No. 24-2836

IN THE

United States Court of Appeals for the Ninth Circuit

DIANA THEODORE,

Plaintiff-Appellant,

v.

AMERICAN EXPRESS NATIONAL BANK,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:23-cv-3710
Hon. Araceli Martínez-Olguín

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT BY THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE AMERICANS FOR FINANCIAL REFORM EDUCATION FUND, AND THE IMPACT FUND

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

The National Consumer Law Center ("NCLC"), the National Association of Consumer Advocates ("NACA"), the Americans for Financial Reform Education Foundation ("AFREF"), and the Impact Fund request leave to file an amici curiae brief in support of Plaintiff-Appellant Diana Theodore in the above captioned matter. Plaintiff-Appellant has consented to the filing of this brief. Amici sought consent from Defendant-Appellee American Express National Bank, but Defendant-Appellee declined to take a position on this request.

IDENTITY AND INTEREST OF AMICI CURIAE

Amici are consumer and civil rights organizations committed to the effective enforcement of consumer laws and the preservation of access to the courts for victims of consumer fraud.

The National Consumer Law Center ("NCLC") is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including *Consumer Arbitration Agreements* (8th ed. 2020) and *Consumer Class Actions* (11th ed. 2024), and has been actively involved in the debate concerning mandatory pre-dispute arbitration clauses, class action waivers,

and access to justice for consumers. NCLC frequently appears as amicus curiae in consumer law cases before trial and appellate courts throughout the country.

The National Association of Consumer Advocates ("NACA") is a nonprofit corporation with a membership of private and public sector attorneys, legal services attorneys, and law professors and law students whose primary area of practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing effort to curb unfair, deceptive and abusive business practices.

Americans for Financial Reform Education Fund ("AFREF") is an independent, nonprofit coalition of more than 200 consumer, labor, civil rights, and community-based groups working to lay the foundation for a strong, stable, and ethical financial system. Launched in the wake of the 2008 financial crisis, AFREF advocates for stronger consumer financial protections and continues to actively participate in regulatory efforts to curb forced arbitration.

The Impact Fund is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country.

The Impact Fund has served as party or amicus counsel in major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Amici curiae are interested in this case because the outcome will directly affect the people they serve. Specifically, amici curiae are committed to ensuring that consumers receive the rights and adequate legal protections they are due.

The attached brief explains developments in empirical research investigating consumers' understanding of mandatory arbitration provisions. The brief provides relevant background information to better inform the Court when it considers Plaintiff-Appellant Diana Theodore's argument that consumers like herself are unlikely to have given meaningful consent to arbitrate their claims. This issue is a requirement for contract formation and the central focus of this appeal.

Dated: July 16, 2024

/s/ Andre M. Mura

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CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document was filed electronically on July 16, 2024, via the Court's electronic filing system and notice of this filing will be sent to all Parties by operation of the Court's electronic filing system.

/s/ Andre M. Mura
Andre M. Mura

ATTACHMENT 1

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BRIEF OF THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE AMERICANS FOR FINANCIAL REFORM EDUCATION FUND, AND THE IMPACT FUND AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS FRAP RULE 26.1 and LOCAL RULE 26.1

Amici curiae the National Consumer Law Center, the National Association of Consumer Advocates, the Americans for Financial Reform Education Fund, and the Impact Fund make the following disclosures:

1. Amici are not publicly held corporations or other public entities.

2. Amici do not have parent corporations.

3. No publicly held corporation or other publicly held entity owns 10% or more of the stock of amici.

4. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of the litigation.

Dated: July 16, 2024.

/s/ Andre M. Mura
Andre M. Mura

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BRIEF OF THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE AMERICANS FOR FINANCIAL REFORM EDUCATION FUND, AND THE IMPACT FUND AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT DIANA THEODORE

The National Consumer Law Center, the National Association of Consumer Advocates, the Americans for Financial Reform Education Fund, and the Impact Fund respectfully request leave to file this brief as amici curiae in support of plaintiff-appellant Diana Theodore in support of her claim that she is entitled to seek resolution of her consumer claims through litigation. Defendant-Appellee American Express National Bank declined to take a position on this request.

