NO. 23-_____

In the Supreme Court of the United States

CHARLES JUNTIKKA,

Petitioner,

v.

CADELL & CHAPMAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 1, 2023

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QUESTIONS PRESENTED

1. Does the *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000) holding that an arbitrator's "serious error does not suffice to overturn" or vacate an arbitrator's decision include the "serious" legal error of ignoring the of terms of an arbitration agreement in favor of a decision based solely on "equity" in violation of this Court's precedent including *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682 (2010) and the FAA's mandate that arbitrators base their judgments on the interpretation of the terms of the arbitral contract?

2. If *Radcliffe* is left undisturbed, will the FAA's limited right to seek vacatur be effectively neutered in the Ninth Circuit, roiling arbitration practice in the Ninth Circuit in ways contrary to Supreme Court precedent as followed by the Eighth, Fifth and Third Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner

- Charles Juntikka and Associates LLP

Respondent Law Firms

- Lieff, Cabraser, Heimann & Bernstein LLP
- Francis Mailman Soumilas, P.C.
- National Consumer Law Center
- Consumer Litigation Associates, P.C.
- Callahan, Thompson, Sherman & Caudill LLP
- Public Justice, P.C.
- Equifax Information Services
- Experian Information Solutions, Inc.
- Trans Union LLC

Appellees Below Represented by Applicant in the Underlying Case

- Robert Radcliffe
- Chester Carter
- Maria Falcon
- Clifton C. Seale III
- Arnold Lovell, Jr.

Appellees Below Represented by Other Attorneys in the Underlying Case

- Jose Hernandez
- Kathryn Pike
- Lewis Mann
- Robert Randall
- Bertram Robison

LIST OF PROCEEDINGS

Direct Proceedings

U.S. Court of Appeals for the Ninth Circuit

No. 21-56284

Robert Radcliffe, et al., *Plaintiff-Appellants,* and Charles Juntikka and Associates LLP, *Appellant,* and Jose Hernandez et al., *Plaintiff-Appellees,* and Caddell & Chapman, et al. *Appellees,* v. Equifax Information Services, LLC et al., *Defendants*

Date of Opinion: February 23, 2023

Date of Rehearing Denial: April 4, 2023

U.S. District Court for the Central District of California

Case No. 8:05-cv-01070

Terri White et al., *Plaintiff* v.
Experian Information Solutions, Inc.

Order Denying Motion to Vacate Arbitrator's Final Award: October 21, 2021

Related Proceedings

U.S. District Court Central District of California

No. 2:05-cv-07821

Terri N. White et al., *Plaintiffs* v.
Equifax Information Service LLC, et al, *Defendant*

Order Consolidating Cases and Dismissing Case: August 21, 2008

List of Other Cases from the U.S. District Court Central District of California that Were Consolidated into 8:05-cv-01070

2:06-cv-3924
Jose Hernandez v. Equifax Information Svc LLC

2:08-cv-01481, 2:08-cv-01482

Obelia Villaflor v. Experian Information Sol., Inc.

2:20-cv-11710
Timoth Wheeler v. Trans Union LLC et al.

2:20-cv-09908
Loanna Hernandez v. Experian Information Sol., Inc.

2:20-cv-08932
Anthony Sunseri v. Experian Information Sol., Inc. et al.

8:09-cv-00649
Experian Information Solutions Inc v. Illinois Union Insurance Company

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The Order of the U.S. Court of Appeals for the Ninth Circuit, dated February 23, 2023 is include in the Appendix ("App.") at 1a. The Order of the U.S. District Court, Central District of California, dated October 21, 2021, is included at App.6a.

JURISDICTION

The Ninth Circuit denied a timely petition for rehearing for rehearing on April 4, 2023. (App.16a). Justice Kagan granted an extension to file this petition through and including September 1, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

9 U.S. Code § 10
Same; Vacation; Grounds; Rehearing

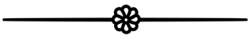
(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.



INTRODUCTION

This appeal presents this Court with a novel issue not previously addressed by the Supreme Court. Whether or not the Supreme Cout's *United Mine Workers* holding that an arbitrator's "serious error does not suffice to overturn" or vacate an arbitrator's decision includes the "serious" legal error of ignoring the of terms of an arbitration agreement in favor of a decision based solely on "equity" in violation of this Court's precedent in *Stolt-Nielsen* and the FAA's mandate that arbitrators base their judgments on the interpretation of the terms of the arbitral contract. *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62; *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682.

Over the years, dissatisfied arbitrants have appealed to the federal courts to limit the ability of

arbitrators to circumvent the terms of arbitral contracts. This Court has routinely enforced those contracts according to their terms.

