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No. 97429-2

Court of Appeals No. 78356-4-1

IN THE SUPREME COURT OF WASHINGTON

STEVEN BURNETT, individually and on behalf of all others similarly
situated,

Respondent,

v.

PAGLIACCI PIZZA, INC.,

Petitioner.

**BRIEF OF PUBLIC JUSTICE, P.C. AS AMICUS CURIAE IN
SUPPORT OF RESPONDENT**

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STATEMENT OF AMICUS CURIAE

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. To further its goal of defending access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration.

As part of this project, Public Justice has repeatedly challenged one-sided arbitration clauses like Pagliacci's, which allow a company to bring its claims in court, but require workers or consumers to arbitrate their claims.

As the Respondent addresses in his brief, the lower court's decision about the one-sided nature of Pagliacci's arbitration clause in this case is in keeping with the law in this State (and is consistent with the Federal Arbitration Act, which permits states to strike down one-sided arbitration clauses, as they strike down other types of one-sided and unfair contract terms). This brief will address the fact that this conclusion – that one-sided arbitration clauses are substantively unconscionable – is consistent with and supported by the clear majority of appellate authority throughout the United States. Public Justice was counsel or amici in many of those cases, and is very familiar with the law on this subject throughout

the country. Pursuant to Washington Rule of Appellate Procedure 10.6(a), Public Justice certifies that all parties have consented to the filing of this brief.

INTRODUCTION

Pagliacci's arbitration clause is one-sided. It preserves a right for Pagliacci that is not available to its employees: the ability to bring employment-related disputes before a court of law. Pagliacci's unwillingness to bind itself to arbitration undermines any claim that it might make that arbitration is a fair and just system – Pagliacci's position is that arbitration is good enough for the worker, but NOT good enough for itself. To be clear, this is not a mistake or a drafting error. Rather, it is Pagliacci acknowledging the risks it runs with arbitration—for example, committing to resolving an as-yet-unknown dispute in a private forum without the ability to appeal adverse rulings—and intentionally drafting away this risk while knowingly placing its workers in the same uncomfortable position it seeks to avoid. This is simple hypocrisy. But more than that, this one-sided provision creates a substantively unconscionable agreement that unilaterally benefits the drafter of the provision, thereby creating the sort of contract, as one state high court said, that one would expect to see “between rabbits and foxes.” *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 861 (W. Va. 1998). As this

brief will establish, the heavy majority of appellate and high court authority in states around the country, reinforced by federal appellate authority, holds that such one-sided provisions are substantively unconscionable and unenforceable.¹ This Court should follow this authority and make clear that under Washington law, such one-sided arbitration clauses are also substantively unconscionable and unenforceable.

The federal appellate authority is in accord. The lower court properly ruled that the arbitration clause at issue here is substantively unconscionable because the effect of Pagliacci's two-step mandatory arbitration policy is so one-sided and harsh that it is substantively unconscionable. In so doing, the lower court channeled the voices of nine Ninth Circuit rulings, three other courts of appeal, and nine state supreme courts.

¹ As Part II of this brief will establish, the Federal Arbitration Act permits state law to hold that one-sided arbitration clauses are substantively unconscionable. *See, e.g., Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 176 (Wis. 2006) ("Our application of state contract law to invalidate the arbitration provision at issue in the instant case is consistent with Section 2 of the Federal Arbitration Act."). A one-sided arbitration clause is hardly a core characteristic of arbitration. The vast majority of modern arbitration clauses are mutual and bilateral. Pagliacci's clause is a relic and an outlier.

This Court should follow the weight of authority from states around the country, and hold that one-sided arbitration clauses are substantively unconscionable.

ARGUMENT

I. Numerous Courts, Both State and Federal, Have Ruled that One-Sided Arbitration Provisions are Egregiously Unfair and Unconscionable.

A central issue in this appeal is whether Washington contract law would find that a one-sided arbitration clause is substantively unconscionable and unenforceable. While the parties have addressed this at length, we strongly believe that the Respondent has the better argument.

