

No. 09-497

In The
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,

Petitioner,

v.

ANTONIO JACKSON,

Respondent.

**On Writ Of Certiorari to The
United States Court Of Appeals
for The Ninth Circuit**

BRIEF FOR RESPONDENT

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STATUTES

The relevant statutory provisions, Sections 2, 4 and 10 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 2, 4, and 10.

STATEMENT OF THE CASE

Factual Background. This dispute arises out of a racial discrimination and retaliation lawsuit against Petitioner Rent-A-Center West, Inc. (“Rent-A-Center”), a nationwide furniture and electronics rent-to-own company. Rent-A-Center hired Respondent Antonio Jackson, an African-American man, as an account manager in 2004. J.A. 7. Jackson repeatedly sought promotions to a higher position, but each time Rent-A-Center promoted non-African-American employees with less seniority. J.A. 7. Jackson complained to his store manager, other store managers, and the corporate human resources office. J.A. 7. Rent-A-Center eventually promoted him but then terminated him without cause within two months of the promotion. J.A. 7. On February 1, 2007, Jackson sued Rent-A-Center in federal court for racial discrimination and retaliation under 42 U.S.C. § 1981. J.A. 8-9.

The Arbitration Agreement. Rent-A-Center moved to dismiss the proceedings and compel arbitration under FAA Section 4, citing an arbitration clause it had required Jackson to sign when he was hired as

a condition of employment. J.A. 10, 12. According to Rent-A-Center, this arbitration clause requires Jackson to arbitrate all claims or controversies against Rent-A-Center, including any challenges to the enforceability or applicability of the arbitration clause itself. Specifically, Rent-A-Center relies on a provision stating that “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” J.A. 34.

Rent-A-Center’s arbitration clause also contains a number of provisions that specify how disputes between the parties are to proceed. First, the agreement enumerates the types of claims that are arbitrable and the types of claims for which Rent-A-Center reserves its right to proceed in court. Notably, “claims for discrimination (including, but not limited to race, sex, sexual harassment, sexual orientation, religion, national origin, age, workers’ compensation, marital status, medical condition, handicap or disability)” are covered by the agreement, while “claims by [Rent-A-Center] for injunctive and/or other equitable relief for unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information” are not arbitrable. J.A. 30-31.

Second, the arbitration clause contains a fee- and cost-splitting provision, which states that Rent-A-Center shall pay only half of “any filing fees and the

cost of the Arbitrator's fee," and that "[e]ach party shall pay for its own costs and attorneys' fees, if any." J.A. 35.

Third, the agreement limits the right to take discovery by allowing the deposition of only "one individual and any expert witness designated by another party," and limits written discovery to requests for production. J.A. 32.

Finally, the arbitration clause contains a judicial review provision stating that a party opposing the enforcement of an arbitration award may bring an action in court to set aside the award. J.A. 36. In contrast to the judicial review provision of the FAA, 9 U.S.C. § 10, Rent-A-Center's arbitration clause provides that "the standard of review will be the same as that applied by an appellate court reviewing a decision of a trial court sitting without a jury." J.A. 36.

Respondent's Opposition to the Motion to Compel Arbitration. Jackson opposed Rent-A-Center's motion on the grounds that the company's arbitration agreement is procedurally and substantively unconscionable. J.A. 40.

Jackson argued that the clause is procedurally unconscionable because he was in a position of unequal bargaining power when it was imposed as a condition of employment. J.A. 41-42.

Regarding substantive unconscionability, Jackson argued that the agreement was impermissibly one-sided because (1) it lopsidedly obligated him to

arbitrate any claims he might have against the company (*e.g.*, tort claims, claims of discrimination or harassment based on race, sex, age or disability), yet gave Rent-A-Center the right to litigate common claims it may have against him, such as the unauthorized disclosure of trade secrets, in court (J.A. 42-43); and (2) the limits on depositions would unfairly benefit Rent-A-Center given Jackson's burden of proof on the discrimination claims, and the reality that evidence of racial and retaliatory intent typically is in defendants' hands and requires more than two depositions to prove. J.A. 43-44.

Jackson further challenged the arbitration agreement as substantively unconscionable because it included discovery provisions that limited written discovery to requests for production (J.A. 44) and required employees to pay for half of the arbitration fees with no cap. J.A. 43.

The Decisions Below. Less than three months after Rent-A-Center moved to compel arbitration, the district court granted the motion. Pet. App. 1a-6a. The district court held that the arbitration agreement was not substantively unconscionable because Jackson had not demonstrated a likelihood of overly burdensome arbitration expenses. Pet. App. 5a. The court did not reach Jackson's other unconscionability arguments.

The Court of Appeals reversed, holding that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that

he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.” Pet. App. 15a. The court cited *Buckeye Check Cashing, Inc. v. Cardegn*a, 546 U.S. 440, 446 (2006), for the proposition that challenges to the validity of a contract, but “not specifically its arbitration provisions” are for the arbitrator, not a court, to decide. Pet. App. 11a. The court held that the “flip side of this rule” is that challenges to the validity of an arbitration agreement, “apart from the validity of the contract as a whole,” are threshold questions for the court to decide. *Id.* The court explained that the rationale for requiring courts to determine threshold challenges to the validity of arbitration provisions is that “arbitration is itself a matter of contract,” which means that “a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty.” *Id.* (citation omitted).

The court below also reversed the district court’s alternative holding that Rent-A-Center’s arbitration agreement was not unconscionable. Pet. App. 18a. The court held that the district court erred in failing to address two of Jackson’s arguments regarding substantive unconscionability: namely, that the agreement’s claim coverage and discovery provisions were one-sided. Pet. App. 19a-20a. The court below thus instructed the district court to complete its analysis of substantive unconscionability and, if it determined

that Rent-A-Center’s clause was substantively unconscionable, to also determine whether the agreement was procedurally unconscionable. Pet. App. 20a.

SUMMARY OF ARGUMENT

Rent-A-Center’s argument is premised on a single, demonstrably false, proposition: that the Federal Arbitration Act (“FAA”) always requires that arbitration clauses be enforced according to their terms. FAA Section 2 explicitly provides, however, that arbitration clauses shall be enforced as written “save upon such grounds as exist at law or in equity for the revocation of any contract.” Rent-A-Center’s sweeping statement is at odds with the plain text of the statute.

According to Rent-A-Center, FAA Section 2 requires a court to enforce an arbitration award even if Section 2’s own criteria for enforceability and validity are not met, as long as there is a written arbitration provision stating that any disputes relating to the enforceability of the provision are to be resolved by the arbitrator. Thus, a court faced with such a clause has no choice but to grant a motion to compel arbitration under FAA Section 4 without considering the clause’s validity. Rent-A-Center’s mantra is that arbitration clauses must be enforced “as written,” without qualification, and that courts have no role to play, before enforcing arbitration clauses, in

drawing outer boundaries of unfairness beyond which arbitration clauses may not go.

As properly understood, consistently with this Court’s precedents, the FAA requires enforcement only of arbitration agreements that are valid under state law applicable to all contracts, and it does so by setting up a specific statutory scheme with detailed rules and enforcement provisions. 9 U.S.C. §§ 2, 4. This Court has rejected the proposition that there are no limits to what parties can agree to under the FAA. Instead, the Court has emphatically held that parties cannot contract out of the important protections embedded in the text of the FAA, and that courts will not enforce provisions of arbitration agreements that are “at odds” with the “textual features” of the FAA. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Rent-A-Center seeks to upend this longstanding system by advocating an approach that would – if adopted – prevent the courts from fulfilling their fundamental, statutorily required and time-honored role of determining that arbitration clauses meet the requirements of Section 2 of the Act *before* enforcing them. Under this new approach, the drafter of an arbitration agreement could – as Rent-A-Center is attempting to do here – evade having a court determine if an arbitration clause is valid and enforceable before enforcing it simply by inserting a provision stating that challenges to the clause’s validity are to be decided by the arbitrator, not the court (“a delegation clause”). Under Rent-A-Center’s theory, the sole

criteria for judging the validity of such a clause would be its language; such a clause must be enforced, under this approach, even if it were signed under duress – presumably even at gunpoint – so long as the language of the delegation clause is “clear and unmistakable.”

This approach not only does violence to the FAA but also runs afoul of this Court’s repeated teachings that determinations of the validity and enforceability of an arbitration clause (as opposed to the contract as a whole) are for the *court* to decide, not the arbitrator. See *Buckeye Check Cashing, Inc. v. Cardegn*a, 546 U.S. 440, 445-46 (2006); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

The cases on which Rent-A-Center relies – *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) – merely suggest that challenges to the *scope* of validly formed arbitration agreements may, by clear and unmistakable language, be delegated to arbitrators. But this case involves a challenge to the *validity* and *enforceability* of a clause under Section 2, and both the FAA and this Court’s teachings make clear that the law does *not* permit the drafter of an arbitration agreement to stop a court from deciding whether a valid arbitration agreement even exists.

Rent-A-Center’s attempt to rip *AT&T* and *First Options* from their moorings has grave implications

for the ongoing credibility of the arbitration system. If Rent-A-Center were to succeed, there would be nothing to stop stronger parties to contracts across America from inserting similar language into the arbitration clauses that routinely appear in employment and consumer contracts. The result would be a wholesale elimination of courts' role in ensuring that arbitration clauses are valid and enforceable before enforcing them – a result that could not help but erode the public's faith in the legitimacy and integrity of arbitration as a fair and just alternative dispute resolution mechanism.

