No. 16-3577

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ABDUL JALUDI

Plaintiff-Appellant,

v.

CITIGROUP, et al.

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
No. 15-2076

**BRIEF OF *AMICI CURIAE* PUBLIC JUSTICE, P.C.,
NATIONAL EMPLOYMENT LAW PROJECT,
& COMMUNITY LEGAL SERVICES OF PHILADELPHIA
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the amici states that they have no parent corporations and that there is no publicly held corporation that owns 10% or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Public Justice, P.C. is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public justice has a strong interest in ensuring workers are free to publicly expose wrongdoing by their corporate employers and defend themselves against retaliation in court. To defend access to justice for workers, consumers, and others harmed by corporate wrongdoing, Public Justice has long conducted a special project devoted to fighting abuses of mandatory arbitration. Through this project, Public Justice has seen firsthand how corporations continue to apply old arbitration clauses contrary to statutes, the parties' intentions, and the clauses' own text.

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 50 years of experience advocating for the employment and labor rights of workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP has

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, amici affirm that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting the brief, and no person, other than *amici*, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

supported the expansion of retaliation and whistleblower protections and enforcement. NELP's areas of expertise include workplace rights and their enforcement under state and federal employment and labor laws, including wage and hour rights, anti-discrimination, and health and safety protections. For any of these rights to be upheld, workers must have access to transparent adjudication in courts of law when they come forward to complain, as Mr. Jaludi has in this case. NELP has litigated directly and participated as amicus curiae in numerous cases before most of the federal circuit courts, state courts, and the U.S. Supreme Court, and has provided Congressional testimony addressing the whistleblower and employment issues raised in this case.

Community Legal Services of Philadelphia (CLS) is a non-profit legal services organization founded in 1966 that represents thousands of low-income Philadelphians every year in a variety of civil legal cases, including employment cases. CLS advocates for workplace rights of its mostly non-union clients on the federal, state, and local levels on matters including unemployment compensation, wage and hour rights, anti-discrimination, and other areas that impact poverty and economic inequality. CLS has litigated directly and participated as amicus curiae in cases before the Third Circuit and in Pennsylvania state courts on behalf of workers. CLS joins this brief after seeing that more and more low wage workers are being compelled to sign arbitration agreements by their employers.

INTRODUCTION

The district court pulled an arbitration clause back from the dead and used it to deny Abdul Jaludi access to justice. Mr. Jaludi worked for Citigroup for twenty-five years. In 2013, he sued the company under the Sarbanes-Oxley Act, alleging that Citigroup retaliated against him for blowing the whistle on the company's ethical violations. In turn, Citigroup moved to compel arbitration under its 2009 arbitration policy, which required Mr. Jaludi to arbitrate all disputes related to his employment including claims under Sarbanes-Oxley.

Citigroup relied on its 2009 arbitration agreement even though, in 2010, Congress passed the Dodd-Frank Act, which declared predispute arbitration agreements requiring arbitration of Sarbanes-Oxley claims to be invalid and unenforceable. *See* 18 U.S.C. § 1514A(e). On top of that, Citigroup and Jaludi had already agreed to a new, superseding arbitration policy in 2011 that, under operative contract law principles, should have governed the dispute instead of the 2009 policy. Finally, the text of the 2011 policy expressly excludes arbitration of Sarbanes-Oxley claims. Despite all that, Citigroup still tried to enforce the old 2009 arbitration clause and keep Mr. Jaludi out of court.

And the district court let Citigroup do it. The court held that the Dodd-Frank amendment to Sarbanes-Oxley could not retroactively invalidate the 2009 agreement to arbitrate whistleblower claims, and that Citigroup's 2011 arbitration agreement didn't supersede or conflict with the 2009 agreement. Nothing could kill the 2009 arbitration clause—not legislative action invalidating it, not the parties' mutual intentions to override it, and not even the text of the new 2011 policy that excludes arbitration of disputes under Sarbanes-Oxley.

This case is just one example of an increasingly common phenomenon: the arbitration clause that never dies. Corporations try to resurrect old arbitration agreements and drag disputes into arbitration contrary to statutes, principles of contract law, and even the text of the arbitration clauses themselves. These Frankenstein arbitration clauses take on a life of their own. Citigroup has tried to resuscitate one of these undying arbitration clauses; this Court should slay it once and for all.

ARGUMENT

I. Corporations Try to Enforce Arbitration Clauses Even After Congress Bans Them.

In 2010, Congress passed the Dodd-Frank Act "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1367 (2010). The Act amended the whistleblower provision in Sarbanes-Oxley to say: "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 18 U.S.C. 1514A(e)(2). Despite the fact that Congress passed a statute to stop companies from forcing whistleblowers into arbitration, that's exactly what Citigroup is trying to do.

