No. 04-1264

In The Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN CARDEGNA, ET AL.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Florida

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

When state contract law requires state courts to determine whether a contract is criminal and void *ab initio* before enforcing any of the contract's provisions, including an arbitration provision, does the Federal Arbitration Act ("FAA") preempt that state law and nonetheless require the state court to compel arbitration before determining whether a contract exists?

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INTRODUCTION

The Supreme Court of Florida held below that a court must resolve allegations that an agreement is criminal and void *ab initio* before it enforces any of the agreement's provisions, including an arbitration provision. This decision was based on generally applicable rules of Florida contract law providing that agreements whose principal purpose is the commission of a crime are void *ab initio* in their entirety, meaning that no "contract" to perform any aspect of these agreements ever comes into existence.

Petitioner Buckeye Check Cashing, Inc. ("Buckeye") does not dispute the decision below *if* state law controls whether state courts enforce arbitration clauses in agreements that are void *ab initio*. Buckeye maintains, however, that the FAA preempts generally applicable rules of state law on this issue and requires Florida state courts to enforce arbitration clauses in agreements before and without determining whether those agreements are criminal and void *ab initio* under Florida law. Buckeye claims that this case is governed, and Florida law is preempted, by *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). In that case, this Court held for cases in federal court that, when two parties have agreed to arbitrate disputes arising out of a contract, and one of them argues that the entire contract (as opposed to the arbitration clause in particular) is voidable under a defense such as fraudulent inducement, the arbitrator – not the court – should resolve the challenge to the enforceability of the entire contract. Under this rule of "separability," federal courts are directed to examine certain defenses to the enforceability of an arbitration clause separately from defenses to the enforceability of the contract as a whole.

Prima Paint, however, does not govern this case, which is a state court case (not a federal court case) and which involves an agreement that is allegedly void *ab initio* (not a validly formed contract allegedly voidable as a defense). Buckeye's attempt to extend *Prima Paint* to preempt Florida state law in this case cannot overcome the presumption against preemption of state law. It is contrary both to the plain language of the FAA and the principles set forth in this Court's decisions interpreting the FAA.

STATEMENT OF THE CASE

A. Plaintiffs' Allegations.

This putative class action was brought under Florida state law by respondents John Cardegna and Donna Reuter ("Plaintiffs") on behalf of a class of Florida consumers against Buckeye. Plaintiffs allege that Buckeye, falsely portraying itself as a legitimate check cashing service, illegally charged and collected usurious interest from thousands of Plaintiffs through repeated violations of various Florida statutes.[1]

Plaintiffs' Complaint alleges that Buckeye lent money to Plaintiffs under terms specified in form agreements. J.A. 15. The form agreements contained an "Arbitration

[1] Plaintiffs alleged that Buckeye's practices violated Florida's Lending Practices Act, Chapter 687, Florida Statutes; Florida's Consumer Finance Act, Chapter 516, Florida Statutes; Florida's Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes; and Florida's Civil Remedies for Criminal Practices Act, Chapter 772, Florida Statutes. Joint Appendix ("J.A.") 25-32.

Provision" purportedly requiring the parties to arbitrate any disputes that they might have, on the second page of the agreement, under the heading of "Additional Terms and Conditions," along with other terms such as a "Dishonored Check Fee." *E.g.,* J.A. 36. In each transaction, Plaintiffs gave Buckeye a personal check and agreed that the face value of the check would be paid within a short time period, usually two weeks. In exchange, Buckeye gave Plaintiffs cash in an amount less than the face value of the check. In each transaction, Buckeye agreed to hold the check until the next payday or until the Plaintiff received her or his next Social Security or other government check. *E.g.,* J.A. 17.