Finally, even if the Court were to determine that parties may contract around the FAA's requirement that a court ensure the validity of an arbitration clause before enforcing it, Rent-A-Center has failed to demonstrate that its delegation clause complies with "ordinary state-law principles" governing contract construction and that "clear and unmistakable evidence" proves the parties agreed to delegate the threshold question of the arbitration clause's validity to the arbitrator. *First Options*, 514 U.S. at 944.

ARGUMENT

I. STRIPPING COURTS OF THEIR ROLE IN DETERMINING WHETHER A VALID AGREEMENT TO ARBITRATE EXISTS BEFORE ENFORCING THE AGREEMENT WOULD VIOLATE THE FAA.

A. Section 2 of the FAA Bars a Court from Enforcing an Arbitration Clause Without First Determining that the Terms and Requirements of Section 2 Itself Are Met.

This case turns on a fundamental principle of federal arbitration law: a court must determine that an arbitration clause is “valid” and “enforceable” before it can enforce that clause. 9 U.S.C. § 2. Under Section 2 of the FAA, an arbitration clause is “valid” and “enforceable” “save upon such grounds as exist at law or equity for the revocation of any contract.” Therefore, as the court below correctly held, a challenge to the enforceability of an arbitration clause under FAA Section 2, including an argument that the clause is unconscionable, must be decided by the court. That holding was compelled by this Court’s repeated instructions that courts, not arbitrators, must decide challenges to the validity of an arbitration clause.

FAA Section 2 is the “primary substantive provision of the Act.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24 (1983). It provides:

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

9 U.S.C. § 2. Section 2 does not make arbitration clauses automatically valid and enforceable. Rather, it sets out three basic requirements that an arbitration clause must satisfy if it is to be enforced. First, there must be a written agreement. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds. Under this third prong of Section 2, a “generally applicable contract defense[], such as . . . unconscionability” may render an arbitration clause unenforceable. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). The lower court’s conclusion that the FAA requires a court to decide whether an arbitration agreement satisfies the statute before the agreement is enforced is fully in keeping with – and, indeed, compelled by – the language of Section 2.

Rent-A-Center argues, however, that its delegation clause permits it to opt out of Section 2’s requirements. Under Rent-A-Center’s theory, so long as

the language of a delegation clause is “clear and unmistakable,” a court faced with a motion to compel arbitration need not – indeed, may not – look any further. *See Pet. Br.* 14.

That approach would violate Section 2’s mandate that arbitration clauses are enforceable only when they are not subject to “such grounds as exist at law or equity for the revocation of any contract,” because for a court to send to an arbitrator a challenge to the validity of the arbitration agreement is to *enforce* the arbitration clause *before its validity has been decided*. Rent-A-Center’s theory puts the cart before the horse.

This is not merely an academic objection. Consider, for example, an arbitration agreement that requires one party to pay prohibitively large fees, travel extraordinary distances, or submit her claim to an arbitrator with close ties to the other party. Under Rent-A-Center’s theory, if such a clause were also to contain a delegation clause, then any questions as to the validity and enforceability of that clause would have to be decided by the arbitrator, not the court. But this would present an insurmountable Catch-22, for to pursue such a challenge in arbitration a party would have to subject itself to the aspects of the clause that it is arguing are unconscionable in the first place. Under this system, any party who seeks to challenge an arbitration clause will, in effect, have lost before she has begun.

Taken to its logical conclusion, Rent-A-Center’s argument would require courts to enforce even

blatantly forged arbitration clauses, so long as the language of the writing stated that the arbitrator was to decide whether a valid agreement had been formed.¹ Even Rent-A-Center's *amici* admit that such a result would be unacceptable and that a court must decide if an agreement exists before sending the dispute to arbitration. *See Amicus Br.* of Chamber of Commerce 12. The Chamber fails, however, to offer any principled reason why one of Section 2's three requirements must be decided by a court, but the others need not be. This omission is not surprising, for there is no conceivable basis for such a curious result.

Rent-A-Center's argument also logically would require a court faced with an arbitration agreement containing a delegation clause to enforce it without first determining whether the dispute involves interstate commerce. Such a delegation would be inconsistent with the practice of this Court and other courts, which have consistently determined whether interstate commerce was present in cases involving

¹ This issue arises surprisingly often. *E.g., Walter Indus., Inc. v. McMillan*, 804 So.2d 1081, 1086 (Ala. 2001) (home builder's motion to compel arbitration denied where court found that builder had forged homeowners' signatures on its arbitration clause); *Johnson v. Countrywide Home Loans, Inc.*, No. 1:02-CV-311, 2003 WL 21920926, at *3 (E.D. Tenn. July 9, 2003) (in light of a consumer's allegations that signature on the arbitration clause was forged, consumer could not be compelled to submit to arbitration before a trial on the issue of the forgery occurred); *Dougherty v. Mieczkowski*, 661 F. Supp. 267, 275 (D. Del. 1987) (same).

challenges to arbitration clauses. *E.g., Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (per curiam) (determining, prior to any arbitration, that Section 2's requirement of a "contract evidencing a transaction involving commerce" was met); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (stating that the FAA applies only to "two kinds of contracts . . . , namely those in admiralty or evidencing transactions in 'commerce.' Our first question, then, is whether the consulting agreement between F & C and Prima Paint is such a contract").

It is clear from the foregoing that a court must determine that the first two requirements of Section 2 – the existence of a genuine written agreement to arbitrate and the presence of interstate commerce – are met before it can enforce an arbitration clause. It follows that the Section's final requirement – that agreements are only enforceable "save upon such grounds as exist at law or equity for the revocation of any contract" – must also be determined by a court. This Court has explained that Section 2 creates an "enforceability mandate," under which "State law . . . is applicable to determine which contracts are binding under Section 2." *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009).

The Court has repeatedly reached precisely this conclusion. In its cases setting forth the so-called "separability doctrine," this Court has held that, while a challenge to a contract as a whole is for the arbitrator to determine, a challenge to an arbitration clause based on Section 2 of the FAA is for the court.

E.g., *Buckeye Check Cashing*, 546 U.S. at 445 (if a party challenges the “arbitration clause itself” then “*the federal court* may proceed to adjudicate it”) (emphasis added) (citing *Prima Paint*, 388 U.S. at 403-04). The Court has echoed this conclusion in several FAA cases outside of the separability context, as well. *E.g.*, *Mitsubishi Motors*, 473 U.S. at 627 (“*courts* should remain attuned” to claims that an arbitration agreement is invalid under FAA Section 2) (emphasis added); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964) (“The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede *judicial* determination that the collective bargaining agreement does in fact create such a duty.”) (emphasis added). Rent-A-Center’s reading of Section 2, in contrast, finds no support in this Court’s jurisprudence.

In short, the language of Section 2 and this Court’s jurisprudence relating to it dictate that a *court* must find that all three of Section 2’s requirements – an agreement, the presence of interstate commerce, and no violation of any generally applicable rule of state contract law – are established *before* enforcing an agreement to arbitrate.²

² The lower court decisions embraced by Rent-A-Center, including *Awuah v. Coverall N.A., Inc.*, 554 F.3d 7 (1st Cir. 2009), fundamentally misinterpret FAA Section 2. In *Awuah*, without citing Section 2 at all, the First Circuit found that a clause delegating to an arbitrator the decision of “whether the arbitration clause is valid” could be enforceable under most

(Continued on following page)

B. Section 4 of the FAA Requires that Courts Evaluate Challenges to an Arbitration Clause as Invalid Under Section 2 Before Enforcing the Clause.

This reading of Section 2 is also supported by Section 4, which states that a party may petition a court for an order directing arbitration to proceed, and that, “if the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.” 9 U.S.C. § 4.

As this Court has observed, Section 4 is a procedural “device[] for enforcing an arbitration agreement.” *Moses H. Cone*, 460 U.S. at 22. Although Section 4 itself is silent as to the standards by which a court must determine whether an arbitration clause is enforceable, the substantive content for the provision is provided by Section 2, which, as explained above, provides that an arbitration agreement may only be enforced if it does not run afoul of “such grounds as exist at law or equity for the revocation of any

circumstances despite a party’s unconscionability challenge to that clause’s validity. *Id.* at 10. But Section 2’s mandate creates a bright line rule: a court must determine whether the arbitration clause is valid under Section 2 *before* enforcing the agreement to arbitrate and *before* sending the parties to an arbitrator. Nevertheless, even in *Awuah*, the court imposed some limits on Rent-A-Center’s absolute rule that parties may delegate any issue to an arbitrator. 554 F.3d at 12 (declining to enforce a delegation clause where “arbitration in this case may itself be an illusory remedy”).

contract.” 9 U.S.C. § 2. As this Court has explained, the procedural provisions of the FAA, Sections 4 and 3, allow litigants to “invoke arbitration agreements made enforceable by section 2.” *Carlisle*, 129 S. Ct. at 1901. Thus, properly understood, Section 4 permits parties to challenge in court, before proceeding to arbitration, the validity of an arbitration clause on any ground set forth in Section 2.³

³ The courts of appeal have consistently applied this rule. *E.g., Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (“A party to a *valid and enforceable* arbitration agreement is entitled to . . . an order compelling . . . arbitration. *See, e.g.*, 9 U.S.C. §§ 3-4.”) (emphasis added); *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 486 (5th Cir. 2002) (Section 4 “provides for a court’s role in the arbitral process prior to issuance of an award in the event of a claimed ‘default’ of that process pursuant to a *valid* agreement.”) (emphasis added); *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002) (“[W]hen asked by a party to compel arbitration under a contract, . . . [i]f the *validity* of the agreement to arbitrate is ‘in issue,’ the court must proceed to a trial to resolve the question. 9 U.S.C. § 4.”) (emphasis added) (internal quotations omitted); *Glass v. Kidder Peabody & Co., Inc.*, 114 F.3d 446, 451 (4th Cir. 1997) (“Sections 2, 3 and 4 of that Act are the key statutory provisions governing the substantive and procedural law associated with arbitration cases and the enforceability of arbitration agreements found *valid* by the district court.”) (emphasis added); *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868 (7th Cir. 1985) (“[A]lthough section 4 . . . speaks only of challenges to ‘the making’ of the agreement to arbitrate, the term has been held to encompass any challenge to the *validity* of the agreement.”) (emphasis added); *cf. Conrad v. Phone Directories Co., Inc.*, 585 F.3d 1376, 1380 (10th Cir. 2009) (Section 4 “authorize[es] district courts to compel arbitration under a *valid* agreement to arbitrate”) (emphasis added).

