IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Case No. 17-55275

ZIBA YOUSSOFI,

Appellant,

v.

CREDIT ONE BANK, N.A.,

Appellee.

On Appeal from the United States District Court
for the Southern District of California

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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STATEMENT REGARDING CONSENT

All parties consent to the filing of this *amicus* brief.[1]

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, 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* briefs in cases that raise issues of vital concern to the Nation's business community.

Appellant contends that enforcement of arbitration agreements under the Federal Arbitration Act is unconstitutional under the Petition Clause because such agreements that have not been individually negotiated. *Amicus curiae*'s members depend on arbitration for its simplicity, informality, and expedition. *Amicus curiae* and its members thus have a strong interest in this case.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The Court should decline Appellant's invitation to hold that arbitration under the FAA, as interpreted by the Supreme Court, is unconstitutional. *Amicus curiae* agrees with all of Credit One's arguments, and add two more arguments in support of Credit One's position.

The premise of Appellant's position is that the Constitution treats arbitration agreements differently from other contracts. In Appellant's view, as to the mine run of contracts, there is no constitutional problem with applying the ordinary principle that parties are bound by the contracts they sign. But according to Appellant, applying that standard to arbitration agreements violates the Petition Clause, which instead requires that parties enter into arbitration agreements "knowingly and voluntarily."

That argument has no basis in precedent. Appellant relies on cases from this Court applying a knowing-and-voluntary standard to contracts that would infringe a party's substantive right to participate in the political process, as well as contracts that would strip a party's right to a hearing altogether. Such contracts are very different from arbitration agreements, which merely transfer disputes from a judicial to an arbitral forum.

Indeed, courts have invariably rejected arguments indistinguishable from Appellant's argument. Litigants have repeatedly and unsuccessfully argued that

the enforcement of arbitration agreements without a "knowing and voluntary" standard violates their Seventh Amendment right to a jury trial—which is not meaningfully different from Appellant's argument here that the enforcement of arbitration agreements without a "knowing and voluntary" standard violates their Petition Clause right to litigate in court. Four courts of appeals, as well as other courts, have rejected that theory, and none has held to the contrary. The Court should follow that unanimous and well-reasoned authority.

ARGUMENT

I. As Courts Have Unanimously Held, Enforcing Arbitration Clauses According To Their Terms Does Not Violate The Constitution.

Appellant asks the Court to do something remarkable: hold that arbitration under the FAA is unconstitutional as applied to all arbitration agreements that have not been individually negotiated. Appellant maintains that the enforcement of such arbitration agreements violates her Petition Clause right to pursue dispute resolution in court, rather than an arbitral tribunal.

The Court should reject that argument. *Amicus curiae* agrees with Credit One's arguments on state action (Credit One Br. 11-20), and will not repeat them.

Appellant's contention fails for an additional reason. Even if enforcement of an arbitration agreement were state action, it would not violate the Petition Clause. The premise of Appellant's argument is that the Constitution requires the waiver of Petition Clause rights to be "knowing and voluntary," and signing a consumer

arbitration agreement does not satisfy that heightened standard. That premise is incorrect. The Constitution prescribes no special "knowing and voluntary" standard for arbitration agreements. Rather, the Constitution treats an arbitration agreement as what it is: a contract like any other. If the Constitution permits enforcement of other contracts without a heightened "knowing and voluntary" standard—which Appellant does not dispute—then the Constitution permits enforcement of arbitration agreements without a heightened "knowing and voluntary" standard. Courts have unanimously rejected the contention that the Constitution treats arbitration agreements differently from other contracts, and the Court should reach the same conclusion here.

A. The Constitution Prescribes No Special Rules Governing The Enforcement Of Arbitration Agreements.

Contracts that have not been individually negotiated are generally enforceable. Indeed, such contracts are ubiquitous: any time a person uses a credit card, rents a car, or subscribes to a cell phone service, the person signs a contract that has not been individually negotiated. If such contracts were not enforceable, the commercial system would grind to a halt. Appellant does not suggest that the enforcement of such contracts poses any constitutional concern.

Such contracts are enforceable even without a showing that they are "knowing and voluntary." Of course, no contract can be enforced unless there is bilateral consent. But the law assumes that if a person signs an agreement, he

consents to its terms. He cannot later argue in litigation that even though he signed the agreement, he did not "knowingly and voluntarily" agree to all the terms therein. *Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87, 93 (2013) ("[T]he law effectively presumes that everyone who signs a contract has read it thoroughly, whether or not that is true"); *Restatement (Second) of Contracts* § 157 cmt. b (1981) ("Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms."). This principle conforms to commercial reality. In the real world, people routinely sign agreements without reading every word. If they could avoid enforcement of such agreements by arguing after the fact that they did not read every word, the commercial system could not function. Appellant does not suggest that this basic principle of contract law violates the Constitution.

