NO. 15-_____

In the Supreme Court of the United States

CYNTHIA LEE,

Petitioner,

–v–

FAIRFAX COUNTY SCHOOL BOARD;
DR. JACK DALE, former Superintendent;
DR. PHYLLIS PAJARDO, Assistant Superintendent;
JAMEY CHIANETTA, Principal,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should establish a uniform standard to determine the point at which large arbitration costs unconscionably hinder private litigants from vindicating their rights in order to settle the three-way split that has developed among federal circuit courts since the Court's decision in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)?

2. Whether mandatory arbitration agreements, in which government employers compel employees to forego judicial forums as a condition of employment, amount to a violation of the fundamental substantive due process right to access to the judicial system, or, at the very least, whether government-mandated arbitration agreements should be subject to a higher standard of review than the unconscionability standard the Court announced in *Green Tree Fin. Corp.-Alabama v. Randolph* as being applicable to private arbitration agreements?

3. Whether a mandatory arbitration agreement is *per se* unconscionable under *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) when it fails to provide mutual appeal rights to the parties?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than the parties listed on the cover page of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cynthia Lee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unreported motions hearing held on October 31, 2014, at which The Honorable Anthony J. Trenga of the United States District Court for the Eastern District of Virginia announced his order, is reproduced, in relevant part, at App.5a. The Fourth Circuit's *per curiam* opinion, dated August 18, 2015, affirming the district court's decision, is reproduced at App.1a. These opinions are unpublished.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit adopted the reasoning and affirmed the decision of the district court on August 8, 2015. (App.1a) A timely petition for rehearing was denied on September 22, 2015. (App.6a) Petitioner was granted an extension of time to file a petition for writ of certiorari until February 19, 2016 (Supreme Court Docket 15A492). This Court has jurisdiction to review

cases from the court of appeals pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

This petition arises generally under the Federal Arbitration Act (FAA), codified at 9 U.S.C. § 2, which provides: "[A]n agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The relevant text of the FAA is reproduced at App.7a.

STATEMENT OF THE CASE

Mandatory arbitration agreements that foreclose access to the courts are not *per se* unenforceable so long as they provide an effective forum for litigants to vindicate their rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). In *Green Tree Fin. Corp.-Alabama v. Randolph*, this Court held that one factor that may preclude a litigant "from effectively vindicating her federal statutory rights in the arbitral forum" is "the existence of large arbitration costs." 531 U.S. 79, 90 (2000). However, neither *Green Tree*, nor the Court's post-*Green Tree* decisions, established a standard or uniform formula for determining the point at which the cost of arbitration is so large that it

effectively impedes a litigant from vindicating her federal rights. In the absence of guidance from the Court, lower courts have, as one circuit court put it, "taken a stab at outlining the proper formula." *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 217 (3d Cir. 2003). Unfortunately, that "stab" at a formula has been ambiguous, inconsistent, contradictory, and has resulted in a three-way split among eleven circuits.

In this three-way split, one circuit–the Ninth–abides by a *per se* rule, pursuant to which a mandatory arbitration agreement that splits costs of arbitration between the employer and employee renders the agreement invalid. Eight circuits–the First, Second, Third, Fourth, Seventh, Eighth, Eleventh, and D.C.–follow a retrospective case-by-case approach, pursuant to which the enforceability of fee-splitting arbitration clauses essentially depends on the particular litigant's ability to pay. Two circuits–the Sixth and Tenth–apply a prospective systemic formula, pursuant to which the enforceability of the clause depends on its potential future "chilling effect" on similarly situated litigants.

The split among the circuits is neither new nor isolated. *Green Tree* is now nearly twenty years old and nearly every circuit that has considered the issue has commented on (if not lamented) the doctrinal vacuum left in the case's wake. Far from reaching a consensus, the circuits have branched out in more and more complex and conflicting variations of how to determine the point at which a cost-splitting provision in a mandatory arbitration agreement is unconscionable. Without the Court's intervention, the circuits are unlikely to resolve the split on their own but instead will continue to splinter in interpretive confusion and

to apply ambiguous and inconsistent standards, thereby leaving the vindication of a grieving party's rights entirely up to the haphazardness of geography.

Moreover, up to now, the Court's jurisprudence on whether mandatory arbitration agreements stand as unconstitutional barriers to the judicial system has focused exclusively on the power of one private party to compel another private party to arbitrate. The Court has never explicitly answered the question whether mandatory arbitration agreements, in which government employers compel employees to give up their right to a judicial forum as a condition of employment, should be subject to a more rigorous standard. The unconscionability holding of *Green Tree*, which was designed to address the power imbalance between private parties, does not and cannot account for the power differential between state actors and private litigants, where the state's bargaining power is backed by the entire machinery of government, the vast expanse of police and tax powers, and the full weight of institutional authority and social control.

The standard by which lower courts judge the unconscionability of mandatory arbitration agreements is an issue of enormous social significance. Today, it is virtually impossible to apply for a credit card, use a cellphone, get cable or internet service, shop online, rent a car, get a job, or even place a relative in a nursing home without agreeing to forego one's right to seek redress in the courts in favor of private arbitration. As repeat players, corporations reap enormous advantages from mandatory arbitration: they are able to forum-shop, choose the arbitrator,

close all avenues of appeal, and shift the cost of adjudication to ordinary citizens in ways that would be unimaginable and indeed impermissible in a judicial forum. So, for the vast majority of ordinary people, arbitration means giving up any meaningful access to fair and impartial litigation. But more significantly, the abuses of arbitration that have become commonplace in even the most routine of private commercial transactions are now being employed in government employment contracts such that the state itself now uses the enormous coercive power of government to force ordinary citizens to give up judicial vindication of their rights.

Such is the case here. The Fairfax County Public Schools (FCPS) compelled Ms. Cynthia Lee into an arbitration agreement that was unconscionable in two respects. First, as a condition for keeping her job once she made a claim of racial discrimination against FCPS, Ms. Lee was coerced into signing an arbitration agreement, pursuant to which, had she not settled, she would have been responsible for half of the costs of arbitration. These costs were estimated to be around $70,000, an amount that few teachers in Fairfax County Public Schools would be able to pay. Second, FCPS' arbitration agreement did not provide mutual appeal rights to the parties: if Ms. Lee lost at arbitration, she had no right to appeal but if she won, FCPS had the right to appeal. Both the mandate that she be required to pay for half of the arbitration costs, and the non-mutual appeal rights made it impossible for her to effectively vindicate her rights at arbitration. In sum, although the *Green Tree* Court may have been unclear as to what it meant by unconscionability, it is difficult to believe that it

meant for a circuit court to hold that a Plaintiff on a public school teacher's salary has a fair and effective forum to vindicate her rights when her employer not only charges her half the costs of the arbitration, but also tells her that she cannot appeal if she loses but the employer can appeal if she wins. (App.41a)

Petitioner respectfully request the Court grant the petition in order to answer three significant questions that were not answered by *Green Tree* and have not been answered by the Court's post-*Green Tree* jurisprudence: (1) Whether federal circuits should abide by a uniform standard in determining the point at which a fee-splitting provision in a mandatory arbitration agreement unconscionably hinders a litigant from effectively vindicating her rights? (2) Whether a mandatory arbitration agreement, in which a government employer compels an employee to forego a judicial forum as a condition of public employment amounts to a violation of the fundamental substantive due process right to access to the judicial system, or at the very least, whether such an agreement should be subject to a higher standard of review than the unconscionability holding of *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)? And (3) whether a mandatory arbitration agreement is *per se* unconscionable under *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) when it fails to provide mutual appeal rights to the parties?

REASONS FOR GRANTING THE WRIT

I. IN THE WAKE OF *GREEN TREE FIN. CORP.-ALABAMA V. RANDOLPH* THE CIRCUITS HAVE BECOME ENTANGLED IN A THREE-WAY SPLIT ON HOW TO ASSESS WHETHER A CLAUSE REQUIRING A PLAINTIFF TO PAY ALL OR SOME PORTION OF THE EXPENSIVE ARBITRATION FEES PREVENTS A PLAINTIFF FROM VINDICATING HER RIGHTS.

Arbitration agreements are valid "[s]o long as the litigant may effectively vindicate [his or her] statutory cause of action in the arbitral forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). In *Green Tree Fin. Corp.-Alabama v. Randolph*, this Court held that one factor that may preclude a litigant "from effectively vindicating her federal statutory rights in the arbitral forum" is "the existence of large arbitration costs." 531 U.S. 79, 90 (2000). However, neither *Green Tree* nor the Court's post-*Green Tree* decisions established a standard or formula for determining the point at which the cost of arbitration unfairly impedes a litigant from vindicating her federal rights. *See, e.g.*, *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139, 1149 (10th Cir. 2014) ("It is thus unclear from *Green Tree* [h]ow detailed the showing of prohibitive expense must be to support the conclusion that the provision, at a minimum, is unenforceable.") (internal quotation marks omitted).

Without the Court's guidance, lower courts have, as one circuit court put it, "taken a stab at outlining the proper formula." *Spinetti v. Serv. Corp. Int'l*, 324

F.3d 212, 217 (3d Cir. 2003). Unfortunately, the lower courts' "stab" at a formula has been ambiguous, inconsistent, contradictory, and has resulted in a three-way split among the circuits.

The Ninth Circuit branch of the split abides by a *per se* rule, pursuant to which a mandatory arbitration agreement that splits costs of arbitration between the employer and employee renders the agreement invalid because it fails "to ensure that employees [would] not have to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895-96 (9th Cir. 2002). The First, Second, Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits branch of the split follows a retrospective individualized formula, pursuant to which the enforceability of a fee-splitting provision of an arbitration agreement depends upon the claimant's ability to pay arbitration costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. *See In re Am. Express Merchs.' Litig.*, 681 F.3d 139 (2d Cir. 2012); *Toledano v. O'Connor*, 501 F. Supp. 2d 127 (D.D.C. 2007); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005); *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Spinetti v. Service Corp. Int'l.* 324 F.3d 214 (3rd Cir. 2002); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001). The Sixth and Tenth Circuits branch favors a prospective systemic approach, pursuant to which enforceability of a cost

splitting provision depends not only on whether it will deter the individual claimant, but also on whether such a clause will deter similarly situated individuals based on the effect arbitration costs are likely to have on a defined class of people. *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139 (10th Cir. 2014); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 661-65 (6th Cir. 2003).