Citigroup argues the new law can't retroactively invalidate its 2009 arbitration agreement with Mr. Jaludi because of the "presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994). However, "the statute's temporal reach becomes unacceptable only when its retroactive application would significantly impair existing rights and thereby disappoint legitimate expectations." *Dinnall v. Gonzales*, 421 F.3d 247, 252 (3d Cir. 2005).

To determine whether a statute has a retroactive effect, courts are "guided by considerations of fair notice, reasonable reliance, and settled expectations." *Atkinson v. Att'y Gen. of U.S.*, 479 F.3d 222, 231 (3d Cir. 2007). Courts "must determine the 'important event' to which the statute allegedly attaches new legal consequences." *Deweese v. Nat'l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 251 (3d Cir. 2009).

Here, the important event is Citigroup's alleged retaliation which gave rise to Mr. Jaludi's claim under Sarbanes-Oxley. The events forming the basis of the Sarbanes-Oxley claim happened *after* the Dodd-Frank amendment was passed. The amendment had no effect on anyone's substantive rights until there was a Sarbanes-Oxley claim. The amendment doesn't prohibit the company from drafting or retaining an arbitration agreement that applies to Sarbanes-Oxley claims; it prohibits the *enforcement* of such an agreement. The company had fair notice that it could no longer enforce that type of agreement. That's why the company published a new, superseding arbitration policy in 2011 that excluded mandatory arbitration of Sarbanes-Oxley claims.

This case is no different than *Deweese*. In that case, the Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak shared use of the railroad tracks. *Deweese*, 590 F.3d at 242. The two had an agreement that required SEPTA to indemnify Amtrak for personal injury liability expenses. *Id.* When a passenger was hit by a train and sued for damages, Amtrak tried to enforce its indemnity agreement with SEPTA, but SEPTA asserted sovereign immunity under a state law. *Id.* at 241.

But in the many years since SEPTA and Amtrak signed their indemnity agreement, Congress passed the Reform Act, which preempts state law and allows companies like Amtrak to enforce their indemnity agreements. *Id.* at 243. SEPTA said the Reform Act couldn't preclude its sovereign immunity defense because that would be an impermissible retroactive application of the statute. *Id.* at 244. The statute, SEPTA argued, didn't exist when the parties signed the indemnity agreement. *Id.*

But this Court held that to determine whether the Reform Act would have a "retroactive effect" the Court must look to the "important event to which the statute allegedly attaches new legal consequences." *Id.* at 251. The Court explained, "the important event is not the execution of the [indemnity] Agreement in 1982, as SEPTA asserts, but is rather the Deweese accident in 2004, after which Amtrak had the right to indemnity from SEPTA." *Id.* Moreover, the court reasoned, SEPTA had fair notice of the statute's effects "well before Amtrak first invoked its contractual indemnity right in 2004 and so has no basis for claiming 'reasonable reliance' on its sovereign immunity defense." *Id.* at 252. SEPTA had ample time to renegotiate its agreement or indemnity obligations, but chose not to. Likewise, the important event in *Jaludi* was the retaliation that gave rise to Mr. Jaludi's Sarbanes-Oxley claim, triggering the new limit on Citigroup's right to enforce its arbitration clause. Because that all happened after Congress enacted Dodd-Frank, this case does not involve the retroactive application of the statute.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. And that includes cases arising from language in a pre-existing contract. If parties can continue to enforce pre-existing contracts, regardless of what laws are passed, legislative reforms will be impossible. Put another way, Citigroup's expanded interpretation of what constitutes retroactive application would limit Congress's ability to regulate *future* conduct. Congress passes laws all the time that change the context in which parties originally entered into a contract. If those laws can't affect existing contractual relationships *moving forward* and instead only affect newly formed contractual relationships, then legislative reforms will have a slow, drip by drip (or contract by contract) affect and Congress won't be able to accomplish its legislative objectives.

Further, such an expansive interpretation of what constitutes "retroactive" application of a statute would create an enforcement loophole: corporations could avoid new laws by just extending old contract provisions for as long as possible. This tactic would also exacerbate the problem discussed in Part II about how corporations deploy broad, boundless arbitration clauses to force arbitration of disputes that the other party never intended to arbitrate. Congress must be able to pass legislation affecting arbitration agreements just as it can pass legislation affecting indemnity agreements and every other type of contractual relationship. The FAA requires courts to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal citation omitted). This equal-treatment principle requiring arbitration agreements to be handled similarly to other types of contracts applies to the law of statutory retroactivity as much as to any other area of law.