The complaint alleges that the rate of interest charged by Buckeye on each transaction ranged from 137% to 1,317% A.P.R. (depending on several factors, including the length of the loan), and the rate was usually over 300% A.P.R. *E.g.,* J.A. 35, 37, 39, and 41. Plaintiffs allege that the essence of each transaction is lending money at highly usurious rates of interest and that the agreements were criminal on their face.[2]

[2] In another case currently pending, the Florida Supreme Court is considering whether identical transactions are usurious loans. In *McKenzie Check Advance of Fl. v. Betts*, No. SC04-1825, the payday lender defendant argues (as Buckeye argued below) that it has not violated Florida law because it does not make loans, but instead merely charges a check cashing fee, and is therefore supposedly not subject to Florida's laws against loan sharking. No party has asked this Court to resolve the question whether Buckeye's conduct involves lending within the meaning of Florida statutory law. Nonetheless, some of Buckeye's *amici* have asserted that the agreements in this case are legal. *E.g., Amicus* Brief of the Consumer Financial Services Association ("CFSA") at 3. Without responding here to the argument as to whether the transactions involved in this case are "loans,"and thus subject to usury

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Chapter 687 of the Florida Statutes provides felony sanctions for such usurious lending. The threshold for first degree misdemeanor criminal usury is 25% per annum, § 687.071(2), Fla. Stat. (2001). Lending money at an interest rate in excess of 45% per annum is a third degree felony. § 687.071(3), Fla. Stat. (2001). Lending money at either the misdemeanor or felony levels of usury is defined as "loan sharking." § 687.071(1)(f), Fla. Stat. (2001). The instant agreements provide for interest rates as high as twenty-nine times the felony threshold. The written agreements themselves are criminal contraband under Florida law. Fla. Stat. § 687.071(5) (2001).

B. The Proceedings Below.

This case was filed in Florida state court. J.A. 1. Shortly thereafter, Buckeye removed it to federal court. J.A. 6. In the district court, Buckeye petitioned to compel Plaintiffs to arbitrate. *Id.* Plaintiffs moved to remand, however, and the district court, upon finding that it had no jurisdiction, granted that motion. J.A. 7. That ruling is not challenged here.

On remand, Buckeye filed another motion to compel arbitration in the state trial court. Plaintiffs opposed the

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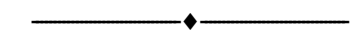
laws, it is worth noting that Buckeye's agreement identifies an "Annual Percentage Rate," *e.g.,* J.A. at 35; and a "Finance Charge." *Id.* The agreement also explains that certain disclosures are being made pursuant to the "Truth in Lending Act," and discloses that the "rate of interest charged is higher than that on substantially similar *loans*." *Id*. (emphasis added). While Buckeye and other payday lenders eventually obtained legislation that they argue prospectively exempts them from the state's usury laws (a proposition that Plaintiffs dispute), that legislation does not help them here because it was not in effect at the time these loans were made.

motion on the grounds, among others, that the entire contract was criminal and void *ab initio*. Buckeye argued that illegality was an issue for an arbitrator, not a court, to decide, citing *Prima Paint*. Plaintiffs responded that *Prima Paint* does not apply to this case. Plaintiffs also argued that the text of the FAA does not support Buckeye's efforts to compel arbitration here. The state trial court denied Buckeye's motion to compel arbitration. Buckeye appealed to the District Court of Appeals, which reversed the trial court.

The Florida Supreme Court reversed the District Court of Appeals. Petition Appendix ("P.A.") 1a-26a. It held that, before a Florida state court can compel arbitration of a case, the court, not an arbitrator, must first decide whether a contract exists at all under Florida law. It held that "Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract." P.A. 7a. The Court cited Florida case law involving illegal contracts (that did not involve arbitration issues) dating back more than half a century. *Id*. (citing *Wechsler v. Novak*, 26 So.2d 884, 887 (1946) (involving an attempt to influence a government official)). The court below also relied on a leading treatise on arbitration law for the proposition that "[c]ontracts in violation of statutory prohibitions are void, and issues arising under such contracts are therefore not arbitrable." *Id.* (quoting *R.P.T. of Aspen, Inc. v. Innovative Comm, Inc.*, 917 P.2d 340 (Colo. Ct. App. 1996), citing 2 Martin Domke, *Commercial Arbitration* 8.06 (rev. ed. 1995)). This appeal followed.