A. The Ninth Circuit Abides by a *Per Se* Rule Holding That an Arbitration Agreement That Does Not Ensure Claimant Will Not Pay Unreasonable Cost Is, on Its Face, Unenforceable.

Of the eleven circuits entangled in the three-way split, the Ninth Circuit alone abides by a straightforward categorical rule, pursuant to which a fee-splitting clause in an arbitration agreement is *per se* unenforceable. *Circuit City Stores*, 279 F.3d at 894. In *Circuit City Stores*, where three coworkers alleged sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress, the court held that the fee scheduling scheme along with other portions of the arbitration agreement made the entire agreement unenforceable. *Id.* at 895-96. The court found that the agreement failed "to ensure that employees do not have to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." *Id.*

B. The First, Second, Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits Apply a Retrospective Case-by-Case Approach, Pursuant to Which the Enforceability of Fee-Splitting Arbitration Clauses Essentially Depends on the Present Litigant's Ability to Pay.

In contrast to the Ninth Circuit's *per se* rule, the First, Second, Third, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits have all adopted variations of a retrospective individualized balancing test to determine the enforceability of cost-splitting provisions in mandatory arbitration agreements. However, to say that these circuits all use some version of a balancing test is not to imply that they all agree on the factors that should be considered in the balancing test. To the contrary, even among the retrospective-individualized-balancing test circuits, there are serious disagreements about what the balancing test means and how it should be applied.

Courts in the Fourth, Seventh, and D.C. circuits all seem to look to (1) the claimant's ability to pay arbitration costs, (2) the expected cost differential between arbitration and litigation in court, and (3) whether that cost differential is so substantial as to deter the bringing of claims. *Bradford*, 238 F.3d at 556. In *Bradford,* the Fourth Circuit found that the employee failed to demonstrate an inability to pay the arbitration costs nor present evidence that the cost differential deterred him from bringing a claim. *Id.* at 558. Similarly, in *James v. McDonald's*, the Seventh Circuit essentially followed the *Bradford* analysis by requiring evidence of the plaintiff's financial hardship

and a comparative analysis of the "cost differential between arbitration and litigation." *James*, 417 F.3d at 680 (affirming the lower court where the plaintiff failed to show evidence of inability to pay or the comparative expense of litigating claims). Lastly, the D.C. Circuit relied upon *Bradford's* individualized approach in requiring a showing of the plaintiff's inability to pay arbitration costs and a comparison of the cost to arbitrate versus the cost to litigate. *Toledano*, 501 F. Supp. 2d at 149. The *Toledano* court found that the plaintiff failed to demonstrate that the fee-splitting clause of the arbitration agreement was unenforceable, because (1) the plaintiff's estate never gave any indication of the financial position of the estate and (2) the plaintiff presented evidence of the expected cost for arbitration but not litigation. *Id.* at 150.

Unlike the Fourth, Seventh, and D.C. Circuits, which also look at the individual's ability to pay the fees he was likely to incur, the Eleventh and Eighth Circuits focus less on the cost differential between arbitration and litigation. In *Musnick v. King Motor Co. of Fort Lauderdale*, the court held that Musnick's affidavit, stating he was generally fearful that he would be "unable to pay", without any supporting evidence amounted to an inadequate showing of Musnick's inability to pay. 325 F.3d at 1262. In *Faber v. Menard*, the Eighth Circuit also downplayed the cost differential between arbitration and litigation in requiring a former employee to show evidence of his financial hardship along with an estimate of the fees that he was likely to incur if he were to move forward with arbitration against his employer for age discrimination and retaliation. 367 F.3d at 1054 (remanding the case to the lower court to develop the

record of likely costs of arbitration and plaintiff's financial position to pay such costs).

In contrast to the Eighth and Eleventh Circuits, the First Circuit focuses almost exclusively on the costs of arbitration. It emphasizes a preliminary merits analysis that looks at whether a plaintiff or legal representation would have any incentive to arbitrate based on the costs of arbitration and the expected amount of recovery. *Kristian.*, 446 F.3d at 52. In *Kristian*, the First Circuit concluded that the provision of the arbitration agreement that required all costs to be covered by the plaintiff prevented the customer-plaintiffs from being able to vindicate their statutory rights against Comcast. *Id.* at 64. Similar to the First Circuit, the Second Circuit determined in *American Express III* that the costs of arbitration would be prohibitive for merchants trying to pursue a claim against American Express based on a preliminary merits analysis. *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 217 (2d Cir. 2012) *rev'd sub nom. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013). The Second Circuit analyzed whether it would be "economically rational for such a merchant to pursue recovery of damages given the likely out-of-pocket costs of the arbitration or litigation proceeding." *Id.* The Second Circuit later seriously questioned its own cost prohibitive standard in *American Express III* without establishing a new standard, dismissing *Green Tree's* warning against high arbitration costs that preclude a litigant from "effectively vindicating her rights" as mere dicta. *In re Am. Express Merchs.' Litig.*, 681 F.3d 139, 147 (2d Cir. 2012).

The Third Circuit does not explicitly articulate which test it uses, but instead cites to the retrospective individualized approach taken by the Fourth Circuit as well as the prospective systemic approach taken by the Sixth Circuit. *Spinetti*, 324 F.3d at 217. Although the Third Circuit cites to two different tests, it applied the retrospective individualized analysis in determining that plaintiff was not equipped to pay arbitration costs, because her individual income would not afford her the opportunity to pay for the likely cost to arbitrate as she barely had enough to pay her own living expenses. *See id.* at 217. However, in *Alexander v. Anthony*, the Third Circuit used the similarly situated approach to hold that the "loser pays" provision was unconscionable by looking at the expected cost of arbitration, without reviewing the specific financial records of the plaintiffs. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269 (3d Cir. 2003). The court then decided that the financial status of unemployed refinery workers simply could not afford to pay $800.00-$1000.00 a day for an arbitrator. *Id.*

C. The Sixth and Tenth Circuits Use a Prospective Systemic, Focusing on Whether a Cost Splitting Provision Will Not Only Deter the Present Claimant, but Will Also Have a Chilling Effect on Similarly Situated Future Litigants.

While the Sixth and Tenth Circuits also follow a case-by-case approach, theirs differ in significant ways from that of the First, Second, Fourth, Seventh, Eighth, Eleventh, and D.C. Circuits. Specifically, the Sixth and Tenth circuits not only focus on the

individual before the court, but also on all individuals that are similarly situated. *Morrison*, 317 F.3d at 646.

In *Morrison*, the Sixth Circuit consolidated two cases involving arbitration agreements between employees and their respective employers. *Id.* Each of the agreements contained cost splitting provisions requiring the employees to pay a substantial cost to arbitrate their claims. *Id.* The Sixth Circuit opined, "A cost splitting provision should be unenforceable whenever it would have the 'chilling effect' of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights." *Id.* at 661. The Sixth Circuit gave the most comprehensive analysis of how to apply the *Green Tree* standard by declaring that the reviewing court should (1) define the class of "similarly situated potential litigants" by job description and socioeconomic background; and (2) address the effect of arbitration costs on the class by looking at average arbitration cost compared to the cost of litigation. *Id.* at 663-64. Finally, the reviewing court should "discount the possibilities that the plaintiff will not be required to pay costs or arbitral fees because of ultimate success on the merits, either because of a cost shifting provisions in the agreement or because the arbitrator decides that such costs or fees are contrary to federal law." *Id.* Similarly, in *Sanchez v. Nitro-Lift Techs.*, pointing out the *Green Tree* standard was "unclear", the Tenth Circuit also evaluated whether the cost splitting provision would be deemed unenforceable based on whether it would deter a substantial number of similarly situated individuals. 762 F.3d at 1149-50.

II. WITHOUT THE COURT'S INTERVENTION THE CIRCUITS ARE UNLIKELY TO RESOLVE THE SPLIT ON THEIR OWN BECAUSE IN THE NEARLY TWENTY-YEAR DOCTRINAL VACUUM LEFT BY *GREEN TREE* REPEATED ATTEMPTS BY LOWER COURTS TO ARTICULATE A WORKABLE STANDARD HAVE ONLY RESULTED IN INTERPRETIVE CONFUSION BOTH AMONG AND WITHIN THE CIRCUITS.

Green Tree is now nearly two decades old. In the sixteen intervening years since the Court's decision not only has the split deepened, but also the circuits themselves have acknowledged they are unlikely to resolve the discrepancies without the Court's intervention. This is not for lack of trying. The circuits have made every attempt to fill in the doctrinal vacuum left by *Green Tree* and create a workable standard for determining whether a fee-splitting clause creates a cost prohibitive barrier to the vindication of one's rights, but time and time again the results have been utter confusion throughout and within the circuits.

The Fourth Circuit, the first of the circuits to address the question after *Green Tree*, acknowledged the Court did not announce a standard for determining whether a fee-splitting clause creates a cost prohibitive barrier to the vindication of one's rights. *See Bradford,* 238 F.3d at 557 ("Notably, the *Green Tree* Court suggested that some showing of individualized prohibitive expense would be necessary to invalidate an arbitration agreement on the ground that fee splitting would be prohibitively expensive, although it did not decide that issue."). Other circuits rapidly followed, each pointing out the lack of a

standard. *Sanchez*, 762 F.3d at 1149 ("It is thus unclear from *Green Tree* [h]ow detailed the showing of prohibitive expense must be' to support the conclusion that the provision, at a minimum, is unenforceable.") (internal quotation marks omitted); *Toledano*, 501 F. Supp. 2d at 148 ("Although the Court clearly contemplated a burden-shifting framework for such challenges, it reserved for another time the question how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.") (internal quotation marks omitted); *Faber*, 367 F.3d at 1053 (explaining that the "Supreme Court has not established what quantum of proof is necessary" to meet the burden of showing when arbitrators' fees are cost prohibitive); *Spinetti*, 324 F.3d at 217 ("Although '*Green Tree* does not provide us with a standard for how detailed the showing of prohibitive expenses must be to support the conclusion that the provision, at minimum, is unenforceable,' several courts have taken a stab at outlining the proper formula."); *Morrison*, 317 F.3d at 660 (explaining that *Green Tree* did not provide a standard for determining when costly expenses make a provision unenforceable and that the Fourth Circuit's individualized standard is inadequate).

