No. 25-7199

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEDRO RIOS, JR. and CHRISTIAN MARQUEZ, *individually and on behalf of those similarly situated*,

Plaintiffs-Appellees,

v.

HRB DIGITAL, LLC and HRB TAX GROUP, INC.,

Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of California No. 3:25-cv-03530-EMC
The Honorable Edward M. Chen, District Court Judge

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, RETAIL LITIGATION CENTER, INC., AND NATIONAL RETAIL FEDERATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the Chamber of Commerce of the United States of America ("Chamber"), the Retail Litigation Center, Inc. ("RLC"), and the National Retail Federation ("NRF") (collectively, "*amici*") are non-profit, tax-exempt organizations incorporated in the District of Columbia; they have no parent corporations; and no publicly held company has 10% or greater ownership in *amici*.

Dated: July 27, 2026 /s/ Adam G. Unikowsky

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America ("Chamber")** is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases like this one that raise issues of concern to the nation's business community.

The **Retail Litigation Center, Inc. ("RLC")** is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade association solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide

[1]All parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 *amicus* briefs on issues of importance to the retail industry.

The **National Retail Federation ("NRF")** is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. The NRF empowers the industry that powers the economy. Retailers represent the nation's largest private sector employer, contributing $5.3 trillion to the annual GDP and supporting more than one in four U.S. jobs—for 55 million working Americans. For over a century, the NRF has been a voice for every retailer and every retail job, educating and communicating the powerful impact retail has on local communities and global economies.

Many of *amici*'s members rely on agreements for individual arbitration and have structured millions of contractual relationships around arbitration's speed, simplicity, low cost, and accessibility. *Amici* accordingly offer the Court their perspective on how mass arbitration operates in practice—and on why staged bellwether procedures like the one at issue here are essential to preserving meaningful access to individual arbitration.

The District Court's decision is misguided in two respects. First, it drains legal significance from a consumer's right to opt out of arbitration. Second, it condemns the bellwether-style proceedings that ensure that mass arbitrations proceed smoothly. If either holding stands, businesses would be discouraged from offering arbitration at all, harming businesses and consumers alike. *Amici* have a strong interest in ensuring that arbitration fulfills its promise of an efficient and effective means of dispute resolution.

SUMMARY OF ARGUMENT

Plaintiffs agreed to arbitrate their disputes with H&R Block. Each plaintiff had a thirty-day right to opt out of the arbitration agreement, and each plaintiff declined to exercise that right. Under *Mohamed v. Uber Technologies, Inc.*, 848 F.3d 1201 (9th Cir. 2016), and *Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198 (9th Cir. 2002), that meaningful opt-out right defeats any claim of procedural unconscionability. Even setting aside this Court's precedent, the District Court's approach is unsound. A regime in which an opt-out counts for nothing tells businesses that offering consumers a genuine choice buys them nothing—and would predictably cause opt-out rights to disappear. Such a result benefits no one.

The District Court's substantive-unconscionability holding is equally troubling. The District Court condemned a staged bellwether procedure that mirrors the process federal courts use every day to manage mass claims; that tolls the statute of limitations from notice until each claim is heard, withdrawn, or resolved; that lets claimants select half of every set of test cases; and that forbids giving any award preclusive effect against other claimants. The court never seriously engaged with the "commercial setting, purpose, and effect" of the provision, as California law requires, Cal. Civ. Code § 1670.5(b). It also failed to recognize the reality that no arbitral forum can adjudicate thousands of identical claims simultaneously. Nor could any court do so other than through processes like the MDL bellwether process—the very process that the arbitration agreement here emulates. The real-world alternative to orderly staging is an unmanaged free-for-all, resulting in tens of millions of dollars in non-refundable fees assessed before a single claim is tested; settlements coerced by fee arithmetic rather than claims' merit; claim inventories salted with fictitious, duplicative, and unvetted claimants; and, for many businesses and their customers, the loss of the benefits of arbitration altogether. The record in this case exemplifies each of those pathologies. Staged bellwether proceedings do not merely clear the minimal unconscionability bar: They are the only mechanism that preserves individual, merits-based arbitration at scale—for businesses and consumers alike. The Court should reverse.