SUMMARY OF ARGUMENT

Buckeye argues that the state law applied in the decision below conflicts with, and thus is preempted by, the FAA. Although Buckeye identifies no language in the FAA to support this theory, it argues that the decision below is contrary to the separability principle that this Court recognized in *Prima Paint*. Buckeye argues that *Prima Paint* holds that only an arbitrator – and not a state court – can decide any challenge to a contract, even a challenge to whether a contract was formed or exists at all, if the challenge relates to the entire contract and not just the arbitration clause. Pet. Br. at 1. Buckeye further argues that any state law providing that a state court should not enforce an arbitration clause in a criminal agreement that is void *ab initio* is preempted. The only exception that Buckeye acknowledges is if a challenge is raised to a party's assent to a contract as a whole.

Buckeye's argument, however, must overcome the heavy presumption against preempting state law in areas – such as the law of contract formation – traditionally governed by state law. This presumption should be decisive here, because this Court also has held that federal law does not preempt state law where federal law provides no guidance on an issue – and there are no applicable principles of federal law governing the question of what is a "contract."

Against this backdrop, the decision below must stand. As a threshold matter, the separability rule enunciated in *Prima Paint* cannot preempt state law in this case, because the arbitration issues here arose in Florida state court. *Prima Paint*'s holding was grounded in the language of 9 U.S.C. § 4, which on its face only establishes a

procedural rule for federal court proceedings. Section 4 applies to petitions brought in "any United States district court." Section 3, which the Court held also incorporates a separability rule, likewise only applies to suits "brought in any of the courts of the United States." It was appropriate for this Court to apply Section 4 in *Prima Paint*, because that case was an appeal from federal courts. Because the arbitration issues in this case arose in state court proceedings, however, *Prima Paint* has no application here.

Buckeye really is asking this Court to extend *Prima Paint* to preempt state law in state court cases, and to enforce arbitration clauses in agreements that are void *ab initio* under generally applicable rules of state law, not just valid contracts allegedly voidable by one party as a defense. That attempt to extend *Prima Paint* is contrary to the FAA itself.

Buckeye never identifies which provision of the FAA it is relying on, but Section 2 of the Act is the only provision that this Court has held applies in state courts. Buckeye's argument, however, is directly contrary to the language of Section 2. Section 2 says that arbitration provisions are enforceable when they are found "*in*" a "*contract*," or when there is an agreement to arbitrate an existing controversy that "*arises out of*" a "*contract*." Buckeye argues that the separability rule must be applied and arbitration provisions must be enforced whenever there is assent (or an agreement) to an arbitration provision. The language of the statute, however, provides that such agreements are enforceable only when they are found in a contract or when they relate to a controversy that arises out of a contract. Accordingly, the question of whether a contract exists is a threshold issue that must be resolved *before* a court can begin to enforce the FAA.

This case involves the threshold issue of whether a contract exists. Under generally applicable principles of Florida law – and that of most other jurisdictions – an agreement to perform a criminal act does not form a *contract*. There may be an agreement to sell cocaine, for example, but there is no such thing under Florida law as a "*contract*" to sell cocaine (much less an enforceable arbitration provision in a "contract" to sell cocaine). That principle governs this case. Plaintiffs colorably allege that Buckeye charges interest rates that violate Florida's criminal laws and that Buckeye's payday lending agreement is, therefore, void *ab initio*. As the court below held, under general principles of Florida contract law, no contract is ever formed by an agreement that violates a statute. P.A. 6a. Plaintiffs' arguments in this case thus go to the existence and formation of the contract in the first instance, an issue that a court must resolve before the FAA comes into play.

Buckeye's proposed extension of *Prima Paint* also is contrary to the scheme of the statute. This Court has repeatedly directed, including in *Prima Paint* itself, that "the purpose of Congress [in enacting the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." 388 U.S. at 404 n.12. Under longstanding principles of Florida law applicable to all contracts, courts may not enforce any provision of a contract if its primary purpose is criminal. Buckeye's proposed extension of *Prima Paint* would be only valid if this Court were to read Section 2 of the FAA as establishing a new federal law of contract formation that made arbitration agreements more enforceable than all other types of contracts. For all of these reasons, Buckeye's preemption

arguments should be rejected and the decision below should be affirmed.

