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

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BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ALLIANCE FOR JUSTICE, ASIAN AMERICAN JUSTICE CENTER, CONSTITUTIONAL ACCOUNTABILITY CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law, Alliance for Justice, Asian American Justice Center, Constitutional Accountability Center, National Partnership For Women & Families, and National Women's Law Center submit this brief with the consent of the parties[1] in support of Respondent Jackson and the proposition that courts should decide the threshold issue of the enforceability of an arbitration agreement.

Amici represent large segments of our society who rely on our nation's civil rights laws to ensure that they are not victims of workplace discrimination. An individual's ability to seek redress in court for unlawful discrimination is critical to the eradication of discrimination in the workplace. Although the court has held that such discrimination claims may be subject to arbitration by agreement, courts must still assess threshold challenges to the validity of specific agreements. This ensures that employees are not forced to arbitrate if they have not meaningfully agreed to do so or if the terms of the agreement are unconscionable.

Fuller statements of interest for all *amici* are included in the appendix to this brief.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici,* their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

SUMMARY OF ARGUMENT

As the Court has recognized, "ameliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority.'" *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 779 (1976). Laws such as 42 U.S.C. § 1981, the statute upon which Antonio Jackson relies, were intended to secure this essential national policy. Federally-guaranteed civil rights cannot be adequately protected if employees are subject to unconscionable arbitration terms. Thus, in response to well-founded claims of unconscionable arbitration provisions, courts must determine the limited, threshold issue of the enforceability of the arbitration agreement. Particularly when federally-protected civil rights are at stake, courts must ensure that the parties entered into a valid arbitration agreement prior to compelling arbitration.

The Federal Arbitration Act ("FAA") requires, and the Supreme Court has recognized, that a court may not compel arbitration of any dispute until it is satisfied that a valid arbitration agreement exists. Therefore, courts, not arbitrators, should fulfill the statutory duty set out in the FAA to ensure that the parties entered into an enforceable agreement to submit claims to arbitration.

Permitting courts to make this threshold determination furthers the congressional intent to ensure an adequate forum for civil rights claims and to provide remedies for unlawful discrimination. History shows that arbitration agreements in the employment context have all too often been

unconscionably biased. Courts should ensure that civil rights claimants have access to federal courts unless they have meaningfully agreed to an alternative forum, particularly in cases such as those arising under Section 1981 and other statutes that were expressly crafted to ensure fair tribunals for victims of discrimination. Courts should undertake such threshold review of arbitration clauses pursuant to their traditional role of policing unconscionability in contracts. This limited review also serves to enhance the legitimacy and credibility of the arbitral process. Allowing courts to play this limited role will not result in a flood of litigation. Litigation will occur only on the basis of well-founded claims of unconscionable terms or invalid arbitration agreements.

ARGUMENT

I. WHEN ADDRESSING CLAIMS OF UNCONSCIONABILITY IN AN AGREEMENT THAT APPEARS TO SUBMIT THE ISSUE OF ARBITRABILITY TO THE ARBITRATOR, THE COURTS SHOULD STILL FULFILL THEIR STATUTORY DUTY TO ENSURE THERE IS AN ENFORCEABLE AGREEMENT TO DO SO.

A. The Court and Congress have recognized that the right to be free from unlawful workplace discrimination can be subject to arbitration, but courts should determine whether an arbitration agreement should be enforced in the face of a claim of unconscionability.

The Court has long recognized the paramount importance that Congress has attached to each individual's right to be free from invidious discrimination.[2] This national principle stems from

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[2] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA "reflects a societal condemnation of invidious bias in employment decisions" in a case brought by an individual employee); *Franks*, 424 U.S. at 779 ("[A]meliorating the effects of past racial discrimination [is] a national policy objective of the 'highest priority.'"); *NAACP v. FPC*, 425 U.S. 662, 665 (1976) (recognizing that "the elimination of discrimination from our society is an important national goal").

an intent to "eliminate 'the last vestiges of an unfortunate and ignominious page in this country's history.'" *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 465 (1986) (internal citations omitted). To overcome this history of workplace discrimination based upon characteristics such as race, sex, and age, statutes such as Section 1981, the ADEA, and Title VII allow individuals to proceed to court to protect their rights against employers. *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"); Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. ("ADA"). By these statutory means, Congress has attempted to ensure that every person has the right to challenge and seek redress for unlawful workplace discrimination. While the Court has said that these vital rights can be subject to arbitration,[3] these rights cannot be adequately protected through arbitration if agreements to arbitrate, including the threshold issue of