IDENTITY AND INTEREST OF AMICI CURIAE

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Amici curiae are interested in this case because the outcome will directly affect the people they serve. Specifically, amici curiae are committed to ensuring that consumers receive the rights and adequate legal protections they are due.[1]

ARGUMENT

This case involves the interpretation of two claims resolution provisions drafted by Defendant-Appellee American Express National Bank and included in its cardholder agreements. Both provisions reference arbitration; from the perspective of ordinary consumers, however, neither makes clear that arbitration is mandatory for some cardholders. The key difference between the two provisions is that one states that a "covered borrower" is "not required" to "elect" arbitration

[1] No party or counsel for a party in this appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the amici curiae or their counsel in the pending appeal.

and, further, that a request to arbitrate by American Express may be rejected, while the other provision focuses only on what happens if one party elects to proceed by arbitration. *See* Appellant's Opening Brief at 9-10 (quoting from and comparing the two provisions). Plaintiff-Appellant Diana Theodore, relying on the language of one of these provisions—the one stating that the covered borrower "may elect" but is "not required" to resolve claims by individual arbitration—brought claims under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.*, alleging that American Express implemented unlawful interest rate increases. American Express responded to Theodore's lawsuit by moving to compel Theodore to arbitrate her claims, arguing that the language of the other claims resolution provision precludes Theodore from proceeding with her claims in court. The District Court acknowledged that the term "covered borrower" was not defined in the cardholder agreement, and noted that information clarifying the operation of the two claims resolution procedures to covered and non-covered borrowers could be found only in a paragraph nested under a subsection titled "Military Lending Act," which was itself nested under an "Other important information" subheading. ER-3. Nevertheless, the trial court granted the motion to compel.

Plaintiff-Appellant's Opening Brief explains at length why the text of the cardholder agreement at issue in this case is ambiguous at best and cannot be construed to compel arbitration. Amici submit this brief to provide the Court with

important empirical evidence showing that consumers do not understand arbitration provisions even under the best of circumstances.

Consumers do not understand mandatory arbitration provisions as agreements to forego their legal rights in court and submit all disputes to binding arbitration, even in instances where there is only *one* claims provision available. Most people do not read these provisions and, when they do, they misinterpret what the terms of the provisions mean. *See* Roseanna Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation*, July 25, 2023, 19 PLoS ONE 2:e0296179m, https://doi.org/10.1371/journal.pone.0296179 (finding consumers generally do not read the fine print and do not understand that they are agreeing to mandatory arbitration). As a result, consumers cannot be said to meaningfully consent to mandatory arbitration, even when the provisions may seem relatively clear to lawyers and judges. *See, e.g.*, Imre Stephen Szalai, *Arbitration Agreements by America's Top Companies*, 52 UC Davis L. Rev. 233, 236 (2019) ("[M]eaningful consent is often lacking in consumer arbitration agreements . . ..").

The situation presented here is much more problematic than the usual, run-of-the mill mandatory arbitration dispute. American Express's inclusion of two, somewhat conflicting, claims resolution provisions in its cardholder agreements—*including one provision which clearly allows the cardholder to decline*

arbitration—makes it even less likely that the consumers who received these cardholder agreements understood that language to constitute their contractual consent to forego legal rights. And, without this consent, there is no agreement to arbitrate. The consumers who received these ambiguous agreements from American Express must be permitted to have their day in court.

I. Because consent is the touchstone of determining whether an agreement to arbitrate was formed, the trial court should have considered what ordinary consumers would have understood they were agreeing to in American Express's cardholder agreement.