If anything, the district court's expansive view of retroactivity is especially troublesome in the arbitration context where the Supreme Court has foreclosed alternative forms of regulation. The Court has repeatedly found the Federal Arbitration Act to have expansive federal preemptive effects. *See, e.g.*, *Concepcion*, 563 U.S. at 341. As a result, states have little power to rein in corporations who abuse power imbalances with employees and consumers to force them to accept one-sided or unfair arbitration provisions. So when Congress steps in to strengthen protections for consumers and employees, it's especially important for courts to honor its intent. Otherwise, corporations remain in the driver's seat, enforcing agreements that Congress doesn't want enforced.

Finally, in a prior brief, Citigroup argued courts deciding questions of retroactivity should make a "commonsense, functional judgment" and be guided by the parties' "reasonable reliance" and "settled expectations." No. 16-3577, Doc. No. 003112563010, at 36 (March 14, 2017). The term "settled expectations" comes from *Landgraf*, which states:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

511 U.S. at 265.

But few if any "settled expectations" were actually at stake in this case. Mr. Jaludi was subject to employment-at-will, which means that neither he nor his employer were bound by any settled expectations regarding the duration or terms of his employment. *See* SA-0137. Employment-at-will is the predominant default doctrine governing employment in the United States today, absent a clear intent by the parties to the contrary.[2] Under this doctrine, an employer can discharge an employee for any or no reason, and an employee can leave a job without notice or reason as well. *See Raines v. Haverford College*, 849 F. Supp. 1009, 1011–12 (E.D. Pa. 1994).

Aside from the two arbitration provisions Mr. Jaludi signed during his tenure at Citigroup, he did not have any other contract governing the duration or terms of his employment there. Unlike commercial transactions and other contracts, employment-at-will is a relationship that imposes few to no conditions on the parties, beyond those spelled out in federal and state laws, such as Title VII and the Sarbanes-Oxley Act. In fact, some courts have theorized that employment-at-will

[2] H.G. Wood, A Treatise on the Law of Master and Servant § 134, at 272 (John D. Parsons, Jr. ed., 1877) ("a general or indefinite hiring is prima facie a hiring at will"). This view of employment adopted by many U.S. courts in the late nineteenth and early twentieth centuries holds firm today in all states except Montana. *See* Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 Baylor L. Rev. 707 (2006); *see also* Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)*, 57 Mont. L. Rev. 375 (1996).

is an illusory contract due to its indefinite duration and the fact that both parties retain discretion to terminate at any time. *See* Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. Rev. 427, 478 (2016); Lord, *The At-Will Relationship*, 58 Baylor L. Rev. at 739–42.

Thus, in the at-will employment context, neither the employer nor the employee has settled expectations about their future relationship. Neither party is relying on the other. Of course, here, Citigroup is referring to its reliance on the arbitration clause. But any "common sense, functional judgment" should recognize the context in which the arbitration clause was signed and the reality that applying the 2010 Dodd-Frank Act in this case would not create a great disruption to Citigroup's settled expectations or unfairly disadvantage them in any way. In *Landgraf*, the Supreme Court recognized "the largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." 511 U.S. at 271. But in the at-will employment context, there is no such thing as predictability or stability. Given the context in which the arbitration agreement was made, there's no risk that applying the 2010 Dodd-Frank Act would inflict any real injustice on Citigroup.

Further, as discussed in Mr. Jaludi's brief, the Supreme Court in *Landgraf* focused on what the law was at the time of the lawsuit—not the date the employee was hired—in its retroactivity inquiry. *See* Appellant's Opening Br. at 47. This is especially appropriate in the employment-at-will context because Mr. Jaludi had no right to continued employment as an at-will employee. Each day was a new transaction, a new day in the employment-at-will relationship.

In sum, there's nothing retroactive about applying the 2010 Dodd-Frank amendment to Citigroup's 2013 attempt to enforce an arbitration agreement in a dispute about Citigroup's post-2010 conduct. And applying the amendment would not pose a great disruption to the parties' settled expectations since Mr. Jaludi was an at-will employee and neither he nor Citigroup had any settled expectations to disrupt. Despite this, Citigroup wants this court to keep its 2009 arbitration clause on life support and force Mr. Jaludi to arbitrate his whistleblower claim contrary to a federal statute. But if federal legislation can't invalidate arbitration clauses that purport to cover disputes that Congress has declared nonarbitrable, then what can? If arbitration clauses can survive despite statutes invalidating them, then corporations—not Congress—will always dictate the ability of plaintiffs to access the courts.