ARGUMENT

I. BUCKEYE MUST OVERCOME A HEAVY PRESUMPTION AGAINST PREEMPTION OF ORDINARY STATE CONTRACT LAW RULES.

There is no dispute that, if Florida law governs the question of whether a contract was formed in this case, and whether a state court or an arbitrator decides that question, Plaintiffs prevail. Buckeye does not dispute that generally applicable Florida contract law renders agreements to commit a crime void *ab initio* in their entirety, and thus that, under Florida law, a court must decide whether an agreement is void *ab initio* before enforcing any provision in it, including an arbitration provision. Instead, Buckeye argues that federal law overrides and preempts Florida law. *E.g.,* Pet. Br. at 1 ("state law has nothing to do with the real issue"). Buckeye essentially argues that federal law requires state courts to recognize an exception to the normal principles of contract law governing illegal agreements. This new rule of federal contract law would apply only to arbitration clauses, and would require both federal and state courts to enforce arbitration provisions in circumstances where they would not enforce other types of contract terms.

This case thus must be analyzed in light of the strong presumption against federal preemption of state contract law. This Court has directed repeatedly that, "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has

made such an intention 'clear and manifest.'" *Bates v. Dow Agrosciences*, 125 S. Ct. 1788, 1801 (2005) (internal citations omitted). The presumption against preemption applies both to the existence of preemption and the scope of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485 (1996). The presumption helps ensure that the balance between federal and state power will not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Contract law is an area traditionally governed by state law. While there is a body of federal common law governing contracts in a few narrow areas (such as in collective bargaining disputes governed by the federal labor laws or in certain maritime settings), few areas of law have been more deeply entrusted to the states than the law of contract formation.[3]

[3] *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 84 (1982) ("the cases before us, which center upon appellant Northern's claim for damages for breach of contract . . . , involve a right created by *state* law. . . ."), 458 U.S. at 90 (Rehnquist, J. and O'Connor, J., concurring) ("the lawsuit . . . seeks damages for breach of contract . . . which are the stuff of traditional actions at common law. . . . There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims . . . arise entirely under state law."); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("[C]ommercial agreements traditionally are the domain of state law. State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable"); *Pan Am. Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663 (1961) (contract dispute) ("The suits are thus based upon claims of right arising under state, not federal law. . . . The rights as asserted by Cities Service are traditional common law claims."); *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 40 (1988) (Scalia, J., dissenting) ("Nor can or should courts

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The presumption against preemption is also particularly strong here because Buckeye is proposing a federal rule to govern the procedures that state courts should follow. The court below held that state courts should decide the threshold issue of whether a contract exists before sending a case to arbitration. Buckeye is insisting that federal law requires that a different procedure be followed. There is a very strong presumption against federal preemption in this setting, as federal law recognizes that states traditionally may adopt their own rules on procedural issues. *E.g., Howlett v. Ross*, 496 U.S. 356, 372 (1990) ("The states thus have great latitude to establish the structure and jurisdiction of their own courts."); *Southland Corp. v. Keating*, 465 U.S. 1, 33 (1984) (O'Connor, J., dissenting) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered.") (quoting Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954)).

In light of this heavy presumption, this Court has held that federal law may preempt state law in only three circumstances: (a) when Congress has expressly provided for preemption; (b) when Congress intends for federal law to occupy a field; or (c) where state law conflicts with a federal statute. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 371 (2000). As this Court has recognized,

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ignore that issues of contract validity are traditionally matters governed by state law.").

however, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Therefore, the FAA can displace state law only through the doctrine of implied conflict preemption. *Id*. at 477-78.