Rent-A-Center's argument to the contrary does not withstand scrutiny. Rent-A-Center argues that Section 4 does not apply here because an unconscionability defense does not implicate the "making" of a contract. Pet. Br. 25-26 n.9. That argument defeats itself, because if Rent-A-Center were correct that Section 4 only allows courts to hear issues about the "making of an agreement" as narrowly defined, then it would follow that an unconscionability challenge could *never* be considered by a court even *absent* a delegation clause. This reading of the statute cannot be reconciled with this Court's well-established teachings that arbitration clauses may be challenged as unconscionable under applicable state law. *E.g.*, *Doctor's Assocs.*, 517 U.S. at 687. The only plausible way to read Section 4 is as having a scope that is co-extensive with Section 2.

Rent-A-Center's narrow interpretation of the language of Section 4 also finds no support in contract law. When the FAA was passed, in 1925, the generally applicable contract defenses incorporated into Section 2 of the FAA (fraud, duress, or unconscionability) were understood to be defenses precisely to the "making" of a contract. *E.g.*, *Hume v. United States*, 132 U.S. 406, 415 (1889) (defining unconscionable agreement as that "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other"); *Paris v. Smith*, 270 F. 65, 67 (2d Cir. 1920) (fraud renders a contract unenforceable where "one of the parties fails to act in good faith, and in fact

deceives the other” such that there is no “meeting of the minds”); *Diescher v. Comm'r of Internal Revenue*, 18 B.T.A. 353, 358 (1929) (“[C]ontracts made [under duress] are void because there has been no voluntary meeting of the minds.”). Thus, Section 4 itself does not, as Rent-A-Center suggests, limit challenges to defenses that, involve the execution of the contract. Pet. Br. 26 n.9. Instead, the FAA’s drafters chose language that encompassed all of Section 2’s state-law defenses, including unconscionability.

Rent-A-Center’s crabbed reading of Section 4 also ignores this Court’s jurisprudence. This Court has held that an argument that an arbitration clause is invalid under Section 2 because it is subject to a generally applicable contract defense constitutes a challenge to “the making of the arbitration agreement” within the meaning of Section 4 and thus is for a court to resolve. In *Prima Paint*, the Court held that, when a state contract law defense is interposed against an arbitration clause itself (as opposed to when such a defense is raised against the underlying contract), Section 4 of the FAA requires that *a court* – not an arbitrator – must resolve that defense:

Under section 4, . . . the federal court is instructed to order arbitration to proceed once it is satisfied that ‘the making of the agreement for arbitration . . . is not in issue.’ Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – *an issue which goes to the ‘making’ of the agreement to arbitrate* – the federal court

may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

388 U.S. at 403-04 (emphasis added); *see also Buckeye Check Cashing*, 546 U.S. at 445. The italicized language makes clear that where a litigant contends that the parties did not make an enforceable arbitration clause itself, because of fraud in the inducement, that challenge requires a court – not an arbitrator – to resolve.

That this case involves an unconscionability challenge to an arbitration agreement, rather than a challenge based on fraud in the inducement (as in *Prima Paint*), is a distinction without a difference. A finding that a so-called “agreement” was procured by fraud in the inducement renders it voidable, *see Langley v. Fed. Deposit Ins. Corp.*, 484 U.S. 86, 94 (1987), which means that “one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract.” Restatement (Second) of Contracts § 7 (1981); *see also Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) (“contracts tainted by mistake, duress, or even fraud are voidable at the option of the innocent party”). In *Prima Paint*, this Court held that this sort of defense – i.e., one that merely renders a contract “voidable,” rather than “void” – goes to the “making” of the arbitration agreement and therefore, under Section 4, is for a court to decide.

Because unconscionability similarly renders a contract “voidable,” there is no reason to treat these defenses differently. In each case, under standard contract law principles, a contract has come into existence, but the aggrieved party has a defense to its enforcement based on standard principles of contract law. In the language of Section 2, one party is seeking to enforce an arbitration clause and the other contends the agreement is invalid and unenforceable. *E.g., King v. Fox*, 458 F.3d 39, 40 (2d Cir. 2006) (unconscionable provision rendered agreement voidable); *Worldwide Underwriters Ins. Co. v. Brady*, 973 F.2d 192, 195 (3d Cir. 1992) (under Pennsylvania law, “contracts are voidable if their enforcement would produce an unconscionable result”); *White v. Gen. Motors Corp., Inc.*, 908 F.2d 669, 673-74 (10th Cir. 1990) (“fraud, ambiguity, duress, or unconscionability” are grounds to hold a contract voidable). Nevada law adheres to this hornbook rule. *Mallin v. Farmers Ins. Exch.*, 839 P.2d 105, 118 (Nev. 1992) (“unconscionable contract provisions are voidable”).

Because unconscionability is precisely the same type of defense to a contract as fraud in the inducement – both render an arbitration agreement, or any other contract term, voidable – both defenses are governed by *Prima Paint*’s holding that such defenses go to the “‘making’ of the agreement to arbitrate” and are therefore for a court to decide under Section 4 of the FAA. *E.g., Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998) (claims that arbitration clause “lacks mutuality of obligation, is

unconscionable, and violates public policy,” go “to the ‘making’ of the agreement to arbitrate,” and are thus to be decided by a court) (citing *Prima Paint*) (emphasis added).

This conclusion is bolstered by the legislative history of the FAA, which makes clear that Section 4 of the Act was intended to ensure that courts would decide whether an arbitration clause is valid under generally applicable contract law. Evidence of this legislative intent comes from Julius Henry Cohen, “one of the primary drafters of” the FAA. *Hall Street*, 552 U.S. at 589 n.7. Shortly after the FAA was passed, Cohen co-authored an article with Kenneth Drayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926), which has been recognized as illuminating the Act’s legislative history. E.g., *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 288 n.1 (1995) (Thomas, J., dissenting). In this article, Cohen and Drayton stated that Congress intended *courts* to pass on challenges to the validity of arbitration clauses:

At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.

12 VA. L. REV. at 267-68, 271. See also *A Bill Relating Sales and Contracts to Sell in Interstate and Foreign*

Commerce and a Bill to Make Valid and Enforceable Written Provisions on Agreements for Arbitration of Disputes; Hearing on S. 4213 and 4214 Before the Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 5 (1923) (Statement of Sen. Walsh) (“[T]he court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law, and consequently, the court is obliged, it seems to me you are obliged, to go to court.”).

In short, both the language and history of Section 4 make plain that Congress intended the enforceability of arbitration clauses under the Act to be *determined* by the courts, not merely assumed without any consideration.

C. The Court Has Not Created an Exception Permitting Parties to Contract Out of the FAA’s Requirement that a Court Determine the Validity of an Arbitration Clause Before Enforcing It.

Rent-A-Center argues that it can simply opt out of both Sections 2 and 4 by use of a delegation clause. Rent-A-Center’s sole basis for its argument comes from two snippets of language from this Court’s decisions in *AT&T*, 475 U.S. 643, and *First Options*, 514 U.S. 938. *E.g.*, Pet. Br. 12. A closer look at the facts underlying those cases and the premises of the long line of “arbitrability” cases before and after

them, however, reveals that they did not alter the fundamental principle that a court must decide whether an arbitration clause is valid and enforceable before enforcing it.⁴ Rather, *AT&T* and *First Options* merely stated a rule that, while courts normally must decide gateway questions of the scope of a valid and enforceable arbitration clause, there is a narrow exception: parties may, under certain circumstances, assign that question to an arbitrator.

