No. 22-1218

IN THE

Supreme Court of the United States

WENDY SMITH, ET AL.,

Petitioners,

v.

KEITH SPIZZIRRI, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF NEITHER PARTY

SEAN DOMNICK
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(561) 625-6260
sean.domnick@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

March 4, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct. AAJ addresses this Court as amicus curiae to call attention to important developments in the terms inserted by corporations in arbitration clauses that intentionally keep individual claimants out of court and out of arbitration, blocking the fair and just resolution of disputes between individuals and major corporations.

SUMMARY OF ARGUMENT

1. America's businesses interests, who had long sought an alternative to the civil justice system to resolve their disputes, have succeeded in overcoming judicial hostility to arbitration agreements. They not only won enactment of the Federal Arbitration Act ("FAA") in 1925, but more recently this Court has extended the reach of the FAA to enforce arbitration

---

[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

agreements between corporations and their customers and employees. As a result, most Americans are subject to arbitration agreements in employment contracts, consumer purchase agreements, financial services contracts, and even nursing home admission contracts.

This Court has presumed that enforcement of these agreements is beneficial, resulting in dispute resolution at lower cost, faster results, and greater efficiency. But many Americans are also facing greater unfairness. In the modern marketplace, consumer and employment contracts (and their arbitration "agreements") are, almost universally, contracts of adhesion. They are drafted entirely by corporations who present them to customers and workers on a take-it-or-leave-it basis with no opportunity to alter or negotiate their terms. Some corporations take advantage of this power imbalance to game the arbitration to gain unfair advantages.

Two types of abuses merit this Court's scrutiny. The first involves the corporation that, having demanded arbitration of a consumer or employment claim, turns into a "deadbeat defendant" by failing to pay its arbitration fees or otherwise fulfill its contract commitments. The result is that the arbitration provider closes the file and the consumer or employee must return to square one in the district court, where the company may well move to compel arbitration again. A second type of abuse is to turn the contracted-for arbitration into a sham by attaching onerous or impossible conditions in order to deter claimants from actually pursuing arbitration of their legitimate claims.

These tactics do not serve the objectives of the FAA. On the contrary, they make arbitrations between individuals and corporations much more expensive and ponderous. Their purpose is immunity from any accountability.

2. The FAA provides a solid textual basis for district courts to play a role in ensuring that corporations construct and perform their adhesive arbitration agreements in good faith. The fact that all of the plaintiff's claims have been referred to arbitration does not mean there is no further role for the district court. What if the arbitration cannot or will not be had, due to the actions of a recalcitrant corporate defendant? When a party has so moved, the court "shall" enter a stay, preserving its own jurisdiction. The consumer or worker can invoke the court's authority under § 4 to order a deadbeat defendant that has refused to pay arbitral fees to abide by the agreement.

3. If, however, it is clear to the district court that the arbitration will not actually take place due to the unfair conditions imposed by the corporation's adhesive arbitration agreement, the court should recognize that its order compelling arbitration effectively ends the action and is, as a practical matter, a final order. Entry of a dismissal enables the individual to obtain their only opportunity to test the validity of those conditions by appellate judicial review.

Corporations can and do place into their adhesive contracts abusive provisions that derail arbitrations before they can commence. These provisions turn the contracted-for arbitrations into sham proceedings. They succeed in locking the employee or consumer out of the judicial forum, but they impose conditions that

ensure that the arbitration will not actually take place.

One way to effectively deter the filing of claims is sticker shock. Despite its proponents' claims that arbitration stands as a less expensive alternative to the civil justice system, parties in arbitration shoulder many expenses that litigants do not. Arbitration providers impose filing fees and other charges, and the arbitrators themselves charge for their services. A claimant contemplating an arbitral claim may be obligated for a significant share of the expense. Scarier yet, many adhesive arbitration agreements have fee-shifting provisions that mean the prospective claimant must take a gamble: If the arbitrator renders an unfavorable decision, the claimant not only loses, but may be ordered to pay the corporation's costs and attorney fees as well.

Corporations can ward off claimants by making it clear that they own the arbitrators. Some have done so by administering arbitrations themselves, but courts have found that such in-house arbitrations can be too egregiously one-sided (for example, by giving the company complete control over the choice of arbitrators). Other corporations have chosen established arbitration providers whose rules and procedures have been tailored to favor their business-side customers.

Yet another means of discouraging arbitration claims is to impose scheduling provisions in adhesive arbitration agreements that go far beyond delaying, and amount to denying justice. One corporation has demanded not only that all claims be individually arbitrated, but also that those arbitrations be scheduled

at such a pace that many of the thousands of claimants would be waiting for more than a century to have their day in arbitration.

Adhesive arbitration agreements are essentially contracts between hens and foxes—and foxes are not reliable guardians of their own compliance with settled principles of good faith in the creation and performance of contracts. When district courts grant orders compelling arbitration, they must be mindful of this power imbalance and preserve the judiciary's role in preventing abusive gamesmanship.

