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SCIENTOLOGY'S FRANKENSTEIN CLAUSE: THE STITCHED MONSTROSITY OF RELIGIOUS ARBITRATION CONTRACTS

Mark Lammey

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Mark Lammey*

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INTRODUCTION

In recent years, two lines of doctrine have emerged from our nation's high court. First, religious liberties are well-protected, and the First Amendment has repeatedly proved itself to be a formidable sentry for those engaged in religious practices.[1] Second, though perhaps less publicized, arbitration is well favored, and the Federal Arbitration Act ("FAA") forbids hostility from the courts toward arbitration.[2] Opinions interpreting the FAA since the 1980s have consistently given great deference to arbitration agreements, hewn away at statutory grounds for invalidation of arbitration agreements or vacatur of arbitral awards, and deracinated court-made limiting doctrines.

This Article does not argue the merits of either line of precedent. If religious liberty and arbitration agreements are to be given deference, so much the better. What has become problematic is the nexus between the two, where the drafting party to a religious arbitration contract can now avail themselves of both lines of precedent, raising the shield of the First Amendment with one arm and that of the FAA with the other, rendering opaque what ought to be transparent in the rules and procedures of religious tribunals and grounding in coercion what ought to be grounded in voluntarism in their contracts.

The Church of Scientology, the new kid on the block, the "test case religion,"[3] has crafted religious arbitration agreements that push the limits of what religious and FAA protections will allow. These agreements bring together a particular collection of traits that, standing alone, appear defensible: adhesive contracts are generally acceptable in consumer contexts; broad scope arbitration agreements have not been seen problematic by most courts; parties in many circumstances are free to contract for non-neutral arbitrators; the interpretation of church doctrine is generally off-limits for courts.

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[1] *See* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 525 (2022) ("Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.' Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."); *see also* Fulton v. City of Phila., 593 U.S. 522, 542-43 (2021) (holding that the city of Philadelphia had violated the First Amendment when it refused to contract with a religious foster agency unless the agency would agree to certify same-sex couples as foster parents).

[2] *See* David Horton, *Arbitration about Arbitration*, 70 STAN. L. REV. 363, 377 (2018); *see also* 9 U.S.C. § 2.

[3] Renae Barker, *Scientology, the Test Case Religion*, 40 ALT. L.J. 275, 275 (2015).

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Taken individually, each aspect is theoretically defensible with precedent pulled from purely commercial or purely religious contexts. Courts seem willing to atomize their analyses, finding justifications for each aspect without reference to the others. Scholars have similarly suggested narrow, pre-packaged answers in the form of a singular religious liberty or contract defense argument. However, the deficiencies of such an arbitration agreement only come into sharp relief when viewed as a whole, with each part exacerbating the problematic elements of the others. Only then does the assemblage of parts come alive. This Article attempts to show that isolated analyses have been insufficient and argues that a holistic review by courts, perhaps under the framework of a comprehensive and informed unconscionability review, is needed to demonstrate the unenforceability of these contracts.

Part I looks at the history of relevant arbitration doctrine and the application of unconscionability review as well as the line of church doctrine precedent that presents in these cases. Part II explores the Scientology arbitration agreement at issue and how court analysis has either engaged in parceled treatment of unconscionability or turned to clumsy and overbroad First Amendment principles. Part III discusses the individual qualities of current Scientology arbitration agreements and how courts fail to acknowledge these missing justifications for enforcement. Part IV responds to suggested answers from scholars and argues that a successful and meaningful challenge to enforcing these contracts requires going beyond isolated arguments and demonstrating how the various parts reinforce each other to yield an unenforceable contract.

I: "IF I CANNOT SATISFY ONE, I WILL INDULGE THE OTHER": THE DUAL LAYERS OF PROTECTION FOR RELIGIOUS ARBITRATION AGREEMENTS

A. Arbitration Law

The FAA came about as a legislative response to judicial hostility toward arbitration in the early twentieth century.[4] This has given rise to a well-recognized federal doctrine favoring arbitration that has made arbitration clauses overwhelmingly common in employment and consumer contracts.[5] However, the FAA includes statutory grounds for invalidating an agreement to arbitrate and

[4] *See* Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 649 (2022) ("The FAA was enacted in response to judicial hostility to arbitration."); David Horton, *Pirate Arbitration*, 106 MINN. L. REV. 2111, 2116 (2022) ("In 1925, Congress passed the Federal Arbitration Act (FAA) to abolish ancient strands of the common law that invalidated pre-dispute arbitration clauses.").

[5] Horton, *Pirate Arbitration*, *supra* note 4, at 2117.

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grounds for vacating an arbitral award; challenges on both ends, before and after arbitration has actually occurred, are notoriously difficult and have been the subject of much litigation in recent decades.[6]

On the front end, agreements to arbitrate will be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[7] The Supreme Court has interpreted this clause to mean that arbitration contracts are on "equal footing" with other contracts, that arbitration agreements are subject to traditional validity defenses like fraud, duress, and unconscionability.[8] Though this does make the validity of arbitration agreements subject to state contract defenses, the Supreme Court has also adopted an "equal-treatment" principle, whereby the FAA preempts state rules that discriminate against arbitration.[9] Such reasoning was employed in *AT&T Mobility LLC v. Concepcion*, where the Supreme Court found that the FAA preempted a California state court rule that was being used to find class-action waivers in consumer adhesion contracts unconscionable and unenforceable.[10] Thus, states grounds for the "revocation of any contract" must not be obstacles designed to interfere with arbitration and the goals of the FAA directly.[11]

Recent precedent has made it difficult to even raise traditional contract defenses as many courts feel bound to send questions of duress, fraud, or unconscionability to arbitration—the arbitration set out in the allegedly unenforceable contract. Agreements often contain a "delegation provision" in which the parties indicate the

[6] Although the cases this article discusses come from a variety of federal and state courts, and there can be significant variation in state law contract defenses and in the analysis a court might apply to an agreement to arbitrate, there is a great deal of uniformity amongst the states as a result of FAA preemption and general adoption of the Uniform Arbitration Act. *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 SANTA CLARA L. REV. 501, 516 (2012).

[7] 9 U.S.C. § 2. *See also* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (describing Section 2 of the FAA as the "primary substantive provision of the Act") (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

[8] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) ("[C]ourts must place arbitration agreements on an equal footing with other contracts[.]"); *Rent-A-Center, W., Inc.*, 561 U.S. at 68 ("Like other contracts, however, they may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'").

[9] *See Viking River Cruises*, 596 U.S. at 650; *AT&T Mobility LLC*, 563 U.S. at 352 (invalidating a California rule that class-action actions were unconscionable under state law, finding that the FAA preempts State law that "stands as an obstacle" to its objectives).

[10] 563 U.S. at 340, 352.

[11] *Id.* at 352.

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scope of arbitration and thus delegate specific issues to the arbitrator.[12] In other words, the portion of a contract relating to arbitration might be described in two parts: the first part outlines which disputes should go to arbitration, and the second part discusses how arbitration works when the parties get there. The delegation provision might sensibly limit which controversies should go to arbitration, perhaps carving out types of claims (e.g., antitrust, intellectual property) or types of relief (e.g., injunctive, damages) for the court rather than the arbitrator.[13] These clauses have been employed to shunt questions of enforceability to the arbitrator as well, so that even a claim that a party was fraudulently induced into an agreement or that the contract is unconscionable *in toto* must be dealt with in arbitration.[14] The internal logic of such holdings, perhaps sensible in their factual contexts, have resulted in quite draconian results. Parties who fail to raise a precise and timely challenge to the arbitration agreement or a delegation clause might find themselves in exactly the tribunal they claim is unconscionable, attempting to convince its arbitrators that their own tribunal's structure or procedure is oppressive.

On the back end, once the tribunal has issued its award, Section 9 of the FAA allows for a party to enforce the arbitral award in court, while Section 10 provides the grounds for vacatur of that award.[15] Vacatur can result from "corruption, fraud, or undue means," "evident partiality or corruption in the arbitrators," arbitrator misconduct, or arbitrators exceeding their powers.[16] Notably missing amongst these is any explicit declaration that an award is subject to vacatur if the arbitrator failed to follow the law in her decision.[17] By design, arbitrations are not reviewed for their strict compliance with legal principles and district courts do not engage in a rigorous review of the legal analysis of arbitrators; rather, several courts seem to acknowledge

[12] *See Rent-A-Center*, 561 U.S. at 68 ("The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.").

[13] *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 66 (2019) (evaluating a clause that delegated all matters to the arbitrator except for "actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property").

[14] *See* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."); *see also* David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 636–39 (2020) (describing circumstances in which entities utilizing delegation clauses have attempted to force consumers to litigate the question of arbitrability).

[15] 9 U.S.C. §§ 9–10; *see also* 9 U.S.C. § 11 (providing statutory grounds for modification of an award).

[16] 9 U.S.C. § 10(a)(1)–(4).

[17] *See* Thomas R. Newman & Steven J. Ahmuty Jr., *Arbitration Awards—Manifest Disregard of Law*, LAW.COM: N.Y. L.J. (Apr. 30, 2019, 12:45 PM), https://www.law.com/newyorklawjournal/2019/04/30/arbitration-awards-manifest-disregard-of-law/ [https://perma.cc/Y4GM-JSNX].

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that arbitrators have the ability to disregard law if they choose.[18] While certain doctrines have grown up around the statutory grounds for vacatur, primarily aimed at reining in truly egregious disregard of the law, the long-term survival and applicability of such grounds is an open question.[19]

Thus, arbitration in the secular context alone presents a very hands-off item for the courts. At the outset, a court may be uneasy about finding an arbitration agreement unconscionable due to the equal treatment principle and may even send the issue of unconscionability to the arbitrator and avoid analyzing it altogether. Even after the arbitration has taken place, the court might still be unwilling to review the reasoning of the arbitrator or the integrity of the award.

B. First Amendment Doctrine

These difficulties for a party resisting arbitration are only magnified in the religious context. Religion has played a part in dispute resolution in North America since before the founding.[20] In places in early colonial Massachusetts, the church courts had significant power and even heard criminal cases.[21] Religious courts became less common after the founding, and even more insular groups, like the Mormons, eventually saw their tribunals losing power to secular courts.[22] This was in large part because religious courts depended on the consent of the parties for their power and growing religious diversity reduced their effective reach.[23] Religious courts of the past thus recognized that their power was derived from the voluntary consent of their adherents and could not be imposed on unwilling third parties.[24]

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[18] Leslie v. Leslie, 50 N.J. Eq. 103, 107 (1892) ("So long as he acts uprightly and impartially, and keeps within the limits of his authority, and deprives neither party of a full and fair hearing, his judgments are unimpeachable and irreversible."); NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 532 (2d Cir. 2016) ("[E]ven if an arbitrator makes mistakes of fact or law, we may not disturb an award so long as he acted within the bounds of his bargained-for authority.").

[19] *See generally* Carl J. Mudd, *The Past, Present, and Future of the Doctrine of Manifest Disregard*, 10 AM. J. MEDIATION 37 (2017) (discussing the "manifest disregard" doctrine and the debate over the exclusivity of the FAA grounds for vacatur); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 674 n.3 (2010) (leaving open the question of whether "'manifest disregard' survives . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10").

[20] Walter, *supra* note 6, at 509 (describing religious influence in early colonial America).

[21] *Id.* at 510 (describing the ill-defined boundaries between the jurisdiction of church and secular courts).

[22] *Id.* at 513.

[23] *Id.*

[24] *Id.*

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Early in the twentieth century, arbitration of all sorts was heavily disfavored by the courts.[25] But building on the legal landscape shaped by the FAA and the Uniform Commercial Code, religious parties contracting for arbitration found a way to effectively interact with secular law.[26] While some jurists resisted this shift to enforcing arbitration, the legal system came to accept arbitration and parties were able to make use of the growing acceptance of choice of law and choice of forum in contracts.[27] This created conditions fertile for the growth of religious arbitration contracts.[28]

Today, Jewish, Islamic, and Christian arbitration has become common in the United States and courts routinely enforce arbitral awards handed down by these religious tribunals.[29] These contracts for arbitration and the arbitral awards have been analyzed under a secular rubric, despite all manner of religious liberty arguments raised against them. Nicholas Walter, in his article on the subject, tracks several disputes regarding religious arbitration and concludes that they have been treated much the same as their secular counterparts.[30] Parties have argued that religious arbitration is problematic because the arbitrators will apply religious law instead of secular law, that religious arbitral awards run contrary to public policy, that enforcing such agreements raise First Amendment "religious question" issues, and that certain religious procedures or pressures constitute duress or unconscionability in contract formation.[31] Walter finds, though, that "American courts, so far as possible, treat challenges to religious arbitration exactly as they would challenges to secular arbitration."[32]

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[25] Rachel Donnelly, *A Historical View of Arbitration Agreements and their Rise in Employment Agreements*, TYSON & MENDES (June 3, 2019), https://www.tysonmendes.com/historical-view-arbitration-agreements-rise-employment-agreements/ [https://perma.cc/EN93-9NPZ].

[26] Michael J. Broyde, *Faith-Based Arbitration Evaluated: The Policy Arguments for and Against Religious Arbitration in America*, 33 J.L. & RELIGION 340, 341–42 (2018).

[27] *Id.* at 341 (noting that Justice Cardozo, writing at the time, would have disallowed arbitration but that the history of the U.S. legal system moved clearly in the other direction).

[28] *Id.* at 342.

[29] *See* Walter, *supra* note 6, at 519–21 (relating statistics about the number of arbitrations and other mediations carried out by entities like Peacemaker Ministries, a Christian dispute resolution group, and Beth Din of America, a Jewish organization "conduct[ing] over 400 'family' matters each year . . . and 100 commercial matters").

[30] *See generally id.*

[31] *See id.* at 521–27.

[32] *Id.* at 527.

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This treatment is likely required by the First Amendment as courts are generally not permitted to involve themselves in issues of religious doctrine and ecclesiastical matters. The church autonomy doctrine sprung from *Watson v. Jones*, where the Supreme Court held that civil courts had no jurisdiction over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[33] That principle has since proliferated into all manner of prohibitions involving church property disputes,[34] regulation of religious schools,[35] and employment discrimination of ministers.[36] *Serbian E. Orthodox Dioceses v. Milivojevich* was one such case dealing with an intra-church dispute over the possible improper defrockment of a Bishop and reorganization of the diocese.[37] The Illinois Supreme Court looked into the petitioner Church's constitution and penal code and decided that the defrockment was to be set aside as arbitrary and that the reorganization was invalid.[38] Reversing Illinois's highest court, the Supreme Court found it a violation of the First Amendment for a court to reject the decision of a church high court on issues of church doctrine.[39]

> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the

[33] 80 U.S. 679, 733 (1871).

[34] Kedroff v. Saint Nicholas Cathedral Russian Orthodox Church, 344 U.S. 94, 120–21 (1952) (instructing courts that there must be a line "between the responsibilities of church and state for the disposition or use of property" and that church customs and law on ecclesiastical matters must control).

[35] NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 501–02 (1979) (describing the risk of excessive government entanglement if the NLRB and courts were permitted to scrutinize the hiring decisions of parochial schools and their contracts with teachers).