Crucially, neither *AT&T* nor *First Options* held that this exception would apply to a challenge to the validity or enforceability of an arbitration agreement under Section 2 of the FAA. In *AT&T*, the Court faced the question whether a court or an arbitrator should

⁴ A number of scholars have noted that the term “arbitrability” has generated confusion in part because it lumps together distinct questions of, on the one hand, the validity and/or existence of arbitration clauses and, on the other, the scope of concededly valid arbitration agreements. E.g., Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?*, 13 AM. REV. INT'L ARB. 19, 28 n.25 (2002) (“The *First Options* Court confusingly used the term ‘arbitrability’ to include . . . the question of what particular dispute the clause covers. . . . The term ‘arbitrability’ is also generally used to address the question of whether, under applicable law, a dispute is susceptible of arbitration at all – i.e., the validity or enforceability of the arbitration agreement as applied to a particular dispute.”). Accordingly, this brief will avoid that term and instead distinguish between disputes as to whether the requirements of Section 2 have been met, on the one hand, and disputes as to whether a given claim falls within the scope of a valid agreement to arbitrate, on the other.

determine whether the arbitration clause in a collective bargaining agreement covered a particular grievance claim arising from AT&T's decision to lay off workers. 475 U.S. at 644. AT&T argued that its layoff decision was within its exclusive discretion and that it was not required to submit the propriety of that decision to arbitration. *Id.* at 645-46. The Court held that, as a general rule, "the question of arbitrability – whether a [contract] creates a duty for the parties to arbitrate *the particular grievance* – is undeniably an issue for judicial determination." *Id.* at 649 (emphasis added). However, the Court explained, that general rule only applies "[u]nless the parties clearly and unmistakably provide otherwise." *Id.* The question whether a "particular grievance" is arbitrable is a question of scope. *See United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 n.7 (1960). Indeed, there was no dispute in *AT&T* as to the validity or enforceability of the arbitration agreement at issue. *See id.* at 646-47. Thus, *AT&T* did not, as Rent-A-Center urges, leap into entirely new territory and create a sweeping exception from Section 2's explicit command. Nothing in this Court's cases authorizes parties to impose contractually invalid arbitration clauses but write them in such a way as to block courts from fulfilling their duty under the FAA.

The same is true of *First Options*. In *First Options*, the Court addressed whether the Kaplans, who had entered into an arbitration agreement with First Options on behalf of their company, MK1, had given an arbitrator authority to decide whether

claims against them personally were subject to arbitration. 415 U.S. at 941. Arbitration had already taken place; over the Kaplans' objections, the arbitrator had decided that he did have that authority. The question for the Court was whether the district court should have reviewed the arbitrator's award independently or deferentially, and the answer turned on whether the Court found the Kaplans had clearly and unmistakably agreed to let the arbitrator determine whether claims against them were arbitrable. *Id.* at 942. The Court held that, because the Kaplans had not so agreed, the lower court was correct in reviewing the arbitrator's decision independently.

The *First Options* Court noted in dicta that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clear and unmistakable’ evidence that they did so,” *id.* at 944, but that language does not imply that parties could lawfully delegate to the arbitrator questions of whether an arbitration clause is *valid* under Section 2 of the FAA. As a threshold matter, the Court explained that a court must ascertain whether the agreement to arbitrate complied with “ordinary state-law principles that govern the formation of contracts.” *Id.* Indeed, the Court in *First Options* started with the understanding that there was a valid agreement in existence between the company owned by the Kaplans and First Options – the case did not involve a challenge, under Section 2, to the enforceability of that agreement. *Id.* at 945 (explaining that clear and unmistakable evidence was important

because “[a] party often might not focus on . . . the significance of having arbitrators decide the scope of their own powers” (citing Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1508-09 (1959)). Moreover, the Court expressly recognized that the Kaplans could have gotten “an independent court decision on arbitrability . . . by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, *see* 9 U.S.C. § 4.” 415 U.S. at 946. The Court thus acknowledged that if a challenge to the presence of a valid Section 2 agreement had been brought under Section 4, that challenge would have been for a court. *Id.*

This reading of *First Options* is supported by the Cox article cited by the Court. As Cox explained, “[a] specific stipulation giving the arbitrator power to decide all questions of arbitrability is in substance a promise to submit to arbitration all questions concerning the *meaning* of the arbitration clause.” Cox, *supra*, at 1508 (emphasis added). It makes sense that parties to a valid arbitration agreement should be able to authorize the arbitrator to decide its scope because scope is at bottom a question of contract meaning or interpretation. However, “since the arbitrator’s authority and legitimacy are based on the existence of a valid and enforceable agreement to arbitrate,” disputes over whether a valid arbitration agreement exists “more directly call into question the arbitrator’s authority than disputes over the scope of such an agreement.” Karen Halverson Cross, *Letting*

the Arbitrator Decide? Unconscionability and the Allocation of Authority Between Courts and Arbitrators 24 (Feb. 14, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1552966; see also *Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 488, 491 (1972) (“nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitration”).

This Court’s own later statements confirm that the language that Rent-A-Center relies on from *First Options* merely relates to the scope of arbitration clauses. In *Carlisle*, 129 S.Ct. at 1902-03, for example, this Court interpreted the statement in *First Options* that “arbitration . . . is a way to resolve those disputes – but only those disputes – that the parties have agreed to submit to arbitration” as “pertain[ing] only to issues parties agreed to arbitrate.” In other words, this Court described *First Options* in *Carlisle* as no more than a classic dispute over the scope of an arbitration clause: what issues did the parties agree to arbitrate?

In the wake of *AT&T* and *First Options*, the Court has never applied the “clear and unmistakable” exception to hold that the drafter of an arbitration clause can delegate the validity and enforceability of the clause under FAA Section 2 to the arbitrator. On the contrary, even in a case where the language of the arbitration clause clearly provided that all questions of the enforceability of the clause were to be decided by the arbitrator, the Court itself addressed and

decided a challenge to the validity of the arbitration agreement. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 83 n.1 (2000) (deciding the validity of an arbitration clause despite clear language delegating “[a]ll disputes . . . relating to . . . the validity of this arbitration clause” to an arbitrator). Under Rent-A-Center’s theory, the Court should never have reached that question.

Rent-A-Center and its *amici* argue that in addition to *AT&T* and *First Options*, two decisions by this Court support its claim that it can contract around FAA Section 2. Rent-A-Center and its *amicus* the Equal Employment Advisory Council (“EEAC”) argue, for example, that the unconscionability decision is properly one for the arbitrator in light of this Court’s decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). *See Pet. Br. 22; Amicus Br. of EEAC 12.* *Bazzle* does not support Rent-A-Center here, however, as this Court specifically stated that the question there did *not* concern “the validity of the arbitration clause.” 539 U.S. at 452. There was no dispute in *Bazzle* as to whether the threshold requirements of Section 2 had been met; the only question for the arbitrator was whether the (concededly enforceable) clause permitted a particular type of action.

Similarly, EEAC argues that this Court’s decision in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003), suggests that the validity of Rent-A-Center’s arbitration clause is for the arbitrator to decide. *Amicus Br. of EEAC 11-12 n.3.* *PacifiCare* is readily

distinguishable from this case. The sophisticated physician plaintiffs in *PacifiCare* did not argue that the agreement at issue there was unconscionable or otherwise unenforceable under Section 2 of the FAA. See Pet. Reply Br. 1, 3, 10, *PacifiCare*, 538 U.S. 401 (No. 02-215), 2003 WL 359257. *PacifiCare* involved an arbitration clause whose language and effect were ambiguous as to whether a particular form of relief would be available in arbitration. See *PacifiCare*, 438 U.S. at 405. This Court held that it could not determine that the agreement was unenforceable on that basis when the arbitrators might well interpret it to provide for the disputed form of relief. The Court did not suggest that the arbitrators were empowered to decide whether the arbitration agreement itself was enforceable, but only that they should decide in the first instance what relief was available under its ambiguous terms. Thus, *PacifiCare* was much more akin to the scope cases discussed above than the present case.

In short, where there is no dispute that a valid and enforceable agreement to arbitrate exists, the Court has stated that, if they do so clearly and unmistakably, parties may agree that the arbitrator may decide issues related to the scope of that agreement. But here, the existence of a valid and enforceable agreement to arbitrate *is* disputed. The language of Section 2, this Court's jurisprudence relating to the FAA, and other persuasive authority all dictate that, where challenged, all three of Section 2's requirements – an agreement, the presence of

interstate commerce, and no violation of any generally applicable rule of state law – must be found by a court *before* it enforces an arbitration clause.

D. A Comparison with the Law Governing Forum Selection Clauses Establishes that Stripping Courts of Their Role in Determining Threshold Challenges to the Validity of Arbitration Clauses Would Result in Treating Arbitration Clauses Differently Than Analogous Contractual Provisions.

Rent-A-Center's theory also fails because it seeks to have this Court treat arbitration agreements differently than the most closely analogous type of contractual provisions: forum-selection clauses. Adopting Rent-A-Center's approach would thus violate this Court's teaching that arbitration provisions must be placed on "equal footing with all other contracts." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

This Court has stated that an agreement to arbitrate is "in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). As such, agreements to arbitrate, like the one at issue in this case, are subject to the same contract-validity rules that govern the enforcement of forum selection clauses. *See id.* at 519 n.14.

This Court has held that, when faced with a disputed motion to enforce a forum-selection clause, a

non-forum court *must* determine the validity and enforceability of the clause before sending the parties to the specified forum. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (non-forum courts faced with a motion to compel a forum-selection clause are to “enforce the forum clause specifically *unless* [the resisting party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching”) (emphasis added). Under Rent-A-Center’s logic, the non-forum court should enforce the clause first and have the forum court determine whether the clause constitutes “overreaching.”