ARGUMENT

I. DISTRICT COURTS THAT ORDER ARBITRATION UNDER THE FAA SHOULD STAY JUDICIAL PROCEEDINGS TO RETAIN JURISDICTION TO OVERSEE THE ARBITRATION AND SHOULD DISMISS THE ACTION WHERE IT IS CLEAR THE ARBITRATION WILL NOT OCCUR, ALLOWING FOR APPELLATE JUDICIAL REVIEW.

A. The Enforceability of Adhesive Arbitration Agreements Leaves Workers and Consumers Vulnerable to Overreaching by Powerful Corporations Seeking to Game the System and Evade Accountability.

America's businesses, which are frequent defendants in the civil justice system, have succeeded in overcoming "the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 24 (1991). They not only won enactment of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16 (1925), but this Court has extended the reach of the FAA to enforce arbitration agreements between corporations and their employees, *e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), and between corporations and their customers, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Arbitration provisions are now ubiquitous. "In 2018, at least 826,537,000 consumer arbitration agreements were in force," with the actual number "likely higher." Imre Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019). Additionally, more than 60 million workers are subject to employment contracts with forced arbitration procedures. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. (April 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.

This Court has stated the FAA favors enforcement of these agreements "in order to realize . . . lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). But the widespread saturation of arbitration has given rise to significant problems that outweigh or negate these potential benefits.

Arbitration "agreements" entered into by employees and consumers (including borrowers, investors, and even nursing-home patients), are almost universally contracts of adhesion. They are documents drafted entirely by the more powerful party and "pre-

sented on a take-it-or-leave-it basis . . . without opportunity for the 'adhering' party to negotiate."). *Achey v. Cellco P'ship*, 293 A.3d 551, 557 (N.J. App. Div. 2023) (citation omitted). As Justice Scalia remarked for this Court, "the times in which consumer contracts were anything other than adhesive are long past." *Concepcion*, 563 U.S. at 346–47 (2011) (citations omitted).

It is in the nature of an adhesive contract that the drafting party can insert just about any provision it wants for its own advantage. Too often, corporations abuse their dominant negotiating position to game the system. They manipulate the conditions they impose on their employees or customers in ways that do not make arbitration quicker or cheaper—in fact, quite the opposite.

Having obtained a district court order compelling arbitration, thereby blocking the availability of a judicial forum, the corporation may further block the arbitration by failing to abide by the agreement they themselves have drafted. Or they may add conditions and obstacles that make arbitration much more expensive and difficult, with the expectation that the claimant will be dissuaded from pursuing the arbitration at all. "[W]here no claims are filed at all due to the harsh provisions, arbitration clauses operate as a means of suppressing claims and conferring de facto immunity for wrongdoing committed by the corporate drafter." Imre Szalai, *A New Legal Framework for Employee and Consumer Arbitration Agreements*, 19 Cardozo J. Conflict Resol. 653, 687 (2018).

B. The FAA Provides the Basis for Courts Both to Protect the Rights of Weaker

Parties to Arbitration Agreements and to Further the Objectives of the Statute.

The FAA provides a solid textual basis for district courts to play an important role in ensuring that arbitrations are constructed and administered in good faith, both to protect the rights of individuals subjected to adhesive arbitration agreements and to protect the objectives of the FAA from subversion by sham arbitrations or dilatory tactics.

Section 3 of the FAA provides that when a district court finds an issue is referable to arbitration, the court "*shall* on application of one of the parties stay the trial of the action *until such arbitration has been had*." 9 U.S.C. § 3 (emphasis added). Such an interlocutory order is not appealable. 9 U.S.C. § 16(b)(1). On the other hand, appeal may be taken from "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89 (2000).

But how is the district court to determine in a particular case whether an order compelling arbitration *should* be accompanied by an interlocutory stay of the action, or a final order of dismissal. This Court has twice reserved that question expressly. *See Green Tree*, 531 U.S. at 87, n.2; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019). It is squarely presented in this case.

Amicus submits that the answer is clear: District courts should act to preserve the availability of judicial protection of the rights of the weaker party by remedying the bad-faith failure of the dominant party

to proceed with the arbitration and by affording appellate review of conditions imposed on the weaker party for the purpose of preventing a fair arbitration altogether.

The law of contracts "imposes upon each party a duty of good faith and fair dealing in [the contract's] performance and its enforcement." Restatement (Second) of Contracts § 205 (1981). But adhesive arbitration agreements are essentially contracts between hens and foxes. Given their unequal power, the marketplace cannot be relied on to uphold that duty—nor should the fox alone stand guard.

The guiding principle for district courts should be to preserve for the courts "their natural and appropriate function in cases involving adhesion contract disputes: to redress [the] imbalance of power." Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 Fordham L. Rev. 761, 788–89 (2002). The need to preserve access to judicial remedies, both by the district court with jurisdiction and by the appellate courts, is underscored in the many examples set forth *infra*.

II. WHEN A DISTRICT COURT ENTERS AN INTERLOCUTORY ORDER COMPELLING ARBITRATION, THE FAA REQUIRES THE COURT TO STAY THE ACTION, RETAINING JURISDICTION TO FACILITATE AND ENFORCE THE ARBITRATION AGREEMENT.