But perhaps, there is no better evidence that the circuits are unlikely to resolve the split on their own than the post-*Green Tree* jurisprudence of the Third Circuit and the Second Circuit. In *Spinetti*, the Third Circuit acknowledges that "several courts have taken a stab at outlining the proper formula." 324 F.3d at 217. The Second Circuit even admitted to failing to create a consistent standard in determining whether arbitration fees are cost prohibitive in *Amex III* while

also declining to create a more appropriate standard. *In re Am. Express Merchs.' Litig.*, 681 F.3d at 147 ("Only *Amex III* has suggested that a claim that may be expensive to litigate—whether in court or in arbitration—can for that reason be deemed to entail preclusive arbitration costs.") (internal quotation marks omitted).

The split among and within the circuits is neither new nor isolated. In the sixteen years since *Green Tree*, no fewer than eleven circuits have in one form or another "taken a stab" at the question. Far from reaching a consensus the circuits have branched out in more and more complex and conflicting variations of how to determine the point at which a cost-splitting provision in a mandatory arbitration agreement is unconscionable. In other words, without the Court's intervention, the circuits will continue to operate in a doctrinal vacuum and to apply ambiguous and inconsistent standards, thereby leaving the vindication of a grieving party's rights entirely up to the randomness of geography.

III. THE COURT'S *GREEN TREE* JURISPRUDENCE HAS YET TO ANSWER THE QUESTION OF WHETHER MANDATORY GOVERNMENT ARBITRATION AGREEMENTS, IN WHICH STATE ACTORS COMPEL PRIVATE PARTIES TO GIVE UP THEIR RIGHT TO A JUDICIAL FORUM AS A CONDITION OF EMPLOYMENT, AMOUNTS TO A VIOLATION OF THE FUNDAMENTAL SUBSTANTIVE DUE PROCESS RIGHT TO ACCESS TO THE JUDICIAL SYSTEM, OR WHETHER SUCH AGREEMENTS SHOULD BE SUBJECT TO A HIGHER STANDARD OF REVIEW THAN THE UNCONSCIONABILITY STANDARD APPLICABLE TO PRIVATE AGREEMENTS.

This Court has long recognized access to the courts as a fundamental right subject to substantive due process protection. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (explaining that disabled litigants have a right to freely access the courts without physical barriers); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1997) (explaining that parents whose custodial rights to their children have been terminated must have access to the courts); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (explaining that it is "beyond doubt that prisoners have a constitutional right of access to the court . . . "); *Ex parte Hull*, 312 U.S. 546, 549 (1941) (explaining that state actors may not abridge or impair a petitioner's right to apply to a federal court for a writ of habeas corpus).

To be sure, the Court has also long held that, even though mandatory arbitration agreements often effectively bar access to the courts for many litigants, they remain valid "[s]o long as the litigant may effectively vindicate [his or her] statutory cause of

action in the arbitral forum." *Gilmer*, 500 U.S. at 28. However, the Court's jurisprudence on whether mandatory arbitration agreements stand as unconstitutional barriers to the judicial system has focused exclusively on the power of one private party to compel another private party to arbitrate.[1] By contrast, the Court has never explicitly answered the question that is squarely presented in this case: whether mandatory government arbitration agreements, in which a state actor compels a private party to give

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[1] *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015) (involving a private corporation and an individual customer); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (involving private merchants and a private credit-card issuer); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) (involving customers and a private corporation); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (involving customers and a private corporation); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (involving private shipping companies and a private corporation); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (involving former employees and a private business); *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008) (involving a private corporation and a number of former employees); *Preston v. Ferrer*, 552 U.S. 346 (2008) (involving two private citizens); *EEOC. v. Waffle House, Inc.*, 534 U.S. 279 (2002) (involving the Equal Employment Opportunity Commission (EEOC), bringing a claim on behalf of a private citizen and private corporation with whom the private citizen had an arbitration agreement); *Circuit City Stores*, 532 U.S. at 105 (involving an individual citizen and a private corporation); *Green Tree Fin. Corp.-Alabama,* 531 U.S. at 82 (2000) (involving an individual customer and a private corporation); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (involving a former employee and a private association); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) (involving a former employee and a private corporation); *Livadas v. Bradshaw*, 512 U.S. 107 (1994) (involving a private citizen and state commissioner who refused to bring an enforcement action against a private corporation).

up her right to a judicial forum, amounts to a violation of the fundamental substantive due process right to access to the judicial system; or, at the very least, whether such agreements should be subject to a standard more rigorous than the unconscionability holding of *Green Tree*, which is currently applicable to private mandatory arbitration agreements between two private parties?

A. The Unconscionability Standard of *Green Tree*, Which Was Designed to Address Ordinary Contractual Bargaining Between Private Parties, Cannot Account for the Power Differential Between State Actors and Private Litigants, Where the State's Bargaining Power Is Backed by the Entire Machinery of Government, the Vast Expanse of Police and Tax Powers, and the Full Weight of Institutional Authority and Social Control.

This Court has held that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never to be enforceable in the employment context." *Gilmer*, 500 U.S. at 33. *Gilmer* both followed and preceded a long line of cases, in which the Court gave a great deal of deference to arbitration agreements.[2] The rationale

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[2] *See Greenwood*, 132 S. Ct. at 665 (upholding an arbitration agreement in a dispute concerning a possible violation of the Credit Repair Organizations Act (CROA)); *Preston*, 552 U.S. at 346 (upholding an arbitration agreement in which the parties agreed to arbitrate all questions arising under a contract regardless of the dispute); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (upholding an arbitration agreement

behind strict judicial respect for arbitration agreements is based on the fundamental belief in the ability of two private parties to enter into a contract, and that if parties agree to resolve their dispute through arbitration, courts should not interfere with the parties' original intent. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960) ("The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator . . . The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.").[3]

However, there are two reasons why the general contract principles that have driven the Court's *Green Tree* jurisprudence should not determine the enforceability of a mandatory arbitration agreement in which the government compels employees as a condition of employment to forgo a judicial forum for vindication of their rights.

To begin with, an employment agreement bears little resemblance to a traditional contract.[4] A traditional

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in which the arbitrator would determine the validity of a contract instead of the court).

[3] Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 WILLAMETTE L. REV. 259, 267 (2014).

[4] Griffin Toronjo Pivateau, *Private Resolution of Public Disputes: Employment, Arbitration, and the Statutory Cause of Action*, 32 PACE L. REV. 114, 116 (2012).

contract in Virginia is, "an agreement [or bargain], for consideration, between two or more parties" who exchange promises or performances. *See Montagna v. Holiday Inns, Inc.*, 269 S.E.2d 838, 844 (Va. 1980). A voluntary "meeting of the minds" is the core of a valid contract, and includes the bargain that leads to the contract. *See Phillips v. Mazyck*, 643 S.E.2d 172, 175 (Va. 2007). By contrast, in government employment contracts involving arbitration agreements, "[e]mployees are in 'no position to bargain or shop for a better term' [because] [e]mployees typically receive [these] contracts containing mandatory arbitration clauses as a condition for new or continued employment on a take-it-or-leave-it basis."[5] Hence, "[t]he [extreme] power imbalance in the employment relationship results in contracts that are not bargained-for exchanges."[6] This imbalance of power is significantly heightened when the government itself is the employer and drafter of the contract.

Second, and more significantly, an employment contract, in which the government is a party, features an enormous power imbalance in favor of the government because the individual is, quite literally, facing the full backing of state police and tax powers. Generally, when reviewing the inequality or imbalance of the power between contracting parties, courts focus on the extent to which the contract may be said to be procedurally or substantively

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[5] Giesbrecht-McKee, *supra* note 3, at 268.

[6] *Id.*

unconscionable.[7] Thus, it is well understood that "[p]rocedural unconscionability is present when 'a party lacks a meaningful choice' or the bargaining process makes the court question a party's 'true assent' to the contract [and substantive] unconscionability is present 'when the terms of the bargain unreasonably favor one party,' or the terms are overly harsh."[8] In the specific context of mandatory arbitration agreements, this Court has noted that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of . . . overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *See Gilmer*, 500 U.S. at 33; *see also Mitsubishi*, 473 U.S. at 627.[9]

Power imbalance, lack of meaningful choice, and the absence of fair bargaining power are all exponentially magnified when the state is one side of the contractual employment relationship. While a typical private corporation may indeed possess a far greater measure of financial, legal and social resources than an individual litigant, government actors have at their disposal, not just greater resources but also the entire machinery of the state, the vast expanse of police and tax powers, and the full breadth and depth

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[7] Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141-42 (2005).

[8] Giesbrecht-McKee, *supra* note 3, at 267-68.

[9] *See also* Giesbrecht-McKee, *supra* 3, at 267-68; Erin O'Hara O'Connor, Kenneth J. Martin, & Randall S. Thomas, *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 147 (2012). *See generally* George W. Kuney & Robert M. Lloyd, *Contracts: Transactions and Litigation* 309-10 (2d ed. 2008).

of institutional authority and social control. That is to say the power differential between unequally matched private parties as opposed to the government versus a private party is not just one of degree, but of kind. This power differential cannot be adequately addressed by the Court's *Green Tree* holding. In short, the voluntariness of entering into a contract, and inherent inequality of bargaining power with a government entity, such as the FCSB should be subject to a stricter level of scrutiny when involving an arbitration clause where a party gives up her right to bring a dispute before a court.

The use of arbitration to settle disputes between employers and employees was historically employed in negotiations involving major employers and labor unions, which represented a large number of workers.[10] In representing a number of workers, labors unions had the resources to fully manage a claim through an arbitration process and gain a more balanced result. The demonstrably bizarre consequences generated by mandatory-arbitration agreements covering claims, such as Ms. Lee's, are such that congressional silence should have been taken to mean that Congress could not have intended their enforcement in instances such as this.[11]

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[10] Lisa A. Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39, 41 (2014).

[11] Reginald Alleyne, *Arbitrators' Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U. PA. J. LAB. & EMP. L. 1, 48 (2003).