The Ninth Circuit's decision in *Radcliffe v. Equifax Information Services, LLC* (App.1a-5a). is at variance with this Court's precedent. The grounds for granting this petition are relatively simple. The contract containing the arbitration clause directed the arbitrator on how to split money at issue according to a simple mathematical formula. The arbitrator admittedly "overrode" the contract and the allocation formula due to equity, which flatly conflicts with Supreme Court precedent in *Stolt-Nielsen et al.* (App.5a).

The Ninth Circuit characterized the arbitrator's decision as a mere "erroneous interpretation of the law" and cited to the Supreme Cout's *United Mine Workers* holding that an arbitrator's "serious error does not suffice to overturn" or vacate an arbitrator's decision." (App.4a, 5a). If left to stand, it immunizes arbitral awards that openly depart from the clear terms of the parties' contract as required by *Stolt-Nielsen*. This would overrule the holding in *Stolt-Nielsen* and effectively authorizes the exception to swallow the rule.

That cannot be the rule, but that is exactly what happened. According to the Ninth Circuit "the arbitrator understood the relevant law as permitting her to override the contract . . . , the district court properly denied the motion to vacate the fee award." (emphasis added) (App.5a). The *Radcliffe* decision stands in stark contrast to this Court's decision in *Stolt-Neilsen* and a long line of other Supreme Court decisions mandating that arbitrators must base their judgments on the interpretation of contractual terms and not on the arbitrator's view of what is "fair" or "equitable."

It is important to grant certiorari in this case to resolve the conflict between *Stolt* and *United Mine Workers*. Without a resolution of this conflict, this issue will escape judicial review in the Ninth Circuit since few if any parties will expend the considerable resources necessary to move to vacate an arbitral award in light of the existence of the *Radcliffe* decision. Without a resolution of this issue, arbitrators in the Ninth Circuit will—for all practical purposes—be immunized from any possible legal error by *Radcliffe* including an arbitrator's refusal to obey Supreme Court arbitration precedent. Arbitrators—motivated by equitable considerations—can mistakenly ignore all Supreme Court precedent including *Stolt, Concepcion* and *Viking River* with the knowledge that a "serious error of law" does not suffice to vacate the arbitral award in the Ninth Circuit.

Certiorari is necessary to dispel the belief among federal judges that arbitrators may expressly and openly ignore the terms of parties' contract but still avoid vacatur for having made a mere "legal mistake." If certiorari is not granted, the *Radcliffe* decision will roil long standing Supreme Court arbitration precedent within the Ninth Circuit and it will create a sharp conflict with the Eighth, Fifth and Third Circuits that all follow the holding in *Stolt-Nielsen et al*.

STATEMENT OF THE CASE

In 2004 and 2005, Charles Juntikka, a consumer bankruptcy attorney, undertook a year-long review of over 3,000 of his clients' post discharge credit reports and discovered that approximately 90 percent of said credit reports inaccurately showed that their delinquent debts were still delinquent and overdue. These credit report errors caused his clients to have increased difficulty procuring jobs, apartments, and mortgages because the delinquent accounts were still active on the credit reports. Some discharged debtors paid their discharged debts when they needed a clean credit report to obtain work or housing. Juntikka undertook to document this problem. Ultimately, Juntikka's firm met in person with over one thousand of his clients.

1. The History of the Underlying Litigation.

Juntikka compiled the results of his pre-filing investigation and brought the evidence to the Lieff Cabraser law firm and the law firm of Daniel Wolf with a view toward filing class actions. In 2005, Lieff, Charles Juntikka, Daniel Wolf entered into a Co-Counsel Agreement (CCA) with an arbitration clause. (App.78a-84a). Then, Lieff and Juntikka filed class actions for approximately 15 million total class members in the Central District of California against Experian, Equifax and Trans Union for failure update credit reports as required by the FCRA.

A similar case was filed in the Northern District of California. The court in the Central District directed Juntikka to enter into a Joint Prosecution Agreement (JPA) with the competing case's class counsel (App.85a-

100a) and the class actions proceeded in the Central District.

2. The History of the Arbitration Matter.

After the cases settled in 2019, the District Court granted attorney fees of $11,161,163. After the Court granted the attorney fees, Juntikka and Lieff Counsel[1] could not agree on the proper allocation of the attorney fees among the law firms. After negotiations broke down, Juntikka requested arbitration pursuant to the relevant terms in the co-counsel agreement and the District Court ordered that the matter be arbitrated.

The Joint Prosecution Agreement set forth a simple mathematical formula for the allocation of the attorney fees on the successful conclusion of the class action matters. Importantly, each firm was entitled to a minimum distribution of the legal fees under the Joint Prosecution Agreement. (App.90a).