A. Upon Ordering the Parties to Proceed to Arbitration, and Upon a Party's Motion, the FAA Requires the Court to Enter a

Stay, Preserving Its Jurisdiction to Enforce the Arbitration Agreement.

The FAA provides that a district court entering an order compelling arbitration "shall on application of one of the parties *stay the trial of the action until such arbitration has been had* in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added).

Section 16, which Congress added in 1988, makes clear that a stay under § 3 is, in the ordinary case, "an interlocutory order," from which "an appeal may not be taken." 9 U.S.C. § 16(b)(1). *See, e.g.*, *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955 (10th Cir. 1994) ("[A] stay pending arbitration entered pursuant to § 3 will virtually always be characterized as interlocutory . . . ."). The stay is designed to remain in place until the contracted-for arbitration "has been had." 9 U.S.C. § 3.

But what if the arbitration cannot or will not be had due to the defendant's own recalcitrance?

The Ninth Circuit's view, that the district court is free to dismiss when all claims have been referred to arbitration, is admittedly atextual: "*[N]otwithstanding the language of [§ 3]*, a district court may either stay the action or dismiss it outright when, as here, the court determines that all of the claims raised in the action are subject to arbitration." Pet. App. 5a (emphasis added) (quoting *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014)).

The Ninth Circuit's position is premised on the assumption that when all claims are sent to arbitration, nothing remains over which the district court might exercise its jurisdiction. To the contrary, the plain text

of the FAA makes clear that an order compelling arbitration does not end the district court's role and responsibility in the case.

Section 4 provides that an employee or consumer facing a corporation's failure to arbitrate can move the district court "for an order directing that such arbitration proceed in the manner provided for in [the] agreement." 9 U.S.C. § 4. Indeed, § 4 "requires courts to compel arbitration in accordance with the terms of the agreement." *Concepcion*, 563 U.S. at 344.

By entering a stay of the action, the district court preserves its own jurisdiction to enter such an order. It has become increasingly clear that the availability of such orders is essential to preserving the rights of individual claimants and the integrity of the arbitration itself.

B. Corporations Can and Do Refuse to Arbitrate Employee and Consumer Claims, Including by Failing to Pay Their Share of Fees as Required by the Arbitration Agreement.

It is counterintuitive that a corporation might demand that its employees or consumers agree to arbitrate disputes, but then resist and undermine the arbitration after a claim is filed. Yet, a dismaying number of major corporations have derailed arbitrations by refusing to pay their share of the arbitration fees they themselves wrote into their contracts. Am. Ass'n for Just., *The New Forced Arbitration Even Worse Than the Old Forced Arbitration* 4 (2023), https://www.justice.org/resources/research/the-new-forced-arbitration-even-worse-than-the-old-forced-arbitration.

For the corporation, arbitration can truly be "fast" and inexpensive if it can win by not paying and not playing. But this "deadbeat defendant" tactic forces the individual to choose between paying the entire cost or abandoning the arbitration entirely. Paul Bland, *Bait and Switch: Many Corporations Promise to Pay Arbitration Fees, But Don't*, Public Justice (Mar. 25, 2014), https://www.publicjustice.net/bait-and-switch-many-corporations-promise-to-pay-arbitration-fees-but-dont/.

Yet, the individual consumer or employee did not agree to shoulder the entire cost. More importantly, that cost is often prohibitively expensive for most claimants. Their only opportunity to hold the corporation to the terms of the agreement it drafted is to invoke the jurisdiction of the district court under § 4 to order the defendant to arbitrate according to the agreement. The defense strategy was clear to one appellate court: Having forced consumers out of court and into arbitration, "Intuit is now seeking to push the claims out of arbitration and into oblivion." *Intuit Inc. v. 9,933 Individuals*, No. B308417, 2021 WL 3204816, at *8 (Cal. Ct. App. July 29, 2021).

Corporate defendants benefit from rejecting their obligations in their own contracts due to the reverse incentives built into arbitration as currently administered. In court, when a plaintiff files a complaint and pays the initial filing fee, the case is docketed, a judge is assigned, and the defendant must respond to the complaint. A defendant who does nothing risks default or summary judgment.

But in arbitration, the plaintiff's filing of a complaint and payment of the non-refundable initial filing

fee is insufficient to start the case. In most instances, the defendant must pay at least part of the fee. If the defendant does not, then the case is not docketed, and plaintiff's claim is not heard. *See, e.g.*, *Eliasieh v. Legally Mine, LLC*, Nos. 18-cv-03622-JSC, 19-cv-05977-JSC, 2020 WL 1929244, at *2 (N.D. Cal. Apr. 21, 2020) (arbitration provider terminated arbitration in light of party's failure to pay fee); *Waters v. Vroom Inc.*, No. 22-cv-01191, 2023 WL 187577, at *1–2 (S.D. Cal. Jan. 13, 2023) (same); *Steffanie A. v. Gold Club Tampa, Inc.*, 2020 WL 4201948, at *1–2 (M.D. Fla. (Jul. 22, 2020)) (same).