In order to establish that the FAA impliedly preempts Florida's contract law holding that agreements to commit a crime are void *ab initio* in their entirety, Buckeye must demonstrate that there is an "actual conflict" between federal and state law, either because it is "impossible for a private party to comply with both . . . requirements" or because the state laws "stand[ ] as an obstacle to the accomplishment and execution of full purposes" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (citations omitted). This Court has also rejected claims of preemption where no federal law addresses the subject that state law is regulating. *See, e.g., Freightliner*, 514 U.S. at 289-90 (unanimous holding that common-law claims involving a manufacturer's failure to install antilock brakes in trucks are not preempted by the Motor Vehicle Safety Act because "[t]here is no express federal standard addressing [antilock brakes] for trucks or trailers."). Accordingly, Buckeye has the burden of establishing that federal law addresses and conflicts with state law with respect to the subject matter at issue here – the formation of contracts.

To establish that federal law preempts state law in this area, Buckeye must point to specific language in the FAA that conflicts with – and thus overrides – state law. In determining whether a state rule of law is preempted by federal law, a court's "sole task is to ascertain the intent of

Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (plurality). The most reliable indicator of Congress' intent, of course, is its own language. *E.g., Nixon v. U.S.*, 506 U.S. 224, 232 (1993) ("the well-established rule [is] that the plain language of the enacted text is the best indicator of intent.") As will be shown, the plain language of the FAA shows that Buckeye is wrong and that Congress did not intend to displace the state law principles applied by the state court below.

II. *PRIMA PAINT* INTERPRETED 9 U.S.C. §§ 3 AND 4, WHICH DO NOT APPLY TO THIS *STATE COURT* CASE.

Buckeye's argument that Florida law is preempted by this Court's decision in *Prima Paint* should be rejected because that decision was based on sections of the FAA that, by their own terms, have no application in state court cases like this one. *Prima Paint* held that the separability rule was dictated by the language of 9 U.S.C. § 4, and that it applies equally to cases governed by 9 U.S.C. § 3. Both of these provisions, however, create procedural rules that on their face apply only in federal district court cases where there is an independent basis for federal court jurisdiction. Because this case, unlike *Prima Paint*, is on appeal from state court proceedings, there is no statutory basis for applying *Prima Paint*'s separability rule here.[4]

[4] This argument against extending *Prima Paint* to the facts of this case is properly before the Court. The Florida Supreme Court recognized the argument in distinguishing federal court cases based on differences in controlling law, noting that federal cases to the contrary were based upon federal law, *see* 894 So.2d at 864 ("However, the case before us is distinguishable because *Bess* [*v. Check Express*, 294 F.3d

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The Court granted review in *Prima Paint* to resolve a circuit split over whether a federal court or an arbitrator decides allegations that a contract with an arbitration clause was induced by fraud, and whether this determination of who decides is governed by the FAA or state law. *See Prima Paint*, 388 U.S. at 402. In holding that the FAA creates a separability rule requiring federal courts to refer fraud allegations to an arbitrator if they do not implicate the validity of the arbitration clause, the Court found that this result was compelled by the language of 9 U.S.C. § 4:

> *With respect to cases brought in federal court* involving maritime contracts or those evidencing transactions in "commerce," we think that Congress has provided an explicit answer. That answer is to be found in § 4 of the Act, which provides a remedy to a party seeking to

1298 (11th Cir. 2002)] was expressly resolved under federal law, not state law principles."), and that those cases were based on "the scope of the district court's authority under 9 U.S.C. § 4." 894 So.2d at 864. Moreover, even if it had not been explicitly addressed, this separate argument against extending *Prima Paint*'s separability principle to this case would fall within this Court's traditional 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) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)) (emphasis added). Finally, since the question presented is whether the rule of *Prima Paint* governs this case, the determination of whether *Prima Paint* and 9 U.S.C. §§ 3 and 4 *ever* apply in state court proceedings is "so integral to the decision of the case that [it] could be considered fairly subsumed by the actual question[ ] presented." *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) (citation omitted)); *see also Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) ("Under the facts of this case, however, addressing the implications of [28 U.S.C.] § 1446(b)'s one-year limitation is predicate to an intelligent resolution of the question presented. We therefore regard the issue as one fairly included within the question presented.") (citations omitted).