In the Co-Counsel Agreement (CCA) between Lieff Cabraser and Juntikka, Lieff acknowledged that Juntikka was entitled to a specified number of billable hours. Paragraph 10 of the CCA stated that: "It is agreed that as of the date of this Agreement, CJA (Juntikka) has incurred $63,440 in Common Expenses and has expended $901,200 in billable time in connection with the investigation and prosecution of the cases covered hereunder." (App.83a). There was also

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[1] The "Lieff Counsel" consists of Juntikka's former co-counsels: Lieff Cabraser, Caddell & Chapman, Consumer Litigation Associates, the Law Office Michell Toups and the National Consumer Law Center.

an acknowledgment of the work incurred by Juntikka in the Joint Prosecution Agreement (JPA).[2] (App.94a).

3. The Arbitrator's Preliminary Motion Ruling on Whether the Allocation Terms Controlled the Arbitrator's Decision.

In a preliminary motion before the arbitration trial, the arbitrator considered the issue as to whether the arbitrator was bound by the allocation terms set forth in the co-counsel agreements. (App.18a-34a). Juntikka argued that the arbitrator had a duty to apply terms of the arbitration agreement. (App.19a). The Lieff Counsel argued that the fee sharing agreements should not apply, and "that fees should be distributed equitably." (App.19a). The arbitrator's opinion agreed with the Lieff Counsel stating as follows:

> . . . a fee-sharing agreement is not entitled to strict contract enforcement. It can be viewed as a contract subject to a condition subsequent—the condition being a Tribunal's evaluation of what equity requires.

(emphasis added) (App.30a). In their decision, the arbitrator unequivocally refused to apply the terms of arbitration agreements:

> The CCA and the JPA will not mandate the distribution of attorneys' fees between the Wolf [Juntikka] Team and the Caddell Team as a matter of law.

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[2] In the Joint Prosecution Agreement (JPA) that was signed by all the parties after the CCA agreement between Lieff and Juntikka, the JPA states that the Lieff Group (including Juntikka and Wolf) had incurred $1,383,506 in billable hours. (App.94a).

(App.34a). The arbitrator then concluded that "The ultimate issue for the Tribunal will be what is the fair amount to allocate . . . " (emphasis added) (App. 34a). Consequently, the arbitrator never even attempted to apply the allocation terms in her Final Award opinion.

The arbitrator based her decision on *In re FPI/ Agretech Securities Litigation*, 105 F.3d 469 (9th Cir. 1997), where the Ninth Circuit held that a district court overseeing class settlement approval can invalidate fee-sharing agreements and allocate attorney fees on equitable grounds and relative benefit to the class provided by each attorney. The arbitrator concluded that "Agretech's analysis therefore teaches that "fee-sharing arrangements among class counsel are not enforceable contracts." (App.29a).

The arbitrator's reliance on *Agretech* was misplaced because *Agretech* was not an arbitration case at all. It exclusively dealt with the authority of the District Court. Therefore, it had no relevance to the authority of arbitrator to ignore the terms of an arbitration agreement. Obviously, arbitrators do not inherit the equitable authority of district court judges.

More importantly, the Ninth Circuit's *Agretech* case could never overrule *Stolt* or properly confer on an arbitrator the authority to ignore contractual terms bargained for by the parties to the arbitral agreement. It would be a flagrant violation of the FAA and the long line Supreme Court precedents including *Stolt-Nielsen*.

4. The Arbitration Trial and Award.

After the Pre-Filing Motion was decided, the Arbitrator presided over a trial to determine the fee awards based on equity alone. (App.35a-77a). In their decision, the arbitrator expressly "acknowledged" and "respected" the fact that Juntikka's legal work benefited the class as set forth in her "Final Award" decision:

> The Arbitrator acknowledges and respects Mr. Juntikka's initiative to help his bankruptcy clients and finds that Mr. Juntikka's study provided at least some benefit in the early stages of the litigation. As the Wolf [Juntikka] Team's brief points out, the District Court referenced Mr. Juntikka's study in three opinions: [1] its decision denying TransUnion's motion to dismiss, [2] its decision rejecting preliminary approval of the Acosta/Pike settlement, and [3] its tentative order denying Experian's motion for summary judgment.

Final Award at 13. (App.49a). Despite the arbitrator's acknowledgment of Mr. Juntikka's work on the case, the arbitrator agreed with Lieff Counsel's counter argument that Juntikka should receive no share of the attorney fees because he opposed the adequacy of a proposed $63 million settlement offer to settle the class action cases.[3]

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[3] Juntikka and Boies Schiller & Flexner, his new co-counsel, objected to the Lieff Counsel's proposed monetary settlement on the grounds of (1) the inadequacy of the proposed monetary settlement offer; and (2) a separate objection that Lieff Counsel's unethical misconduct made them inadequate counsel. *Radcliffe v. Experian Information Solutions, Inc.,* 715 F.3d 1157 (9th Cir.