Washington state law holds that a contract is substantively unconscionable if the terms are so “one-sided” or “overly-harsh” that they render it unconscionable. *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 815 (2009) (en banc). In these instances, the contractual terms skew far enough in one direction to be considered “monstrously harsh,” “shocking to the conscience,” and “exceedingly calloused.” *Zuver v. Airtouch Commc’ns., Inc.*, 153 Wn.2d 293, 303 (2004) (citing *Nelson v. McGoldrick*, 127 Wn.2d 124, 131 (1995)). In other words, these contracts are so egregiously one-sided that the only conclusion can be that they are

unconscionable. And, because arbitration provisions are treated like any other contract, *see Weiss v. Lonquist*, 153 Wn. App. 502, 510 (2009), arbitration clauses that are excessively one-sided are also unconscionable.

Rather than address this issue in greater depth, and potentially repeat some of the arguments made by the Respondent in this case, the remainder of this amicus brief will focus on how this conclusion is consistent with the law in numerous other states, and in many federal courts as well.

A. Eight Other State Supreme Courts Have Held That Egregiously One-Sided Arbitration Agreements are Substantively Unconscionable.

Repeatedly, other state supreme courts also found egregiously one-sided arbitration provisions unconscionable. The Tennessee Supreme Court has noted that the “majority view” of courts nationwide is that a one-sided arbitration clause that allows the corporation’s claims to remain in court while requiring the individual’s claims to go to arbitration is unconscionable. *Taylor v. Butler*, 142 S.W.3d 277, 286 n.4 (Tenn. 2004). Other state supreme courts have also recognized this as the majority rule. *See Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 559 (W. Va. 2012) (“In a majority of jurisdictions, it is well-settled that a contract which

requires the weaker party to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, may be found to be substantively unconscionable.”).

The Tennessee Supreme Court—having invalidated an arbitration clause that required a consumer to bring all claims in arbitration, while allowing all of the car dealer’s claims to remain in court—is among the majority in this opinion. *Taylor*, 142 S.W.3d. at 286. That court reached that conclusion because the clause was unreasonably favorable to the dealer and oppressive to the consumer. *Id.*

The California Supreme Court similarly ruled “that in the context of an arbitration agreement imposed by the employer on the employee, such a one-sided term is unconscionable.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000). That court recognized the need to “be particularly attuned to claims that employers with superior bargaining power have imposed one-sided, substantively unconscionable terms as part of an arbitration agreement.” *Id.* at 690. Therefore, the court concluded that “[g]iven 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.’” *Id.* at 692. Moreover, in California, even if a contract is not completely non-mutual, it can still be unconscionable if it exempts the claims the company is most likely to pursue against individuals. *Mercurio v. Super. Ct.*, 116 Cal. Rptr. 2d 671, 677 (Cal. Ct. App. 2002).

The West Virginia Supreme Court—the first state supreme court to address this issue—struck down a clause requiring the elderly consumers to submit any claims they might have to arbitration, but permitting the lender to sue the couple to collect debts owed. Describing this arrangement as the type of deal reached by a rabbit and fox, the court concluded that the agreement was unconscionable and unenforceable. *See Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 1998); *see also Dan Ryan Builders*, 737 S.E.2d 550, 559 (W. Va. 2012); *Emp. Res. Grp., L.L.C. v. Harless*, 2017 WL 1371287, at *6 (W. Va. Apr. 13, 2017) (concluding that non-mutual clauses clearly favorable to one party over another are likely to be unconscionable). In pointing to the difference in bargaining position, the *Arnold* court stated that “[a] determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available

to the plaintiff, and ‘the existence of unfair terms in the contract.’” 204 W. Va. at 236 (citing *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Tel. Co.*, 186 W. Va. 613, 413 S.E.2d 670 (1991)). Consequently, the court concluded that “[g]iven the nature of this arbitration agreement, combined with the great disparity in bargaining power, one can safely infer that the terms were not bargained for and that allowing such a one-sided agreement to stand would unfairly defeat the Arnolds’ legitimate expectations.” *Arnold*, 204 W. Va. at 236.

Later on, that court also stated that “[s]uch ‘unilateral’ arbitration clauses lend themselves ‘extremely well to the application of the doctrine’ of unconscionability because ‘the right the clause bestows upon its beneficiary is so wholly one-sided and unfair that the courts should feel no reluctance in finding it unacceptable.’” *Dan Ryan Builders*, 230 W. Va. at 290 (quoting *Arnold*, 230 W. Va. at 290).