ARGUMENT

I. Plaintiffs' Right to Opt Out of Arbitration Defeats Their Procedural-Unconscionability Challenge.

Plaintiffs declined to exercise a thirty-day right to reject arbitration while keeping full use of H&R Block's services. Under *Ahmed* and *Mohamed*, that opt-out right is dispositive: an agreement a consumer was free to refuse is not procedurally unconscionable. The District Court's contrary ruling misreads those precedents and, if allowed to stand, would eliminate any incentive for businesses to offer consumers an opt-out.

A. *Mohamed* is binding precedent that the District Court was required to follow.

In *Mohamed*, this Court held that an opt-out right defeated procedural unconscionability, reversing Judge Chen's ruling to the contrary. 848 F.3d at 1211. This Court explained that, per its prior decision in *Ahmed*: (1) an arbitration agreement is not procedurally unconscionable where the plaintiff was not required to accept the agreement and had a meaningful opportunity to opt out, and (2) the district court was not at liberty to ignore *Ahmed* merely because it believed *Ahmed* was inconsistent with California Supreme Court precedent. *Id.* at 1211 & n.5. *Mohamed* enforced the opt-out even though the provision was, in the District Court's words, "buried in the agreement," and even though exercising it was "more burdensome" than a one-time election. *Id.* at 1211 (internal quotation marks omitted).

The type of opt-out provision that defeated procedural unconscionability in *Mohamed* does so here too. The arbitration provision in H&R Block's Online Services Agreement ("OSA") appears under a bold, capitalized heading, and the opt-out appears in a separately bolded box, exercisable within thirty days. 1-ER-3-4; 2-ER-174-75, 2-ER-185, 2-ER-199-202 (Schuessler Decl. ¶¶ 7-8 & Ex. 4 §§ 1.3, 11).

H&R Block honors timely opt-outs, and neither plaintiff ever attempted one. 2-ER-207 (Crew Decl. ¶ 5). Moreover, when signatories do not submit a timely opt-out but later decide they would prefer to litigate before a judge rather than an arbitrator, they retain that option. The OSA permits any claim to proceed on an individual basis in small-claims court at the claimant's election, 2-ER-199 (OSA § 11.1)—an option at least one H&R Block customer represented by declarants below in fact exercised. 2-ER-85 (Ostfeld Decl. ¶ 52). Unsurprisingly, three federal courts have upheld materially identical versions of this same agreement, each emphasizing the opt-out. *Hunt v. Meta Platforms, Inc.*, 729 F. Supp. 3d 964, 970-71 (N.D. Cal. 2024); *Caimano v. H&R Block*, 2024 WL 3295589, at *12-13 (E.D. Pa. July 3, 2024); *Pabon v. HRB Digital LLC*, 2025 WL 2254008, at *2-4 (E.D.N.Y. Aug. 7, 2025).

The District Court sought to confine *Ahmed* and *Mohamed* to the "adhesion" prong of the procedural inquiry, reasoning that *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251 (9th Cir. 2017), permits a separate finding of "oppression or surprise." 1-ER-13. The District Court was wrong. "Oppression" means the absence of "negotiation and meaningful choice," *OTO, LLC v. Kho*, 8 Cal. 5th 111, 126 (2019) (quotation marks omitted). That may arise, for example, if a person is given a contract on a take-it-or-leave-it basis and is faced with economic pressure, such as threatened loss of employment, not to turn it down. *Id.* at 127. But *Ahmed* and *Mohamed* establish that a genuine right to keep the service while walking away from arbitration *is* meaningful choice. A consumer who has thirty days to reject arbitration simply by mailing a letter is not "oppressed" into arbitrating. And *Poublon*'s description of "surprise"—situations where "a party with less bargaining power is not told about an unusual provision, or the party is otherwise lied to, placed under duress, or otherwise manipulated into signing the arbitration agreement," 846 F.3d at 1261 n.2 (internal quotation marks omitted)—does not fit the facts here. There is nothing "unusual" about arbitration, and the consumer had thirty days to read the agreement at leisure to avoid any risk of "surprise." That is why *Ahmed* and *Mohamed* treated the opt-out as dispositive of the procedural inquiry.

