

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 FOR PROFESSIONAL ARBITRATORS
AND ARBITRATION SCHOLARS AS
AMICI CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

This case involves questions of substantial importance to the field of arbitration. *Amici* are professional arbitrators and arbitration scholars. They file this brief to provide the Court the benefit of their many years of practical experience and scholarly study. In our view, assigning courts the task of deciding the validity of employment and consumer arbitration agreements is most consistent with the text and underlying policies of the Federal Arbitration Act. Judicial determination of unconscionability claims in particular increases public confidence in the neutrality of arbitration and promotes consistency, predictability, and the overall fairness of the arbitration process. *Amici* include:

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¹ Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have filed letters of consent with the Clerk of the Court.

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SUMMARY OF ARGUMENT

I. The Federal Arbitration Act permits a federal court to order arbitration only upon finding that the parties have entered into a written agreement to arbitrate their dispute. That agreement, in turn, must be valid under generally applicable state law principles, including the doctrine of unconscionability.

This Court has held that the question whether a party has validly agreed to arbitrate a dispute should be decided by a court in order to ensure that no one is deprived of a judicial forum unless she has truly agreed to resolve her dispute elsewhere. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995). Petitioner points out, however, that the Court also has held that an arbitrator may decide whether a particular issue is within the scope of an arbitration agreement, so long as the parties have agreed to arbitrate *that* question as well. Petitioner claims the same principle applies to who should determine an agreement's validity, including whether it is unconscionable.

Even if that were right, it would not help petitioner in this case. Even if this Court were to hold, for example, that parties could agree in a second, post-dispute agreement to arbitrate the validity of the initial arbitration agreement, that second agreement would itself have to be valid and could not be enforced if it were also unconscionable.

And under this Court's clear precedents, whether the second agreement is unconscionable would be a question for the court to decide.

In this case, the agreement to arbitrate the underlying employment dispute and the agreement to arbitrate validity are part of the same arbitration agreement. Respondent's unconscionability charge goes to both parts of the agreement. Consequently, before the district court may enforce the agreement to arbitrate validity, it must necessarily resolve the unconscionability claim that applies to the agreement in its entirety.

II. That result is required by the text of the statute and this Court's precedents, but is also consistent with the purposes of the FAA and sound public policy.

The efficacy and legitimacy of arbitration depend on courts and arbitrators playing complementary roles. Courts perform a gatekeeping function by ensuring that parties are sent to arbitration, and deprived of a traditional judicial forum, only if they truly agreed to arbitrate their dispute in a valid written agreement. At the same time, by enforcing doctrines like unconscionability, courts ensure that the arbitration regime comports with traditional contract rules for bargaining fairness. The FAA itself does not significantly regulate the arbitration process, leaving that task instead to state law contract rules of general applicability. Judicial enforcement of those rules enhances public confidence in the fairness of arbitration, which could be undermined by suspicions of self-dealing if left principally to appointing agencies and to arbitrators paid to handle the cases. Having ensured the basic

fairness of the system, courts then step back and allow arbitrators to exercise their expertise in efficiently resolving particular disputes. Their decisions are then subject to reversal in only unusual circumstances, precisely because judicial involvement on the front end makes the results worthy of substantial deference.

Judicial resolution of unconscionability questions also has the advantage of allowing development of a body of law that can guide the drafting of arbitration agreements and promotes fairness, consistency, and predictability. Giving validity questions to arbitrators, on the other hand, undermines those values. Arbitration decisions typically are confidential, are rarely disseminated, and most importantly are not precedential. As a result, businesses looking for guidance on how to write a lawful arbitration agreement that they can be confident will be enforced would have nowhere to turn if judges automatically referred validity questions to arbitrators.

In fact, the past two decades of judicial decisionmaking have resulted in employment and consumer arbitration agreements that are fairer and more likely to be enforced. The development of that body of law will be impeded, if not entirely ended, if this Court were to adopt petitioner's position in this case.

ARGUMENT**I. The District Court Was Required In This Case To Decide Whether The Disputed Arbitration Agreement Was Valid And Enforceable.**

The court of appeals correctly held that the district court was required to decide whether the arbitration agreement – including its obligation to arbitrate the validity of the agreement itself – was unconscionable.²

A. The Enforceability Of Agreements To Arbitrate The Validity Of A Consumer Or Employment Arbitration Agreement Is A Question For The Court.