Specifically, Lieff Counsel asserted that Juntikka's opposition to a monetary settlement offer as inadequate caused Lieff to hesitate to finalize a $63 million settlement. The defendants then backed out of the settlement. The defendants then ultimately settled for a lower settlement amount of $45 million or $18 million less than the previous offer. Based on this chain of events, Lieff Counsel concluded that since Juntikka was to blame for Lieff's hesitation to accept the higher offer, he was also responsible for the loss of $18 million dollars because of Lieff's failure to finalize the $63 million dollar settlement.

The Lieff Counsel's argument had no basis in the arbitration contract since there was no term in the co-counsel contract requiring attorneys to support a monetary settlement offer as a pre-condition to receiving their share of the attorney fees. However, the arbitrator was free to ignore the terms of the arbitral contract since they had already ruled that they were not bound by the CCA or JPA agreements.

Juntikka responded to Lieff's argument by pointing out that (1) Juntikka had no vote on the executive committee and he had no power to veto a settlement; and (2) Lieff Counsel had a fiduciary duty to the class members to conclude the $63 million settlement

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2013) The Ninth Circuit reversed the approval of the settlement based on the unethical misconduct of the Lieff Counsel but did not address the adequacy of the proposed monetary settlement. After the Ninth Circuit's reversal of the first settlement, Lieff Counsel was reappointed to represent the same class members. A second Ninth Circuit panel approved the adequacy of the proposed monetary relief settlement over the objection of Boies Schiller and Juntikka. *Radcliffe v. Hernandez*, (9th Cir., Dec. 12, 2019, No. 18-55606).

offer if they believed it to be adequate—even if Juntikka himself opposed the proposed settlement.

The arbitrator held against Juntikka stating that:

> The remaining argument raised by the Wolf [Juntikka] Team is that the Caddell [Lieff] Team shares responsibility for the evaporation of the $63 million offer. The Wolf [Juntikka] Team argues that the Executive Committee could have out voted Mr. Wolf and, moreover, that the Caddell [Lieff] Team had a fiduciary duty to out vote him 4 to 1 if the Cadell [Lieff] Team felt that a settlement was in the best interests of the class. While the Caddell [Lieff] Team had the votes to do so, they cannot be faulted for seeking to find consensus to keep the plaintiffs' counsel team from fracturing . . .

(App.60a, 61a).

In their Final Award opinion, the arbitrator then concluded that "The defendants lowered their offer from $63 million dollars to $45 million dollars . . . No matter how much pre objection work the Wolf [Juntikka] Team performed, there is simply no way for the Wolf [Juntikka] Teams's positive contributions to make up for that $18 million loss." (App.64a).

In short, the arbitrator penalized Juntikka for opposing a monetary settlement that he believed to be inadequate. This decision contradicted the allocation terms of the arbitral agreement. It also had no basis in the agreement since supporting the settlement offer was not a prerequisite in the arbitral contract for Juntikka to be awarded his rightful share of the attorney fees his work. But, of course, none of this mattered

because the arbitrator had already ruled that the arbitrator was not required to abide by the terms in the arbitration agreements.

5. The District Court's Denial of the Motion to Vacate Based on *Agretech*.

Juntikka filed a motion to vacate the arbitrator's award on the following grounds: (1) The arbitrator disregarded the allocation terms in violation of the district court's order, the FAA and *Stolt* and other long standing Supreme Court precedent requiring the arbitrator to enforce the terms of the arbitration agreement. (2) Juntikka also argued that Lieff Counsel —all sophisticated class action attorneys—had given up their right to seek an equitable distribution of fees by entering into an arbitration agreement that controlled the fee allocation; (3) The arbitration contract did not and could not be construed as requiring that Juntikka support the monetary settlement as a precondition to receiving his share of the attorney fees (ECF No. 1202 at 13, 28-31); (4) The arbitrator's reliance on *Agretech* was misplaced because it was not an arbitration case and merely set forth the authority of a District Court to determine class action fees based on equity regardless of a co-counsel agreement. An arbitrator obviously does not inherit the authority of the District Court; (5) *Agretech* would violate the Supreme Court's decision in *Stolt* if it had been an arbitration case and was applied to arbitration.; and (6) The arbitral award was against public policy because Juntikka had a fiduciary duty under Rule 23 to not support a monetary settlement offer he believed to be inadequate. If his fee allocation was conditioned on support for a settlement, he believed to be inadequate, the arbitrator's decision would put him in a

conflict with the class members interest since he would be coerced into supporting a settlement that he believed to be inadequate.

The Lieff Counsel argued the same arguments that they made before the arbitrator including their argument that *Agretech* gave the arbitrator the authority to dispense with the arbitration agreement and decide the arbitration based on equity alone. They also argued that the settlement was adequate so Juntikka supporting the settlement would not be against public policy.

