Supreme Court, U.S.
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No. 09-497

In the
# Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

*Petitioner,*

v.

ANTONIO JACKSON,

*Respondent.*

**On Petition for 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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## IDENTITY AND INTEREST OF AMICUS CURIAE[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 *Athens Disposal Co. v. Franco*, docket no. 09-272; *Stolt-Nielsen S.A., et al. v. Animalfeeds Int'l Corp.*, docket no. 08-1198; *DHL Express (USA), Inc. v. Ontiveros*, 129 S. Ct. 1048 (2009); *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 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file 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 AND SUMMARY OF REASONS FOR GRANTING THE PETITION

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. Such contracts are the product of the parties' own assessments of their costs and benefits, and as no third party is in a better position to decide whether the benefits outweigh the costs, the parties' own judgment deserves respect. In this case, the parties clearly and unmistakably agreed that an arbitrator would 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, 917 (9th Cir. 2009) ("Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator.").

The Ninth Circuit decision below, resting on a mere allegation of unconscionability to invalidate an arbitration contract and further announcing that *any* party in *any* case need not do more to invoke a court's jurisdiction, stands in stark contrast with this Court's jurisprudence and promises to undermine the enforceability of untold thousands of arbitration agreements throughout the western United States. For the reasons set forth below, the petition for writ of certiorari should be granted.

## ARGUMENT

## I

## THIS CASE IMPLICATES FREEDOM OF CONTRACT CONCERNS BEYOND ARBITRATION IN THE EMPLOYMENT CONTEXT

### A. The FAA Is Premised on Freedom of Contract

> "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 and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (citations 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). As such, the FAA institutes default rules for arbitration.

Default rules ensure that if parties forget to include certain terms in their contracts, those contracts still will be enforced using statutory "gap fillers" that

are designed to mimic what contracting parties would have wanted, had they considered the subject. *See, e.g.*, U.C.C. § 2-305 (1998) (allowing parties to contract even where no price term has been determined). The law allows parties to waive these rules because

> a meaningful power of exit is one important component of the concept of political freedom . . . . [A] person who may not "opt out" of a social arrangement is, to this extent, unfree . . . . [G]enuine consent implies the existence of meaningful alternatives . . . [and] in a free society, persons should have the power and right to contract around the background rules supplied by a legal system.

*See* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 904 (1992). *See also* Christopher R. Drahozal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp. Disp. Resol. L.J. 419, 421 (2003) (Legislatures should "make a particular rule a mandatory rule only if one of the parties to the contract is unable to protect itself from the other, or if the contract has effects on third parties who are unable to protect themselves. Otherwise, the rule should be a default rule."); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 Am. Rev. Int'l Arb. 225, 230 (1997) ("[T]he statute's default allocation of authority between courts and arbitrators need not implicate in any way the power of the parties themselves to structure the arbitration mechanism so as to advance their own interests.").

Given this "power to exit," contracting parties will tend to choose terms which suit their needs; this improves efficiency by ensuring that parties do not

have their hands tied by provisions which they do not want. Contracting around default rules can be costly, but prohibiting parties from doing this can be even costlier. *See* Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. Cal. Interdisc. L. J. 389, 402 (1993) ("[T]he state's choice of a default rule cannot affect the substance of private contracts . . . . [but] will affect total contracting costs."). Where there is no social harm to be anticipated, or where that harm can be addressed by less intrusive means, parties should be free to negotiate to accomplish the things they wish to do, including determining the method of adjudicating possible future disputes. In short, "freedom of contract is the general rule and restraint the exception." *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283, 288 (1932). In determining the validity of limits on the right to contract, "regard is to be had to the general rule that competent persons shall have the utmost liberty of contracting, and that it is only where enforcement conflicts with dominant public interests [that courts will refuse to enforce them]." *Id.*

These principles apply to arbitration agreements as well. As this Court recognized in *Volt Information Sci., Inc. v. Bd. of Trus. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989), 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. It provides default rules that the parties may waive in order to bring their own preferences and knowledge to bear on a problem.