These rulings influenced the New Mexico Supreme Court in striking down an arbitration clause that “provided that the lender alone had the exclusive and unlimited alternative to seek any judicial remedies it might otherwise have available to it in law or in equity in the event of a default by the borrower.” *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 904 (N.M. 2009). In contrast, the borrowers had no right to go to

court. *Id.* at 908. That court's decision in *Rivera v. Am. Gen. Fin. Services, Inc.* reaffirmed the *Cordova* ruling. There, the New Mexico Supreme Court overturned a lower court's overly broad interpretation of *Cordova* to uphold an arbitration agreement that allowed the lender, but not the borrower, to access the courts. 6 P.3d 803, 819 (N.M. 2011).

Moreover, the New Mexico Supreme Court also overturned a facially neutral contract provision because, in its application, the provision benefitted only the insurer, not the insured. *Padilla v. State Farm Mut. Auto. Ins. Co.*, 133 N.M. 661 (2003). There, a claim resolved in favor of the insurer on the issue of liability would never be subject to de novo appeal; however, a finding in favor of the insured that the uninsured motorist was liable was subject to de novo appeal, and at risk of being overturned at that stage. *Id.* at 665–66. Consequently, the court stated that, despite being facially equal, the provision at issue created an unfair limitation on an insured's access to a de novo appeal and created an inequity in the certainty of an arbitration award. *Id.* at 665; *see also Schmidt v. Midwest Family Mut. Ins. Co.*, 426 N.W.2d 870, 873 (Minn. 1998).

The Supreme Court of Wisconsin also ruled against enforcing egregiously one-sided arbitration provisions in *Wisconsin Auto Title*

Loans, Inc. v. Jones. That case involved an arbitration clause allowing Wisconsin Auto Title Loans a choice of forum between arbitration and the circuit court, but restricting the borrower to arbitration. *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 173 (Wis. 2006). The court held that the clause contradicted the doctrine of substantive unconscionability, which limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum itself. *Id.*

In addition, Mississippi, Montana, and Arkansas have also refused to uphold egregiously one-sided arbitration provisions. *Caplin Enters., Inc. v. Arrington*, 145 So.3d 608, 617 (Miss. 2014) (en banc) (invalidating an arbitration clause allowing debt collectors to collect their debts through the judicial process while requiring debtors to arbitrate their claims against the collector) (arbitration clause “which permitted Zippy Check to pursue judicial remedies while relegating the plaintiffs’ claims to arbitration is also clearly oppressive and substantively unconscionable”); *Global Client Solutions, L.L.C. v. Ossello*, 367 P.3d 361, 371 (Mont. 2016) (concluding that a clause permitting a service provider to seek judicial relief against a consumer was unconscionable) (“This arbitration provision unreasonably favors Global to the detriment of Ossello and is therefore unconscionable

and unenforceable”). *Cf. Alltel Corp. v. Rosenow*, 2014 Ark. 375, 386 (2014) (explaining that the FAA requires courts to place arbitration contacts on “equal footing with other contracts”) (“The lack of mutuality to arbitrate in the arbitration agreement renders the agreement invalid and unenforceable.”). Also, the Supreme Court of North Carolina found that the one-sidedness of an arbitration clause between a lender and a borrower contributed to its substantive unconscionability. *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 107 (2008).

**B. The Weight of Federal Appellate Authority Agrees
That Egregiously One-Sided Arbitration Clauses are
Unconscionable.**

Numerous federal courts of appeals share this same viewpoint. Specifically within the Ninth Circuit, nine decisions have recognized the serious effects of egregiously one-sided arbitrations clauses and ruled the same. *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1000–01 (9th Cir. 2010); *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1004–05 (9th Cir. 2010); *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1079–80 (9th Cir. 2007), *overruled on other grounds by Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir. 2013); *Narampa v. MailCoups, Inc.*, 469 F.3 1257, 1285 (9th Cir. 2006) (en banc); *Al-Safin v.*

Circuit City Stores, Inc., 394 F.3d 1254, 1260–61 (9th Cir. 2005); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174–75 (9th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 785 (9th Cir. 2002); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 941 (9th Cir. 2001).