[3] *Amici* remain concerned that subjecting these important rights to arbitration based on pre-dispute, binding arbitration clauses maximizes the disparity in bargaining power between the parties, and leads to inequitable agreements at the expense of employees' right to be free from employment discrimination and in derogation of Congress's intent to rid the workplace of discrimination. Because of these concerns and the Court's repeated assertion that arbitration changes only the forum, not the substantive rights, *see Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[B]y 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."), it is even more critical that courts play a meaningful role to ensure there truly is a knowing, voluntary agreement to arbitrate these claims when the process is challenged as unconscionable.

arbitrability, are unconscionable.[4] Arbitration may be a useful tool only when there is truly an enforceable agreement and the agreement to arbitrate is knowing and voluntary.[5] As the Court and Congress have recognized, this must be the starting point for all inquiries into whether an

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[4] The term "unconscionability"can have a broad meaning. One early attempt to capture its meaning defined it as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449 (D.C. Cir. 1965); *see also Am. Software, Inc. v. Ali,* 54 Cal. Rptr. 2d 477, 479 (Cal. Ct. App. 1 Dist. 1996) ("While the term 'unconscionability' is not defined by statute, the official comment explains the term as follows: 'The basic test is whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract . . .'" (citation omitted)); *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960) ("[T]he courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of the economic necessities of the other.").

[5] As the Court noted in *First Options of Chicago, Inc. v. Kaplan*, arbitration agreements often contain several types of agreements. 514 U.S. 938, 945 (1995). These can include agreements to arbitrate the merits of the dispute and agreements about who should decide the question of what is covered by the arbitration agreements. *Id.* The issue currently before the Court deals with the second issue—who decides whether there is an agreement to arbitrate. Though the meaning of arbitrability is confusing and has not been clearly defined by the Court, this brief refers to arbitrability as "whether under applicable law a dispute is subject to arbitration at all." Resp. Br. 24 n.4. Accordingly, there must first be a determination that there was an actual enforceable agreement for arbitrability to be determined by the arbitrator. If there is such an agreement, issues relating to the enforceability of the merits arbitration are properly determined by the arbitrator.

employee has effectively waived the right to bring these important federal claims before a federal court and agreed to defer instead to an arbitrator. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) ("[A] compulsory submission to arbitration cannot precede judicial determination that the [arbitration agreement] does in fact create such a duty."); *see also* A Bill Relating Sales and Contracts to Sell in Interstate and Foreign Commerce and a Bill to Make Valid and Enforceable Written Provisions on Agreements for Arbitration of Disputes; Hearing on S. 4213 and 4214 Before S. Comm. on the Judiciary, 67th Cong. 5 (1923) (Statement of Sen. Walsh) ("[T]he court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law, and consequently . . . it seems to me you are obliged, to go to court.").

While not the issue confronting it, a majority of the Court in *First Options of Chicago, Inc. v. Kaplan*, suggested in dicta that parties may agree to assign the issue of arbitrability to an arbitrator, but only if there is "'clea[r] and unmistakabl[e]' evidence" that the parties intend for an arbitrator to decide this threshold issue.[6] 514 U.S. 938, 944 (1995). *See also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) ("In certain limited circumstances, courts assume that the parties

[6] As discussed in detail in Respondent's brief, this language only addresses the limited issue of the parties' agreement regarding the scope of what the arbitrator can decide, as opposed to issues of validity and enforceablility of the agreement to arbitrate. *See* Resp. Br. 26-28.

intended courts, not arbitrators, to decide a particular arbitration-related matter . . . [these limited situations] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all . . ."); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) ("[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide.") (citations omitted). To the extent the language in *First Options* can be read to provide the parties *some* latitude to agree as to who decides arbitrability, the Court surely could not have intended to divest the courts of *all* ability to make threshold determinations as to whether there was a valid agreement as to who decides arbitrability and to determine whether these agreements are unconscionable. To do so would run counter to the express language of the FAA and would undermine the integrity and credibility of the arbitral forum.

In fact, the Court has recognized repeatedly that courts should play a role to ensure fairness in the arbitration process and to ensure that there is an enforceable agreement. *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (citing *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987)). "Courts should remain attuned to well-supported 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.*, 473 U.S. at 627; *see also Gilmer*, 500 U.S. at 33 (stating that "[a] claim of unequal bargaining power is best left for resolution

in specific cases").

The Court and Congress have recognized a federal policy in favor of arbitration.[7] However, there is no presumption that "matters which go beyond the application of contract terms are subject to arbitration." *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 80 (1998). The courts can liberally construe the scope of an agreement only where two parties have entered into a valid, *consensual* agreement to arbitrate. This is especially true when determining whether there is an enforceable agreement to have the arbitrator decide threshold issues regarding arbitrability, since there is a presumption that the courts will decide this issue.[8]

Even assuming, *arguendo,* that the Court

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[7] Section 118 of the Civil Rights Act of 1991 provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. *See also Wright*, 525 U.S. 70; *Howsam*, 537 U.S. at 83.