II. Corporations Try to Enforce Arbitration Clauses Contrary to Principles of Contract Law.

Corporations often try to apply arbitration clauses indefinitely, contrary to the contracting parties' mutual intentions. And they do so in a variety of ways. In *Jaludi*, Citigroup tried to apply an old arbitration agreement despite a superseding contract. Other times, corporations rely on an arbitration agreement's broad, unbounded language to force arbitration of disputes far beyond what the contracting parties actually intended to arbitrate. And sometimes, it's a combination of both tactics. Corporations try to apply outdated arbitration agreements to disputes the parties never agreed to arbitrate by pointing to the broad, unbounded language in the old agreement.

But no matter how corporations spin it, these attempts to enforce arbitration agreements indefinitely—and in all kinds of contexts—undermine the first principle of all arbitration decisions: that only disputes that the parties have contractually agreed to submit to arbitration are subject to arbitration. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010). The Federal Arbitration Act's policy in favor of arbitration is supposed to be "limited by the principle that arbitration is a matter of consent, not coercion." *Holick v. Cellular Sales of N.Y., LLC*, 802 F.3d 391, 395 (2d Cir. 2015). But this principle is not always honored.

A. Outdated Arbitration Clauses

Corporations try to take old, expired arbitration clauses and apply them to disputes that arise years later, contrary to the parties' clear intentions. For example, Citigroup is trying to use its 2009 arbitration policy to force Mr. Jaludi to arbitrate his Sarbanes-Oxley claim even though Citigroup and Mr. Jaludi mutually agreed to a new, superseding arbitration policy in 2011. The arbitration policies appear in the 2009 and 2011 Employee Handbooks, respectively. The 2011 Handbook states that "[t]his Handbook supersedes any Employee Handbooks or Human Resources policies, practices or procedures that may have applied to you and that are inconsistent with and prior to this Handbook's distribution." SA-0096.

The 2011 arbitration policy differs from the 2009 policy in two important ways: First, it expressly excludes from arbitration "disputes which by statute are not arbitrable," presumably in reference to the 2010 Dodd-Frank Act that declared Sarbanes-Oxley claims nonarbitrable. SA-0140. Second, the 2011 policy omits the prior reference to Sarbanes-Oxley claims. SA-0140–0144. In other words, Citigroup and Mr. Jaludi made a new arbitration agreement, one they both agreed would supersede the 2009 agreement and one that does not require Mr. Jaludi to arbitrate his Sarbanes-Oxley claim. But the district court ignored the superseding agreement and let Citigroup revive an old, expired arbitration agreement contrary to the parties' intentions.

Citigroup is not the first company to try this. Rent-A-Center did the same thing. Paul Kabba worked as a store manager for Rent-A-Center, a rental furniture company, until 2008 when he was assaulted and robbed at gunpoint. *See Kabba v. Rent-A-Ctr.*, No. PWG-17-211, 2017 WL 1508829, at *1 (D. Md. Apr. 27, 2017), *aff'd sub nom.*, 730 F. App'x 141 (4th Cir. 2018). Due to his injuries, Kabba took medical leave and Rent-A-Center eventually terminated his employment.

Years later, in 2013, Rent-A-Center re-hired Kabba as a lead assistant manager. Kabba was presented with an arbitration agreement in the employment application, but he refused to sign it. *Id.* Then, on his first day of work, Rent-A-Center fired Kabba after he told Rent-A-Center he had medical issues that limited the amount of heavy lifting he could do. *Id.* Kabba sued the company for violating the Americans with Disabilities Act. *Id.* Rent-A-Center tried to compel arbitration based on an arbitration agreement Kabba signed back in 2002 during his first period of employment with the company. *Id.*

The court, however, refused to compel arbitration. It reasoned that Rent-A-Center didn't intend the arbitration clause in the 2002 agreement to cover disputes arising from Kabba's 2013 employment because the company included a new arbitration agreement in the 2013 employment packet. *Id.* at *8. That agreement would serve no purpose if Rent-A-Center believed the old agreement still applied. *Id.* Further, even if the old 2002 agreement could apply, the fact that Rent-A-Center decided to hire Kabba in 2013 even though Kabba didn't sign the arbitration agreement Rent-A-Center gave him in 2013 suggests "a mutual intent to modify the agreements such that they do not apply to Kabba's 2013 employment." *Id.* The court refused to compel arbitration because it was clear that *neither* party expected the old arbitration agreement to apply to Kabba's new job. Unlike the district court in *Jaludi*, the Maryland court focused on whether the parties mutually intended the old arbitration clause to keep applying.