That principle applies even when a contract can be framed as waiving a constitutional right. For instance, the Fifth and Fourteenth Amendments protect against the deprivation of property without due process. Yet, people routinely sign contracts requiring them to pay money—such as rental car agreements with refueling charges, to take one example—and if they do not pay, those contracts are enforceable in court. The commercial system relies on such terms routinely, and no one would suggest that enforcing these terms violates the Constitution.

Nor does Appellant suggest that there would be any constitutional concern with a federal statute *generally* directing enforcement of contracts that have not been individually negotiated. The Constitution simply does not regulate how to define consent under contract law.

Appellant argues, however, that the Constitution prescribes special rules for arbitration agreements that do not apply to other contracts. In Appellant's view, when the contract is an arbitration agreement, the Constitution forbids application of the traditional principle that people are bound by the contracts they sign. As Appellant sees it, an arbitration agreement results in a waiver of the Petition Clause right to pursue a claim in court, and the Constitution therefore demands that the agreement be signed "knowingly and voluntarily." This means that the party seeking to enforce the contract must show not only that the counterparty signed the agreement, but that he was subjectively aware of the arbitration provision and subjectively wanted to arbitrate disputes.

In support of this position, Appellant asserts that "the Ninth Circuit has adopted, expressly acknowledged, and applied the knowing, voluntary, and intelligent waiver standard to civil cases," citing a flurry of cases, including *Davies v. Grossmont Union High School District*, 930 F.2d 1390 (9th Cir. 1991); *Leonard v. Clark*, 12 F.3d 885 (9th Cir. 1994); *Gete v. INS*, 121 F.3d 1285 (9th Cir. 1997); *Walls v. Central Contra Costa Transit Authority*, 653 F.3d 963 (9th Cir. 2011); and

Clark v. Capital Credit & Collection Service, Inc., 460 F.3d 1162 (9th Cir. 2006). App. Br. 8, 18-19.

These cases do not support Appellant's contention that arbitration agreements are subject to a heightened standard of voluntariness. At best, those cases hold that a contract that waives a *substantive* constitutional right, or completely strips a party of the right to *any* hearing, should be subject to a heightened standard of voluntariness. Those cases, however, do not hold that arbitration agreements—which are bilateral agreements to transfer disputes to a different forum—are subject to a heightened standard of voluntariness.

Of the cases cited by Appellant, *Gete* and *Clark* are completely off point, as they did not involve contracts at all: *Gete* addressed whether forfeiture procedures are waived by a failure to post a bond, 121 F.3d at 1294, while *Clark* addressed whether a request for information constituted implied consent for a responsive communication. 460 F.3d at 1172.

Davies and *Leonard* were unusual cases where a contract stripped a party of the right to participate in the political process. In *Davies*, a politician entered into a contract restricting him from running for public office. The Court recited the legal standard that waivers of a constitutional right must be "voluntary, knowing, and intelligent," but concluded that this standard was satisfied, rejecting the politician's assertion that "he did not intend such a waiver." 930 F.2d at 1395. The Court

nonetheless held that the contract violated public policy because it interfered with the public's right to choose election officials of its choice. *Id.* at 1400.

In *Leonard*, a union signed a contract that included a provision limiting a union's ability to endorse payroll-increasing legislation. The union then attempted to escape enforcement of that contract by arguing that it violated the union's First Amendment rights. The Court recited the standard that First Amendment rights may be waived if "the waiver is knowing, voluntary and intelligent," and concluded that the standard was satisfied: "If the Union felt that First Amendment rights were burdened by Article V, it should not have bargained them away and signed the agreement." 12 F.3d at 890.

These cases are materially different from this case. Both cases involved the waiver of a *substantive* constitutional right (*i.e.*, the right to run for office, and the right to free speech); not the waiver of a *procedural* constitutional right (*i.e.*, the right to judicial, as opposed to arbitral, procedures).