[8] Although the Court has recognized a "'federal policy favoring arbitration agreements,'" *Howsam*, 537 U.S. at 83 (*citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983)), "it has made clear that there is an exception to this policy: The 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.* (*citing AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raised a 'question of arbitrability' for a court to decide." *Id.* (*citing First Options*, 514 U.S. at 943-46).

intended the clear and unmistakable evidence standard to apply to purported assignments of questions of unconscionability and validity of the employment arbitration agreement, given the Court's prior decisions, it is simply not possible that the Court envisioned lower courts playing a mere ministerial role of simply looking at whether the language was as clear, as Petitioner maintains. Pet. Br. 18-19. Rather, as evidenced by the Court's decisions in the employment context, courts should determine whether there is an enforceable agreement to have the arbitrator decide these threshold issues before the matter is sent to arbitration.

B. The Federal Arbitration Act requires, and the Supreme Court has recognized, that a court may not compel arbitration of any dispute until it is satisfied that a valid arbitration agreement exists.

The FAA mandates that courts play this threshold review role as to whether the parties entered an enforceable agreement to have the arbitrator decide the threshold issue of arbitrability. Section 4 of the FAA states, in relevant part, that a court may not compel arbitration of any dispute until it is "satisfied that the *making of the agreement for arbitration* . . . is not in issue." 9 U.S.C. § 4 (emphasis added). Upon such a finding, a court may then "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." *Id.* Accordingly, the text of the FAA embodies the requirement that only valid arbitration agreements may be sent into binding arbitration.

See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967) ("[I]f an issue . . . goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it [pursuant to Section 4 of the FAA]."); *see also* Resp. Br. Parts I.A & I.B.

Petitioner suggests that this section of the FAA provides "direct textual support" for the argument that parties may structure arbitration agreements "to commit particular issues to the arbitrator." Pet. Br. 16. Petitioner misconstrues Section 4 of the FAA by overlooking the requirement that a court may only compel parties to proceed to arbitration *after* a finding that the *making of the agreement for arbitration* is not in issue. Once a court is satisfied with the formation of the arbitration agreement, then parties may proceed to arbitration.

Section 2 of the FAA also requires that only valid arbitration agreements may be sent to arbitration. Section 2 states that an agreement to arbitrate shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Accordingly, the FAA recognizes that courts may make an initial determination as to whether an arbitration agreement is valid before sending parties into binding arbitration. *See Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478-79 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . . Arbitration under the Act is a matter of consent, not coercion . . . .").

Permitting courts to determine the validity of

an arbitration agreement does not contravene the FAA's goal of avoiding the expense or delay of litigation. Rather, allowing courts to make this determination at the initial stages of litigation avoids the expense and delay incurred through the process of appeal.[9] Accordingly, an initial determination of unconscionability by the court does not undermine the FAA's goals; instead, it furthers the policy of Section 2 of the FAA by ensuring that claims are properly submitted to an arbitrator when—and only when—the parties entered a valid and enforceable agreement to arbitrate.[10]

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[9] Having courts perform this threshold review in determining the validity of an arbitrability agreement also ensures that these claims are reviewed at the outset of litigation, rather than through the extremely restrictive standard of review applicable on appeal, which has the potential to mask errors in the arbitrator's decision of arbitrability. *See First Options*, 514 U.S. at 942 (noting the importance of whether an issue goes initially to a court versus an arbitrator because "the court will set that decision aside only in very unusual circumstances"); *Barbier v. Shearson Lehman Hutton Inc*., 948 F.2d 117, 120 (2d Cir. 1991) ("It is well-settled that judicial review of an arbitration award is narrowly limited."). Indeed, in a recent argument before the Court, Justice Breyer characterized the standard of review as being so narrow that the arbitrator's decision must be upheld unless it is from Mars. *See* Transcript of Oral Argument at 9-10, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, No. 08-1198 ("[W]hen the arbitrator says something, unless it's in Marrs [sic], follow it.").