[36] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012) (distinguishing neutral laws of general applicability, such as an ADA anti-retaliation provision or a state ban on peyote, from "a church's selection of its ministers," which the First Amendment shields from inquiry into discriminatory intent).

[37] 426 U.S. 696, 697–98 (1976).

[38] *Id.* at 708.

[39] *Id.* at 709.

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> Constitution requires that civil courts accept their decisions as binding upon them.[40]

Thus, issues at the crossroads of religion and arbitration often go under-analyzed by courts. It is no surprise, given the highly deferential standard courts must apply to arbitration agreements coupled with the First Amendment restrictions on civil courts involving themselves in ecclesiastical matters. Rather, arbitration issues often present in the purely secular context like the enforceability of arbitration agreements in contracts of adhesion, the standards for vacatur when an arbitrator appears to be misapplying the law, or problems of bias in the selected arbitrator.[41]

The Church of Scientology's arbitration agreements, though a recent phenomenon with limited societal impact, showcase what has been permitted to grow in the shadow of FAA and First Amendment protections. While there is little doubt that religious arbitration should and does receive great deference, it must be the case that not all religious arbitration contracts are enforceable. If they were categorically enforceable, then a church could design and impose an arbitration agreement on its members (1) in the form of an adhesion contract, signed without meaningful consent or review, (2) unlimited in scope such that any past, present, or future claims against the church or anyone associated with the church would go to arbitration, (3) where arbitration would be run by the church, with oversight by its officers and complete control over who was permitted to serve as an arbitrator, and (4) without any formal procedures and with the freedom to make up rules ad hoc during proceedings. Prior to *Garcia v. Church of Scientology*,[42] such an unprecedented and extreme agreement could have been the *reductio ad absurdum* demonstrating the fallacy that courts will enforce any religious arbitration agreement.

However, FAA and First Amendment precedents have proven a potent mix utilized by the Church of Scientology (the "Church"). As a seasoned party to litigation but a relatively new player on the religious arbitration scene, the Church has managed to draft arbitration agreements, carry out arbitration processes, and

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[40] *Id.* at 724–25.

[41] *See* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 71–72 (2019) (holding in a case between a manufacturer and distributor that a court-made doctrine excepting enforcement of certain arbitration was inconsistent with the FAA); Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 662 (2010) (evaluating whether the parties could be compelled to submit to class arbitration in a conflict between a shipper company and distributor); Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–41 (4th Cir. 1999) (finding an arbitration clause in an employment contract unenforceable due the grossly one-sided nature of the arbitration and impartiality of the arbitrators).

[42] No. 18-13452, 2021 U.S. App. LEXIS 32601 (11th Cir. Nov. 2, 2021).

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hand down arbitral awards that are pushing the boundaries of all manner of precedent. Armed both with secular grounds for enforceability and First Amendment protections, the Church is pioneering the outer limits of what courts will tolerate in religious contracting.

II: "IF COWARDICE OR CARELESSNESS DID NOT RESTRAIN OUR INQUIRIES": COURTS AVOIDING THE UNCONSCIONABILITY ANALYSIS

A. Scientology Background

Scientology is a recent and controversial religious movement, touting its celebrity members and seemingly at the heart of scandal and perpetual legal conflict.[43] The movement emerged in America in the 1950s with its founder, L. Ron Hubbard, at the helm.[44] Hubbard, after serving in the Navy during World War II, became a science fiction writer and eventually developed "Dianetics," a science Hubbard claimed would provide physical, psychological, and even supernatural benefits to the participants.[45] Through a process called "auditing," adherents undergo a questioning process to remove damaging memories, called "engrams," and apparently achieve benefits including "increased IQ[,] . . . health and vitality" and eventually, according to Hubbard, the ability to "communicate telepathically, to see through walls, even to re-arrange molecules to fix appliances."[46] To its adherents, Hubbard was and is the man who "solved the riddle of the human mind," and to Hubbard, Scientology was the new religion overthrowing "the false gods of the old" and his contribution to the improvement of man.[47]

The Church of Scientology grew in size and influence into the 1960s, forming a large bureaucratic hierarchy, described as "resemble[ing] less a traditional Church than it does 'multi-national enterprises such as Ford Motor Company'" and characterized by a former FBI member as "one of the most effective intelligence operations in the U.S., rivaling even that of the FBI."[48] Hubbard, out of fear of subversion within, developed an internal code of "Ethics" and a process to "weed out individuals dubbed 'suppressive persons'" believed to be a "threat to the

[43] *See* Hugh B. Urban, *Fair Game: Secrecy, Security, and the Church of Scientology in Cold War America*, 74 J. AM. ACAD. RELIGION 356, 357 (2006).

[44] *Id.* at 364–65.

[45] *Id.* at 365.

[46] *Id.*

[47] *Id.* at 356, 364.

[48] *Id.* at 368–69.

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functioning of the Church."[49] Hubbard also endorsed a concept known as "fair game."[50] If a person or group was deemed suppressive, they were "fair game" and, in the words of Hubbard, could be "deprived of property or injured by any means by any Scientologist without any discipline of Scientologists[,] [or could] be tricked, sued or lied to or destroyed."[51] The Church has since retreated from such doctrine and "fair game" was canceled as official policy during church reforms, however, "the Church has by no means ceased its aggressive response to any groups or individuals . . . perceived to be a threat to the prosperity of the movement."[52]

In 1997, a director of the Cult Awareness Network characterized Scientology as "likely the most ruthless, the most classically terroristic, the most litigious and the most lucrative cult the country has ever seen."[53] Indeed, the Church has engaged in all manner of litigation, going after media and journalists, anticult groups, copyright infringers on the internet, and even U.S. government agencies.[54] Notably, as it came under scrutiny by the IRS, the Church began to project itself as more overtly religious, "veiling itself in Christian imagery."[55] It was a shrewd decision in a bid to gain First Amendment protections and firmly cement itself as a religion. While of questionable authenticity, one scholar in 1997 described the Church as "a particularly useful 'hard case' to illuminate" issues of freedom of religion, because of the "profound suspicion and hostility" it has engendered in a variety of legal systems the world over.[56]

Recent litigation involving the Church has not been between the Church and outside entities, but rather against its own former members. For instance, in *Headley v. Church of Scientology*, former members brought claims against the Church for violations of the Trafficking Victims Protection Act, alleging the Church had subjected them to forced labor under dangerous conditions.[57] The Ninth Circuit

[49] *Id.* at 374.

[50] *Id.* at 375.

[51] *Id.* at 375 (citing a policy letter of Hubbard's from 1966).

[52] *Id.* at 375–76.

[53] *Id.*

[54] *See id.* at 376–81.

[55] *Id.* at 377 (describing Scientology's shifts in imagery "to win First Amendment protection"). "[C]ounselors started sporting clerical collars. Chapels were built, franchises became 'missions,' fees became 'fixed donations,' and Hubbard's . . . cosmology became 'sacred scriptures.'" *Id.*

[56] Paul Horwitz, *Scientology in Court: A Comparative Analysis and Some Thoughts on Selected Issues in Law and Religion*, 47 DEPAUL L. REV. 85, 88–89 (1997).

[57] 687 F.3d 1173, 1174 (9th Cir. 2012).

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ultimately upheld a decision for the Church, finding no violation.[58] There has since been a steady stream of ex-members ready to accuse the Church of various wrongs and harassment.[59] However, these plaintiffs have seldom seen the inside of a courtroom. *Headley* was resolved at the Ninth Circuit in 2012. The following year, Luis Garcia brought his fraud and breach of contract suit against the Church and was compelled to arbitrate his claims before Scientologists in accordance with the arbitration procedures of the Church of Scientology: the first proceeding of its kind.[60]

B. Garcia v. Church of Scientology: The First Arbitration

Luis Garcia joined the Church of Scientology in 1982.[61] Over the course of twenty-two years, Luis signed at least twenty written enrollment agreements with the Church each time he engaged the church for services, sometimes signing multiple agreements in a week.[62] Amongst the artful clauses in the contracts were such statements as "I . . . recognize, acknowledge and agree that. . . . Scientology is a religion, the Church is a church of the Scientology religion, and all the services and activities of the Scientology religion are exclusively religious in nature"[63] and "[m]y freely given consent to be bound exclusively by the discipline, faith, internal organization, and ecclesiastical rule, custom, and law of the Scientology religion in

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[58] *See id.* at 1181; *see also* Jeffrey W. Tye, *Ninth Circuit Rules against Scientology Ministers' Forced-Labor Claims in Headley v. Church of Scientology International*, 43 GOLDEN GATE U. L. REV. 135, 138 (2013).

[59] *See, e.g.*, *New Lawsuit Accuses Church of Scientology of Human Trafficking*, UNIVERSAL LIFE CHURCH (Aug. 5, 2019), https://www.ulc.org/ulc-blog/new-lawsuit-accuses-church-of-scientology-of-human-trafficking [https://perma.cc/DU8H-3S98]; Christine Hauser & Remy Tumin, *Leah Remini, Vocal Scientology Critic Files Suit Against Church*, N.Y. TIMES (Aug. 4, 2023), https://www.nytimes.com/2023/08/04/us/leah-remini-scientology-lawsuit.html; Alex Johnson, *Ex-Scientology Member Sues Church and Its Leader Alleging Abuse, Human Trafficking*, NBC NEWS (June 19, 2019, 8:16 PM), https://www.nbcnews.com/news/religion/ex-scientology-member-sues-church-its-leader-alleging-abuse-human-n1019506 [https://perma.cc/TNX6-5SEQ]; Danielle Salisbury, *Man Says He Spent $15,000, Received Scientology Instead of Treatment at Rehab Center*, MLIVE (Nov. 10, 2015, 2:00 PM), https://www.mlive.com/news/jackson/2015/11/man_says_he_spent_15000_receiv.html [https://perma.cc/KY9U-FVYA].

[60] Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *3 (11th Cir. Nov. 2, 2021) ("The parties participated in a two-day arbitration—the first in the history of the Church of Scientology.").

[61] Joint Motion & Memorandum of Served Defendants to Compel Arb. & to Stay Proc. at 2, Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2018 U.S. Dist. LEXIS 119099 (M.D. Fla. July 17, 2018) [hereinafter Joint Motion to Compel Arb.].

[62] *Id.* at 16.

[63] *Id.* at Exhibit 1, at p. 4. For a discussion of the relevance of such statements and their bearing on First Amendment doctrine, see *supra* Part I.

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all matters relating to Scientology Religious Services."[64] Importantly here, the following provision was included in the contracts:

> In accordance with the discipline, faith, internal organization, and ecclesiastical rule, custom and law of the Scientology religion, and in accordance with the constitutional prohibitions which forbid government interference with religious services or dispute resolution procedures, should any dispute, claim or controversy arise between me and the Church, any other Scientology church, any other organization which espouses, presents, propagate[s] or practices the Scientology religion, or any person employed by any such entity, which cannot be resolved informationally by direct communication, I will pursue resolution of that dispute, claim or controversy solely and exclusively through Scientology's Internal Ethics, Justice and binding religious arbitration procedures, which include application to senior ecclesiastical bodies, including, as necessary, final submission of the dispute to the International Justice Chief of the Mother Church of the Scientology religion, Church of Scientology International ("IJC") or his or her designee.[65]

In 2013, after breaking from the Church, Mr. Garcia and his wife filed a complaint against various entities within the Church of Scientology alleging fraud, unfair and deceptive trade practices, and breach of contract.[66] According to the Garcias, the Church had pressured and misled them for years into making sizeable donations to various church projects and humanitarian endeavors.[67] The defendants moved to compel arbitration, pointing to the several agreements in which plaintiffs

[64] Joint Motion to Compel Arb. at Exhibit 1, at 1.

[65] *Id.* at Exhibit 1, at 1. The IJC is a position within the Church of Scientology's hierarchical structure, held at the time by a man named Mike Ellis. *See* Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at *6 (M.D. Fla. Mar. 13, 2015). For a discussion of *Milivojevich* and the significance of the included phraseology, see *supra* Part I. There seems to be keen eye toward the First Amendment cases and the indicia of what courts are explicitly not permitted to analyze under such doctrines.

[66] *See generally* Complaint & Demand for Jury Trial, Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2013 WL 265312 (M.D. Fla. Jan. 23, 2013). The complaint named as defendants "Church of Scientology Religious Trust; Church of Scientology Flag Service Organization, Inc.; Church of Scientology Flag Ship Service Organization, Inc. d/b/a Majestic Cruise Lines; IAS Administrations, Inc; U.S. IAS Members Trust." *Id.* at 1.

[67] *See id.* at 15–16 (alleging that the Church made false statements and engaged in "high pressure solicitations for donations" that would go to directly help "starved children in Africa"). The complaint alleges the Church also lied about humanitarian projects to fight child pornography, assist tsunami victims in Sri Lanka, and fight bush fires in Australia. *Id.* at 16–18. A large portion of the damages sought surrounded the "Super Power" project, a planned facility in Clearwater, Florida, to which plaintiffs contributed $340,000.00 over the course of several years. *Id.* at 8–11.

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agreed to arbitrate any claims against the Church and arguing that any attempt to resolve this claim in court would necessarily require an impermissible application of Scientology policy and doctrine, thus running afoul of the First Amendment.[68]

The district court granted the motion to compel arbitration, finding (1) that Florida law would apply to the contracts, (2) a valid agreement to arbitrate existed between the parties, despite First Amendment concerns, and (3) the arbitration clauses were not unconscionable.[69] In analyzing unconscionability, the court found that notwithstanding these contracts being contracts of adhesion, that quality alone was not enough to show procedural unconscionability.[70] Plaintiffs argued that a complete lack of rules and procedures for Scientology arbitration and the overly broad scope of the agreements supported a finding of procedural unconscionability, but the court disagreed.[71] Rather, applying Florida law, it stated that the arbitration clauses were enforceable because "the Garcias had some idea of what disputes would be subject to arbitration and the manner of effecting arbitration."[72] As to scope, the court found that "broad arbitration agreements are enforceable" and there was nothing improper about having the Garcias bound to arbitrate all their claims against defendants, whether or not they related to the subject matter of the signed agreements.[73]

On the issue of substantive unconscionability, plaintiffs argued that arbitration could not be fair and neutral, because the Garcias would necessarily be considered "Suppressive" for having left the Church.[74] Because the arbitration agreement required all arbitrators to be "Scientologist[s] in good standing," church doctrine required these members to be biased against plaintiffs.[75] The court found that the argument, "compelling as [it] might otherwise be," was off-limits because analyzing it would require the court's "prohibited intrusion in religious doctrine."[76] Thus, on

[68] *See* Joint Motion to Compel Arb., *supra* note 61, at 4–10.

[69] Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2015 WL 10844160, at *3, *12 (M.D. Fla. Mar. 13, 2015).

[70] *Id.* at *6.

[71] *Id.* at *5–8.

[72] *Id.* at *8.

[73] *Id.* at *10.

[74] *Id.* at *11.

[75] *Id.*

[76] *Id.* (citing *Kedroff*, 344 U.S. at 115).