Moreover, these cases do not hold that any contract resulting in a restriction on speech is subject to a heightened standard of scrutiny—and the Supreme Court has squarely rejected that proposition. In *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Supreme Court held that a reporter's confidentiality agreement was enforceable because it was a contract like any other—even though the effect of the agreement was to prevent the reporter from exercising his right to free speech. *Id.*

at 671 (enforcing contract because "Minnesota law simply requires those making promises to keep them"). Notably, Justice Souter's dissenting opinion argued for the imposition of a knowing-and-voluntary standard. It argued that "the requirements" for waiver "have not been met here." *Id.* at 677 (Souter, J., dissenting). It cited *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), which held—in the context of a *litigation* waiver—that courts should be "unwilling to find waiver in circumstances which fall short of being clear and compelling." *Id.* at 145; *see Cohen*, 501 U.S. at 677 (Souter, J., dissenting) (citing *Curtis*, 388 U.S. at 145). But Justice Souter's dissent did not persuade the majority of the Court, which declined to treat contracts that waive First Amendment rights any differently from other types of contracts. Thus, there is no basis for imposing a special knowing-and-voluntary waiver standard on all contracts that would restrict speech—must less all contracts that would affect procedural rights in litigation.

The final case cited by Appellant is *Walls*, 653 F.3d 963. In that case, the Court applied a heightened standard of scrutiny to a contract that stripped a litigant of the right to a hearing altogether. Walls was a government employee who signed a contract purporting to contain a complete waiver of his right to a pre-termination hearing. The court found that this contract waived "his right to due process," and thus should be subject to a heightened knowing-and-voluntary standard. *Id.* at 969-70.

By contrast, an arbitration agreement does not strip a plaintiff's right to a hearing altogether. Rather, an arbitration agreement is a bilateral agreement that merely transfers the resolution of substantive claims to a different forum. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By 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 a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."). Nothing in *Walls* suggests that an agreement to arbitrate a wrongful termination claim—as opposed to an agreement extinguishing *all* rights to challenge wrongful termination—would be subject to heightened scrutiny.

B. Courts Have Uniformly Held That The Constitution Prescribes No "Knowing And Voluntary" Standard For Arbitration Agreements.

This is not the first case in which a litigant has argued that the Constitution requires application of a "knowing and voluntary" standard to arbitration agreements. Numerous courts have considered, and rejected, this argument.

No court of appeals has squarely resolved the question of whether enforcement of consumer arbitration agreements under the FAA violates the Petition Clause. Several courts, however, have considered a similar argument—whether the enforcement of an arbitration agreement that was not signed "knowingly and voluntarily" violates the Seventh Amendment. Litigants in those

cases have made the exact argument that Appellant makes here—that they cannot be stripped of their constitutional right to litigate in court without a "knowing and voluntary" waiver.

Those arguments have uniformly failed, on the ground that the Constitution does not place arbitration agreements on a different footing from other contracts. To the contrary, once a party voluntarily enters into an arbitration agreement, the constitutional right to litigate in court simply leaves the picture.

Fourth Circuit. In *Sydnor v. Conseco Financial Servicing Corp.*, 252 F.3d 302 (4th Cir. 2001), the plaintiff claimed that the enforcement of an arbitration agreement violated the Seventh Amendment because "the defendants had a duty to ensure that the appellees fully informed themselves of the arbitration agreement and waiver of a jury trial." *Id.* at 306. The Fourth Circuit rejected this argument out of hand. It explained that "an elementary principle of contract law is that a party signing a written contract has a duty to inform himself of its contents before executing it." *Id.* (quotation marks omitted). Further, "the fact that the appellees waived their right to a jury trial" did not "require the court to evaluate the agreement to arbitrate under a more demanding standard," because it "is clear that a party may waive her right to adjudicate disputes in a judicial forum." *Id.* at 307.

Fifth Circuit. The Fifth Circuit addressed this issue in *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702 (5th Cir. 2002). The plaintiff contended

that the enforcement of the arbitration agreement violated the Seventh Amendment, citing *Miranda v. Arizona*, 384 U.S. 436 (1966), for the proposition that "a waiver of a constitutional right must be voluntarily, knowingly, and intelligently made." 294 F.3d at 711. The Court rejected this argument, observing that *Miranda* "does not trigger the application of the Seventh Amendment right to a jury trial in a civil case." *Id.* It explained that "[t]he Seventh Amendment does not confer the right to a trial, but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." *Id.* (quotation marks omitted).