A court may order parties to arbitrate under Section 4 of the FAA only upon a finding that the parties entered into a written agreement to arbitrate their dispute. *See* 9 U.S.C. § 4 (permitting court to order arbitration only if “the making of the agreement for arbitration or the failure to comply therewith is not in issue” or has been resolved in the petitioner’s favor). It is this agreement that gives arbitrators the power to decide disputes and implicit in this requirement is that the written agreement be lawful and enforceable. The phrase “written agreement” thus incorporates state law principles that determine under what circumstances an alleged

² This case involves solely questions regarding the unconscionability of a pre-dispute employment contract of adhesion. *Amici* take no position on the FAA’s application to other kinds of contracts in other settings.

agreement shall be recognized and enforced by the courts. *Cf. First Options*, 514 U.S. at 944 (“When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability) courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.”).³ In Section 2, Congress ratified that traditional understanding, providing that a written agreement to arbitrate is valid, “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Petitioner acknowledges that ordinarily, threshold questions such as whether the parties have validly agreed to arbitrate a dispute are for the court. Petr. Br. 21-22. The reason for this rule, this Court has explained, is that “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). Referring such issues to courts rather than arbitrators “avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.” *Id.* at 83-84.

For the same reasons the validity of an employment or consumer arbitration agreement is a question for the court. There is no reason to assume that an employee or consumer would ordinarily agree to have an arbitrator “decide the scope of [her] own

³ The Court has added one caveat: “Courts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *Id.* (internal punctuation in original).

powers.” *First Options*, 514 U.S. at 945. To the contrary, just as parties would reasonably expect judges to determine the scope of an arbitration agreement, so too would parties expect a judge to determine the validity of a consumer or employment contract. *Id.* In this context, to hold otherwise would create an unacceptable risk of sending cases to arbitration in the absence of the valid consent that is the foundation of arbitration’s legitimacy.

(A different presumption might apply in other contexts, for example business-to-business arbitration agreements where expectations may be different, and contracts of adhesion are less common. That question is not presented here and *amici* take no position on it.).

B. Even If Parties Can Agree To Arbitrate The Validity Of An Employment Or Consumer Arbitration Agreement, The Enforceability Of *That* Agreement Is For The Court To Decide.

As petitioner notes, this Court has recognized an exception to the rule that certain threshold issues are to be decided by courts rather than arbitrators. *See* Petr. Br. 22-23. But that exception ultimately is of no help to petitioner here.

In *First Options*, this Court considered whether courts or arbitrators should decide whether a particular dispute falls within the scope of an arbitration agreement. The answer to the question, the Court held, “turns upon what the parties agreed about *that* matter.” 514 U.S. at 943 (emphasis in original). In particular, the Court held that the scope of arbitration is for the courts “unless there is clear and unmistakable evidence” that the parties

agreed to submit the scope question to arbitration. *Id.* at 944 (internal punctuation and citations omitted).

Petitioner argues that the same rule should apply to the question of who decides whether an arbitration agreement is valid and enforceable. Petr. Br. 22-24. So long as the employer shows by clear and unmistakable evidence that the employee agreed to submit the validity question to arbitration, petitioner argues, that agreement should be enforced like any other. *Id.*

Even if that were so, *but see* Resp. Br. 24-31, the agreement to arbitrate the validity of a consumer or employment arbitration agreement could be enforced only if two important conditions were met. First, like any agreement to arbitrate any issue, the agreement to arbitrate validity would have to satisfy the requirements of Section 2 of the FAA to be enforceable. In other words, the agreement would have to be in writing and valid under generally applicable state contract principles. *See* 9 U.S.C. § 4. Thus, for example, an agreement to arbitrate validity would not be enforceable if coerced by one side or obtained by fraud. And, as in this case, it would not be enforceable if it were unconscionable within the meaning of state law.

Second, as with any other arbitration agreement, the validity of the agreement to arbitrate validity would have to be resolved by a court. *See First Options*, 514 U.S. at 944 (establishing standard for how “*a court should decide* whether the parties have agreed to submit the arbitrability issue to arbitration”) (emphasis added).

As discussed next, these two qualifications preclude sending a validity question to arbitration in the circumstances of this case.

C. In This Context, When An Agreement To Arbitrate Validity Is Part Of A General Arbitration Agreement, The Entirety Of Which Is Alleged To Be Unconscionable, A Court Must Resolve The Enforceability Of The Entire Arbitration Agreement.

