No. 18-15203

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEWITT LAMBERT,

Plaintiff-Appellant,

v.

TESLA, INC., DBA TESLA MOTORS, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:17-cv-05369
Hon. Vince Chhabria

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant is a natural person. Accordingly, he is not required to file any corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1.

Date: May 9, 2018

California Civil Rights Law Group

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INTRODUCTION

In 1866, Congress confronted widespread efforts by the dominant white community to exclude the newly-freed slaves from the national economy through private contract. White supremacists had hoped to accomplish by private agreement what they could not accomplish by public law. In response, Congress enacted 42 U.S.C. § 1981, which gives all persons the right to sue in federal court to protect their "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" as is "enjoyed by white citizens." § 1981(a), (b).

Section 1981 made two radical changes to previous contract law. First, Congress determined that discriminatory contracts were subject to the control of the demos, rather than the private party with the most bargaining power. Discrimination henceforth would not be a matter of private, even secret, choice, but instead a matter of public concern. Second, Congress placed jurisdiction for oversight in the federal judiciary—not the States, and certainly not other private parties. After all, if the party with the most bargaining power could pick its own private judge by the same discriminatory contract, then Section 1981 was a dead letter.

Seven score and five years later, Congress passed Section 118 as part of the Civil Rights Act of 1991. The Act states, in part, "Where appropriate and to the extent authorized by law, the use of . . . arbitration is encouraged" to resolve civil

rights disputes. Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991). But, as explained below, arbitration is neither appropriate nor authorized by law with regard to claims under Section 1981.

The United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (hereinafter, "*Gilmer*"), provides the test for determining whether arbitration is appropriate for a statutory claim. It held that "all statutory claims may not be appropriate for arbitration." *Id*. at 26. To determine if a statute's claims are appropriate for arbitration, courts look to the statute's text, legislative history, and fundamental purposes.

The text of the 1866 Act suggests a congressional intent not to allow waiver of judicial forum. Congress enacted Section 1981 six decades before the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, at a time of universal judicial hostility to arbitration and in response to the failure of the quasi-arbitral Freedmen's Bureau tribunals. Had Congress intended to allow waiver of a judicial forum in contravention of the prevailing norms of the time, it would have done so.

Moreover, contemporaneous statements of legislators show that the Act intended to create federal judicial oversight, not private arbitration, of discrimination in private contracting. Finally, arbitration would undermine the fundamental purpose of Section 1981, which is to subject discriminatory private

contracting to public scrutiny, if parties could privately contract for their own oversight.

Plaintiff and Appellant DeWitt Lambert seeks to have his Section 1981 claims for racial discrimination heard in federal court, as has been the right of all persons in the United States since 1866. Accordingly, Mr. Lambert requests that this court reverse its decision compelling arbitration and remand to the District Court for trial.

JURISDICTIONAL STATEMENT

This is an appeal from the final judgment of a United States district court; this Court has jurisdiction pursuant to 28 U.S.C. § 1291. As Plaintiff has brought claims under federal statutes, 42 U.S.C. § 1981 and the Declaratory Judgment Act, 22 U.S.C. § 2201, the district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court's final order, dismissing all claims in the case, was entered on January 8, 2018. Plaintiff filed his notice of appeal on February 7, 2018, making the appeal timely under 28 U.S.C. § 2107(a).

The Federal Arbitration Act provides for an "immediate appeal of any 'final decision with respect to an arbitration,' regardless of whether the decision is favorable or hostile to arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000). A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (internal citations omitted). This includes an order dismissing an action "notwithstanding that the dismissal was in favor of arbitration," even if "the parties could later return to the court to enter judgment on an arbitration award." *Interactive Flight Techs., Inc. v. Swissair Swiss Air Transp. Co.*, 249 F.3d 1177, 1179 (9th Cir. 2001).

STATUTORY AUTHORITIES

42 U.S.C. § 1981

(a) Statement of Equal Rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceerity of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts defined." For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866)

An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a

punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Sec. 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to

carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Sec. 4. And be it further enacted, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act, as they are authorized by law to exercise with regard to other offences against the laws of the United States.

Sec. 5. And be it further enacted, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offense. And the better to enable the said

commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.

Sec. 6. And be it further enacted, That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offense may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.

Sec. 7. And be it further enacted, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of

offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.

Sec. 8. And be it further enacted, That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

Sec. 9. And be it further enacted, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.

Sec. 10. And be it further enacted, That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

Section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 107

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

ISSUES PRESENTED

1. Whether the district court erred in interpreting Section 118 of the Civil Rights Act of 1991 as an unqualified endorsement of arbitration in all contexts, instead of requiring the application of the *Gilmer* test to the underlying statute, Section 1981.

2. Whether claims arising under the Civil Rights Act of 1866 are appropriate for arbitration under *Gilmer*, in light of Congress's unqualified rejection of pseudo-arbitration as a means of vindicating civil rights, its exceptional grant of federal jurisdiction over all claims arising under the Act, and the Act's stated goals of guaranteeing plaintiffs access to the federal courts and deterring discrimination.

STATEMENT OF THE CASE

Appellant DeWitt Lambert's ("Appellant" or "Mr. Lambert") alleged the following in his Complaint. ER 108. He moved across the United States from Alabama to the Bay Area, believing that the move would offer him an opportunity to advance in his career. ER 109. When he applied for, and was offered, a job with Defendant Tesla, Inc. ("Appellee" or "Tesla"), an automobile manufacturing company that presents itself as progressive, he was thrilled. ER 111. He eagerly accepted the job, signing a contract with Tesla. Included in Mr. Lambert's contract was an arbitration provision. ER 111.