Yet, in this modern era, "employees are often forced to agree to arbitration or lose their jobs, and since agreements are usually non-negotiable and drafted by the employer, the agreements [are usually] one-sided [and] inherently designed to favor the employer"[12] as it was in Ms. Lee's case. Further, when an agreement, such as one drafted by FCSB, forces the employee to split the cost of arbitration, the employee is usually unable to bring the claim because the personal expense is too high to justify bringing a claim.[13] Indeed, "[s]ocial norms of privacy concerning arbitrators' compensation may at least partially explain why the linkage of mandatory arbitrators' fees and the fairness of mandatory-arbitration proceedings have so seldom been argued."[14] These issues presented by forced arbitration agreements are usually exasperated when the agreement pits a lone employee against the full resources of a state backed entity, with the full support of citizens' tax dollars. This is why "[m]any have argued that mandatory arbitration should be eliminated entirely in cases where the parties have unequal bargaining power.[15]

It is commonplace, as this Court noted in *U.S. Trust Co. of New York v. New Jersey*, that there is a

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[12] Nagele-Piazza, *supra* note 10, at 42.

[13] *Id.*

[14] Alleyne, *supra* note 11, at 29-30.

[15] Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2361 (2012); *see also* Jean R. Sternlight, *Counterpoint: Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, DISP. RESOL. MAG., Fall 2009, at 5.

difference in the enforceability of contractual obligations when a state actor is a party to a contract. 431 U.S. 1, 23 (1977). When a governmental entity is a party to a contract, it never ceases to carry the full weight of the citizens that it represents. In carrying that weight, there is an inherent inequality in the bargaining power between the parties to the contract. The inequality of bargaining power between parties has long been recognized and is best seen through the development of federal government contract law, which "remains concerned with the context of the bargaining process and purposefully seeks to remedy some clear bargaining power disparities resulting from the fact that government bargaining power is usually strong."[16] These developments arise under the idea that "[w]henever the powerful can dictate terms to the weak, they will take unfair advantage of them, making the resultant contract a 'bargain' in name only."[17] Even in *Gilmer*, as mentioned above, this Court added, "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or *overwhelming economic power that would provide grounds* 'for the revocation of any contract.'" 500 U.S. at 33 (emphasis added).

Arbitration agreements involving a governmental entity create a Hobson's choice, which involves a free

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16 Barnhizer, *supra* note7, at 846-47.

17 Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 WAKE FOREST L. REV. 1017 (2014).

choice where there is no real alternative.[18] Employees are forced to either forego meritorious claims or personally finance a claim that will likely exceed any recovery.[19] The Federal Arbitration Act's purpose to increase freedom to contract has been used as a weapon against parties with little to no bargaining power.[20] In essence, greater scrutiny of arbitration agreements involving government entities will strengthen the free and voluntary nature of contracting, and prevent a society where millions of citizens are forced to give up their constitutional rights just to be employed by their government.

IV. THE LACK OF MUTUAL APPEAL RIGHTS IN A MANDATORY ARBITRATION AGREEMENTS IS *PER SE* UNCONSCIONABLE.

The Fairfax County School Board (FCSB) required its employees to sign an arbitration agreement drafted by the School Board that fails to give mutual appeal rights, thereby unfairly advantaging the School Board. Under Step 5 of the Grievance Procedure, the agreement provides: "Following a hearing from a fact-finding panel, the employee shall not have the right to a further hearing by the school board . . . The school board shall have the right to require a further hearing in any grievance proceeding . . . " (App.24-25a) This provision is in direct opposition with § 16(a) of the Federal Arbitration Act, which provides: "an appeal

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[18] Jeffrey M. Salas, *Unequal Bargaining Power*: *Navigating Arbitration Clauses*, 87 WIS. LAWYER 10 (2014).

[19] *Id.*

[20] *Id.*

may be taken from a final decision with respect to an arbitration that is subject to this title." 9 U.S.C. § 16. Several circuits acknowledge that the lack of mutuality in an arbitration agreement should factor into determining whether the agreement is unconscionable. *See Dan Ryan Builders, Inc. v. Nelson*, 508 F. App'x 207, 208 (4th Cir. 2013) (recognizing that a court may decline to enforce a contract clause such as an arbitration provision if the obligations or rights created by the clause unfairly lack mutuality); *Adams*, 279 F.3d at 894 (finding that the asymmetrical clause requiring employees and not the employer to arbitrate was unconscionable). In *Green Tree*, the court reiterated that under § 2 of the Act "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Green Tree Fin. Corp.-Alabama,* 531 U.S. at 89.

Here, the clause allowing only FCSB to appeal makes this arbitration agreement revocable under contract law because of the power it gives one party over the other. Normally, when viewing the inequality or imbalance of the power between contracting parties, the courts' focus "is most evident and explicit in [its] unconscionability . . . analysis."[21] Where there is an extreme imbalance of power, a "court will strike down contract provisions in whole or in part if the agreement is both procedurally and substantively

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[21] Barnhizer, *supra* note 7, at 141-42.

unconscionable and enforcing the contract as written 'would be fundamentally unfair.'"[22] It is well understood that "[p]rocedural unconscionability is present when 'a party lacks a meaningful choice' or the bargaining process makes the court question a party's 'true assent' to the contract [and substantive] unconscionability is present 'when the terms of the bargain unreasonably favor one party,' or the terms are overly harsh."[23] Where an agreement deprives a party of the mutual right to appeal, it has stripped that party of a meaningful opportunity to vindicate her rights.

V. THE STANDARD BY WHICH LOWER COURTS JUDGE THE UNCONSCIONABILITY OF MANDATORY ARBITRATION AGREEMENTS IS AN ISSUE OF ENORMOUS SOCIAL SIGNIFICANCE BECAUSE THESE AGREEMENTS ARE NOW INCREASINGLY EXPLOITED BY STATE ACTORS USING THE FULL COERCIVE POWER OF GOVERNMENT TO COMPEL CITIZENS TO GIVE UP JUDICIAL VINDICATION OF THEIR STATUTORY AND CONSTITUTIONAL RIGHTS AS A CONDITION OF PUBLIC EMPLOYMENT.

Today, it is increasingly difficult, if not virtually impossible, to apply for a credit card, use a cellphone, get cable or internet service, shop online, rent a car, get a job, or even place a relative in a nursing home without surrendering one's right to seek redress in the

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22 Giesbrecht-McKee, *supra* note 3, 267-68.

23 *Id.*

courts in favor of private arbitration.[24] As repeat players, corporations reap enormous advantages from mandatory arbitration: they are able to forum-shop, choose the arbitrator, close the doors of appeals when they win and open them when they lose, and shift the cost of adjudication to ordinary citizens in ways that would be unimaginable in a judicial forum.[25] For the

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[24] Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Nov. 1, 2015, at A1.

[25] Another tactic companies have used to successfully game arbitration is by eliminating the use of class action lawsuits as one of the mandatory conditions of arbitration. *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a "Privatization of the Justice System"*, N.Y. TIMES, Nov. 2, 2015, at A1. Because it is almost impossible for an individual to take on a corporation, individual claims stand little chance of being litigated. Between 2010 and 2014, only 505 consumers with a claim of $2,500 or less went to individual arbitration. *Id.* Class action suits allow a large group of people to band together in order to recover small individual amounts of money and expose company wrongdoing. Individual arbitration clauses essentially disabled consumer challenges to practices such as predatory lending, wage theft, and discrimination. For example, in *Discover Bank v. Superior Court*, consumers challenged the lawfulness of a $29.00 late fee but a class action waiver prevented consumers from aggregating their claims. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). While this is not a trivial amount to each individual consumer, it is far less than the cost of individual arbitration. While this Court has decided to reject attacks on class action waivers in the consumer context, the issue has not been decided specifically in the employment context. The reach of *Am. Express Co. v. Italian Colors Restaurant* is unsettled and employees should be allowed to challenge class action waivers. *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. at 2304. In employment agreements, an employee may face the risk of

vast majority of ordinary people, arbitration is not a fair and impartial adjudicative forum; it is the place where they pay for the privilege of having their rights ignored.

Significantly, the sort of arbitration abuses that have become commonplace in even the most routine of private commercial transactions are now being employed in government employment contracts to compel employees to give up as a condition of employment rights guaranteed by federal statutes and constitutional law. This is not merely corporations flexing their market power against private litigants, but the state itself, using the enormous coercive power of government to force ordinary citizens to give up judicial vindication of their rights. This Court has never held *Green Tree* to apply to government employment contracts, and yet state actors are increasingly relying upon *Green Tree* to shield from judicial scrutiny, a host of statutory and constitutional rights. Hidden from the courts are such issues as the reach of Title VII of the Civil Rights Act of 1964, or even the meaning of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which are being decided by private arbitrators cherry-picked by employers rather than federal courts.

The social significance at the heart of this issue becomes obvious when one considers the advantages that inhere to corporations (and now increasingly the

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employer retaliation when asserting an individual claim, as opposed to if they would assert a claim as a class.

government) when they use arbitration as a coercive tool.

A. Arbitration Creates Advantages for Repeat Players.

Arbitration agreements favor employers, the repeat players in the arbitral forum, over the employee, often a one-time player, because employers are much more familiar with the system and the arbitrators. Though it is common sense for each party to seek an arbitrator that will *see* the case from their viewpoint, companies work more closely with arbitrators, not allowing for an equal selection process. Employees tend to be less informed about the process than their opposing party.[26] The employer and its law firm, through their various associations, tend to be intimately familiar with the record and predispositions of various arbitrators. This insider knowledge influences which arbitrator corporations (and government actors) select to conduct future arbitration hearings.[27] On the other hand, the individual, a first-time player, knows very little about a particular arbitrator, besides what is given in formal resumes, which often does not reveal the whole story.[28] This gives the company an upper hand in arbitration hearings. The company is able to select an arbitrator that will be more favorable to its position

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[26] *See* Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685, 689-90 (2004).

[27] *Id.*

[28] *Id.*

based on his or her decisions in previous cases. Furthermore, arbitrators know that employers are repeat players and will be familiar with competing arbitrators' records.[29] To guarantee that employers will continue to perceive them as "acceptable," arbitrators may, consciously or subconsciously, avoid a record, which employers will view as unfavorable. Granting favorable outcomes to companies will ensure the company continues to work with them.[30] The New York Times found that 41 arbitrators handled 10 or more cases for one company from 2010-2014.[31] Companies often use their financial resources to substantially influence individual arbitrators' decisions. For example, an arbitrator was taken to a basketball game by a company's lawyer the night before a proceeding began.[32] These actions are extremely troublesome since individuals are unable to appeal the decisions of the arbitrator and they are left with a hefty price with no resolution.