This Court’s rule for forum-selection clauses (which is the same rule that applies under Respondent’s reading of the FAA) is designed to ensure that only legally valid and enforceable forum-selection clauses are enforced and to prevent one party from gaining access to a forum through impermissible means. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (“It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental unfairness.”). As a result, no court is free to disregard this threshold inquiry, even where the forum-selection clause is “clearly mandatory and all-encompassing.” *Bremen*, 407 U.S. at 20.⁵

⁵ Rent-A-Center’s *amici* acknowledge this rule, yet they ignore how it underscores the extreme nature of Rent-A-Center’s
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The sanctity of this rule in the forum-selection context is beyond dispute, and lower courts have uniformly applied it. *E.g., Rivera v. Centro Medical de Turabo, Inc.*, 575 F.3d 10, 18 (1st Cir. 2009) (“[A] forum selection clause should be enforced unless the resisting party can show ‘that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching . . . or that enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.’”)(quoting *Bremen*, 407 U.S. at 15) (brackets omitted); *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 243 (5th Cir. 2009); *Lipcon v. Underwriters at Lloyd’s, London*, 148 F.3d 1285, 1295-96 (11th Cir. 1998); *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1294 (9th Cir. 1998) (*en banc*); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1363 (2d Cir. 1993).

position, which requires “unobstructed enforcement” of an arbitration agreement. See *Amicus Br. of Pacific Legal Foundation* 6 (calling the rule in *Bremen* “the generally sanctioned approach”). Even according to *amici*, a party challenging a motion to enforce a forum-selection clause is entitled to challenge that clause’s enforceability in the non-forum court, and a non-forum court is entitled to decide whether the clause must be enforced. See *Amicus Br. of Chamber of Commerce* 26 (“[T]his Court’s forum-selection decisions show [that] a party challenging such an agreement as unconscionable or unreasonable must satisfy a demanding test.”). The Chamber says that “an arbitration clause should not be refused enforcement merely for perceived, general unfairness,” *id.* at 27, but that is not what is at stake in this case, which is whether a court may decide gateway question of enforceability *at all*.

Under this well-settled rule, courts are required to address precisely the threshold questions that Rent-A-Center seeks here to consign to arbitrators. See Restatement (Second) of Conflict of Laws § 80 (1988) (“The parties’ agreement as to the place of action . . . will be given effect unless it is unfair or unreasonable.”). According to the Restatement, a court may decline to enforce a forum-selection clause if, among other reasons, “it finds that the provision was obtained by fraud, duress, the abuse of economic power or other unconscionable means.” *Id.* cmt. c.

In this case, Rent-A-Center is asking this Court to erect a different set of rules for arbitration agreements. Under Rent-A-Center’s proposal, a non-forum court has *no* authority to decide threshold questions regarding the arbitration agreement’s validity or enforceability, and instead must *automatically* send the parties to arbitration – an approach at odds with the “correct approach” that guides enforcement of forum-selection clauses in traditional contracts. *Bremen*, 407 U.S. at 15. Arbitration agreements are “as enforceable as other contracts, but not more so.” *Prima Paint*, 388 U.S. at 404 n.12. To allow an arbitration clause to assume self-enforcing status that requires a court to automatically enforce the agreement with no inquiry into its fundamental fairness, would impermissibly elevate it over other contracts.⁶

⁶ Although this Court has never expressly decided the effect of a forum-selection clause that contains a delegation clause like
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II. PERMITTING PARTIES TO STRIP COURTS OF THEIR STATUTORY ROLE OF ENSURING ARBITRATION AGREEMENTS ARE VALID BEFORE ENFORCING THEM WOULD GUT FAA SECTION 2 AND ENDANGER THE LEGITIMACY OF ARBITRATION.

FAA Section 2, which provides that arbitration clauses are only as enforceable as other contract terms, is crucial not only to protecting the enforceability of fair arbitration agreements, but also to preserving the rights of weaker parties to contracts. By empowering courts to “invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract,’” Section 2 guards against the risk of abuse that accompanies unequal bargaining power. *Allied-Bruce*, 513 U.S. at 281. For example, corporations may insist on mandatory arbitration in consumer contracts only because Section 2 “gives States a method for protecting consumers against unfair pressure to agree to a contract

the one at-issue here, it is illogical to believe that such a provision in a standard form contract could successfully defeat the rule this Court erected in *Bremen* and prevent a party from challenging the enforceability of a forum-selection clause in a non-forum court. To allow a party to achieve this result simply by fiat undermines the *raison d'être* of the rule, which is to ensure that only those forum-selection clauses that are fair and reasonable are enforced. A party cannot avoid this requirement simply by inserting bootstrapping language into the clause. This same reasoning applies here.

with an unwanted arbitration provision.”⁷ *Id.* Rent-A-Center’s proposed new rule would seriously limit that protection and thereby erode public faith in arbitration as a legitimate alternative to court.

Furthermore, because judicial review of arbitration awards is extremely narrow, if Rent-A-Center’s rule becomes law, an arbitrator’s decision that an arbitration clause is not unconscionable will be essentially unreviewable. While arbitrators are indisputably competent to decide issues of state law and contract validity in general, no decisionmaker should have ultimate power to judge itself.

A. Court Decisions Striking Down Unconscionable Arbitration Clauses Guard Against the Misuse of Arbitration and Promote Enforcement of Fair Arbitration Clauses.

The Court’s promise in *Allied-Bruce* that FAA Section 2 would guard against abuse has been largely realized by lower courts’ refusal to enforce arbitration

⁷ This Court has recognized the importance of the FAA’s protection against abuse of arbitration clauses by powerful parties in a series of cases dating back decades. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (arbitration agreements should be enforced “[a]bsent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract”); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (same); *Mitsubishi Motors*, 473 U.S. at 627 (same).

clauses that are invalid under state law. Arbitration agreements, now widespread in employment and consumer settings, are routinely enforced by courts either without controversy or, sometimes, over challenges. Crucially, however, in an important minority of cases federal and state courts throughout the United States have struck down extreme abuses of the arbitration process.

For example, courts have struck down contract terms that imposed prohibitive costs of arbitration upon individuals.⁸ Similarly, courts have struck down

⁸ E.g., *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 778 (N.D. Ill. 2002) (holding unenforceable an arbitration fee provision that would have required consumer to pay "staggering" costs, from \$48,000 to \$126,000, to have claim against restaurant chain arbitrated); *Phillips v. Assocs. Home Equity Servs.*, 179 F. Supp. 2d 840, 846-47 (N.D. Ill. 2001) (refusing to enforce arbitration clause where consumer would have been required to pay a \$4,000 filing fee, as well as half of the arbitrator's fees, travel expenses, hearing room rental, and costs, to arbitrate her Truth in Lending Act claim, which was "likely to be at least twelve times what it currently costs to file a case in federal court"); *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892, 896-97 (W.D. Va. 2001) (invalidating arbitration clause when fees and costs amounted to an "insurmountable barrier" to consumer vindicating statutory rights; consumer would have had to pay \$2,000 filing fee, plus costs ranging from \$600-4100 per day); *Jones v. Fujitso Network Commc'ns., Inc.*, 81 F. Supp. 2d 688, 693 (N.D. Tex. 1999) (refusing to enforce term that would have required employee fired for requesting medical leave to pay up to \$7,000 to pursue his claim in arbitration because it would "substantially limit[] the use of the arbitral forum"); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766, 768 (Idaho 2003) (refusing to enforce clause that would have required insured to pay \$2,500 to arbitrate claim for under

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as unconscionable clauses that gave one party exclusive power to select the particular arbitrator for any disputes.⁹ Contrary to Rent-A-Center's claims, these courts have not invalidated arbitration clauses out of any "hostility to arbitration" or on the theory that arbitration itself is unconscionable *per se*. Pet. Br. 13. Rather, successful unconscionability challenges involve terms that are not inherent to arbitration, but have involved either clauses that warp the arbitration process (such as those allowing one party sole power to select the arbitrator) or other terms that have been tacked on to arbitration clauses by parties seeking some sort of other advantage, such as terms shortening limitations periods or stripping individuals of rights that they would have under

\$10,000 arising from denial of payment for multiple sclerosis treatment); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571, 574 (N.Y. App. Div. 1998) (striking term requiring consumer to pay advance non-refundable \$4,000 arbitration fee, where fee exceeded value of most Gateway products and would "surely serve[] to deter the individual consumer" from pursuing his claim); *Mendez v. Palm Harbor Homes, Inc.*, 45 P.3d 594, 605 (Wash. Ct. App. 2002) (invalidating clause that would have required "desperately" poor purchaser of used mobile home to pay over \$2,000 in arbitration fees to arbitrate \$1,500 claim).

⁹ E.g., *McMullen v. Meijer, Inc.*, 355 F.3d 485, 493-94 (6th Cir. 2004); *Murray v. United Food & Commercial Workers Union*, 289 F.3d 297, 303 (4th Cir. 2002); *Harold Allen's Mobile Home Factory Outlet v. Butler*, 825 So.2d 779, 785 (Ala. 2002); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006); *Ditto v. RE/MAX Preferred Props., Inc.*, 861 P.2d 1000, 1004 (Okla. Ct. App. 1993).

federal and state civil rights and consumer laws.¹⁰ Indeed, in many cases of this latter sort, courts strike down only the abusive term and enforce the remainder of the arbitration clause. For example, in *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85-86 (D.C. Cir. 2005), the court, in an opinion by then-Judge Roberts, struck down a term barring an employee from recovering punitive damages available under a statute. The court then severed that term and enforced the remainder of the arbitration clause. *Id.*¹¹ Faithfully applying FAA Section 2, these decisions enforce this Court's mandate that arbitration must allow parties to "effectively vindicate" their rights. *Mitsubishi*, 473 U.S. at 637; *Gilmer*, 500 U.S. at 28. Far from being "paternalistic" or hostile to

¹⁰ E.g., *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 n.14 (5th Cir. 2003) (ban on punitive and exemplary damages unenforceable in Title VII case); *Alexander*, 341 F.3d at 266 (in civil rights case, refusing to enforce term shortening limitations period to only 30 days as "clearly unreasonable and unduly favorable to" the employer); *Alterra Healthcare Corp. v. Linton*, 953 So.2d 574, 578 (Fla. Dist. Ct. App. 2007) (refusing to enforce arbitration clause capping noneconomic damages and waiving punitive damages permitted by state Assisted Living Facilities Act); *In re Poly-America, L.P.*, 262 S.W.3d 337, 359-60 (Tex. 2008) (invalidating provision stripping consumer of statutory right to attorneys' fees if he prevailed).