But corporations don't just try to extend arbitration clauses beyond their temporal reach. They also try to extend the clauses beyond their scope. Corporations try to apply arbitration clauses to disputes entirely unrelated to the underlying contractual relationship, disputes the parties never anticipated, much less intended to arbitrate.

B. Unbounded Arbitration Clauses

Corporations write broad arbitration clauses and then try to argue that the clause is unbounded and applies indefinitely, no matter the context. An employee or consumer who enters into an arbitration agreement with a corporation for a particular job or purchase may be surprised, years later, to find that agreement being dusted off and used again when the corporation wants to force arbitration over a completely unrelated dispute.

The temporal reach of arbitration clauses is intertwined with questions of scope because the Supreme Court adopted a presumption that arbitration clauses will continue to apply even after the underlying contract expires, but only if the post-contract dispute arises under the contract. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205–06 (1991). A post-expiration grievance "arises under the contract" where (1) "it involves facts and occurrences that arose before expiration," (2) "an action taken after expiration infringes a right that accrued or vested under the agreement," or (3) "under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Id.* For example, in *Stevens-Bratton v. TruGreen, Inc.*, the plaintiff's claim that a lawn services company was making autodialed telemarketing calls to her in violation of the Telephone Consumer Protection Act did not "arise under" her expired contract for lawn services, so the court did not presume the contract's arbitration clause applied. 675 F. App'x 563, 568–71 (6th Cir. 2017).

But corporations are chipping away at this rule. In response to the Supreme Court's efforts to narrow the presumption and refocus the analysis on what the parties actually intended, corporations started using broad survival clauses. *See, e.g.*, *Treinish v. BorrowersFirst, Inc.*, No. 1:17-CV-1371, 2017 WL 3971854, at *2 (N.D. Ohio Sept. 8, 2017) (contract said "Arbitration Provision shall survive (i) suspension, termination, revocation, closure, or amendments to this Agreement and the relationship of the parties and/or the Lender Parties; [and] (ii) the bankruptcy or insolvency of any party or other person"). Even without broad survival clauses, corporations try to enforce unbounded arbitration clauses in employment and consumer contracts, no matter the time, context, or nature of the dispute.

For example, employers use broad arbitration clauses to force workers to arbitrate disputes unrelated to their employment relationship—disputes the workers never expected or agreed to arbitrate. This is most evident in corporations' use of arbitration clauses to prevent their employees from bringing sexual harassment and assault cases in court. The most infamous example is *Jones v. Halliburton*, 583 F.3d 228, 230 (5th Cir. 2009). While Jamie Leigh Jones was working for a private defense contractor overseas in Baghdad, a group of her coworkers allegedly drugged, beat, and gang-raped her in her barracks. *Id.* When she reported the incident, the company held her in a container under armed guard. *Id.* When Jones sued Halliburton for negligence, assault and battery, and false imprisonment, the company tried to use an arbitration clause in her employment contract to force her claims out of court. *Id.* at 231.

But the Fifth Circuit didn't let the company stretch its arbitration clause that far, finding Jones' claim was not subject to arbitration because Jones was not "acting in any way related to her employment by being the alleged victim of a sexual assault." *Id.* at 237; *but see Forbes v. A.G. Edwards & Sons, Inc.*, No. 08 CIV. 552(TPG), 2009 WL 424146, at *8 (S.D.N.Y. Feb. 18, 2009) (holding employee's claims related to her sexual assault at a work conference were within scope of broad arbitration clause).

Nearly ten years after *Jones*, mandatory arbitration clauses continue to silence employees subject to sexual assault and harassment in the workplace. *See* Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, Vox (May 21, 2018) (describing use of mandatory arbitration clauses to silence employees' sexual harassment and assault allegations at Fox News and Uber)[3]; Debra S. Katz, *30 Million Women Can't Sue Their Employer Over Harassment. Hopefully That's Changing*, Washington Post (May 17, 2018).[4]

Corporations have attempted to do the same thing with arbitration clauses in consumer contracts, trying to enforce those clauses to require arbitration of disputes arising in contexts that have nothing to do with the consumer's original contract. A recent example is Wells Fargo's use of arbitration clauses in customers' legitimate account-opening agreements to force arbitration of claims about the Bank opening fraudulent accounts in those customers' names. In 2016, federal regulators announced that Wells Fargo employees had created millions of fake accounts using the names of real customers to meet sales quotas. The bank paid $185 million in fines and penalties and $142 million to settle class action