The District Court held *Mohamed* to be effectively superseded, reasoning that post-2016 California Court of Appeal decisions supply "convincing evidence" that the California Supreme Court would reject a dispositive opt-out rule. 1-ER-13-16. But there is nothing "intervening" about the state decisions on which the District Court relied. Each rests on *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), a 2007 decision that predates *Mohamed*. Decisions applying pre-existing law do not supply "convincing evidence" of intervening change—particularly where, as here, several of the cited decisions are unpublished and could not be cited even in California's own courts. *See* Cal. R. Ct. 8.1115(a). Those courts may have disagreed with *Mohamed*, but *Mohamed* remains binding precedent in this Court, even if it is not binding in California state court. The published decisions, moreover, arise from settings far removed from this one: medical providers pressuring recipients to sign ambiguous provisions as a precondition to obtaining treatment, *e.g.*, *Swain v. LaserAway Medical Group, Inc.*, 57 Cal. App. 5th 59, 68-73 (2020), or elder-care admissions signed under acute pressure, *e.g.*, *Haydon v. Elegance at Dublin*, 97 Cal. App. 5th 1280, 1288-89 (2023). A consumer choosing among many competing tax-preparation services—and who has the opportunity to make that choice months before any filing deadline, 2-ER-175-76 (Schuessler Decl. ¶ 10)—faces no comparable potential or actual coercion.

Third, treating an honored opt-out as legally meaningless would place California unconscionability law in tension with its own general principles—and therefore with the Federal Arbitration Act. In cases not concerning arbitration, California courts hold that "the 'oppression' factor of the procedural element of unconscionability may be defeated" where the complaining party had a meaningful ability to avoid the challenged term. *Dean Witter Reynolds, Inc. v. Super. Ct.*, 211 Cal. App. 3d 758, 768-72 (1989) (account termination fee); *accord Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1319-20 (2005) (termination fee not procedurally unconscionable despite adhesion); *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 482-83 (2006) (shipping charges); *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808-09 (2006) (refueling fee the customer could avoid entirely through his own choice). A contractual opt-out is a *more* direct form of meaningful choice than any of those: the consumer keeps the service and sheds the term. A rule under which avoidability defeats oppression for termination fees, shipping charges, and fuel surcharges—but never for arbitration clauses—would be a rule specifically disfavoring arbitration, and the FAA forbids exactly that. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 251 (2017); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

B. Treating a meaningful opt-out as dispositive is sound policy.

Wholly apart from precedent, the rule of *Ahmed* and *Mohamed* is correct. Opt-out provisions are beneficial because they allow consumers more choice while ensuring predictability for businesses. The district court's decision, if upheld by this Court, would undermine those benefits and pressure businesses to abandon such provisions.

First, bright-line rules at the formation stage serve consumers and businesses alike. Contract drafters need to know, when they design an arbitration program, what will make it enforceable. Consumers need to know that the choices they are offered are real. A regime in which a fully honored exit right can be retroactively discounted in a free-form "totality" inquiry gives drafters no way to comply and consumers no reliable signal about what their choices mean. The Court should reserve searching judicial scrutiny for the genuinely abusive agreements that deserve it rather than converting every consumer contract into a mini-trial on "oppression."

Second, the opt-out supplies precisely what procedural-unconscionability doctrine exists to protect: choice. Although standardized contracts without opt-out provisions are both enforceable and ubiquitous, the California Supreme Court has stated that in view of "the adhesive nature" of such contracts, courts should "scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided." *Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 915 (2015). But that additional scrutiny is unwarranted when a contract provides an opt-out provision. An opt-out converts a standardized form into a genuine election, made privately, with no salesperson, screen, or deadline standing over the consumer, across a thirty-day window. If even that cannot establish meaningful choice, the doctrine has stopped policing choice and started policing arbitration itself.

Third, the District Court's approach creates perverse incentives. Opt-out rights are voluntary, pro-consumer features; no law requires companies to offer them. If offering consumers a genuine exit buys a company nothing when its agreement is later challenged, rational drafters will stop offering exits—leaving consumers with fewer rights. Courts should not adopt rules whose predictable consequence is the elimination of consumer-protective contract terms.

II. The Staged Bellwether Provision Is Not Unconscionable—It Is the Mechanism That Makes Mass Arbitration Work Fairly for All Parties.