> compel compliance with an arbitration agreement. Under § 4, *with respect to a matter within the jurisdiction of the federal courts* save for the existence of an arbitration clause, the federal court is instructed to order arbitration once it is satisfied that "the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue."

Id. at 403 (emphasis added). The Court thus limited the scope of the question before it to the allocation of authority in "cases brought in federal court," and resolved that question based on a statutory provision that itself applies only to petitions for arbitration in "any *United States district court* which, save for such agreement, would have jurisdiction under Title 28." 9 U.S.C. § 4 (emphasis added). *Prima Paint* therefore does not, and cannot, determine who resolves the threshold contract challenge in this state court case.

Although *Prima Paint* relied on the language of 9 U.S.C. § 4 to support its holding, that case actually arose under 9 U.S.C. § 3. Like Section 4, Section 3 applies to "any suit or proceeding brought in any of the *courts of the United States* upon any issue referable to arbitration . . . " 9 U.S.C. § 3 (emphasis added). The Court's actual holding recognized that the separability rule applies under either provision governing proceedings in federal courts: "We hold, therefore, that in passing upon a § 3 application for a stay while the parties arbitrate, a federal court may consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404. Thus, neither *Prima Paint* nor the statutory provisions on which it relies purports to govern the allocation of authority between courts and arbitrators in *state court* proceedings.

This limitation to federal court proceedings was central to *Prima Paint*'s holding. After resolving the statutory interpretation issue, the Court had to address the constitutionality of what was arguably a federal law rule of decision in a diversity jurisdiction case. *Id*. at 404-05. In resolving this constitutional question, the Court flatly rejected the contention that it was creating federal substantive law for diversity cases and held instead that the severability rule was made pursuant to Congress's power to regulate procedural matters *in federal courts*:

> The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. Rather, the question is *whether Congress may prescribe how federal courts are to conduct themselves* with respect to subject matter over which Congress plainly has power to legislate. The answer to that question can only be in the affirmative.

Id. at 405 (emphasis added). The Court thus found that the separability rule, consistent with the plain language of Sections 3 and 4, is a rule of procedure governing the allocation of authority between federal courts and arbitrators that Congress created pursuant to its power to regulate proceedings in federal courts.[5] Therefore, Buckeye's argument for applying this separability rule to govern the state court proceedings here would call into question the constitutional underpinnings of *Prima Paint* itself.

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[5] *See also Bess,* 294 F.3d at 1306 n.3 ("In reaching our decision, however, we are not deciding questions of Alabama contract law; rather, we are deciding the scope of the district court's authority under 9 U.S.C. § 4, a question of federal law.").

Although this Court subsequently held that Section 2 of the FAA applies to state court proceedings, *see Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984), it has never held that the procedural rules of Sections 3 and 4 at issue in *Prima Paint* also apply in state court and displace any different state laws. To the contrary, *Southland* disavowed any such intention by clarifying that, "[i]n holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts." *Id*. at 16 n.10.[6] Likewise, in *Volt*, which held that the FAA does not preempt a state procedural rule allowing stays of arbitration when there is related litigation pending, the Court again explained that:

> While we have held that the FAA's 'substantive' provisions – §§ 1 and 2 – are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court.

489 U.S. at 477 n.6. In light of these decisions recognizing the plain textual limitations of Sections 3 and 4 to cases in federal court, many state appellate courts have held that these provisions do not govern state court proceedings and

[6] *Southland*'s disavowal on this point was made in response to Justice O'Connor's forceful dissent challenging both the statutory and constitutional bases for applying the FAA's procedural rules in Sections 3 and 4 to state courts. *See id*. at 29 ("§§ 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts.") (O'Connor, J., dissenting); *id*. at 31 n.20 ("[A]bsent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights.").

thus do not preempt state laws addressing procedures for deciding arbitration-related issues.[7]