[10] Because the determination of unconscionability is analogous to a jurisdictional determination, it is improper to grant an arbitrator more power than judges possess at the district court level. Both determinations affect whether the court, or the arbitrator, can properly exercise control over the parties. While a district court's ruling on matters of jurisdiction is subject to de novo review by a court of appeals, the review of an arbitrator's decision is subject to extremely limited review. *See,*

Moreover, the Court has stated repeatedly that, because arbitration is a matter of contract, whether a valid agreement to arbitrate exists is an issue that should be determined at the outset by the courts.[11] *See, e.g., United Steelworkers of Am. v. Warrior & Golf Navigation Co.*, 363 U.S. 574, 582 (1960) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("The question of arbitrability . . . is undeniably an issue of judicial determination."); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962) ("Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."). While arbitration is an avenue through which to resolve disputes quickly and efficiently, parties must first have agreed to submit those disputes to arbitration. *See First Options*, 415 U.S. at 943. Accordingly, "[c]ourts should not assume that . . . parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944 (citations omitted).

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e.g., Corfield v. Dallas Glen Hills LP, 355 F.3d 853, 857 (5th Cir. 2003); *see also* 9 U.S.C. § 10.

[11] However, as discussed *infra*, the Court appears to permit parties to agree to have an arbitrator decide threshold issues going to the scope of the arbitration clause if there is "'clea[r] and unmistakabl[e]' evidence" of their intent to do so. *First Options*, 415 U.S. at 944 (citations omitted).

C. Adopting Petitioner's proposed rule of law would lead to absurd results.

When considering a motion to compel arbitration, the FAA requires that the court be "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Similarly, before a court can stay a proceeding where the matter may be subject to arbitration, the court must be "satisfied that the issue . . . is referable to arbitration under such an agreement." *Id.* § 3. The Court has repeatedly stated that the FAA mandates arbitration only where the parties entered an enforceable agreement to arbitrate. *See First Options*, 514 U.S. at 944.

The over-reaching arbitration clause drafted by Petitioner and offered as a non-negotiable condition of employment seeks to divest the courts of the very power needed to ensure that arbitration occurs only on the basis of an enforceable agreement. Petitioner's arbitration clause provides that "[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. Br. 4-5. Petitoner argues that because the plain language of the agreement allocates "exclusive authority" to the arbitrator to determine the validity of the arbitration agreement, under a plain reading of this clause, the court lacks the authority to determine the validity of the agreement. However, the FAA requires that a court

make this determination before it can send claims into binding arbitration. *See* 9 U.S.C. § 4. In short, the courts must do more than look at words on paper.

Petitioner's proposed rule of law contravenes the requirements of the FAA and misconstrues the Court's holdings in *AT&T* and *First Options*. Petitioner insists that a signed arbitration clause that contains language purporting to delegate arbitrability to an arbitrator is all that is needed to constitute "clea[r] and unmistakabl[e]" evidence that the parties have agreed to arbitrate the agreement's validity. *See* Pet Br. 12. This ignores the Court's language in *First Options* that "[c]ourts should not assume that . . . parties agreed to arbitrate arbitrability unless there is '*clea[r] and unmistakabl[e]*' evidence that they did so." *First Options*, 415 U.S. at 944 (citations omitted) (emphasis added). In order for the Court's clear and unmistakable language to have any meaning, the courts must look beyond the language to ensure a valid agreement exists.

Assume Mr. Jackson claimed that although his name was on the agreement, he never signed it. Instead, the employer simply wrote each employee's name on these agreements. Petitioner could not credibly argue that just because there is clear and unmistakable language sending all formation issues to the arbitrator, that the courts would have no role in deciding whether there truly was an agreement to arbitrate arbitrability. Similarly, a well-founded claim of unconscionablity, particularly procedural unconscionability, goes to whether there was actually a meaningful and enforceable agreement to

arbitrate.

Thus, where a claim of unconscionability creates a question as to whether there is an enforceable knowing and voluntary agreement, regardless of language in the agreement purporting to assign the question to the arbitrator, the court should determine whether such an agreement exists. Allowing courts to make this threshold determination adheres to the procedures established in the FAA by ensuring that the parties have in fact agreed to submit to arbitration.

D. Permitting courts to make limited threshold determinations regarding validity and enforceability of arbitration clauses furthers Congress's intent to ensure an impartial forum for civil rights claims and to ensure meaningful remedies for unlawful discrimination.

To fulfill congressional intent to protect vulnerable populations from unlawful discrimination, courts should determine the threshold issue of arbitrability. This role is especially important when federally-protected civil rights are at stake. The fundamental purpose of civil rights laws is to secure the right of all people to be free from invidious discrimination. *See, e.g. NAACP v. FPC*, 425 U.S. 662, 665 (1976). The Court has made clear that the federal civil rights laws reflect a fundamental national policy to end discrimination and to heal the deep national wounds created over the course of centuries. *See generally*

Franks, 424 U.S. at 779. Congress envisioned the courts playing a key role in ensuring that victims of discrimination have a reasonable forum to obtain relief for civil rights violations. *Local 28 of Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 465 (citing *Abermarle Paper Co. v. Moody*, 422 U.S. 405, 465 (1975)).