California law required the District Court to assess the bellwether provision in light of its "commercial setting, purpose, and effect." Cal. Civ. Code § 1670.5(b);

George v. eBay, Inc., 71 Cal. App. 5th 620, 630 (2021). The court instead evaluated the provision against an imaginary baseline—a world in which thousands of identical claims could be arbitrated at once—and never asked what actually happens when mass arbitrations proceed without contractual structure.

A. Mass arbitration has become a vehicle for coercing settlements untethered to the merits—and this case exemplifies the problem.

Companies frequently subsidize arbitration fees to make the forum accessible. In recent years, some plaintiffs' firms have weaponized that subsidy. The strategy is to file, or threaten, thousands of essentially identical arbitration demands at once, triggering an immediate, largely non-refundable fee obligation calculated per case. Under the American Arbitration Association's current mass arbitration fee schedule, a campaign of 10,000 claimants generates roughly $37.4 million in fees for the business—against, at most, roughly $1.5 million for the claimants' side. U.S. Chamber of Commerce Institute for Legal Reform, *Private Power, Public Harms: The Coercive Dynamics of Mass Arbitration*, at 15 (Dec. 2025) ("*Private Power*"), https://bit.ly/3TRf8Em. Although the initiation fee for the business—$8,125—is modest, the fees rapidly balloon. They include $1,366,857 in per-case fees, $6,000,000 in arbitrary appointment fees, and a staggering $24,000,000 in arbitration compensation. *Id.* Many of these fees are due up front and are non-refundable. And campaigns of that size are now routine: businesses have recently faced threatened or filed mass arbitrations of 50,000 claims (Samsung), 75,000

(Amazon), and 125,000 (Intuit), with fee exposure under then-applicable schedules exceeding $300 million and $500 million for the last two. U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements*, at 13-14, 20, 27 (Feb. 2023) ("*Shakedown*"), https://bit.ly/4buYfFR; *see Wallrich v. Samsung Elecs. Am., Inc.*, 106 F.4th 609, 613 (7th Cir. 2024).

The purpose and effect of such filings is settlement pressure divorced from the merits. As one scholar concluded after interviewing the strategy's architects, "[t]he mass-arbitration model operates on its ability to impose significant *in terrorem* settlement pressure" through "astounding" fees that "can spell financial catastrophe for a potential defendant"—leverage that can exceed a certified class action's even for "more dubious claims." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1345, 1349-52, 1380 (2022). For abusive mass arbitration, such settlements are the entire point: a business facing a $58 million fee invoice may find it difficult to reject a $20 million demand even if every underlying claim is meritless.

The claim inventories that generate this leverage are, with disturbing frequency, unvetted or worse. Claimants' counsel withdrew 8,282 demands against Intuit after it emerged that the claimants were not customers or never paid the disputed fee. *Shakedown* at 36-37. A process arbitrator dismissed 89% of the claimants in a mass arbitration against Wells Fargo because counsel could not attest, after more than a year, that they were actual customers who incurred the challenged fee. *Private Power* at 29. The Seventh Circuit reversed an order compelling Samsung into a 50,000-person arbitration where claimants offered no evidence that they were Samsung customers at all—and Samsung's claimant lists included deceased individuals and fictitious addresses. *Wallrich*, 106 F.4th at 614, 619; *Shakedown* at 36-37. These are not aberrations. They are the products of a solicitation model built on social-media advertisements promising "free money" for one to two minutes of sign-up time—advertisements that are often framed as class actions, rarely mention arbitration, and increasingly rely on third-party lead generators and automated services to supply "claimants" wholesale. *Private Power* at 16-30.

This case is part of the same phenomenon. Of the 2,644 notices of dispute submitted by plaintiffs' counsel, H&R Block's records show that roughly 40% are facially untenable—submitted for individuals who were never H&R Block customers, never used the online product at issue, never completed a tax filing, or did not file in the alleged tax years. 2-ER-170-71 (Murdock Decl. ¶¶ 6-7). Twenty-three percent of the claimants, including both named plaintiffs, submitted duplicate notices through different firms, each purporting to represent them. 2-ER-88 (Supp. Murdock Decl. ¶ 11); 2-ER-209-29 (Crew Decl. Exs. 1-6). The District Court invalidated the contractual tool designed to manage precisely these abuses—while crediting complaints of delay from the counsel generating them.