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the front end, the district court found neither procedural nor substantive unconscionability and compelled arbitration.[77]

Yet following this ruling, the arbitration still could not proceed. Per the agreement, each party was to pick one arbitrator, with the two selected arbitrators picking a third, and all panel members were to be Scientologists in good standing with the Mother Church.[78] When the parties could not agree on arbitrator selection, the court stepped in. Relying on section five of the FAA,[79] the court requested a list of "500 Scientologists in good standing in the greater Los Angeles, California area, selected at random" from the Church; the court then selected three arbitrators from that list.[80]

The Garcia arbitration took place in July 2018, and subsequently the Garcia's brought "back end" claims.[81] The district court would write again for the parties, this time refusing vacatur of the arbitral award.[82] The Garcias had brought claims in arbitration seeking roughly one million dollars from the various defendants; the arbiters awarded the Garcias $18,495.36.[83] The Garcias argued that pursuant to sections 10(a)(2) and 10(a)(3) of the FAA, "the arbitration panel acted with evident partiality and engaged in misconduct."[84] The court acknowledged that the arbitration

[77] *Id.* at *12.

[78] *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 8:13-cv-220-T-27TBM, 2017 WL 10845264, at *3 (M.D. Fla. May 19, 2017) (describing the agreed upon procedure for selection of arbitrators). Specifically, the agreement would have the plaintiffs request arbitration and select their arbitrator first. The defendant would then select an arbitrator within 15 days, or failing that, the IJC would select for them. *Id.*

[79] *See id.* at *2 (citing 9 U.S.C. [section] 5 for its instruction that when an arbitration agreement does not provide the method for selecting arbitrators or "there shall be a lapse in the naming of an arbitrator . . . the court shall designate and appoint an arbitrator . . . .").

[80] *Id.* at *1.

[81] Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 8:13-cv-220-T-27TBM, 2018 WL 3439638, at *2 (M.D. Fla. July 17, 2018).

[82] *See generally id.*

[83] *Id.* at *2. The lion's share of the Garcias' claims were seeking returns of donations made to the Super Power fund and another fund called the "Ideal Org fund." *Id.* at *1. Smaller sums were claimed for "services and religious retreat accommodations" they did not receive. *Id.* The arbitral award was specifically for repayment for some of those services, and the IJC accepted the decision and voluntarily sent the Garcias the adjudged amount two days after arbitration ended. *Id.*

[84] *Id.* at *2. The Garcia's argument for vacatur was summarized by the court as "(1) refusing to hear evidence or witnesses critical of the Church; (2) refusing to consider their fraud claims; (3) allowing the IJC to have ex parte conduct with the panel; (4) refusing to allow their counsel to attend the arbitration; and (5) failing to provide sufficient written findings for the Court to review." *Id.*

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was subject to partiality, but concluded that the Garcias knew this was bound to happen when they signed the agreements.[85] The court cited to authority that when parties agree to select interested arbitrators, "evident partiality" is no longer a basis for vacatur under section 10(a)(2).[86] As to misconduct, the court related the arbitral procedure and its possible defects raised by the Garcias: the IJC rejected and/or redacted some of the evidence the Garcias wanted to submit,[87] the IJC made contact *ex parte* several times with the arbitrators as part of the "hatting" process by which he instructed them on the arbitration process,[88] the Garcias were not permitted to have a lawyer represent them during the arbitration,[89] and the arbitrators' ultimate decision on certain claims took the form of simply checking "no" on a form without explanation.[90] The court again relied on the First Amendment, finding that while the parties may disagree about the fairness of the arbitration, those "arguments raise secular notions of due process" which are inapplicable.[91] Finding that the FAA permits a narrow scope of review, coupled with First Amendment prohibition on interpreting Scientology doctrine, the court found no grounds on which to vacate the award.[92]

On appeal, the Eleventh Circuit examined the trial court's front- and back-end decisions to compel arbitration and deny vacatur, and it essentially affirmed wholesale.[93] On the issue of unconscionability, the majority retreaded the same rationale as the trial court: it referenced approvingly the trial court's decision to invoke First Amendment grounds for avoiding an investigation of substantive unconscionability, and it decided that without other evidence, the Garcias failed to

[85] *Id.* at *3.

[86] *Id.*

[87] *Id.* at *2.

[88] *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *3 (11th Cir. Nov. 2, 2021). "Hatting" appears to be a term used in Scientology arbitration to describe the process by which new arbitrators are trained on the process. *Id. See supra* note 65 and accompanying text for a discussion of the IJC role.

[89] *Garcia*, 2021 WL 5074465, at *3.

[90] *Garcia*, 2018 WL 3439638, at *2. Interestingly, the IJC was empowered to look at all evidence the Garcias sought to admit and rule on its admissibility. The grounds for disallowance included traditional evidentiary grounds like irrelevance or hearsay, but also included "Entheta," a "term that means anything critical of the Church." *Id.* at *3 n.5.

[91] *Id.* at *4.

[92] *Id.*

[93] *See generally Garcia*, 2021 WL 5074465.

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meet the burden of proving the agreements to be unconscionable.[94] On the issue of vacatur, it rejected the Church's arguments that the First Amendment bars or restricts review,[95] but, similar to the trial court, found that partiality is no ground for vacatur when the "partiality inherently exists in the arbitration procedure selected by the parties."[96]

The opinion did, however, draw a robust yet respectful dissent from Judge Rosenbaum. She would have found the arbitration agreement invalid and vacated the order to compel arbitration.[97] She criticized the majority for conjuring up a valid "form and procedure for arbitration" where there was, in fact, no rules or procedures at all.[98] In fact, "the Church had never once conducted an arbitration," and simply saying arbitration will follow religious principles should not be enough.[99]

Rosenbaum made the cutting observation that "no matter the religion . . . religious principles are not arbitration procedures."[100] To say that the arbitration will take place under the auspices of a religion means nothing, especially when as here, the "Church could point to nothing that the court found would advise the Garcias of the arbitration rules and procedures (because there weren't any) or would rein in the Church's conduct of the arbitration (because no rules and procedures bound the Church)."[101] Without identifying a "form and procedure" for arbitration, the

[94] *Id.* at *9.

[95] *Id.* at *10.

[96] *Id.* at *12. Here, the Eleventh Circuit cites to both a Second Circuit and Eighth Circuit opinion addressing a similar issue in the case of NFL contracts. The applicability of this precedent will be explored in later sections.

[97] *Id.* at *13 (Rosenbaum, J., dissenting).

[98] *Id.* at *16.

[99] *Id.*

[100] *Id.* at *17 ("[S]aying an arbitration will be 'conducted in accordance with Scientology principles' is a lot like saying a football game will be played in accordance with Scientology principles . . . . What does that mean? . . . Religious principles are no more meaningful in identifying the form and procedure of arbitration than they are in establishing the form and procedure of a football game.").

[101] *Id.* at *18. It is also worth noting that the majority had to confront the *Spicer* case. In that case, the court found an arbitration agreement unenforceable because despite the clause referencing rules and procedures found in another document, the parties had failed to attach the procedures or incorporate the other document by reference. Spicer v. Tenet Fla. Physician Servs., LLC, 149 So. 3d 163 (Fla. Dist. Ct. App. 2014). Rosenbaum criticizes the majority for distinguishing *Spicer*; apparently an arbitration with set rules and procedures is not enforceable unless the contract explicitly incorporates them, but arbitration here was enforceable where rules "did not exist until the IJC made them up on the spot." *Garcia*, 2021 WL 5074465, at *18.

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arbitration agreement should have failed under Florida law, and Rosenbaum would not have sanctioned an "arbitrary and unfair proceeding."[102]

Notably, the Eleventh Circuit opted not to publish its opinion despite its length and sharp dissent. This has not stopped the Church from citing it in their subsequent attempts to compel arbitration, nor other courts from relying on and repeating a similar rationale for avoiding evidence of substantive unconscionability.

C. Bixler v. Superior Court*: An Unpopular and Unwieldy Solution*

The *Bixler* case arose out of circumstances related to the much-publicized rape trial of actor Danny Masterson.[103] Chrissie Carnell Bixler was among the women who came forward with accusations of rape against Masterson.[104] Collateral to the criminal trial, Bixler, along with four other plaintiffs, brought a civil action in 2019 in a California state court against Masterson and affiliates of the Church of Scientology.[105] The suit concerned alleged stalking, invasion of privacy, and intentional infliction of emotional distress, as well as acts taken to intimidate and silence the plaintiffs in response to their allegations against Masterson.[106]

Defendants presented a contract signed by Bixler containing the same arbitration agreement as in *Garcia*.[107] Leveraging their success in *Garcia*, the Church put the Free Exercise and Establishment Clauses at the forefront claiming "the religious nature of arbitration exempted it from certain standards which would apply to routine civil arbitrations."[108] The Church argued that it is permitted to "establish

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[102] *Id.* at *20.

[103] At the time of this writing, Masterson has been sentenced to "30 years to life in prison" for the rape of two women. *See* Andrew Limbong, *Actor Danny Masterson Sentenced to 30 Years to Life in Prison for Rape*, NPR (Sept. 7, 2023, 3:12 PM), [https://perma.cc/5AXH-H6ZR].

[104] Nancy Dillon, *Everything We Know About the Civil Suit Against Danny Masterson and the Church of Scientology*, THE ROLLING STONE (Nov. 1, 2021), https://www.rollingstone.com/culture/culture-news/what-we-know-danny-masterson-scientology-rape-civil-suit-1249704/ [https://perma.cc/ZNU4-7S9C].

[105] *See* Court Order re Motions to Compel at 2, Bixler v. Church of Scientology Int'l, No. 19STCV29458 (Cal. Ct. App. Dec. 30, 2020); First Amended Complaint for Damages at 1, Bixler v. Church of Scientology Int'l., No. 12STCV29458 (Cal. Ct. App. Dep't Feb. 28, 2020) (listing the Church of Scientology International, Religious Technology Center, Church of Scientology Celebrity Centre International, David Miscavige, Daniel Masterson, and Does 1-25 as defendants).

[106] First Amended Complaint for Damages, *supra* note 105, at 1.

[107] *See* Bixler v. Superior Court, No. B310559, 2022 Cal. App. Unpub. LEXIS 302, at *9–13 (Cal. Ct. App. Jan. 19, 2022). The language of contract is, in pertinent part, the same as that from the Garcia case.

[108] *Id.* at *15.

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its own rules governing its relationship with its members exempt from civil law" and that submitting to ecclesiastical arbitration was one such condition that the "[c]ourt may not interfere with."[109] The Church also buttressed its motion with a declaration from Lynn Farny, a corporate officer and ordained minister of Scientology.[110] Her declaration suggested that Scientology's religious belief is "interwoven with its justice principles," that justice within the Church has "exact procedures for resolving matters," and that church doctrine requires that "only specially qualified members of the Church . . . can adjudicate disputes concerning the proper interpretation and application of its religious laws."[111]

The trial court granted the motion to compel arbitration, reasoning that even though the suit sought damages only for actions that took place after plaintiffs had left the Church, "the plain words of the agreements encompassed all claims against Scientology and not merely those arising from the contracts."[112] On the issue of fairness, the trial court found such an analysis would be an "inquiry of faith" and was not permitted by the Free Exercise Clause and the religious abstention doctrine.[113]

The California Appeals Court reversed, holding that Bixler had a "constitutional right to leave a faith" and that enforcing these agreements would violate the "right to change religions."[114] The court found it problematic that the Church's contracts sought to bind the signatory to litigating any future claims against the Church or its members, "including torts of whatever kind," in a Scientology tribunal, run by Scientology members, and governed by Scientology law.[115] Stated narrowly, the Court held that "Scientology's written arbitration agreements are not enforceable against members who have left the faith, with respect to claims for subsequent non-religious, tortious acts."[116] Stated broadly, the Constitution forbids any religious entity to set the "price[] of joining its religion (or obtaining a single

[109] *Id.*

[110] *Id.* at *16.

[111] *Id.* at *16–17. At a later hearing on the issue, the Church argued that "the agreement to arbitrate survived termination of the agreement itself, stating, 'this is a pledge for as long as you might have claims against the Church to arbitrate your issues against the Church.'" *Id.* at *21–22.

[112] *Id.* at *23–24.

[113] *Id.* at *24.

[114] *Id.* at *25–26.

[115] *Id.* at *29.

[116] *Id.* While the Court of Appeal does also address the issues of religious abstention and hostility toward religion, it ultimately concludes that neither is implicated here and neither issue enters substantively into their holding. *Id.* at *30–38.

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religious service) [to be] eternal submission to a religious forum."[117] While this seems a bright line rule, is does not address the thorny questions that emerge: who decides when someone has "left the faith" and what standards should apply to acts taken before such a leaving?

D. Baxter *and* Haney*:* Garcia *Redux*

Since *Garcia*, two curious cases have arisen and a trend has emerged regarding treatment of an unconscionability defense. The courts continue to easily find procedural unconscionability but decline to investigate substantive unconscionability, echoing the First Amendment reasoning of *Garcia*.[118] Highly concerning is the lack of attention paid to the procedural facts, which through the lens of unconscionability looks progressively worse, and a disregard for any substantive unconscionability arguments, no matter how they are framed, despite plaintiffs bringing increasingly varied arguments more attenuated from church doctrine or religious entanglement. The worrisome result is that future courts will conclude that even with immense amounts of procedural unconscionability, no secular arguments as to substantive unconscionability can be considered, leaving this contract defense ever just out of reach for these plaintiffs.

1. *Baxter v. Miscavige*

Gawain Baxter was raised in Scientology, being placed in a Church nursery at two-months old.[119] At six, he allegedly signed a "contract pledging to serve [the Church] for one-billion years."[120] He did not attend public or private school, but rather received his education through Scientology, including indoctrination courses.[121] In his middle teenage years, he was transported from Florida to Curacao and forced to provide free labor and services aboard a Church-owned ship, the Freewinds, working between sixteen and twenty-four hours a day.[122] He also claimed he was physically beaten, forced to work in dangerous conditions without safety

[117] *Id.* at *40.

[118] *See* Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465, at *9 (11th Cir. Nov. 2, 2021).

[119] First Amended Complaint at 51, Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *51 (M.D. Fla. Mar. 31, 2023).

[120] *Id.*

[121] *Id.* at *52–53.

[122] *Id.* at *55–57.

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equipment, and at one point was exposed to asbestos without a mask and was not permitted to seek medical care.[123]

Gawain attempted to leave the ship and the religion.[124] After overcoming several obstacles, he and his wife were permitted to leave, but they were compelled to sign a series of documents while being videotaped, were not permitted a copy of the documents, were not given an opportunity to examine the documents or seek assistance in understanding the documents, and were led to believe that failure to sign the documents would lead to "punitive ethics handlings" and denial of "their travel and identity documents."[125] After leaving, the Baxters claim they were subject to harassment, which intensified after they filed the complaint against the Church.[126]

The Church moved to compel arbitration, citing the same capacious language as that referenced in *Bixler*.[127] While substantively, these facts are incredibly different from *Garcia* and one would expect a different unconscionability analysis, the Church convinced the court to follow and expand on the path that *Garcia* blazed.[128] Baxter presented four separate arguments challenging the validity of the arbitration clause: "(1) the arbitration agreements are unconscionable and not enforceable by third parties;[129] (2) the arbitration provisions amount to an unlawful prospective waiver of substantive rights; (3) forcing Plaintiffs to participate in an ecclesiastical dispute resolution process when they no longer believe in Scientology would violate their First Amendment rights; and (4) the agreements were never formed due to duress, fraud, and lack of mutual assent."[130] The court, looking to *Garcia*, found the first three issues already answered and invoked First Amendment

[123] *Id.* at *60–61. For a description of the facts relating to Laura Baxter's upbringing and similar experiences, *see id.* at *63–69.