Unfortunately, in the course of his employment at Tesla, Mr. Lambert was subjected to a pattern of harassment and discrimination based on his African-American ancestry. ER 112. Specifically, Mr. Lambert's coworkers and supervisors frequently referred to Mr. Lambert as a "nigger," physically assaulted him, and insulted him. ER 112. When Mr. Lambert complained to Tesla's upper management and human resources department, Tesla not only failed to stop the harassment, but rewarded his harassers with promotions while punishing Mr. Lambert. ER 113-114.

As a result of the above, on September 15, 2017, Mr. Lambert filed suit against Tesla in the United States District Court for the Northern District of California, alleging violations of 42 U.S.C. § 1981's prohibition on race discrimination in the making and enforcement of contracts, including in employment. ER 108. Mr. Lambert also brought a claim under the Declaratory Judgment Act, 28 U.S.C. § 2201, seeking a declaration by the district court that claims brought under Section 1981 are non-arbitrable. ER 108.

On October 30, 2017, Tesla moved to dismiss Mr. Lambert's complaint with prejudice, or, in the alternative, to compels the matter to arbitration. ER 91. Tesla asserted that the arbitration agreement Mr. Lambert had signed was enforceable and not unconscionable. *E.g.*, ER 99.

Opposing Tesla's motion to dismiss, and simultaneously moving for partial summary judgment as to his Declaratory Judgment Act Claim, Mr. Lambert argued that the unique history of Section 1981, passed as part of the Civil Rights Act of 1866, rendered it inappropriate for arbitration under the test set forth in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). ER 61. Specifically, Mr. Lambert argued that the statute's legislative history manifested an intent not to allow waiver of a judicial forum, and that its fundamental purposes were inconsistent with mandatory arbitration. ER 61-73.

On November 27, 2017, Tesla filed an opposition to Mr. Lambert's motion for partial summary judgment. ER 33. In support of its position, Tesla cited to the Ninth Circuit's decision in *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), interpreting Section 118 of the Civil Rights Act of 1991, which Tesla argued "encouraged" arbitration. ER 43. Mr. Lambert filed his reply on December 4, 2017. ER 13. He argued that Section 118 does not encourage arbitration in all cases, and that the Ninth Circuit's decision in *Luce* held that Section 118 incorporates the *Gilmer* analysis and requires its application to the underlying statutes it amended. ER 21-23. Mr. Lambert then addressed mandatory arbitration's conflict with Section 1981's fundamental purposes. ER 24-28.

On January 1, 2018, in a one-page order, the district court granted Tesla's motion to compel arbitration, and dismissed the case. ER 11. The court cited to

Luce, where this Circuit found Title VII claims to be arbitrable, and concluded that Section 1981 claims are appropriate for arbitration as well. In support of this reasoning, the court invoked Section 118's text: "[w]here appropriate and to the extent authorized by law . . . arbitration[ ] is encouraged to resolve disputes arising under" the statutes amended by the 1991 Act. ER 11 (quoting 105 Stat. 1071 § 118). Looking to the second clause, it concluded that arbitration is "encouraged" for Section 1981 claims, as that statute was amended by the 1991 Act. ER 11-12. Finally, the court recognized that there are significant differences between Title VII and Section 1981, but stated simply "these differences do not justify departing from the reasoning of *Luce, Forward*." ER 12.

SUMMARY OF THE ARGUMENT

The district court erred in failing to give full effect to the text of Section 118 of the Civil Rights Act of 1991, which limits arbitration to claims where it is "appropriate" and "authorized by law." 105 Stat. 1071 § 118. Precedent from this and other circuits compel the conclusion that Section 118 does not operate as an unqualified endorsement of arbitration.

Instead, Section 118 requires an application of the three-part test set forth in *Gilmer* to the underlying statute. Under *Gilmer*, courts look to the (1) text, (2) legislative history, and (3) fundamental purposes of a statute to determine whether there is a congressional intent to preclude waiver of a judicial forum.

The text of Section 1981 does not support arbitrability of those claims. The Civil Rights Act of 1866 was passed at a time of universal judicial hostility to mandatory, private arbitration, and prior to the Federal Arbitration Act. Had Congress intended to contravene the consensus at the time against waiver of a judicial forum, it would have made this explicit. Rather than allow waiver, Section 1981 understandably places authority in the federal courts.

Second, Section 1981's legislative history evinces a clear intent not to allow waiver of a judicial forum. Congress's intent is made even clearer considering the state of affairs in the South, of which it was well aware.

Finally, the underlying purposes of the statute, direct enforcement of civil rights through the federal courts and general deterrence of racial discrimination, cannot be reconciled with arbitration. Indeed, the statute could not operate at all if the same contract alleged to be discriminatory could be used to require the aggrieved party into arbitration.

STANDARD OF REVIEW

A district court's order compelling arbitration is reviewed de novo. *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 n.2 (9th Cir. 2002); *Harden v. Roadway Package Sys., Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001).

ARGUMENT

The district court erred in holding that Section 1981 claims are arbitrable for two significant reasons. First, Section 118 contains the limiting language, "appropriate and to the extent authorized by law." 105 Stat. 1071 § 118. Accordingly, it does not render arbitrable all claims brought under statutes amended by the 1991 Act; instead, it compels courts to apply the test set forth in *Gilmer* to the underlying statute.

Second, the district court did not apply *Gilmer* to the underlying statute, Section 1981, as required under Section 118. Section 1981's text, legislative history, and fundamental purposes all weigh against finding arbitration "appropriate" and "authorized by law." The context surrounding the drafting and enactment of Section 1981 shows that, as it was passed before the FAA, Congress would have provided for waiver of a judicial forum had it intended to allow it.

