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Toward a Future of Enforcement: A Critique of the Ninth Circuit's Invalidation of Mandatory Arbitration Agreements in Employment Contracts

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COMMENT

TOWARD A FUTURE OF ENFORCEMENT:

A CRITIQUE OF THE NINTH CIRCUIT'S INVALIDATION OF MANDATORY ARBITRATION AGREEMENTS IN EMPLOYMENT CONTRACTS

INTRODUCTION

Imagine that you are searching for a job. As you scan for job listings in the morning paper, you notice an article about the monthly employment report issued by the United States Department of Labor.[1] The report reveals that nine million American workers are unemployed, just like you.[2] Of the nine million jobless workers, just over two million reported that they have been searching for work for six months or longer.[3] The article also points out that workers who remain unemployed for extended periods of time tend to accept positions that pay less

[1] *See, e.g.,* MONTHLY LABOR REVIEW, November/December, 2003, at 93, Table 4, *available at* http://stats.bls.gov/news.release/empsit.t01.htm (last visited March 5, 2004).

[2] For example, the unemployment rate for the month of September 2003 was 6.1%, which correlates to approximately nine million Americans without jobs. *Id.*

[3] Of the nine million persons unemployed as of September 2003, 2.1 million reported that they had been looking for work for 27 weeks or longer. *Id.* at 95, Table 7, *available at* http://stats.bls.gov/news.release/empsit.t09.htm (last visited March 5, 2004).

than previously held positions.[4] You understand; you have not received a paycheck in six months.

Later that same day, you are offered a job that pays a salary higher than you have ever earned. There is only one condition: before you may accept the employer's offer, you must sign a mandatory arbitration agreement. The agreement requires you to arbitrate future workplace disputes instead of bringing your claims in court. The employer explains that the agreement covers any claims that may arise out of your employment relationship, including violations of your civil rights. Would you sign the arbitration agreement to secure the job? Or would you reject a steady paycheck to preserve the right to your day in court?

On the eve of a recession that left nine million American workers jobless,[5] the United States Supreme Court held that the Federal Arbitration Act (hereinafter "FAA") applies to employment contracts.[6] To the American worker, this means that under the FAA, employers may require prospective employees to sign agreements to arbitrate disputes that arise out of the employment relationship, including state and federal statutory claims of employment discrimination.[7] Of course, employers offer applicants a choice: arbitrate, or return to the want ads.[8]

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[4] Jon E. Hilsenrath, *'Jobless' Recovery Feels a Lot Like a Recession*, WALL ST. J. ONLINE (October 3, 2003), *at* http://www.careerjournal.com/salaryhiring/hotissues/20030610-hilsenrath.html (last visited March 5, 2004).

[5] The current recession began in March 2001. *Id.*

[6] The U.S. Supreme Court decided Circuit City v. Adams, 532 U.S. 105, 119 (2001) on March 21, 2001, on the eve of the current recession. *See id.* The FAA refers to the Federal Arbitration Act of 1925, ch. 213 §1, 43 Stat. 883. The FAA was reenacted in 1947 as 9 U.S.C. §§ 1-14 (1947). Current version at 9 U.S.C. §§ 1-16 (2000).

[7] *See, e.g.*, Circuit City v. Adams, 532 U.S. at 119 (holding the FAA governs the arbitration clauses in a Circuit City job application, which the prospective employee was required to execute before being considered for employment).

[8] Arbitration is a process by which a dispute is submitted to one or more impartial persons, called arbitrators, for a final and binding decision. American Arbitration Ass'n, *AAA Glossary of Dispute Resolution Terms, available at* http://www.adr.org/index2.1.jsp?JSPssid=15784 (last visited February 23, 2004).

When the arbitration agreement is contained in a take-it-or-leave-it employment contract, however, the decision to "take it" will rarely be truly voluntary, particularly when jobs are difficult to obtain.[9]

This Comment focuses on mandatory pre-dispute arbitration agreements that prospective employees must sign in order to be hired, or even considered, for a given position. Growing numbers of employers are implementing mandatory arbitration programs to resolve workplace disputes in response to recent case law upholding the enforceability of arbitration agreements.[10] Employers may present arbitration agreements in employment contracts, employment handbooks, or in job applications.[11] This Comment posits that while arbitration is an efficient method of adjudicating many claims, mandatory arbitration agreements in employment contracts are potentially unfair to employees for three reasons. These three concerns arise because employers typically control the terms on which most employees are hired.[12]

The first concern arises where employers require employees to sign arbitration agreements as a condition of employment. This means that if the applicant wants to accept an employer's job offer, then she must also accept the arbitration

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[9] *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 131 (1997) ("unless the adherent has a meaningful opportunity to bargain or shop [the arbitration] term, she may feel compelled to accept it . . . .").

[10] G. Roger King and Rob Edmund, *Mandatory Employment Arbitration Agreements: As More Employers Weigh Their Costs and Benefits, Courts Remain Divided Over Enforceability of Key Provisions*, 9 No. 4 HR ADVISOR: LEGAL PRACTICE AND GUIDANCE 6, July/August 2003. For case law encouraging employers to implement mandatory arbitration programs, see, for example, Circuit City v. Adams, 532 U.S. 105 (2001) (upholding the enforceability of arbitration agreements in the employment context).

[11] U.S. Equal Employment Opportunity Commission, EEOC Notice Number 915.002, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (July 10, 1997), *at* http://www.eeoc.gov/policy/docs/mandarb.html (last visited March 5, 2004) [hereinafter EEOC Notice].

[12] *See, e.g.*, Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 115 (2000) ("in the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment . . . .").

agreement on the employer's terms. Because most employees lack the bargaining power to negotiate or reject unfavorable terms, such agreements may be considered procedurally unconscionable.[13] Second, in operation, arbitration agreements often compel *only employees* to give up the right to bring future claims in court because employers are unlikely to initiate typical employment-related suits against employees.[14] Such agreements are unfairly one-sided.[15] Finally, employers who enjoy superior bargaining power may impose arbitration provisions that restrict employees' statutory rights. Such provisions may be considered substantively unconscionable.[16] To illustrate how these fairness concerns affect employees, this Comment sets forth the approaches taken by the Ninth Circuit Court of Appeals and the California Supreme Court in assessing the enforceability of mandatory arbitration agreements in employment contracts.[17]

In Part I,[18] this Comment provides the backdrop against which the United States Supreme Court decided *Circuit City v. Adams II* (hereinafter "*Adams II*"), a landmark decision upholding the enforceability of arbitration agreements in the em-

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[13] Under California law, unconscionability refers to "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 486 (1982). The definition of unconscionability implicates two distinct aspects of unconscionability: procedural and substantive. *Armendariz*, 24 Cal. 4th at 114. Procedural unconscionability focuses on the process of contract formation, and the extent to which the stronger party used its superior bargaining position to oppress the weaker party. *Id.* Substantive unconscionability focuses on whether the terms of the contract produce "overly harsh" or "one-sided" results. *Id.* A contract is unenforceable under California law if it is both procedurally and substantively unconscionable, though the elements need not be present to the same degree. *Id.* For examples of cases finding arbitration agreements procedurally unconscionable, see *Armendariz*, 24 Cal. 4th at 114-115; Circuit City v. Adams, 279 F.3d 889, 893 (9th Cir. 2002); Circuit City v. Ingle, 328 F.3d 1165, 1171 (9th Cir. 2003); Circuit City v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003). *Cf.* Circuit City v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002); Circuit City v. Najd, 294 F.3d 1106, 1108, n.2 (9th Cir. 2002) (finding no showing of procedural unconscionability where employees had the opportunity to opt out of the arbitration program).

[14] *See, e.g.*, Circuit City v. Ingle, 328 F.3d 1165, 1173 (9th Cir. 2003).

[15] *See id.*

[16] *See, e.g., Armendariz*, 24 Cal. 4th at 90. *See supra* note 13 for a definition of substantive unconscionability.

[17] *See infra* notes 154-229 and accompanying text for discussion of Ninth Circuit cases. *See infra* notes 230-278 and accompanying text for discussion of the California Supreme Court case, *Armendariz*, 24 Cal. 4th 83.

[18] *See infra* notes 23-153 and accompanying text.

ployment context.[19] Part II examines Ninth Circuit decisions in the aftermath of *Adams II*, which applied the doctrine of unconscionability under California contract law to invalidate compulsory arbitration agreements, in spite of the pro-arbitration mandate of *Adams II*.[20] Part III considers the California Supreme Court's approach to assessing unconscionability in the employment arbitration case, *Armendariz v. Foundation Health Psychcare Services*.[21] Part IV compares the two approaches, and recommends changes to the Ninth Circuit's current approach to assessing unconscionability claims.[22] Last, Part V concludes that the Ninth Circuit should adopt the recommended approaches in order to balance the preservation of employees' rights with a policy encouraging voluntary arbitration as an effective method of resolving employment disputes.

I. BACKGROUND

A. MANDATORY ARBITRATION AGREEMENTS IN EMPLOYMENT CONTRACTS IMPLICATE COMPETING FEDERAL CONCERNS: THE FEDERAL ARBITRATION ACT AND TITLE VII

Mandatory arbitration agreements in employment contracts often implicate two federal policies that affect employment relationships.[23] On one hand, the FAA represents a federal policy favoring the enforcement of arbitration agreements.[24] On the other hand, Title VII of the Civil Rights Act of 1964 (hereinafter "Title VII") prohibits employment discrimina-

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[19] Circuit City v. Adams, 532 U.S. 105 (2001). In the main text, this Comment refers to the U.S. Supreme Court's decision in Circuit City v. Adams, 532 U.S. 105 (2001), as *Adams II*. In *Adams II*, the U.S. Supreme Court reversed the Ninth Circuit's decision in Circuit City v. Adams, 194 F.3d 1070 (9th Cir. 1999), referred to herein as *Adams I*. Following its decision in *Adams II*, the U.S. Supreme Court remanded the case to the Ninth Circuit for further proceedings consistent its opinion. This Comment refers to the remand, Circuit City v. Adams, 279 F.3d 889 (9th Cir. 2002), as *Adams III*.

[20] *See infra* notes 154-229 and accompanying text.

[21] *See infra* notes 230-278 and accompanying text. *Armendariz*, 24 Cal. 4th 83 (2000).

[22] *See infra* notes 279-344 and accompanying text.

[23] *See, generally*, King and Edmund, *supra* note 10 (stating that the U.S. Supreme Court's decision in Circuit City v. Adams, 532 U.S. 105 (2001), confirmed that arbitration agreements between employees and employers are enforceable under the FAA, and reaffirmed that employees can be required to arbitrate employment disputes, including statutory discrimination claims under Title VII).

[24] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). *See* 9 U.S.C. §§ 1-16 (2000).

tion and gives victims of workplace discrimination the right to sue offending employers in federal court.[25] Mandatory arbitration agreements create tension between these two federal policies by requiring employees to arbitrate, rather than litigate, their Title VII claims.[26] The tension between the FAA and Title VII is exacerbated by concerns that arbitration procedures do not allow employees to fully vindicate the civil rights that Title VII protects.[27] Any attempt to reconcile the FAA's policy favoring arbitration with the protection of employees' Title VII rights, however, must also account for the advantages that employees gain by arbitrating employment disputes.[28]

1. The FAA's Pro-Arbitration Mandate

Employers that require employees sign mandatory predispute arbitration agreements as part of the hiring process may rely on the FAA to enforce employees' obligations to arbitrate employment-related claims.[29] Prior to the enactment of the FAA, judges frequently refused to enforce arbitration agreements because such agreements deprived the courts of jurisdiction.[30] In 1925, Congress passed the FAA to quell "judicial hostility" to arbitration and to ensure that courts would enforce private arbitration agreements.[31] In addition, Congress hoped to encourage arbitration as an alternative to trial in or-

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[25] Title VII, The Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 255, codified at 42 U.S.C. § 2000e-2 (2000) (unlawful employment practices); *id.* § 2000e-5 (f)(1)(A) (2000) (civil action by person aggrieved).

[26] *See, e.g.*, EEOC Notice, *supra* note 11. ("The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws.").

[27] *See id.* (taking the position that agreements requiring employees to arbitrate workplace discrimination claims as a condition of employment are contrary to the principles embodied in these civil rights laws).

[28] *See, e.g.*, Circuit City v. Adams, 532 U.S. at 122-123 (endorsing the "real benefits" of enforcing arbitration agreements in the employment context).

[29] *See, e.g.*, Circuit City v. Adams, 532 U.S. at 119 (holding that the FAA applies to arbitration agreements in employment contracts).

[30] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 n.6 (1985) (referring to the House Report accompanying the FAA, H.R. REP. NO. 68-96, at 1-2 (1924)).