¹¹ See also *Hadnot*, 344 F.3d at 478; *Great Earth Cos.*, 288 F.3d at 890-91 (severing provision requiring arbitration in distant forum but enforcing rest of clause); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir. 2001) (striking provision that barred recovery of punitive damages but enforcing rest of clause); *Alterra*, *supra*, n.10; *In re Poly-America*, *supra*, n.10.

arbitration, Chamber Br. 14, such decisions promote arbitration as a fair institution.

Not only have judicial unconscionability decisions led to fairer arbitration provisions, they have also enhanced the integrity of the arbitration process. That was the conclusion of the drafters of the Revised Uniform Arbitration Act (“RUAA”), which “incorporate[s] the holdings of the vast majority of state courts and the law that has developed under the [FAA].” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85 (2002).¹² One comment relating to “[c]ontracts of adhesion and unconscionability” addresses situations of “[u]nequal bargaining power” in the employer/employee relationship. The RUAA comment directly addresses the central issue of this case:

Because an arbitration agreement effectively waives a party’s right to a jury trial, *courts*

¹² In *Howsam*, this Court looked to the RUAA for persuasive authority in interpreting the FAA. Based on the RUAA, the Court determined that questions of “procedural arbitrability” are generally questions for the arbitrator. *Howsam*, 537 U.S. at 85. The RUAA, which was prepared by a blue-ribbon panel of arbitrators, commercial attorneys, and scholars interested in alternative dispute resolution, has been widely celebrated as “a worthy, and overdue, effort to modernize our arbitration laws.” Samuel Estreicher & Kenneth J. Turnbull, *Revised Uniform Arbitration Act Approved*, N.Y.L.J., Nov. 2, 2000, at 3. It was endorsed by numerous arbitration providers, including the American Arbitration Association, JAMS, and the National Academy of Arbitrators as well as the ABA. Francis J. Pavetti, *Why States Should Enact the Revised Uniform Arbitration Act*, 3 PEPP. DISP. RESOL. L.J. 443, 444 n.2 (2003).

should ensure the fairness of an agreement to arbitrate, particularly in instances involving statutory rights that provide claimants with important remedies. *Courts* should determine that an arbitration process is adequate to protect important rights. Without these safeguards, arbitration loses credibility as an appropriate alternative to litigation.

RUAA § 6, cmt. 7, 7 U.L.A. 28 (2000) (emphasis added).

Such judicial involvement in the process, as one major corporation recently acknowledged in this Court, has encouraged corporations to rewrite their arbitration clauses to comply with generally applicable law:

At first, many [mandatory arbitration] provisions [in consumer contracts] plainly favored the businesses that drafted them. Invoking state unconscionability principles, several courts struck down these clauses, concluding that they impeded customers' ability to receive full redress for their claims. In response, businesses committed to the use of arbitration, including AT&T, jettisoned this first generation of arbitration provisions and developed a second generation, which eliminated most of the features that courts had singled out for criticism.

Amicus Br. of AT&T Mobility, L.L.C. 4, T-Mobile USA, Inc. v. Laster, No. 07-976 (Feb. 25, 2008).

Recent testimony from pro-arbitration witnesses, provided during Congressional debate over the Arbitration Fairness Act (“AFA”), also explains how judicial resolution of unconscionability challenges helps preserve the legitimacy of arbitration.¹³ Professor Stephen J. Ware of the University of Kansas School of Law, for example, testified that

we currently have a very sensible system in which courts determine, case-by-case, which arbitration agreements should not be enforced and which provide for a fair process and so should be enforced. . . . Congress should continue to rely on the courts, as guided by the [FAA], to police the neutrality of arbitration in the United States.

Mandatory Binding Arbitration: Is it Fair and Voluntary? Hearing Before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary, 111th Cong. 85, 181 (2009) (statement of Prof. Stephen J. Ware); see also, Mandatory Binding Arbitration Agreements: Are They Fair for Consumers? Hearing Before the Subcomm. on Commercial and Administrative Law of the Comm. on the Judiciary, 110th Cong. 44 (2007) (statement of Mark J. Levin, Esq., Ballard Spahr Andrews & Ingersoll, LLP) (“[C]ourts very rigorously scrutinize arbitration agreements to

¹³ The AFA, currently pending before both houses of Congress, S. 931, 111th Cong. (2009); H.R. 1020, 111th Cong. (2009), would amend the FAA to ban pre-dispute arbitration clauses in all consumer and employment contracts.

make sure that they are fair, and they are quite vigilant in refusing to enforce those relatively few agreements that they conclude do not pass muster under applicable state and federal laws.”).

In sum, although many arbitration clauses serve the interests of mutually consenting parties, arbitration has, on occasion, been abused through the use of manifestly unfair terms and clauses that seek to exploit a gap in bargaining power between the parties drafting such clauses and the parties required to sign them. Judicial scrutiny of such clauses helps ensure fairness and prevent abuses that would harm the institution of arbitration.¹⁴

¹⁴ Neither the merits of Jackson’s particular unconscionability challenges nor the question of whether those challenges would be preempted by the FAA are before the Court. Rent-A-Center seeks a much grander prize: the ability for it and like-minded companies to draft around the FAA’s requirement that courts review the validity and enforceability of arbitration clauses before enforcing them. Rent-A-Center and its *amici* have, however, advanced some arguments against Jackson’s unconscionability arguments, none of which have merit. Courts throughout the nation have held that one-sided arbitration clauses like Rent-a-Center’s are unconscionable. *E.g.*, *Taylor v. Butler*, 142 S.W.3d 277, 286 n.4 (Tenn. 2004) (noting that decisions taking the same position as Jackson are “the majority view,” and are “more persuasive”); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 168 (5th Cir. 2004); *Batory v. Sears, Roebuck & Co.*, 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006); *Worldwide Ins. Group v. Klopp*, 603 A.2d 788, 791 (Del. 1992); *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So.2d 990, 992 (Fla. Dist. Ct. App. 2004); *Greenpoint Credit L.L.C. v. Reynolds*, 151 S.W.3d 868, 875 (Mo. Ct. App. 2005). Equally

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B. Post-Arbitration Judicial Review Alone Will Not Adequately Protect Against Abuses.

Rent-A-Center speaks of referring the issue of contract enforceability to the arbitrator “in the first instance,” Pet. Br. 12, suggesting that even if the arbitrator makes an incorrect decision, it can always be subsequently cured by judicial review of the arbitrator’s decision. While the FAA does provide for limited judicial review of arbitration awards, 9 U.S.C. §§ 9-11, post-arbitration review is insufficient to ensure the legitimacy and fairness of arbitration for at least two reasons. First, it would be easy for employers to create arbitration systems that would deter employees from ever entering arbitration, much less seeking review. Second, judicial review of arbitrators’ decisions is so narrow that arbitrators’ decisions on the validity of arbitration clauses will never be meaningfully reviewed.

unpersuasive is the Chamber of Commerce’s argument, Br. 19, that the FAA preempts state law invalidating overly one-sided terms favoring the stronger party, such as the Nevada law at issue here. *E.g., Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 176 (Wisc. 2006) (“Our application of state contract law to invalidate the arbitration provision at issue in the instant case is consistent with § 2 of the Federal Arbitration Act.”). In any event, even if Jackson’s unconscionability arguments were meritless or preempted, that would not mean that the courts should not decide those issues before compelling arbitration, which is the issue here.

1. Requiring Employees to Wait for Judicial Review of the Fairness of Arbitration Clauses Until After They Have Completed Arbitration Creates Possibilities for Severe Abuse.

Rent-A-Center's rule would permit employers and corporations to impose arbitration clauses that would deter individuals from ever going through abusive arbitration systems and would insulate those systems from all post-arbitration judicial review. As explained above, most arbitration clauses are enforceable and have been enforced, but there have been situations where agreements marked by overreaching have made it expensive, difficult, or impossible for individuals to pursue claims in arbitration. Requiring employees and consumers to navigate such systems before they could challenge their fairness would enable employers and businesses to deter nearly all claims.

For example, some arbitration clauses have required individuals to travel long distances to have their claims heard.¹⁵ If an individual could not

¹⁵ Courts have routinely struck down such provisions as unconscionable. *E.g., Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1290 (9th Cir. 2006) (*en banc*) (invalidating requirement that individual travel from California to Boston to arbitrate); *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 610 (E.D. Pa. 2007) (refusing to enforce requirement that Pennsylvania consumer's claim be heard in California); *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) ("[T]he selection of Arkansas as the venue for arbitration is unexpected and (Continued on following page)

challenge the unfairness of such a procedure until after arbitrating under it, few challenges would ever be heard, because few individuals – no matter how valid their claims – would be able to pursue them under such a system. Rent-A-Center’s proposed rule thus would render even such flagrantly illegal provisions effectively non-reviewable.