A recent example illustrates this "deadbeat defendant" tactic. When Juan Mason sought to put an end to harassing auto-dialer calls he had been receiving from Coastal Credit, LLC, he brought suit against the automotive finance company alleging the calls violated Florida law and the federal Telephone Consumer Protection Act. *Mason v. Coastal Credit, LLC*, No. 3:18-cv-835-J-39MCR, 2018 WL 6620684, at *1–2 (M.D. Fla. Nov. 16, 2018). Coastal Credit promptly moved to compel arbitration based on the terms of the car payment agreement. *Id.* Mason voluntarily dismissed his case, initiated arbitration, and paid his share of the American Arbitration Association ("AAA") filing fee. *Id.* More than two months later, the AAA notified the parties that Coastal Credit had failed to pay its $1,700 share of the filing fees plus other costs owed under the AAA's consumer arbitration rules. *Id.*

After considerable foot-dragging and delay by Coastal Credit, it became clear that the company had no intention of complying with its own arbitration provision. The company even suggested that Mason "take

care of the AAA fees," totaling $3,450. *Id.* at *3. When Mason declined, AAA closed the file and terminated the arbitration, four months after Mason initiated his claim. *Id.* He filed suit once again in federal district court, and once again, Coastal moved to compel arbitration. *Id.* at *4. This time, the court held that Coastal's breach of its contractual obligation to pay its share of AAA fees waived any right to compel arbitration a second time. *Id.* at *8. *See also Hoeg v. Samsung Elecs. of Am., Inc.*, No. 23 C 1951, 2024 WL 714566, at *7 (N.D. Ill. Feb. 20, 2024) (granting plaintiff-consumers' motion for an order compelling arbitration under § 4 after their contracted-for arbitral proceeding was administratively closed because of Samsung's failure to pay arbitration fees); *Day v. Clymo*, No. 6:13-cv-871-Orl-40KRS, 2015 WL 3830346 (M.D. Fla. June 3, 2015) (finding that defendant waived any right to compel arbitration after it failed to pay AAA fees for an employment arbitration). *See generally* Alexi Pfeffer-Gillett, *Unfair by Default: Arbitration's Reverse Default Judgment Problem*, 171 U. Pa. L. Rev. 459 (2023).

Defendants' refusals to pay arbitration fees called for in their own arbitration adhesive contracts have become even more common with the advent of mass arbitrations. Major corporations have almost universally modified their employment and consumer adhesive arbitration contracts to require claimants to bring only individual arbitrations. Corporations that might be found liable for relatively small, but numerous, claims were confident—with good reason—that individual arbitrations of such claims would simply be economically infeasible. Until they were not. *See* J. Maria

Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1288 (2022).

Workers alleging wage theft and other claims of relatively small sizes began filing multiple individual claims in arbitration, presenting their employer with the obligation to pay its share, as required by the arbitration agreement it drafted. *See generally id.* at 1327–38. As one court stated in granting the motion of 5,879 DoorDash couriers to compel the delivery service company to arbitrate their wage claims:

> [T]he workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.

Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067–68 (N.D. Cal. 2020); *see also Fishon v. Peloton Interactive, Inc.*, 336 F.R.D. 67, 68 (S.D.N.Y. 2020) (indicating that, after more than 2,700 Peloton owners filed individual arbitration demands with the AAA, Peloton failed to pay its required arbitration fees and instead chose to defend a class-action suit in federal

court); *Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246, 1250, 1252 n.2 (N.D. Cal. 2019), *aff'd*, 823 F. App'x 535 (9th Cir. 2020) (granting a motion to compel arbitration filed by 5,257 Postmates delivery drivers with wage claims).

The availability of a district court having jurisdiction to order a deadbeat defendant to pay arbitration fees, as required by the agreement, is essential to preventing corporations from gaming the system and undermining the goals of the FAA. *See, e.g.*, *Allemeier v. Zyppah, Inc.*, No. CV 18-7437 PA (AGRX), 2018 WL 6038340, at *4 (C.D. Cal. Sept. 21, 2018) (ordering the defendant to pay arbitration fees under § 4).[2]

III. WHERE IT IS CLEAR THAT AN ORDER COMPELLING ARBITRATION WILL NOT RESULT IN AN ARBITRATION BUT WILL EFFECTIVELY END THE LITIGATION, THE DISTRICT COURT SHOULD DISMISS THE ACTION IN A FINAL APPEALABLE ORDER.

A. Dismissal Following an Order Compelling Arbitration Is Final and Appealable.

In some cases, it is clear to the court that the order compelling arbitration effectively ends the action. Conditions imposed by the corporation in its adhesive

---

[2] It is no answer that a plaintiff could go to the district court under § 4 and institute a new action to compel the defendant to arbitrate. The delay and expense involved in initiating a new action should not be imposed on the innocent party. Moreover, upon dismissal, because there is no pending court action, the statute of limitations continues to run, so that new action by the plaintiff could be time-barred.

arbitration agreement can make arbitration economically infeasible, or even impossible.