[31] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds*, 470 U.S. at 219-220 n.6).

der to ease the burdens of crowded court dockets and high litigation costs.[32]

To accomplish its goals, the FAA makes arbitration agreements as enforceable as other contracts.[33] Section 2 of the FAA provides in part:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . *shall be valid, irrevocable, and enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract.[34]

In addition to requiring courts to enforce arbitration agreements to the same extent as any other contract, the FAA also provides a remedy to bring about enforcement.[35] If an employee who is a party to a valid arbitration agreement refuses to arbitrate her claims, § 4 of the FAA authorizes the employer-party to request an order compelling arbitration from a United States district court.[36] Similarly, if an employee opposing arbitration ignores the arbitration agreement and files her claims in court, § 3 of the FAA allows her employer to ask the court to delay trial proceedings pending arbitration of any claims covered by the agreement.[37] Doubts as to whether an agreement covers specific claims are to be resolved by courts in favor of arbitration.[38]

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[32] *Dean Witter Reynolds*, 470 U.S. at 220 (referring to the House Report accompanying the Federal Arbitration Act, H.R. REP. NO. 68-96, at 1 (1924)).

[33] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n.12 (1967).

[34] 9 U.S.C. § 2 (2000) (emphasis added).

[35] *Dean Witter Reynolds*, 470 U.S. at 220 n.6.

[36] 9 U.S.C. § 4 (2000) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.").

[37] *Id.* § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, 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, providing the applicant for the stay is not in default in proceeding with such arbitration.").

[38] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

In addition to overcoming judicial hostility to arbitration in the federal courts, Congress enacted the FAA to supplement state arbitration statutes.[39] The existing state statutes provided arbitration procedures but did not require state courts to enforce private arbitration contracts.[40] To fill in the gaps in these statutes, the U.S. Supreme Court held that the FAA requires state courts as well as federal courts to enforce arbitration clauses.[41] Accordingly, the FAA governs all claims covered by the arbitration agreement, whether based on federal or state law.[42] The U.S. Supreme Court further held that Congress precluded the states from requiring a judicial forum for claims that parties agreed to settle by arbitration.[43] As a result, the FAA preempts state laws that treat arbitration provisions less favorably than other contract provisions.[44] Thus, employees may not avoid arbitration by bringing their claims in state court as opposed to federal court.[45]

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[39] Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).

[40] *Id.*

[41] *Id.* at 15-16.

[42] *See id.* at 17 (holding arbitrable a claim based on California Franchise Investment Law).

[43] *Id.* at 10.

[44] *Id.* at 16 n.9. Preemption is "[t]he principle (derived from the Supremacy Clause) that a federal law can supersede or supplant any inconsistent state law or regulation. Also termed federal preemption." BLACK'S LAW DICTIONARY 1197 (7th ed. 1999).

[45] *See Southland*, 465 U.S. at 15 ("We are unwilling to attribute to Congress the intent . . . to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts, we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to federal court jurisdiction.").

2. *Implications of Arbitrating Title VII Claims*

The U.S. Supreme Court interprets the FAA as Congress's declaration that federal policy favors the enforcement of arbitration agreements.[46] In spite of this policy, mandatory arbitration agreements imposed as a condition of employment still give rise to litigation over their enforceability.[47] Litigation persists around the widely held concern that arbitration procedures differ from judicial proceedings in ways that may prevent employees from fully vindicating civil rights guaranteed to them by state and federal statutes.[48] The Equal Employment Opportunity Commission (hereinafter "EEOC"), as the federal agency in charge of enforcing federal employment discrimination laws, recognizes the legitimacy of this concern.[49] The EEOC takes the position that agreements requiring employees to arbitrate workplace discrimination claims as a condition of employment are contrary to the principles embodied in these civil rights laws.[50]

Title VII provides an example of a federal civil rights statute, enacted to protect each individual's rights to enjoy equal employment opportunities and to be free from discrimination in the workplace.[51] The civil rights protected by Title VII "flow directly from core Constitutional principles," such as the fundamental right to be accorded the equal protection of the laws.[52] Title VII ensures equal employment opportunities by setting forth uniform federal standards of discriminatory employment

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[46] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[47] *See* American Arbitration Ass'n, *AAA National Rules for the Resolution of Employment Disputes*, *available at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\..\..\focusArea\employment\AAA121current.html (last visited February 24, 2004) [hereinafter *AAA Rules*].

[48] *See, e.g.*, EEOC Notice, *supra* note 11.

[49] *See id.*

[50] *Id.*

[51] *See* 42 U.S.C. § 2000e-2 (2000) (unlawful employment practices).

[52] EEOC Notice, *supra* note 11; U.S. CONST. Amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

practices.[53] To enforce these standards, Title VII establishes the right to bring an action in federal court for employees who have been the victims of illegal discriminatory action by their employers.[54] Thus, both federal courts and individual employees play a part in Title VII's enforcement scheme.[55]

Federal courts play a vital role in enforcing Title VII and other federal employment discrimination statutes "through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief."[56] Federal courts interpret anti-discrimination laws and publish written decisions.[57] These decisions are exposed to public scrutiny and are subject to correction by higher courts and Congress.[58] Thus, the courts assure that the anti-discrimination laws are applied in accordance with their purpose, to ensure equal opportunity in employment.[59] The public nature of these decisions also exposes employers' discriminatory practices to public consternation and deters future violations of civil rights laws.[60]

In order that courts may fulfill their role in enforcing Title VII, individual employees must have access to the judicial forum to assert their claims.[61] Title VII grants this right of action to aggrieved employees.[62] By bringing claims to court, individual plaintiffs vindicate both their own interests and the public's interest in exposing discriminatory practices and deterring future civil rights violations.[63] In the Civil Rights Act of 1991 (hereinafter "the 1991 Act"), Congress reaffirmed the key role of individual litigants by amending Title VII to provide

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[53] *See* 42 U.S.C. § 2000e-2(a) (2000).

[54] *See id.* § 2000e-5(f)(1).

[55] *See, e.g.*, EEOC Notice, *supra* note 11.

[56] *Id.* (citing Kremer v. Chemical Constr. Corp., 454 U.S. 461, 479 n.20 (1982)("federal courts were entrusted with ultimate enforcement responsibility" of Title VII.)).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *See* 42 U.S.C. § 2000e-5(f) (2000).

[63] EEOC Notice, *supra* note 11.

additional remedies and protections to victims of discrimination.[64] For the first time in Title VII's history, the 1991 Act explicitly provided victims of discrimination with the right to a jury trial as one of these additional protections.[65] Congress passed the 1991 Act to strengthen Title VII in response to findings that U.S. Supreme Court decisions had eroded the statute's civil rights protections.[66]

Viewed in light of the 1991 Act's purpose of strengthening Title VII, arbitration procedures are arguably inconsistent with the goals and framework of Title VII as amended. The arbitration of Title VII claims may undermine the policy goals underlying the statute by removing civil rights claims from the public forum of our nation's courts.[67] Arbitration is a private method of dispute resolution.[68] Arbitral decisions are binding only upon the parties who hired the arbitrator.[69] Arbitrators are not accountable to the public even if their interpretations of Title VII conflict with the public's interest in exposing and remedying discrimination in the workplace.[70] Moreover, employers who are found to practice discrimination are shielded from public criticism.[71] This lack of public disclosure weakens the deterrence function of Title VII.[72] As a result, the private nature of arbitration means that the proceedings are less likely to advance the public policies underlying the statute.[73]

In addition to potentially undermining the broad social policies of Title VII, arbitration proceedings differ from judicial proceedings in ways that may adversely affect the fair resolution of individual employees' claims. First, employees asserting Title VII claims may opt to have juries hear and resolve their

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[64] The Civil Rights Act of 1991, P.L. 102-166, §§ 2-3, *reprinted in* notes 42 U.S.C. § 1981 (2000).

[65] 42 U.S.C. § 1981a(c) (2000).

[66] Specifically, Congress found that the U.S. Supreme Court decision in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989), weakened the scope and effectiveness of Federal civil rights protections. *See* P.L. 102-166, § 2, *reprinted in* notes to 42 U.S.C. § 1981 (2000).

[67] EEOC Notice, *supra* note 11.

[68] *Id.*

[69] *Id.*

[70] *See id.* ("The nature of the arbitral process allows . . . for minimal, if any, public accountability of arbitrators or arbitral decision-making.").

[71] *Id.*

[72] *Id.*

[73] EEOC Notice, *supra* note 11.

claims.[74] Commentators view courts and juries as "more likely to adhere to the law, and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs."[75] In the arbitration process, however, a jury trial is not an option.[76] Second, the arbitrator conducting the proceedings may be biased in favor of "repeat player" employers who have previously arbitrated employment disputes.[77] Such employers are better aware of arbitrators' past decisions, while less experienced employees may be unable to make an informed selection of arbitrators.[78] Third, arbitration rules often limit the amount of discovery each party is allowed, or leave to the arbitrator decisions regarding the scope of discovery.[79] Limitations on discovery may make it difficult for employees to obtain from employers the documents and information necessary to prove employment discrimination claims.[80] Fourth, the arbitrator may not be required to issue a written opinion stating the reasons for his decisions, which limits the extent to which arbitral decisions are subject to judicial review.[81] As a result, higher courts and Congress often cannot scrutinize and correct arbitral decisions.[82]

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[74] *Id. See also*, 42 U.S.C. § 1981a(c) (2000) (jury trial).

[75] Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 119 (2000) (citing Robert Haig, *Corporate Counsel's Guide: Legal Development Report on Cost-Effective Management of Corporate Litigation, in* FEDERAL PRETRIAL PRACTICE, PROCEDURE AND STRATEGY, at 177, 186-187 (PLI Litig. & Admin. Practice Course Handbook Series No. 610, 1999)).

[76] EEOC Notice, *supra* note 11.

[77] *Id. See also, Armendariz*, 24 Cal. 4th at 115 (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997)).

[78] EEOC Notice, *supra* note 11.

[79] *See, e.g., AAA Rules*, *supra* note 47. Rule 7, relating to discovery, states: "The arbitrator shall have the authority to order such discovery...as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." *Id.* Discovery refers to "compulsory disclosure, at a party's request, of information that relates to the litigation. The primary discovery devices are interrogatories, depositions, requests for admissions, and requests for production." BLACK'S LAW DICTIONARY 478 (7th ed. 1999).

[80] *See* EEOC Notice, *supra* note 11.

[81] *Id.* Judicial review refers to "a court's review of a lower court's or an administrative body's factual or legal findings." BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

[82] EEOC Notice, *supra* note 11.

In spite of the potential negative implications of arbitrating Title VII claims, the U.S. Supreme Court held that these attacks on arbitration procedures are insufficient to render an arbitration agreement unenforceable.[83] Such attacks "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and they are "far out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes."[84] Nor is the frequent presence of unequal bargaining power between employer and employee an adequate basis for finding an arbitration agreement unenforceable in the employment context.[85] According to the U.S. Supreme Court, most federal and "parallel" state statutory claims, including employment discrimination claims, may be the subjects of an enforceable arbitration agreement contained in an employment contract.[86] Potential plaintiffs are free to waive rights conferred by statute, because "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."[87] The assumption that a litigant will be able to fully and effectively vindicate her statutory claim, albeit in an arbitral forum, is a primary justification for the U.S. Supreme Court's current endorsement of the policy favoring enforcement of arbitration agreements.[88]

Fairness concerns notwithstanding, employees may opt to arbitrate their claims in order to take advantage of the benefits associated with arbitration.[89] Arbitration allows both parties to a dispute to avoid the high costs of litigation.[90] Moreover, arbi-

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[83] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).

[84] *Id.* (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc. 490 U.S. 477, 481 (1989)).

[85] *Id.* at 33.

[86] *See id.* at 26 (listing cases standing for the proposition that various types of statutory claims may be the subject of an enforceable arbitration agreement: Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); *Rodriguez de Quijas*, 490 U.S. 477).

[87] *Mitsubishi Motors*, 473 U.S. at 628.

[88] *See Gilmer*, 500 U.S. at 28.

[89] *See, e.g.,* Circuit City v. Adams, 532 U.S. 105, 122 (2001) ("For parties to employment contracts . . . there are real benefits to the enforcement of arbitration provisions.").

[90] *See id.* at 123.

tration proceedings are less formal than court proceedings and thus may provide swifter resolution of claims.[91] Employees of average means are in a better position to assert their claims when costs and burdens are minimized, particularly because employment litigation may involve claims for small amounts of money.[92] Commentators also urge that arbitration agreements increase employees' access to a forum to settle their disputes because lower costs and decreased time expenditure make it easier for would-be plaintiffs to secure attorney representation.[93] Thus, the availability of an arbitral forum increases the likelihood that employees will be equipped to assert their claims.[94] Employees considering whether to accept an employer's arbitration agreement should be aware that arbitration might harbor both benefits and shortcomings when it comes to resolving their civil rights claims.

B. NINTH CIRCUIT PRE-*ADAMS II* DECISIONS PROTECTED EMPLOYEES FROM COMPELLED ARBITRATION OF TITLE VII CLAIMS

Prior to the U.S. Supreme Court's decision in *Circuit City v. Adams II*,[95] the Ninth Circuit frequently refused to enforce arbitration provisions in employment contracts that sought to compel employees to arbitrate Title VII employment discrimination claims.[96] For example, in *Prudential Insurance Company v. Lai*, the Ninth Circuit held that a Title VII plaintiff

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[91] *See id.*

[92] *See id.*

[93] *See* Edward A. Marshall, *Title VII's Participation Clause and Circuit City Stores v. Adams: Making the Foxes the Guardians of the Chickens*, 24 BERKELEY J. EMP. & LAB. L. 71, 96-97 (2003).