Similarly, some arbitration clauses include “loser-pays” rules that require plaintiffs with non-frivolous claims, but who nonetheless do not ultimately prevail, to pay the defendant’s attorneys’ fees. A number of courts have held that such rules were unconscionable and unenforceable.¹⁶ Delaying judicial scrutiny of unfair loser-pays rules would deter many individuals from vindicating their rights under civil rights and consumer protection laws because they could not afford to take the risk of arbitrating under such rules as a prerequisite to challenging them.

Under Rent-A-Center’s approach, corporations could sidestep this judicial protection and draft clauses providing that the same arbitration firms

unconscionably unfair.”); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (striking down term requiring arbitration in distant forum because it “effectively eliminates any remedy for consumers”).

¹⁶ E.g., *Alexander*, 341 F.3d at 269 (loser-pays rule, among other terms, “effectively denied [the employee] recompense for [the employer’s] alleged misconduct.”); *Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996) (loser-pays rule was “substantively unconscionable on its face”).

that impose loser-pays rules would judge the fairness of such rules. The result would be predictable: “[A]ssessing attorney’s fees against plaintiffs simply because they do not finally prevail would substantially add to the risks of inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.” *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1987).

Rent-A-Center’s proposed rule of law would create easy opportunities for abuse that could never be remedied. The proper way to prevent such abuses is the way that Congress created and FAA Sections 2 and 4 require – allowing courts to resolve allegations that a given arbitration clause violates generally applicable rules of state contract law *before* enforcing the clause.

2. The FAA Provides For Only Very Narrow Review of Arbitration Awards.

Post-arbitration judicial review also cannot be relied on to police arbitration abuses because of the limited nature of review permitted by the FAA. The standard of judicial review for arbitrators’ decisions is “one of the narrowest standards of judicial review in all of American jurisprudence,” *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005), to the point that “perhaps it ought not be called ‘review’ at all.” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994). FAA

Section 10(a) provides that an arbitrator's award may be vacated only if (1) "the award was procured by corruption, fraud or undue means"; (2) the arbitrators displayed "evident partiality or corruption"; (3) the arbitrators "were guilty of misconduct," including refusing to postpone the hearing, refusing to hear material evidence, or other misconduct prejudicing the rights of a party; or (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Only the last of these four categories – FAA Section 10(a)(4) – provides for any review at all of the substance of a decision. But even that review is meaningless here. Rent-A-Center does not suggest, nor could it, that, by ruling on an issue the parties expressly delegated to him, an arbitrator could "exceed[] [his] powers" under FAA Section 10(a)(4). Therefore, if Rent-A-Center prevails and this Court holds that the drafter of an arbitration clause can delegate to an arbitrator the power to decide whether the arbitration clause itself is valid and enforceable, an arbitrator's decision that an arbitration clause is valid and enforceable would not be reviewable under FAA Section 10(a)(4).

See First Options, 514 U.S. at 942-43.

The other grounds for "review" are even more narrow. For example, arbitration awards may not be overturned even if "a court is convinced [the arbitrator] committed serious error." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Indeed, an arbitration award will stand

even if the arbitrator's factfinding was "silly," *id.* at 39, the arbitrator based his decision on invented contract language, *Brentwood Med. Assocs. v. United Mine Workers of Am.*, 396 F.3d 237, 243 (3d Cir. 2005), or the arbitrator committed "even clear or gross errors" of law, *Gingiss Int'l, Inc. v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995). In short, "unless the arbitrator appears utterly to have failed to execute his duty to interpret the contract or the relevant law, the arbitrator's decision must stand." *Upshur Coals Corp. v. United Mine Workers of Am., Dist.* 31, 933 F.2d 225, 231 (4th Cir. 1991).

As a result of this sharply limited judicial review, confining courts to review of arbitration awards after the fact will not safeguard the fairness of arbitrations. If, as Rent-A-Center proposes, parties can contractually force courts to enforce arbitration agreements without regard to whether they are unconscionable by use of a delegation clause, then no court will ever undertake a substantive review of the validity of the arbitration clause. Plainly, that would not do.

C. Relying Upon Arbitrators to Eliminate Abuses of the Arbitration Process Would Not Be Effective.

As noted above, many courts have invalidated arbitration clauses on grounds that they imposed prohibitive arbitration fees or allowed one party to choose the arbitrators. Under Rent-A-Center's

position, so long as a magic sentence is inserted into a standard contract, any challenge to a given arbitration provider's fees or fairness would be addressed to an arbitrator whose income depends upon those same fees or who was chosen by the party that drafted the clause.

A rule that the only judge of the fairness of an arbitrator's fees will be the arbitrator himself is contrary to longstanding notions of due process. *See In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man is permitted to try cases where he has an interest in the outcome."). In *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972), the Court held that it was unconstitutional for a mayor to levy fines against traffic violators when he had an inherent incentive to impose fines due to his supervision of the village's finances. Similarly, in *Connally v. Georgia*, 429 U.S. 245, 246, 251 (1977), a system in which a justice of the peace was paid a prescribed fee for issuing each search warrant but received nothing for denying a warrant was held to violate due process. Likewise, an arbitrator would have a built-in financial incentive to rule against any challenge to his own fees. Having arbitrators judge the propriety of their own compensation, or the fairness of their own rules, is an even more direct conflict of interest than those in *Ward* and *Connally*.

One real-world illustration shows the risks of abuse invited by Rent-A-Center's approach. In 2009, the National Arbitration Forum ("NAF"), formerly the largest consumer arbitration provider in the

United States, was forced to abandon all consumer arbitration in the wake of a law enforcement action that rocked the consumer credit industry. NAF had long been the “go-to arbitrator for consumer credit disputes,” handling over 214,000 claims against alleged debtors in 2006 alone. Carrick Mollenkamp, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, Wall St. J., Oct. 15, 2009, at A14. For years, NAF had aggressively marketed itself to lenders.¹⁷ Operating a system that favored lenders was quite lucrative to the owners of the NAF, see Mollenkamp, *supra*, as well as to individual arbitrators who handled large numbers of cases for it. One former NAF arbitrator noted, “I could sit on my back porch and do six or seven of these cases a week and make \$150 a pop without raising a sweat, and that would be a very substantial supplement to my income. . . . I’d give the [credit-card companies] everything they wanted and more just to keep the business coming.”

¹⁷ See Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum’s Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000, at E1 (“[A]rbitration industry experts say [that] the forum’s business involves more corporate-consumer disputes, in large part because of the company’s aggressive marketing.”); Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 16, 2008, at 72 (“[b]ehind closed doors, NAF [sold] itself to lenders as an effective tool for collecting debts”); Ken Ward, Jr., *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, Apr. 4, 2002, at 5A (“[I]n solicitations and advertisements, NAF has overtly suggested to lenders that NAF arbitration will provide them with a favorable result.”).

Chris Serres, *Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions?*, Star Trib. (Minneapolis), May 11, 2008, at 1D.

A law enforcement action filed by the Attorney General of Minnesota (NAF's home state) alleged that the NAF had engaged in fraud, deceptive trade practices, and false advertising, based on the secret fact – supported by substantial documentary evidence attached to the complaint – that NAF was substantially owned by the same entity that owned the largest debt collection law firms in the U.S. (at a time when NAF was hearing tens of thousands of cases brought by those law firms). Ten days after the Minnesota action was commenced, NAF agreed to withdraw from consumer arbitrations.¹⁸

¹⁸ See Associated Press, *Firm Agrees to End Role in Arbitrating Card Debt*, N.Y. Times, July 20, 2009, at B8. NAF's collapse also occurred just a few days before a Congressional hearing into NAF's abusive practices. See Staff of the Domestic Policy Subcomm. of the H. Comm. on Oversight and Government Reform, 111th Cong., *Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum* (2009), available at <http://domesticpolicy.oversight.house.gov/documents/20090721154944.pdf>. Moreover, at the Congressional hearing, NAF's C.E.O. admitted under oath that, consistently with key allegations of the Minnesota A.G.'s lawsuit, \$42 million in profits from the debt collection enterprise had been distributed to NAF and selected members of its management. *Arbitration or 'Arbitrary': The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov't Reform*, July 22, 2009, video webcast at <http://domesticpolicy.oversight.house.gov/>

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Before these facts came to light, however, the only check on NAF's conduct was provided by courts reviewing arbitration clauses. In the early 1990s, the NAF had adopted rules that required individuals to travel to Minnesota to arbitrate claims, no matter how far they lived from Minnesota or how small their claims were. Applying standard principles of state contract law, a California court held that NAF's rule rendered unconscionable a subprime lender's arbitration clause. *See Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566 (1993). After the *Patterson* case was decided, the NAF changed its rule to permit consumers to have arbitrations conducted in their local federal judicial district. Nat'l Arbitration Forum, Code of Procedure Rule 32(A) (Aug. 1, 2008). It is extremely unlikely, however, that the NAF itself would ever have struck down its own rule as unconscionable if it had not been forced to do so by the decision in *Patterson*.

Although the majority of arbitration providers operate honorable businesses, court resolution of unconscionability challenges is necessary to prevent extreme abuses. Rent-A-Center's proposed rule would allow companies that impose arbitration clauses upon consumers and employees to eliminate this critical protection.

story.asp?ID=2551 (oral statements of Michael Kelly, Chief Executive Officer, National Arbitration Forum and Forthright).