Section 1981 is a law unlike any other civil rights statute, enacted specifically because Congress sought to provide African American employees a federal forum from which to escape the tendency of private contract to interfere with their ability to enforce their rights. In addition, throughout the Act's legislative history, members of Congress repeatedly emphasized the importance of access to a federal judicial forum.

Finally, Section 1981's fundamental purposes cannot be squared with arbitration. The purpose of the 1866 Act was to allow direct enforcement of civil rights through the federal judiciary. Private, mandatory arbitration is a creature of contract, and neither a judicial forum nor a function of the federal government. Moreover, Section 1981 specifically guarantees the right to be free of discrimination in the making and enforcement of contracts; a method of dispute resolution required by an allegedly discriminatory contract cannot effectuate an employee's rights to be free of that discrimination.

Furthermore, arbitration's opacity eviscerates Section 1981's deterrent effect. Regardless of whether a given arbitration contains a non-disclosure agreement, arbitration hearings and records are not publicly available, precluding effective coverage by the press. This stands in stark contrast to a federal judicial forum, in which there is a strong presumption in favor of the public availability of information and the corresponding deterrent effect of these public proceedings.

Comparisons of Section 1981's fundamental purposes to those of post-Reconstruction civil rights statutes are misguided. Most notably, unlike statutes enforced by the Equal Employment Opportunity Commission ("EEOC"), Section 1981 is enforced *solely* by private individuals and not by government agencies.

I. THE SUPREME COURT'S DECISION IN *GILMER* PROVIDES THE CORRECT TEST FOR DETERMINING WHETHER ARBITRATION IS APPROPRIATE UNDER SECTION 1981

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) the Supreme Court explained that "all statutory claims may not be appropriate for arbitration." *Id*. at 26. A statutory claim is inappropriate for arbitration where an intention not to allow waiver of a judicial forum is "discoverable in the text of [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Id*.

Section 118 of the Civil Rights Act of 1991 ("1991 Act" or "Civil Rights Act of 1991") provides that "where appropriate and to the extent authorized by law" arbitration of civil rights disputes is "encouraged." 105 Stat. 1071 § 118. In doing so, it requires courts to apply the *Gilmer* test to all statutes amended under the 1991 Act, including Section 1981.

The court below erred in finding Section 1981 claims arbitrable under Section 118 because it failed to consider the first half of the sentence. The district court's approach conflicts with traditional rules of statutory interpretation, this and other circuits' interpretation of other parts of Section 118, and this Court's interpretation of Section 118's limiting language "to the extent authorized by law."

A. Section 118 Of The Civil Rights Act Of 1991 Encourages Arbitration Only Where Appropriate And To The Extent Authorized By Law

Section 118 encourages arbitration in the civil rights context only "where appropriate and to the extent authorized by law." 105 Stat. 1071 § 118. When interpreting a statute, a court must "give significance to all of its parts." *Boise Cascade Corp. v. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991). It should construe the statute so as not "to make surplusage of any provision." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996). Here, the District Court relied wholly on the phrase "is encouraged," which fails to give significance to all of Section 118's parts. If Section 118 were a congressional approval of arbitration of civil rights claims across the board, then "where appropriate and to the extent authorized by law" would be surplusage.

The rule against surplusage extends with particular force to qualifying language. Where, as here, "the language in question cuts back or qualifies other language that sweeps very broadly, there's a particularly strong inference that the legislature employed the qualifier to limit the more general language in some meaningful way." *Hearn v. W. Conference of Teamsters Pension Tr. Fund*, 68 F.3d 301, 304 (9th Cir. 1995).

Considering the phrase "is encouraged" in isolation also contravenes the principle that courts should not rely upon "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95

(1993); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) (explaining that courts should "consider not only the bare meaning of the word, but also its placement and purpose in the statutory scheme.").

Applying these principles, Section 118 "encourages" arbitration only in limited circumstances: where authorized by law, as determined by a *Gilmer* analysis of the underlying statute.

B. This And Other Circuits Recognize The Limited Scope Of Section 118

This Circuit has already given effect to the limiting language of Section 118. In *Ashbey v. Archstone Property Management, Inc.*, 785 F.3d 1320 (9th Cir. 2015), this Court explicitly stated that Section 118 is *not* "an unfettered endorsement of alternative dispute resolutions." *Id.* at 1323. Instead, "such resolutions are permissible only 'where appropriate.'" *Id.*; *see also Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994).

Other circuits have taken a similar approach. Likewise, in *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007), the First Circuit interpreted Section 118's phrase "where appropriate" as requiring a knowing waiver of the right to a trial. It explained: "Under Title VII and the [Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA")], we have applied an independent federal scrutiny of the adequacy of the notice of waiver of judicial rights because in the language of these statutes Congress referred to 'appropriate' waivers." *Id*. at 58-59.

The *Skirchak* court expanded on its rationale by stating that Section 118 "*expressly cabin[s] [its] endorsement[ ] of arbitration* in cases covered by those statutes by providing that '[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged.'" *Id*. at 58–59 n.5 (emphasis added).