[94] *See id.*

[95] Circuit City v. Adams, 532 U.S. 105 (2001).

[96] *See, e.g.*, Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).

could only be forced to arbitrate claims she *knowingly* agreed to submit to arbitration.[97] The contract at issue in *Lai* did not specify the types of disputes the parties agreed to arbitrate.[98] "[B]ecause they did not knowingly contract to forego their statutory remedies in favor of arbitration," the court held that the employee was not bound by a valid agreement to arbitrate these employment disputes.[99]

Similarly, in *Duffield v. Robertson Stephens & Co.*, the Ninth Circuit held that employees could not be required, as a condition of employment, to waive the right to bring future Title VII claims in court.[100] The court found sufficient evidence from the text and legislative history of the Civil Rights Act of 1991 to conclude that Congress intended to preclude compulsory arbitration of Title VII claims.[101] One goal of the 1991 Act was to strengthen Title VII by making it easier to bring and prove lawsuits, and by increasing the available judicial remedies.[102] To augment plaintiffs' options, section 118 of the 1991 Act encourages the use of alternative dispute resolution methods, such as arbitration, to resolve employment disputes.[103] The Ninth Circuit reasoned, however, that it would be paradoxical for Congress to intend to strengthen Title VII, yet encourage "the use of a process whereby employers condition employment on their prospective employees' surrendering their rights to a judicial forum for the resolution of all future claims of race or sex discrimination."[104] The court held that Congress intended to encourage *voluntary* arbitration, but to preclude *compulsory* arbitration of Title VII disputes.[105]

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[97] *Lai*, 42 F.3d at 1305 (emphasis added). Knowingly means: "(1) having or showing awareness or understanding; well-informed. For example, a knowing waiver of the right to counsel; (2) Deliberate; conscious." BLACK'S LAW DICTIONARY 876 (7th ed. 1999).

[98] *Lai*, 42 F.3d at 1305.

[99] *Id.* Other courts have disagreed. *See, e.g., Armendariz*, 24 Cal. 4th at 99 n.7 (2000)(citing Seus v. John Nuveen & Co., 146 F.3d 175, 183-184 (3rd Cir. 1998) and Patterson v. Tenet Healthcare Inc., 113 F.3d 832, 838 (8th Cir. 1997), and declining to decide whether the agreement notified employees they were required to arbitrate statutory claims).

[100] *Duffield*, 144 F.3d at 1190.

[101] *Id.* at 1194 (referring to the Civil Rights Act of 1991, P.L. 102-166).

[102] *Id.* at 1191 (citing H.R. REP. NO. 102-40(I) at 30 (1991) and H.R. REP. NO. 102-40(II) at 1-4 (1991)).

[103] *See* Pub. L. No. 102-166, §118, *reprinted in* notes to 42 U.S.C. § 1981 (2000).

[104] *Duffield*, 144 F.3d at 1193.

[105] *Id.* at 1193, 1202-1203. The Ninth Circuit, *en banc*, recently overruled *Duffield* in EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).

The following year in *Craft v. Campbell Soup Co.,* the Ninth Circuit held that the FAA did not apply to any labor or employment contracts.[106] Craft, an employee of Campbell Soup Company and a union member, filed a grievance with the union alleging racial discrimination, harassment, health and safety concerns, and other claims.[107] Pursuant to a Collective Bargaining Agreement, Craft's claim, if not resolved by the grievance process, would be submitted to arbitration.[108] While his grievance was pending, Craft filed suit in federal district court alleging racial discrimination and retaliation in violation of Title VII, and state law claims for assault and emotional distress.[109] The United States District Court for the Eastern District of California ordered the arbitration of Craft's state law claims, but held that Craft could not be compelled to arbitrate his Title VII claims.[110]

On appeal, the Ninth Circuit held that the FAA did not apply to the labor agreement that governed Craft's employment.[111] At the time the FAA's coverage provision was drafted, U.S. Supreme Court decisions had restricted the scope of Congress's commerce power.[112] The Ninth Circuit determined that in enacting the FAA, Congress could only have reached the

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[106] Craft v. Campbell Soup Co., 177 F.3d 1083, 1094 (9th Cir. 1999). Surprisingly, the question had never been previously resolved. *Id.* at 1090 ("neither this court nor the Supreme Court has definitively ruled on whether the FAA applies to labor and employment contracts.").

[107] *Craft*, 177 F.3d at 1084.

[108] *Id.* A collective-bargaining agreement as it is used in labor law, is "[a] contract that is made between an employer and a labor union and that regulates employment conditions. Also termed collective labor agreement; trade agreement." BLACK'S LAW DICTIONARY 257 (7th ed. 1999).

[109] *Craft*, 177 F.3d at 1084.

[110] *Id.* The district court actually granted summary judgment in favor of Campbell Soup on Craft's state law claims. *Id.* at 1084 n.4 ("the court agrees Campbell's motion for summary judgment is equivalent to motion to compel arbitration under 9 U.S.C. § 4."). Campbell Soup appealed that portion of the district court's decision. *Id. at* 1084. Summary judgment is "[a] judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law. This procedural device allows the speedy disposition of a controversy without the need for trial." BLACK'S LAW DICTIONARY 1449 (7th ed. 1999).

[111] *Craft*, 177 F.3d at 1094.

[112] *Id.* at 1086-1087 (referring to Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941); Howard v. Illinois Cent. R.R., 207 U.S. 463 (1908); United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924)). "Commerce power" refers to the constitutional grant of power to Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art. I § 8, cl. 3.

employment contracts of workers who actually transported people or goods in interstate commerce.[113] Section 1 of the FAA then exempted those same employment contracts from the FAA's coverage.[114] The Ninth Circuit concluded, therefore, that Congress did not intend the FAA to cover any employment contracts.[115] In *Craft*, the Ninth Circuit became the only federal court of appeals to hold that the FAA did not govern arbitration clauses in employment contracts.[116]

C. THE U.S. SUPREME COURT STEPS IN: *CIRCUIT CITY V. ADAMS I AND II*

1. Circuit City v. Adams I

In *Circuit City v. Adams* (hereinafter "*Adams I*"), Adams, the plaintiff, completed and signed a portion of the Circuit City job application, entitled Circuit City Dispute Resolution Agreement (hereinafter "DRA").[117] The agreement required employees to submit all claims to mutually binding arbitration, and was a mandatory prerequisite to employment with Circuit City.[118] Two years later, Adams filed an employment discrimination suit against Circuit City in state court, under California's Fair Employment and Housing Act (hereinafter "FEHA").[119] Pursuant to the FAA, Circuit City filed suit in federal district court to stay the state court action and to compel

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[113] *Craft*, 177 F.3d at 1087. *See* 9 U.S.C. § 2 (2000).

[114] *Craft*, 177 F.3d at 1087 (9th Cir. 1999). *See also*, 9 U.S.C. § 1 (2000) (containing an exemption from the FAA's coverage: "but nothing herein contained shall apply to contracts for employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.").

[115] *Craft*, 177 F.3d at 1087. *See also*, 9 U.S.C. § 1 (2000) and *supra* note 114.

[116] Circuit City v. Adams, 532 U.S. 105, 109, 111 (2001) (citations omitted).

[117] Circuit City v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).

[118] Circuit City v. Adams, 194 F.3d at 1071.

[119] Circuit City v. Adams, 532 U.S. at 110. The California Fair Employment and Housing Act (FEHA), CAL. GOV. CODE §§ 12900-12996 (West Supp. 2004). Unlawful employment practices are set forth in CAL. GOV. CODE § 12940 ("It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California: (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.").

Adams to arbitrate his claims.[120] The United States District Court for the Northern District of California held that the DRA obligated Adams to submit to arbitration.[121]

On appeal to the Ninth Circuit, and in light of its fresh holding in *Craft*, the court reasoned that if the DRA was considered an employment contract, then the FAA did not apply.[122] The court defined "employment contract" as "an agreement setting forth 'terms and conditions' of employment," and found that the DRA met this definition.[123] In a brief *per curiam* opinion, the Ninth Circuit held that the district court lacked jurisdiction to compel arbitration under the FAA, reversed the district court's order compelling arbitration, and remanded the case for dismissal.[124]

2. Circuit City v. Adams II

Following the Ninth Circuit's decision in *Adams I*, the U.S. Supreme Court granted a *writ of certiorari* to resolve the question of whether the FAA applies to employment contracts.[125] In *Adams II*, the U.S. Supreme Court held that § 1 of the FAA exempts only the employment contracts of transportation workers, not employment contracts in general.[126] In reaching

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[120] Circuit City v. Adams, 532 U.S. at 110. A stay is "(1) the postponement or halting of a proceeding, judgment, or (2) an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." BLACK'S LAW DICTIONARY 1425 (7th ed. 1999).

[121] Circuit City v. Adams, 532 U.S. at 110.

[122] Circuit City v. Adams, 194 F.3d at 1071. *See also, Craft*, 177 F.3d at 1094.

[123] Circuit City v. Adams, 194 F.3d at 1071 (quoting Modzelewski v. Resolution Trust Corp., 14 F.3d 1374, 1376 (9th Cir. 1994)).

[124] *Id.* at 1072. A *per curiam* opinion is "an opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 1119 (7th ed. 1999).

[125] Circuit City v. Adams, 532 U.S. at 110-111. A *Writ of Certiorari* is "an extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review. The U.S. Supreme Court uses certiorari to review most of the cases that it decides to hear." BLACK'S LAW DICTIONARY 220 (7th ed. 1999).

[126] Circuit City v. Adams, 532 U.S. at 119. *See* 9 U.S.C. § 1 (2000) ("'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein*

this decision, the Court first rejected Adams's contention that the word "transaction" in § 2 refers only to commercial transactions, therefore his employment contract was not a "contract evidencing a transaction involving commerce" within the meaning of the FAA's coverage provision.[127] The Court reasoned that Adams's interpretation of § 2, which excluded all employment contracts as beyond the scope of the FAA, would render meaningless the separate exemption in § 1 for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce."[128] Furthermore, the Court previously interpreted the words "involving commerce" in § 2 as expressing Congress's intention to legislate to the broadest limits of the commerce power.[129] For these reasons, the Court concluded that the § 2 coverage provision is not limited to commercial deals, but rather is sufficiently broad to reach employment contracts.[130] Therefore, any argument that the FAA does not cover employment contracts would necessarily rely on the exemption contained in § 1.[131]

Having decided that the arbitration provisions in Adams's employment contract were governed by the FAA, the Court went on to decide whether such contracts were removed from the FAA's coverage by the exemption in § 1 for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce."[132] Adams argued that the Court's broad interpretation of "involving commerce" in § 2 brings within the scope of the FAA all contracts that

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contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.") (emphasis added).

[127] Circuit City v. Adams, 532 U.S. at 113. *See* 9 U.S.C. § 2 (2000) ("A written provision in any maritime transaction or *a contract evidencing a transaction involving commerce* to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.") (emphasis added).

[128] Circuit City v. Adams, 532 U.S. at 113 (quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.")). *See also*, *supra* note 126 (text of 9 U.S.C. § 1 (2000)).

[129] Allied-Bruce Terminix v. Dobson, 513 U.S. 265, 277 (1995).

[130] Circuit City v. Adams, 532 U.S. at 113-114.

[131] *Id.*

[132] *Id.* at 114 (referring to 9 U.S.C. § 1).

Congress had authority to regulate.[133] In turn, § 1 exempts all *employment* contracts within that authority.[134] To dispose of this argument, the Court employed the statutory canon *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[135] The Court concluded that the residual clause, "or any other class of workers engaged in interstate commerce," exempts only the contracts of employees similar in nature to "seamen and railroad employees."[136] In other words, § 1 exempts only workers actually engaged in the transportation aspect of interstate commerce.[137]

Consequently, Adams's employment contract fell within the ambit of the FAA.[138] Pursuant to the FAA and the Circuit City DRA, Adams's claims were subject to compelled arbitration, "save upon such grounds as exist at law or equity for the revocation of any contract."[139] Moreover, the Court stated, "arbitration agreements can be enforced without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[140] *Adams II* makes clear that employers whose business activities touch interstate commerce may invoke the FAA to compel employees to arbitrate claims covered by the employers' arbitration agreements, including statutory employment discrimination claims.[141] Conversely, employers can lawfully decline to hire prospective employees who refuse to sign mandatory predispute arbitration agreements.[142]

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 114-115 (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

[136] *Id.* at 115 (referring to 9 U.S.C. § 1).

[137] *Id.* (referring to 9 U.S.C. § 1).

[138] *See id.* at 124 (reversing Ninth Circuit decision that Adams's contract was outside of the scope of the FAA).