B. Arbitration Hearings Lack Neutrality.

Though courts have upheld arbitration agreements as an answer to protracted litigation, they lack a key aspect of judicial forums: neutrality. A New York Times investigation of arbitration agreements found that the use of arbitration has created an alternate system of justice that tends to favor businesses because arbitrators consider the companies their clients. This

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29 *Id.*

30 *Id.*

31 Silver-Greenberg & Corkery, *supra* note 25.

32 *See* Summers, *supra* note 26, at 689-90.

change has gone largely unnoticed and has meant that tens of millions of Americans have lost a fundamental right to their day in court.[33] In short, arbitration agreements have privatized the justice system: there are no strict rules protecting arbitration hearings from conflicts of interest; companies maintain favored lists of arbitrators they steer their disputes to;[34] and more often than not arbitrations are often conducted in the conference rooms of lawyers representing companies accused of wrongdoing.[35]

The fact that companies favor arbitration would not pose such a significant social problem if the courts themselves had not insulated the process from review. For example, in *Hooters of Am., Inc. v. Phillips*, the employer compiled the list of approved arbitrators from which complaining employees were required to choose. 173 F.3d 933 (4th Cir. 1999).[36] Though the Fourth Circuit conceded that this was a way for the company to ensure a biased decision, the court nonetheless reasoned that, "Hooters is free to devise lists of partial arbitrators." *Hooters of Am., Inc.*, 173 F.3d at 939.[37]

In *AT&T Mobility LLC v. Concepcion*, the Court concluded that when Congress endorsed a "pro-arbitration" policy by adopting the FAA in 1925, it intended to promote a streamlined, commercially

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[33] Silver-Greenberg & Gebeloff, *supra* note 24.

[34] *Id.*

[35] *Id.*

[36] *See* Summers, *supra* note 26, at 689-90.

[37] *Id.*

attractive type of arbitration and to preempt state law that interfered with this arbitration paradigm. 563 U.S. 333, 339 (2011) (reinforcing the understanding that the FAA represents a "liberal federal policy favoring arbitration").[38] Whatever may or may not have been Congress' original intent, it is difficult to escape the conclusion that the Court's own jurisprudence on the enforceability of arbitration agreements has (wittingly or unwittingly) resulted in employers and corporations gaining outsized and unfair bargaining power over individual employees and litigants.[39] It is also equally difficult to escape the conclusion that this has expanded arbitrators' jurisdictional power, minimized judicial arbitration oversight, and marginalized the role of state contract law and arbitration's procedural rules.[40] While arbitration *can* be used in a way that benefits those with small dollar claims, it is seldom used in such a way. The lack of review of the decision process, the closed door nature of proceedings, and unequal experience in arbitration proceedings, combined with the "pro-arbitration policy," makes for a dangerous formula for the average American seeking relief in the only forum available to them.

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38 *See* Ronald G. Aronovsky, *The Supreme Court and the Future of Arbitration: Towards a Preemptive Federal Arbitration Procedural Paradigm*, 42 SOUTHWESTERN L. REV. 131 (2012).

39 *See id.*

40 *Id.*

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 17, 2016

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OPINION OF THE FOURTH CIRCUIT (AUGUST 18, 2015)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CYNTHIA LEE,

Plaintiff-Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD;
DR. JACK DALE, former Superintendent;
DR. PHYLLIS PAJARDO, Assistant Superintendent;
JAMEY CHIANETTA, Principal,

Defendants-Appellees.

No. 15-1050

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:14-cv-01116-AJT-TCB)

Before: KING and THACKER, Circuit Judges, and DAVIS, Senior Circuit Judge.

PER CURIAM

Cynthia Lee challenges the district court's order granting the Fairfax County Public School (FCPS) Board's motion for summary judgment and dismissing Lee's complaint alleging that the FCPS Board and FCPS employees (collectively, "Appellees") violated Lee's

civil rights under 42 U.S.C. §§ 1981, 1983 (2012), and her procedural due process rights under the Fourteenth Amendment, and engaged in defamation and wrongful termination under Virginia state law. Lee argues that her claims are not barred by her prior settlement agreement with FCPS because she entered the agreement under duress and the agreement is unconscionable. We affirm.

We review the grant or denial of summary judgment de novo. *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324, 330 (4th Cir. 2009). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012). Summary judgment is only appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the nonmoving party's] case." *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (internal quotation marks omitted).

We first review Lee's claim that her settlement agreement should be set aside because she entered it under duress. Under Virginia law, "[d]uress is not readily accepted as an excuse, and must be proven by clear and convincing evidence." *Pelfrey v. Pelfrey*, 487 S.E.2d 281, 284 (Va. Ct. App. 1997) (internal quotation marks omitted). "Duress exists when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent." *Goode v. Burke Town Plaza, Inc.*, 436 S.E.2d 450, 452 (Va. 1993).

Virginia courts have been particularly hesitant to accept the exertion of economic pressure as a form of duress. *See id.* at 452-53 ("Because the application of economic pressure by threatening to enforce a legal right is not a wrongful act, it cannot constitute duress."); *Seward v. Am. Hardware Co.*, 171 S.E. 650, 662 (Va. 1933) ("A contract reluctantly entered into by one badly in need of money without force or intimidation and with full knowledge of the fact is not a contract executed under duress."). We have reviewed the record and found no evidence of duress. Lee fails to show that FCPS engaged in any wrongful conduct in the negotiation of the agreement, and her financial hardship, standing alone, is insufficient to invalidate a contract due to duress under Virginia law.

We next consider whether the settlement agreement should be invalidated as unconscionable. Traditionally, for a contract to be unconscionable, it must have been "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Chaplain v. Chaplain*, 682 S.E.2d 108, 113 (Va. Ct. App. 2009) (internal quotation marks omitted). In other words, "'[t]he inequality must be so gross as to shock the conscience.'" *Id.* (quoting *Smyth Bros. v. Beresford*, 104 S.E. 371, 382 (Va. 1920)). Unconscionability has both a substantive and procedural element. *Id.* at 114. The former requires a "gross disparity in the value exchanged." *Id.* at 113 (internal alterations and quotation marks omitted). The latter necessitates inequity and bad faith in "the accompanying incidents . . . , such as concealments, misrepresentta-tions, undue advantage, oppressions on the part of

the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like." *Id.* at 114 (internal quotation marks omitted).

We conclude that neither element is present in the settlement agreement before this court. In exchange for releasing her claims against Appellees, Lee avoided termination for incompetence (for which she could have lost her teacher's license), retained a position at FCPS, wiped her record clean, received a neutral reference from FCPS, and could resign with only five-days' notice if she were to obtain new employment. In negotiating these benefits, Lee was represented by counsel. As a result, the district court properly refused to invalidate the settlement agreement due to unconscionability.

Because Lee does not contend that any of her claims were beyond the scope of her settlement agreement, we affirm the district court's judgment. We also deny as moot her motion to reconsider our order denying her motion to expedite. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT OF THE EASTERN DISTRICT COURT OF VIRGINIA (OCTOBER 31, 2014)

IN THE UNITED STATES DISTRICT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CYNTHIA LEE,

Plaintiff,

v.

FAIRFAX COUNTY SCHOOL BOARD, ET AL,

Defendant.

1:14cv01116 (AJT/TCB)

Pursuant to the order of this Court entered on October 31, 2014, and in accordance with Federal Rule of Civil Procedure 58, JUDGMENT is hereby entered in favor of the Defendants, Fairfax County School Board, Dr. Jack Dale, Dr. Phyllis Pajardo and Jamey Chianetta and against the Plaintiff Cynthia Lee

Fernando Galindo
Clerk

/s/ Janice L. Allen
(By) Deputy Clerk

October 31, 2014
Date

ORDER OF THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (SEPTEMBER 22, 2015)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CYNTHIA LEE,

Plaintiff-Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD;
DR. JACK DALE, Former Superintendent;
DR. PHYLLIS PAJARDO, Assistant Superintendent;
JAMEY CHIANETTA, Principal,

Defendants-Appellees.

No. 15-1050
(1:14-cv-01116-AJT-TCB)

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Thacker and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor
Clerk

RELEVANT STATUTORY PROVISION
FEDERAL ARBITRATION ACT, 9 U.S.C. § 2

§ 2–Validity, Irrevocability, and Enforcement of Agreements to Arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

REGULATION 4461.1, HUMAN RESOURCE EMPLOYEE PERFORMANCE AND DEVELOPMENT, EFFECTIVE JANUARY 31, 2012 (OCTOBER 24, 2014)

HUMAN RESOURCES
Duties, Responsibilities, and Rights of Employees
Procedure for Adjusting Grievances—Contracted/ Licensed Professional Personnel

This regulation supersedes Regulation 4461.

I Purpose

The purpose is to provide an orderly procedure for resolving disputes concerning the application, interpretation, or violation of any of the provisions of local school board policies, procedures, rules, and regulations as they affect the work of contracted/licensed professional personnel, other than dismissals or placing on probation. An equitable solution of grievances should be secured at the most immediate administrative level. The procedure should not be construed as limiting the right of any contracted/licensed professional to discuss any matter of concern with any member of the school administration. Nor should the procedure be construed to restrict any contracted/licensed professional's right to seek, or the school division administration's right to provide, a review of complaints that are not included within the definition of a grievance. Nothing in this procedure shall be interpreted to limit a school board's exclusive final authority over the management and operation of the school division.

II. Summary of Changes Since Last Publication

This regulation has been rewritten in its entirety in accordance with the Standards of Quality for school divisions and the statutory mandate of Chapters 13.2 and 15, of Title 22.1, of the Code of Virginia.

III. Applicability

This regulation applies to all contracted/licensed professional personnel, employed under a written contract as provided by § 22.1-302 of the Code of Virginia, all personnel who are required to be licensed under the Virginia Department of Education (VDOE) Regulation 8 VAC 20-22-10 et seq., and, all personnel who are issued a Professional Personnel Contract by Fairfax County Public Schools (FCPS) excluding all Superintendents.

IV. Definitions

The following words and terms when used in this regulation shall have the following meanings unless the context clearly indicates otherwise.

A. Days

Business day: in accordance with § 22.1-312 of the Code of Virginia, any day that the relevant school board office is open.

Days: calendar days unless a different meaning is clearly expressed in this procedure, whenever any period of time fixed by this procedure shall expire on a Saturday, Sunday, or legal holiday, the period of time for taking action under this procedure shall be extended to the next business day.

B. Dismissal

Dismissal: the dismissal of any employee within the term or such employee's contract and the nonrenewal of a contract of an employee on a continuing contract.