When the party with the dominant bargaining position successfully deters its employees or consumers from even initiating the contracted-for arbitration, entry of a stay essentially consigns the case to oblivion. The ordered arbitration will never be "had," as contemplated by § 3, but the interlocutory stay order is not appealable. 9 U.S.C. § 16(b)(1). Entering a stay in that circumstance deprives the claimant of any opportunity for judicial review of the harsh terms that effectively ended any opportunity to obtain redress, either in court or in the arbitral forum.

Even where the district court determines that the agreement is not so unconscionable as to be unenforceable, a final order dismissing the action is warranted to afford the claimant the opportunity—the only opportunity as a practical matter—to challenge those provisions before an appellate tribunal.

The text of the FAA plainly provides for appealability at this stage from "a final decision with respect to an arbitration." 9 U.S.C. § 16(a)(3). This provision aligns with the general jurisdictional imperative set out in 28 U.S.C. § 1291, that appeals courts "shall have jurisdiction of appeals from all final decisions of the district courts." Consequently, a dismissal in connection with an order for the parties to proceed to arbitration that may never take place is "a final decision with respect to an arbitration" within the meaning of FAA, permitting the opposing party immediately to appeal. *See Green Tree*, 531 U.S. at 86–89.

Whether an order compelling arbitration in a particular case should be viewed as a final decision is a question that requires a "practical rather than a technical" approach. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). Most certainly, as this Court has instructed, where the practical impact of an order is that the party is "effectively out of court," that party should be afforded the opportunity to appeal. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 n.2 (1962).

The examples below demonstrate how corporations with irresistible contracting power can and do impose unsupportable conditions on the ability of individuals to pursue arbitration of their claims. These tactics turn contracted-for arbitration into a sham—theoretically available, but, as a practical matter, out of reach. Their intent is to put the claimant out of court *and* out of arbitration, and they are successful in that endeavor. Thus, even where the district court has determined that the matter is referrable to arbitration, the court should also dismiss the action, as there will be no later opportunity for the appellate court to review the order effectively and safeguard the rights of the weaker party to the contract. *Cohen*, 337 U.S. at 546.[3]

---

[3] It is true that 9 U.S.C. § 16(b)(1) expressly allows a claimant to obtain appellate review where the district court makes a finding that the issue is "a controlling question of law as to which there is substantial ground for difference of opinion" and its resolution

Footnote continued on next page.

B. Corporate Defendants Can and Do Impose Burdensome Conditions That Are Designed to Discourage Workers and Consumers from Actually Pursuing Their Claims.

A problematic development in recent years has been the insertion of provisions into adhesive arbitration contracts that are not designed to make arbitration cheaper or faster, or even to tilt the arbitration further in the drafting party's favor. They are preconditions designed to erase claims altogether, to make the arbitration process so onerous that no rational consumer or employee would choose to pursue their claim there.

These sham "arbitrations" serve as a fig leaf to obtain an order to compel, closing off the civil justice system to consumers and employees and small businesses. But the adhesive contract's onerous preconditions practically guarantee that claimants will be deterred from pursuing their claims there. *See* Glover, *Mass Arbitration*, *supra*, at 1295–96 (explaining how

---

"may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). *See, e.g.*, *Vernon v. Qwest Commc'ns Int'l, Inc.*, 925 F. Supp. 2d 1185, 1195 (D. Colo. 2013). But it cannot stand as the only path to appellate review of sham arbitration provisions. Obtaining a determination from the district court that the statutory grounds are met imposes considerable expense and delay on the innocent party, who must also persuade the appellate tribunal to exercise discretion to accept the appeal. Moreover, whether an arbitration can take place may be considered a factual dispute, rather than a controlling legal issue, thereby denying the ability to use the § 1292(b) process. Recognizing that an order to proceed to an arbitration that will never occur is a final order is more consistent with the objectives of the FAA.

sham arbitration provisions conceal a broad effort "to eliminate—or at least drastically reduce—plaintiffs' ability to assert claims anywhere"). And they do succeed. According to one estimate, some 98 percent of employees bound by forced arbitration agreements drop their claims altogether rather than bring them in arbitration. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 696 (2018). As the examples that follow illustrate, these provisions warrant appellate judicial review, and district courts should, on motion by the party opposing arbitration, issue a dismissal.

1. Sticker Shock

For decades, proponents have preached to the public and the courts that forced arbitration is a wonderfully inexpensive bargain. *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at *12, *Concepcion*, 563 U.S. 333 (2010) (No. 09-893), 2010 WL 3167313 ("Above all, arbitration gives consumers a less expensive alternative to litigation.") (citation omitted). However, one might fairly ask where such cost savings might come from in a regime that rejects the judges, supporting personnel, and physical infrastructure funded by taxpayers.