[139] 9 U.S.C. § 1 (2000).

[140] Circuit City v. Adams, 532 U.S. at 123.

[141] *See* 9 U.S.C. § 4 (2000) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.").

[142] *See, e.g.*, Circuit City v. Adams, 532 U.S. at 123.

The U.S. Supreme Court's decision in *Adams II* is not without controversy.[143] The Court's opinion acknowledged that various *amici*, including the attorneys general of twenty-one states, objected to the Court's interpretation of § 1 of the FAA.[144] The attorneys general argued that the application of the FAA to employment contracts violates the presumption against federal preemption in areas traditionally regulated by the states.[145] In essence, the *amici* asserted that: (1) the law of employment relations, particularly employment discrimination law, is an area of traditional state authority; (2) states have a strong interest in developing employment discrimination law and in enforcing their laws in this area; (3) mandatory arbitration agreements frustrate the purposes of state civil rights laws; and finally, (4) each state should be permitted to make its own ultimate determination regarding the enforceability of mandatory arbitration agreements in the employment context.[146] The Court dismissed these objections as misplaced, stating that the "proper target of this criticism" is *Southland v. Keating*, in which the U.S. Supreme Court held that the FAA applies in state courts and preempts state laws that are hostile to arbitration.[147]

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[143] *See, e.g., id.* at 133 (Souter, J., with whom Stevens, J., Ginsburg, J., and Breyer, J. join, dissenting).

[144] *Id.* at 121. *See* Brief of Amicus Curiae of the States of California, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Vermont, Washington, and West Virginia, in support of Respondent, Adams (No. 99-1379), Circuit City v. Adams, 532 U.S. 105 (2001), *available in* 2000 WL 1369472. "Amicus Curiae" is Latin for "friend of the court," and refers to "a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter. Plural amici curiae." BLACK'S LAW DICTIONARY 83 (7th ed. 1999).

[145] Brief of Amicus Curiae of the States of California, Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Pennsylvania, Vermont, Washington, and West Virginia, in support of Respondent, Adams (No. 99-1379), Circuit City v. Adams, 532 U.S. 105 (2001), *available in* 2000 WL 1369472, at *1-2.

[146] *Id.*

[147] Circuit City v. Adams, 532 U.S. at 122 (citing Southland v. Keating, 465 U.S. 1 (1984)).

The U.S. Supreme Court pointed out in *Adams II* that Congress never overturned *Southland.*[148] The Congressional response to *Adams II*, however, is not yet clear. Since *Adams II*, various bills have been introduced in the House of Representatives, "to amend [the Federal Arbitration Act], to allow employees the right to accept or reject the use of arbitration to resolve an employment controversy."[149] None, however, have gained much support.[150] Similarly, the California Assembly Judiciary Committee endorsed a bill that would have "invalidated arbitration agreements between employers and employees that relate to employment practices covered by the Fair Employment and Housing Act [FEHA], that are required as a condition of employment or continued employment."[151] Former California Governor Gray Davis vetoed the measure.[152] Until these legislators garner the support they need to amend the FAA, the U.S. Supreme Court's determination that employers may force employees to arbitrate workplace discrimination claims remains the law.[153]

II. NINTH CIRCUIT JURISPRUDENCE IN THE AFTERMATH OF *ADAMS II*

Following its decision in *Adams II*, the U.S. Supreme Court granted petitions for *writs of certiorari* for several Ninth Circuit cases, and remanded those cases for further considera-

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[148] *Id.* (citing *Southland*, 465 U.S. 1).

[149] H.R. 540, 108th Cong. (2003) (introduced in House of Representatives, February 5, 2003). *See also* H.R. 2282, 107th Cong. (2001) (previous version introduced in House of Representatives, June 21, 2001, "[t]o amend title 9 of the United States Code to exclude all employment contracts from the arbitration provisions of chapter 1 of such title.").

[150] H.R. 540, 108th Cong. (2003), introduced in House of Representatives on February 5, 2003, was still in House Committee as of March 7, 2004. According to www.westlaw.com, database BC (BillCast), H.R. 540 has a 3% chance of passing the House Committee. H.R. 2282, 107th Cong. (2001), failed to pass the 107th Congress.

[151] A.B. 1715, Cal. Assem., Reg. Sess. 2003-2004 (Cal. 2003).

[152] *See* Linda Rapattoni, *Bills on Retaliation, Arbitration Vetoed*, SAN FRANCISCO DAILY JOURNAL, October 14, 2003, at 1 (Governor Gray Davis vetoed A.B. 1715, a bill by the Assembly Judiciary Committee that would have barred employers from forcing employees to arbitrate disputes governed by FEHA).

[153] *See* Circuit City v. Adams, 532 U.S. 105, 123 (2001) ("arbitration agreements can be enforced without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law.").

tion in light of its holding.[154] *Adams II* was remanded to the Ninth Circuit for further proceedings consistent with the U.S. Supreme Court's opinion.[155] In *Circuit City v. Adams III* (hereinafter "*Adams III*"), the Ninth Circuit held that the arbitration agreement in Circuit City's DRA was unconscionable under California law and refused to order Adams to arbitrate his claims.[156] In several other remanded cases, the Ninth Circuit applied the doctrine of unconscionability to invalidate mandatory arbitration clauses.[157] These cases illustrate that even after *Adams II*, the Ninth Circuit remains just as unlikely to enforce mandatory arbitration agreements that are required as a condition of employment.[158] In the wake of the pro-arbitration mandate of

Adams II, the Ninth Circuit has consistently invalidated agreements that compel employee arbitration, an end that neither federal nor state legislators have been able to accomplish.

The Ninth Circuit's post-*Adams II* decisions rely on § 2 of the FAA, which allows employees to rescind arbitration agreements if they can show traditional grounds for invalidating contracts such as fraud, duress, or unconscionability.[159] The

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[154] *See, e.g.,* Circuit City Stores v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002), *cert. granted*, 532 U.S. 938 (2001); Circuit City Stores v. Ingle, 328 F.3d 1165 (9th Cir. 2003), *cert. granted*, 532 U.S. 938 (2001).

[155] Circuit City v. Adams, 532 U.S. at 124.

[156] Circuit City v. Adams, 279 F.3d 889, 896 (9th Cir. 2002).

[157] *See supra* note 13 for a definition of unconscionability. *See infra* Parts II-A and II-C for a discussion of cases in which the Ninth Circuit invalidated arbitration agreements on unconscionability grounds.

[158] CAL. CIV. CODE § 1670.5(a) (West 1985) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.").

[159] 9 U.S.C. § 2 (2000). *See, e.g.,* Circuit City v. Adams, 279 F.3d at 892. Fraud refers to "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. In contract law, fraud also refers to unconscionable dealing; the unconscientious use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain." BLACK'S LAW DICTIONARY 670 (7th ed. 1999). Duress broadly refers to "the threat of confinement or detention, or other threat of harm, used to compel a person to do something against his or her will or judgment. Duress is a recognized defense to a contractual breach." BLACK'S LAW DICTIONARY 250 (7th ed. 1999). Unconscionability refers to "(1) extreme unfairness, or (2) the principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, especially terms that are unreasonably favorable to one party while precluding meaningful choice for the other party." BLACK'S LAW DICTIONARY 1526 (7th ed. 1999).

Ninth Circuit held the arbitration agreements unconscionable for primarily three reasons.[160] First, when arbitration agreements are a required condition of employment, employees cannot negotiate or reject the agreement's terms.[161] The Ninth Circuit considers such agreements to be procedurally unconscionable.[162] Second, because employers are unlikely to bring typical employment-related suits against employees, the arbitration agreements lack bilaterality.[163] Such agreements are considered unfairly one-sided because the employee gives up her right to have her claims resolved in a judicial forum, while her employer, who is unlikely to sue its employees, makes no reciprocal sacrifice.[164] Finally, Ninth Circuit considers terms contained in arbitration agreements that restrict the employee's rights under employment discrimination statutes to be substantively unconscionable.[165]

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[160] *See infra* notes 161-229 and accompanying text.

[161] *See, e.g.*, Circuit City v. Adams, 279 F.3d at 893 ("The [arbitration] agreement is a prerequisite to employment, and job applicants are not permitted to modify the agreement's terms—they must take the contract or leave it.").

[162] *See infra* notes 166-229 and accompanying text for examples of cases assessing procedural unconscionability in the making of arbitration agreements.

[163] *See, e.g.*, Circuit City v. Adams, 279 F.3d at 893-894 ("the [arbitration agreement] unilaterally forces employees to arbitrate claims against the employer."). The use of the term "bilaterality" in the unconscionability context should not be confused with the more common usage of "bilateral" in the sense of a bilateral contract. A bilateral contract is "a contract in which each party promises a performance, so that each party is an obligor on that party's own promise and an obligee on the other's promise." BLACK'S LAW DICTIONARY 318 (7th ed. 1999). In requiring "bilaterality" in an employment arbitration agreement, the California Supreme Court concluded: "Given the basic and substantial nature of the rights at issue [namely, the benefits and protections the right to a judicial forum provides], we find that the unilateral obligation to arbitrate is itself so one-sided as to be substantively unconscionable." Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 117 (2000) (adopting the language in Kinney v. United Healthcare Services, 70 Cal. App. 4th 1322, 1332 (1999)).

[164] *See, e.g.*, Circuit City v. Adams, 279 F.3d at 893-894; Circuit City v. Ingle, 328 F.3d 1165, 1173-1174 (9th Cir. 2003) (rejecting Circuit City's argument that the employer is subjected to same arbitration terms as employees because the only claims realistically affected by the agreement are those employee would initiate against employer).

[165] *See, e.g.*, Circuit City v. Adams, 279 F.3d at 894-895; *Ingle*, 328 F.3d at 1171; Circuit City v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003) (finding DRA substantively unconscionable because it required employees to arbitrate statutory claims without the benefit of a full range of statutory remedies).

A. ON REMAND: *CIRCUIT CITY V. ADAMS III*

The Ninth Circuit's treatment of *Adams II* on remand illustrates how the court applies these principles of unconscionability to invalidate employment arbitration agreements. The U.S. Supreme Court concluded in *Adams II* that Adams's employment contract is within the scope of the FAA.[166] The DRA's provisions for compelled arbitration are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or equity for the revocation of any contract.*" [167] The FAA thus allows employees to revoke arbitration agreements if they can prove traditional grounds for invalidating contracts, such as unconscionability.[168] In *Adams III*, Adams asserted that the DRA is an unconscionable adhesion contract.[169] Because he was employed in California, the Ninth Circuit looked to California contract law to determine whether the agreement is valid.[170]

Applying California law, the court easily found that elements of both procedural and substantive unconscionability infected Circuit City's DRA.[171] In assessing the procedural aspect of unconscionability, the court considered the respective bargaining power of the parties at the time the contract was formed.[172] The DRA was a standard-form contract, drafted by Circuit City, the party with superior bargaining power.[173] Adams had no opportunity to negotiate or modify its terms.[174] Because it was offered as a take-it-or-leave-it prerequisite to Adams's employment, the court determined that the DRA was a

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[166] *See* Circuit City v. Adams, 532 U.S. 105, 124 (2001) (reversing Ninth Circuit decision that Adams's contract was not within the scope of the FAA).

[167] 9 U.S.C. § 2 (2000) (emphasis added).

[168] *Id.*

[169] Circuit City v. Adams, 279 F.3d at 892. An adhesion contract is a standardized contract drafted by the party with superior bargaining power, usually the employer, which is imposed on the weaker party, usually the employee, on a take-it-or-leave-it basis. *Armendariz*, 24 Cal. 4th at 113. Because there is no opportunity to reject or negotiate the terms of the agreement, adhesive contracts have potential to be unfair to the weaker party. *Id.* at 115. Adhesion contracts are enforceable, however, unless a court determines they contain terms that are unconscionable, or "so one-sided as to shock the conscience." *Ingle*, 328 F.3d at 1172 (quoting Kinney v. United Healthcare Services, Inc., 70 Cal. App. 4th 1322, 1330 (1999)).

[170] Circuit City v. Adams, 279 F.3d at 892.

[171] *Id.* at 893.

[172] *Id.*

[173] *Id.*

[174] *Id.*

procedurally unconscionable adhesion contract.[175] *Adams III* makes clear that an arbitration agreement required as a condition of employment is considered procedurally unconscionable, at least where the employer has a stronger bargaining position than the prospective employee.[176]

Turning from the formation process to the substantive terms of the agreement, the Ninth Circuit concluded that the DRA was substantively unconscionable because it contained terms that were "unduly harsh" or oppressive.[177] The Ninth Circuit found that the DRA did not require Circuit City to arbitrate claims against employees.[178] It then held that "this unjustified one-sidedness deprive[d] the DRA of the "modicum of bilaterality"[179] that the California Supreme Court requires for contracts to be enforceable under California law."[180] Additionally, the DRA restricted Adams's ability to fully vindicate his statutory claims by limiting the relief available to him, requiring him to split arbitration costs with the employer, and providing for a one-year statute of limitations on the arbitration of his claims.[181] Having determined the DRA to be both procedurally and substantively unconscionable, the court concluded that the objectionable provisions "pervaded" the agreement.[182] Rather than sever the unconscionable terms, the Ninth Circuit refused to enforce the entire arbitration agreement.[183]

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[175] *Id.*

[176] This is illustrated by Ninth Circuit cases since *Adams III*, including Circuit City v. Ingle, 328 F.3d 1165, 1171 (9th Cir. 2003) and Circuit City v. Mantor, 335 F.3d 1101, 1107 (9th Cir. 2003). *See also*, Circuit City v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002); Circuit City v. Najd, 294 F.3d 1106, 1108, n.2 (9th Cir. 2002) (finding no procedural unconscionability where employees had an opportunity to opt out of the arbitration program).

