ORIGINAL

No. 20-1621

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIA LERNER,

Petitioner,

v.

CITIGROUP,

Respondent.

On Petition for Writ of Certiorari
To the Court of Appeals for The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Antonia Lerner, Petitioner
2639 East 64th Street
Brooklyn, NY 11234

QUESTIONS FOR REVIEW

Whether the proper standard of review and correct legal standard are waived from appellate review merely because the nonmovant did not file an opposition?

PARTIES TO THE PROCEEDINGS

The petitioner is Antonia Lerner.

The Respondent is Citigroup

There were no other named parties in this action below.

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ANTONIA LERNER ("Ms. Lerner") respectfully petitions for certiorari from a final decision by the Court of Appeals for the Third Circuit ("Third Circuit").

ORDERS BELOW

On August 1, 2016, the United States District Court for the District of New Jersey, compelled arbitration and stayed the action pending arbitration. (a8). On April 12, 2019, the District Court denied vacating the award. (a11). On December 15, 2020, the Third Circuit affirmed. (a1),

JURISDICTION

The matter arises under 42 U.S.C. §2000e, et seq. and 42 U.S.C. §12101. On December 15, 2020, the Third Circuit decided the appeal. (a1). Under 28 USC 1254(1), the Court has jurisdiction. Timeliness is under U.S. Sup. Ct. R. 13.1, 13.3, 30.1.

PROVISIONS INVOLVED

9 U.S.C. § 4 states "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

When reviewing a motion to compel arbitration pursuant to 9 U.S.C. § 4, a majority of federal circuits, including the Third Circuit, apply the standard of summary

judgment as enumerated in Rule 56(a) of the Federal Rules of Civil Procedure, which states, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

This Court held, "the trial court must apply the correct standard, and the appeals court must make sure that has occurred." *Fox v. Vice*, 563 U.S. 826, 838, 131 S. Ct. 2205, 2216, 180 L. Ed. 2d 45 (2011).

STATEMENT OF THE CASE

1. Over the years Congress enacted many statutes that serve to protect a person on an individual level to address a wide range of abusive business practices. Amongst them are civil rights, such as 42 U.S.C. §2000e, et seq. (Equal Employment Opportunities), 42 U.S.C. §12101 (Equal Opportunity for Individuals with Disabilities) etc.

To diminish the effects of these statutes, many businesses have developed protocol proclaiming that all disputes can only be reviewed in arbitration. These protocols are found in user agreements, employee handbooks, and similar materials. And are written by sophisticated lawyers for the business without the individual (*i.e.* employee, consumer, etc.) having any input or ability to negotiate its terms. They include terms all sorts of terms and waivers to curve the effects of the law, such as

waiver for class action, punitive damages, or rules of evidence. These businesses are from a wide range across all spectrums, from utility providers to major banks.

The advantage for these arbitration terms, they remove a grievance from the public eye, allows a business to be a repeat player amongst select arbitrators, eliminates the opportunity for the courts to establish precedent, and deters any judicial challenge to a violation of the law. An arbitration proceeding also provides an abridged degree of discovery and rules for evidence compared to federal court. As a direct result, the effect of a given statute enacted by Congress can become significantly diminished without the business facing any, or minimal, consequences.

The lower courts are quick to compel arbitration because arbitration removes cases from their crowded dockets. At this crossroad Ms. Lerner found herself.

2. Since 2001, Ms. Lerner worked for Citigroup, a major national bank, as a quality analyst. In 2014, Ms. Lerner was on an approved maternity leave due to a high-risk pregnancy of twins. Came the time to return to work, the management at Citigroup delayed for weeks to respond to Ms. Lerner's phone calls until the duration for leave had expired. Afterwards, Citigroup informed Ms. Lerner that she lost her position. About three months later, Citigroup rehired Ms. Lerner. Three weeks in, Ms. Lerner was terminated under the excuse that her position was outsourced to Indi. The termination came

after Ms. Lerner had requested for certain disability accommodations resulting from the pregnancy and requested not to work on the Shabbat. Further, Citigroup terminated Ms. Lerner's access to its employment portal and effectively blocked Ms. Lerner from finding other employment within Citigroup. Ms. Lerner brought this case pro se.

In response, Citigroup brought a motion to compel arbitration, asserting in 2009 (a12), 2011 (13), and 2013 (a14), Citigroup introduced an "Employee Handbook." To receive that employee handbook, Ms. Lerner was directed to a form, which informed:

> When you click on the "I Acknowledge" button below, you are acknowledging that:
>
> · You have opened the e-mail that directed you to this Web site.
>
> · You have received the Web link to the Employee Handbook.
>
> · You understand that it's your obligation to read the Handbook and become familiar with its terms.
>
> · Appended to the Handbook is an Employment Arbitration Policy ae well as the "Principles of Employment" that require you to submit employment-related disputes to binding arbitration (see Appendix A and Appendix D). You understand that it is your obligation to read these documents carefully, and that no provision in this Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of Citi's right to compel arbitration of employment-related disputes.
>
> · WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY. YOU UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK. NOR THE HANDBOOK ITSELF. IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT YOUR EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. YOU UNDERSTAND THAT YOUR EMPLOYMENT WITH CITI IS AT-WILL. WHICH MEANS IT CAN BE TERMINATED BY

> YOU OR CITI AT ANY TIME. WITH OR WITHOUT NOTICE. FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.
>
> Please click the "I Acknowledge" button below. Once you acknowledge, you'll have the ability to download and print your copy of the Handbook

Based on the foregoing language, Citigroup asserted that Ms. Lerner is bound to the arbitration terms found in the Employee Handbook. Ms. Lerner, proceeding pro se, did not file an opposition. The District Court granted the motion to compel and stayed the action pending arbitration. (a8). For the time being, Ms. Lerner complied with the order compelling arbitration. (a3).