The District Court denied Juntikka's motion and held the arbitrator's misplaced reliance on *Agretech* was not controlling because "erroneous legal conclusions" are not sufficient to vacate an arbitrator's decision. (App.6a-15a):

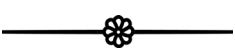
> Juntikka's key attack on the award is that the Arbitrator concluded she had the power to apply equitable considerations to the fee sharing agreement, while Juntikka asserts that the [*Agretech*] case law supports such power only for district courts. Reply at 7-8. However, "[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit and clearly applicable," and "erroneous legal conclusions" are not sufficient to overturn an arbitral award." *Kyocera*, 341 F.3d at 994.

(emphasis added) (App.13a). Juntikka filed a notice of appeal.

6. The Ninth Circuit's Holding that the Arbitrator's "Misplaced" Reliance on *Agretech*—a Non-Arbitration Case—Was Excusable Legal Error.

Juntikka appealed to the Ninth Circuit to reverse the district court decision on the grounds that it was contrary to the Supreme Court's Stolt decision and other long standing Supreme Court precedents. Juntikka also argued that the arbitral award be vacated for the other reasons set forth in the preceding sections. This included Juntikka's argument that "There is nothing in the "plain language of the contract" signed by Juntikka that requires co-counsel to support the executive committee's approval of a monetary settlement—no matter the circumstances—as a pre-condition to receiving their fees." (ECF No. 49 at 29)

The Ninth Circuit—exercising *de novo* review of an arbitration award—set forth two grounds for affirming the district court's denying Juntikka's appeal: (1) the arbitrator did "not show manifest disregard" by relying on *Agretech* to disregard the terms of the arbitration contract; and (2) the Arbitrator's misplaced reliance on *Agretech* was an error of law that did not suffice to "overturn" or vacate the arbitration award. (App.4a, 5a).



REASONS FOR GRANTING THE PETITION

Section 10(a)(4) of the FAA permits vacatur of an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

The Supreme Court has consistently ruled that "The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Thus, "the arbitrator may not ignore the plain language of the contract . . . ," *United Paperworkers*, 484 U.S. at 38 (citing *United Steelworkers*, 363 U.S. at 599), and "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co.*, 570 U.S. at 233 (quoting *Dean Witter*, 470 U.S. at 221). Therefore, "an arbitrator is confined to interpretation and application of the . . . agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers*, 363 U.S. at 597. "When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* This is necessarily so because arbitration is fundamentally "a matter of consent, not coercion." *Volt*, 489 U.S. at 479.

I. THE NINTH CIRCUIT'S *RADCLIFFE* DECISION IS A DE FACTO REVERSAL OF THE SUPREME COURT PRECEDENT THAT ARBITRATORS MUST BASE THEIR DECISIONS ON THE INTERPRETATION OF CONTRACTUAL TERMS AND NOT ON THE ARBITRATOR'S VIEW OF WHAT IS FAIR OR EQUITABLE.

The Ninth Circuit's decision opens the door for a complete erosion of the ground for vacatur of an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." FAA § 10(a)(4). If all an arbitrator must do to ignore contractual terms is point to any common law doctrine allowing non-enforcement of a contract for equitable reasons, the rule will surely be extended outside the context of fee-sharing agreements. The arbitrator, and the district court considering vacatur, can merely rely on the common law doctrine and claim the award was issued "upon the subject matter submitted." Such a result effectively renders the FAA statutory language toothless and eliminates one of the grounds for vacatur under it. In other words, the arbitrator now is free to "dispense [her] own particular brand of justice," under the gloss of—as the Panel Decision puts it—"under[standing] the relevant law." Yet the Supreme Court has routinely stated that the "central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms*." Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682 (quotations omitted).

A review of the *Stolt* decision reveals that the Ninth Circuit's finding that an arbitrator's "overriding"

the contract is not grounds for vacatur is flatly contradicted by *Stolt*: The *Stolt* holding is especially applicable in this case because in the *Stolt-Neilsen* case, the arbitrator only "strayed" from the interpretation of a single contractual term and vacatur was mandated. In the *Radcliffe* case, the degree of disregard of the contract was total.

The Ninth Circuit—exercising *de novo* review of an arbitration award—affirmed the District Court's holding in the final paragraph of the *Radcliffe* opinion:

> Here, the arbitrator understood the relevant law as permitting her to override the contract and allocate fees . . . Accordingly, the district court properly denied the motion to vacate the fee award."

(App.5a). The arbitrator's "override of the contract" is emphasized in the arbitrator's written decision that expressly set forth the arbitrator's refusal to apply the terms of the arbitral agreement:

> The CCA and the JPA will not mandate the distribution of attorneys' fees between the Wolf [Juntikka] Team and the Caddell Team as a matter of law.

(App.34a). The arbitrator then makes it clear that they will substitute their own view of what "equity requires" instead of applying the terms of the arbitral agreement:

> . . . a fee-sharing agreement is not entitled to strict contract enforcement. It can be viewed as a contract subject to a condition subsequent—the condition being a Tribunal's evaluation of what <u>equity requires</u>.