This is particularly evident with respect to the Civil Rights Act of 1866, including Section 1981, which was intended to ensure the fair administration of justice. The framers of this Reconstruction Act sought to "eliminate racial and political prejudice in the administration of civil and criminal justice in the State courts, and provide an alternative system of civil and criminal justice when individuals could not enforce or were denied their civil rights in the state courts." Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L.J. 565, 581 (1989).[12] The framers of the Act knew that they could not achieve their goal of rooting out discrimination without an effective enforcement mechanism in a fair tribunal. *See e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (statement of Sen.

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[12] Noting the virtual impossibility of an emancipated slave or Unionist obtaining a fair trial in former slave-holding states, Senator Sherman spoke in support of the Act, observing, "To say that a man is a freeman and yet is not able to assert and maintain his right in a court of justice is a negation of terms." Cong. Globe, 39th Cong., 1st Sess. 41 (1866). *See generally* Report of the Joint Committee on Reconstruction Pt. II, 240 (1866) (noting that former slave owners were inserting into contracts "tyrannical provisions" that prevented freedmen from exercising their fundamental rights).

Trumbull) (arguing that the civil rights statute would only have force if it also created a clear mechanism of judicial enforcement).

To the extent that employment discrimination claims are subject to arbitration, the Court must balance the national policy favoring voluntary arbitration with the national policy to eliminate discrimination in the workplace. In order to effectively balance these public interests, the courts must ensure that employees' federally-protected civil rights are subject to arbitration only when a valid arbitration agreement exists. When the validity of the arbitration agreement is in question, courts should determine whether the agreement should be enforced in the face of a claim of unconscionability. Whether the arbitration clause is unconscionable constitutes a threshold issue that goes to the essence of whether there is a valid and enforceable agreement. *See* Resp. Br. 21-22.

II. PERMITTING COURTS TO MAKE THE LIMITED THRESHOLD DETERMINATION REGARDING ARBITRABILITY ENHANCES THE INTEGRITY AND CREDIBILITY OF ARBITRATION.

Increasingly, employers require employees to sign arbitration clauses as a condition of employment.[13] These clauses often are included on

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[13] *See, e.g.*, Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581, 586-88 (2004) (presenting empirical evidence of growth in mandatory arbitration for employment disputes following

application forms or presented soon after the employment relationship is formed.[14] In order to get or keep a job, individuals in some cases must waive access to the courts before any dispute arises. *See, e.g., EEOC. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 745 (9th Cir. 2003) (employee lost job offer when he refused to agree to arbitrate). Typically, employees do not obtain legal advice or engage in negotiation over the terms drafted by employers. *See, e.g., Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1171-72, 1179 (9th Cir. 2003) (arbitration provisions allowed only the employer to change the terms of the agreement unilaterally, and the employer presented the agreement on a "take-it-or-leave-it" basis). In short, most employees have little choice but to assent to the arbitral forum under terms set out by the employer.

In light of these imbalances in bargaining power and the potential for abuse, it becomes all the more critical to ensure that courts decide the threshold agreement of arbitrability. Putting the threshold question of arbitrability to courts protects parties from being bound to unconscionable arbitration agreements and ensures that claims taken to arbitration are properly before the arbitrator.

Gilmer). Today, an estimated 30 million workers are subject to mandatory arbitration clauses. National Employment Lawyers Association, "Data Points: Prevalence of Mandatory Arbitration," October 2007, *available at* http://judiciary.house.gov/hearings/pdf/Ventrell-Monsees071025.pdf.

[14] *See, e.g.*, EEOC Notice No. 915.002: Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment (July 10, 1997).

A. Permitting courts to make the initial determination of arbitrability furthers the public interest by enhancing legitimacy and credibility of the arbitral process.

The benefits of assigning arbitrability to the courts extends beyond the individual parties to arbitration agreements or the classes of persons most often bound by mandatory arbitration.

Allocating questions of arbitrability to the courts eliminates the appearance of impropriety that may arise when an arbitrator is called upon to assess whether he or she has jurisdiction to hear the underlying claim. Additionally, if a court determines that a challenged agreement to arbitrate is enforceable, the court's decision legitimizes subsequent arbitration proceedings.

This threshold review by the courts is necessary to instill confidence in the party opposing arbitration that the process is legitimate. The Court has recognized "the question [of who decides arbitrability] . . . has a certain practical importance" in all cases because an arbitrator's decision is subject to only limited judicial review. *First Options*, 514 U.S. at 942. Thus "who—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate can make a *critical* difference to a party resisting arbitration." *Id.* (emphasis added).