This Court has cautioned against permitting "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (citing *Green Tree,* 531 U.S. at 90). But today, parties in arbitration are required to

purchase the services of for-profit arbitration administrators, such as the AAA or JAMS (formerly Judicial Arbitration and Mediation Services, Inc.); the services of a private arbitrator; as well as the cost of hearing rooms, transcription services, and other necessities.

These fees can be very high. Although AAA and JAMS limit the filing fees charged for some consumer and employment arbitrations, not all claims are so capped. *See, e.g.*, *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (filing fee of $2,000 to arbitrate employment discrimination claim); *Myers v. Terminex*, 697 N.E.2d 277, 280–81 (Ohio Ct. Comm. Pleas 1998) (arbitration agreement requirement that homeowner pay a filing fee of $2,000 to AAA to arbitrate property-damage claim).

And the filing fee is not all. "[A]rbitral organizations impose fee after fee at just about every stage of the proceedings." Glover, *Mass Arbitration*, *supra*, at 1351. *See, e.g.*, *Haydon v. Elegance at Dublin*, 97 Cal. App. 5th 1280, 1291 (2023) ("JAMS charges up to $10,000.00 per day for a single-arbitrator arbitration."). In *Jones v. Fujitsu Network Commc'ns, Inc.*, 81 F. Supp. 2d 688 (N.D. Tex. 1999), for example, the arbitration provision "require[d] Plaintiff to pay one-half of the arbitrator's fee, the court reporter's fee, the fee for the arbitrator's copy of the transcript, and facility costs," which rendered the cost of the arbitral forum "prohibitive." *Id.* at 693. In *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778 (9th Cir. 2002), Countrywide's arbitration agreement requiring the employee to pay half of most of the arbitration costs would have imposed costs on Ferguson "into the thousands of dollars." *Id.* at 785.

The most daunting expense by far is for the services of the private arbitrator. Even two decades ago, arbitrators typically charged $300 to $400 per hour. *Id.* at 785 n.7. In *Ferguson*, the court voiced concern over "the significant deterrent effect that such fees will have on employees who are required to arbitrate their civil rights claims." *Id*. *But cf. Vidal v. Advanced Care Staffing, LLC*, No. 1:22-cv-05535-NRM-MMH, 2023 WL 2783251, at *19 (E.D.N.Y. Apr. 4, 2023) (noting that the arbitrator's rate in that case was $450 per hour).

Scarier yet, adhesive arbitration agreements frequently require the individual to pay the company's costs and attorney fees if the arbitrator decides in the company's favor. AAJ's study of AAA and JAMS data found cases such as one where a consumer who initiated an arbitration against Fairfield Imports Three LLC for a $60,000 claim not only lost the arbitration, but also was charged $600,000 for Fairfield's attorney's fees. Am. Ass'n. for Just., *The Truth About Forced Arbitration* 17 (Sept. 2019), https://www.justice.org/resources/research/the-truth-about-forced-arbitration. In another case, a healthcare worker who took his employer to arbitration for $15,001, lost, and, under the arbitration provision, was ordered to pay the employer's attorney fees and costs in the amount of $290,237. *Id.* at 18. *See* IPC's Petition to Confirm Arbitration Award and for Final Judgment, *IPC Healthcare, Inc. v. Schooley*, No. 1:17MC22365, 2017 WL 6018101 (S.D. Fla. June 26, 2017).

AAJ's study of AAA's five-year database found that consumers who were subject to loser-pays provisions and who lost were ordered to pay "an average of

$27,000 in arbitration fees and payments to the defendant and its attorneys." *The Truth About Forced Arbitration*, *supra*, at 17. Moreover, because defense counsel's fees are unknown at the outset of the arbitration, fee-shifting provisions essentially demand that the individual sign over a blank check before they can even initiate their claim. It comes as little surprise, then, that few employees or consumers—even those with claims of clear merit—risk taking such a gamble on arbitration.

This entirely rational calculation was voiced by one claimant, who fell behind on her mortgage payments after her husband died and alleged that her bank's debt collection efforts violated state consumer protection laws. In denying the bank's motion to compel arbitration under its adhesive contract, the district court observed:

> The fee-shifting provision, with mandatory language requiring the losing party to pay all costs and fees, including the attorneys' fees for the other party, constitutes a significant deterrent . . . Ms. Goodwin stated that she would not bring her claim if she were required to risk paying those costs in the event of an adverse ruling.

Goodwin v. Branch Banking & Tr. Co., No. 5:16-CV-10501, 2017 WL 960028, at *5 (S.D. W. Va. Mar. 10, 2017).

2. Owning the Arbitrators

Arbitration, though not defined by the FAA, is broadly understood to require "*neutral* third parties to make a final and binding decision." *Arbitration*,

Black's Law Dictionary (11th ed. 2019) (emphasis added). Arbitration providers, like the AAA and JAMS, establish the procedures by which the arbitrations are conducted and provide the pool of arbitrators from which the claimant must choose.