Buckeye's arguments for extending *Prima Paint*'s separability rule to state court proceedings thus cannot be squared with the FAA's plain language or the Court's interpretation of the Act in *Prima Paint* itself. Instead, both make clear that the separability rule is a matter of federal court procedure governing the allocation of authority between federal judges and arbitrators that applies *only* in federal court proceedings. Therefore, state courts may apply state law rules in determining the allocation of authority between courts and arbitrators, subject only to the FAA's preemptive neutrality requirement that state law not place agreements to arbitrate on a different or lesser footing than other contract terms. Since the contract law rule applied by the state court below in holding that Plaintiffs' threshold allegations of illegality are for courts to decide comports with this neutrality requirement (*see* Part III, *infra*), there is no basis in the FAA for reversing this determination. The decision below thus should be affirmed.

As the next section will make clear, *Prima Paint* does not apply for a second reason: it did not involve a question of contract formation. *Prima Paint* involved a voidability defense to a contract that had been formed, and not the

[7] *See*, *e.g.*, *Southern Cal. Edison Co. v. Peabody W. Coal Co.*, 977 P.2d 769, 774 (Ariz. 1999) (applying state law rule governing appeals); *Simmons Co. v. Deutsche Fin. Serv's Corp.*, 532 S.E.2d 436, 439-40 (Ga. App. 2000) (same); *Collins v. Prudential Ins. Co.*, 752 So.2d 825, 828-29 (La. 2000) (same); *Xaphes v. Mowry*, 478 A.2d 299, 301 (Me. 1984) (same); *Wells v. Chevy Chase Bank*, 768 A.2d 620, 625-26 (Md. 2001) (same); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (same).

threshold issue of whether a contract had been formed at all. Buckeye's reading of *Prima Paint* ignores the crucial distinction between a void and voidable contract. In its brief, Buckeye insists that the distinction between voidable contracts and documents that are void *ab initio* and never form contracts is one "without a difference." *E.g.,* Pet. Br. at 1. As will shortly be seen, these arguments can only be advanced if one assumes that federal law requires state courts to disregard the language of the statute and core principles of contract law.

III. BUCKEYE'S PROPOSED EXTENSION OF *PRIMA PAINT* IS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 2 OF THE FAA AND THIS COURT'S DECISIONS INTERPRETING IT.

Given that *Prima Paint*, by its own terms, does not apply to state court cases, the next question is whether there is any statutory basis for *extending Prima Paint* to cases, like this one, that arise in the state courts. As we now explain, the answer is clearly "no." Under this Court's normal approach to questions of federal preemption, a party asking a court to hold that some body of state law is preempted by federal law must identify a rule of federal law – either in a statute or a regulation – that allegedly preempts the state law. Before a court can turn to the question of whether state law conflicts with federal law, it must first determine whether there *is* any federal law governing the matter in dispute.

Aside from its misguided reliance on *Prima Paint*, Buckeye has not identified any language in the FAA that it claims preempts Florida state law here. The only provision of the FAA that this Court has ever found to have any preemptive effect, however, is Section 2. Accordingly, while

Buckeye's brief is unclear on the point, it appears that what Buckeye is really saying is that this Court should re-interpret its decision in *Prima Paint* as being based upon Section 2 of the Act, and then extend this new interpretation of Section 2 to create a new rule of preemptive federal law.

Buckeye's proposed extension of *Prima Paint*, however, is fatally flawed at the core. It contradicts both the plain language of Section 2 itself and this Court's jurisprudence in several respects.

A. Under the FAA, a Court Must Find that a Contract Exists Before an Arbitration Clause May Be Enforced.

1. Section 2 Only Authorizes Enforcement of an Arbitration Clause that Is "In" a "Contract."

Like Sections 3 and 4, Section 2 also bars Buckeye's attempt to extend *Prima Paint* to preempt state law in this case, because Section 2 provides that arbitration clauses are enforceable when they are "in" a contract or relate to a controversy that is "arising out of" a "contract." Under the plain language of the statute, therefore, any separability principle requiring the enforcement of an arbitration clause could apply only in cases (like *Prima Paint* itself) where there is no dispute that a contract has been *formed*. In *Prima Paint*, this Court faced a situation where a contract unquestionably *existed*, but that contract was arguably voidable and subject to a defense from one party (fraudulent inducement). 388 U.S. at 401 (the case involved a "contract" in interstate commerce). In this case, however, Plaintiffs allege that no contract was ever

formed. And Section 2, by its terms, does not apply if no contract exists.