C. This Circuit Has Held That *Gilmer* Provides The Correct Test For Determining Whether Arbitration Is Appropriate And Authorized By Law

Six months before Congress enacted the Civil Rights Act of 1991, the Supreme Court issued its decision in *Gilmer*. The Court held that some statutory claims can be compelled to arbitration—but where Congress has an intent not to allow waiver of a judicial forum, the claim is non-arbitrable. Courts must "assume that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

This Circuit held in *Luce* that Section 118's limiting language is a reference to *Gilmer*'s analysis: "*Gilmer* was decided in May 1991 and the 1991 Act was not enacted until November of that year. During this intervening six months, Congress surely became aware that *Gilmer*, and not *Alexander*, provided the Supreme Court's prevailing assessment of employment arbitration agreements." *Luce*, 345 F.3d at 751-52; *see also Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 96 (2000) ("[A]t the time Congress passed the 1991 Act, *Gilmer* was

the law. Congress must be presumed to have been aware of *Gilmer* when it used the phrase 'to the extent authorized by law.'").[1]

Section 118 therefore means that arbitration is encouraged when "authorized by law" under the *Gilmer* analysis, not in all situations without differentiation or independent analysis. The plain text of the statute encourages arbitration *only* where "appropriate" and "to the extent authorized by law." 105 Stat. 1071 § 118. Neither the text of the statute nor its legislative history evinces a congressional intent to allow waiver of a judicial forum.

In conducting its analysis, this Court should apply the *Gilmer* test to the underlying statute, Section 1981 as part of the Civil Rights Act of 1866, not to Section 118. If Section 118 incorporates the *Gilmer* analysis, finding that arbitration is "encouraged" or even "authorized by law" by reference to Section 118 itself defeats the purpose of the section by creating a self-referential loop in which no real *Gilmer* analysis is ever conducted.

II. UNDER *GILMER*, SECTION 1981 CLAIMS ARE NON-ARBITRABLE

The *Gilmer* test shows that claims under Section 1981 are not "appropriate" or "authorized by law" for arbitration. To determine whether Congress has

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[1] *Luce* did not accomplish what the district court believes it did. In *Luce* this Circuit focused on the question: does Section 118 *preclude* arbitration of Title VII claims? It concluded that Section 118 does not preclude arbitration; but it did not hold that Section 118 *encourages* arbitration.

manifested an intent not to allow waiver of a judicial forum, courts look to the statute's (1) text; (2) legislative history; and (3) fundamental purposes. 500 U.S. at 26 ("If such an intention exists, it will be discoverable in the text of the [the statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purpose.").

The text of Section 1981 indicates that arbitration is not appropriate or authorized by law for those claims. It was enacted well prior to the FAA, at a time when arbitration was rare, and courts unanimously refused to compel parties to participate in it. Given this context, had Congress wanted to allow out-of-court resolution of claims, it would have made explicit an intent to allow parties to contract out of the federal judicial forum it so exceptionally provided. Instead of allowing arbitration, however, the text of the 1866 Act specifically affords a federal forum.

The second prong—the legislative history—weighs against allowing arbitration because the legislative history reveals that Congress had no intention of allowing any waiver of a federal judicial forum. Finally, the fundamental purposes of Section 1981 cannot be reconciled with arbitration. Comparisons to the legislative history or fundamental purposes of Title VII and other civil rights statutes are inappropriate, as Section 1981's enforcement mechanisms and purposes are unique.

A. Section 1981's Text Provides For Federal Judicial Enforcement, Rather Than Private Arbitration

The Civil Rights Act of 1866 applies, by its own terms, to "[a]ll persons within the jurisdiction of the United States" and has been enforced throughout its history in the courts of the United States. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (April 9, 1866) (extending rights to "all citizens" of the United States); Civil Rights Act of 1870, ch. 114, 16 Stat. 140 (May 31, 1870) (amending the 1866 Act to protect "[a]ll persons within the jurisdiction of the United States"). The method of enforcement prescribed by Congress was suit brought in the federal courts: "The district courts of the United States shall have, exclusively of the courts of the several States, cognizance of all crimes and offences [sic] committed against the provisions of this act. . . ." 14 Stat. 27 § 3. It made no provision for arbitration or alternative dispute resolution.

In 1866, courts universally refused to enforce mandatory arbitration agreements, and such agreements were therefore rare. Congress would have made clear its intent to depart from those prevailing norms. Courts have commonly considered whether a statute was enacted before, or after, the Federal Arbitration Act, and whether arbitration was commonplace at the time of enactment, when applying *Gilmer*. *See, e.g.*, *Gilmer*, 500 U.S. at 26-33; *see also Ziober v. BLB Resources, Inc.*, 839 F.3d 814, 817 (9th Cir. 2016) (taking into consideration, in challenge to arbitration of claims under Uniformed Services Employment and

Reemployment Rights Act, 38 U.S.C. § 4301 *et seq*., that the statute had been enacted after FAA at a time when arbitration was common).

Section 1981 was enacted long *before* the FAA, and at a time when arbitration agreements were uncommon: Section 1981 became law in 1866; the FAA was not passed until 1925. In addition, at the time Section 1981 was passed, courts broadly refused to enforce contractual agreements to resolve disputes by private arbitration. *See* Ian R. Macniel, AMERICAN ARBITRATION LAW: REFORM, NATIONALIZATION, INTERNATIONALIZATION 15 (1992); Ian R. Macniel et al., 1 FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT 4:7 (1995); *see generally* Addison C. Burnham, *Arbitration as a Condition Precedent*, 11 HARV. L. REV. 234 (1897) (advocating reversal of trend among courts to refuse to treat participation in contracted-for arbitration as a condition precedent to litigation). Parties who brought suit in court instead of proceeding with alternative dispute resolution did not face dismissal in favor of arbitration. *See* Macneil et al., *supra* at 4:7; *see generally* Burnham, *supra* at 234.[2]