B. The bellwether provision replicates MDL practice.

Staged bellwether proceedings are not a novel scheme. They are inspired by federal multidistrict litigation, where bellwether trials are frequently used for the resolution of complex cases. Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2323 (2008). This Court has itself recognized that bellwether proceedings are "designed to produce a verdict that would highlight the strengths and weaknesses of the parties' respective cases" and thereby "promote settlement." *In re Hanford Nuclear Rsrv. Litig.*, 534 F.3d 986, 995 (9th Cir. 2008). For better or for worse, the model achieves that settlement-promoting goal: since Congress created the MDL process in 1968, fewer than 3% of consolidated cases have ever been remanded for trial, and a leading study found that 72% of MDL terminations between 2000 and 2015 resulted from settlement. U.S. Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2025*, at 3 (2025), https://bit.ly/4wp22Ng; NYU Center on Civil Justice, *What the Data Show: Mapping Trends in Multidistrict Litigation* (Sept. 2015), https://bit.ly/3zoDwAp; *Pending Multidistrict Litigation: MDL Settlement Rates Between 2000 and March 2015* (Data Courtesy of Judicial Panel on Multidistrict Litigation) at 7, https://bit.ly/4pAo6BM. Given their similarity to MDL bellwether clauses, courts have accordingly upheld arbitral bellwether clauses under California law where, as here, limitations periods are tolled. *Ruiz v. CarMax*

Auto Superstores, Inc., 2024 WL 1136332, at *6 (C.D. Cal. Jan. 18, 2024); *Brooks v. WarnerMedia Direct, LLC*, 2024 WL 3330305, at *17-18 (S.D.N.Y. July 8, 2024).

The District Court's grounds for distinguishing MDL practice, 1-ER-20, do not withstand scrutiny.

Filing. The court reasoned that MDL plaintiffs "actually file their cases," while non-bellwether claimants here cannot. 1-ER-20. As a practical matter, however, a court cannot realistically adjudicate all those cases without a streamlined procedure involving bellwethers. Without a settlement, the vast majority of complaints will sit untouched on an MDL docket for years. And that confers no practical benefit beyond preserving the claim from the statute of limitations—protection the OSA supplies directly through its tolling provisions. What earlier "filing" would change here is chiefly the timing of arbitral fee assessments. The OSA in fact gives claimants *more* control than an MDL does: each side selects half of every bellwether tranche, 2-ER-201-02 (OSA § 11.6), whereas MDL test-case selection is managed by the transferee court and lead counsel.

Capacity. The court asserted that MDL constraints reflect "real-world limitations of judicial resources" while H&R Block's staging is "manufactured," faulting the company for introducing "no evidence that the number of arbitrations that can be conducted simultaneously is inherently constrained." 1-ER-20. That inverts the burden: plaintiffs, not H&R Block, bore the burden of proving unconscionability. *Poublon*, 846 F.3d at 1260. It is also wrong. Arbitral capacity constraints are embedded in the arbitral rules themselves: the AAA's Mass Arbitration Supplementary Rules provide that when case volume exceeds the number of qualified local arbitrators, the AAA "may assign multiple cases to a single Merits Arbitrator, who will decide each case on its own merits." AAA, Mass Arbitration Supplementary Rules, Rule MA-7(c). Seriatim resolution, in other words, is the baseline with or without staging. In one recent mass arbitration, merely assigning arbitrators to fifty cases took more than three months; in another, a provider was sued for invoicing $39 million for nearly 20,000 filings it allegedly lacked the arbitrators to administer. *Private Power* at 13. According to the AAA, a mere 1% of claims in mass arbitrations result in an award: the rest are dismissed, withdrawn, or—most frequently—settled. Adam Shoneck, *Mass Arbitration in 2024: Insights from AAA's New Infographic*, Am. Arb. Ass'n (May 7, 2025), https://bit.ly/4fvIhfL. Plaintiffs' firms are equally constrained—no firm can try thousands of arbitrations simultaneously. Staging does not create the queue; it organizes the queue.

Purpose. Finally, the court suggested the staging serves only "to control HRB's costs." 1-ER-20. Far from being illegitimate, deferring per-case fees until cases are actually arbitrated is the very feature that removes the coercive lever and permits resolution on the merits. Further, deferring per-case fees can benefit claimants: the money not consumed by administrative fees for cases that will never be heard can fund settlements. California's unconscionability doctrine expressly requires courts to credit such commercial justifications, *George*, 71 Cal. App. 5th at 629-30.