C. Employee

Employee or employees: all contracted/licensed professional personnel, employed under a written contract as provided by § 22.1.302 of the Code of Virginia, all personnel who are required to be licensed under the VDOE Regulation 8 VAC 20-22-10 et seq., and, all personnel who are issued a Professional Personnel Contract by FCPS excluding all Superintendents.

D. Grievance

Grievance: a complaint or dispute by an employee relating to his or her employment including, but not necessarily limited to: (1) disciplinary action other than dismissal or placing on probation; (2) the application or interpretation of: (a) personnel policies, (b) procedures, (c) rules and regulations, (d) ordinances end (e) statutes; (3) acts of reprisal against an employee for filing or processing a grievance, participating as a witness in any step, meeting or hearing relating to a grievance, or serving as a member of a fact-finding panel; and, (4) complaints of discrimination on the basis of race, color, creed; political affiliation, handicap, age, national origin or sex.

Each school board shall have the exclusive right to manage the affairs and operations of the school division. Accordingly, the term "grievance" shall not

include a complaint or dispute by an employee relating to (1) dismissal or placing on probation; (2) establishment and revision of wages or salaries, position classifications or general benefits, (3) suspension of an employee or nonrenewal of the contract of an employee who has not achieved continuing contract status, (4) the establishment or contents of ordinances, statutes or personnel policies, procedures, rules and regulations, (5) failure to promote, (6) discharge, layoff or suspension from duties because of decrease in enrollment, decrease in enrollment or abolition of a particular subject or insufficient funding, (7) hiring, transfer, assignment and retention of employees within the school division, (8) satisfactory written performance evaluations, (9) suspension from duties in emergencies, or (10) the methods, means and personnel by which the school division's operations are to be carried on.

While these management rights are reserved to the school board, failure to apply, where applicable, the rules, regulations, policies, or procedures as written or established by the school board is grievable.

E. Grievance File

Grievance File: a file, separate from the employee's personnel file, which contains all documents related to a grievance. The file shall be established and maintained by the Office of Employee Relations in the Department of Human Resources (DHR), for each grievance that progresses beyond Step 1. All pertinent documents to the case shall be included in the grievance file. Such

information shall not reside in the employee's personnel or local file.

F. Mediation

Mediation is an option in the grievance procedure. Mediation refers to a third-party conflict resolution process whereby people trained in mediation skills work with parties in conflict. The mediator's objective is to assist the parties in resolving the conflict, but the primary responsibility remains with the parties themselves. The mediator helps facilitate communications between the parties. The mediator may suggest solutions, but no solution shall be imposed on a party; the parties must agree before any compromise or solution shall take effect.

G. Personnel File

Personnel file: any and all memoranda, entries or other documents included in the employee's file as maintained in the central school administration office or in any file regarding the employee maintained within a school in which the employee serves.

H. Placing on Probation

Placing on Probation: a period not to exceed one year during which time it shall be the duty of the employee to remedy those deficiencies which give rise to the probationary status.

I. Supervisor

Any person having authority to evaluate, to recommend the: hire, transfer, suspension, layoff, recall, promotion, discharge, assignment, reward, or

discipline of other employees; to direct other employees; or, to adjust the grievance of other employees.

J. Written Grievance Appeal

Written grievance appeal: a written or typed statement describing the event or action complained of, the date of the event or action, and a concise description of those policies, procedures, regulations, ordinances or statutes upon which the employee bases his or her claim. The employee shall specify what he or she expects to obtain through the grievance procedure. A statement shall be written upon forms prescribed by this regulation.

V. Grievance Procedure

Recognizing that grievances should be begun and settled promptly, a grievance must be initiated within 15 business days following either the event giving rise to the grievance, or within 15 business days following the fine when the employee knew or reasonably should have known of its occurrence.

Personal face-to-face meetings shall be required at all steps. Informal resolution of disputes is encouraged at all steps. The parties to the grievance may by mutual agreement waive any or all intermediate steps or meetings, with the exception of the initial complaint, reducing the complaint to writing, and the request for grievability determination. The parties shall present all relevant information in support of their claims or defenses at the earliest possible step of the grievance process. Grievances shall be processed as follows:

A. Step 1—Informal Meeting

The employee shall discuss the concern with his or her immediate supervisor, which may be the principal, with the object of resolving the matter informally. The employee shall specify to the supervisor that an informal grievance is being presented. A concern must be raised either within 15 business days following the event giving rise to the concern or within 15 business days from the time the employee reasonably knew or should have known of its occurrence. The immediate supervisor shall review the concern and shall respond orally or in writing within five (5) business days of the discussion.

The immediate supervisor may not refuse to consider a grievance in the informal stage. If the grievance is not timely or consists of matters not covered under the grievance system, the employee shall be so advised. However, the employee must be allowed to set forth his or her concern or dissatisfaction to the immediate supervisor who must listen and respond within the context and time tines of the grievance procedure.

B. Step 2—Review of Written Grievance with Immediate Supervisor (Which May be the Principal)

When an employee is dissatisfied with the decision under the informal procedure, the employee may, submit the grievance utilizing the Statement of Grievance, Form A, to his or her immediate supervisor or principal for review. The employee must initiate the step 1 meeting and file the grievance in writing within 15 business days following

the event giving rise to the concern or within 15 business days from the time the employee reasonably knew or should have known of its occurrence.

The grievance shall be in writing, signed and dated by the grievant, and contain sufficient data to identify and clarify the basis of the grievance to include date of occurrence, description of the violation, citation of the regulation violated, and the date of the informal discussion. It must also explain the efforts made to resolve the grievance informally and specify the relief sought by the employee. If the employee has a representative, the representative's name, address, and phone number shall be included.

1. Receipt of a Grievance

Upon receipt of a written grievance appeal, the immediate supervisor shall take one of the following actions within five (5) business days of receipt of the grievance appeal:

a. Accept the grievance and conduct a Step 2 hearing. A meeting shall be held between the immediate supervisor or his or her designee, or both, and the employee or his or her designee, or both, within five (5) business days of the receipt by the immediate supervisor of the written grievance appeal. At such meeting the employee or other party involved, or both, shall be entitled to present witnesses and to be accompanied by a representative other than an attorney. The immediate supervisor or his or her designee, or both shall respond in writing utilizing Step 2-Decision of Immediate Supervisor/Principal, Form B

within five (5) business days following such meeting.

The immediate supervisor may forward to the employee within five (5) business days from the receipt of the written grievance appeal a written request for more specific information regarding the grievance. The employee shall file an answer thereto within 10 business days, and the meeting must then be held within five (5) business days thereafter.

b. Return the grievance statement to the employee if: (a) it was not filed within the time limits specified for filing under the informal or formal procedures; or (b) it consists wholly of a matter or matters excluded from coverage by the grievance procedure; or (c) the employee has not completed the Step 1-Informal procedure, or (d) the grievance consists of issues or relief not raised under the informal procedure. The determination notice shall be in writing, Step 2-Statement of Grievance, Form A, page 2. The employee shall have the right to request the School Board to review the decision to not accept the grievance. (Refer to Section VI: Grievability)

2. Allegations of Discrimination in Connection with a Grievance

In any complaint involving a charge of discrimination on the basis of race, sex, color, religion, national origin, ancestry, age, disability, marital status, or political affiliation, the complaint shall be referred to the Office of Equity and

Compliance (OEC) in the DHR for determination. The time lines shall be held in abeyance pending investigation and determination by the OEC. An interim report will be provided after 30 days from receipt of the complaint if a final determination has not been made.

The same issue shall not be simultaneously processed under both the OEC as an equal employment opportunity complaint and as a grievance under this procedure. Once the OEC determines whether or not discrimination has occurred, it shall report to the complaining employee. If a complaint remains, the grievance process may be resumed as long as the remaining complaint was originally the subject of a timely grievance.

C. Step 3—Cluster/Department Assistant Superintendent

If the grievance is not settled to the employee's satisfaction in Step 2, the employee can proceed with the grievance to Step 3 by filing a written notice of appeal utilizing Step 3-Appeal of Immediate Supervisor/ Principal Decision, Form C with the appropriate cluster/ department assistant superintendent accompanied by the original written statement of grievance appeal form within five (5) business days after receipt of the Step 2 answer (or the due date of such answer).

A meeting shall then be held between the cluster/department assistant Superintendent and/or his or her designee, or both, the employee and/or his or her designee, or both, and the administrative representative at a mutually agreeable time within five (5) business days. At such meeting, the employee and the administration shall be entitled to present

witnesses and to be accompanied by a representative who may be an attorney. A representative may examine, cross-examine, question, and present evidence on behalf of the employee or the administration without being in violation of the provision of § 54.1-3904 of the Code of Virginia.

The cluster/department assistant superintendent, or his or her designee, may make a written request for more specific information from the employee, but only if such was not requested at Step 2. Such request shall be answered within 10 business days and the meeting shall be held within five (5) business days of the answer.

If no settlement can be reached in said meeting, the cluster/department assistant superintendent, or his or her, designee, shall respond in writing within five (5) business days following such meeting utilizing Step 3-Decision of Cluster/Department Assistant Superintendent, Form D.

D. Step 4—Superintendent's Hearing Officer

If the grievance is not settled to the employee's satisfaction in Step 3, the employee can proceed to Step 4 by filing a written notice of appeal utilizing Step 4-Appeal of Cluster/Department Assistant Superintendent Decision, Form E with the Superintendent's hearing officer, accompanied by the original written statement of grievance appeal form within five (5) business days after receipt of the Step 3 answer (or the due date of such answer).

A meeting shall then be held between the Superintendent's hearing officer, the employee or his or her designee, or both, and the administrative

representative at a mutually agreeable time within five (5) business days. At such meeting, the employee and the administration shall be entitled to present witnesses and to be accompanied by a representative who may be an attorney. A representative may examine, cross-examine, question, and present evidence on behalf of the employee or the administration without violating the provisions of § 54.1-3904 of the Code of Virginia.

If no settlement can be reached in said meeting, the Superintendent's hearing officer shall respond in writing within five (5) business days following such meeting utilizing Step 4-Decision of Superintendent's Hearing Officer, Form F.