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[2] There has been only one instance in which a pre-FAA statute was found arbitrable: the Sherman Act, 15 U.S.C. §§ 1-7, in *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985). However, the *Mitsubishi* decision has little applicability here, as the Supreme Court based its reasoning largely on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The

Later interpretations of the 1866 Act change nothing, as a court's analysis of a statute does not alter its text or legislative history. In *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court considered whether claims under Section 1982, enacted along with Section 1981 as part of the 1866 Act, applied to private, and not just governmental, actors. In finding in the affirmative, *Jones* relied on the 1866 Act's legislative history. *Id*. at 427-436. *Jones* did not alter the Act; rather, it found that the intent had been to apply the law to private actors from the time of its enactment. *Jones* could also not have "amended" the 1866 Act to allow waiver of a judicial forum, regardless of when the case was decided: the Court was never presented with the question of an employee could waive a judicial forum for Section 1981 claims.

B. Section 1981's Legislative History Demonstrates Congress's Intent Not To Allow A Waiver Of A Judicial Forum

This Court should also look to the legislative history and fundamental purposes of Section 1981. This is the approach endorsed, and used, by the Supreme Court in *Gilmer*. There, it considered arbitration of claims under the Age

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Court explained that arbitration awards in some Sherman Act cases were enforceable only due to "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Id*. at 629. *Mitusbishi*'s policy concerns do not apply in this case.

Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). *See* 500 U.S. at 26-33. *Gilmer* held that ADEA claims were appropriate for arbitration—but *only* after taking into consideration the statute's text, legislative history, *and* fundamental purposes. *Id*. This Circuit has followed suit in other contexts. *See Ashbey*, 785 F.3d 1320 (9th Cir. 2015) (interpreting Section 118 by looking both to its text and legislative history).

The 1866 Act's legislative history, unlike that of the ADEA, supports a finding that arbitration is not appropriate or authorized by law for Section 1981 claims. In passing Section 1981, Congress went to extraordinary lengths to allow employees to vindicate their rights in a federal court, and rejected prior efforts to enforce civil rights through the pseudo-arbitration of the Freedmen's Bureau tribunals. Given this legislative history Congress could not have intended to allow waiver of a judicial forum for Section 1981 claims.

1. Congress Went To Exceptional Lengths To Provide A Federal Judicial Forum

Congress's goal in passing Section 1981 was to create a statute establishing the direct federal protection of rights, the first law of its kind. *See Runyon v. McCrary*, 427 U.S. 160 (1976) (noting that the "right of individuals to bring suits in Federal [sic] courts to redress individual acts of discrimination, including employment discrimination[,] was first provided by" Section 1981); Robert J.

Kaczorowski, *Congress's Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 204 (2005) (explaining that the Civil Rights Act of 1866 "conferred jurisdiction on the federal courts to dispense ordinary civil and criminal justice, traditionally administered by the states."). Congress believed "the way to implement the Thirteenth Amendment was to protect men in their 'civil rights and immunities' and to do so *directly through the national government*." Jacobus tenBroek, EQUAL UNDER LAW 178 (1965) (emphasis added).

Numerous legislators emphasized the need for federal governmental action to protect Black employees—something they would not have done if they intended to allow a waiver of it. For example, Representative James Wilson, speaking in favor of the 1866 Act, rose to say, "The power is with us to provide the necessary protective remedies .... They must be provided by the government of the United States, whose duty it is to protect the citizen in return for the allegiance he owes to the Government." Cong. Globe, 39th Cong., 1st Sess. 1294 (1866). Elsewhere, he explained:

> If citizens of the United States, as such, are entitled to possess and enjoy the great fundamental civil rights which it is the true office of Government to protect," then Congress "must of necessity be clothed with the power to insure to each and every citizen these things which belong to him as a constituent member of the great national family."

Id. at 1118. Important to Congress was not only a federal remedy, but a federal *judicial* remedy. Likewise, Senator John Sherman remarked, "To say that a man is a freeman and yet is not able to assert and maintain his right in a court of justice is a negation of terms." Cong. Globe, 39th Cong., 1st Sess. 41 (1866) (statement of Sen. Sherman). Similarly, Representative Eli Thayer emphasized the significance of entrusting enforcement to the federal judiciary, allowing plaintiffs to vindicate their rights "through the quiet, dignified, firm, and *constitutional forms of judicial procedure*." Cong. Globe, 39th Cong., 1st Sess. 1153 (1866) (statement of Rep. Thayer) (emphasis added). Supporters of the Act explained that they desired a federal forum in part because "courts do not consist of judges alone. It will be the duty of the judges, district attorneys, marshals, clerks, grand and petit juries, and the bailiffs of the courts, with the records to accompany each other in these remarkable visitations and perambulations." *Id*. at 1271 (statement of Rep. Kerr).

2. Congress Provided A Federal Judicial Forum Because Of The Failures Of The Freedmen's Bureau Tribunals

Congress enacted Section 1981 because it viewed as a failure attempts to enforce civil rights without the federal court system. One of those alternatives was the Freedmen's Bureau tribunals, which are analogous to modern arbitration. Legal experts in all manner of fields have described the Freedmen's Bureau tribunals as arbitration or pseudo-arbitration. Mark Tushnet, *The Lawyer/Judge As Republican Hero*, 70 STAN. L. REV. ONLINE 29 (2017) (discussing Freedmen's Bureau

tribunals in the context of arbitration); Taja-Nia Y. Henderson, *Dignity Contradictions: Reconstruction As Restoration*, 92 CHI.-KENT L. REV. 1135, 1149–50 (2017) (Freedmen's Bureau agents served as "arbiters of labor fairness"); Adjoa Artis Aiyetoro, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON U. CIV. RTS. L.J. 51, 65 (2007) (stating that Freedmen's Bureau tribunals were "boards of arbitration"); *Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit*, 105 F.R.D. 251, 291 (1984) (statement of Professor Anthony G. Amsterdam) (describing Freedmen's Bureau "arbitration tribunals").