[124] *Id.* at *70–73.

[125] *Id.* at *72.

[126] *Id.* at *74–78.

[127] Defendant Church of Scientology Flag Ship Serv. Org., Inc.'s Motion to Compel Arbitration, or in the Alternative, to Dismiss the Complaint at 5, Baxter v. Miscavige, 2023 U.S. Dist. LEXIS 56913 (Aug. 08, 2022) (No. 8-22-cv-986-TPB-JSS); *see supra* note 105 and accompanying text.

[128] Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *18 (M.D. Fla. Mar. 31, 2023); *see* Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 U.S. App. LEXIS 32601, at *3–9 (11th Cir. Nov. 2, 2021).

[129] This is in reference to defendants who were not party to the contracts, that is other named entities within the Scientology umbrella. This argument does not help plaintiffs, ultimately, as the court notes "the agreements reflect an intent to arbitrate disputes and claims against the Church and its related entities and individuals." *Baxter*, 2023 U.S. Dist. LEXIS 56913, at *8 n.4.

[130] *Id.* at *8.

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concerns.[131] On the issue of duress and fraud, the Court recognized this as untrodden territory and requested supplemental briefing on whether this delegation issue was for the court or the arbitrator.[132] The court found that because "no factual allegations [were] specific to the arbitration provisions themselves," the claims must be decided by the arbitrator.[133]

After the motion to compel was granted, Plaintiffs were granted an interlocutory appeal to settle two questions: (1) whether Plaintiffs' fraud in the execution and duress challenges to the arbitration agreements must be heard by a Scientology arbitrator, rather than the district court; and (2) whether forcing Plaintiffs to participate in a Scientology religious arbitration violates their First Amendment right to leave their religion.[134] Notably, the district court admitted that these issues were difficult and seemed quite eager to have the circuit review.[135] However, the Eleventh Circuit declined to exercise jurisdiction over the interlocutory appeal.[136]

[131] *Id.* at *9, *11–14.

[132] *Id.* at *16–17.

[133] *Id.* For a discussion of the importance and ramifications of failing to challenge the arbitration provision directly, see *infra* Part III.A.

[134] Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 99401, at *7 (M.D. Fla. June 7, 2023).

[135] *Id.* at *8 ("The Court emphasizes that it did not come to its decision to compel arbitration lightly or easily, and the controlling legal issues present difficult questions that have not been squarely addressed by the Eleventh Circuit or United States Supreme Court. There is certainly room for disagreement, even if the Court ultimately found Defendants to have the stronger position.").

[136] *See* Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 99401 (M.D. Fla. Oct. 3, 2024) (Dkt. No. 201). Relatedly, the District Court also declined a request for reconsideration based on an intervening change in controlling law. *See* Baxter v. Miscavige, No. 8:22-CV-986-TPB-JSS, 2024 WL 3597120, at *2 (M.D. Fla. July 31, 2024). Plaintiffs argued that the Supreme Court of the United States' holding in *Coinbase v. Suski* was an intervening change in controlling law that justified reconsideration of the order compelling arbitration. *Id.* at *2 (citing Coinbase, Inc. v. Suski, 602 U.S. 143 (2024)). While Coinbase might be read abstractly as a small step toward returning more oversight over arbitration agreements to the courts, the *Baxter* court distinguished it, recognizing that Coinbase dealt with a unique situation where the parties had entered two separate agreements, one with an arbitration clause and one without. *Id.* Rather, Baxter understood Coinbase to leave in place the legal standards of *Buckeye* and *Prima Paint* which had been at issue in the prior order resolved in favor of arbitration. *Id.* ("[T]he Supreme Court reiterated that '[i]n cases where parties have agreed to only one contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration.'").

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2. *Haney v. Church of Scientology*

At the time of this writing, another relevant case is winding its way through the legal system.[137] Valerie Haney has been involved in a long-running legal dispute with the Church of Scientology, often capturing the attention of celebrity news sources.[138] According to her complaint, Haney was "born into Scientology in 1979 to Scientologist parents" and spent much of her childhood living at a Scientology facility in Florida.[139] As a young child, she was a member of "Cadet Org" which she describes similarly to a boot camp, and at ten years old she was subject to "bullbaiting," which involved shockingly abusive treatment.[140] She goes on to describe how as a teenager she continued to live at Church facilities, was forced to work for almost no pay, and eventually became an assistant to the Miscavige family.[141] Due to domestic disputes in the Miscavige family, Haney was subject to a month's long confinement until she was eventually released to work on a filming set where the Church produced promotional videos.[142] In November 2016, Haney escaped the compound by hiding in the trunk of an actor's car leaving the base.[143]

In 2019, Haney sued for abusive treatment that occurred after her disassociation.[144] The Church moved to compel arbitration, again relying on a bevy

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[137] Doe v. Church of Scientology Int'l, No. 19STCV21210, 2021 Cal. Super. LEXIS 2553, at *1 (Jan. 14, 2021).

[138] Tony Ortega, *She Escaped Scientology in the Trunk of Her Car. Her Nightmare is Far from Over*, ROLLING STONE (Mar. 27, 2023), https://www.rollingstone.com/culture/culture-features/valerie-haney-scientology-escape-car-trunk-religious-arbitration-david-miscavige-tom-cruise-elisabeth-moss-1234703982/ [perma.cc/7V5L-FGDX].

[139] *See* Complaint for Damages at 24, Doe v. Church of Scientology Int'l, No. 19STCV21210, 2021 Cal. Super. LEXIS 2553 (Jan. 14, 2021).

[140] *Id.* at *24–26 (describing the process of bullbaiting by explaining that "during this process, adults would say vulgar and sexually explicit things to children and punish them if they showed any visible reaction. Specifically, Plaintiff was forced, at the age of 10-years-old, to sit in a chair while adults screamed things in her face such as "I am going fuck you and then your mother," and "[y]ou are going to suck my dick.").

[141] *Id.* at *28–29; *see also* Ortega, *supra* note 138 (describing the role of David Miscavige in the Church of Scientology).

[142] *Id.* at *30–31.

[143] *Id.* at *31.

[144] *See generally* First Amended Complaint, Doe v. Church of Scientology Int'l, No. 19STCV21210, 2021 Cal. Super. LEXIS 2553 (Jan. 14, 2021). Plaintiff's first amended complaint lists "ten causes of action against Defendants: (1) intentional misrepresentation, (2) concealment, (3) false promise, (4) false imprisonment, (5) kidnapping, (6) stalking in violation of California Civil Code § 1708.7, (7) libel in

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of signed documents and declarations from Scientology officials.[145] Haney raised the issue of unconscionability, arguing that the arbitration agreement's broad scope rendered it substantively unconscionable and that the "undue influence, duress and/or coercion" she was subject to made it procedurally unconscionable.[146]

The Court found that while broad, the arbitration clauses were not substantively unconscionable because "they are intended to . . . protect the religious doctrines of the Defendants and for them to be able to address challenges to their practices within religious, rather than secular legal structures."[147] On the issue of procedural unconscionability, Haney submitted her own declarations, relating her upbringing in the Church, that she believed she "only had rights that were afforded to [her] by Scientology" and that she was "brainwashed" and did not understand her rights under the contracts.[148] She also described the pressure placed on her to sign the contracts by the Church and its officials.[149] However, the court refused to find any ground for invalidating the agreement, instead finding that while the contracts were contracts of adhesion, the "take-it-or-leave-it" nature of them was not enough to support a finding of procedural unconscionability.[150] On the issues of brainwashing and coercion, the court punted, characterizing them as a "dispute over the Scientology practices that are part of its religious doctrine . . . [which] are substantive questions that go to the

violation of California Civil Code § 45, (8) slander in violation of California Civil Code § 46, (9) constructive invasion of privacy in violation of California Civil Code § 1708.8, (10) intentional infliction of emotional distress." *Doe*, 2021 Cal. Super. LEXIS 2553 at *2.

[145] *See* Petition for Writ of Certiorari apps. 13–17, Haney v. Church of Scientology Int'l, No. 20-1647, 2020 Cal. Super. LEXIS 1839 (Jan. 9, 2020). The relevant language in these documents that the court relates appear to be identical to that at issue in *Garcia*. *See supra* notes 81–89 and accompanying text.

[146] Petition for Writ of Certiorari, *supra* note 145 at app. 19. Haney relied on *In re* Jiffy Lube Int'l, Inc. 847 F. Supp. 2d 1253, 1262–63 (S.D. Cal. 2012) to support the contention that an overly broad arbitration clause is definitionally unconscionable.

[147] Petition for Writ of Certiorari, *supra* note 145 at app. 20.

[148] *Id.* at app. 21.

[149] *Id.*

[150] *Id.* at app. 24–25.

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merits of Plaintiffs claims that should be resolved by the arbitrator."[151] Haney petitioned the Supreme Court for certiorari but was denied.[152]

III: "INVENTION, IT MUST BE HUMBLY ADMITTED, DOES NOT CONSIST IN CREATING OUT OF VOID, BUT OUT OF CHAOS": A COMBINATION OF DISCORDANT PRECEDENTS

The above cases demonstrate how the Church reacted quickly to court decisions, from their first court-compelled arbitration against *Garcia* to current litigation. *Garcia* gave the Church a generous chance to design its arbitration procedures and revealed the First Amendment arguments the Church could expect to see in the future.[153] But most importantly, it allowed them to argue that, when confronted with an unconscionability challenge, (1) courts are constitutionally barred from looking into the substantive unconscionability of their arbitration, and (2) that any level of procedural unconscionability alone is not sufficient to vitiate an arbitration agreement.[154] The combination of Garcia's relative sophistication as a contracting party and his lone substantive argument, suggesting the court look into the doctrine of "suppressive persons," created a difficult obstacle for subsequent litigants. Indeed, despite its unpublished status, courts and scholars seem to assume the same two propositions.[155]

Both *Haney* and *Baxter*, despite radically different narratives about how they came to sign these agreements and broader substantive unconscionability arguments, seem stuck in the rut that *Garcia* created.[156] In the opposite extreme, the *Bixler* court,

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[151] *Id.* at app. 25; *see also* Henry Schein, Inc. v. Archer & White Sales, Inc., 586 U.S. 63, 66 (2019) (evaluating a clause that delegated all matters to the arbitrator except for "actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property"). The Church also made an argument under the ministerial exception, but this was largely ignored by the Court. Petition for Writ of Certiorari, *supra* note 145 at apps. 25–26. Haney also moved for reconsideration on the issue of arbitration, but that petition was denied. *Id.* at app. 36.

[152] Haney v. Superior Court, 2020 Cal. LEXIS 8400 (Cal., Dec. 9, 2020), *cert. denied*, 2021 U.S. LEXIS 3932.

[153] *See* discussion *supra* Part II.B.

[154] *See generally id.*

[155] *See* Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 Y.B. ON ARB. & MEDIATION 45, 57 (2016) ("Because the court could not (and should not) become entangled in the religious doctrines, rules and procedures of the Church of Scientology, the court could make no ruling on whether the Church of Scientology's procedures are substantively unconscionable."); *see supra* notes 116, 133 and accompanying text.

[156] *See generally* Petition for Writ of Certiorari, *supra* note 145 at app. 7–26; Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913 (M.D. Fla. Mar. 31, 2023); Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465 (11th Cir. Nov. 2, 2021).

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perhaps also assuming the difficulties of ruling on unconscionability grounds, decided to forego it entirely and only briefly discuss substantive 'fairness' as something they cannot investigate before turning to the right to leave a religion for a holding.[157]

The following sections look at several aspects of the Church's arbitration agreements and procedures to explore the arguments that plaintiffs ought to be making when bringing their unconscionability challenge, arguing that courts ought to be receptive to them. While each aspect is theoretically justifiable in the abstract or in other contracting contexts, the manner and circumstances in which the Church has been entering into and enforcing these agreements strips these aspects of their justification. When informed by each other, the adhesive nature of the contracts, the malleable process of arbitration, the partiality inherent in the agreement and arbitrators, and the shockingly broad scope of the agreement create an arbitration clause that lacks true precedential support and ought not to be enforced by courts.

A. Contracts of Adhesion and Procedural Unconscionability

Standard form contracts are regularly used and enforced in the secular consumer context. Unconscionability is commonly understood to be a potential—but relatively unsuccessful—defense to such contracts.[158] Keeping in mind the classic purpose of the unconscionability doctrine, preventing the "two evils [of] *oppression* and *unfair surprise*," procedural unconscionability is meant to inquire into that unfair surprise.[159] While state courts vary in the specific factors they consider, generally courts will inquire into "inequality of bargaining power," "lack of meaningful choice" in contracts "offered on a take it or leave it basis," whether "freedom of contract is exploited by a stronger party," whether one party took advantage of a "party's ignorance, feebleness, lack of sophistication . . . or general naivete," and perhaps whether the parties acted in good faith.[160]

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[157] *See* Ruling on Motions to Compel Arbitration at 12, Bixler v. Church of Scientology Int'l, No. 19STCV29458, 2024 Cal. Super. LEXIS 46446 (Feb. 13, 2024) ("The Court here cannot review the arbitration agreements for unconscionability without stepping into a mire of religious doctrine—whether the rules of Scientology are fair as applied to Plaintiffs would require the Court to delve into the doctrines of Scientology. The First Amendment Free Exercise Clause prevents the Court from engaging in that inquiry.").

[158] *But see* Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 967 (2019) (characterizing the doctrine as flourishing, "in stark contrast to the conventional wisdom"). Russell points to several recent cases in which courts have been willing to invoke the doctrine to the benefit of consumers, typically in a consumer credit, payday loan, or mortgage situation. *Id.* at 1020–26.

[159] 7 JAMES M. PERILLO, CORBIN ON CONTRACTS § 29.4 (2024).

[160] *Id.*

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Professor Jacob Russell has written recently on the proper application and effectiveness of the doctrine.[161] He suggests that unconscionability analysis should be "tailored" in certain conditions.[162] While Russel theorizes about consumer contracts, the discussion helps to draw out the purpose for the doctrine as it has been developed in the market of consumer contracting and highlights how adhesive contracting is ill-fit for the religious context.

In addressing procedural unconscionability, Russell notes that while most courts claim to tailor their procedural analysis, they do not often do so effectively.[163] Rather, they always "begin with some pabulum about how the contract was one of adhesion, offered to the consumer without room to bargain or negotiate."[164] Russell suggests this characterization is "as obligatory to courts as it is irrelevant to the analysis."[165] While courts will often relate a description of the contracting party, leaning heavily into traits that would suggest unsophistication and inequality of bargaining power ("lack of college degree, medical ailments, family issues"), to suggest that there was an imbalance in bargaining power, the fact remains that these standard form contracts are signed by masses of similarly situated consumers, nobody reads them, and courts end up enforcing them as written.[166] Underlying this is an assumption that "the market serves the function of bargaining the terms of the contract, and in a manner that is likely far more effective and efficient" than could be done by individual consumers.[167] In the secular context, this simply readies the stage for an exploration of the substantive terms: the true battleground of unconscionability. However, when the substantive exploration is off-limits, as in the religious context, courts need to rethink how they are approaching the balance between the two arms of unconscionability.

