No. 74701-6
SUPREME COURT
OF THE STATE OF WASHINGTON

GERALD ADLER,

Petitioner,

v.

FRED LIND MANOR CORP., *et al.*,

Respondents.

On Discretionary Review from King County Superior Court
Hon. Bruce W. Hilyer

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of both their business contracts and their employment agreements provisions that mandate the arbitration of disputes arising from or related to those agreements. They utilize arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes, whether with employees or with consumers and other contracting parties. Many of those advantages would be forfeited if, as petitioner urges, arbitration agreements could be invalidated based upon judicial scrutiny that is not applied to other kinds of contracts.

INTRODUCTION

Nearly a century ago, Congress passed the Federal Arbitration Act (the "FAA") to provide parties with a cost-effective means to resolve disputes. The FAA mandates that arbitration agreements be treated just like any other contract. Petitioner invites this Court to do a judicial end run around this requirement by positing a variety of bases for invalidating his agreement to arbitrate. All of petitioner's arguments share a common

thread: all would single out arbitration agreements for unfavorable treatment, a result squarely foreclosed by the FAA. To be sure, the Court could adopt petitioner's novel and sweeping view of the unconscionability doctrine and apply it to *all* contracts in the State, but then the validity of any form contract would be imperiled with contracting parties having little certainty about the validity of their obligations to one another. Indeed, the upshot of the holding sought by petitioner would be the judicial nullification of innumerable form contracts routinely used in both the employment and consumer settings, with economic operations in the State of Washington becoming a necessary casualty.

As a policy matter, there is only one group that would benefit from the adoption of petitioner's hostile view of arbitration agreements: the members of the bar. Both employers and employees bear the higher costs of litigation. With fewer opportunities to arbitrate, employers will have reduced profits, and employees can thus expect to have reduced salaries, benefits, and/or profit sharing. And, of course, employees bear the higher costs in the form of increased legal bills or higher contingency fees. More importantly, from an employee's perspective, employees *fare better in arbitration* than they do in court. Specifically, a study published by the ABA demonstrates that employees are *four times* more likely to prevail in arbitration than they are in court. Even accounting for the lower awards

associated with arbitration as compared to litigation, "[e]mployees who take their dispute to arbitration receive almost twice as much of their demands as the employees who take their dispute to court." Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISPUTE RESOLUTION MAGAZINE, Fall 1999, at 24 (Appendix at 4).[1] Employers nonetheless are better off arbitrating because of the reduced costs. In short, both employers and employees benefit from arbitration agreements.

I. THE ARGUMENTS ADVANCED BY PETITIONER CONTRADICT THE REQUIREMENTS OF THE FEDERAL ARBITRATION ACT.

Section 2 of the FAA provides that "[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). Thus, the role of state law in determining the enforceability of an arbitration clause is carefully circumscribed by the FAA. *See generally Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1994); *Perry v. Thomas*, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426

[1] Because several authorities cited herein are not readily available electronically, those authorities have been appended to this brief for the convenience of counsel and the Court. Their availability in the appendix is hereafter denoted by citations to the "App."

(1987). Though an arbitration provision may be invalidated for state law reasons applicable to *any* contract, "the uniqueness of an agreement to arbitrate" cannot undermine its validity. *Perry*, 482 U.S. at 492 n.9.

Indeed, in enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. The Act's "basic purpose" is to put arbitration agreements "on 'the same footing' as" other contracts. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974)). Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate . . . is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.' " *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). Unless that savings clause applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*." *Id.* at 492 n.9 (1987) (emphasis in original).

The Supreme Court applied these principles to invalidate a Montana statute requiring that " 'notice that [the] contract is subject to arbitration' " be " 'typed in underlined capital letters on the first page of the con-

tract.' " *Casarotto*, 517 U.S. at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (1995)). The Court reiterated that, in the FAA, "Congress precluded States from singling out arbitration provisions for suspect status." *Id.* at 687. Montana's first-page notice requirement was impermissible under Section 2 because the requirement "governs not 'any contract,' but specifically and solely contracts 'subject to arbitration.' " *Id.* at 683 Put another way, " 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted' " by the FAA. *Id.* at 687.