Within one year after the conclusion of the Civil War, Congress already realized that it needed a new approach to appropriately protect the civil rights of Black Americans in the South. Professor Terry Kogan has explained that "as a result of abuses in the South, particularly the Blacks Codes and the early failures of the Freedmen's Bureau, Congress saw the need for specific legislation aimed at protecting the civil rights of the new freedmen. The result was the Civil Rights Act of 1866, the forerunner of the fourteenth amendment [sic]." Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 313 (1990).

Prominent among the Bureau's enforcement tools had been pseudo-arbitration tribunals, which it frequently 'contracted out' to private actors—

rendering the tribunals even more analogous to modern day, private arbitration. Where scholars have explored the unfairness of the tribunals, many have attributed the tribunals' problems to the use of private actors. *See, e.g.*, Henderson, *supra* at 1149–50 ("In jurisdictions where [local] whites were employed as Bureau agents [mediating disputes], freedmen suffered."). During a judicial conference of the District of Columbia Circuit, Professor Anthony G. Amsterdam of New York University Law School, drawing from the work of Jerold Auerbach, cited the Bureau tribunals as an example where arbitration "finds and leaves the parties with all of the chips in the hand of the stronger." *Proceedings of the Forty-Fifth Judicial Conference of the District of Columbia Circuit*, 105 F.R.D. at 291 (statement of Professor Anthony G. Amsterdam). Congress was well aware of these deficiencies, as it received regular reports from the military authorities charged with governing the states that had been in rebellion. A common sentiment was that "more explicit statutory guarantees were. . . necessary" to ensure "something more than parchment rights." tenBroek, *supra* at 175.

To achieve this goal, Congress advanced the Civil Rights Act of 1866. Congress insisted that the federal government act directly upon and on behalf of the citizens of the United States to enforce civil rights. That federal intervention was through the courts. At the time, using the federal courts in this way was

exceptional: the first general grant of federal question jurisdiction came nearly ten years later, in 1875. Judiciary Act of 1875, 18 Stat. 470 (1875).

Conservative members of Congress immediately objected. "[A]ll subjects embraced in [Section 1981]," contended one Senator, were "subjects solely of State cognizance; and unless you can show that the States have surrendered the control over them to the Federal Government [sic], they still belong to the States, exclusively." Cong. Globe, 39th Cong., 1st Sess. 479 (1866) (statement of Sen. Saulsbury). Another called the use of the federal judiciary to enforce the Act "enormous" and "oppressive," objecting that it would allow federal jurisdiction over a "transaction that has transpired wholly within the state." *Id.* at 598-99 (statement of Sen. Davis).

3. Congress Could Not Have Intended To Allow A Waiver Of A Federal Judicial Forum

Congress took up the 1866 Act precisely due to concerns over the use of private contracts to strip employees of their rights. Allowing employees to waive their right to a federal forum would have defeated the entire bill. Reports to Congress emphasized again and again the inequality in bargaining power between employees and employers. Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 186 (2006) ("As the Reconstruction Congress was

well aware, intolerable labor conditions prevailed throughout the South, posing severe barriers for freed slaves who attempted to sell their labor for wages . . . .”). Reports to Congress indicated that unfair contracts threatened to make Black employees “much worse off than when they were slaves,” and that this could only be prevented through federal intervention. *Report of the Joint Committee on Reconstruction*, Part IV: Florida, Louisiana, Texas 125, 39th Cong., 1st Sess. (1866) (testimony of Major General Christopher C. Andrews).

Congress knew that allowing waiver of a judicial forum through private contract would have jeopardized enforcement of the rights it sought to extend to Black Americans; allowing for private persons to preside over disputes would efface every right set forth in the bill. As one arbitration scholar has explained:

> Allowing the arbitration clauses would have given former slave owners an ideal tool with which to ‘gut’ [Section 1981]. By naming each other as arbitrators, by imposing high arbitration fees, by failing to issue written decisions, by ensuring the results were binding and subject to virtually no appeal, and perhaps even by limiting the available relief, former slave owners could have eluded federal court review and once again used their own private form of ‘justice’ to maintain their superior position.

Jean Sternlight, *Compelling Arbitration Claims Under the Civil Rights Act of 1866: What Congress Could Not Have Intended*, 47 KAN. L. REV. 273, 282 (1999). The accuracy of Sternlight’s analysis is borne out by history: when the Freedmen’s Bureau contracted out responsibilities to non-government employees, or when its

tribunals incorporated representatives of local whites, Black employees suffered. *See, e.g.*, Henderson, *supra* at 1149–50 (2017).

C. Section 1981's Fundamental Purposes Are Incompatible With Mandatory Arbitration

Section 1981's fundamental purposes cannot be squared with using mandatory private arbitration as a mechanism of enforcement. There are two significant conflicts: first, arbitration conflicts with the intent of Congress to enforce Section 1981 directly through the federal courts, and in particular through the federal judiciary; second, Section 1981 cannot achieve its goal of deterrence if claims under it can be compelled to arbitration.

As the use of arbitration agreements grows, these problems pose an existential risk for the efficacy of deterrence. As of 2017, at least 55% of workers in the United States are subject to arbitration agreements with their employer. *E.g.*, Alexander J.S. Colvin, ECON. POL. INST., *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers* 1 (2017).