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[3] Available at https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court (last visited Dec. 3, 2018).
[4] Available at https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html?utm_term=.2d524e4da441 (last visited Dec. 3, 2018).

claims—but only after years of forcing customers' claims about these fraudulent accounts into arbitration, denying its customers access to the courts and, more importantly, keeping its fraudulent misconduct secret. *See* Stacy Cowley, *Wells Fargo May Have Found More Fake Accounts Created by Employees*, N.Y. Times: DealBook (Aug. 4, 2017)[5]; Robert Weissman & Lisa Donner, *Why Wells Fargo Got Away With it for So Long*, The Hill (Sept. 20, 2016).[6]

Wells Fargo tried to "use broad arbitration language embedded in a product-associated agreement to capture any dispute that may arise, apparently without limit." *Mitchell v. Wells Fargo Bank*, 280 F. Supp. 3d 1261, 1279 (D. Utah 2017). For example, in *Jabbari v. Wells Fargo*, the plaintiffs opened accounts with Wells Fargo, but then discovered years later that the bank had opened several other accounts in their names without their authorization. *See* No. 15-CV-02159-VC, 2015 WL 13699809, at *1 (N.D. Cal. Sept. 23, 2015). Wells Fargo argued the case had to go to arbitration because by becoming Wells Fargo customers, plaintiffs had agreed to arbitrate any dispute, including any disagreement about whether a dispute is subject to binding arbitration. *See id.*

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[5] Available at https://www.nytimes.com/2017/08/04/business/dealbook/wells-fargo-fraud-accounts.html?mcubz=0 (last visited Dec. 3, 2018).
[6] Available at https://thehill.com/blogs/pundits-blog/finance/296706-why-wells-fargo-got-away-with-it-for-so-long (last visited Dec. 3, 2018).

The court agreed, noting that the fake accounts may "relate" to the legitimate accounts, so Wells Fargo's assertion of arbitrability "is not wholly groundless." *Id.* One of the plaintiffs had fake accounts opened in her name *before* she opened a legitimate account. Even then, the court reasoned, the information used to open the account might have come from a meeting to set up the legitimate account, and thus could still fall under the subsequent arbitration provision in her account-opening agreement. *Id.* at *2. The court let arbitration become a matter of coercion, instead of a matter of consent. When Wells Fargo customers agreed to arbitrate disputes related to their accounts, they never imagined that would include disputes regarding fake accounts, fraudulently opened in their names.

Wells Fargo is not alone in its attempts to manipulate arbitration clauses in consumer contracts to cover entirely unrelated disputes, regardless of what the parties actually intended. In *Rogers-Dabbs Chevrolet-Hummer, Inc. v. Blakeney*, a car dealership's employees used a customer's identity to obtain forged titles to stolen vehicles and never gave the customer title to the vehicle he purchased. 950 So.2d 170, 177 (Miss. 2007). When the customer sued, the dealership boldly moved to compel arbitration under the broad arbitration clause in the customer's contract. The court recognized that the customer had agreed to arbitrate claims related to the sale of the vehicle, but it held that "no reasonable person would agree to submit to arbitration any claims concerning a Hummer to which he would never receive a title [or] a scheme of using his name to forge vehicle titles." *Id.* at 177. The court noted that the customer was "presumedly totally unaware" of these actions at the time he signed the arbitration agreement, and that the dispute is "not within the scope of the arbitration agreement." *Id.* at 177–78.

The use of arbitration clauses, contrary to any reasonable interpretation of the contracting parties' intentions, is especially harmful when used to suppress claims of sexual violence. For example, until May 2018, customers using the Uber and Lyft ride-hailing apps had to consent to a terms-of-service agreement that included a broad arbitration provision requiring them to resolve any legal claims against the company in arbitration. In November 2017, a group of women tried to bring claims of sexual assault, rape, sexual harassment, and gender-motivated violence against Uber, but the company moved to compel confidential arbitration of their claims. *See Doe, et al. v. Uber Technologies, Inc.*, No. 17-cv-06571 (N.D. Cal. 2018).

Even assuming these women read Uber's terms of service when they first downloaded the app, they certainly didn't intend the arbitration agreement to cover claims related to being kidnapped and raped by their driver on their way home from work. That's not part of the "service."