This Article does not attempt to engage in the debate whether consumer contracts of adhesion generally should be susceptible to unconscionability attacks. Rather, it suggests that what might be rote recitation or pabulum in the context of a cell phone contract, is anything but in the context of a religious contract. We have left behind the thick markets of credit cards and home insurance and are dealing with

[161] *See* Russell, *supra* note 158.

[162] *Id.* at 1008.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.* at 1008–09.

[167] *Id.* at 1008.

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an agreement between an individual and his church.[168] And while a church might decide to produce preprinted forms to use and create a situation superficially akin to those in cases with precedential unconscionability analyses, courts should be careful not to slip into the same presumptions about procedural fairness. Russell suggests that "[c]ourts should focus on the market in which the contract is signed" when addressing procedural unconscionability.[169] He believes that whether a market is "segmented" or not should guide the analysis; that is, if the class of consumers is large, competitive, and homogenous, it makes more sense to assume the market and class action lawsuits function to police the terms.[170] If the market is more segmented, "there is more need for tailoring the analysis to the individual facts."[171]

The disputes over these Scientology contracts arise in situations that are "highly segmented" and outside the reach of the many market forces we expect to temper contracts of adhesion. The number of practicing Scientologists is hard to determine, but it's doubtful that enough exists to create the kind of thick, policing market for those routine court presuppositions about adhesive contract to apply.[172] We are here dealing with a religious entity for which there is no alternative (though, arguably, one could think about religions "competing" for adherents, in some sense) in the way that one might easily buy a Ford if contracts with Chevy are unfavorable, or contract with AT&T instead of Verizon for the same reason. That lack of direct competition and a highly segmented group of 'consumers' relieves the Church of many of the pressures that would otherwise force it to restrain its contracting, which heightens the need for a more individualized and searching review by the courts.

The courts in both *Baxter* and *Haney* seemed reluctant to engage in a particularized analysis of procedural unconscionability, following the holding in

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[168] *See* Broyde, *supra* note 26 (discussing the purpose and value underlying religious arbitration in America); Michael A. Helfand, *'The Peculiar Genius of Private-Law Systems': Making Room for Religious Commerce*, 97 WASH. U. L. REV. 1787 (2020) (describing the unique position that religious contracting and arbitration occupies in our society, and the problems courts face in finding proper tools to regulate such contracts).

[169] Russell, *supra* note 158, at 1010.

[170] *Id.*

[171] *Id.*

[172] *See* Barry A. Kosmin et al., *American Religious Identification Survey 2001*, THE GRADUATE CTR., https://commons.trincoll.edu/aris/files/2013/11/ARIS-2001-report-complete.pdf [https://perma.cc/YS9S-T2WU] (estimating the number of Scientologists in the United States in 2001 to be 55,000); *So How Big is the Church of Scientology Really?*, LEAVING SCIENTOLOGY (Mar. 27, 2010), https://leavingscientology.wordpress.com/2010/03/27/so-how-big-is-the-church-of-scientology-really/ [https://perma.cc/RM5U-A9W4] (estimating the number of scientologists in the United States in 2010 to be no more than 40,000).

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Garcia.[173] While the Eleventh Circuit expressed approval of the language in the Scientology arbitration agreement in *Garcia*,[174] the plaintiffs in *Baxter* and *Haney* were starkly different from the Garcias. Applying Russell's notion of tailoring, because these plaintiffs were highly individualized, the courts should not have focused on the clause itself and so readily accepted *Garcia* as determinative. Rather, the procedural unconscionability analysis as applied to Garcia, an individually wealthy and voluntary member of the church, should not have any bearing on the analysis as applied to Baxter or Haney, both of whom were young and financially and psychologically dependent on the Church when they signed their respective agreements.

A second concern is the form and specificity of a challenge to the arbitration agreement. Procedural unconscionability, when it rises to a certain pitch, begins to sound as undue influence or duress: a dominant party, using its psychological advantage or position of trust and confidence to foist an unfair agreement onto the subservient party[175] or a party employing wrongful or threatening conduct to "overcome the free will of a party."[176] Considering the alleged circumstances of *Baxter* and *Haney*, the facts seem to support such defenses and indeed, *Baxter* clearly raised such a defense, but the court failed to rule on it.[177] This raises the nuanced process required by Supreme Court precedent when challenging arbitration agreements: if a contract contains a delegation provision, challenges to contract enforcement generally will be shunted to the arbitrator, while a challenge *to the delegation clause* directly will go to the court.[178] This seems to be the case for unconscionability, duress, fraud, and other contract defenses; thus, parties need to be clear that they are challenging the delegation clause as invalid under one of these theories. Confusingly, the *Baxter* court engaged in an analysis of unconscionability but offered a tortured conclusion that issues of fraud and duress would go to the Church's arbitration for a decision.[179] These circumstances illustrate that, on a

[173] *See* Petition for Writ of Certiorari, *supra* note 145 at apps. 24–26; Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *18–19 (M.D. Fla. Mar. 31, 2023); Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465, at *7 (11th Cir. Nov. 2, 2021).

[174] Garcia v. Church of Scientology Flag Serv. Org., No. 18-13452, 2021 WL 5074465, at *7 (11th Cir. Nov. 2, 2021).

[175] *See* PERILLO, *supra* note 159, § 28.10.

[176] *Id.* § 28.2.

[177] *See supra* note 134.

[178] *See supra* Section I.

[179] Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 99401 at *9 (M.D. Fla. June 7, 2023).

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practical level, plaintiffs' attorneys need to be pleading their contract defenses carefully or risk having unconscionability, undue influence, duress, and fraud determined by the very tribunal they are arguing, legally or equitably, they ought not be before under the doctrine.

Secondly, and perhaps most importantly, religious arbitration presents circumstances when the justification for delegation of contract defenses to an arbitral body breaks down. *Rent-a-Center, W., Inc. v. Jackson* represented a high point regarding the trust courts place in arbitral tribunals' ability to rule on their own jurisdiction: in response to an unconscionability challenge to a contract, the court decided that unless the plaintiff "challenged the delegation provision specifically, we must treat it as valid . . . and must enforce it . . . leaving any challenge to the validity of the Agreement as a whole for the arbitrator."[180] However, Justice Scalia's comments during oral argument reveal that he had an assumption about the back-end challenge available to plaintiffs that justified such a holding.[181] Scalia, a notable proponent of enforcing arbitration agreements, believed that an arbitrator would be bound to follow state law in determining the unconscionability question and a failure to do so would give a court the basis on which to review and set aside the decision made in arbitration.[182] However, what we see in *Garcia* is that courts are *not willing* to conduct such review ex-post in the case of religious arbitration, feeling bound by

[180] Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 72 (2010).

[181] *See* Transcript of Oral Argument at 9–10, Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) (No. 09-497) ("JUSTICE SCALIA: I don't agree with that. I mean, if—if the argument is made—I gather it wasn't made here, but if the argument is made that this agreement was not voluntary, and the evidence of that involuntariness is how outrageously unfair it is—now, I'm not sure that that's enough evidence. You may need some other stuff as well to—to persuade a court. But if that is the argument, that the one-sidedness is evidence that the agreement was not voluntary, I don't see how that's for the arbitrator."); *see also id.* at 29–31 ("JUSTICE SCALIA: Is that—is that right? Is the arbitrator free to decide unconscionability in a vacuum without taking into account State law at all? And doesn't he get reviewed afterwards by the State court on the basis of a much more lenient standard than—than if the court decided it de novo. But can he really disregard State law regarding unconscionability? MR. SILVERBERG: Well, the problem is, Your Honor, and if I understand Your Honor's question correctly, that determination must of course be made by the court, because the arbitrator doesn't have any authority to do anything until the requirements of section 2 are met. And I hope I'm understanding Your Honor's question. JUSTICE SCALIA: No—I mean, you—I thought you were saying that if we allow this to go to the arbitrator, the arbitrator can simply disregard the question of unconscionability. MR. SILVERBERG: That—in essence, yes. JUSTICE SCALIA: And that's not my understanding. My understanding is that he's—he is obliged to take account of State law regarding unconscionability, but it's going to be his call, as it would be the district judge's call if this had gone to court, whether in fact this is unconscionable. Afterwards, there will be court review. And if he has totally disregarded all State law regarding unconscionability, wouldn't—wouldn't you have a basis to set aside the—the arbitration?").

[182] *See id.* at 30.

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First Amendment prohibitions on second-guessing the religious tribunal.[183] Thus, if the tribunal's reasoning and decision on contract defenses disappear into a black box of religious arbitration, and the court cannot conduct meaningful review, the logic underlying *Rent-a-Center*'s holding—that arbitration can be a proper forum for determining such contract defense—is undermined.[184]

In sum, contracts of adhesion are necessary in the modern consumer landscape and so courts have constructed a framework for enforcing them despite their obvious shortcomings with respect to consent and bargaining. However, courts should be aware, and parties ought to bring to their attention, that such contracts are only defensible because of checks in the system like market forces and class actions. Moreover, the limits of permissible court review on religious arbitral decisions raises doubts about whether issues of contract defenses should be delegated as liberally as they are in secular contexts. Thus, contracts of adhesion that call for religious arbitration will typically lack both the checks of market forces, litigation, and court review.[185] Without such safeguards, religious adherents have none of the protections that secular consumers have in similar circumstances. This raises serious doubts as to whether doctrines that give deference to contracts of adhesion and an arbitral tribunal's ability to rule on its own legitimacy should apply in the religious context.

B. Concealed Rules and Illusory Process

Arbitration necessarily has some set of rules and procedures; whether those rules and procedures exist at the time of contracting is not always clear. The *Garcia* dissent highlights the issue of whether standing arbitration rules and procedures are necessary to find an arbitration clause enforceable.[186] Obviously, the Eleventh Circuit in its unpublished opinion answered that question with a no.[187] However, win or lose, when the sufficiency of a tribunal's rules and procedures are put at issue, the party attempting to enforce their arbitration agreement surely leaves litigation with a powerful incentive to draft and formalize future arbitration procedures differently, thus avoiding the issue on the next go-round. A good faith effort to draft an enforceable arbitration procedure would be the lesson for any party engaged in

[183] *See supra* Section II.

[184] *See Rent-A-Center*, 561 U.S. at 70.

[185] Dasteel, *supra* note 155, at 46.

[186] Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465 at *20 (11th Cir. 2021) (Rosenbaum, J., dissenting).

[187] *Id.* at *6, *7.

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secular arbitration. One scholar suggests this would be the lesson for parties contracting for religious arbitration as well.[188] Not so for the Church of Scientology.

The novelty of a tribunal is distinct from whether that tribunal has formalized rules and procedures. As a general principle, a particular form of arbitration is not (and probably should not be) disfavored simply because it is new. In *Garcia*, when looking to see whether rules for arbitration existed, "the district court concluded, there were no such things, and the Church had never once conducted an arbitration."[189] Courts ought to be even-handed with newer arbitral bodies and enforce arbitration agreements the same, even if the entity has not yet conducted an arbitration. Yet such a standard would still require fledging tribunals to be transparent in their procedures.

This issue arose in the context of Indian payday loan agreements. Various circuits have dealt recently with the issue of "Tribal Lenders extend[ing] low-dollar, high-interest loans that must be repaid on a short timeline."[190] One such agreement contained a clause requiring "arbitration conducted by a representative of the Cheyenne River Sioux Tribe."[191] When the Eleventh Circuit analyzed this agreement, it described the district court findings that "the Tribe did not select or approve arbitrators, that there were no tribal consumer dispute rules, and that there were no procedures for conducting arbitrations under the auspices of the Tribe."[192] The Eleventh Circuit did not permit some sort of arbitration to go forward and allow the forum to make up rules on the fly, as was the case in *Garcia*.[193] The various Circuit opinions to address this particular clause have reached the same conclusion, finding that an illusory arbitral forum renders the clause unenforceable.[194]

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[188] *See* Helfand, *supra* note 168 and accompanying text.

[189] *Garcia*, 2021 WL 5074465 at *16.

[190] Hengle v. Treppa, 19 F.4th 324, 332 (4th Cir. 2021). *See also* Gingras v. Think Fin., Inc., 922 F.3d 112 (2d Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 239 (3d Cir. 2020); Swiger v. Rosette, 989 F.3d 501 (6th Cir. 2021).

[191] MacDonald v. CashCall, Inc., 883 F.3d 220, 223 (3d Cir. 2018); *see also* Inetianbor v. CashCall, Inc., 768 F.3d 1346, 1348 (11th Cir. 2014).

[192] *Inetianbor*, 768 F.3d at 1356.

[193] *Id.* at 1354.

[194] *See Williams*, 965 F.3d at 238 n.8 (3d Cir. 2020) ("[W]e held that contract was unenforceable because the arbitral forum there was illusory . . . ."); Jackson v. Payday Fin., LLC, 764 F.3d 765, 770 (7th Cir. 2014) ("[T]he promise of a meaningful and fairly conducted arbitration [wa]s a sham and an illusion."); *Inetianbor*, 768 F.3d at 1356 (Restani, J., concurring) ("[T]he record before us would compel any factfinder to reach the same result . . . that the forum selection provision was a 'sham and an illusion'.") (quoting *Jackson*, 764 F.3d at 770).

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Similarly, in *Hooters of America, Inc. v. Phillips*,[195] the Fourth Circuit confronted a lack of arbitration rules and procedures in a purely secular context. Phillips, a bartender, threatened a sexual harassment suit against her employer, Hooters, who then filed suit to compel her to arbitrate.[196] Phillips had signed an arbitration agreement in 1994, but was never given a copy of the rules and procedures of arbitration to review.[197] Rather, Hooters instituted a set of rules for its arbitration in 1996 described by the court as "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding."[198] The Circuit decided that promulgation of such a biased set of arbitration rules was itself a breach of the arbitration agreement and a violation of the duty of good faith and fair dealing.[199] Arguably, such principles ought to apply *a fortiori* when rules simply do not exist or are intentionally kept secret from the counterparty or court, as in *Garcia*;[200] this was not the case.

A charitable reading of the Eleventh Circuit's *Garcia* majority is that they acted out of caution for First Amendment principles and were, at that point, dealing with an arbitration that had already taken place; it is difficult to hold that the arbitral forum is a complete sham when the proceeding has already happened.[201] However, Rosenbaum's dissent undermines the use of First Amendment grounds for such action.[202] It seems quite easy to inquire whether arbitration rules and procedures exist without nearing any entanglement issues: either they exist, or they do not. This is an entirely distinct question from 'did the Church arbitration properly execute its rules?' or 'does Church doctrine require arbitrators to treat certain persons with partiality?'– both of which might require an inquiry into Church doctrine and at that point may run afoul of *Milivojevich* and related First Amendment doctrines.[203] The Indian

[195] 173 F.3d 933 (4th Cir. 1999).

[196] *Id.* at 935.

[197] *Id.* at 936.

[198] *Id.* at 938.

[199] *Id.* at 940.