3. Came on appeal, Ms. Lerner was represented by counsel, who argued that the District Court was obligated to apply the proper legal standard, regardless if Ms. Lerner had filed an opposition, and erred as a matter of law because the mere words "I agree to read and understand' (an employee handbook)" does not constitute a knowing agreement for arbitration nor waive a remedy provided by Congress in a civil rights statute. *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997). *Nelson* has been followed in the First, Sixth and D.C. Circuits.

The Third Circuit refused to address *Nelson* under the premise that Ms. Lerner failed to file an opposition to the motion to compel. (a5).

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT CONTRAVENES THIS COURT'S HOLDING OF *FOX V. VICE*, 563 U.S. 826, 838, 131 S. CT. 2205, 2216, 180 L. ED. 2D 45 (2011) THAT "THE TRIAL COURT MUST APPLY THE CORRECT STANDARD, AND THE APPEALS COURT MUST MAKE SURE THAT HAS OCCURRED."

The Court held, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 1353, 4 L. Ed. 2d 1409 (1960). Whether and when a court may exercise its authority to compel arbitration, is a pure question of law. As the Court held in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537, 202 L. Ed. 2d 536 (2019) "a court's authority under the Arbitration Act to compel arbitration may be considerable, it isn't unconditional" and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412, 203 L. Ed. 2d 636 (2019) "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."

This case presents an issue of national importance. Given that the circuits unanimously apply the standard of Fed. R. Civ. P. 56(a) when considering a motion to compel arbitration. Under standard of Fed. Rule Civ. Proc. 56(c), according to the Court in *Beard v. Banks*, 548 U.S. 521, 529, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006), it is the burden of the movant to demonstrate "the absence of a genuine issue

of material fact and his entitlement to judgment as a matter of law." *Id.* Only "**If**" the movant "has done so, then" the court must determine whether nonmovant "bears the burden of persuasion." *Id* (emphasis added). In other words, until the movant has not carried the burden of establishing a right to summary judgment, the nonmovant had no duty to file an opposition. There is a pressing question whether a court may grant a motion to compel on default when taken all the evidence of the movant there is no agreement to arbitrate as a matter of law?!

Under *Nelson*, the mere agreement to download and read an employee handbook is not a knowing agreement for arbitration. Thus, in this case Citigroup could not establish an agreement to arbitrate by the mere agreement to download and read the employee handbook.

This Court held, "the trial court must apply the correct standard, and the appeals court must make sure that has occurred." *Fox v. Vice*, 563 U.S. 826, 838, 131 S. Ct. 2205, 2216, 180 L. Ed. 2d 45 (2011). The underlying issue is sharpened by the Third Circuit's refusal to consider the issue on appeal, under its waiver doctrine, by viewing the issue of whether there is an arbitration agreement as a factual argument of the parties. But, the Third Circuit erred, under FRCP 56 the question is whether there is a contract as matter of law and whether the District Court applied the correct standard as spelled out in *Nelson*. A court cannot write a contract when none exists.

This case presents the prefect vehicle to address the issue on whether the proper standard of review and correct legal standard are waived from appellate review merely because the nonmovant did not file an opposition. A number of Circuits hold that "the court, not the parties, must determine the standard of review, and therefore, it cannot be waived." *Worth v. Tyer*, 276 F.3d 249, 262 (7th Cir. 2001). The "contracting parties cannot dictate to a federal court the standard of review that governs a case." *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 610 (9th Cir. 2020). "A party's concession on the standard of review does not bind the court, as such a determination remains for this court to make for itself" since the "standard of review to apply is a pure issue of law." *United States v. Perrin*, 926 F.3d 1044, 1046 (8th Cir. 2019), *Hydro Res., Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1170 (10th Cir. 2010). It "is always the duty of our court to apply the proper standard of review to a district court's decision, without regard to the (Continued) parties' arguments or their agreements to the contrary." *U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Virginia, LLC*, 899 F.3d 236, 256 (4th Cir. 2018).

At this crossroad there are two standards that should be resolved, the question whether the proper standard of review and correct legal standard are waived from appellate review merely because the nonmovant did not file an opposition. According to the Third Circuit, the failure of the district court to apply the proper standard is

waived from appellate review for merely not filing an opposition and complying with the erroneous order. Yet, according to the Fourth, Seventh, Eight, Ninth and Tenth Circuits the positions of the parties are irrelevant, the district court still had an independent duty to apply the proper standard of review. In this case, it is precisely the question as to whether the district court acted properly under FRCP 56 to determine that an arbitration agreement exists when according to *Nelson*, the mere acknowledgment of the duty to read an employee handbook does not constitute an arbitration agreement. If the movant did not establish the right to compel arbitration as a matter of law, then the District Court could not compel arbitration regales if an opposition was filed by Ms. Lerner.

CONCLUSION

The Court should grant the petition for a writ of certiorari. Indeed, the Court often grants "certiorari to decide whether the lower courts applied the correct legal standard." *Ayestas v. Davis*, 138 S. Ct. 1080, 1088, 200 L. Ed. 2d 376 (2018).

Dated: Brooklyn, NY
May 9, 2021

Respectfully submitted,

Antonia Lerner

State of New York }
County of Kings } ss:
PERSONALLY SUBSCRIBED
AND SWORN BEFORE ME,
THIS 10 DAY OF MAY, 2021
BY ANTONIA LERNER

SERGEY IZHOVSKIY
Notary Public State of New York
No. 01IZ6114737
Qualified in Kings County
Commission Expires August 23, 2024