(emphasis added) (App.30a). The arbitrator then concludes by abandoning the terms of the arbitral contract in the interests of a decision based on what was "fair" to the parties to the agreement: "The ultimate issue for the Tribunal will be what is the fair amount to allocate . . . " (App.34a).

The foregoing statements in the arbitrator's decision can only be characterized as a repudiation of the FAA, *Stolt* and other long standing Supreme Court precedent. This is contrary to this Court's repeated directions to arbitrators to interpret and apply the terms of the arbitral agreements and not to engage in dispensing their "own brand of industrial justice" based on their view of what "equity requires." There is no doubt that the arbitrator in this case "overrode" both the terms of the contract and Supreme Court precedent.

In the final paragraph of the *Radcliffe* decision, the Ninth Circuit excuses the arbitrator's mistaken reliance on the *Agretech* decision as distinguishable from *Stolt* and other Ninth Circuit cases that vacated arbitration awards because in those cases "the arbitrator blatantly disregards express terms of the parties' agreements. (emphasis added) (citations omitted); *see also Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682-83. But in those cases, the arbitrator "underst[oo]d and correctly state[d] the law but proceed[ed] to disregard the same." (emphasis added) (App.5a)

The Ninth Circuit puts great store in the fact that the *Radcliffe* arbitrator's legal error was not a "blatant" disregard of arbitral terms. This is irrelevant. It doesn't matter if the arbitrator's disregard of the contract terms was intentional or not. It only

matters that it was mistaken and legally erroneous. The Ninth Circuit's suggestion that the arbitrator truly believed the "relevant law [*i.e. Agretech*] as permitting her to override the contract" doesn't cure the violation of the FAA's mandate that arbitrators must make decisions based on the terms of arbitral contract. (App.4a, 5a)

The *Radcliffe* arbitrator's honest, but mistaken belief that the relevant case law gave her the authority to throw out the terms of the arbitration agreement does not justify overturning Supreme Court precedent. The FAA does not have an exemption for arbitrators who make the honest mistake of jettisoning the bargained for terms of an arbitral agreement and then substitute their own judgment as to what "equity requires."

II. THE NINTH CIRCUIT'S *RADCLIFFE* HOLDING THAT AN ARBITRATOR'S ERROR OF LAW—INCLUDING AN ARBITRATOR'S ERRONEOUS AND EXPRESS REFUSAL TO APPLY THE TERMS OF THE ARBITRAL CONTRACT—IS EXCUSABLE AND DOES NOT REQUIRE VACATUR IS A MISSTATEMENT OF SUPREME COURT PRECEDENT.

The Ninth Circuit cites the *United Mine Workers* case. This citation is made to support the Ninth Circuit's holding that: "Even if the arbitrator incorrectly applied *Agretech*, "we may not reverse an arbitration award even in the face of an erroneous interpretation of the law." (citations omitted) (App.4a, 5a).

The *Radcliffe* court's citation to the Supreme Court's *United Mine Workers* decision presents this Court with a novel issue not previously addressed by the Supreme Court. Whether or not the Supreme

Cout's *United Mine Workers* holding that an arbitrator's "serious error does not suffice to overturn" or vacate an arbitrator's decision includes the "serious" legal error of ignoring the of terms of an arbitration agreement in favor of a decision based solely on "equity" in violation of this Court's precedent in *Stolt-Nielsen* and the FAA's mandate that arbitrators base their judgments on the interpretation of the terms of the arbitral contract. *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62; *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 682.

The *Radcliffe* opinion's reliance on the *United Mine Workers* decision is inapt. If this Court adopted the *Radcliffe* decision's interpretation of *United Mine Workers*, it would overrule the FAA and the holdings in *Stolt-Nielsen et al* and upend bedrock principles of arbitration jurisprudence.[4]

Moreover, *Stolt* and *United Mine Workers* need not conflict. As Judge Posner explained: there is a distinction between an arbitrator's excusable legal error in the interpretation of a contractual term and an arbitrator's fatal, legal mistake of completely disregarding contractual terms:

> As we have said too many times to want to repeat again, the question for decision by a

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[4] The *Radcliffe* decision also cites the *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001), but the *Garvey* opinion in fact supports the grant of certiorari in this case. The *Garvey* opinion states as follows: "As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. *Paperworkers v. Misco*, Inc., 484 U.S. 29, 38 (1987)" (App.4a).

> federal court asked to set aside an arbitration award . . . is not whether the arbitrator or arbitrators erred in interpreting the contract; it is not whether they clearly erred in interpreting the contract; it is not whether they grossly erred in interpreting the contract; it is whether they interpreted the contract. *Hill v. Norfolk & Western Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987)

It is true that most legal mistakes by arbitrators are not grounds for vacatur. But, as Judge Posner stated, there is at least one legal mistake that an arbitrator can never make. An arbitrator simply cannot engage in "industrial justice" and utterly abandon the interpretation of contractual terms bargained for by the parties in favor of a decision based on their view of what is "fair." *Id*. Indeed, if this were true, the exception would swallow the rule.