1. Congress Enacted Section 1981 For The Explicit Purpose Of Affording A Federal Judicial Forum

Mandatory arbitration is, plainly, not a federal judicial forum—in fact, it is neither federal, nor a judicial forum. This cannot be reconciled with the main reason behind the enactment of Section 1981: to afford a *federal judicial forum* to employees faced with racial discrimination. The 1866 Act "guarantee[d] access to

the judiciary as the normal means of maintaining rights," including those rights set forth in Section 1981. tenBroek, *supra* at 178.

Congress's goal in passing Section 1981 was to create a statute establishing the direct federal protection of rights, the first law of its kind. *See Runyon v. McCrary*, 427 U.S. 160 (1976) (noting that the "right of individuals to bring suits in Federal courts to redress individual acts of discrimination, including employment discrimination[,] was first provided by" Section 1981).

In other words, in passing the 1866 Act, for the first time in American history Congress "nationalized" the civil rights of American citizens. *See, e.g.*, tenBroek, *supra* at 178. Its goal was to "protect men in their 'civil rights and immunities,' and to do so directly through the national government," and specifically through the federal courts. *Id*. In fact, "the federal government alone was to be the agency of enforcement. Thus was effected a *complete nationalization* of the civil or natural rights of persons." *Id*. at 179 (emphasis added).

This cannot be reconciled with the nature of mandatory, private arbitration, which has no accountability to the public. The very essence of arbitration is to allow resolution of disputes in a private forum. Arbitration's non-governmental nature means that it has neither the ability to enforce general injunctions backed by the force of the federal government, nor any marshals, or clerks, or juries, or bailiffs. *See Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 937 (9th Cir.

2013) (endorsing the argument that an arbitrator may only issue an injunction if the arbitration agreement allows for such relief). Unlike the federal courts, arbitrators derive their power from—and their powers are limited by—a contract, not the United States Constitution.

Moreover, mandatory arbitration of Section 1981 claims would undo the 1866 Act's remarkable achievement: allowing employees to seek the direct intervention of the federal government when they face discrimination or oppression in private contract. Instead, private arbitration eliminates any role for the federal government in enforcing those statutory rights—in direct conflict with the intent of Congress. Congress envisioned the enforcement of Section 1981 through "the quiet, dignified, firm, and constitutional forms of judicial procedure." Cong. Globe, 39th Cong., 1st Sess. 1153 (1866) (statement of Rep. Thayer). Instead, arbitration provides for resolution of disputes outside of the restrictions of established, substantive law. Arbitrators "decide disputes based on flexible conglomerations of law, equity, practicalities, and applicable norms of standards." Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, U. KAN. L. REV. 1211, 1216 (2006); *see also* Edward Brunet, *Arrbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) (explaining that formal law has a "subordinate role" in arbitration).

2. Arbitration Interferes With Section 1981's Goal Of Deterring Discrimination

Among the purposes of Section 1981 is to "serve[ ] as a deterrent to employment discrimination." *See, e.g., Carroll v. Gen. Accident Ins. Co. of Am.*, 891 F.2d 1174, 1176 (5th Cir. 1990). Deterrence under Section 1981 cannot be achieved through arbitration, for several reasons: (1) arbitration interferes with public awareness of discrimination claims; (2) even when proceedings become public, lack of written awards in arbitration prevents potential violators from understanding the facts and nature of previous cases; and (3) arbitration outcomes lack the force, power, and prestige of federal enforcement.

There can be no deterrence without "public knowledge of disputes and their disposition." Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 431 (1999). This is because "[p]otential violators can appreciate the threat of sanctions only when they learn that similarly situated actors have been punished." *Id*. This cannot happen in arbitration.

When arbitrators issue written awards, they are not required by law to be published, and in fact are generally not published. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 490 (2006). Every other element of arbitration is similarly opaque:

> No open docket notifies the public or the media of the filing of an arbitration claim or the existence of the dispute . . . . Parties cannot share, and the public cannot access, evidence, testimony, briefs, motions, and other information disclosed . . . . [T]he public cannot attend arbitral hearings, which are generally only open to participants and their representatives. Absent party agreement, the forum makes no transcript of the proceedings.

Id. at 484-486; *see also* Moohr, *supra* at 402.

By contrast, the federal judiciary exercises a strong presumption in favor of public access to hearings and transcripts: "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597 (1978); *see also Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) ("[W]e start with a strong presumption in favor of access to court records."). This rule exists in part to promote "the public's understanding of the judicial process of significant public events." *Valley Broad. Co. v. U.S. Dist. Court—D. Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986). As a result, journalists can report on judicial proceedings and their outcomes, and potential defendants are alerted to the consequences of racial discrimination.

Because arbitrations are secret, parties are not aware of outcomes, and journalists do not report even egregious discrimination. Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679, 682 (2004) ("These private mechanisms are often

intended to avoid publicity, which they easily accomplish because the disputes are never entered onto a court docket; they are unlikely ever to come to the attention of the press or consumer advocates, who serve as the public's watchdogs.").

Arbitration also undermines the deterrent function of Section 1981 because arbitrators are not required to issue reasoned opinions or indicate whether they have awarded punitive damages. Even when arbitrators do issue written awards, they are often brief and barely reasoned in comparison to judicial decisions. *See* Brunet, *supra* at 85 ("The typical arbitration concludes with a terse, non-explanatory written award that is not disclosed to the public.").