The Supreme Court has made it abundantly clear that arbitration is a "matter of contract and consent." *Coinbase, Inc. v. Suski*, 144 S. Ct. 1186, 1191 (2024). Absent an affirmative contractual agreement, a party "cannot be coerced into arbitrating a claim, issue, or dispute." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 660 (2022). Thus, a defendant's motion to compel arbitration necessarily turns on the question of whether there was an affirmative agreement on the part of the plaintiff to forego a judicial forum in favor of arbitration. *Coinbase*, 144 S. Ct. at 1192 ("[T]he first question in any arbitration dispute must be: What have these parties agreed to?"). If there is no meaningful consent to mandatory arbitration, a court cannot compel it.

To find that Plaintiff-Appellant Theodore had consented to arbitration in this case, the trial court focused on the different language in the two claims resolution provisions drafted by American Express. The District Court acknowledged that

American Express failed to define "covered borrower"—the operative term that governed whether Theodore had agreed to mandatory arbitration. *See* Order Granting Motion to Compel Arbitration and Dismissing Case, ER-3. But even though the term was not defined anywhere in the agreement, and explained only obliquely under a separate provision in the cardholder agreement several pages away from the claims resolution procedures, nestled under a subheading titled "Military Lending Act," the court accepted American Express's *post hoc* argument that the more reasonable reading of the contract meant the term "covered borrower" did not include consumers like Theodore.

The District Court read the cardholder agreement in light of the Military Lending Act provision, with an informed understanding of how that provision fits with the demands of the Act itself. But while that analysis may be viewed as an admirable attempt to reconcile two seemingly conflicting and ambiguous contractual provisions, the trial court side-stepped the most important legal inquiry: What would an ordinary consumer have understood from the agreement they received from American Express? *See Coinbase*, 144 S. Ct. at 1192 (emphasizing that "the first question in any arbitration dispute must be: what have these parties agreed to?"); *see also U.S. Fid. & Guar. Co. v. Sandt*, 854 P.2d 519, 523 (Utah 1993) (noting, in the insurance context, that a consumer agreement "must be construed in light of how the average, reasonable" consumer would understand it).

Lawyers and judges who have extensive training and experience in reading legal provisions might understand that a claims resolution provision entitled "Claims Resolution for Covered Borrowers" applies only to covered borrowed military service members. But it is unlikely that the plaintiff in this case or any other consumers, particularly those without legal training, would reach a similar conclusion.

II. Empirical research shows that ordinary consumers frequently do not understand the consequences of mandatory arbitration agreements.

An extensive and growing body of empirical research shows that ordinary people do not understand that mandatory arbitration clauses in form contracts mean they are giving up their right to go to court, even when the provisions are far clearer as the language drafted by American Express in this case. *See, e.g.*, Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 Md. L. Rev. 1, 2 (2015) (concluding that consumers exhibit a "profound lack of understanding" about both "the existence and effect of arbitration clauses"); Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, at Section 3.4.3 page 19 (2015)

(stating that over a third of consumers who signed arbitration agreements mistakenly believed they could still go to court).

The most recent study, conducted in June 2023, has replicated and amplified the conclusions of previous research. *See* Sommers, *supra,* at 1 ("Less than 1% of respondents correctly understood the full significance of the arbitration agreement"). In this study, Professor Sommers relied upon a private survey research firm to develop and curate a sample of over one thousand consumers that was representative of the adult population across an array of demographic factors including age, gender, race/ethnicity and geographic region. *Id.* at 5. The respondents in the sample were then asked to read and review a typical consumer contract including a mandatory arbitration provision. *Id*. After reviewing the contract, the respondents were then asked a series of recall and comprehension questions, including what their options would be under various hypotheticals involving a potential future dispute. *Id*. at 5-6.

Remarkably, "[l]ess than five percent of respondents could recall that the contract they were shown had said anything at all about arbitration." Sommers, *supra*, at 1. Instead, "consistent with prior empirical research," this study found that "few respondents focused on dispute-resolution terms, or indeed read the fine print at all, when encountering a consumer contract." *Id.* at 9; *see also* Victoria C. Plaut and Robert Bartlett, *Blind Consent? A Social Psychological Investigation of*

Non-Readership of Click-Through Agreements, 36 L. and Human Behavior 293, 293-311 (2012) (experimental survey research finding that 80 percent of people report that they do not read the terms of online contracts before clicking "I agree").