In a letter asking Uber to change its policies, the women wrote: "Silencing our stories and the stories of countless other female victims emboldens predators by failing to hold them accountable. . . . Uber's condition of forced arbitration makes future suffering by women like us a near certainty." *See* Open Letter from Katherine, Lauren, Sophia, et al. to Board of Directors, Uber Technologies, Inc. (April 26, 2018).[7]

Some courts have already sounded the alarm about these unbounded arbitration clauses and started to rein them in. In *Wuest v. Comcast Corp*, for example, the court refused to let Comcast use an arbitration clause in a former customer's long-expired subscriber agreement to force the customer's Telephone Consumer Protection Act claim into arbitration. No. CV C 17-04063 JSW, 2017 WL 6520754, at *3 (N.D. Cal. Oct. 5, 2017). The court explained that even broad arbitration clauses cannot be boundless; they cannot "cover any and all disputes between the parties, even those arising from a completely separate incident." *Id.* "[I]f there is no limiting clause in the arbitration provision absurd results would ensue, such that if a defendant murdered the plaintiff in order to discourage default on a loan, the wrongful death claim would have to be arbitrated." *Id.* at *3 (internal quotation marks and brackets omitted).

Similarly, the Seventh Circuit in *Smith v. Steinkamp* refused to let a payday lender take a broad arbitration clause from one of the borrower's previous loan

[7] Available at http://www.wigdorlaw.com/wp-content/uploads/2018/04/Uber-Sexual-Assault-Victims-Open-Letter-to-Uber-s-Board-of-Directors.pdf (last visited Dec. 3, 2018).

agreements and apply it to a dispute over a different loan. 318 F.3d 775, 777 (7th Cir. 2003). The court again recognized the absurdity of boundless arbitration clauses, noting that under the payday lender's theory, if one of its employees picked the borrower's pocket twenty years from now and the borrower sued the employee for conversion, the borrower would *still* be forced to arbitrate. *Id.* Such a result isn't just absurd; it's contrary to the bedrock principle of contract law—mutual consent. At the end of the day, "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989).

Corporations argue their arbitration clauses apply indefinitely and are unlimited in scope, but that's not how employees or consumers understand these agreements. And such boundless, open-ended authorization renders consent meaningless. That's why some courts have rejected overly broad or vague contract provisions; they obscure the thread between authorized conduct and the parties' actual intentions. These Frankenstein clauses no longer reflect the parties' mutual intentions. Yet corporations want them to live on, yanking defendants out of court, contrary to core principles of contract law.

III. Corporations Try to Enforce Arbitration Clauses Even When the Very Text of the Clause Says the Clause Does Not Apply.

The previous section explained why principles of contract law should rein in boundless arbitration clauses, even if the clauses use broad language. But much of the time, there's no need to impose external limits on an arbitration clause because those limits are already provided in the clause's text. Still, corporations will sometimes try to get courts to overlook express terms limiting the matters committed to arbitration by touting the "liberal federal policy favoring arbitration."

That's what Citigroup did in *Jaludi.* While the district court was focused on issues related to the retroactive application of Dodd-Frank and the presumption in favor of arbitration, it overlooked the express wording in the 2011 arbitration agreement between Mr. Jaludi and Citigroup. The agreement expressly excludes from mandatory arbitration "disputes which by statute are not arbitrable." SA-0140. The Dodd-Frank Act (which was already law in 2011) declares Sarbanes-Oxley whistleblower claims nonarbitrable. Thus, the contract expressly excludes Sarbanes-Oxley whistleblower claims from mandatory arbitration.

Citigroup's arbitration policy could easily have said arbitration is mandatory unless prohibited by statute. If that's what it said, the language of the contract would just beg the question: does Dodd-Frank prohibit the enforcement of pre-Dodd-Frank agreements to arbitrate Sarbanes-Oxley claims? But that's not what the 2011 policy says. It expressly excludes *a category of disputes* from mandatory arbitration—"disputes which by statute are not arbitrable." The policy doesn't just say arbitrate in accordance with the law; it creates a substantive carve out for disputes that statutes currently declare nonarbitrable. The text of the 2011 arbitration policy reflects Citigroup's intent to update its arbitration policy in accordance with Dodd-Frank. Whether or not Citigroup was required to do so, that's what it did.

Nowhere in the 2011 arbitration policy does it say that this is the policy "moving forward" or "just for new employees." Nor could it. The company has one arbitration policy in its Employee Handbook, and the Handbook supersedes all prior policies, practices, or procedures that are inconsistent with it. It doesn't matter whether Congress intended Dodd-Frank to apply to existing employment relationships; Citigroup and Mr. Jaludi agreed that it would.