[177] Circuit City v. Adams, 279 F.3d at 893 (citing Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000)).

[178] *Id.*

[179] In requiring a "modicum of bilaterality" to enforce an arbitration agreement, the California Supreme Court explained: "Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness based on 'business realities.'" *Armendariz*, 24 Cal. 4th at 117. *See also, supra* note 163.

[180] Circuit City v. Adams, 279 F.3d at 893 (citing *Armendariz*, 24 Cal. 4th at 118).

[181] *Id.*

[182] *Id.* at 895-896.

[183] *Id.* (noting court's discretion under California law to sever an unconscionable term or refuse to enforce the contract in its entirety pursuant to CAL. CIV. CODE § 1670.5(a) (West 1985)).

B. APPLYING UNCONSCIONABILITY IN OTHER CASES: VOLUNTARY EQUALS ENFORCEABLE

Following its decision to invalidate the arbitration agreement in *Adams III*, the Ninth Circuit upheld the validity of two other Circuit City arbitration agreements.[184] In *Circuit City v. Ahmed*, the Ninth Circuit initially reversed the order of the United States District Court for the Central District of California compelling arbitration of Ahmed's claims under FEHA, based on *Craft's* holding that employment contracts are exempted from the FAA's coverage.[185] The U.S. Supreme Court granted *certiorari*, and remanded the case for further consideration in light of its decision in *Adams II*.[186] On remand, the Ninth Circuit affirmed the district court's order compelling arbitration.[187] Similarly, in *Circuit City v. Najd*, the court upheld the validity of the DRA's arbitration provisions.[188]

Relying on one key factor, the Ninth Circuit distinguished the arbitration agreements at issue in both *Ahmed* and *Najd* from that which it refused to enforce in *Adams III*.[189] Both Ahmed and Najd had an opportunity to decline participation in the arbitration program by mailing in a one-page form.[190] Therefore, neither Ahmed's nor Najd's contracts were procedurally unconscionable because they were free to accept or reject the arbitration clause without risking their continued employment with Circuit City.[191] Absent a showing of procedural unconscionability by Ahmed or Najd, the court declined to address their arguments that the agreements were substantively unconscionable, and upheld the agreements as valid.[192]

In contrast to Ahmed and Najd, Adams was required to sign the arbitration agreement contained in his Circuit City job

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[184] Circuit City v. Ahmed, 283 F.3d 1198 (9th Cir. 2002). Circuit City v. Najd, 294 F.3d 1104 (9th Cir. 2002).

[185] Circuit City v. Ahmed, 195 F.3d 1131 (9th Cir. 1999) (reversing district court order compelling arbitration based on Craft v. Campbell Soup Co., 177 F.3d 1083, 1086 (9th Cir. 1999)).

[186] *See* Circuit City v. Ahmed, 283 F.3d 1198 (9th Cir. 2002), *cert. granted,* 532 U.S. 938 (2001).

[187] *Ahmed*, 283 F.3d at 1200.

[188] *Najd*, 294 F.3d at 1109.

[189] *See Ahmed,* 283 F.3d at 1199; *Najd*, 294 F.3d at 1108.

[190] *See Ahmed,* 283 F.3d at 1199; *Najd*, 294 F.3d at 1108.

[191] *See Ahmed,* 283 F.3d at 1199; *Najd*, 294 F.3d at 1108.

[192] *Ahmed*, 283 F.3d at 1200; *Najd*, 294 F.3d at 1108.

application before he could be considered for employment.[193] The arbitration agreement was an adhesion contract because Adams had to either accept Circuit City's terms, or reject the entire contract along with the job.[194] Circuit City's superior bargaining power is buttressed by the fact that few employees are in a position to refuse employment because of an arbitration clause.[195] For these reasons, the Ninth Circuit found the DRA at issue in *Adams III* to be a procedurally unconscionable adhesion contract.[196] The pattern established by *Adams III,* on one hand, and by *Ahmed* and *Najd* on the other hand, indicates that the Ninth Circuit will not enforce an arbitration agreement upon which employment is conditioned, so long as the party opposing arbitration also establishes an element of substantive unconscionability.[197]

C. PRESUMED UNCONSCIONABLE: *CIRCUIT CITY V. INGLE*

Similarly to Adams, Ingle, the plaintiff in *Circuit City v. Ingle,* was required to sign an arbitration agreement before Circuit City considered her employment application.[198] Three years after Circuit City hired her, Ingle filed suit against Circuit City in the United States District Court for the Southern District of California.[199] She alleged claims of sexual harassment, sex discrimination and disability discrimination under FEHA, and sex discrimination and retaliation claims under Title VII.[200] Circuit City moved to compel arbitration pursuant to the FAA, but the district court denied the motion on the ground that Circuit City unlawfully conditioned Ingle's em-

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[193] Circuit City v. Adams, 279 F.3d at 891-892.

[194] *Id.* at 893.

[195] *Id.*

[196] *Id.*

[197] *See, e.g., id.* (holding the arbitration provisions in Adams's DRA unconscionable based on findings of both procedural and substantive unconscionability). *Cf. Ahmed*, 283 F.3d at 1199; *Najd*, 294 F.3d at 1108 (finding no procedural unconscionability, therefore declining to address arguments as to substantive unconscionability, and holding the DRA a valid, enforceable contract).

[198] Circuit City v. Ingle, 328 F.3d 1165, 1169 (9th Cir. 2003).

[199] *Id.*

[200] *Id.*

ployment upon her agreement to forego statutory rights and remedies.[201]

The district court relied on the Ninth Circuit's decision in *Duffield v. Robertson Stephens & Co.*, which held that employees may not be required, as a condition of employment, to waive their right to bring future Title VII claims in court.[202] The Ninth Circuit, however, overruled *Duffield*.[203] In an *en banc* decision, the Ninth Circuit disavowed *Duffield* and held that no conflict exists between the purpose of Title VII and compulsory arbitration of Title VII claims.[204] In overruling *Duffield*, the Ninth Circuit ostensibly brought its position in line with other circuits, and with the U.S. Supreme Court.[205] In reality, however, the impact of this decision is minimal. The Ninth Circuit recognized that *Duffield* was called into question by the U.S. Supreme Court's broad pronouncement in *Adams II* that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[206] Since *Adams II,* the Ninth Circuit has not relied on *Duffield* to invalidate agreements to arbitrate Title VII claims. Rather, it has invalidated arbitration agreements based on state law unconscionability grounds.[207] The Ninth Circuit's reliance on state law contract defenses to invalidate arbitration agreements is evidence that it has not embraced the federal policy favoring the enforcement of arbitration agreements in employment contracts.

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[201] *Id.* The district court based its ruling on Duffield v. Robertson, Stephens, & Co., 144 F.3d 1182 (9th Cir. 1998) (holding that an employee cannot be compelled to arbitrate Title VII claims). *Ingle*, 328 F.3d at 1169.

[202] *Duffield*, 144 F.3d at 1190, *overruled by* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).

[203] *Luce, Forward*, 345 F.3d at 750-751.

[204] *Id. En banc* is French for "on the bench," and refers to "a decision rendered with all judges present and participating; in full court." BLACK'S LAW DICTIONARY 546 (7th ed. 1999).

[205] *Luce, Forward*, 345 F.3d at 748-749.

[206] Circuit City v. Adams, 532 U.S. 105, 123 (2001).

[207] *See, e.g.*, Circuit City v. Adams, 279 F.3d 889, 895 (9th Cir. 2002); Circuit City v. Ingle, 328 F.3d 1165, 1180 (9th Cir. 2003); Circuit City v. Mantor, 335 F.3d 1101 (9th Cir. 2003) (invalidating DRA found unconscionable under California law). *Cf.* Circuit City v. Ahmed, 283 F.3d 1198, 1199 (9th Cir. 2002); Circuit City v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002) (upholding DRA absent procedural unconscionability).

On appeal in *Ingle,* the Ninth Circuit affirmed the district court's denial of Circuit City's motion to compel arbitration.[208] The Ninth Circuit concluded that the Circuit City arbitration agreement was unconscionable under California law, without relying on *Duffield*.[209] The court found that Circuit City's superior bargaining power precluded Ingle "from enjoying a meaningful opportunity to negotiate and choose the terms of the contract."[210] Moreover, the Ninth Circuit refused to allow Circuit City to rely on *Ahmed* or *Najd* to support its contention that the DRA in *Ingle* was not procedurally unconscionable.[211] The arbitration agreements in *Ahmed* and *Najd* were not procedurally unconscionable only because the employees in those cases each had an opportunity to opt out of the arbitration program.[212] Ingle had no such opportunity.[213] Therefore, *Adams III*, rather than *Ahmed* and *Najd*, controlled the Ninth Circuit's finding that Ingle's agreement was procedurally unconscionable.[214]

Turning next to the question of substantive unconscionability, the Ninth Circuit found that the DRA at issue in *Ingle* required arbitration of claims brought by employees, but not claims brought by Circuit City.[215] As in *Adams III*, this "one-sidedness" deprived the DRA of the bilaterality required to enforce the contract under California law.[216] Circuit City argued that the terms of the agreement applied equally to its own claims, but to no avail.[217] The Ninth Circuit concluded that only employees' claims are "realistically affected" by the agreement because of the unlikelihood that Circuit City would initiate an action against lower-level employees.[218] Thus, "the lucre of the arbitration agreement flows one way: the employee relinquishes rights while the employer generally reaps the

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[208] *Ingle*, 328 F.3d at 1169.

[209] *Id.* at 1180.

[210] *Id.* at 1171 (quoting Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1532 (1997)).

[211] *Id.* at 1172.

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *Id.* at 1173.

[216] *Id.*

[217] *Id.*

[218] *Id.* at 1173-1174.

benefits of arbitrating employment disputes."[219] In other words, when employees promise to forgo their rights to a judicial forum, employers obtain an advantage but make no reciprocal sacrifice.[220]

Based on this assumption, the Ninth Circuit went a step further in *Ingle* than it did in *Adams III*. The Ninth Circuit held that under California law, arbitration contracts between employers and employees raise *a rebuttable presumption of substantive unconscionability*.[221] This holding alters the usual procedure under California law by which a party to an arbitration agreement may ask a court to compel arbitration pursuant to the agreement and to the FAA.[222] A court following that pro-

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[219] *Id.* at 1174.

[220] *See, e.g.*, Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83, 117 (2000) ("Given the disadvantages that may exist for plaintiffs arbitrating disputes, it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the employee as plaintiff but not to accept such limitations when it seeks to prosecute a claim against the employee, without at least some reasonable justification for such one-sidedness.").

[221] *Ingle*, 328 F.3d at 1174 (emphasis added).

[222] CAL. CODE CIV. PROC. § 1281.2 (West 1982) ("On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: (a) The right to compel arbitration has been waived by the petitioner; or (b) Grounds exist for the revocation of the agreement. Subsection (c) provides in relevant part: A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition . . . If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit. If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies. If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."). California courts have held that CAL. CODE CIV. PROC. § 1281.2, subsection (c) is preempted by

cedure must first decide whether the agreement to arbitrate exists.[223] The party seeking arbitration must prove by a preponderance of the evidence that such agreement exists because the court may not compel arbitration unless the parties have themselves agreed to arbitrate.[224] If an agreement exists but the party opposing arbitration raises a defense to preclude its enforcement, the court must then decide whether the agreement is enforceable.[225] The party opposing arbitration must prove the elements of its defense by a preponderance of the evidence.[226] Usually, employees challenging the enforceability of an arbitration agreement must prove why it should *not* be enforced.[227] *Ingle's* holding shifts this burden to employers to show why the contract *should* be enforced.[228] *Ingle* instructs courts within the Ninth Circuit to presume that employment arbitration agreements are substantively unconscionable unless the employer can demonstrate that *the effect* of the arbitration contract is bilateral.[229]

III. A POSITIVE APPROACH TO UNCONSCIONABILITY UNDER CALIFORNIA LAW: *ARMENDARIZ V. FOUNDATION HEALTH PSYCHCARE SERVICES*

The Ninth Circuit decisions to invalidate arbitration contracts on unconscionability grounds rely heavily on the California Supreme Court decision in *Armendariz v. Foundation*

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the FAA. *See* Warren-Guthrie v. Health Net, 84 Cal. App. 4th 804, 811, 812 (2000) ("Section 1281.2(c), which allows the state court to disregard an arbitration clause due to the possibility of inconsistent rulings, is clearly inconsistent with the FAA's general mandate requiring enforcement of arbitration clauses . . . We hold, therefore, that section 1281.2 has been preempted by the FAA *if* it is used in order to avoid or delay arbitration of a contract dispute governed by the FAA."). The United States Supreme Court held that "application of the California statute [section 1281.2(c)] is not preempted by the [FAA] in a case where the parties have agreed that their arbitration agreement will be governed by the law of California." Volt Info. Sciences v. Leland Stanford Jr. Univ., 489 U.S. 468, 470 (1989).