Corporate defendants have done quite well in arbitrations conducted by the AAA and JAMS. *See* Am. Ass'n for Justice, *Forced Arbitration by Corporations Surges to Unprecedented Levels* 3 (Dec. 2023), https://www.justice.org/resources/research/forced-arbitration-by-corporations-surges-to-unprecedented-levels. Nevertheless, in recent years, some major corporations have shifted from these established entities to "defendant-friendly outfits." J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 Wash. U.L. Rev. 1617, 1638 (2023) (citation omitted).

All too often, these alternative arbitration providers are even more defendant-friendly because they are dependent upon and controlled by corporate defendants who also regularly arbitrate before them. Consequently, they are pleased to create a "sham system" that is so biased as to be "unworthy even of the name of arbitration." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999).

As an early example, Hooters developed a self-run dispute resolution program in the 1990s. After an employee complained that she was subjected to sexual harassment at work in violation of Title VII, Hooters filed an action under § 4 to compel arbitration as provided in the employment contract. *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 588–89 (D.S.C. 1998), *aff'd*, 173 F.3d 933. However, the district court held

that the arbitration agreement was "illusory" and unenforceable. *Id.* at 618.

Affirming the denial, the court of appeals reviewed the rules devised by Hooters to govern its arbitrations, which provided that any claim would be heard by a panel of three arbitrators, all of whom were "selected from a list of arbitrators created exclusively by Hooters." 173 F.3d at 938–39. This rule gave Hooters "control over the entire panel" and placed "no limits whatsoever" on whom Hooters could select. *Id.* at 939. Hooters was "free to devise lists of panel arbitrators who ha[d] existing relationships, financial or familial, with Hooters and its management." *Id.* The rules did not even prohibit Hooters from placing an employee's own manager on the list—meaning that an employee's sexual harassment claim could theoretically be heard by the manager she was accusing. *Id.*

"Given the unrestricted control that one party (Hooters) has over the panel," Judge Wilkinson observed for the appeals court, "the selection of an impartial decision maker would be a surprising result." *Id.* Because these procedures were "egregiously unfair," the agreement was unenforceable. *Id.* at 938. "By agreeing to settle disputes in arbitration," the employee had not agreed to "procedures so wholly one-sided as to present a stacked deck." *Id.* at 940. The "sham system" that Hooters had set up, Judge Wilkinson held, was not arbitration "in any meaningful sense of the word." *Id.* at 940–41.

DoorDash has similarly found a way to stack the deck against its employees in arbitration by influencing the arbitration provider. When the company became unhappy with AAA's due process protocols and

filing fee arrangements, it found a new arbitration provider, the International Institute for Conflict Prevention & Resolution ("CPR"). CPR agreed to use protocols that, as described in internal emails, were "created for DoorDash, at DoorDash's request, and with the input of DoorDash and its lawyers." Glover, *Mass Arbitration*, *supra*, at 1370–71. Shortly afterwards, DoorDash "successfully compelled arbitration at a new provider under a process it had a hand in making." Glover, *Recent Developments*, *supra*, at 1638.

In like fashion, Live Nation Entertainment and its subsidiary, Ticketmaster, changed arbitration providers midway through an antitrust dispute with Taylor Swift fans, who had accused the company of inflating ticket prices in violation of antitrust and consumer protection laws. Ticketmaster designated New Era ADR as its new dispute resolution forum. Alexandra Ong, *The Eras vs New Era: How Bulletproof Is Ticketmaster's Arbitration Provision?*, The Race to the Bottom (Mar. 1, 2023), https://www.theracetothebottom.org/rttb/2023/3/1/the-eras-vs-new-era-how-bulletproof-is-ticketmasters-arbitration-provision.

Under New Era's subscription model, corporations pay a yearly subscription fee, regardless of the number of claims it arbitrates, aligning New Era's financial interest with its corporate customers in minimizing the number of claims that are actually arbitrated. Alexis Narotzky, *The New Era of ADR*, J. of Conflict Resolution, https://www.cardozojcr.com/cjcr-blog/the-new-era-of-adr.

Ticketmaster's and New Era's rules stack the deck heavily against consumers by requiring claimants to pay 100 percent of the filing fee and prove their case

in the face of extreme limitations on documents that can be submitted (ten total), briefing length (five pages maximum), the number of witnesses (two to three), and discovery (none). *See Terms of Use*, Ticketmaster, https://help.ticketmaster.com/s/article/Terms-of-Use?language=en_US#section17.

When a claimant is faced not only with the expense of bringing an arbitration, but also with the prospect of a tribunal that is far from neutral and with the considerable risk of financial ruin if the tribunal rules in favor of the company, it is clear that the defendant's arbitration conditions "make access to the forum impracticable," *Italian Colors*, 570 U.S. at 236, and the claimant has been effectively put "out of court." *Idlewild Bon Voyage*, 370 U.S. at 715 n.2. In those circumstances, the district court should deny the petition to compel arbitration or enter a final order of dismissal to enable an immediate appeal.

3. Wait in Line

Another tactic corporations have employed is delay—including extreme delay. Such corporate tactics can be so extreme that in one recent instance, the delay threatened to make some claimants wait for more than a century for their day in arbitration, leading two courts to find the agreement unconscionable. *See Achey*, 293 A.3d at 558; *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1028–29 (N.D. Cal. 2022).