Acceptance of petitioner's arguments in this case would run afoul of the FAA's prohibition against the application of more stringent rules to arbitration agreements than is applied to all other private agreements. Indeed, in portions of its brief, petitioner appears to be asking this Court to adopt a judicial rule that would be functionally identical to the legislative rule invalidated by the Supreme Court in *Casarotto*. We therefore respectfully submit that the Court should reject petitioner's arguments as contrary to federal law and should respect the plain terms of the arbitration agreement entered into between petitioner and respondent.

A. Petitioner's Jury Trial Argument Rests Upon A Request for Heightened Scrutiny That Is Contrary To The FAA.

Petitioner argues that "the Arbitration Agreement violates Mr.

Adler's constitutional right to a trial by jury." Pet. Br. at 18. Specifically, petitioner asserts that an arbitration agreement cannot constitute a "voluntary, knowing, and intelligent" waiver of a person's jury trial right where (1) it is negotiated on a "take-it-or-leave-it" basis, (2) the agreement does not contain a conspicuous description of the constitutional right to a jury trial, (3) there is a disparity in bargaining power between the parties, and (4) the party signing the waiver is not "sophisticated." Pet. Br. at 13-18. Putting aside all of the reasons why these four factors are not even satisfied by the facts in this case, the petitioner's argument independently fails because it explicitly seeks to create a judicial test for invalidating arbitration agreements that does not apply to any other type of agreement.

Petitioner does not (and cannot) cite to any authority for the proposition that *all* contracts satisfying the four factors outlined above must be invalidated. A moment's reflection demonstrates that any such authority would be preposterous on its face: both employment and commercial contracts routinely are negotiated on a "take-it-or-leave-it" basis, and often are presented by large commercial businesses to smaller, less "sophisticated" businesses or individuals; yet these factors are not invoked to invalidate ordinary commercial and employment agreements.

Moreover, to the extent this "conspicuousness" prong is unique to arbitration agreements, it must be invalid. The Supreme Court has held

that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 492 n.9. "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the legislature cannot." *Id.* It is true that this Court has held that the waiver of a jury trial right must be " 'voluntary, knowing, and intelligent.' " *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001) (citation omitted). But in that very case, this Court also held that a plaintiff's failure to "timely request a jury," or "to properly participate in an arbitration" would satisfy that standard. *Id.* It is simply not tenable that such inaction may give rise to a "knowing, voluntary, and intelligent" waiver, but *signing an express agreement* cannot.

Here, the petitioner signed a contract entitled "Arbitration Agreement," which stated in the *very first sentence* that "any dispute related to my employment relationship shall be resolved exclusively through binding arbitration." CP42. An arbitration agreement with that level of clarity constitutes a perfectly valid waiver of the Seventh Amendment right to a jury trial. *See, e.g., Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a

valid arbitration agreement"). Accordingly, if this Court requires more clarity than the straightforward contract signed by the petitioner before it will enforce an arbitration agreement, then it will effectively have read into the State's Constitution a requirement that is preempted by the FAA. *See, e.g., Casarotto*, 517 U.S. at 683; *Southland Corp.*, 465 U.S. at 10. By its very terms, the FAA necessarily provides that a valid arbitration agreement waives any right to a jury trial that either party has under either the federal or any state constitution. It follows that so long as there is an otherwise valid agreement under the FAA, no state may impose any heightened requirement for waiving the state's constitutional right to a jury trial so as to frustrate arbitration.

B. The Supreme Court Has Squarely Foreclosed Plaintiff's Argument That Arbitration Is Inappropriate In Employment Discrimination Cases.

Petitioner also asserts that arbitration is simply inappropriate for a case brought under the Washington Law Against Discrimination (WLAD), because it "does not provide the safeguards for civil rights plaintiffs, like Mr. Adler, who 'assume the role of a private attorney general' and that are provided by the judicial system." Pet. Br. at 21-22. And petitioner invokes a California court decision in support of the argument that "arbitration agreements in the context of 'public unwaivable statutory rights' are held to a higher standard than arbitration agreements in the context of

'private rights.' " Pet. Br. at 10 n.4, 23 (citation omitted).