[223] Rosenthal v. Great W. Fin. Sec. Corp., 14 Cal. 4th 394, 413 (1996).

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.*

[228] Circuit City v. Ingle, 328 F.3d 1165, 1174 (9th Cir. 2003).

[229] *Id.* (emphasis added).

Health Psychcare Services.[230] It should be noted at the outset that *Armendariz* was decided before the U.S. Supreme Court definitively ruled that the FAA applies to employment contracts.[231] Furthermore, *Armendariz* was not decided under the FAA, but rather under a state law equivalent entitled the California Arbitration Act (hereinafter "CAA").[232] These distinctions are inconsequential, however, because the CAA specifically covers agreements between employers and employees, and because the language of the CAA echoes the FAA's coverage provision.[233] Similarly to federal law, California law favors the enforcement of valid arbitration agreements contained in employment contracts.[234] Under both the CAA and the FAA, arbitration agreements may only be invalidated on grounds of fraud, duress, or unconscionability.[235]

In *Armendariz*, two employees filed claims of wrongful termination against their former employer, Foundation Health Psychcare Services, alleging they were terminated because of their sexual orientation (heterosexual) in violation of FEHA.[236] Before they were hired, both employees signed employment applications that included clauses requiring arbitration of future wrongful termination claims.[237] Subsequently, both employees signed separate employment agreements containing the same arbitration clause.[238] When the employees filed suit, the employer moved for an order compelling arbitration of the

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[230] *See, e.g.*, Circuit City v. Adams, 279 F.3d 889 (9th Cir. 2002); *Ingle*, 328 F.3d 1165; Circuit City v. Mantor, 335 F.3d 1101 (9th Cir. 2003) (citing Armendariz v. Found. Health Psychcare Services, Inc., 24 Cal. 4th 83 (2000)).

[231] *Armendariz*, 24 Cal. 4th 83 (2000), was decided August 24, 2000, compared with Circuit City v. Adams, 532 U.S. 105 (2001), decided March 21, 2001.

[232] The California Arbitration Act, CAL. CIV. PROC. CODE § 1281 (West 1982) ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."). Compare the FAA's coverage provision. 9 U.S.C. § 2 (2000) ("A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

[233] *See supra* note 232. *See also*, *Armendariz*, 24 Cal. 4th at 98.

[234] *Armendariz*, 24 Cal. 4th at 97.

[235] *Id.* at 114. *See also*, CAL. CIV. PROC. CODE § 1281 (West 1982); 9 U.S.C. § 2 (2000).

[236] *Armendariz*, 24 Cal. 4th at 91, 92 n.1 ("Same-sex harassment has been held unlawful under the FEHA.").

[237] *Id.* at 91.

[238] *Id.* at 91-92.

employees' claims pursuant to the CAA.[239] The trial court concluded that the arbitration agreement was unconscionable.[240] The trial court also found that several provisions of the agreement contributed to its overall unfairness. As a result, the entire agreement was held invalid.[241] The Court of Appeal for the First District reversed the trial court's decision, severed the unconscionable terms, and held that the remainder of the arbitration agreement should be enforced.[242] The California Supreme Court granted review.[243]

The agreement before the California Supreme Court in *Armendariz* required employees to submit all wrongful termination claims to binding arbitration.[244] The employer, however, remained free to file suit in court.[245] The employees were first required to sign the arbitration agreements before they could be hired, and again later in order to keep their jobs.[246] Moreover, the employees had no opportunity to negotiate the terms of the agreements.[247] For these reasons, the *Armendariz* court determined that the arbitration agreements were adhesion contracts.[248] Given the "economic pressure" felt by employees engaged in job searches and hiring processes, the court found that the adhesive nature of the arbitration agreements rendered the formation of the agreements procedurally unconscionable.[249]

In finding the agreement procedurally unconscionable, the *Armendariz* court emphasized that most employees presented with pre-employment arbitration agreements are not in a position to refuse a job because the employer requires arbitration.[250] Secondly, the California Supreme Court recognized the overall benefits of arbitration to employees, including reduced cost, expeditious resolution of claims, and informal proceedings.[251] It

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[239] *Id.* at 92. *See* CAL. CIV. PROC. CODE § 1281.2 (West 1982).
[240] *Armendariz*, 24 Cal. 4th at 92.
[241] *Id.*
[242] *Id.* at 93.
[243] *Id.*
[244] *Id.* at 91.
[245] *Id.* at 118.
[246] *Id.* at 114-115.
[247] *Id.*
[248] *Id.*
[249] *Id.* at 115.
[250] *Id.*
[251] *Id.* (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997)).

also warned, however, that such advantages are balanced by disadvantages to employees, such as waiver of the right to a jury trial, limited discovery and judicial review, and often, reduction of the size of employee awards.[252] The *Armendariz* court also acknowledged that while *voluntary* arbitration is favored in California, "voluntariness has been its bedrock justification."[253] For these reasons, the *Armendariz* court instructed California courts to be "particularly attuned" to claims by employees that employers with superior bargaining power imposed oppressive arbitration agreements.[254]

Before a court may refuse to enforce an agreement on unconscionability grounds, it must find that the contract contains elements of both procedural and substantive unconscionability.[255] In addition to being procedurally unconscionable, the *Armendariz* court found that certain terms contained in the arbitration agreements were substantively unconscionable as well.[256] First, the arbitration agreements lacked bilaterality.[257] The arbitration clause did not expressly authorize the employer to litigate claims in court.[258] The wording of the clause implied, however, that *employees* agreed to arbitrate claims arising out of wrongful termination, but not *employers*.[259] In addition to lacking bilaterality, the arbitration clause also restricted the amount of the employees' damage awards under FEHA, while no such restriction applied to the employer.[260] These "multiple defects" led the court to conclude that the agreement was "permeated" by unconscionability, thus entirely unenforceable.[261]

The agreement in *Armendariz* was limited in scope to wrongful termination claims, a claim employers typically would

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[252] *Id.* (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997)).

[253] *Id.* (emphasis added).

[254] *Id.*

[255] *Id.* at 114.

[256] *Id.* at 116.

[257] *Id.* at 120.

[258] *Id.* at 92. The arbitration clause signed by the employees stated in part: "I agree as a condition of my employment, that in the event my employment is terminated, and I contend that such termination was wrongful . . . I and Employer agree to submit any such matter to binding arbitration . . . ." *Id.*

[259] *Id.*

[260] *Id.* at 121.

[261] *Id.* at 126.

not bring against employees.[262] Still, the court found that this fact could not justify the agreement's limitation to employee claims.[263] The *Armendariz* court stated, however, that an arbitration agreement need not require the arbitration of *all* claims between employers and employees in order to be bilateral.[264] Thus, the *Armendariz* court articulated a workable standard for assessing bilaterality: an arbitration agreement is bilateral if it requires both contracting parties to arbitrate any claims arising out of "the same series of transactions or occurrences."[265] In other words, employers must agree to arbitrate claims arising out of the employment relationship which employees are required to arbitrate.[266]

The *Armendariz* court also considered whether arbitration is an appropriate forum for resolving employees' workplace discrimination claims.[267] The threshold inquiry set forth by the U.S. Supreme Court asks whether the agreement to arbitrate a statutory claim requires employees to give up substantive rights afforded by the statute, as opposed to simply submitting "to their resolution in an arbitral, rather than judicial, forum."[268] Accordingly, the *Armendariz* court held that employment discrimination claims under FEHA are arbitrable, "*if* the arbitration permits an employee to vindicate his or her statutory rights."[269] For example, the *Armendariz* court refused to enforce the agreement at issue because it restricted employees' damage awards.[270] The agreement limited the amount employees could recover to wages lost from the date of discharge to the date of the arbitration award.[271] Under FEHA, however, em-

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[262] *Id.* at 120.

[263] *Id.*

[264] *Id.* (emphasis added).

[265] *Id.*

[266] *Id.*

[267] *Id.* at 101.

[268] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[269] *Armendariz*, 24 Cal. 4th at 90 (emphasis added).

[270] *Id.* at 103-104 (emphasis added). The arbitration agreement provides in part: "I and Employer . . . agree that in any such arbitration, my exclusive remedies for violation of the terms, conditions or covenants of employment *shall be limited to a sum equal to the wages I would have earned from the date of any discharge until the date of the arbitration award. I understand that I shall not be entitled to any other remedy . . . including but not limited to reinstatement and/or injunctive relief.*" *Id.* at 92, 103-104.

[271] *Id.*

ployees can sue for an amount up to $150,000 in damages.[272] Similarly, the arbitration agreement at issue in *Armendariz* precluded employees from seeking the remedy of reinstatement to their previous positions.[273] Under FEHA, by contrast, employees can ask a court to order their employer to reinstate them.[274]

According to *Armendariz*, the California Supreme Court will not enforce arbitration provisions that compel employees to arbitrate statutory claims without providing for the full range of rights and remedies afforded by the applicable statute.[275] To ensure that employees retain the rights they would enjoy if they brought their statutory claims in court, the *Armendariz* court endorsed five minimum requirements for the arbitration of such claims.[276] An arbitration agreement that contemplates the arbitration of an employee's future Title VII and/or FEHA claims would have to guarantee to the employee the following safeguards: (1) A neutral arbitrator; (2) adequate discovery; (3) a written decision that will permit limited judicial review; (4) the availability of all types of relief otherwise available in court; and (5) limitations on the costs of arbitration that are incurred by the employee.[277] In addition to providing these

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[272] CAL. GOV. CODE § 12970 (West Supp. 2004) ("(a) If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue and cause to be served on the parties an order requiring the respondent to cease and desist from the unlawful practice and to take action, including, but not limited to, any of the following: (3) The payment of actual damages as may be available in civil actions under this part, except as otherwise provided in this section. Actual damages include, but are not limited to, damages for emotional injuries if the accusation or amended accusation prays for those damages. *Actual damages awarded under this section for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses shall not exceed, in combination with the amounts of any administrative fines imposed pursuant to subdivision (c), one hundred fifty thousand dollars ($150,000) per aggrieved person per respondent.*") (emphasis added).

[273] *Armendariz,* 24 Cal. 4th at 103-104 (emphasis added). *See supra* note 270.

[274] CAL. GOV. CODE § 12970 (a)(1)(West Supp. 2004) ("(a) If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue and cause to be served on the parties an order requiring the respondent to cease and desist from the unlawful practice and to take action, including, but not limited to, any of the following: (1) The hiring, reinstatement, or upgrading of employees, with or without back pay.").

[275] *Armendariz*, 24 Cal. 4th at 103-104.

[276] *Id.* at 103 n.8 (limiting endorsement of the "Cole" factors to the context of mandatory employment arbitration agreements).

[277] *Id.* at 102 (quoting Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1482 (D.C. Cir. 1997)). The "Cole" factors include: *(1) Neutral arbitrator.* The California Supreme Court previously held that a neutral arbitrator is essential to ensuring

safeguards, the terms of arbitration agreement must bind both employers and employees.[278]

IV. RECOMMENDATION FOR EVALUATING CLAIMS OF UNCONSCIONABILITY IN THE FUTURE: A COMPARISON OF NINTH CIRCUIT AND CALIFORNIA SUPREME COURT APPROACHES

Viewing *Armendariz* and the Ninth Circuit line of cases together, three essential concerns emerge.[279] First, mandatory arbitration clauses in employment agreements are adhesion contracts that may be considered procedurally unconscionable when required as a prerequisite to employment.[280] Second, an agreement to arbitrate must be bilateral, or equally binding as to claims brought by the employee and the employer.[281] Third,

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the integrity of the arbitration process. Graham v. Scissor-Tail, Inc., 28 Cal.3d 807, 825 (1981). *(2) Adequate Discovery.* The *Armendariz* court inferred that when parties agree to arbitrate statutory claims, they also implicitly agree to such discovery procedures as are necessary to vindicate such claims, including access to essential documents and witnesses as determined by the arbitrator. *Armendariz*, 24 Cal. 4th at 106. The *Armendariz* court also noted that a limitation on discovery is one important component of the simplicity and expedition of arbitration, and assigns the arbitrator the task of balancing simplicity with the requirements of the statutory claim. *Id.* at 106 n.11. *(3) A written decision that will permit limited judicial review.* The *Armendariz* court held that an arbitrator in a FEHA case must issue a written decision revealing the findings and conclusions on which the arbitration award is based. *Id.* at 107. *(4) The availability all relief available in court.* An arbitration agreement must not limit statutorily imposed remedies, such as punitive damages and attorney fees. *(5) Limitations on costs of arbitration incurred by employees.* The *Armendariz* court concluded that when an employer imposes mandatory arbitration as a condition of employment, it may not require employee to bear any type of expense that she would not be required to bear if she were free to bring claims in court. *Id.* at 113. The *Armendariz* court further held that a mandatory arbitration agreement that covers FEHA claims impliedly requires the employer to pay all types of costs that are unique to arbitration. *Id.*

[278] *Armendariz*, 24 Cal. 4th at 120.