Verizon customers, like virtually all wireless and cell phone consumers, are bound by an adhesive arbitration agreement that bars them from taking Verizon to court and prohibits class arbitrations. Their only recourse is to bring an individual arbitration. *Achey*, 293

A.3d at 554. But when customers became aware that Verizon had been adding undisclosed administrative fees to their bills, they filed class actions in California and New Jersey, alleging consumer fraud and false advertising. In both cases, Verizon moved to compel arbitration on an individual basis. *Id.* at 553–54; *MacClelland*, 609 F. Supp. 3d at 1028.

Verizon's arbitration agreement also imposes conditions designed to prevent customers from proceeding with individual arbitrations on a mass scale. *MacClelland*, 609 F. Supp. 3d at 1040. Under Verizon's rules, if twenty-five or more customers represented by the same counsel bring similar individual claims against Verizon, only ten of their claims may be arbitrated at once. *Id.* The eleventh customer's claim could not even "be filed in arbitration until the first ten have been resolved." *Id.* At that point, the next ten may proceed to arbitration, and so on until all the claims have been processed.

This procedure produces untenable and unworkable results, as evidenced by the California action, where 2,712 Verizon customers retained the same law firm to bring similar claims through arbitration. *Id.* In that case, the final tranche of cases could expect to be filed in the year 2179 at the earliest—160 years from now. *Id.*

Such delay "conflict[s] with one of the basic principles of our legal system—justice delayed is justice denied." *Id.* at 1042 (quoting *Dietrich v. Boeing Co.*, 14 F.4th 1089, 1095 (9th Cir. 2021)). Of course, because the cases could not be filed until their "turn" came up, most consumers' causes of action would be barred by the applicable statute of limitations. *See id.* at 1040–

42. It is no answer to suggest, as Verizon did, that consumers simply find different counsel. Apart from the unfairness of requiring customers to surrender their fundamental right to be represented by counsel of their choice, the 2,712 California claimants would have needed to find and retain 113 separate firms to represent them.

In the New Jersey action, the Verizon batching requirement would have required 145 years to arbitrate all of the 2,537 Verizon customers who had filed claims. *Achey*, 293 A.3d at 555. Notably, the trial court had granted an order compelling arbitration as spelled out in the agreement. *Id.* at 450. If a federal court had done the same and stayed proceedings, the plaintiffs would have had very limited options, if any, to seek review. Both the New Jersey appellate and federal district courts concluded that the conditions imposed by Verizon "operate to effectively thwart arbitration and vindication of rights altogether." *Id.* at 558; *MacClelland*, 609 F. Supp. 3d at 1045–46. Had the Northern District of California granted the motion to compel despite this precondition, it certainly would have spelled the end of the litigation, warranting a final and appealable order dismissing the case.

Defendants have also made use of other creative devices designed to ward off arbitrations, such as stringent limits on discovery. *See e.g.*, *Walker v. Ryan's Fam. Steak Houses, Inc.*, 400 F.3d 370, 387 (6th Cir. 2005) (rule allowing only one deposition). Others impose unrealistic time limits. *See, e.g.*, *Hill v. Garda CL Nw., Inc.*, 308 P.3d 635, 636 (Wash. 2013) (employer's arbitration clause shortened the statute of limitations to fourteen days). Some have even included a choice-

of-law provision that applies a non-existent law. *See, e.g.*, *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1309 (S.D. Fla. 2013) (involving a payday lender's arbitration provision that stated arbitrations were to be governed by the "consumer dispute rules" of the Cheyenne River Sioux Tribe, even though both the company and the Tribe eventually admitted that such rules "do not exist").

An especially egregious example is *DeOrnellas v. Aspen Square Mgmt., Inc.*, 295 F. Supp. 2d 753 (E.D. Mich. 2003), a wrongful termination case in which the employee's arbitration agreement allowed the company to choose any location for the arbitration, with claimant to bear the travel and lodging costs of attorneys, witnesses, and other persons necessary to the arbitration. *Id.* at 766.

In all of these cases, the harsh preconditions imposed in the company's arbitration agreement do not further the purpose of resolving claims quickly and inexpensively. To the contrary, they place obstacles of expense and delay in the claimant's path with the clear expectation and intention that the claimant will give up and not pursue the claim at all, effectively shielding the corporation from accountability. District courts should recognize the practical finality of a referral to arbitration in such circumstances and enter an order dismissing the action to allow the provisions to be tested by appellate review.

CONCLUSION

For the foregoing reasons, amicus asks this Court to affirm the judgment of the court below in this case, while cautioning district courts against foreclosing

district court supervision and appellate judicial review of arbitration agreements or tactics that effectively foreclose the promised of quick and inexpensive resolution of disputes through arbitration.

Respectfully submitted,

Jeffrey R. White
AMERICAN ASSOCIATION
FOR JUSTICE
777 6th Street NW, #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

March 4, 2024