[200] *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *3 (11th Cir. Nov. 2, 2021).

[201] The Garcias, procedurally, had already completed arbitration and were challenging both the order compelling arbitration and the order denying vacatur of the arbitral award. *See Garcia*, 2021 WL 5074465 at *3, *9, *11. Further, the Eleventh Circuit cites to both a Second Circuit and an Eighth Circuit opinion addressing a similar issue in the case of NFL contracts. *See id.* at *12.

[202] *Id.* at *17 (Rosenbaum, J., dissenting).

[203] *See generally* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

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payday cases suggest that pointing to the void where rules and procedures *ought to be* can be enough to avoid enforcement, or at least provide a degree of substantive unconscionability in the arbitration agreement.[204]

Additionally, it seems problematic to give religion a pretextual excuse for not having formally defined rules and procedures, especially when the actual process is under challenge. In the trial court's account of the Scientology arbitration, the ICJ, an officer and agent of the defendant Church, had the ability to speak with the arbitrators *ex parte* and was able to invoke an idiosyncratic rule of evidence, "entheta," by which he had discretion to exclude evidence.[205] In the subsequent cases, rather than formalize and publicize procedures to give credibility to their arbitration process, the Church doubled down on the secrecy, relying instead on attestations by Church members like Farny to suggest the process is so intertwined with religious doctrine that courts cannot consider it anyway.[206] Again, without asking the court to evaluate the contents or quality of the Church's rules and procedures, plaintiffs ought to be able to argue that keeping those rules and procedures secret or failing to provide them at the time of contracting can function as breach of contract or bad faith, as well as color the court's unconscionability analysis.

Professor Michael Helfand has written on the value of religious arbitration in our secular legal landscape.[207] He suggests that the success of religious arbitration agreements has come about by secularizing language and giving courts more, rather than less, to work with so that secular enforcement structures like the FAA can take effect.[208] He argues that Supreme Court decisions place an incentive on private law parties to draft their agreements in a manner that permits enforcement.[209] While this

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[204] *See, e.g.*, Hengle v. Treppa, 19 F.4th 324, 332 (4th Cir. 2021); Gingras v. Think Fin., Inc., 922 F.3d 112 (2d Cir. 2019); Williams v. Medley Opportunity Fund II, LP, 965 F.3d 229, 239 (3d Cir. 2020); Swiger v. Rosette, 989 F.3d 501 (6th Cir. 2021).

[205] *Garcia*, 2021 WL 5074465 at *3.

[206] *See* Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302, *16–17 (Cal. Ct. App. Jan. 19, 2022). At a later hearing on the issue, the Church argued that "the agreement to arbitrate survived termination of the agreement itself, stating, 'this is a pledge for as long as you might have claims against the Church to arbitrate your issues against the Church.'" *Id.* at *21–22.

[207] Michael A. Helfand, *Church, State, and Jewish Education*, 18 FORTY (Feb. 14, 2023), https://18forty.org/podcast/michael-a-helfand-church-state-and-jewish-education/ [https://perma.cc/6GKS-KWQH].

[208] *See* Helfand, *supra* note 168.

[209] "At its core, this approach encourages parties to draft private law agreements using secular terminology, thereby allowing courts to resolve disputes implicating such agreements without threatening Establishment Clause principles." *Id.* at 1790.

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might be true for most religious entities desirous of an outward impression of compliance with secular norms, this is clearly not the path Scientology has struck. Rather, the Church injects as much religiosity as possible into their agreements and declarations to shield them from court review.[210]

While not alone a strong argument, plaintiffs should still be able to raise the issue of an illusory or mercurial arbitration process as a part of their defense to enforcement. The Scientology arbitration process has at this point adjudicated multiple disputes, so to say it does not exist would be false.[211] But if the Church insists on maintaining opaque rules or denying parties a chance to read and review arbitration rules prior to enforcement, this should enter the equation when evaluating unconscionability. While some of this clearly goes to procedure, plaintiffs should argue that a clause that binds them to arbitrate in a forum with unrevealed rules and procedures, subject to change at the discretion of the Church after signing, is a material degree of substantive unconscionability.

C. Unjustifiable Partiality in the Selection of Arbitrators

Parties are free to choose arbitrators in a variety of manners, according to their contract. Often, in cases where parties agree to arbitrate under the AAA or another third-party organization, the rules of that entity will supply a selection process if the parties fail to stipulate or adhere to a process in their contract.[212] For instance, the AAA Commercial Rules state that if parties "have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed" in a manner set up in the rules.[213] This process involves the AAA supplying a list of possible arbitrators, parties given the chance to strike some names, and if the parties fail even then to mutually agree to a name, the AAA will step in and choose.[214]

Courts recognize that the selection of arbitrators, especially when in the hands of the more powerful drafting party, can evidence substantive unconscionability and provide grounds for not enforcing the arbitration agreement. For instance, in *Beltran*

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[210] *See Bixler*, 2022 Cal. App. Unpub. LEXIS 302, at *16–17, *21–22.

[211] *See* Eugene Volokh, *Scientology and Arbitration*, REASON: THE VOLOKH CONSPIRACY (Jan. 23, 2020, 8:05 AM), https://reason.com/volokh/2020/01/23/scientology-and-arbitration/ [https://perma.cc/RJ3Y-X8P2].

[212] *See* AM. ARB. ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-12 (2022).

[213] *Id.* at R-13.

[214] *Id.*

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v. AuPairCare, Inc.,[215] au pairs brought a class action suit against au pair sponsoring companies, alleging antitrust, RICO, and FLSA violations.[216] The district court refused to enforce the arbitration agreement on unconscionability grounds and found a provision that "vest[ed] [the company] with the right to unilaterally select an arbitrator is substantively unconscionable."[217] The Tenth Circuit agreed, finding that such a "clause has a high degree of substantive unconscionability."[218]

That arbitrators should be neutral seems obvious and proceeds necessarily from first principles of fairness; however, the analysis is changed when the parties have contracted for partial arbitrators explicitly. In *Garcia*, the Church's arbitration agreement reflects a common tripartite scheme for arbitrator selection but limits the pool of suitable arbitrators to those "in good standing with the Mother Church."[219] When the parties were unable to agree on arbitrator selection, the district court stepped in and chose the arbitrator from a list supplied by the Church.[220] When they brought claims of evident partiality after the proceeding, the Eleventh Circuit turned to contracted-for partiality cases for support, discussed here in turn.[221]

In *Winfrey v. Simmons Food, Inc.*,[222] the Eighth Circuit dealt with a dispute between a food company and poultry growers.[223] The arbitration agreement allowed each party to pick an arbitrator, and those two would pick a third.[224] The food company objected to the growers' arbitrator, arguing for vacatur of the award due to arbitrator bias and a failure to disclose his connections with the other party.[225] The Eighth Circuit, affirming the decision to enforce the award, recognized that those

[215] 907 F.3d 1240 (10th Cir. 2018).

[216] *Id.* at 1246.

[217] *Id.* at 1249.

[218] *Id.* at 1258; *see also* Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 207 (Cal. 2013) (stating that "an adhesive agreement that gives the employer the right to choose a biased arbitrator is unconscionable").

[219] *See* Garcia v. Church of Scientology Flag Serv. Org., No. 8:13-cv-220-T-27TBM, 2017 WL 10845264, *3–6 (M.D. Fla. May 19, 2017).

[220] Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465 at *8 (11th Cir. 2021).

[221] *Id.* at *11–12.

[222] 495 F.3d 549, 550 (8th Cir. 2007).

[223] *Id.* at 550.

[224] *Id.*

[225] *Id.* at 551.

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arbitrators selected by the parties are not expected to be neutral.[226] Rather, "parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen"—a justifiable proposition in the context in which it was written.[227]

Taking this reasoning a step further, the Second Circuit, in *NFL Mgmt. Council v. NFL Players Ass'n*,[228] refused to vacate an award on evident partiality, despite the arbitrator adjudicating the merits of his own conduct.[229] Tom Brady, then quarterback for the New England Patriots, was suspended from the NFL for four games following a scheme to improperly deflate footballs.[230] Brady contested his discipline but was forced to arbitrate the dispute before NFL commissioner Roger Goodell, in accordance with his collective bargaining agreement ("CBA").[231] The CBA gave Goodell the power to both take disciplinary actions against players and serve as or appoint the sole arbitrator to hear appeals from those decisions.[232] While the district court found Goodell's actions during the arbitration "deprived Brady of fundamental fairness,"[233] the Second Circuit disagreed.[234] On the issue of evident partiality, the court cited to *Winfrey*, asserting "arbitration is a matter of contract, and consequently, the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."[235]

While this sort of wandering precedent may just be the common law working as intended, it is remarkable how in just a skip and a jump, the *Garcia* court extended this reasoning far outside its logical bounds. In deciding that the Scientologist arbitrators had not acted with evident partiality, they invoke that same language from *Winfrey*¸ and turn to *NFL Mgmt. Council* for support.[236] "[A]rbitration is a matter of contract . . . so the 'regime' for selecting arbitrators is bargained for and agreed upon

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[226] *Id.* at 552.

[227] *Id.* at 551 (quoting Delta Mine Holding Co. v. AFC Coal Properties, 280 F.3d 815, 821 (8th Cir. 2001)).

[228] 820 F.3d 527 (2d Cir. 2016).

[229] *Id.* at 548–49.

[230] *Id.* at 531.

[231] *Id.* at 531–34.

[232] *Id.* at 537.

[233] *Id.* at 536.

[234] *Id.* at 548–49.

[235] *Id.* at 548.

[236] *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *11–12 (11th Cir. Nov. 2, 2021).

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by the parties, which we can only presume they determined was mutually satisfactory."[237] In a contract between two sophisticated commercial parties, as in *Winfrey*, we expect there to be true and knowing bargain and consent, neither of which was at issue. There, the court was only holding a party to its prior bargained-for obligation; each party was permitted to select a partial arbitrator and both parties would be bound by the result.[238] Notably, the process was held to be neutral with both parties having equal ability to affect the arbitrator composition.[239] In *NFL Mgmt. Council*, shockingly, we are taught that a party to the arbitration can *serve as the arbitrator*.[240] This radical degree of partiality is only justified by the sophistication of and negotiation between the parties. Though Brady may not have bargained for the term itself, we can assume that the player's union acted on his behalf and perhaps this concession for a partial arbitrator was made for benefits elsewhere in the contract.

When we get to *Garcia*, we now have a truly adhesive contract, a take-it-or-leave-it contract, between a church and its parishioner without any bargaining or meaningful consent.[241] We also have the Church as both defendant and controlling entity of the arbitral forum; the arbitration process is controlled completely by the Church, and the arbitrator selection process restricts the pool of arbitrators to those the Church deems "in good standing."[242] Such an agreement is reminiscent of the one in *Hooters*: there, the plaintiff was permitted to choose one arbitrator, but only from a "list of arbitrators created exclusively by Hooters."[243] The *Hooters* court even

[237] *Id.* at *12 (citations omitted).

[238] Winfrey v. Simmons Food, Inc., 495 F.3d 549, 550 (8th Cir. 2007).

[239] *Id.* at 551.

[240] NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527, 531 (2d Cir. 2016).

[241] *Garcia*, 2021 WL 5074465 at *2.

[242] *Id.*

[243] Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999) ("The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. . . . The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decisionmaker would be a surprising result.").

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quoted the Society of Professionals in Dispute Resolution, stating that "it would be hard to imagine a more unfair method of selecting a panel of arbitrators."[244]

Courts, like the *Baxter* court, should not be relying on *Garcia* and treating partiality inherent in the arbitrator selection process as a given. Partiality of a particular arbitrator in a neutral selection scheme, as in *Winfrey*, is perfectly defensible but that oft-quoted reasoning has been co-opted in an absurd way. In *Baxter*, the court notes that if the arbitrators exhibit evident partiality, the plaintiffs can look to vacate the award *but* reminds plaintiffs that they "agreed to a method of arbitration with inherent partiality and cannot . . . seek to vacate that award based on that very partiality."[245] Baxter who was introduced into the Church as a child, alleges years of abusive and illegal treatment by the Church, and that he was forced to sign an adhesive arbitration agreement as a condition for leaving the Church.[246] Yet in the eyes of the court, he has apparently "agreed" to this inherent partiality in the arbitration.[247] This application of "inherent partiality" has no place in the analysis of these contracts of adhesion. Such a statement is sensible in the context of a balanced commercial agreement, defensible in a CBA between sophisticated parties, but patently absurd when applied to an adhesive religious contract purporting to shunt human trafficking claims by a church into the church's own courts. At the very least, an arbitrator selection clause with such partiality evidences substantive unconscionability on the face of the contract that a court can and should consider without First Amendment concerns.

D. An Even More Infinite Scope of Arbitration

Arbitration clauses typically constrain the subjects of arbitration to matters arising from the contract. Parties are of course free to limit the scope of their arbitration agreements, keeping certain types of controversies in court.[248] When deciding whether to compel arbitration, courts may first determine whether a particular arbitration clause is broad or narrow to determine whether a particular claim should go to arbitration. If an arbitration clause is broad, there is a presumption of arbitrability; a narrow clause comes with no such presumption and may lead a

[244] *Id.* at 939 (characterizing the arbitration system at issue as "deficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair").

[245] *See* Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *15 n.7 (M.D. Fla. Mar. 31, 2023).

[246] *Id.* at *4–5.

[247] *Id.* at *7–8.

[248] *"Class Arbitration": The Current Law*, LAW 360 (June 12, 2017), https://www.mintz.com/insights-center/viewpoints/2017-06-14-class-arbitration-current-law [https://perma.cc/4SGK-DGRJ].

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court to find a collateral issue not subject to arbitration. This distinction reflects an understanding that arbitration is a matter of consent, and the FAA requires parties express a clear intent to arbitrate their claims.[249] Thus, broad arbitration clauses will raise a presumption of arbitrability when the parties dispute whether a claim is covered.[250]

Curiously, the upper limit on the scope of an arbitration agreement is not often probed.[251] Rather the "broad" arbitration agreements that courts encounter are typically restricted to a "dispute arising out of" a contract, an employment, or some other definite relationship between the parties.[252] There seems to be an implicit understanding that parties enter into contracts with specified bounds and arbitration agreements either reflect the bounds of that contract, or narrow arbitration to certain matters within. However, "infinite arbitration" clauses, those that purport to govern all future disputes "between any related party in perpetuity," are becoming more common.[253] Courts are divided on their approach to enforcing such clauses, with some taking pains to avoid the question, while others have squarely held them to be absurd or unconscionable.

In *Hearn v. Comcast*,[254] the Eleventh Circuit dealt with a class action against Comcast Cable Communications, LLC for improperly pulling consumer credit

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[249] 9 U.S.C. § 2 ("[A]n agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable.").

[250] *See* Tamar Meshel, *In Defense of Moses*, 96 ST. JOHN'S L. REV. 395, 397 (2022) (recognizing that ever since the Supreme Court's decision in Moses H. Cone, courts have faithfully applied the presumption that federal law requires a "'presumption . . . in favor of arbitration' and that 'any doubts about the scope of arbitrable issues should be resolved in favor or arbitration'"); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

[251] *See* Horton, *Infinite Arbitration Clauses*, *supra* note 14, at 641 (describing the few times that judges have had to face "infinite" clauses, and one court's acknowledgment that there is "almost no case law addressing such broad arbitration clauses").