C. Staged proceedings are a practical way to resolve mass arbitrations on the merits.

The District Court deemed the arbitration agreement's staging procedure to be unfair. But the District Court never asked the dispositive practical question: unfair compared to what?

Without staging, mass arbitrations historically have ended with the business paying a coercive settlement priced off the fee invoice—of which claimants receive whatever remains after contingency fees that publicly available retainer agreements set as high as 70%, *Private Power* at 11, 21. In many cases, in the aftermath, the business abandons arbitration, depriving every customer of its benefits, including the overwhelming majority of customers who are not part of any mass-arbitration campaign. *Shakedown* at 48.

It is worth pausing on why. Consider what "simultaneous" arbitration of thousands of identical claims would actually require. Each demand triggers its own filing fee, its own case-management fee, and its own arbitrator appointment. The result is thousands of appointments, drawn from a limited pool of qualified consumer arbitrators in each claimant's state. The appointments alone can take months. And when the appointments finally occur, the mass arbitration becomes a free-for-all. Each of hundreds of simultaneously appointed arbitrators sets her own schedule, her own briefing calendar, and her own procedural rulings, with no mechanism for coordinating discovery, reconciling inconsistent rulings on identical form-contract issues, or rationally ordering which claims go first. Cases are heard in whatever order appointments happen to clear, not in the order most likely to test the claims' merits. Counsel on both sides must staff every proceeding at once, which no firm, on either side, can realistically do. The plaintiffs' firms that assemble five-figure claim inventories cannot try even a small fraction of them. And when unvetted claimants predictably fail to appear—because they cannot be reached, forgot they signed up, or never existed—the hearing slot, the arbitrator's time, and the per-case fees are consumed anyway, while engaged claimants with genuine claims wait in line behind them. The result is thousands of stalled dockets generating fee invoices, which is precisely the coercive leverage that prices the settlement.

Staging changes each of those dynamics. Test cases—half of them selected by claimants—are resolved individually, on the merits, by arbitrators from each claimant's home state. No award has preclusive effect on any other claimant, 2-ER-202 (OSA § 11.7)—the feature whose absence doomed the procedures in *Heckman v. Live Nation Entertainment, Inc.*, 120 F.4th 670, 683-84 (9th Cir. 2024), *cert. denied*, 146 S. Ct. 96 (2025). The outcomes generate real-world valuations that let the remaining claimants make informed settlement decisions. And because a claim portfolio's settlement value comes to depend on how claims actually fare, staging deters the mass accumulation of claimants who have no claims.

Consumers benefit from this structure. Individual arbitration serves consumers well: empirical studies show they prevail more often than in litigation, recover multiples of median litigation awards, and finish faster. Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer & Employment Arbitration*, ndp | analytics, at 4 (Mar. 2022), https://bit.ly/4he0scr. But those benefits presuppose engaged claimants with genuine claims. Some mass arbitration claimants have genuine claims too, but those claimants get lost not only among the "claimants" who never had a valid claim, but also among those claimants who cannot reach their lawyers, who forgot they signed up, who believed they were joining a class action settlement, who deny being represented at all, or who are deceased. *Private Power* at 16-35. Herding thousands of such "claims" into simultaneous individual proceedings would produce defaults and dismissals, not recoveries, while the per-case fees accrue regardless. Sequencing engaged bellwether claimants to the front, with all other claims tolled and preserved, ensures that consumers with real claims actually obtain relief. And, as previously noted, if claimants prefer having their dispute resolved by a judge rather than an arbitrator, the OSA permits any claim to proceed in small-claims court at the claimant's election, 2-ER-199 (OSA § 11.1).

D. The District Court's remaining criticisms—delay, choice of counsel, and tolling—do not establish substantive unconscionability.

The District Court's remaining justifications for finding unconscionability are not persuasive.