Seventh Circuit. In *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999), the plaintiff asked the court to invalidate an arbitration agreement on the ground that it was an "unconscionable contract of adhesion." *Id.* at 366. She maintained that enforcing it according to its terms violated Article III, the Seventh Amendment right to a jury trial, and the Fifth Amendment right to due process and equal protection. *Id.* at 368. The Seventh Circuit rejected these arguments. As a threshold matter, it agreed with Credit One's state action argument here: "In this case, the defendant, not the government, sought to compel arbitration, so there is no basis to find that Koveleskie was deprived of her rights because of government action." *Id.* It also found that "[e]ven if one were to

assume state action here, it is highly unlikely that any constitutional violation occurred." *Id.* It concluded that Koveleskie waived her right to an Article III forum, and that "there is no constitutional right to a jury trial outside of an Article III forum." *Id.* It also rejected the plaintiff's Fifth Amendment arguments, holding that it is "simply not the case" that "a non-Article III forum is inadequate." *Id.*

Eleventh Circuit. In *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), the plaintiff argued that enforcing an arbitration agreement violated the Seventh Amendment unless it was "subject to a heightened 'knowing and voluntary' standard in evaluating the enforcement of their waiver." *Id.* at 1370. The court disagreed. It observed that "a party agreeing to arbitration does not waive any substantive statutory rights; rather, the party simply agrees to submit those rights to an arbitral forum." *Id.* at 1371. Relying on *Koveleskie*, *Sydnor*, and *American Heritage*, the court concluded that "general contract principles govern the enforceability of arbitration agreements and that no heightened 'knowing and voluntary' standard applies, even where the covered claims include federal statutory claims generally involving a jury trial right." *Id.* at 1372.

Other courts. Appellant's argument has found no additional favor in federal district courts or state supreme courts. For instance, in *Preferred Care of Delaware v. Crocker*, 173 F. Supp. 3d 505 (W.D. Ky. 2016), the plaintiff urged the court to invalidate the FAA on the ground that it "violates one's Seventh

Amendment right to a jury trial." *Id.* at 513 n.2. She argued, as Appellant does here, that "a waiver of a constitutional right must be voluntarily, knowingly, and intelligently made," and "[b]ecause the FAA substitutes the knowing-and-voluntary requirement to waive constitutional rights and replaces it with the standard to enforce an ordinary contract, the FAA exceeds congressional authority and violates the separation-of-powers doctrine." *Id.* (quotation marks omitted). The court had no difficulty rejecting this argument, observing that the right to a jury trial did not apply if "claims are properly before an arbitral forum pursuant to an arbitration agreement." *Id.* (quotation marks omitted). The court rejected the plaintiff's constitutional argument in light of the unanimous view that the Constitution did not require courts to "apply the heightened 'knowing and voluntary' standard in evaluating a waiver of the right to a jury trial under an arbitration agreement." *Id.*

In *Melena v. Anheuser-Busch, Inc.*, 847 N.E.2d 99 (Ill. 2006), the plaintiff, like Appellant here, argued that "before a constitutional right may be waived, it must be clear the waiver was entered into voluntarily and knowingly." *Id.* at 108. Thus, she argued, "the arbitration agreement is ineffective to waive her seventh amendment and statutory trial rights, such as the right to access to the courts and the right to a jury trial." *Id.* The court observed that "[s]imilar arguments have

been rejected by several federal circuit courts of appeal," and rejected the plaintiffs' argument in light of *Koveleskie, Sydnor, American Heritage,* and *Kaley.*

Likewise, in *Title Max of Birmingham, Inc. v. Edwards*, 973 So. 2d 1050 (Ala. 2007), the court rejected the same argument in light of the unanimous authority holding that "a court's enforcement of an arbitration agreement does not violate the protections established by the Seventh Amendment to the Constitution of the United States." *Id.* at 1056 n.3. The court agreed with the Eleventh Circuit that "the fact that the appellees waived their right to a jury trial require" does not "require the court to evaluate the agreement to arbitrate under a more demanding standard. It is clear that a party may waive her right to adjudicate disputes in a judicial forum." *Id.* (quotation marks omitted).

This unbroken line of authority forecloses Appellant's argument here. If the Constitution requires no heightened "knowing and voluntary" standard when a litigant waives his Seventh Amendment right to litigate in court, as courts have uniformly held, it requires no heightened "knowing and voluntary" standard when a litigant waives his Petition Clause right to litigate in court, as Appellant argues here. The Court should follow that case law and affirm the District Court.

CONCLUSION

The judgment of the District Court should be affirmed.

September 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitation because this brief contains 3,529 words.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2017, a true and correct copy of the foregoing Brief was served on all counsel of record in this appeal via CM/ECF.

/s/ Adam G. Unikowsky