This case is a lot like *Nielsen v. Piper, Jaffray & Hopwood, Inc.* where the Seventh Circuit decided there was no need to determine whether a rule barring arbitration of certain class action security claims applied retroactively because the parties, in their arbitration agreement, agreed to incorporate all intervening statutes and regulations that affected or were inconsistent with the agreement. 66 F.3d 145, 149 (7th Cir. 1995). Likewise, here, Mr. Jaludi and Citigroup expressly agreed to incorporate the Dodd-Frank amendment. But now that Citigroup's unhappy with the result, it's trying to get the court to ignore the plain meaning of the contract's language—language Citigroup drafted itself.

Citigroup isn't the only corporation to try and backpedal on its own drafting and advance bizarre interpretations of arbitration clauses inconsistent with their text. For example, in *Borecki v. Raymours Furniture Co.*, Scott Borecki visited a furniture store and purchased a bedroom set. No. 17-cv-1188, 2017 WL 5900288, at *1 (S.D.N.Y. June 21, 2017), *report and recommendation adopted*, No. 17-cv-1188, 2017 WL 5953172, at *1 (S.D.N.Y. Nov. 28, 2017). As part of that transaction, he agreed to a Sales Ticket, which contained an arbitration provision. It required arbitration of "any claim, dispute, or controversy . . . that in any way arises from or relates to the goods and/or services you have purchased or are purchasing . . ." *Id.* It went on to say "claim" has "the broadest reasonable meaning." *Id.*

Two years later, Borecki started receiving spam text messages from the furniture company. *Id.* at *2. He eventually sued the company, on behalf of himself and a class of customers receiving spam text messages, for violating the Telephone Consumer Protection Act. *Id.* The furniture company found the arbitration provision from Borecki's old Sales Ticket and moved to compel arbitration. *Id.* In determining whether Borecki's claim fell within the scope of the two-year-old arbitration agreement, the court looked to its text. *Borecki*, WL 5953172 at *2. The court reasoned that the phrase "any claim, dispute or controversy . . . that in any way arises from or relates to" is often "a hallmark of a 'broad' arbitration clause." *Id.*

But the court added that "[d]espite the breadth of that language when considered in isolation . . . one cannot ignore the language that follows. *Id.* The provision says "from or relates to the goods and/or services you have purchased." *Id.* Thus, the court said, the arbitration clause is actually narrow, and because the TCPA claim in no way relates to Borecki's two-year-old purchase of a bed set, it does not fall under the scope of the parties' arbitration agreement. *See id.* at *3.

The presumption in favor of arbitration "does not operate at all" where there is "no doubt presented by the text of the agreement." *Hendrick v. Brown & Root, Inc.*, 50 F. Supp. 2d 527, 535 (E.D. Va. 1999). And in *Jaludi*, the text of the 2011 arbitration agreement expressly excludes mandatory arbitration of Sarbanes-Oxley claims.

In sum, the 2009 arbitration agreement that Citigroup is trying to enforce should have died long ago. It should have died when Congress declared it invalid; again when the parties agreed to a new, superseding arbitration agreement; and once more when the parties expressly excluded Sarbanes-Oxley claims from mandatory arbitration in the text of their new agreement. It is time to stop letting Frankenstein arbitration clauses run loose, forcing employees and consumers into arbitration for disputes they never expected or intended to arbitrate, and at a minimum requiring them to expend time and resources defending their right to access the courts against these Frankenstein monster attacks. And the indefinite, relentless application of these clauses doesn't just deny individuals their day in court; it lets large companies conceal their misconduct—from pervasive sexual violence in the work place to massive consumer fraud schemes.

CONCLUSION

For the foregoing reasons and the reasons stated in the Appellant's Brief, this Court should reverse the district court's order and allow Mr. Jaludi to pursue his claims in court.

Dated: December 3, 2018

Respectfully submitted,

By: /s/ Ellen Noble

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COMBINED CERTIFICATIONS

I, Ellen Noble, hereby certify as follows:

1. Pursuant to Rule 46.1 of the Local Appellate Rules for the United States Court of Appeals for the Third Circuit, I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), I certify that this Brief of Amici Curiae complies with the type and volume limitations of Fed. R. App. P. 32(a)(7)(B):
    a. According to the word count in the word processing system employed in drafting this brief (Microsoft Word 2016), the brief contains 6,482 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
    b. This Brief has been written in Times New Roman, a proportionally-spaced, 14-point serif font.
3. On today's date, December 3, 2018, I filed this brief with the Clerk of the United States Court of Appeals for the Third Circuit via the Court's CM/ECF system, which will cause service on counsel for all parties of record, who are registered CM/ECF Users.

4. I further certify that the E-Brief was scanned for computer viruses using the current version of Windows Defender, and no virus was detected.
5. I also certify that the text of the hard copies and the E-Brief are identical.

Dated: December 3, 2018 /s/ Ellen Noble