### B. The Sweeping Ninth Circuit Decision Encourages Even Sophisticated Parties To Cry "Unconscionable!" To Invalidate Arbitration Contracts

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 question of unconscionability is for the court." *Id.* Nothing in the sweeping language of this decision would restrict its holding only to employment contracts, or those in the consumer context (two areas in which one party to the contract is assumed to have greater knowledge and sophistication of legal remedies).

Instead, the Ninth Circuit decision could just as easily void arbitration contracts between two businesses, or other equally sophisticated parties, in conflict with the general approach. *See, e.g., 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. Imp., 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).

Even employment disputes may involve highly sophisticated executives in conflict with their companies. "[S]o 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).[2] *See also*

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[2] 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

(continued...)

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

### C. Public Policy Supports Allowing Parties, Wherever They Stand on the Spectrum of Sophistication, To Customize Arbitration To Resolve Their Disputes

The decision below significantly undermines the parties' choice whether to accept default rules or to customize dispute resolution procedures to best suit their needs. "Default" rules are simply intended to provide terms that are acceptable to the greatest number of people, so that those who forget or who choose to omit a provision will have the default provision incorporated into the contract. *See, e.g.*, *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 617-18 (2d Cir. 2001) ("When interpreting a state law

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[2] (...continued)
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).

contract, therefore, an established definition provided by state law or industry usage will serve as a default rule, and that definition will control unless the parties explicitly indicate, on the face of their agreement, that the term is to have some other meaning."). But default rules by themselves are neither better nor worse than customized rules. There is nothing exceptional about a three-arbitrator panel rather than a single arbitrator, for example.

Moreover, as a matter of public policy, allowing parties to negotiate around default rules increases efficiency by ensuring that parties are not given costly overprotection, or deprived of protections that they desire. Requiring parties to abide by unwanted terms in a contract will in many cases cost more than their agreement to waive those default protections, and whenever this happens, parties will contract around those rules. "A law of contract not based on [such] efficiency considerations will therefore be largely futile." Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 89 (1977).

The decision below, which undermines the ability of parties to tailor their agreements in all contexts, may be particularly onerous to commercial enterprises and others 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).

The Ninth Circuit decision threatens to derail arbitration contracts in all contexts, whenever a party to an explicit agreement simply alleges unconscionability. Because this threat goes to the heart of the FAA and this Court's jurisprudence approving arbitration as a legitimate alternative means of dispute resolution, the petition for a writ of certiorari should be granted.

## II

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

The Ninth Circuit's decision treats a claim of unconscionability less as an allegation than an incantation—the mere utterance of the word and poof! the contract terms disappear. 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. Atlantic 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.").

Why, then, does the Ninth Circuit single out arbitration contracts as particularly vulnerable to claims of unconscionability? The majority opinion reflects that the court simply distrusts arbitrators to decide the question, and assumes that an arbitrator would find that the parties agreed to arbitrate. Yet there is no solid basis for this assumption. 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 that it would have liked to submit to arbitration); *Aircraft Braking Systems Corp. v. Local 856, Int'l Union, United Automobile, Aerospace and Agricultural 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. "[I]n 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). This is analogous to litigating subject-matter jurisdiction in federal court under the Federal Rules of Civil Procedure. Fed. Rule Civ. Proc. 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. This Court's very recent decision *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (holding that a provision in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate statutory discrimination claims was enforceable as matter of federal law) plainly requires judges to respect

the arbitration process. In so doing, the Court rejected the broad dicta in the *Gardner-Denver* line of cases that criticized the use of arbitration for the vindication of statutory antidiscrimination rights. *Id.* at 1469. The Court recounted holdings of recent vintage rejecting judicial hostility to arbitration. *Id.* at 1471 (citing *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[A]rbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and that "there is no reason to assume at the outset that arbitrators will not follow the law.") and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.")). Affirming this position, the Court concluded:

> An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the 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. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." In any event, "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims

> that we have found to be arbitrable, such as RICO and antitrust claims." At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.

*14 Penn Plaza*, 120 S. Ct. at 1471 (citations omitted). It is hard to fathom justification behind the Ninth Circuit's decision in this case that does not center on "objections centered on the nature of arbitration." As such, the decision fails to abide by the FAA and undermines the parties' freedom of contract for no legitimate reason.

## CONCLUSION

The petition for writ of certiorari should be *granted*.

DATED: November, 2009.

Respectfully submitted,

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