Because it is possible that consumers do understand that they are forfeiting legal rights, even when they have not read or cannot recall the dispute resolution terms, Professor Sommers also tested the respondents' comprehension of their legal rights under an agreement in various hypothetical disputes. Sommers, *supra*, at 10-17. Consistent with the findings of prior research, Sommers found that most respondents mistakenly believed that they would still have the right to go to court and would retain other legal rights, such as the right to trial by jury. *Id*. Indeed, many respondents continued to believe that they could go to court to appeal an arbitration decision, even after the researchers explained the concept of mandatory arbitration very directly to them. *Id*. at 12; *see also* Zeb J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 9 Conn. L. Rev. 381 (2008) (finding in the employment context that while 67% of employees identified their employer's arbitration clause as an agreement they had previously signed, only 17% understood that they had waived their right to sue their employer).

III. Consumers like Diana Theodore are highly unlikely to have understood that American Express's cardholder agreement meant consenting to mandatory arbitration and forgoing their right to go to court.

With these findings in mind, it seems especially unlikely that American Express's consumers understood—or meaningfully consented—to mandatory arbitration in this case, which involves not one but two claims provisions, one of which explicitly states that you can still go to court. It also seems unlikely that consumers would understand that a provision entitled "Claims Resolution for Covered Borrowers" does not apply to them, particularly when the term "covered borrowers" is defined nowhere in the agreement. As the Utah courts have held in other contexts, consumer contracts like this one, which are not clear to a person of "ordinary intelligence and understanding," are ambiguous as matter of law. *See Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685, 686–87 (Utah 1999) (noting, in the insurance context, that a contract is ambiguous "if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding"). In the arbitration context, this kind of contractual ambiguity is worrisome because of consumers' poor understanding of mandatory arbitration provisions, even those which are not ambiguous.

Consumer consent is a front-and-center question every time a defendant seeks to compel arbitration. *See Coinbase*,144 S. Ct. at 1192 ("Arbitration is strictly a matter of consent.") (quoting *Granite Rock Co. v. Teamsters*, 561 U.S.

287, 299 (2010)). But when a legally sophisticated defendant claims that a court must harmonize an claims resolution procedure with a mandatory arbitration clause with *other* provisions that consumers may not understand are connected or related to a clause that forfeits their rights to seek relief in court, courts should be especially attuned to whether the consumer gave meaningful consent. This is particularly so when the defendant has exercised exclusive control over the drafting of the agreement, as was the case with American Express and this agreement. Consumers' already poor comprehension of mandatory arbitration provisions is likely to be greatly exacerbated if there are multiple claims resolutions procedures, especially where the operative term distinguishing between mandatory and optional arbitration is defined nowhere in the agreement. It is simply not credible to claim that the consumer has consented to mandatory arbitration under these circumstances and the contract should not be construed to deny the plaintiff her day in court.

CONCLUSION

Amici respectfully request that the Court deny American Express's attempt to force Theodore into compulsory arbitration of her claims, and reverse.

Dated: July 16, 2024

<u>/s/ Andre M. Mura</u>

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STATEMENT OF RELATED CASES

Amici are not aware of any related cases, as defined by Ninth Circuit Rule 28-2.6, that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I am the attorney representing amici curiae National Consumer Law Center, National Association of Consumer Advocates, Americans for Financial Reform Education Fund, and Impact Fund. This brief contains 2753 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5).

Date: July 16, 2024

/s/ Andre M. Mura
Andre M. Mura

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document was filed electronically on July 16, 2024, via the Court's electronic filing system and notice of this filing will be sent to all Parties by operation of the Court's electronic filing system.

/s/ Andre M. Mura
Andre M. Mura