[252] *See* Local Union 97, IBEW v. Niagara Mohawk Power Corp., 67 F.4th 107, 113 (2d Cir. 2023) (describing the dichotomy between broad and narrow clauses in the following manner: "A broad clause is one that 'purport[s] to refer to arbitration all disputes arising out of a contract,' whereas a narrow clause 'limit[s] arbitration to specific types of disputes'") (quoting Oldroyd v. Elmira Sav. Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998); *see also* Sanchez v. Nitro-Lift Techs., L.L.C., 762 F.3d 1139, 1146 (10th Cir. 2014) ("Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it.") (quoting Cummings v. FedEx Ground Package Sys., 404 F.3d 1258, 1261 (10th Cir. 2005).

[253] Horton, *Infinite Arbitration Clauses*, *supra* note 14, at 633.

[254] 992 F.3d 1209 (11th Cir. 2021).

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reports in violation of the Fair Credit Reporting Act ("FCRA").[255] Hearn complained that despite signing an agreement to arbitrate during a previous interaction with Comcast, Hearn had terminated that agreement and was contacting Comcast to open a new account when they improperly checked his credit score.[256] Hearn argued that the previous arbitration agreement was no longer valid, that his claim did not relate to the previous contract, and that "the Arbitration Provision is overly broad and unconscionable."[257] The Eleventh Circuit acknowledged that:

> There [] is nothing unusual about an arbitration clause . . . that requires arbitration of all disputes between the parties to the agreement. [And] [w]e have enforced such a clause before because it evidenced a clear intent to cover more than just those matters set forth in the contract.[258]

Thus, the Eleventh Circuit recognized that arbitration agreements can be enforceable despite having a scope that reaches matters beyond what is contained in the underlying contract.[259] However, they also described a "standard arbitration clause" as one that "includes language that limits the scope of the arbitrable issues to 'any controversy or claim arising out of, or relating to [the] agreement, or breach thereof.'"[260] Ultimately, they decided that the FCRA claim properly fell within the Arbitration Provision.[261] They explicitly declined to answer Hearn's third contention; "Our holding is narrow—we do not answer if the broad scope of the Arbitration Provision is enforceable under the FAA."[262]

However, other court opinions suggest that infinite arbitration clauses are explicitly defective. The Southern District Court of California was forced to interpret a clause that would have applied to "any and all disputes" when an oil service company attempted to enforce the arbitration clause on a customer.[263] The court

[255] *Id.* at 1211.

[256] *Id.*

[257] *Id.* at 1212.

[258] *Id.* at 1213 (quoting Bd. of Trs. of Delray Beach Police & Firefighters Ret. Sys. v. Citigroup Glob. Mkts. Inc., 622 F.3d 1335, 1343 (11th Cir. 2010)).

[259] *Id.* at 1213.

[260] *Id.* (quoting Telecom Italia, SpA v. Wholesale Telecom Corp., 248 F.3d 1109, 1114 (11th Cir. 2001)).

[261] *Id.* at 1215.

[262] *Id. But see* Wexler v. AT & T Corp., 211 F. Supp. 3d 500, 502 (E.D.N.Y. 2016).

[263] *In re* Jiffy Lube Int'l, Inc., 847 F. Supp. 2d 1253, 1262 (S.D. Cal. 2012).

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stated, and the company was forced to agree that, "a suit by [the customer] against [the company] regarding a tort action arising from a completely separate incident could not be forced into arbitration—such a clause would clearly be unconscionable."[264] Other courts have reached similar conclusions,[265] and Judge Posner once commented that "absurd results ensue" if we read arbitration clauses as "standing free from [the underlying contract]."[266]

In *Bixler*, we are privy to a slight but telling development in the contractual preference of the Church.[267] There, the court was dealing with multiple plaintiffs who had all signed several agreements over the course of many years.[268] The language was substantially the same in many agreements, but the court notes that one petitioner "signed an earlier version of the agreement several times between 1997 and 2001."[269] The older arbitration agreement stated that "IN NO EVENT SHALL ANY DISPUTE, CLAIM OR CONTROVERSY ARISING OUT OF MY

[264] *Id.* at 1263.

[265] *See Wexler*, 211 F. Supp. 3d at 504 (interpreting an infinite clause in an AT&T standard form contract) ("Although the Court shares the concerns voiced in Jiffy Lube, holding that Mobility's arbitration clause is unconscionably broad would be in tension with *Concepcion*. The Court concludes instead that an arbitration clause that is unlimited in scope presents a question of contract *formation*."). *But see* Mey v. DIRECTV, LLC, 971 F.3d 284, 287–88 (4th Cir. 2020) (reversing the district court which had stated that "construction which does not so limit the scope of the arbitration clause would be unconscionably overbroad"). The fourth circuit ultimately held that they did not need to "define the outer limits" of the arbitration agreement to find that the claims at issue should go to arbitration. *Id.* at 295. Judge Pamela Harris dissented, recognizing that enforcing AT&T's arbitration clause, which purported to reach any claims against "respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns" could have massive repercussions. *Id.* at 302 (Harris, J., dissenting). AT&T had, at the time, 165.9 million wireless subscribers, and, according to SEC filings, AT&T had "thirty-six principal subsidiaries—including Warner Bros., HBO, and Turner—each of which may well have its own subsidiary corporations." *Id.* at 307–08 (Harris, J. dissenting). She concluded that if every one of those entities could make use of the arbitration clause against any present or former customer, it would "badly distort[] the bedrock notion that arbitration is a matter of consent." *Id.*

[266] *See* Smith v. Steinkampf, 318 F.3d 775, 777 (7th Cir. 2003) (describing circumstances where defendant Instant Cash attempted to rely on an arbitration clause in a loan agreement that plaintiffs had signed earlier to compel arbitration in a later dispute based on a separate transaction) ("[I]f Instant Cash murdered Smith in order to discourage defaults and her survivors brought a wrongful death suit against Instant Cash (a 'common law' suit, thus encompassed by (c)), Instant Cash could insist that the wrongful death claim be submitted to arbitration. For that matter, if an employee of Instant Cash picked Smith's pocket when she came in to pay back the loan, and Smith sued the employee for conversion, he would be entitled to arbitration of her claim. It would make no difference that the conversion had occurred in Smith's home 20 years after her last transaction with Instant Cash.").

[267] *See* Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302 (Cal. Ct. App. Jan. 19, 2022).

[268] *Id.* at *1–2.

[269] *Id.* at *9, *13.

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PARTICIPATION IN THE SERVICE BE SUBMITTED TO A COURT FOR JUDICIAL DETERMINATION."[270] This reads familiar, like the countless other standard form contracts or waivers that attempt to channel disputes "arising out of" some event or set of obligations with a nexus to the underlying contract.[271] All the other agreements signed by the *Bixler* plaintiffs contained far more capacious language.

> I am forever abandoning, surrendering, waiving, and relinquishing my right to sue, or otherwise seek legal recourse with respect to any dispute, claim or controversy against the Church, all other Scientology churches, all other organizations which espouse, present, propagate or practice the Scientology religion, and all persons employed by any such entity both in their personal and any official or representational capacities, regardless of the nature of the dispute, claim or controversy.
>
> . . . .
>
> . . . In accordance with the discipline, faith, internal organization, and ecclesiastical rule, custom, and law of the Scientology religion, and in accordance with the constitutional prohibitions which forbid governmental interference with religious services or dispute resolution procedures, should any dispute, claim or controversy arise between me and the Church, any other Scientology church, any other organization which espouses, presents, propagates or practices the Scientology religion, or any person employed by any such entity, which cannot be resolved informally by direct communication, I will pursue resolution of that dispute, claim or controversy solely and exclusively through Scientology's Internal Ethics, Justice, and binding religious arbitration procedures, which include application to senior ecclesiastical bodies, including, as necessary, final submission of the dispute to the International Justice Chief of the Mother Church of the Scientology religion, Church of Scientology International ('IJC') or his or her designee.[272]

This move to "infinitize" the arbitration clause, in addition to the injection of religious terminology, should be cause for concern for multiple reasons.

First is the temporal scope. The signee is "forever . . . relinquishing [their] right to sue" the Church.[273] This alone is not unusual; it is not as though a party could

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[270] *Id.* at *15 n.10.

[271] *See, e.g.*, *AAA-ICDR® Clause Drafting*, AM. ARB. INST., https://adr.org/Clauses [https://perma.cc/MKR3-22E9] (last visited Nov. 10, 2025).

[272] *Bixler*, 2022 Cal. App. Unpub. LEXIS 302, at *10–12.

[273] *Id.* at *10.

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simply wait long enough to get around an enforceable arbitration agreement if the dispute properly falls within. But parties do expect that their contracts, at some point in the future, will have run and neither party will be bound by the arbitration agreement with regards to events that occur afterwards.[274] Scientology's clause is forward-looking in the most extreme sense, made more ominous by language from their pledge agreements, like the one Baxter signed as a child promising servitude to the Church for one billion years.[275]

Second is the scope of covered claims. While again, the language, "any dispute, claim or controversy" would not alone be problematic in other contexts, here, it is completely unmoored from any underlying contractual harbor. Thus, it gives the Church carte blanche to assert arbitration without even evaluating the nature of the claim it would be defending. This language may seem so workaday given the context of other, more traditional contracts.[276] When utility providers or credit card companies are invoking their broad arbitration agreements, they are almost always doing so to compel arbitration of a suit directly related to their narrow association with the consumer: a defective product, an overbilling, a credit check.[277] In the average consumer case, the phrase "any dispute, claim or controversy" is doing no work because the controversy will always sit in the heartland of the contractual subject matter. Here, Scientology is fielding breach of contract, fraud, human trafficking, defamation, harassment, destruction of property, and intentional infliction of emotional distress claims: "any dispute, claim or controversy" is doing an alarming amount of work.[278]

Third is the scope of covered parties. Defendants eligible to invoke the clause include, apparently, "the Church, any other Scientology church, any other organization which espouses, presents, propagates or practices the Scientology religion, or any person employed by any such entity."[279] Such a clause somehow finds a further infinity than that contained in the *AT&T* cases, where at least legal

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[274] *See* Danielle Braff, *Did You Read the Small Print? 'Infinite' Arbitration Clauses Are on the Rise*, AM. BAR ASS'N (Sept. 6, 2024, 11:46 AM), https://www.abajournal.com/web/article/did-you-read-the-small-print-forced-arbitration-cases-are-on-the-rise [https://perma.cc/A9S4-C244].

[275] *See* Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *5 (M.D. Fla. Mar. 31, 2023).

[276] *See* Braff, *supra* note 274.

[277] *See id.*

[278] *See generally supra* Part II.

[279] *See* Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302, at *11–12 (Cal. Ct. App. Jan. 19, 2022).

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ties between entities (agency, subsidiary, etc.) was required.[280] In *Bixler*, we see this aspect employed by defendants.[281] There, five separate plaintiffs had brought a joint action against "Religious Technology Center," "Church of Scientology International," and "Church of Scientology Celebrity Centre International."[282] Each plaintiff had signed separate arbitration agreements and yet the workings of four separate motions to compel in tandem was enough to convince the trial court to send the entire matter to arbitration.[283]

While arbitration clauses should rightfully permit complex cases to proceed in arbitration where an agent, parent, or subsidiary of the signatory is a party, the Church's clause sweeps in a great deal more parties than logic would permit an arbitration clause. Such a situation calls to mind Judge Posner's absurd hypothetical.[284] Consider, by signing a standard form contract to attend a single service at a Florida church, who could then invoke this clause? Surely the several large Scientology organizations and likely all their high-ranking officers. But what about a small Scientology church in California? A Scientology bookstore in California? An unaffiliated bookstore that happens to sell, and thus propagate, Scientology materials? The store clerk working at that unaffiliated bookstore? A celebrity who was paid for promotional services?

E. Lifeless Clay

These four characteristics of the Church's arbitration clause each find support in the case law alone. But when considered together, each takes the life out of the others and results in an arbitration agreement that ought to be unenforceable.

First, as a contract of adhesion under attack for unconscionability, the courts are quite willing to find it procedurally unconscionable but provide no oversight of its substantive terms. Without the check of courts at either the compelling or enforcement stage of arbitration and market forces or litigation to rein in its excesses,

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[280] *See* Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 504 (E.D.N.Y. 2016); Mey v. DIRECTV, LLC, 971 F.3d 284, 291 (4th Cir. 2020).

[281] *See Bixler*, 2022 Cal. App. Unpub. LEXIS 302, at *16.

[282] *See* Ruling on Motions to Compel Arbitration, *supra* note 157, at 1, 8 n.1 ("As a note, Defendant presented arguments regarding their ability to enforce the arbitration agreements based on their standing as signatories or non-signatories. Plaintiffs did not argue that Defendants lack standing.").

[283] *Id.* at 13. The trial court also expressly would have allowed Masterson to participate in the arbitration, despite not being a signatory to any of the contract, because he was an "agent of [the Church]." *See id.* However, remember that the Court of Appeal of California reversed on First Amendment principles, not for any contractual or procedural defect in compelling arbitration. *See Bixler*, 2022 Cal. App. Unpub. LEXIS 302, at *2.

[284] *See* Smith v. Steinkampf, 318 F.3d 775, 777 (7th Cir. 2003).

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the justification for allowing such clauses in an adhesive contract disappear. Second, while a new arbitral forum is acceptable and there is no expectation that all tribunals should have the same degree of formality, a complete lack of transparency or willingness to concretize rules and procedures is unjustifiable. Given that the true consent of signatories to an adhesive contract is already at issue, and the immense scope of claims to which the contract purports to apply, there is a clear issue of substantial fairness regarding the seemingly illusory process the Church has employed. Third, because the Church—*itself the defendant in the actions*—is also allowed unilateral control over permissible arbitrators, the justification for partial arbitrators is clearly undercut by the adhesive nature and breadth of the contract. While partiality inheres in many contracts, often those situations are buttressed by sophistication of parties, robust negotiation, and a narrowed scope of covered claims,[285] none of which is present here. Finally, the scope of the agreement lacks proper justification and exceeds the breadth of other so-called 'infinite' arbitration clauses. Again, arguments might be different if the parties had truly negotiated and consented to such extreme and lasting terms; to think that such scope is proper in an adhesive contract is absurd.

IV: ALONE AND MISERABLE: NO AGREEMENT ON THE PROPER SOLUTION

Assuming religious contracts can go too far and assuming that the current Scientology arbitration clause does, what then is the solution? The scholarly discussion around this topic has been fragmented and aimed at both religious and secular answers to the problem.

A. The First Amendment Proposals

Jeff Dasteel has written on this intersection of religion and contracts of adhesion and suggests that one possible solution would be for plaintiffs to invoke the Religious Freedom Restoration Act ("RFRA").[286] He recognizes the issues that spring from religious arbitration agreements and reads Supreme Court precedent as giving religious tribunals robust protections that cannot be overcome by asking courts to weigh substantive unconscionability.[287] For instance, his reading of *Milivojevich* is that it stands for the proposition that "religious arbitrations are all but unreviewable under the Federal Arbitration Act because courts will not review

[285] *See* Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 439 n.29 (citing GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 71 (2009)).