Again, any argument that calls for "a higher standard" to be applied to arbitration agreements, or to any particular subset of arbitration agreements, runs directly afoul of the FAA. *See Casarotto*, 517 U.S. 681. Thus, this Court should refuse to impose the "five requirements" that California courts recently fashioned for any "arbitration agreement that is being applied to public policy employment claims." Pet. Br. at 23-24.

This Court should also reject petitioner's argument because it boils down to nothing more than an assertion that it is *always* wrong to arbitrate civil rights disputes: specifically, petitioner asserts that civil rights claims are inappropriate for arbitration because "[a]rbitration often limits or eliminates certain kinds of procedural protections," "[a]rbitrators do not have to be lawyers," "[a]rbitrators do not have the authority to grant injunctive or remedial relief," "[a]rbitrators do not have to follow the rules of evidence nor do they have to abide by the rules of discovery," and "[a]rbitrations are usually confidential proceedings thereby insulating an employer guilty of discrimination from publicity." Pet. Br. at 22.

The Supreme Court has already rejected these very arguments. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), the Court held that a claim under the Age Discrimination in Employment Act could properly be subjected to mandatory

arbitration. It rejected "a host of challenges to the adequacy of arbitration procedures," including that arbitrators would be "biased," that "the discovery allowed in arbitration is more limited than in the federal courts," that "arbitrators will not issue written opinions, resulting . . . in a lack of public knowledge of employers' discriminatory policies," and that "arbitration procedures ... do not provide for broad equitable relief and class actions." *Id.* at 30-32.

Furthermore, the Court in *Gilmer* specifically distinguished the main authority on which petitioner relies for the proposition that arbitration is inappropriate for the resolution of civil rights claims – namely, the Supreme Court's earlier decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974). As *Gilmer* made clear, that decision dealt only with whether arbitration of *contractual* rights precluded bringing suit on statutory rights where there was no agreement to arbitrate those statutory rights. *See Gilmer*, 500 U.S. at 42. *Gilmer* also rejected the view "that arbitration was inferior to the judicial process for resolving statutory claims." *Gilmer*, 500 U.S. at 34 n.5 (citation omitted). " 'We are well past the time when judicial suspicion of . . . arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.' "

The Supreme Court's conviction on this matter is manifest: it re-

cently held that the FAA's exemption for "seamen, railroad workers and any other class of workers engaged in commerce" applied only to transportation workers, such that the Act applies to essentially *all* employment contracts. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001). In so doing, it also confirmed that "there are real benefits to the enforcement of arbitration provisions," and that the Court has "been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context." *Id.* at 122-23.

C. The FAA Preempts Plaintiff's Unconscionability Argument.

Petitioner argues that the arbitration agreement in this case can be invalidated under Washington's general common law of contractual "unconscionability." Ordinarily, of course, it is extremely rare for a contract to be invalidated as "unconscionable." *See generally* E. Allan Farnsworth, CONTRACTS, at 312 (3d ed.); *Forsythe v. BancBoston Mortgage Corp.*, 135 F.3d 1069, 1074 (6th Cir. 1997); *Southwest Pet Prods. v. Koch Indus.*, 89 F. Supp. 2d 1115 (D. Ariz. 2000). A contract is unconscionable only if "it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept.' " RESTATEMENT (SECOND) CONTRACTS § 208, cmt. b (quoting *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889)). That standard simply cannot be met here: an employee

simply cannot be met here: an employee might sensibly agree to the arbitration agreement signed by Mr. Adler because, as explained below, arbitration is a far more efficient method for resolving disputes than litigation, and, as ABA studies of arbitration of employment disputes demonstrate, generally brings about a result that is more beneficial to the employee. Thus, it is eminently reasonable for an employee to conclude that arbitration is the best way to resolve an employment dispute.[2]