III. THE NINTH CIRCUIT'S *RADCLIFFE* DECISION WILL CREATE WIDESPREAD DELETERIOUS EFFECTS UPON THE PROPER CONDUCT OF ARBITRATION IN THE NINTH CIRCUIT.

It is important to grant certiorari in this case to resolve the conflict between *Stolt* and *United Mine Workers*. Without a resolution of this conflict, this issue will escape judicial review in the Ninth Circuit since few if any parties will expend the considerable resources necessary to move to vacate an arbitral award in light of the existence of the *Radcliffe* decision. Without a resolution of this issue, arbitrators in the Ninth Circuit will—for all practical purposes—be immunized from any possible legal error by *Radcliffe* including an arbitrator's refusal to obey Supreme Court arbitration precedent. Arbitrators—motivated

by equitable considerations—can mistakenly ignore all Supreme Court precedent including *Stolt, Concepcion* and *Viking River* with the knowledge that a "serious error of law" does not suffice to vacate the arbitral award in the Ninth Circuit.

1. The *Radcliffe* Decision Will Have Deleterious Effects on All Supreme Court Arbitration Precedent in the Ninth Circuit.

If the Ninth Circuit's *Radcliffe* decision is undisturbed, District Courts in the Ninth Circuit will be under pressure to overlook other arbitrators' honest, but mistaken, legal errors that could effectively neuter all Supreme Court arbitration precedents. *Radcliffe* is a roadmap for arbitrators, District Courts and the Ninth Circuit to circumvent the other Supreme Court arbitration decisions that arose out of the Ninth Circuit and were reversed by this Court. The mechanism to override Supreme Court precedent is clear.

For example, suppose an arbitrator honestly—but mistakenly—decides to override a consumer contract because it is an adhesion contract or unconscionable. Suppose the same arbitrator chooses to make their decision on equitable considerations alone in violation of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344. Under these facts, the District Court will be compelled to follow the Ninth Circuit's *Radcliffe* holding that no vacatur is required under this fact pattern even if the arbitrator's decision incorrectly ignored the *Conception* decision. After all, *Radcliffe* instructs the District Courts that an arbitrator can make a serious legal mistake, but this is not grounds for vacatur—even though this is a violation of the Supreme

Court precedent. This would now logically include the *Conception* decision requiring arbitration in consumer contracts of this kind.

Another example is provided by *Viking River Cruises, Inc. v. Moriana* case. In this case, the Ninth Circuit held that a California statute improperly restricted the use of arbitration contracts in certain employment situations. In an eight to one decision, the Supreme Court reversed the Ninth Circuit's *Viking River Cruises* decision. But using the logic of the *Radcliffe* opinion an arbitrator could apply the statutory provisions of the California state law contrary to the holding in the *Viking River Cruises* case and this mistake, again, would not be subject to vacatur under the *Radcliffe* holding. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022)

If an arbitrator's legal mistake is excusable and does not require vacatur, it puts all Supreme Court arbitration decisions in jeopardy in the Ninth Circuit.

2. The *Radcliffe* Decision's Deleterious Effects on the Limited Right to Seek Vacatur Will Escape Judicial Review in the Ninth Circuit.

In the wake of *Radcliffe*, the right of a party to seek the district court's review of an arbitrator's decision—already limited—will now become virtually non-existent in the Ninth Circuit. If an arbitrator's legal mistake that violates multiple Supreme Court decisions can be summarily dismissed as a "mere" error by the Ninth Circuit in *Radcliffe*, no future party is likely to incur the attorney fees and expend resources to seek vacatur even in the most erroneous

of arbitrator opinions. For all practical purposes, arbitrator decisions will become unreviewable.

This neutering of the FAA will escape judicial scrutiny. Why would any party undertake such a futile effort when the *Radcliffe* arbitrator was excused from legal error that ignored Supreme Court precedent? Even meritorious cases will never see the light of day given the economics of pursuing a motion to vacate in the Ninth Circuit after *Radcliffe*.

IV. THE NINTH CIRCUIT'S *RADCLIFFE* DECISION WILL CREATE AN UNNECESSARILY CONFUSING SPLIT WITH THE EIGHTH, FIFTH, AND THIRD DISTRICTS THAT CAN LEAD TO ARBITRATORS MISTAKENLY OVERRIDING CONTRACTUAL TERMS FOR THE SAKE OF EQUITY.