The Supreme Court recently recognized the importance of avoiding even the appearance of impropriety in the judicial context, observing that

"[a]lmost every State . . . has adopted the American Bar Association's objective standard" mandating that judges avoid not only impropriety, but "the appearance of impropriety." *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (quoting ABA Annotated Model Code of Judicial Conduct Canon 2 (2004)). The Court went on to observe that "[t]hese codes of conduct serve to maintain the integrity of the judiciary and the rule of law" as the "'power and prerogative of a court to [resolve disputes] rest, in the end, upon the respect accorded its judgments,'" which "'depend in turn upon the issuing court's absolute probity.'" *Id.* (quoting *Republican Party of Minn.* v. *White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Similarly, the perceived impartiality of arbitrators is critical to acceptance of their authority to issue binding decisions on matters otherwise left to the judiciary.

B. Courts should undertake a meaningful threshold review pursuant to their traditional role of policing unconscionable provisions in arbitration clauses.

Courts have performed a vital role in policing attempted abuses of arbitration by rejecting arbitration clauses found to be unconscionable. Courts have refused to compel arbitration on the basis of unconscionable provisions that seek to unreasonably control the arbitrator selection process, impose high costs, limit discovery, or limit the availability of remedies provided by law, etc. *See, e.g., Alexander v. Anthony Int'l, L.P.,* 341 F.3d 256 (3d Cir. 2003) (disapproving provision requiring loser to pay the opponent's attorneys' fees because

the employees could not meet such a financial burden); *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933 (4th Cir. 1999) (disapproving provision allowing employer "unrestricted control" over the selection of a panel of three arbitrators); *Graham Oil Co. v. ARCO Prods. Co.,* 43 F.3d 1244, 1247-49 (9th Cir. 1994) (disapproving provision that purported to forfeit statutorily-mandated right to recover damages); *Hulett v. Capitol Auto Group, Inc.*, 2007 WL 3232283 (D. Or. Oct. 29, 2007) (striking unconscionable limits on discovery).

Allegations of fundamental unfairness and bias in the design of an arbitration system go beyond the "generalized attacks" on neutrality resting on general "suspicion of arbitration" that the Court has rejected. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 78, 89-90 (2000); *Gilmer*, 500 U.S. at 30 (citing protection of 9 U.S.C. § 10(b)). Rather, specific allegations of bias and fundamental unfairness in the arbitration process rise to the level of rendering an arbitration contract substantively unconscionable. In such cases, neither logic nor efficiency recommends withholding judicial review of the allegation of fundamental bias until after the conclusion of the allegedly defective arbitration proceedings. Nor does the law so require. Rather, the FAA authorizes the courts to address this issue upfront and without any deference to the arbitrator when considering the validity and enforceability of the agreement to arbitrate under state unconscionability doctrine. *Cf. McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 (6th Cir. 2004) (rejecting argument that under *Gilmer*, allegations of arbitrator bias should only be considered in subsequent review of the arbitration decision, and

explaining that "[w]hen the process used to select the arbitrator is fundamentally unfair . . . there is no need to present separate evidence of bias or corruption in the particular arbitrator selected.").

The question of "who decides" claims that an arbitration agreement is unenforceable due to unconscionability raises practical and policy concerns. Claims of unconscionability in the arbitration context frequently focus on fundamental unfairness of the system of dispute resolution provided for in the agreement. In such cases, forcing the question of unconscionability into the very decision-making system alleged to be unconscionably unfair or inaccessible makes little sense and raises "the most potent" public policy concerns. *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 12 (1st Cir. 2009).

In the context of employment agreements and other contracts of adhesion, claims of such unconscionable bias are common and have been recognized by courts. In the prominent case of *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, for example, an employee brought suit against Hooters for sexual harassment and Hooters moved to compel arbitration based on its mandatory arbitration agreement with employees. *Id.* at 935-36. The Fourth Circuit affirmed the district court's denial of the motion, finding the agreement unenforceable because the rules for arbitration, "taken as a whole . . . are so one-sided that their only possible purpose is to undermine the neutrality of the proceedings." *Id.* at 939. The court discussed various one-sided aspects of the arbitration procedures, including a rule allowing Hooters to change the rules of arbitration "in whole or in part" whenever it wished

and "without notice" to the employee. *Id.* The court also focused in particular on the "mechanism for selecting a panel of three arbitrators," which gave Hooters "unrestricted control" over the composition of the arbitration panel without any protections against bias or conflict of interest. *Id.* The court found that such design was "crafted to ensure a biased decisionmaker." *Id.*