Here, petitioner relies on a single arbitration clause that purports to simultaneously commit the employee to arbitrating any employment dispute as well as the validity of the arbitration agreement. The unconscionability objection respondent raises applies to the arbitration agreement as a whole. As a result, in resolving the unconscionability of the agreement to arbitrate validity – which the court is required to do under *First Options* – the court will necessarily also resolve the unconscionability of the agreement that is relied upon to compel arbitration of the underlying dispute.⁴

⁴ When a party challenges the enforceability of an entire contract, only one part of which is an arbitration clause, the validity question may be decided by the arbitrator because “as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). In such cases, the law presumes that parties may validly agree to arbitrate disputes arising from their contractual relationship, even if other aspects of their agreement are not valid and enforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (permitting

Respondent can avoid this result only by assuming either that (a) the court need not decide whether the agreement to arbitrate validity is, itself, valid prior to enforcing it; or (b) the existence of a signed agreement that encompasses validity is sufficient to show a clear and unmistakable agreement to arbitrate validity. Both assumptions are mistaken.

In *First Options*, the Court made clear that even when parties are allowed to contract out of the default rule that arbitrability questions are to be decided by the court, the court retains responsibility for ensuring that the parties have, in fact, clearly and validly so agreed. In fact, the Court itself examined the evidence in *First Options* and determined that the respondents had not entered into an enforceable agreement to arbitrate the scope of the arbitration agreement. See 514 U.S. at 946-47. The district court in this case had the same responsibility to ensure that the alleged agreement to arbitrate validity was itself valid under state law, including under the doctrine of unconscionability.

Had the district court engaged in that analysis, it could not have found that respondent had validly consented to arbitrate validity simply because he signed the arbitration agreement. To assume the

arbitrator to decide general validity challenge to entire contract because “no claim has been advanced by Prima Paint that F & C fraudulently induced it to enter into the agreement to arbitrate”). But when, as in this case, a party challenges the validity of an arbitration agreement or clause directly, that presumption has no place and the validity question is for the court. See *Buckeye*, 546 U.S. at 445-46.

parties agreed to arbitrate the validity of the arbitration agreement, based solely on the existence of an arbitration agreement whose validity has not yet been determined, is hopelessly circular. Respondent's signature on the document does nothing to resolve whether that agreement is to be recognized and enforced under general principles of state contract law. Surely, for example, the signature would not itself provide the "clear and unmistakable" evidence of a valid agreement to submit an arbitrability question to arbitration if respondent alleged that he signed the document at gunpoint. There is no basis for a different result where, as here, the agreement is challenged on unconscionability grounds.

II. Judicial Review Of Unconscionability Challenges Promotes The Basic Purposes Of The FAA.

Petitioner complains that, as a practical matter, respondent's position will preclude arbitrators from resolving validity claims in a great majority of cases. That may be so. But as shown above, that result is entirely consistent with the language of the statute and the decisions of this Court. Moreover, as discussed next, it also furthers the basic purposes of the statute.

A. Congress Intended Cooperative And Complementary Roles For Courts And Arbitrators Under The FAA.

While Congress surely intended the FAA to "overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), it just as plainly gave courts

important responsibilities in safeguarding the fairness and legitimacy of arbitration. Indeed, courts and arbitrators play cooperative and complementary roles under the statute.

Arbitration often provides an effective – and sometimes superior – method for resolving legal conflicts. At the same time, the norm in our legal system is open access to a judicial forum to resolve legal disputes, particularly disputes involving statutory rights. *See, e.g.,* Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 SPG LAW & CONTEMP. PROBS. 279, 309-18 (2004). Congress struck a balance under the FAA, encouraging the use of arbitration by removing prior judicial impediments to the enforcement of arbitration agreements, while at the same time precluding courts from forcing parties to arbitration in the absence of the parties' freely given consent or when the contract to arbitrate fails the basic requirements of fairness required under general state law contract principles. *See* 9 U.S.C. §§ 2, 4.

Judicial determination of threshold issues – including the conscionability of an arbitration agreement – ensures that arbitration is consensual, and that its rules are fundamentally fair. *See, e.g., Hume v. United States*, 132 U.S. 406, 406 (1889) (explaining that an unconscionable contract is one that “no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept on the other”). Such review is critical because the FAA itself provides few requirements for, or limitations on, the arbitration process itself. Congress instead left the policing of the fairness of arbitration to state law contract

principles of general applicability including the doctrine of unconscionability. 9 U.S.C. § 2.