The *Radcliffe* decision reinforces the facile and false notion that an arbitrator can make any legal mistake and said decision is invulnerable to review in the District Court. District's Courts and arbitrators outside the Ninth Circuit can now use the *Radcliffe* case as a model to avoid the interpretation of the contractual terms in favor of the arbitrator's desire to do what is "fair" instead of interpreting the terms bargained for by the parties.

Sister circuits in the Eighth, Fifth and Third Circuits have issued decisions in accordance with controlling Supreme Court arbitration precedent on arbitrator abuse of power. All these decisions sharply conflict with the Ninth Circuit's *Radcliffe* decision.

For example, the Eighth Circuit has found it necessary to vacate awards "where the arbitrator ignored or went beyond the plain text of the parties' agreement, and that text was unambiguous." *Boise*

Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers (PACE), 309 F.3d 1075, 1082 (8th Cir. 2002) (emphasis added). In *Boise Cascade*, the Eighth Circuit vacated an arbitral award when the arbitrator "dispense[d] his own brand of industrial justice." *Id.* at 1085. "In this case, there is abundant evidence that the arbitrator's decision did not consider the parties' intent, that it contravenes that intent, and that 'additional facts exist that strongly indicate that the arbitrator did not premise his award on the contract,' . . . In these circumstances, we do not merely disagree with the arbitrator's decision; rather, we find that his award fails to draw its essence from the parties' agreement." *Id.* at 1086-87 (internal citations omitted) (emphasis added).

Similarly, in *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 907 F. Supp. 2d 986 (D. Minn. 2012), the district court held that an arbitration award does not draw its essence from the parties' contract when it is expressly contrary to the terms of the agreement. *U.S. Postal Serv.* 907 F. Supp. 2d at 987. The district court vacated an arbitration award where the arbitrator ignored a contractual provision that "specifically and expressly" provided the criteria for the design of postal worker storage lockers. *Id.* at 994. By ignoring the contract provision, the court determined the arbitrator did not simply misinterpret the agreement, but rather he "essentially rewrote it." *Id.* The court concluded the arbitrator impermissibly ignored the controlling contract provisions:

> While it is true that an arbitrator is entitled to nearly unfettered leeway when interpreting contract language, he may not "disregard or modify unambiguous contract provisions.

Id. (internal citations omitted).

The Fifth Circuit also will not countenance an arbitrator disregarding controlling contract provisions. *See Pool Re Ins. Corp. v. Organizational Strategies, Inc.*, 783 F.3d 256, 262 (5th Cir. 2015). "'[W]here the arbitrator exceeds the express limitations of his contractual mandate, judicial deference is at an end.'" *Id.* (quoting *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n, Associated Mar. Officers, AFL-CIO*, 889 F.2d 599, 602 (5th Cir. 1989)) (emphasis added).

Likewise, the Third Circuit has applied Supreme Court precedent by limiting an arbitrator's discretion to actual application of the controlling contract provisions—not considering and then ignoring them. *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125, 1133-34 (3d Cir. 1972). In *Swift*, the arbitrator issued an award requiring one party to put up a cash bond. *Id.* at 1128. The district court vacated that portion of the award. *Id.* On appeal, the Third Circuit affirmed, concluding that in awarding a cash bond, the arbitrator had exceeded his powers under the pertinent agreement. *Id.* at 1133-34. This was true even though the appealing party asserted that if the agreement did not authorize the arbitrator to award the cash bond, then the governing AAA rules of commercial arbitration provide the arbitrator with the power to fashion any relief that is equitable. *Id.* at 1132. The Third Circuit rejected the assertion that the arbitration rules could authorize the arbitrator to render an award not contemplated by the agreement:

> [T]he principle of flexibility of relief cannot be permitted to obscure or to effect a metamorphosis of the claim itself. That untoward

> event would occur if we were to permit the arbitrator's award to stand in this case. [Citation.] *Id.* at 1133-34. To award . . . relief . . . which the Agreement . . . seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture onto unprotected ground. *Id.* Thus, because the controlling agreement did not contemplate an exercise of equity in place of the agreement's actual terms and limitations, the arbitrator had exceeded his powers. [Citation]

Id. at 1133-34.

> To award . . . relief . . . which the Agreement . . . seems to exclude rather than to intend, is to eclipse the framework of the agreement and to venture onto unprotected ground.

Id. Thus, because the controlling agreement did not contemplate an exercise of equity in place of the agreement's actual terms and limitations, the arbitrator had exceeded his powers. *Id.*

CONCLUSION

Certiorari is necessary to dispel the belief among federal judges that arbitrators may expressly and openly ignore the terms of parties' contract but still avoid vacatur for having made a mere "legal mistake." If certiorari is not granted, the *Radcliffe* decision will roil long standing Supreme Court arbitration precedent within the Ninth Circuit and it will create a sharp conflict with the Eighth, Fifth and Third Circuits that all follow the holding in *Stolt-Nielsen et al.*

Respectfully submitted,

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