Moreover, petitioner argues that "a contract may be invalidated for *either* substantive *or* procedural unconscionability," Pet. Br. at 25, and then goes on to assert that the arbitration agreement in this case may be invalidated on either ground. This is an extreme position. Courts have consistently held that "the doctrine of unconscionability involves *both* 'procedural' *and* 'substantive' elements." *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (emphases added) (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181-82 (3d Cir. 1999) (applying Pennsylvania law) and *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003)

[2] It is true that a number of recent decisions have refused to enforce arbitration agreements on unconscionability grounds. *See* Pet. Br. at 10-11, 29-31. Many of these cases, however, appear to be premised not on the principles of contract law that are applicable to all contracts, but on the courts' policy judgment that arbitration is an inferior forum for the vindication of a party's rights. For example, in *Armendariz v. Foundation Health Psychcare Servs.*, 24 Cal. 4th 83, 119, 6 P.3d 669, 693 (Cal. 2000), upon which petitioner repeatedly relies, the court held that "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." That reasoning directly contradicts the Supreme Court's holding that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2 [of the FAA]." *Perry*, 482 U.S. at 492 n.9.

(applying California law)). This Court should decline petitioner's novel invitation to jettison the traditional elements of the unconscionability doctrine. Indeed, petitioner's radically expansive view of unconscionability would cast doubt upon the enforceability of a whole host of standard commercial and employment contracts that previously would have been thought entirely unproblematic.

For example, petitioner makes much of the fact that this was a "take it or leave it" contract of "adhesion." But so too are almost all employment contracts, and a huge number of commercial contracts: the "stronger" party routinely issues a "take it or leave it" offer – "I will hire you for $XX and not a penny more" – and the "weaker" party must decide whether to accept that offer. So long as the underlying contract does not itself violate some law (such as the minimum wage), these types of agreements have never before been thought to be "unconscionable." Likewise, it cannot be sufficient under ordinary principles of contract law for one party simply to claim that he "did not understand" one term of the contract, and that therefore the contract is unenforceable due to unconscionability. Yet that is precisely what petitioner argues here. Pet. Br. at 31. Under the FAA, if this Court accepts petitioner's argument, it will be announcing that the defense of "I did not understand" will be solid grounds to invalidate *any* contract.

Similarly, if this Court accepts petitioner's substantive unconscionability arguments, it will be announcing new rules for what two parties may agree upon in their commercial and employment contracts. According to petitioner, two parties may not agree that one of them will perform certain acts (referring all disputes to arbitration) in exchange for another party providing compensation (continued employment).[3] Nor can two parties agree to split costs or fees with respect to any joint undertaking. Nor may they agree that certain rights are subject to time limits. These are all untenable propositions when applied to commercial and employment contracts generally, yet they would necessarily follow under the FAA were this Court to accept petitioner's arguments.[4]

II. ARBITRATION AGREEMENTS SERVE THE INTERESTS OF BOTH EMPLOYERS AND EMPLOYEES.

Petitioner's thinly-veiled hostility to arbitration agreements rests on the patently false assumption that arbitration systematically disadvan-

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[3] In reality, it appears from the face of the arbitration agreement that both Mr. Adler and Fred Lind Manor agreed to refer any employment disputes to arbitration. The agreement refers to "the aggrieved party" submitting "his/her/its intention to seek arbitration," and hence does not appear to have been limited to the employee's claims.

[4] To be sure, an arbitration agreement must not be so onerous as to make it impossible for the prospective litigant to "effectively ... vindicate [his or her] statutory cause of action in the arbitral forum," but the Supreme Court has held very clearly that the party challenging the arbitration agreement bears the burden of presenting evidence to demonstrate why those burdens are prohibitive. *Green Tree Fin. v. Randolph*, 531 U.S. 79, 90-91, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000) (internal quotation marks and citation omitted). Here, petitioner does not point to any evidence presented below as to why the straightforward terms of this agreement necessarily would prevent anyone from vindicating their rights under the WLAD. Absent any such evidence, the trial court was correct to compel arbitration in accordance with the agreement's plain terms.

tages employees. Petitioner ignores the three distinct advantages that employees realize in the arbitration context. First, employees bear fewer litigation costs. Second, they receive their awards more quickly. And third, studies consistently show that employees have a higher success rate in arbitration than in litigation and therefore enjoy a greater likelihood of realizing the amounts they claim in arbitration as compared to litigation.