Excluding judicial consideration of such questions in the course of a Section 3 or 4 proceeding would effectively eliminate judicial review of these critical prerequisites to a fair and legitimate arbitration proceeding. The availability of judicial review *after* the arbitration has been completed is no substitute. The Act allows courts to vacate or modify arbitration awards only “in very unusual circumstances.” *First Options*, 514 U.S. at 942. And those grounds, set out in Sections 10 and 11 of the Act, focus on the case-specific misconduct or mistakes of particular arbitrators, not on the fairness of the rules or the forum of arbitration.⁵ That extreme deference at the end of the arbitration process is justifiable because courts have the authority at the outset to ensure that the parties validly agreed to the arbitral process and that the process is worthy of the

⁵ See 9 U.S.C. § 10(a)(1) (“the award was procured by corruption, fraud, or undue means”); *id.* § 10(a)(2) (“partiality or corruption” of arbitrators); *id.* § 10(a)(3) (arbitrator “misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence . . . or of any other misbehavior”); *id.* § 10(a)(4) (arbitrators “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”); *id.* § 11(a) (“an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award”); *id.* § 11(b) “[w]here the arbitrators have awarded upon a matter not submitted to them”); *id.* § 11(c) (“[w]here the award is imperfect in matter of form”).

confidence the law places upon it to produce fair results in particular cases.⁶

The FAA thus effects a sensible distribution of authority and responsibility between courts and arbitrators. Courts monitor the gate, controlling who is required to forgo litigation in favor of arbitration, and policing the rules of the game in accordance with established, generally applicable contract law principles. They then step back and allow arbitrators to make their case-specific findings, subject to reversal by the courts only in extreme cases of unexpected failures in an otherwise trustworthy system.

B. Judicial Determination Of Unconscionability Claims Enhances Public Confidence In The Fairness And Legitimacy Of Arbitration.

The FAA's division of authority between courts and arbitrators makes great sense. It protects arbitrators and appointing agencies from allegations that their threshold determinations are tainted by self-interest, thereby enhancing public confidence in our arbitration system, and ultimately encouraging its use.

⁶ In part because of these highly deferential standards, but also for other reasons, many employees with meritorious unconscionability claims may never bring them before a court if forced to first arbitrate the claim. *See* Resp. Br. 45-47. This is particularly likely when the unconscionability of the agreement arises from the fact that the agreement makes arbitration so burdensome or expensive that employees will be deterred from prosecuting their claims in the arbitral forum. *See infra* 26-27.

Whether fairly or not, some members of the public may doubt the ability of arbitrators to neutrally adjudicate threshold issues that will determine whether the arbitrator's services will be required to resolve the dispute. Indeed, while the vast majority of arbitrators would apply unconscionability doctrine in good faith if called to do so, the task can put arbitrators in an awkward position, particularly when a party's claim is founded upon the alleged unfairness of rules adopted by the person or organization that selected the arbitrator. Some arbitrators may fear that declaring the selecting party's arbitration agreement or rules unconscionable would diminish the likelihood that the arbitrator would be selected again in future cases, much to the arbitrator's long-term financial detriment.

In the end, even the appearance of possible bias or self-interest by arbitrators could undermine the public's willingness to take advantage of arbitration. *Cf. Commonwealth Coatings Corp. v. Cont. Cas. Co.*, 393 U.S. 145, 150 (1967) (noting general presumption that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias"). At the same time, complaints about the neutrality of arbitration have led to calls to limit the FAA, as applied in a number of contexts, including employment contracts. *See, e.g.*, Arbitration Fairness Act of 2009, H.R. 1020 (111th Cong., 1st Sess.).

In fact, the arbitration community has no interest in presiding over disputes in which arbitration was not freely and validly agreed to by

both parties. And, as discussed next, in our view judicial unconscionability review has contributed to improvements in the fairness and efficacy of arbitration.

C. Judicial Determination Of Unconscionability Claims Promotes Uniformity, Predictability, And The Fairness Of Arbitration.

In addition to its neutrality, judicial resolution of unconscionability claims allows for the development of a body of law that promotes consistency, predictability, and ultimately the fairness of arbitration, in a way that arbitral decisionmaking simply cannot.

