Most importantly, courts may not harbor suspicion against an arbitral forum, just because arbitration operates under procedures that differ from court rules. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1471 (2009) ("[T]he recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration."). There is, moreover, no evidence that arbitration is worse than litigation at achieving just results. What little empirical work has been done suggests that arbitrators decide cases much as judges do, and without the distortions common in cases tried to juries. Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate,* 2006 J. Disp. Res. 469, 480 n.86 (citing Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 Law & Contemp. Probs. 105, 107 (2004)).

In fact, studies show that "plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are

fairer under either system." *The New Judicial Hostility*, 2006 J. Disp. Res. 480-81 n.87 (citing David Sherwyn, *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1564 (2005)). *See also* Michael H. LeRoy & Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv. Negot. L. Rev. 167, 184 (2008) (discussing a survey of employment arbitrations where "[e]mployees won more often in arbitration than similar plaintiffs in court"); Michael H. LeRoy, *Getting Something for Nothing: When Women Prevail in Employment Arbitration Awards*, 16 Stan. L. & Pol'y Rev. 573, 589-90 (2005) (finding that female employees prevailed in arbitration much more often than similarly situated women in litigation, though the amounts of the awards were lower.) Thus, some employees may affirmatively prefer to resolve their claims in arbitration. *See* Michael Z. Green, *Tackling Employment Discrimination with ADR: Does Mediation Offer a Shield for the Haves or Real Opportunity for the Have-Nots?*, 26 Berkeley J. Emp. & Lab. L. 321, 327-30 (2005) (suggesting benefits for employees in pursuing arbitration given the harsh results presented by the court system). This preference, including a preference to have arbitrability claims resolved by an arbitrator, is not unconscionable.

CONCLUSION

For the reasons set forth above, the decision below should be *reversed*.

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Respectfully submitted,

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