1. Congress passed the FAA to provide employers and employees a mutually-advantageous alternative for resolving their disputes. *See* S. REP. NO. 68-536, at 3 (1924) (App. 8); H.R. REP. NO. 68-96, at 2 (1924) (App. 7). And the Supreme Court has explained that the "real benefits to the enforcement of arbitration provisions," which include enabling "parties to avoid the costs of litigation," extend at least equally to "employment litigation" such as this. *Circuit City Stores*, 532 U.S. at 122-23.

Petitioner's notion that arbitration is substantively unfair because it imposes greater costs upon employees cannot be squared with the facts. Study upon study has concluded that arbitration predictably affords employers and employees alike a *dramatically cheaper* route to achieving results comparable to those available in court.[5] For instance, a survey of employment lawyers concluded that the cost of litigation was *more than four times* the cost of arbitration: each party's combined costs, including

[5] *See* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735 n.91 (2001).

attorneys' fees, expenses, and court costs, averaged $96,000 in litigation as compared to only $20,000 in arbitration. *See* William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44 (App. 3). Other studies bear out the conclusion that arbitration costs a fraction of what litigation does.[6]

Employees bear the increased cost of litigation both directly and indirectly. For those employees that hire counsel on an hourly basis, the studies discussed above demonstrate that litigation costs a multiple of arbitration. And even in a suit brought on contingency fee, employees must typically pay an upfront retainer of $3,000 and upwards, plus a consultation fee of $200-300; this is far more than the upfront cost of arbitration.[7]

More significantly, employees bear the higher cost of litigation in the form of higher contingency fees. Lawyers set contingency fees based on (1) the amount of investment (including out of pocket expenses) necessary to prosecute a case and (2) the rate of return necessary to compensate for the likelihood of success. *See generally* Herbert M. Kritzer, *The*

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[6] *See* U.S. GEN. ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 19 (1997) (App. 6); Lewis L. Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 ANNALS AM. ACAD. POL. & SOC. SCI. 103, 117 (1994) (App. 5).

[7] *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 783, 794-803 (2003); ABA SECTION OF DISPUTE RESOLUTION, ARBITRATION NOW 24-29 (Paul Haagen ed. 1999) (App. 1); Eric J. Mogilnicki and Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U.L. REV. 761, 767, 770-72 (2003) ("Arbitration is . . . less expensive than litigation.).

Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DEPAUL L. REV. 267, 271, 285-88 (1998) (explaining how contingency fee arrangements are set and structured). As discussed more fully below, arbitration does not negatively affect the second factor, and thus lawyers should be willing to accept a lower percentage of an award as a contingency fee given that the amount of investment needed to arbitrate is significantly less than the amount required to litigate. Of course, a lower contingency fee redounds directly to the benefit of employees.

Employees also indirectly bear the increased costs paid out by employers. An employer with higher profits can pay out more in the way of salaries, fringe benefits and profit-sharing. *See, e.g.*, Ware, 16 OHIO ST. J. ON DISP. RESOL. at nn.69, 71. And even if the cost savings flow directly to the bottom line, employees that own shares of stock through retirement plans or options benefit from the company's increased profitability.

2. A second distinct benefit of arbitration is that it is a much faster route to ultimate redress than is available in court, taking "less than half of the time required for civil litigation."[8] For an employee awaiting resolu-

[8] ABA, ARBITRATION NOW at 23 (App. 1); Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998) (Whereas it takes "almost two years (679.5 days) from the time the average employment discrimination case is filed in federal district court until the time it is resolved," "[t]he average case in arbitration is resolved in 8.6 months."); *see also* Mogilnicki & Jensen, 19 GA. ST. U.L. REV. at 766-67 ("the average turnaround time for NASD arbitrations [is] 12.9 months . . . . In comparison, median turnaround time for civil cases in federal district courts during these same periods was more than 20 months.").

tion of a dispute that implicates the ability to earn a living, justice delayed can result in justice denied.