As an example, the Ninth Circuit in *Ingle v. Circuit City* ruled that Circuit City’s arbitration agreement with its workers was substantially unconscionable under California law because it required the workers to arbitrate their claims against the company, but did not require the company to arbitrate any of its claims. *Ingle*, 328 F.3d at 1174–75. Explaining that the FAA requires arbitration provisions to be treated like ordinary contracts, the *Ingle* court ruled that a contract requiring workers to arbitrate their claims while granting the employer—the drafter of the arbitration provision—access to the courts is the definition of “grossly one-sided.” *Id.* at 1174 n.10. The court further ruled that holding such one-sided contracts to be unconscionable does not “single out arbitration provisions for suspect status,” *Ingle*, 328 F.3d at 1170 n.3; rather, it applies [California’s] “generally applicable” doctrine against one-sided contracts to arbitration agreements.

Many other federal appellate courts have agreed. In *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), for example, the Fifth Circuit also struck down an arbitration clause that provided that “only the customer, but not [the cell phone company], is required to arbitrate.” The Fifth Circuit followed “Louisiana appellate cases [that] have deemed such an arrangement unconscionable and unenforceable,” as well as “arbitrary and lacking in good faith.” *Iberia Credit Bureau*, 379 F.3d at 169 (citations omitted); *see also Noohi v. Toll Bros.*, 708 F.3d 599, 612–13 (4th Cir. 2013); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1551 (11th Cir. 1985).

**II. State Laws Striking Down One-Sided Arbitration
Clauses are Consistent with the Federal Arbitration
Act.**

Although one-sided arbitration clauses are generally deemed unconscionable, the Supreme Court ruled that the FAA preempts even generally applicable contract defenses if they interfere with a fundamental attribute of arbitration. *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011). However, numerous courts have clarified that the ruling in *Concepcion* “does not preclude the application of the California unconscionability principles as stated in [*Armendariz*].” *Cisneros v. Am.*

Gen. Fin. Services, Inc., 2012 WL 3025913, at *4 (N.D. Cal. July 24, 2012). And, several circuit courts have held that the FAA does not require courts to enforce egregiously one-sided contracts simply because they involve arbitration. See *Noohi v. Toll Bros.*, 708 F.3d 599, 612–13 (4th Cir. 2013); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1551 (11th Cir. 1985). So too have the supreme courts of Arkansas, California, Missouri, Montana, New Mexico, Tennessee, West Virginia, and Wisconsin. See *Global Client Solutions, LLC*, 367 P.3d at 370–71; *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 752 (Tenn. 2015); *Alltel Corp.*, 2014 Ark. at 386; *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 495 (Mo. 2012); *Dan Ryan Builders*, 230 W.Va. at 291; *Cordova*, 146 N.M. at 266; *Wis. Auto Title Loans, Inc.*, 290 Wis.2d at 557; *Armendariz*, 24 Cal. 4th at 119–20. Therefore, the Supreme Court’s decision in *Concepcion* does not mean that egregiously one-sided arbitration provisions must be blindly upheld as fundamental attributes of arbitration. Consequently, *Concepcion* should have no bearing on this Court’s analysis of Pagliacci’s arbitration clause. Rather, this Court should join the crowd in recognizing these types of clauses as what they are, egregious and unconscionable.

CONCLUSION

At least four federal circuits and eight other supreme courts agree that egregiously one-sided arbitration clauses are unconscionable. On top of that, established Washington state law agrees that one-sided agreements are unconscionable when they excessively shift the balance in one party's favor. Accordingly, this Court should rule that Pagliacci's arbitration provision limiting only Burnett's access to the courts is unconscionable and unenforceable.

RESPECTFULLY SUBMITTED this 9th day of December, 2019.

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CERTIFICATE OF SERVICE

I, Jason T. Dennett, hereby certify that on December 9, 2019, I served the above and foregoing **Brief of Public Justice, P.C. As Amicus Curiae in Support of Respondent** by causing true and accurate copies of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Jason T. Dennett
Jason T. Dennett, WSBA #30686

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