Unfortunately, the unconscionably-biased system of arbitration at issue in *Hooters* is not unique. In similar cases, courts have rejected employers' attempts to stack the deck by controlling the selection of the arbitrator or promulgating one-sided procedural rules. *See, e.g., Murray v. UFCW Int'l, Local 400*, 289 F.3d 297, 303-04 (4th Cir. 2002) (refusing to enforce arbitration agreement "utterly lacking in the rudiments of evenhandness" under unconscionability doctrine because the employer retained complete control of the selection of arbitrators, with no protections against bias or conflict of interest); *McMullen*, 355 F.3d at 494 (holding unconscionable an arbitration provision that was "fundamentally unfair" in that it gave employers excessive control over the process and selection of arbitrators); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 944-49 (N.D. Ind. 2000) (denying motion to compel arbitration because the procedure for selecting the arbitration panel ensured that two of the three arbitrators would have biasing ties to the employer); *see also* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?,* 57 STAN. L. REV. 1631, 1650 (2005) (observing that "companies have selected arbitrators who might clearly be expected to be biased, such as a representative of management of the company

against whom a claim might be made"). If courts abdicate their role in considering such challenges to arbitration agreements, the incidence of such abuses will likely increase.

The second category of claims that is uniquely inappropriate for assignment to arbitral authority includes claims that the arbitration agreement is substantively unconscionable because the arbitral forum that it establishes is inaccessible to one of the parties. If the court enforces an assignment of the unconscionability question to the arbitrator, the party may be left without access to any forum at all, judicial or arbitral, to have both the question of unconscionability and the underlying claim heard. In such cases, even the FAA's promise of limited judicial review of the arbitral decision offers no relief. Without access to the arbitral forum, there will be no decision of which to seek review. This would be particularly troubling for claims, like Mr. Jackson's, that are brought pursuant to Section 1981, which was specifically crafted to ensure that civil rights claimants have access to justice and a fair tribunal.

The most commonly alleged barrier to access to arbitration is cost. Courts have considered challenges regarding the total potential costs a complaining party may incur in the course of arbitration, which could be so high as to render pursuit of a claim devastating, *see, e.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (holding that an arbitration provision requiring the loser to pay the opponent's attorneys' fees was substantively unconscionable with respect to the discharged refinery workers because they could not

meet such a financial burden), as well as claims regarding upfront costs of entry to arbitration. *See, e.g., Shankle v. B-G Maint. Mgmt. of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999) (declining to enforce an arbitration agreement with a cost-splitting provision and requiring an upfront deposit of $6,000). Both types of claims could present unconscionable and insurmountable barriers to arbitration, even arbitration of the threshold question of unconscionability. Another barrier to access that has been dismantled in some states pursuant to the unconscionability doctrine is the selection of a distant arbitral forum. *See, e.g., Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566-68 (Cal. Ct. App. 1993) (holding unconscionable an arbitration clause that required California consumers to arbitrate any disputes in Minnesota, where the cost of obtaining a hearing in such forum might approach the amount at issue in the underlying dispute). Depending on the circumstances of the parties, a distant arbitral forum may like a high upfront cost render the arbitral forum inaccessible. Clearly, allegations of such unconscionability should be resolved by a court to ensure reasonable access to the arbitral forum. Congress did not intend to create a regime wherein employees are pressured to waive access to the courts in exchange for illusory access to arbitration.

For all of the above reasons, courts should decide well-founded claims of unconscionability at the outset, rather than waiting until after arbitrators rule on the unconscionability claim and the merits of the underlying claim. A contrary ruling could add significant and unnecessary delays, inefficiencies, and costs, by inviting duplicitous

proceedings.

III. PERMITTING COURTS TO DETERMINE THRESHOLD CLAIMS OF UNCONSCIONABILITY WILL NOT CAUSE A FLOOD OF LITIGATION.

Courts should determine the threshold legal issues regarding whether there is actually an enforceable agreement as to who decides the issue of arbitrability. Indeed, Petitioner, citing favorably to *Howsam*, acknowledges that courts traditionally have the jurisdiction to determine threshold issues of arbitrability, including issues of unconscionability. Pet. Br. 21-22 ("Inasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide.").[15] Petitioner and its *amici* concede the courts have a role to play in determining threshold issues of arbitrability; however, Petitioner and its *amici* appear more concerned about the level of evidence that should be required for the courts to play this threshold review role. They repeatedly characterize the evidence here as "merely a claim," Pet. Br. at 26, and refer to "*any* claim of unconscionablity, no matter how weak," *id.* at 22, "a mere allegation of unconscionability," *id.* at 24, and "Jackson merely alleges . . ." *Id.* at 26 n.9. They also raise an unfounded concern that a flood of litigation will result from baseless allegations of unconscionability. *See* Brief for Pacific Legal

[15] Petitioner's supporting *amici* also seem to concede there is some role for the courts to play in determining threshold issues. *See* Emp. Adv. Council Am. Br. at 9; Br. in Support of the Petition for a Writ of Certiorari by Am. Pacific Legal Foundation at 6.