Delay. The court posited that the provision "could impose a 13-year timeline" to resolve 2,000 notices. 1-ER-17. That arithmetic assumes what the entire bellwether experience refutes: that no case ever settles. In court, 97% of MDL cases end without remand for trial; in arbitration, mass proceedings routinely resolve after a handful of test cases. *See*, *e.g.*, Matthew C. Helland, *Costs of Defense in Mass Individual Wage-and-Hour Arbitrations: A Case Study*, 3 PLI Current 213, 215-16 (2019), https://bit.ly/4fhmg5s. The record here is consistent: in the one tranche of twenty H&R Block arbitrations that proceeded, all but two were resolved by voluntary dismissal or final hearing, with schedules and continuances set by agreement of the parties. 2-ER-78-81 (Ostfeld Decl. ¶¶ 16-36). Speculation that delay might nonetheless occur cannot invalidate an arbitration agreement. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000) (unproven "risk" is "too speculative").

Moreover, invalidating the arbitration agreement will not eliminate the need for staging. 2,644 individual arbitrations could not possibly proceed simultaneously, and staging would occur by necessity in a federal court system with over half a million pending cases. *Private Power* at 7. An arbitration agreement is not unconscionable because of "delay" when the delay results from a single law firm simultaneously filing thousands of claims against a single defendant. HRB's provision, moreover, scales faster than the clause invalidated in *Pandolfi v. AviaGames, Inc.*, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024), *aff'd*, 2025 WL 2463742 (9th Cir. Aug. 27, 2025), *cert. denied*, 2026 WL 1377138 (U.S. May 18, 2026), on which the District Court principally relied: after two rounds of twenty, fifty or more cases proceed at a time, and arbitrators may be reappointed. 2-ER-201-02 (OSA § 11.6).

Choice of counsel. The court worried that the provision could induce claimants to seek different counsel. 1-ER-19. The provision does not restrict whom any claimant may retain. Instead, it sequences cases when twenty-five or more arrive through the same or coordinated counsel—the same trigger the AAA's own rules use, AAA, Mass Arbitration Supplementary Rules, Rule MA-1(b)(i), and the same coordination function MDL courts perform through lead-counsel appointments. Notably, the District Court's own prior decision faulted a bellwether clause for sweeping too *broadly*, because it reached claims brought by unrelated counsel.

Pandolfi, 2024 WL 4051754, at *6. H&R Block drew its provision narrowly, to same-or-coordinated counsel—and was faulted for that too. A doctrine that condemns both the broad version and the narrow version of a term is not a neutral principle of contract law; it is hostility to the term itself, which the FAA forbids. *Concepcion*, 563 U.S. at 341-42.

Tolling. Finally, the court held the tolling provisions "ambiguous, subjective, and asymmetrical." 1-ER-22. The terms foreclose that reading. Section 11.2(B) tolls the statute of limitations from the date a complete notice of dispute is sent; 2-ER-201-02 (OSA § 11.6) then tolls it "from the beginning date of the Informal Resolution Period until that Notice is selected for a bellwether proceeding, withdrawn, or otherwise resolved." As the court in *Caimano* observed of this very agreement, "no consumer is at risk of losing any claims as a result of this provision." 2024 WL 3295589, at *12 (internal quotation marks and alterations omitted). Tolling is precisely what distinguished the enforceable staging clauses in *Ruiz* and *Brooks* from the clause invalidated in *MacClelland v. Cellco Partnership*, 609 F. Supp. 3d 1024 (N.D. Cal. 2022), which contained none. *See Ruiz*, 2024 WL 1136332, at *6. Whether a given notice is "fully complete" under § 11.2's objective checklist is, like every other question of contractual compliance, one for a court or arbitrator to decide—as the District Court acknowledged is "true on its face," 1-ER-22—and the possibility that a party may someday dispute compliance describes all of contract law, not unconscionability. Nor is a boilerplate reservation of rights oppression: plaintiffs' own counsel "reserve[d] all rights" in the very notices at issue. 2-ER-128-36, 2-ER-150-56 (Ellersick Decl. Exs. 7, 11). As for asymmetry, the tolling provisions protect only claimants—businesses do not file mass arbitrations against their own customers—and a one-way benefit running to consumers cannot be substantively unconscionable against them.

CONCLUSION

The District Court's order denying the motion to compel arbitration should be reversed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit set forth in Ninth Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,180 words.

I further certify that this brief complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5)(A) and with the type-style requirements set forth in Federal Rule of Appellate Procedure 32(a)(6).

Dated: July 27, 2026 /s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2026, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: July 27, 2026 /s/ Adam G. Unikowsky