The Superintendent's hearing officer may make a written request for more specific information from the employee, but only if such was not requested in Step 3. Such request shall be answered within 10 business days, end the meeting shall be held within five (5) business days of the date on which the answer was received. If the grievance is not resolved to the satisfaction of the employee in Step 4, the employee may elect to have a hearing by a fact-finding panel, as provided in Step 5, or after giving proper notice, may request a decision by the School Board, as provided in Step 6.

E. Step 5—Fact-Finding Panel

In the event the grievance is not settled upon completion of Step 4, either the employee, or the school board, may elect to have a hearing by a fact-finding panel prior to a decision by the school board, as provided in Step 5. If the employee elects to proceed to Step 5, he or she must notify the Superintendent

through the assistant superintendent, DHR, in writing utilizing Step 5-Request for Fact-Finding Panel, Form G of the intention to request a fact-finding panel and enclose a copy of the original written statement of grievance form within five (5) business days after receipt of a Step 4 decision (or the due date of such decision). If the school board elects to proceed to a fact-finding panel, the Superintendent must serve written notice of the school board's intention upon the employee within 15 business days after the decision provided by Step 4.

1. Panel

Within five (5) business days after the receipt by the Superintendent of the request for a fact-finding panel, the employee and the Superintendent shall each select one panel member from among the employees of the school division other than an individual involved in any previous step of the grievance procedure as a supervisor, witness, or representative. The two panel members so selected shall, within five (5) business days of their selection, select a third impartial panel member who shall possess some knowledge and expertise in public education and education law and be capable of presiding over an administrative hearing.

With the mutual consent of the parties, the panel selection process may be modified to allow the selection of the impartial panel member by the parties rather than by the other panel members. The parties may also agree to waive the timelines for selection of the other panel members and hearing dates.

2. Selection of impartial Third Panel Member

In the event that both panel members are unable to agree upon a third panel member within five business days, both members of the panel shall request the chief judge of the circuit court having jurisdiction of the school division to furnish a list of five qualified and impartial individuals from which one individual shall be selected by the two members of the panel to serve as the third member. The individuals named by the chief judge may reside either within or outside the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia, and in all, cases shall possess some knowledge and expertise in public education and education law and shall be deemed by the Judge capable of presiding over an administrative hearing. Within five (5) business days after receipt by the two panel members of the list of fact finders nominated by the chief judge, the panel members shall meet to select the third panel member. Selection shall be made by alternately deleting names from the list until only one remains. The panel member selected by the employee shall make the first deletion.

The third impartial panel member shall chair the panel and shall have the authority to conduct the hearing and make recommendations as set forth herein while acting as a hearing officer. Panel members shall not be parties to or witnesses to the matter grieved. No elected official shall serve as a panel member.

3. Holding of Hearing

The hearing shall be held by the panel within 30 business days from the date of the selection of the final panel member. The panel shall set the date, place, and time for the hearing and shall so notify the Superintendent and the employee. The employee and the Superintendent each may have present at the hearing, and be represented at all stages, by a representative or legal counsel.

4. Procedure for Fact-Finding Panel

a. The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the employee, the hearing shall be private.

b. Prior to the hearing, or at the beginning of the hearing, the panel may ask for written statements from the administration and the employee clarifying the issues involved and, at the discretion of the panel, may allow closing statements.

c. The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the employee and the superintendent. The panel may, at its discretion, vary this procedure, but shall afford full and equal opportunity to all parties to present any material or relevant evidence and shall afford the parties the right of cross-examination.

d. The parties shall produce such additional evidence as the panel may deem necessary

to an understanding and determination of the dispute. The panel shall be the judge of the relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the panel and of the parties.

e. Exhibits offered by the employee or the Superintendent may be received in evidence by the panel and, when so received, shall be marked and made a part of the record.

f. The hearing may be reopened by the panel, on its own motion or upon application of the employee or of the Superintendent, for good cause shown, to hear after-discovered evidence at any time before the panel's report is made.

g. The panel shall make a written report which shall include its findings of fact and recommendations, and shall file it with the members of the school board, the Superintendent, and the employee, not later than 30 business days after the completion of the hearing,

h. A stenographic record or tape recording of the proceedings shall be taken. The recording may be dispensed with entirely by mutual consent of the parties. If the recording is not dispensed with, the two parties shall share the cost of the recording equally. If either party subsequently requests a transcript, that party shall bear the expense of its preparation.

i. The recommendations and findings of fact of the panel submitted to the school board shall be based exclusively upon the evidence presented to the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.

5. Expenses

a. The employee shall bear his or her own expenses. The school board shall bear the expenses of the Superintendent. The expenses of the panel shall be borne one half by the school board and one half by the employee.

b. The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the chief judge of the circuit court. No employee of the school division shall receive such per diem for service on a panel during his or her normal business hours if he or she receives his or her normal salary for the period of such service.

c. Witnesses who are employees of the school board shall be granted release time if the heating is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

6. Right to Further Hearings

Following a hearing by a fact-finding panel, the employee shall not have the right to a further hearing by the school board as provided in subsection F3 of this section. The school board shall have the

right to require a further hearing in any grievance proceeding as provided in subsection F3 of this section.

F. Step 6—Decision by the School Board

1. If an employee elects to proceed directly to a determination before the school board, he or she must notify the Superintendent in writing of the intention to appeal directly to the board, of the grievance alleged, and the relief sought within five business days after receipt of the answer as required in Step 4 or the due date thereof. Upon receipt of such notice, the school board may elect to have a hearing before a fact-finding panel, as indicated in Step 5, by filing a written notice of such intention with the employee within 10 business days of the deadline for the employee's request for a determination by the school board.

2. In the case of a hearing before a fact-finding panel, the school board shall give the employee its written decision within 30 business days after the school board receives both the transcript of such hearing, if any, and the panel's finding of fact, and recommendations unless the school board proceeds to a hearing under subsection F3 of this section. The decision of the school board shall be reached after considering the transcript, if any, the findings of fact and recommendations of the panel, and such further evidence as the school board may receive at any further hearing which the school board elects to conduct.

3. In any case in which a hearing before a fact-finding panel is held in accordance with Step 5, the

local school board may conduct a further hearing before such school board.

a. The local school board shall initiate such hearing by sending written notice of its intention to the employee and the Superintendent within 10 business days after receipt by the board of the findings of fact and recommendations of the fact-finding panel and any transcript of the panel hearing. Such notice shall be provided upon forms to be prescribed by the Board of Education and shall specify each matter to be inquired into by the school board.

b. In any case where such further hearing is held by a school board after a hearing before the fact-finding panel, the school board shall consider at such further hearing the transcript, if any: the findings and recommendations of the fact-finding panel; and such further evidence including, but not limited to, the testimony of those witnesses who have previously testified before the fact-finding panel as the school board deems may be appropriate or as may be offered on behalf of the employee or the administration.

c. The further hearing before the school board shall be set within 30 business days of the Initiation of such hearing, and the employee must be given at least 15 business days written notice of the date, place, and time of the hearing. The employee and the Superintendent may be represented by legal counsel or other representatives. The hearing before the school board shall be

private, unless the employee requests a public hearing. The school board shall establish the rules for the conduct of any hearing before it. Such rules shall include the opportunity for the employee and the Superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses and the right of all parties or their representatives to cross-examine the witnesses. Witnesses may be questioned by the school board.

The school board's attorney, assistants, or representative, if he or she, or they, represented a participant in the prior proceedings, the employee, the employee's attorney, or representative and, notwithstanding the provisions of § 22.1.69 of the Code of Virginia, the Superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the employee, the school board's attorney or representative, and the Superintendent, may join the school board in executive session to assist in the writing of the decision.

A stenographic record or tape recording of the proceedings shall be taken. However, the recording may be dispensed with entirely by mutual consent of the parties. If not dispensed with, the two parties shall

share the cost of the recording equally; if either party requests a transcript, that party shall bear the expense of its preparation.

d. The decision of the school board shall be based solely on the transcript, if any; the findings of fact and recommendations of the fact-finding panel; and any evidence relevant to the issues of the original grievance produced at the school board hearing in the presence of each party. The school board shall give the employee its written decision within 30 business days after the completion of the hearing before the school board. In the event the school board's decision is at variance with the recommendations of the fact-finding panel, the school board's written decision shall include the rationale for the decision.

4. In any case where a hearing before a fact-finding panel is not held, the board may hold a separate hearing or may make its determination on the basis of the written evidence presented by the employee and the recommendation of the Superintendent.

5. The school board shall retain its exclusive final authority over matters concerning employment and the supervision of its personnel.

VI. Grievability

A. Initial Determination of Grievability

Decisions regarding whether a matter is grievable shall be made by the school board at the request of the Superintendent or employee. The party wishing to request a grievability decision shall submit a memorandum through the clerk of the school board to the school board within five (5) business days of receiving a response that an issue is not grievable. The submission shall include a copy of the original written statement of grievance form as well as any response(s) and appeals) which have been filed. The memorandum shall state why the appeal is being made and shall include both relevant factual information and the rationale in support of the appeal. The appeal memorandum shall be transmitted simultaneously to the other party in the grievance. The other party shall have five (6) business days from receipt of the appeal to submit a memorandum through the clerk of the school board to the school board and Simultaneously to the other party in the grievance setting forth its views on the requested appeal, including both relevant factual information and the rationale in support of the other party's position.

Consideration by the school board shall take place in executive session and shall be based upon the submitted materials; however, the school board reserves the right to request oral arguments by the parties. All reasonable efforts will be made to transmit the board's decision within 10 business clays after the executive session in which the matter was last considered. Such determination of grievability

shall be made subsequent to the reduction of the grievance to writing and prior to any panel or board hearing, or the right to such determination shall be deemed to have been waived. Failure of the school board to make such a determination within such a prescribed period shall entitle the employee to advance to the next step as if the matter were grievable.

B. Appeal of Determination on Grievability

1. Decisions of the school board may be appealed to the circuit court having Jurisdiction in the school division for a hearing on the issue of grievability.

a. Proceedings for a review of the decision of the school board shall be instituted by filing a notice of appeal with the school board within 10 business days after the date of the decision and giving a copy thereof to all other parties.

b. Within 10 business days thereafter, the school board shall transmit to the clerk of the court to which the appeal is taken, a copy of its decision, a copy of the written notice of appeal, and the exhibits. The failure of the school board to transmit the record within the time allowed shall not prejudice the rights of the employee. The court may, on motion of the employee, issue a writ of certiorari requiring the school board to transmit the records on or before a certain date.

c. Within 10 business days of receipt by the clerk of such record, the court, sitting without a Jury, shall hear the appeal on the

record transmitted by the school board and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court may, in its discretion, receive such other evidence as the ends of Justice require.

d. The court may affirm the decision of the school board or may reverse or modify the decision. The decision of the court shall be rendered not later than 15 days from the date of the conclusion of the court's hearing.