3. Petitioner's hostility to arbitration is also misplaced because employees *fare better* in arbitration than they do in court. After comparing "the results of employment arbitrations conducted by the American Arbitration Association in 1993-1995 with the results of employment discrimination litigation in the federal district courts in 1994," a study published by the American Bar Association found -- consistent with "[o]ther studies [finding] fewer employees prevailing in litigation than arbitration" -- that "[e]mployees who arbitrated their claims won 63% of the time" while "[e]mployees who went to court won only 14.9% of their cases." ABA, ARBITRATION NOW at 16 (App. 1). These findings were bolstered by the American Bar Association's follow-up comparison of the outcomes in "employment discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to July 31, 2001" with the outcomes reflected in "reported NASD and NYSE arbitration awards made between January 1989 through February 2002 in . . . employment cases." Michael Delikat and Morris M. Keliner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, ABA Vol. VI, Issue 3, Winter 2003, at 8-9 (App. 2). "[C]laimants had a higher success

rate in arbitration (46%), compared to employment cases tried to conclusion in the federal court in New York over the same period (34%)." *Id.* at 10.

Although the amount recovered by employees who prevail in court tends to exceed that recovered by employees who prevail in arbitration, *see* ABA, ARBITRATION NOW at 17-18 (App. 1); Ware at n.90, the risk-adjusted outcomes employees achieve in arbitration are more favorable to employees: when the likelihood of success is factored in, employees receive 18 percent of the amount they initially claim in arbitration, and only 10 percent of the amount they claim in court. *See* ABA, ARBITRATION NOW at 18 (App. 1). The ABA study concludes:

> Thus, the data furnishes little support for the idea that arbitration shortchanges employees. All of the studies find that employees prevail more often in arbitration than they do in court. And while successful plaintiffs receive less in arbitration than in court, plaintiffs as a whole recover more. There is no evidence of arbitral bias against employees; employee-plaintiffs win more often, and receive a higher percentage of their demands than employer-plaintiffs.

Id. at 22; *see* Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISPUTE RESOLUTION MAGAZINE, Fall 1999, at 24 ("It is hard to maintain the belief that arbitration is second class justice in the face of this evidence.") (App. 4). In short, the data foreclose petitioner's claim that arbitration is systematically biased against employees.

Despite results that decidedly favor employees, employers also benefit from arbitration. The reduced savings in legal fees and costs more than compensate businesses for the increased amount of awards. Most employment disputes do not involve disagreements over millions of dollars. Often, they involve claims for tens of thousands of dollars. Considering that savings in a routine case have been estimated at more than $75,000, *see* Howard, at 44 (App. 3), it is hardly surprising that employers readily assume the additional risk that they will end up having to pay out on employees' claims that are less than the amount of the cost savings. In essence, employers and employees share the cost savings from arbitration: both employers and employees pay lower legal bills, and employees enjoy a higher risk-adjusted likelihood of receiving the amount they claim.

All of the available evidence vindicates Congress's judgment that employers and employees should be entitled to structure their agreements so as to provide for resolution of their disputes through arbitration rather than litigation. The reality is that employees, without compromising their prospects for recovery, realize profound benefits from arbitration that petitioner now blithely discounts and would have this Court jettison.

CONCLUSION

For the foregoing reasons, the superior court's order compelling arbitration should be affirmed.

May 6, 2004

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No. 74701-6

WASHINGTON STATE SUPREME COURT

GERALD ADLER,	)	
	)	
Petitioner,	)	CERTIFICATE
	)	OF SERVICE
v.	)	
	)	
FRED LIND MANOR CORP., *et al.*,	)	
	)	
Respondents.	)	
	)	

I, Stephanie Sherman, declare under penalty of perjury under the that I am a legal assistant with Charles J. Cooper, 1500 K Street, N.W., Suite 200, Washington, D.C., 20005;

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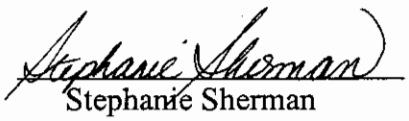
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