Effective deterrence requires potential defendants to be aware of the repercussions of violating the law, including what facts give rise to what penalties. When arbitrators do not issue detailed, written awards, non-parties to the arbitration will have no ability to determine liability by comparing their potential violations to those committed by the defendant.

Though regulated, the vast majority of rules governing arbitration are set by the private corporations that provide arbitration services. For example, some arbitration services require the arbitrators they hire to issue written awards; however, there is no legal requirement that arbitrators in fact do so. The protections in arbitral rules are subject to change at the whim of the arbitral service and, by extension, the private parties who pay their fees.

Finally, arbitration is necessarily non-governmental in nature, weakening both specific deterrence—i.e., preventing the same actor from repeating the same behavior—and general deterrence. Federal courts speak with the power of the federal government; they derive their power from that of the state. Moohr, *supra* at 401 ("The judicial branch definitively applies coercive state power to issue judgment in a visible, unbiased, accountable, and rationalized manner."). The state power behind courts enhances the deterrent effect of dispute outcomes in judicial forums. *Id*. at 400 ("[J]udicial decisions, which speak with the authority of the state, provide general deterrence of future violators.").

3. Analogies To Other Civil Rights Statutes Are Inappropriate

In considering the fundamental purposes of Section 1981, this Court should not rely on the analysis of statutes enforced by EEOC. Section 1981's provision of a federal judicial forum was unique in a variety of ways. As a result, *Gilmer*'s reasoning as to the ADEA, does not apply here.

Unlike every other civil rights claim subject to arbitration, Section 1981 was enacted at a time when mandatory arbitration was flatly rejected by the courts. *See, e.g.*, *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 450 (1874) (stating that "[t]here is no sound principle upon which [arbitration agreements] can be specifically enforced"). In addition, Congress specifically provided a judicial forum for claims under the 1866 Act, at a time when general federal question

jurisdiction did not exist—a significant point of contention in the debates over the bill. It would not have taken the extraordinary step of expanding federal court jurisdiction, only to undercut it by allowing mandatory, out-of-court resolution.

This stands in contrast to the ADEA and every other civil rights statute that has been compelled to arbitration, which were all enacted well after the FAA and at a time when general federal question jurisdiction had been long established and was uncontroversial.

Moreover, *Gilmer*'s fundamental purposes analysis relied on the role the EEOC played in enforcing the ADEA, a role that it does not play for Section 1981. Congress desired a "flexible approach to the resolution of claims" under the ADEA: the EEOC "is directed to pursue 'informal methods of conciliation, conference, and persuasion." 500 U.S. at 29. As a result, the Court concluded that "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress." *Id*. The same reasoning applies to Title VII, and all other civil rights statutes found to be appropriate for arbitration, but not to Section 1981—Section 1981 involves no enforcement by any federal agency and provides for no kind of alternative dispute resolution.

Section 1981's method of achieving deterrence is also distinguishable: because the EEOC itself can bring claims, and is not bound by arbitration, statutes such as Title VII and the ADEA retain their deterrent effect regardless of whether

individual plaintiffs are compelled to arbitration. Furthermore, like federal courts, and unlike arbitrators, the EEOC speaks with the voice of the state and the power of the federal government; the enforcement role of the federal government beyond the courts enhances deterrence of future violations, whether or not private parties are able to vindicate their claims in public or not.

For example, *Gilmer* rejected the argument that arbitration interfered with the ADEA's goal of deterrence largely due to the ability of the EEOC to enforce the law:

> An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination.

Id. at 29. *Gilmer* observed that the EEOC could file in court outside of the bounds of arbitration and could publicly enforce statutes regardless of individual arbitration agreement. Not so here. The EEOC does not enforce Section 1981—wronged employees cannot file a Section 1981 charge with the agency, and the EEOC cannot bring suit under Section 1981. If this Court were to rule that Section 1981 claims are subject to arbitration, there would be *no* federal enforcement of this statute where an arbitration agreement exists, contrary to its purposes and the intent of Congress.

Gilmer also considered other instances in which statutes enforced by administrative agencies had been compelled to arbitration, such as the Securities Act of 1933 and the Securities Exchange Act of 1934. *Id*. Parallel enforcement of a statutory claim by an administrative agency supports a finding that the claim can be compelled to arbitration. But the converse must be true, as well. When there is no agency involvement, such as under Section 1981, then individual plaintiffs should have the power to enforce their claims in court. *See, e.g.*, *Price v. Pelka*, 690 F.2d 98, 101 (6th Cir. 1982) (noting that it is private parties who enforce Section 1981). Moreover, if Section 1981 plaintiffs can be compelled to arbitrate their claims, no agency can take up their cause and file on their behalf in court.

Gilmer requires that courts consider the fundamental purposes of *each* statute, and how arbitration relates to those purposes. Arbitration is not appropriate or authorized by law for Section 1981 merely because other statutes, vastly different from the one at issue, have purposes compatible with the arbitration of claims arising under those other statutes.

CONCLUSION

For the foregoing reasons, plaintiff requests this Court to reverse the judgment of the district court and remand the case for trial, and hold that claims under 42 U.S.C. § 1981 are not appropriate or authorized by law for arbitration.

[signature page follows]

Date: May 9, 2018

CALIFORNIA CIVIL RIGHTS LAW GROUP

/s/ Lawrence A. Organ
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Attorneys for Appellant DeWitt Lambert

STATEMENT OF RELATED CASES

Appellant is not presently aware of any related cases presently before this court.

Date: May 9, 2018

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/s/ Lawrence A. Organ
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface, Times New Roman 14-point font, using Microsoft Word 2016.

Date: May 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 9, 2018

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