1. Judicial Resolution Of Unconscionability Claims Creates A Body Of Precedent That Promotes Equal Treatment And Consistent Enforcement Of Arbitration Agreements.

Judicial decisions on threshold arbitration issues are public, widely disseminated, and precedential. As a result, over the past two decades, resolution of unconscionability claims by the courts has led to the development of an extensive body of law defining the requirements for valid arbitration agreements. That body of law, in turn, promotes equal treatment of similar arbitration agreements in similar settings. At the same time, the developing body of precedent affords businesses and employers guidance on how to write arbitration agreements that they can have confidence will actually be enforced when challenged. The importance of that predictability should not be underestimated. The value of ensuring an arbitral

forum – and avoiding the expense, distraction, and delay of traditional litigation – is often overwhelmingly more important to an employer or business than is maintaining any particular feature of an arbitration scheme. In the absence of any statutory guidance on the question, judicial decisions provide critical direction to those drafting arbitration agreements and to agencies establishing arbitration rules.

Arbitral unconscionability decisions cannot perform this valuable function. Arbitration decisions, particularly in the consumer and employment context, often contain no written analysis and usually are confidential. *See, e.g.*, American Arbitration Association, Employment Arbitration Rules and Mediation Procedures, Rule 23 (“The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.”), available at <http://www.adr.org/sp.asp?id=32904>.

Even when not secret, arbitration decisions are not systematically published or otherwise widely disseminated. *See, e.g.*, David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1284-86 (2009). And even if they were, the decisions lack any binding precedential authority. In fact, neither courts nor arbitrators treat arbitration decisions as precedential. *See, e.g.*, William Landes & Richard Posner, *Adjudication as a Private Good*, 8 J. LEG. STUD. 235, 248 (1979). To the contrary, when called upon to decide unconscionability claims, arbitrators themselves rely on judicial precedent, a body of law that can develop

only if judges, rather than arbitrators, decide most unconscionability questions in the first instance.⁷

2. *Judicial Resolution Of Unconscionability Claims Has Led To An Evolutionary Improvement In Arbitration Agreements.*

The Court need not speculate about the benefits of judicial resolution of claims that arbitration agreements are unconscionable; over the past twenty years, judicial decisionmaking has in fact improved the substance of arbitration clauses as drafters have responded to the case law with new generations of fairer arbitration agreements that are now more likely to be enforced.

While there continue to be disputes among parties as well as courts over some aspects of arbitration agreements, years of judicial decisions have led to a basic consensus on some important questions and have ended a number of egregious practices adopted by early arbitration agreements.

For example, courts have found unconscionable agreements that required arbitration of consumer or employee claims while preserving the drafter's right to sue the consumer or employee in court. *See, e.g., Cordova v. World Finance Corp. of N.M.*, 208 P.3d 901, 908-09 (N.M. 2009) (lender agreement required borrower to arbitrate claims, while preserving loan

⁷ Even if arbitral unconscionability decisions are challenged in court, those judicial decisions may not result in useful precedent defining the contours of unconscionability because the standard of review permits courts to overturn incorrect legal determinations only in "very unusual circumstances." *First Options*, 514 U.S. at 942.

company's right to pursue claims in court); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 280 n.12 (W. Va. 2002) (same for jewelry company); *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172-73 (N.D. Cal. 2002) (same for mortgage lender); *Showmethemoney Check Cashers, Inc. v. Williams*, 27 S.W.3d 361, 367 (Ark. 2000) (same for payday lender); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (7th Cir. 1997) (same for employment agreement).

In other cases, the courts have refused to enforce agreements that permitted the drafter of the agreement to choose the arbitrator. *See, e.g., State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mont. 2006) (president of company that drafted agreement permitted to choose the arbitrator); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Ok. Ct. App. 1993) (employer has sole authority to appoint arbitration panel). Relatedly, courts have declined to enforce agreements under which the drafter (or a closely related entity) had sole authority to select the pool of eligible arbitrators, sometimes resulting in a financial dependency between individual arbitrators and a party. *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004) (employer chooses panel of eligible arbitrators); *Murray v. United Commercial Food Workers Intern'l Union*, 289 F.3d 297, 303 (4th Cir. 2002) (same); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (same); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 947-48 (N.D. Ind. 2000) (same); *see also Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 173-74 (Cal. 1981) (agreement called for dispute between union and non-union member to be arbitrated by a member of the union).