III. JACKSON DID NOT AGREE TO DELEGATE THE QUESTION OF THE ARBITRATION CLAUSE'S VALIDITY TO AN ARBITRATOR.

Even if it were *legally* possible to contract around the FAA's requirement that a court ensure the validity of an arbitration clause before enforcing it, Rent-A-Center would still have to demonstrate not only that the parties intended that result using "ordinary state-law principles" of contract construction, *First Options*, 514 U.S. at 944, but also that "clear and unmistakable evidence" proves the parties agreed to give the arbitrator this power. *Id.* For three reasons, this Court should hold that Rent-A-Center has not satisfied this test or, if necessary, remand this case to the district court to decide whether it has.¹⁹

¹⁹ This argument was not waived. Pet. Br. 19 n.6. While the Ninth Circuit noted that Jackson "does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator," Pet. App. 13a (emphasis added), the court's decision makes clear that Jackson challenged the enforceability of that language. See Pet. App. 9a-10a. Rent-A-Center's suggestion that Jackson has not advanced any argument concerning whether clear and unmistakable evidence in this case establishes the parties' intent to commit these gateway issues to an arbitrator has no merit. See Resp't Br. in Opp'n at 3 (Respondent "takes issue with Petitioner's assertion that the intent of the parties was 'clear and unmistakable'"). Jackson's further development of the argument in this brief falls within this Court's rule that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995) (quotation omitted); see also Sup. Ct. R. 15.2.

First, neither the district court nor the Ninth Circuit found that Rent-A-Center met the *First Options* test. To start with, the district court did not consider whether – or find that – the delegation clause complied with “ordinary state-law principles that govern the formation of contracts.” *First Options*, 514 U.S. at 944. Jackson opposed the motion to compel on the ground that the entire arbitration agreement, including the delegation clause, was unconscionable. *See J.A.* 39-47. The district court did not address whether the delegation clause was unconscionable, but, instead, rejected Jackson’s argument that the arbitration agreement was unconscionable because of its costs provision, without reaching any other substantive unconscionability or procedural unconscionability issues. *See Pet. App.* 1a-6a.

The district court also did not consider whether – or find that – there was “clear and unmistakable evidence” that Jackson had agreed to delegate arbitrability questions to the arbitrator. Its decision does include words to that effect, *see Pet. App.* 4a, but, read in context, they show that the district court was not making any such finding at all. Rather, the district court held that, because Jackson’s unconscionability challenge went to the arbitration agreement as a whole – and not just the delegation clause – the challenge needed to be decided by the arbitrator. It said, *Pet. App.* 4a:

Where the contract agreeing to arbitrate is challenged as whole, it is for the arbitrator to decide the validity of the agreement. [Citing

Buckeye.] The Agreement to Arbitrate clearly and unmistakably [sic] provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable. Plaintiff challenges the agreement to arbitrate as a whole. Plaintiff claims it is void as unconscionable. When there is an agreement to arbitrate, the court cannot hear challenges to the contract as a whole. [Citing *Buckeye.*] As such the question of arbitrability is a question for the arbitrator.

The district court's ruling misapplied *Buckeye*, which said that challenges to *contracts* as a whole are to be decided by arbitrators. This Court's severability cases have long held that challenges to *arbitration agreements* (as opposed to contracts as a whole) are to be decided by courts. *See supra*, Part I.A. This Court did say in *First Options* that parties could agree to assign questions of arbitrability (referring to the scope of arbitration clauses) to arbitrators if their agreement to do so was valid under state law and clear and unmistakable, 514 U.S. at 944, but, in this case, the district court never found that either of those conditions was met.

On appeal, the Ninth Circuit overturned both the district court's decision that the arbitrator should decide whether the parties had agreed to arbitrate questions of the arbitration clause's validity and its decision that the arbitration clause was not unconscionable. As to the former, the appeals court said:

First Options . . . directs that as a threshold matter the court must decide – by applying “ordinary state-law principles” – whether the parties agreed to arbitrate arbitrability. The Employer urges us to consider only that Jackson signed the Agreement . . . To engage in an artificially contracted review of what the parties agreed to here would contravene this principle and violate the proper role of cooperative federalism. Rather, we hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court.

Pet. App. 15a. (citations omitted). Clarifying the “threshold question of unconscionability” it was referring to, the Ninth Circuit said, “We hold that where, as here, an arbitration agreement delegates the question of the arbitration agreement’s validity to the arbitrator, *a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter.*” Pet. App. 18a. (emphasis added). Because the district court had not decided whether the delegation clause was itself enforceable and had not considered all of Jackson’s unconscionability arguments, the Ninth Circuit remanded the case to the district court to complete its work. Pet. App. 20a. As a result, *no* court below has held that the parties entered into a valid, clear, and unmistakable delegation clause.

Second, the parties did not enter into such an agreement here. As this Court said in *First Options*, “When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability) courts generally (though with a qualification we discuss below) should apply ordinary state law principles that govern the formation of contracts.” 514 U.S. at 944. The qualification the Court discussed was that, in addition to applying ordinary state law principles, courts also had to find “clear and unmistakable evidence” that the parties agreed to arbitrate questions of arbitrability. Although the *First Options* exception is limited to scope, *see supra*, Part I.C, even if it were not, neither part of the exception is satisfied here.

Under Nevada state law, which applies in this case, a contract is unconscionable when “the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party.” *Bill Stremmel Motors, Inc. v. IDS Leasing Corp.*, 514 P.2d 654, 657 (Nev. 1973). A sliding scale approach is applied. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2002) (“Generally, both procedural and substantive unconscionability must be present. . . . However, less evidence of substantive unconscionability is required in cases involving great procedural unconscionability.”) (internal quotations omitted).

This case involves great procedural unconscionability. Respondent was required to sign the agreement to get a job or a promotion. Rent-A-Center requires “all new employees” and “all employees who

receive promotions” to “agree to arbitrate all past, present, and future disputes.” J.A. 27.

The delegation clause is also substantively unconscionable. Contrary to Rent-A-Center’s contention, the Agreement does not confer “*exclusive authority*” to an arbitrator “to decide a claim of unenforceability due to alleged unconscionability.” Pet. Br. 3 (emphasis added). Instead, the clause included an important *quid pro quo*: in exchange for initially allowing an arbitrator to decide certain gateway questions, the clause provides for plenary post-arbitration judicial review – substantially more stringent scrutiny than provided by the FAA. *Compare* J.A. 36 with 9 U.S.C. § 10. Thus, the arbitration clause, when read in its entirety, evidences an intent to contract out of not only the FAA’s requirement that a court initially determine whether an arbitration clause is “valid and enforceable” before enforcing it, but also the FAA’s limits on judicial review.²⁰

But therein lies the rub, because the provision for enhanced judicial review of the arbitrator’s decision is unenforceable. This Court has held FAA Section 10 contains the statute’s “exclusive grounds”

²⁰ See *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 81 (1998) (rejecting reliance on one clause “in isolation” to demonstrate clear and unmistakable intent of parties to submit specific issue to arbitrator); *Canfora v. Coast Hotels and Casinos, Inc.*, 121 P.3d 599, 605 (Nev. 2005) (parties’ intent must be “gleaned from reading the contract as a whole in light of the circumstance under which it was entered”).

for post-arbitration judicial review, and that parties cannot contractually agree to expand those grounds for judicial review. *Hall Street*, 552 U.S. at 584. Because the parties' purported waiver of FAA Section 2 hinged on expanded post-arbitration judicial review that is not available because it violates FAA Section 10, the agreement to arbitrate arbitrability is one-sided and substantively unconscionable.²¹

Similarly, Rent-A-Center has not provided "clear and unmistakable evidence" that the parties intended to enforce the pre-dispute waiver absent the corresponding expansive post-arbitration judicial review. *See Restatement (Second) of Contracts § 184 (1981)* ("[A]n agreement may be unenforceable as to corresponding equivalents on each side"). Put another way, it is not clear and unmistakable that the parties intended to take away from the courts the ultimate power to decide the enforceability of the arbitration clause and delegate that power to the arbitrator, because their contract as written would have left the

²¹ Rent-A-Center wants to have its cake and eat it too, in essence seeking to enforce one half of this bargain (gateway delegation) to its advantage, while avoiding the potential disadvantage of the unenforceable second half (expanded judicial review). The law does not permit this result. *See Restatement (Second) of Contracts § 184 cmt. b (1981)* ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable. The fact that the term contained in a standard form supplied by the dominant party argues against aiding him in this request.").

courts with plenary power to decide that legal issue. But Rent-A-Center, in light of the result in *Hall Street*, is now asking the Court to enforce only half of the parties' agreement. Even if the "clear and unmistakable evidence" test applies here, "courts [should] hesitate to interpret silence or ambiguity on the 'who decides arbitrability' point as giving arbitrators that power." 514 U.S. at 945.

First Options itself, moreover, demonstrates why the "clear and unmistakable evidence" required is lacking here. In that case, sophisticated parties personally negotiated the agreements at issue in great detail. Even so, the Court looked beyond the language of the agreements themselves, reviewed the parties' interactions and the context in which they took place, and found no "clear and unmistakable evidence." In this case, the only evidence of record is the language of Rent-A-Center's non-negotiable agreement and the fact that the company required Jackson to sign it. That is hardly compelling evidence of a meeting of the minds on "who (primarily) should decide arbitrability" or "upon the significance of having arbitrators decide the scope of their own power." 514 U.S. at 945.

Finally, if this Court decides that further inquiry into Nevada law or the facts is needed to decide whether the *First Options* test is met, this case should be remanded to the district court for that inquiry. As noted above, the courts below have not yet ruled on whether the agreement to arbitrate arbitrability questions in this case satisfies *First Options*.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

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