[279] These cases provide a good basis for comparison because the inquiry is the same under the CAA and the FAA. *See supra* note 232.

[280] *See, e.g., Armendariz*, 24 Cal. 4th at 114-115 ("There is little dispute that [the arbitration agreement is adhesive]. It was imposed on employees as a condition of employment and there was no opportunity to negotiate."). *See also*, Circuit City v. Ingle, 328 F.3d 1165, 1172 (9th Cir. 2003) ("because Circuit City presented the arbitration agreement . . . on an adhere or reject basis, we conclude that the agreement is procedurally unconscionable.").

[281] *See, e.g., Armendariz*, 24 Cal. 4th at 120 ("an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences."). *See also, Ingle*, 328 F.3d at 1174 ("unless the employer can demonstrate that the effect of a contract to arbitrate is bilat-

terms that restrict or limit an employee's rights or remedies under civil rights statutes are substantively unconscionable.[282] These concerns are at the heart of the controversy surrounding the use of mandatory arbitration agreements in employment contracts—they need to be fair to the employees they are imposed upon. The following sections compare the approaches of the Ninth Circuit and the California Supreme Court with respect to these three concerns, and recommends the approaches that best protect employees' interests.

A. AVOID ADHESION CONTRACTS TO AVOID PROCEDURAL UNCONSCIONABILITY

The U.S. Supreme Court's opinion in *Adams II* will likely encourage more employers to implement mandatory arbitration programs.[283] Nonetheless, the *Armendariz* court and the Ninth Circuit cases agree that it may be unfair to force prospective employees to choose between securing a job by signing an arbitration agreement, or remaining unemployed but preserving their right to a judicial forum.[284] In California, both the federal and the state courts are likely to find procedural unconscionability based solely on a showing that the arbitration agreement is a prerequisite to employment.[285] Moreover, the Ninth Circuit held that merely offering employees a choice of whether or not to participate in the employer's arbitration program might not suffice to avoid a finding of procedural unconscionability.[286] Rather, employers must offer employees a *meaning-*

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eral . . . with respect to a particular employee, courts should presume such contracts substantively unconscionable.").

[282] *See, e.g., Armendariz*, 24 Cal. 4th at 121 ("The unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer."). *See also, Ingle*, 328 F.3d at 1175-1180 (finding terms several terms restricting employees rights under applicable statutes to be substantively unconscionable).

[283] *See, generally*, King and Edmund, *supra* note 10 (stating that many employers are implementing mandatory arbitration programs in response to recent high-profile cases upholding the enforceability of arbitration agreements).

[284] *See, e.g., Armendariz*, 24 Cal. 4th at 114-115; Circuit City v. Adams, 279 F.3d 889, 893 (9th Cir. 2002) (citing *Armendariz*, 24 Cal. 4th at 114-115); *Ingle*, 328 F.3d at 1171 (citing Circuit City v. Adams, 279 F.3d at 893).

[285] *See, e.g., Armendariz*, 24 Cal. 4th at 114-115; Circuit City v. Adams, 279 F.3d at 893 (citing *Armendariz*, 24 Cal. 4th at 114-115); *Ingle*, 328 F.3d at 1171 (citing Circuit City v. Adams, 279 F.3d at 893).

[286] *See* Circuit City v. Mantor, 335 F.3d 1101, 1106-1107 (9th Cir. 2003).

ful opportunity to decline participation the arbitration program.[287] The employees' decisions must be absolutely free from employer pressure.[288] Because their approaches to this issue are similar, neither the Ninth Circuit nor the California Supreme Court offers a definitively superior solution to this recurring issue.

The ultimate solution undoubtedly lies with Congress to enact legislation giving employees the right to accept or reject an agreement to arbitrate claims arising out of their employment.[289] This may prove difficult, given the lack of support received by bills introduced for this purpose at both the state and federal levels.[290] Moreover, members of Congress resorted to lobbying the Ninth Circuit to uphold *Duffield's* preclusion of compelled arbitration of statutory employment discrimination claims.[291] In a bizarre reversal of roles, fourteen members of the House of Representatives joined in filing a brief as *amici curiae* in support of their position.[292] These members of Congress appear to be asking the Ninth Circuit to accomplish by judicial decision what they have thus far been unable to accomplish through legislative amendments to the FAA. As a result, it is left to employers to correct the flaws that led employment arbitration agreements to the Ninth Circuit and the California Supreme court in the first place.

Employers should stop making their arbitration agreements mandatory, and start making them voluntary and desir-

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[287] *Id.*

[288] *Id.*

[289] *See, e.g.*, H.R. 540, 108th Cong. (2003) ("to amend [the Federal Arbitration Act], to allow employees the right to accept or reject the use of arbitration to resolve an employment controversy.").

[290] *See supra* notes 150-152.

[291] *See* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003), for reference to Brief of Members of the U.S. House of Representatives, George Miller, Barney Frank, Dennis J. Kucinich, John Conyers, Jr., Robert E. Andrews, William D. Delahunt, Harold E. Ford, Jr., Ron Kind, Edward J. Markey, Major R. Owens, Donald M. Payne, Hilda L. Solis, John F. Tierney, and Lynn L. Woolsey, in Support of the EEOC (Nos. 00-57222, 01-55321), EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (brief authored by David S. Schwartz and John M. True).

[292] *See* EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) for reference to Brief of Members of the House of Representatives, George Miller, Barney Frank, Dennis J. Kucinich, John Conyers, Jr., Robert E. Andrews, William D. Delahunt, Harold E. Ford, Jr., Ron Kind, Edward J. Markey, Major R. Owens, Donald M. Payne, Hilda L. Solis, John F. Tierney, and Lynn L. Woolsey, in Support of the EEOC (Nos. 00-57222, 01-55321), EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (brief authored by David S. Schwartz and John M. True).

able to employees. By eliminating the adhesive aspect of these agreements, employers will eliminate the concerns that arbitration agreements oppress employees and favor employers. An employer who offers his employee the option of a voluntary arbitration program for the resolution of workplace claims retains the ability to educate and encourage employees to take advantage of the benefits of such a program. Employers may wish to emphasize that employees often find it difficult to secure an attorney to litigate their Title VII claims, which generate high litigation costs but produce comparatively small damage awards.[293] For this reason, the employer's arbitration program may provide employees with the only feasible procedure for asserting their claims.[294] Employers may further promote employee participation by incorporating into their arbitration agreements the other two crucial fairness concerns, (1) bilaterality, and (2) access to a full range of rights and remedies.[295] These steps will increase the probability that employees will voluntarily agree to submit future claims to arbitration, while reducing the risk of litigation over enforcement of those agreements later on.

B. ADOPT A WORKABLE STANDARD TO PROVE BILATERALITY

Adhesive arbitration agreements raise concerns that employers will insert terms that oppress employees while favoring employers.[296] These concerns are especially warranted where the agreement requires employees to arbitrate claims against the employer, but does not require the employer to arbitrate claims against employees.[297] In this situation, employees alone bear the effects of the disadvantages of arbitration, including

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[293] *See* Marshall, *supra* note 93, at 96-97 (citing Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOLUTION 559, 563-570 (2001)).

[294] *See id.* at 97 (citing Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOLUTION 559, 564 (2001)).

[295] *See infra* Parts III-B and III-C.

[296] *See, e.g.*, *Armendariz*, 24 Cal. 4th at 115 ("Given the lack of choice and the potential disadvantages that even a fair arbitration system can harbor for employees, we must be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.").

[297] *Id.* at 115-116.

limited discovery and reduced damages awards.[298] Both *Armendariz* and the Ninth Circuit line of cases recognize that "the doctrine of unconscionability limits the extent which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself."[299]

The *Armendariz* court fielded criticism that is also properly directed at the Ninth Circuit's treatment of mandatory arbitration agreements. The FAA precludes courts assessing the enforceability of an arbitration agreement from construing the agreement in a manner different from the way non-arbitration agreements are construed under state law.[300] Consequently, courts may not target elements that are unique to arbitration when assessing unconscionability in agreements governed by the FAA.[301] The *Armendariz* court denied that requiring bilaterality in arbitration agreements singles out those agreements for disfavor in contravention of the FAA.[302] Rather, the court adopted the view that unconscionability may appear in forms peculiar to arbitration, citing as an example an agreement requiring arbitration of employee, but not employer claims.[303] The *Armendariz* court stated, "it does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense."[304] These arrangements are presumed unconscionable unless the employer offers some reasonable justification for the lack of bilaterality.[305]

In *Ingle*, the Ninth Circuit apparently adopted this reasoning in holding that arbitration agreements in employment contracts, at least when required as a condition of employment, raise a rebuttable presumption of substantive unconscionability.[306] The *Ingle* court specifically stated that its conclusion is

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[298] *Id.* at 116 (citing Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1537-1540 (1997)).

[299] *Id.* at 119.

[300] Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

[301] *Id. See also, Armendariz*, 24 Cal. 4th at 119 (citing Heily v. Superior Court, 202 Cal. App. 3d 255, 260 (1988)).

[302] *Armendariz*, 24 Cal. 4th at 119.

[303] *Id.*

[304] *Id.* at 120.

[305] *Id.*

[306] Circuit City v. Ingle, 328 F.3d 1165, 1174 (9th Cir. 2003).

consistent with the federal policy promoting arbitration.[307] In spite of this assurance, federal courts that apply California law within the Ninth Circuit will find themselves in an awkward position. The U.S. Supreme Court commands all courts to address questions regarding the enforceability of mandatory arbitration agreements in employment contracts with "a healthy regard for the federal policy favoring arbitration."[308] Yet Ninth Circuit precedent is also binding on lower federal courts within the circuit.[309] Therefore, these courts are required to presume those same agreements substantively unconscionable under *Ingle*.[310]

The tension between these competing positions is especially acute where an employee is required to sign an arbitration agreement before an employer will consider hiring him. Such agreements are sanctioned by the U.S. Supreme Court and federal law, yet are also susceptible to an easy finding of procedural unconscionability under California law as interpreted by the Ninth Circuit.[311] Of course, courts must also find that the agreement contains terms that are substantively unconscionable before they refuse to enforce it. Employees, however, no longer bear the burden of proving substantive unconscionability.[312] Rather, employers must overcome the Ninth Circuit's presumption that such agreements are fatally one-sided, even where the agreement purports to require arbitration of claims brought by both employees and employers.[313] Thus, federal courts governed by Ninth Circuit precedent need not overcome great hurdles to invalidate mandatory arbitration agreements that are a required condition of employment. Indeed, if the Ninth Circuit approach is embraced, it seems likely

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[307] *Id.* at 1174 n.10.

[308] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[309] *See, generally*, 32 AM. JUR. 2D *Federal Courts* § 604 (2003) (Absent some direction from the United States Supreme Court, binding precedent for the District Courts within a circuit is set by the Court of Appeals for that circuit).

[310] *Ingle*, 328 F.3d at 1174.

[311] *See, generally*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding valid an agreement, required as condition of employment, to arbitrate ADEA claims).

[312] *See, e.g.*, *Ingle*, 328 F.3d at 1174.

[313] *See, e.g.*, *id.* at 1175 ("even if limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitration only employee-initiated claims."). *See also*, Circuit City v. Mantor, 335 F.3d 1101, 1108 (9th Cir. 2003) (adopting language in *Ingle*).

to result in consistent judicial refusal to enforce these agreements. This result is incongruous with the FAA's stated purpose, "to reverse the longstanding judicial hostility to arbitration agreements."[314]

Moreover, the Ninth Circuit's presumption of substantive unconscionability is arguably inconsistent with the FAA for another reason. The U.S. Supreme Court held that the FAA preempts state laws aimed at restricting the enforceability of arbitration provisions.[315] *Ingle's* holding distinguishes arbitration agreements in employment contracts from all other contracts by shifting to employers the burden of proving enforceability.[316] Employers must produce evidence both that the employee agreed to arbitration and that the arbitration agreement is bilateral, therefore enforceable.[317] Employees are relieved of the burden of proving unconscionability until the employer proves bilaterality.[318] The Ninth Circuit is not in direct conflict with the U.S. Supreme Court's holding because the unconscionability defense under California law applies to all contracts, not just arbitration agreements.[319] *Ingle*'s holding, however, applies exclusively to arbitration agreements in employment contracts.[320] Under *Ingle*, the California doctrine of unconscionability operates in a manner aimed at restricting the enforceability of these types of arbitration agreements. Thus, *Ingle's* holding contravenes the FAA's policy of making arbitration agreements as enforceable as other contracts.[321]

The FAA's policy of enforcing arbitration agreements is further eroded by the *Ingle* court's failure to explain *how* an employer might rebut the presumption that its arbitration agreement is unfairly one-sided. There remains some ambigu-

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[314] *Gilmer*, 500 U.S. at 24.