VII. Time Limitations

The right of any party to proceed at any step of this grievance procedure shall be conditioned upon compliance with the time limitations and other requirements set forth in this procedure. However, by mutual consent of both parties, timelines may be extended.

A. The failure of the employee to comply with all substantial procedural requirements including initiation of the grievance and written notice of appeal to the next step in the procedure shall eliminate the employee's right to any further proceedings on the grievance unless just cause for such failure can be shown.

B. Receipt of formal grievance document forms shall be considered timely if delivered personally with receipt acknowledged or e-mailed, faxed, or postmarked to the employee or office of the proper supervisor or adminis-

trator within the time limits prescribed by this procedure.

C. The failure of the school board or any supervisor to comply with all substantial procedural requirements without just cause shall entitle the employee, at his or her option, to advance to the next step in the procedure or, at the final step, to a decision in his or her favor.

The determination as to whether the substantial procedural requirements of the grievance procedure have been complied with shall be made by the school board. In any case in which there is a factual dispute as to whether the procedural requirements have been met or just cause has been shown for failure to comply, the school board shall have the option of allowing the employee to proceed to the next step. The fact that the grievance is allowed to proceed in such case shall not prevent any party from raising such failure to observe the substantial procedural requirements as an affirmative defense at any further hearing involving the grievance.

VIII. Combining Formal Grievances

If an employee submits separate written grievances arising out of the same subject matter or factual events, the administration reserves the right to treat the individual complaints as a combined grievance for purposes of any further steps, hearings, appeals, or other aspects of the grievance procedure.

If several employees submit separate written grievances but the claims and requested relief are the same, the administration reserves the right to

treat the individual complaints as a group grievance. In that event, the group will be asked to designate a single spokesperson for purposes of presenting and processing the grievance and the combined grievance shall be treated as one for all other aspects of the grievance process. A decision rendered in a group grievance shall apply to all employees in the group and each shall be provided a copy of any decision.

IX. Option for Mediation

Nothing in this regulation shall prevent the parties from resolving their differences through mediation.

A. Requests for mediation shall be made by the employee to the Office of Employee Relations within 15 business days following the event giving rise to the concern or within 15 business days from the time the employee reasonably should have known of its occurrence.

B. If the grievance procedure has already begun, it can be suspended prior to Step 3 to permit the parties to participate in mediation.

C. The mediation process shall be confidential and the mediator shall not reveal information obtained in mediation except as required by law or legal process.

D. Either party may end the mediation process at any time by notifying the Office of Employee Relations.

E. If mediation is unsuccessful, then either party has the right to resume the grievance

procedure at Step 1 (if the employee had not begun the grievance process prior to mediation) or at Step 2 (if the grievance process was suspended to permit mediation).

CONTINUING CONTRACT WITH PROFESSIONAL PERSONNEL (JULY 10, 2013)

THIS CONTRACT is between the FAIRFAX COUNTY SCHOOL BOARD (School Board) and Cynthia D Lee (Employee), [redacted] (Emp,#). The School Board agrees to employ and the Employee agrees to accept such employment in the position of 1.000 (factor) Teacher (Position), subject to the authority of the School Board under the supervision and direction of the Division Superintendent. The School Board and the Employee agree to the following employment conditions:

EMPLOYMENT CONDITIONS

1. The Services to be performed hereunder shall begin on August 25th (month and day), 2003 (year), and terminate on the last day of the 2003-2004 (school year). In the event this contract is terminated prior to the end of the contract period, payment will be made for services rendered.

2. The annual salary for the 2003-2004 (school year), based on 195 (days), MA (degree or pay grade), and 07 (step), is $52,235.00 (amount). Any compensation changes shall be provided by a separate salary notification. The schedule of payments under this contract shall be in 10 installments beginning the last work day of September for a 9 1/2-, 9 3/4-, 10-, 10 1/4-, or 10 1/2-month contract; in 11 installments beginning the last work day of August for an 11-month contract or employed at a location with a School Board approved modified calendar; and 12 installments beginning the last work day of July for a 12-month

contract. Employees who start after the beginning of the normal contract year shall be paid 1/10th, 1/11th, or 1/12th of the annual salary, as specified in the contract, for the remaining months of the normal contract year. The first month's pay for the late-start Employees will be prorated if the first day of work does not correspond with the first work day of that month. The School Board shall deduct from each installment over the term of the Employee's contract the amount due under the Virginia Retirement System, the Educational Employees Supplementary Retirement System, or the Fairfax County Employees' Retirement System, as appropriate. The School Board also shall deduct all required federal and state taxes, including but not limited to Social Security, Medicare, and Income tax withholding, other insurance deemed mandatory by the School Board, and any other deductions required by law over the Employee's contract. All deductions for benefits will be withheld over the length of the Employee's contract. If the Employee does not hold a 12-month contract, an additional deduction will be made from the Employee's net pay during each contract month in order to provide summer payments, unless the Employee opts out of the summer payment program. The Employee's signature on this contract constitutes consent to deductions for summer payments, unless the Employee has on file in the Office of Payroll Management a form electing participation in another pay plan. In the case of unexcused absences from duty, other absences for which the Employee is not entitled to paid leave, or salary overpayment, adjustments will be made on a prorated basis.

When schools are closed as a result of inclement weather or for other cause, the School Board may require such loss of time to be made up within the school term or may extend the school term without additional compensation.

This contract is contingent upon approval by the government appropriating body of an annual budget sufficient to fund the Employee's position and may be discontinued in accordance with Section 22.1-99, Section 22.1-304, Section 22.1-307, or otherwise in accordance with law.

3. The Employee shall perform such pertinent duties during the period of this Contract as are deemed necessary by the School Board, Division Superintendent, or their designees. The Employee shall attend all assigned meetings; be at school during the hours of school operation; and be present at school or at other locations during such times as the School Board, Division Superintendent, their designees, or the Employee's principal or program manager may direct in connection with school events or activities. The Employee accepts these professional obligations and responsibilities and understands that duties may be assigned that will require participation and attendance outside the hours of school operation.

4. The Employee further agrees to meet all professional obligations and responsibilities; comply with provisions of the Constitutions of Virginia and the United States, federal law, the Code of Virginia, the Virginia State Board of Education regulations, and with the rules, regulations, and policies of the school system. The Employee understands and agrees that the School Board, Division Superintendent, and their designees reserve the right to

change the rules, regulations, and policies of the school system as they deem necessary, at any time.

5. The Division Superintendent shall have authority to assign an Employee to a position in the school System and may reassign an Employee to any school or work location within the division during the term of this contract provided no such reassignment shall adversely affect the salary of the Employee under the contract for the school year in which the contract is valid.

6. The School Board, upon recommendation of the Division Superintendent, may place an Employee on probation, or may dismiss, nonrenew, suspend, in accordance with the Code of Virginia and school system policies and regulations, paying for services rendered in accordance with this agreement to date of dismissal.

7. A request to resign from employment should be submitted on or before April 15 of the school year prior to the school year in which the resignation takes effect. A request that is submitted after April 15 but before June 1, that is to take effect prior to the following school year, must include the reason for the resignation. Any request that is submitted: (1) after June 1, to take effect prior to the term of the following school year's contract, or (ii) during the school year in which the Employee submits the resignation request is not in compliance with the notice requirements of this contract and will not be accepted except under extraordinary circumstances beyond the control of the Employee. If the Employee submits his or her resignation after June 1, and the Division Superintendent or designee determines that the Employee did not have good cause for the late

resignation, the School Board may impose the following conditions upon acceptance of the resignation:

a. The Employee shall not be eligible for reemployment with the school system.

b. In response to reference requests, the school system will advise that the Employee resigned his or her position without adequate notice and in breach of contract.

If, however, the School Board rejects the Employee's request to resign, and the Employee nonetheless declines to revoke his or her request to resign, the School Board may dismiss the Employee for breach of contract and abandonment of position. A recommendation to revoke the Employee's license may be made as provided for in the Code of Virginia.

8. This contract shall be null and void and of no further force or effect if the Employee is not eligible under federal or state law to work in the United States.

9. The provisions of this contract supersede the provisions of any previous contract entered into for the purpose of employment.

10. Failure of the Employee to fulfill this contract may constitute sufficient grounds for the termination of the contract by the School Board.

11. The Employee shall meet, in full, state teacher licensure requirements for the position held within the time limits imposed by the regulations of the Virginia State Board of Education, the school division, and/or the Southern Association for Accreditation of Schools and Colleges. This contract

is null and void if at any point during the term of this contract, the Employee does not hold a valid license as defined in the regulations of the Virginia State Board of Education.

12. This contract of employment shall remain in full force and effect from year-to-year subject to the provisions of the Constitutions of Virginia and the United States, federal law, the Code of Virginia, the Virginia State Board of Education regulations, and with the rules, regulations, and policies of the school system, as modified by mutual consent, by operation of law, or pursuant to school division policy.

/s/ Iris Castro (L.S.)
Chairman of the School Board

/s/ Not Legible (L.S.)
Clerk of the School Board

/s/ Cynthia Lee
Employee

7-10-03
Date

VIOLET NICHOLS' ARBITRATION INVOICE

The McCammon Group

Invoice #: DR15805
Date: 5/25/12
Case #: 2011001056
Payment within 30 days of invoice date is appreciated.
Federal I.D. # 54-1754600

Bill To:

John F. Cafferky, Esq
Blankingship & Keith P.C.
4020 University Drive
Suite 312
Fairfax, VA 22030

RE: Superintendent Dale, Fairfax County Public Schools v. Dr. Violet Nichols

Services Rendered By: Johanna L Fitzpatrick

	Hours	Rate	Amount
Arbitration Services: April 18 & 20, 2012	18.75	475.00	8,906.25
Review of Evidence & Preparation of Award	16.00	475.00	7,600.00
Total Arbitration Services		0.00	16,506.25
Potion to be Paid by Other Parties Per Agreement		-50.00%	-8,253.13
Your Allocated Share of Total Services:			$8,253.12
Payments Received from you:			$0.00
Please Pay This Amount:			$8,253.12