[286] Dasteel, *supra* note 155, at 60.

[287] *Id.* at 62.

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ecclesiastic rules or procedures for fairness."[288] He states that the "unconscionability defense under Section 2 of the FAA does not work for religious objections to religious arbitration" because courts are largely unable to evaluate substantive unconscionability claims.[289] A RFRA defense would require showing that the government engaged in action that, though facially neutral, "substantially burdens the exercise of religion."[290] He would level this claim at the FAA itself, it being the government action burdening religion, thereby avoiding the need to plumb the substantive fairness of the religious tribunal, and instead simply disabling the court from enforcing arbitration.[291]

Alternatively, Sophia Chua-Rubenfeld and Frank J. Costa Jr. have suggested a "reverse-entanglement principle" as a solution.[292] Also drawing from *Milivojevich*, they argue that in the same way the First Amendment prevents government and secular courts from becoming entangled in religious matters, the reverse ought to be true as well, "insulating secular law from religious interference."[293] They take a strong view of the Establishment Clause, invoking Jefferson's "wall of separation between church and state."[294] Chua-Rubenfeld and Costa suggest that, at the very least, civil rights litigation in religious courts is unconstitutional and that entanglement principles ought to be employed to "limit[] the power of religious tribunals to adjudicate secular disputes."[295]

Skylar Reese Croy advances a "conscientious objector" defense.[296] She believes that if someone is called on to meet contractual obligations after leaving a religion, that ex-adherent can escape performance if "he or she can prove the agreement violates his or her sincerely held religious beliefs."[297] She believes that

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[288] *Id.* at 51 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).

[289] *Id.* at 62.

[290] *Id.* at 60 (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690 (2014)).

[291] *Id.* at 60–61.

[292] *See* Sophia Chua-Rubenfeld & Frank J. Costa, Jr., Comment, *The Reverse-Entanglement Principle: Why Religious Arbitration of Federal Rights Is Unconstitutional*, 128 YALE L.J. 2087, 2088 (2019).

[293] *Id.* at 2107 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)).

[294] *Id.* (quoting Letter from Thomas Jefferson to Nehemiah Dodge, Ephraim Robbins & Stephen S. Nelson, Danbury Baptist Ass'n (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html [https://perma.cc/G98Z-KGXP]).

[295] *Id.* at 2117, 2120.

[296] Skylar Reese Croy, *In God We Trust (Unless We Change Our Mind): How State of Mind Relates to Religious Arbitration*, 20 PEPP. DISP. RESOL. L.J. 120, 120 (2020).

[297] *Id.*

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because courts are already armed with such a framework from the military context, this path provides the proper solution to those situations where an adherent has changed religion after signing a contract.[298] She takes a tack similar to that of the *Bixler* court, supposing that individuals have a right to change or leave a religion and that some test can be employed to determine whether such a claim is real or just a pretextual attempt to avoid performing under the contract.[299]

B. The Secular Proposals

Terrina LaVallee suggests an ethical solution to the problem.[300] She points to the changing legal landscape around arbitration and the much increased role of the attorney; attorneys are now not simply representing parties before tribunals, but are increasingly responsible for creating them and their procedures from scratch.[301] Because all lawyers' conduct is informed by the Model Rules of Professional Conduct, she points to the work of scholar Imre Szalai to suggest that bar associations, courts, and disciplinary boards can act as regulators by actively enforcing the Model Rules against lawyers who breach duties to third parties when drafting arbitration agreements or engage in misconduct by designing deceitful or lopsided procedures for religious arbitration.[302] Presumably, pressure could come from state legal ethics bodies to curb abusive contracting practices in secular and religious contexts alike.

Dasteel, as an alternative to his RFRA solution, suggests that courts simply ought to abstain from ruling on motions to compel arbitration in circumstances where they cannot fully evaluate the unconscionability defense.[303] He believes if the "court is prevented from making a decision on substantive unconscionability because of the non-interference doctrine . . . [r]ather than decide . . . the party opposing arbitration has failed to meet its burden of proof, the court should decide that the abstention doctrine means the court cannot rule one or the other."[304]

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[298] *See id.* at 123 (describing the "conscientious objector" in the context of military regulations). There, religious adherents may be able to prove that their sincerely held religious beliefs permit them to escape certain contractual obligations. *Id.*

[299] *See id.* at 138–39; Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302 (Cal. Ct. App. Jan. 19, 2022).

[300] Terrina LaVallee, *The Ethics of Religious Arbitration*, 33 GEO. J. LEGAL ETHICS 629, 630 (2020).

[301] *Id.* at 629.

[302] *Id.* at 635–37.

[303] Dasteel, *supra* note 155, at 66.

[304] *Id.*

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Professor Michael Helfand has suggested that religious arguments and expanding constitutional protections are not the proper ways forward for plaintiffs confronting religious arbitration clauses.[305] However, his suggestion is that parties will be successful simply by shifting their unconscionability argument to the enforcement stage—after arbitration has taken place—now armed with facts, rather than speculation and arguments, about the application of religious law.[306] He believes that parties will have "both [the tribunal's] intermediate determinations during the proceedings and its final judgment reflected in its award" which will expose unconscionability either in a faulty process or one-sided results.[307] He acknowledges that parties will still need to make an unconscionability argument at the front end to preserve it for a later challenge, but feels that these "back-end legal protections simply require mining current private law doctrines with respect to waiver."[308] Helfand has gone on to suggest in other writing that contract defenses like impracticability and frustration of purpose might be an avenue for certain parties, rather than utilizing unconscionability.[309] He believes that in cases like *Bixler*, where a party signs a religious contract and then subsequently leaves the faith, the contract is no longer enforceable if "non-occurrence of the supervening event," here the apostasy, "is a 'basic assumption upon which the contract is made.'"[310] However, he seems to admit that given how commonly people leave or change religion, and thus how foreseeable such an event is at the time of contracting, "the deck appears stacked against . . . impracticability and frustration defenses."[311]

C. Unconscionability as the Answer

While each of these theories, whether grounded in constitutional prohibitions or contract law defense, may carry the day for an individual plaintiff, they also seem to have either certain weaknesses or collateral effects on the legal landscape that make them less feasible.

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[305] Helfand, *supra* note 168, at 1787–88.

[306] *Id.* at 1816–17.

[307] *Id.* at 1817.

[308] *Id.*

[309] Michael A. Helfand, *Contractual Commitments and the Right to Change Religions*, 103 N.C. L. REV. 1, 1 (2024).

[310] *Id.* at 57; *see also* Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302 (Cal. Ct. App. Jan. 19, 2022).

[311] Helfand, *supra* note 309, at 56–57.

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On the issue of utilizing First Amendment protections, *Bixler* paints a grim picture. In *Bixler*, the court employed religious constitutional doctrine, stating that an individual possesses an "*inalienable* First Amendment right to the free exercise of religion, which includes her right to change her religious beliefs."[312] The court also made soaring statements, such as "Scientology's written arbitration agreements are not enforceable against members who have left the faith, with respect to claims for subsequent non-religious, tortious acts. To hold otherwise would bind members irrevocably to a faith they have the constitutional right to leave,"[313] and "one of the prices of joining its religion (or obtaining a single religious service) is eternal submission to a religious forum—a sub silencio waiver of petitioners' constitutional right to extricate themselves from the faith. The Constitution forbids a price that high."[314] Regardless of whether the Supreme Court of the United States would ever adopt such statements, this holding, and those like it, would necessarily follow from Dasteel, Chua-Rubenfeld and Costa, or Croy's proposals and are sure to draw strong opposition from many corners.

Despite *Bixler*'s unpublished status and complete lack of precedential value, on petition for certiorari, the Church of Scientology received amici support from Professional Chaplains, Inc., the Church Law Institute, and a Professor of Jewish Law for its position.[315] This is presumably *not* because such entities and individuals are hoping to engage in coercive contracting and to arbitrate their own harassment and defamation claims. Rather, it is the sweeping language about the enforceability of religious contracts and a worry that when the First Amendment is roused, the ground shifts under all religions the same. For this reason, when addressing the particular problem of potentially unfair arbitration contracts, contract law and unconscionability allow a court to take a tailored approach. Other religious groups can then easily distinguish their own contracting procedures and arbitration agreements, rather than worry that a single holding on First Amendment grounds will invalidate whole swaths of contracts.

Regarding the secular arguments, LaVallee's suggestion that certain regulating bodies can put ethics to use is well taken but does not actually provide the relief

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[312] Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302, at *25 (Cal. Ct. App. Jan. 19, 2022) (quoting *In re* Marriage of Weiss, 49 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 1996)).

[313] *Id.* at 29.

[314] *Id.* at 40–41.

[315] *See generally* Brief of *Amicus Curiae* Professors Michael J. Broyde & Ronald J. Colombo in Support of Petitioner, Church of Scientology Int'l v. Bixler, 143 S. Ct. 280 (2022) (No. 22-60); Brief of *Amicus Curiae* Church Law Institute in Support of Petitioners, Church of Scientology Int'l v. Bixler, 143 S. Ct. 280 (2022) (No. 22-60); Brief for *Amicus Curiae* Professional Chaplains, Inc. in Support of Petitioners, Church of Scientology Int'l v. Bixler, 143 S. Ct. 280 (2022) (No. 22-60).

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plaintiffs are seeking; presumably, it does nothing to change the calculus when the parties are disputing the enforceability of the contract.[316] It also seems a thorny thicket to seek discipline of attorneys drafting contracts for religious institutions that are, at least at this point, treated as enforceable by many courts, proving the ethical violation seems as fraught an inquiry into religious doctrine as a direct challenge to the contractual terms. Dasteel's abstention suggestion also seems a fraught path, in much the same way as *Bixler*'s holding.[317] A clear pronouncement that courts are simply unwilling to enforce religious arbitration agreements when a party raises an unconscionability defense is tantamount to saying they are unenforceable; proponents of religious contracts would be as opposed to a form of abstention, rendering their contracts unenforceable, as an explicit decision to find them void for any other reason. Again, we would likely see the religious entities of all stripes manning the barricade.

Helfand's suggestion that unconscionability will be easier to prove on the back-end has proven unfounded.[318] Since that time, we have the benefit of seeing the Eleventh Circuit's disposition in *Garcia* and Garcia's renewed unconscionability argument, where the court was no more willing to engage with the substantive unconscionability of the proceeding, even with the benefit of hindsight.[319] This view, analogous in some ways to Scalia's position that court review on the back-end can cure defects on the front-end, just doesn't seem to bear out empirically.[320] It seems far more valuable to plaintiffs, and a more reliable route, to continue pursuing a front-end remedy, rather than bear the time and expense of the arbitration. Lastly, Helfand's suggestion regarding other contractual defenses may have application in some narrow circumstances, but not for parties in litigation with the Church of Scientology.[321] Based on the alleged facts of *Baxter*, these contracts are routinely being entered into *as a condition of leaving the religion*; that is, far from being an unforeseen supervening event: leaving the religion is the explicit impetus for

[316] *See* LaVallee, *supra* note 300.

[317] *See* Dasteel, *supra* note 155, at 46; *Bixler*, 2022 Cal. App. Unpub. LEXIS 302.

[318] *See* Helfand, *supra* note 168, at 1817.

[319] *See* Garcia v. Church of Scientology Flag Serv. Org., Inc., No. 18-13452, 2021 WL 5074465, at *7, 9 (11th Cir. Nov. 2, 2021); *supra* text accompanying notes 83–87.

[320] *See supra* note 181 and accompanying text. Additionally, Helfand recognizes the limited nature of back-end review. *See* Helfand, *supra* note 309, at 24 (stating that courts are generally not permitted to review arbitral awards on the back end and are expected to exhibit deference to the tribunal the parties have chosen).

[321] *See* Helfand, *supra* note 309.

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entering into the contract.[322] Even in the less drastic cases, the breadth of the Church's arbitration agreement suggests that the intent is explicitly to bind the parties in perpetuity.[323]

Commentators seem to have given up on unconscionability as a front-end contract defense, instead opting to focus on novel and isolated theories. Perhaps it is somewhat counter-intuitive to then tout unconscionability here as the vehicle to counteract abusive religious arbitration contracting when the argument has repeatedly failed in the courts. However, this Article argues that its lack of success is primarily to blame on poor pleading by plaintiffs and outsized First Amendment fears by courts.

Firstly, unconscionability is a much more precise instrument and far less likely to raise the hackles of the religious community at large. By its nature, unconscionability takes account of many factors and weighs them in total to determine whether a particular contract ought to be enforced over objections about the fundamental unfairness of the process of contracting and substance of the terms.[324] It is often separated into its procedural and substantive halves, and the tendency is to further atomize the analysis—that is, to look at each argument suggesting unconscionability separately.[325] This is a mistake and one that plaintiffs need to convince courts to correct. Courts must look at the whole picture, seeing inherent partiality, adhesiveness, overly broad scope, and illusory process as additive rather than distinct analyses. Further, plaintiffs need to be bringing facts and arguments that aren't couched in religious arguments. Plaintiff's biggest mistake in *Garcia* was doing exactly this, arguing substantive unconscionability only by reference to church doctrine, practically begging the court to ignore its argument.[326] The inertia of that decision has influenced unconscionability analyses in subsequent cases where the substantive arguments have sought to extricate religion entirely.[327] Plaintiffs also need to address thoroughly the seemingly contrary precedent; courts need to be made aware that the justifications for partial arbitrators and infinite arbitration clauses are limited to extreme circumstances.

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[322] *See* Baxter v. Miscavige, No. 8:22-cv-986-TPB-JSS, 2023 U.S. Dist. LEXIS 56913, at *5–6 (M.D. Fla. Mar. 31, 2023).

[323] *See* Bixler v. Superior Ct., No. B310559, 2022 Cal. App. Unpub. LEXIS 302, at *10 (Cal. Ct. App. Jan. 19, 2022).

[324] *See Garcia*, 2021 WL 5074465, at *6.

[325] *See, e.g.*, *id.*

[326] *See* Croy, *supra* note 296, at 146–47 (citing *Garcia*, 2021 WL 5074465).

[327] *See, e.g.*, *Baxter*, 2023 U.S. Dist. LEXIS 56913, at *13.

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In sum, unconscionability has several things going for it that other proposals do not. First, it is well-established. Unconscionability as a contract defense exists and will continue to exist outside the realm of religious arbitration. There is no burden on parties to establish a new doctrine or convince the court of policy reasons for extending otherwise unrelated doctrine. Secondly, it is already formulated to account for a multi-factor analysis. The best argument against enforcing the current Scientology arbitration clause is really several arguments all coalescing around ideas of unfairness and lack of justification. This is what unconscionability can and should be targeting. Thirdly, it is narrow and case-specific. When a court finally decides to hold Scientology's arbitration agreement unenforceable *under an unconscionability theory*, I doubt any other religious groups will worry over the enforceability of their own contracts. Religious entities, by and large, are not employing the constellation of horribles used by Scientology and should consequently have no trouble distinguishing the circumstances and substance of their own arbitration agreements and tribunals. It is only by stitching together these disparate arguments of unfairness, under the umbrella of unconscionability, that the Church's arbitration agreement appears as the lifeless amalgamation that it truly is.

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