[315] Circuit City v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) (quoting Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). *See also*, Southland Corp. v. Keating, 465 U.S. 1, 16 n.9 (1984).

[316] *Ingle*, 328 F.3d at 1174.

[317] *See id.* at 1175 ("even if limitation to claims brought by employees were not explicit, an arbitration agreement between an employer and an employee ostensibly binds to arbitration only employee-initiated claims."). *See also*, *Mantor*, 335 F.3d at 1108 (adopting language in *Ingle*).

[318] *Ingle*, 328 F.3d at 1174 n.10.

[319] *See* CAL. CIV. CODE § 1670.5 (West 1985) (codifying the principle that a court can refuse to enforce an unconscionable clause or contract (with no specific mention of arbitration contracts)).

[320] *Ingle*, 328 F.3d at 1174.

[321] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404, n.12 (1967).

ity on this point. On one hand, the Ninth Circuit held in *Lai* that an employee may be compelled to arbitrate only claims she has *knowingly* agreed to arbitrate.[322] Applying this standard, the court invalidated the agreement at issue in *Lai* on the ground that the employee did not knowingly agree to arbitrate her Title VII claim where the agreement did not specify the types of claims that would be subject to arbitration.[323] On the other hand, the *Ingle* court rejected Circuit City's assertion that the arbitration agreement was mutually binding, partly because the agreement listed claims typically initiated by employees, not employers.[324] Circuit City included the list to provide employees with examples of the types of claims covered by the agreement, as the Ninth Circuit previously required.

The *Ingle* court specially pointed out that even if Circuit City were subjected to the same arbitration terms as employees, "the agreement is one-sided anyway" because there is only a remote possibility that Circuit City would initiate claims against lower-level employees.[325] Employers must prove not only that the agreement on its face applies to employer-initiated claims, but also that the effect of the arbitration agreement is bilateral.[326] It will be difficult for employers to prove that the agreement is bilateral short of actually initiating a claim against an employee and submitting to arbitration for its resolution. Without a clear standard for meeting the Ninth Circuit's bilaterality requirement, neither the Ninth Circuit nor lower federal courts will consistently enforce arbitration agreements.

In contrast, the California Supreme Court in *Armendariz* articulated a standard for assessing bilaterality that effectuates the pro-arbitration purposes of the state and federal laws favoring the enforcement of arbitration agreements.[327] The *Armendariz* court explained that an employer might establish the requisite "modicum of bilaterality" by plainly stipulating in

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[322] Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1303 (9th Cir.1994).

[323] *Id.*

[324] *Ingle*, 328 F.3d at 1174 n.8.

[325] *Id.*

[326] *Id.* at 1174.

[327] *Armendariz*, 24 Cal. 4th at 120 ("an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences.").

the terms of the agreement that employer and employee are equally bound to arbitrate disputes arising out of the employment relationship.[328] Contrary to the Ninth Circuit's elusive requirement that employers prove their arbitration agreements are bilateral *in effect,* a "healthy regard for the liberal federal policy favoring arbitration"[329] requires no more than a clear statement that the obligation to arbitrate is reciprocal.

Requiring an affirmative, express stipulation that both parties are mutually bound to arbitrate claims covered by the agreement creates a workable standard to be applied by future courts. Moreover, the standard can be incorporated into existing employment arbitration programs and developed in future ones. Finally, as the employee considers whether to sign the agreement, she will be assured that at a minimum her employer is bound along with her.

C. PROVIDE FOR FULL VINDICATION OF STATUTORY CLAIMS

The third concern recognized by the Ninth Circuit and the *Armendariz* court focuses on whether the arbitration agreement contains provisions that will prevent or impede employees in vindicating their rights under civil rights statutes, such as FEHA and Title VII.[330] The approaches both courts employ to address this issue differ. The Ninth Circuit takes a "negative" or reactive approach, striking individual unconscionable terms from arbitration agreements as they reach the court until the agreement as a whole is rendered unenforceable.[331] In contrast, the *Armendariz* court takes a "positive" approach, adopting a series of affirmative minimum requirements that,

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[328] *Id.*

[329] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

[330] *See, e.g., Armendariz*, 24 Cal. 4th at 121 ("The unconscionable one-sidedness of the arbitration agreement is compounded in this case by the fact that it does not permit the full recovery of damages for employees, while placing no such restriction on the employer."). *See also, Ingle*, 328 F.3d at 1175-1180 (finding terms several terms restricting employees rights under applicable statutes to be substantively unconscionable).

[331] *See, e.g.*, Circuit City v. Mantor, 335 F.3d 1101, 1109 (2003) (holding agreement unenforceable in its entirety "because any earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration would require this court to assume the role of contract author rather than interpreter.").

when met, help to ensure the fair arbitration of important statutory claims.[332]

The *Circuit City* cases illustrate a problem with the Ninth Circuit's approach. In a series of unrelated decisions, the Ninth Circuit found that several terms of Circuit City's DRA deprived the employees of the full range of rights and remedies afforded by the applicable statutes.[333] These terms were held substantively unconscionable.[334] By now, Circuit City should be painfully aware of each invalid provision contained in its DRA. Yet, litigation continues over the amended terms of Circuit City's arbitration agreements.[335] If Circuit City is unable, after many attempts, to draft an arbitration agreement that is acceptable to the Ninth Circuit, then it is surely a formidable task for other employers to do so.

In this sense, Circuit City is representative of many employers who struggle to maintain enforceable compulsory arbitration programs, or who are considering implementing one. The Circuit City plaintiffs are representative of many employees who elect employment and arbitration over unemployment. According to Ninth Circuit precedent, however, these plaintiffs remain secure in the knowledge that they may successfully challenge their executed arbitration agreements in court. The Ninth Circuit sends the message that employees should not, indeed cannot, rely on their employers' arbitration programs to fairly protect their interests.

The Ninth Circuit's "negative" approach does not cure the root of the problem posed by the unfair restriction of employees' rights. The Ninth Circuit identifies unconscionable terms in arbitration agreements on a case-by-case basis. The court has discretion under California law to sever unconscionable terms in order to preserve and enforce the remainder of the agreement.[336] At some point, the number or scope of the offending

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[332] *Armendariz*, 24 Cal. 4th at 102.

[333] For example, in *Ingle*, the Ninth Circuit held the following terms substantively unconscionable: (1) statute of limitations; (2) prohibition on class actions; (3) filing fee; (4) cost-splitting provisions; (5) limitation on remedies; and (6) Circuit City's power to unilaterally modify or terminate the arbitration agreement. *Ingle*, 328 F.3d at 1172-1179.

[334] *See id.*

[335] *See, e.g.*, *Mantor*, 335 F.3d at 1108.

[336] *See* CAL. CIV. CODE § 1670.5 (West 1985) ("if the court as a matter of law finds the contract or any clause . . . unconscionable at the time it was made the court may

terms makes it impracticable to sever all of those terms, and the entire agreement is held unenforceable.[337] Once the agreement is invalidated, it is not clear that terms not specifically found unconscionable were instead affirmatively found acceptable, or whether they were even considered by the court. Employers like Circuit City will eventually catch up with the court's "incremental rule changes," but they continue to run the risk that the court will invalidate their arbitration agreements based on alternative or amended terms.[338]

This approach leaves employers and employees with no basis to compare "good" terms with "bad" terms, and no way to save the overall agreement. For employers, the formula for drafting an enforceable arbitration agreement remains opaque. Prospective employees, in turn, have no reference to a framework for a fair arbitration program to inform their decisions to accept or reject an employer's arbitration agreement. For these reasons, the Ninth Circuit's "negative" approach breeds litigation over the enforceability of arbitration agreements. This trend nullifies the advantages that parties attain by arbitrating rather than litigating a dispute, such as reducing costs and saving time. The Ninth Circuit's approach also contravenes the federal policy favoring arbitration by generating suspicion about the adequacy of arbitration procedures and denigrating arbitration as an effective method of dispute resolution. Finally, it leaves both employers and employees without an understanding of the requirements of a fair arbitration system.

For these reasons, the Ninth Circuit should follow the *Armendariz* court in adopting an affirmative framework setting forth minimum requirements for the fair arbitration of statutory rights.[339] Though the Ninth Circuit referred to these factors in *Adams III*, it has never affirmatively endorsed their consistent application.[340] These requirements include: (1) a neutral arbitrator; (2) adequate discovery; (3) a written deci-

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refuse to enforce the entire contract, or it may enforce the remainder of the contract without the unconscionable clause . . . .").

[337] *See id. See also, Mantor*, 335 F.3d at 1109 (holding agreement unenforceable in its entirety "because any earnest attempt to ameliorate the unconscionable aspects of Circuit City's arbitration would require this court to assume the role of contract author rather than interpreter.").

[338] *See* Schwartz, *supra* note 9, at 131.

[339] *Armendariz*, 24 Cal. 4th at 100.

[340] Circuit City v. Adams, 279 F.3d 889, 895 (9th Cir. 2002).

sion that will permit limited judicial review; (4) the availability of all types of relief otherwise available in court; and (5) limitations on the costs of arbitration that are incurred by the employee.[341] By considering each requirement in turn, the court will effectively assess the overall fairness of the agreement because terms that fail to meet one or more of these requirements will be readily apparent. Patently unsatisfactory terms are more apt to be viewed as severable from the rest of the agreement, assuming the employer made the effort to incorporate a majority of the other requirements. This approach promotes the federal policy favoring arbitration by resulting in the enforcement of more arbitration agreements.

In addition to promoting the federal policy favoring arbitration, adopting these basic requirements will protect the interests of both employers and employees. Employers likely consider it advantageous to retain the ability to choose between litigation and arbitration when it comes to vindicating their own rights.[342] But as the *Armendariz* court noted, "a unilateral arbitration agreement imposed by the employer without reasonable justification reflects the very mistrust of arbitration that has been repudiated by the United States Supreme Court."[343] Whatever reasons an employer has for limiting the agreement to cover only employee claims clearly must yield if the employer desires to enforce the agreement. On one hand, by incorporating these five requirements, employers can guarantee for themselves the preservation of their rights in the arbitration process. Thus, all employers forfeit is the unfair advantage they gain by retaining a choice of forums while limiting employees to arbitration. On the other hand, employees will understand that by agreeing to arbitrate they are not losing the benefits of a judicial forum. Rather, they are gaining the unique benefits offered by an arbitral forum.

Arguably, placing these heightened restrictions on the manner of arbitration is consistent with the U.S. Supreme Court's oft-repeated assurance, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an

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[341] *Armendariz*, 24 Cal. 4th at 102.
[342] *Id.* at 120.
[343] *Id.*

arbitral, rather than judicial, forum."[344] By affirmatively adopting and enforcing these factors, the Ninth Circuit will establish a concise and consistent method of adjudging unconscionability claims. Employees will gain confidence in their employers' arbitration systems, and will have a framework to assess the fairness and desirability of arbitrating their future claims. And employers will *finally* know what they need to do to establish and defend a valid arbitration program.

V. CONCLUSION

Arbitration holds benefits for employees, but prospective employees who are forced to sign arbitration agreements are not likely to appreciate these benefits, particularly if they suspect they are giving up significant rights. Both the Ninth Circuit and the California Supreme Court recognize the potential unfairness these agreements pose to employees. The Ninth Circuit's approach to these agreements, however, tends to exacerbate the perception that arbitration procedures adversely affect employees' rights. To remedy this problem, the Ninth Circuit should adopt certain aspects of the California Supreme Court's approach in *Armendariz* when assessing an employee's claim that an arbitration agreement is unconscionable.

First, the Ninth Circuit should adopt the California Supreme Court's standard for assessing bilaterality, which requires the arbitration agreement to clearly state that employers agree to arbitrate any claims that employees agree to arbitrate. Second, the Ninth Circuit should follow the *Armendariz* court, and adopt a framework of minimum requirements for the arbitration of important statutory claims to ensure that employees do not give up any rights or remedies afforded by the statute. By providing affirmative, workable standards for assessing unconscionability, the Ninth Circuit will balance the preservation of employees' rights with a policy encouraging voluntary arbitration as an effective method of resolving employment disputes.

The courts may only do so much to encourage employees to take advantage of the benefits of arbitration. Employers wish-

[344] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). *See also*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

ing to maintain arbitration programs should seriously consider making employee participation in the programs strictly voluntary. Employers can encourage employee participation by making it clear to employees that the agreement is bilateral, or equally binding on both employees and employers. Similarly, by incorporating into their arbitration programs the recommended minimum requirements for fair arbitration of important claims, employers will be able to educate potential employees about the implications of signing the arbitration agreement. This in turn will inspire employee confidence both in the employers' motives in presenting the agreement and in the employers' arbitration programs.

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