Foundation as Amicus Curiae Supporting Petitioner in Support of Granting a Writ of Certiorari, 6-8; Pet. Br. at 29-34; s*ee also* Chamber of Commerce Am. Br. at 13.

The Court already has anticipated this concern and has repeatedly noted that claims must be "well-founded," *McMahon*, 482 U.S. at 226; *Gilmer*, 500 U.S. at 33, and "well-supported" to trigger the courts' gate-keeping function. *Rodriquez v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) ("[Section] 2 of the Arbitration Act also allows the courts to give relief where the party opposing arbitration presents well-supported 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.") (internal quotations and citations omitted); *Mitsubishi*, 473 U.S. at 627. Trial courts are well-equipped to determine whether the party has a well-founded claim; indeed courts have long made such threshold determinations. Baseless allegations of unconscionability will not lead to litigation and will not flood the courts.

If there is a concern about the quantum of proof of unconscionablity in this case, it is within this Court's discretion to remand this case for the purpose of determining whether Mr. Jackson's claim meets the standard articulated by the Court required to trigger review of threshold legal issues by a court.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

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APPENDIX

APPENDIX

List of *Amici*:

Organizations

The Lawyers' Committee for Civil Rights Under Law is a nonprofit civil rights organization that was formed in 1963 at the request of President Kennedy to involve private attorneys throughout the country in the national effort to ensure the civil rights of all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country. The Lawyers' Committee seeks to ensure that the goal of civil rights legislation to eradicate discrimination is fully realized, and is concerned in this case with the potential negative impact on a plaintiff's ability to obtain relief for valid civil rights claims. To this end, the Lawyers' Committee has filed amicus briefs opposing limitations on access to relief for victims of discrimination and attempting to ensure that arbitration allows for meaningful vindication of federally-protected rights in a number of cases including *Stolt-Nielsen S.A., et al. v. Animalfeeds International Corp.*, 129 S. Ct. 2793 (2009); *14 Penn Plaza LLC, et al. v. Pyett et al.,* 129 S. Ct. 1456 (2009); *Green Tree Fin. Corp. v. Bazzle et al.*, 539 U.S. 444 (2003); *EEOC v. Waffle House Inc.,* 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001); *Wright v. Universal Maritime*

Service Corp. et al., 525 U.S. 70 (1998); *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). The resolution of this case will significantly affect the extent to which the Lawyers' Committee can protect the rights of its clients.

Alliance for Justice ("AFJ") is a national association of over 100 organizations dedicated to advancing justice and democracy. For more than 30 years, AFJ has been leading the fight for a more equitable society on behalf of a broad constituency of environmental, consumer, civil, and women's rights, children, senior citizens, and other groups. AFJ is premised on the belief that all Americans have the right to secure justice in the courts and to have their voices heard when government makes decisions that affect their lives. In this case, AFJ is particularly concerned with unconscionable arbitration provisions that limit plaintiffs' ability to pursue valid civil rights claims.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in litigation, public policy, advocacy, and community education. AAJC and its affiliates have a long-standing interest in protecting individuals' civil rights in the employment setting. This interest has resulted in AAJC's participation in a number of amicus briefs before the courts on the issues of employment discrimination and unfair employment

practices where the parties have unequal bargaining power.

Constitutional Accountability Center ("CAC") is a nonprofit think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history, including preserving access to equal justice and impartial courts. CAC has a particular interest in the text and history of the Reconstruction Amendments, and the statutes passed to enforce these Amendments, as demonstrated by the amicus briefs CAC has filed in *Caperton v. Massey*, 129 S. Ct. 2252 (2009); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009); and *McDonald v. City of Chicago*, *petition for cert. filed*, 130 S. Ct. 48 (U.S. Sept. 30, 2009) (No. 08-1521).

The National Partnership for Women & Families is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination, and has filed numerous amicus curiae briefs in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex

discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace by supporting the full enforcement of anti-discrimination laws, including Title VII of the Civil Rights Act of 1964 and other laws that protect employees. NWLC has prepared or participated in numerous amicus briefs filed with the Supreme Court and the Courts of Appeals in employment discrimination cases.