Other agreements permitted the drafter unfettered discretion to establish the rules of arbitration and to unilaterally change them at any time. *See, e.g., Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008); *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254, 1259-60 (9th Cir. 2005); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002); *Floss v. Ryan's Family Steakhouses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000); *Hooters*, 173 F.3d at 939. And in some cases, arbitration agreements have been held unenforceable because the rules of arbitration were egregiously one-sided. *See, e.g., Hooters*, 173 F.3d at 938-39 (employee, but not employer, was required to give pre-hearing notice of arguments and witnesses, precluded from moving for summary judgment, and prevented from seeking vacatur of arbitral decision on ground that the arbitrators exceeded their authority).

Courts likewise have refused to enforce provisions in some agreements that established arbitration venues great distances from consumers or employees, effectively preventing both litigation and arbitration of covered disputes. *See, e.g., Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) (car purchase agreement required purchaser in Arkansas to arbitrate in Missouri); *Hagedorn v. Veritas Software Corp.*, 250 F. Supp. 2d 857, 862 (S.D. Ohio 2002) (employment agreement required lifelong Ohio resident to arbitrate in San Francisco); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (small consumer claims from across the nation required to be arbitrated in person in California); *Arnold v. Goldstar Fin. Sys., Inc.*, 2002 U.S. Dist. LEXIS 15564, at *32-*36 (N.D. Ill. Aug.

20, 2002) (credit repair service's agreement required consumer to travel from Illinois to Florida).

Courts have also found unconscionable provisions that required employees or consumers to pay arbitration fees and costs so high as to effectively prevent arbitration of the claims. *See, e.g., McNulty v. H&R Block, Inc.*, 843 A.2d 1267, 1273-74 (Pa. Super. Ct. 2004) (finding unconscionable provision imposing arbitration fees higher than damages sought); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999) (striking agreement that would have required terminated janitorial employee to pay up to \$5,000 to arbitrate age discrimination claim); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (finding unconscionable provision requiring terminated sales representative to pay \$2,000 filing fee); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (refusing to construe arbitration agreement to permit imposing costs of up to \$1,000 per day upon terminated security guard); *Comb*, 218 F. Supp. 2d at 1176 (finding unconscionable provision requiring consumer to pay up to \$5,000 in costs to arbitrate claims of less than \$310).

Even when not precluding vindication of important rights entirely, some arbitration agreements drastically limited the scope of the relief available, effectively constituting a waiver of important legal rights rather than simply providing an alternative forum for the resolution of statutory claims. *See, e.g., Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 304 n.3 (Mo. Ct. App. 2005) (agreement precluding consequential damages);

Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 279 (3d Cir. 2004) (agreement precluding award of statutorily authorized attorney's fees); *Carll v. Terminix Int'l Co.*, 793 A.2d 921, 923 (Pa. Super. 2002) (agreement precluding most monetary damages awards); *Paladino*, 134 F.3d at 1061-62 (agreement precluding non-contractual damages for Title VII claims); *see also Graham Oil Co. v. ARCO Prods. Co., a Div. of Atl. Richfield Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (agreement replaced statutory one year limitations period with a ninety-day statute of limitations).

2. Because they were public and precedential, these decisions prompted companies and arbitration organizations to reconsider their practices, leading to revisions that made arbitration agreements fairer and enforcement of arbitration clauses more predictable. *See generally*, Brief of AT&T Mobility LLC as *Amicus Curiae* In Support of Neither Party, *T-Mobile USA, Inc. v. Laster*, No. 07-976, at 11 (2008) (explaining that AT&T Mobility “and other companies responded to the decisions invalidating first-generation arbitration provisions by revising their arbitration agreements to address the concerns expressed in those decisions”) (collecting sources); Alan S. Kaplinsky, *The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers*, 1414 PLI/Corp 305, 315 (2004).

At the same time, there has been a productive dialog between the courts and arbitration organizations and practitioners, leading to changes in the rules applied in many arbitration settings. *See, e.g.*, Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes

Advisory Committee, *available at*
<http://www.adr.org/sp.asp?id=22019>.

More remains to be done. Some unfair agreements continue to be written and consensus on some questions has yet to be achieved. But accepting petitioner's position in this case would prevent further progress and risk a return to the uncertainty and unfairness that often prevailed before courts began to develop a body of public precedent to protect the integrity of the arbitration process and provide needed guidance to the arbitration community.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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