Section 2 of the FAA provides only for the enforcement of arbitration provisions which are found (1) "in . . . a contract" or (2) which are agreements to arbitrate an existing controversy "arising out of . . . a contract." Section 2 of the Act states:

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

9 U.S.C. § 2 (Emphasis added.)

In other words, the Act provides that, in non-maritime cases (such as this one), written provisions for arbitration must be "*in*" a "*contract*," or must be an agreement to arbitrate an existing controversy that is "arising out of such a contract," to be "enforceable." The definition of the word "in" is "contained or enclosed by; inside; within." Webster's New World Dictionary (3d College Ed. 1988) ("Websters").[8] Thus, when the FAA says that a provision to

[8] "When the terms in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). *See also Smith v. U.S.*, 508 U.S. 223, 228 (1993) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning.") Accordingly, it is entirely appropriate for this

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arbitrate is enforceable if it is "in" a contract, the agreement must be "contained or enclosed by" a contract, "inside" a contract, or "within" a contract. Similarly, the word "arise" means "to result or spring *from* something." Webster's at 74 (emphasis in original). When the FAA says that an agreement to arbitrate is enforceable if it involves a controversy that "arises out of" a contract, then the controversy must "result or spring from" a contract. Buckeye's provision does not meet any of those requirements, because it is set forth in an illegal agreement that, under Florida law, never constituted a contract in the first place.

Buckeye argues that as a matter of federal law, when there is a challenge to the formation of a contract that contains an arbitration provision, the question of whether a contract was formed is one that must be answered by an arbitrator – and not a court. Buckeye acknowledges only one exception to this proposed federal rule – when the challenge to the formation of the contract involves the issue of assent. *E.g.*, Pet. Br. at 1. But that position is contrary to the language of § 2 of the FAA. As just noted, an arbitration provision is only enforceable if it is "in" a "contract" or "arises out of" a controversy that arises from a "contract." By focusing solely upon assent, Buckeye confuses the idea of an agreement with a contract. Whenever two parties assent to something, they may have an agreement, but that does not mean that they have a "contract." The terms are not synonymous. In Florida (as in many other states), for example, two parties may each

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Court to look at dictionary definitions to give words their ordinary meaning. *See, e.g., Chapman v. United States*, 500 U.S. 453, 461-65 (1991).

assent to an arrangement which has the principal purpose of committing a felony, but while this assent gives rise to an agreement, it decidedly is not a "contract." Section 2 of the FAA only provides for the enforcement of those arbitration agreements that are "in" or that involve controversies that "arise out of" *contracts*. Indeed, Buckeye's proposal is untethered to any statutory language at all. Buckeye effectively suggests that this Court treat the FAA as a general command that federal law requires the enforcement of arbitration clauses as often as possible, a position that cannot be squared with the limitations of the statute's language.[9]

As Buckeye conceives of the separability doctrine of *Prima Paint*, its agreement here really constitutes two separate agreements. One is a written agreement containing terms that provide for Buckeye to give cash to Plaintiffs in exchange for interest and fees, and the second is an agreement to arbitrate disputes. Pet. Br. at 18. Because these two agreements are supposedly separate, Buckeye argues that it is appropriate to enforce the agreement to arbitrate even if the principal purpose of the agreement as a whole is illegal. Buckeye's position is not consistent with Section 2 of the Act. Section 2 does not speak of agreements to arbitrate as "contracts" standing alone and apart from the rest of a contract that addresses other issues. Instead, Section 2 of the FAA speaks of arbitration "provisions" or "agreements" that are enforceable when they are

[9] It also is notable that Section 2 does not even use the word "assent." This is not surprising, since assent is an element of *state* law governing formation of contracts, and the FAA does not displace state law with a new federal law of contracts.

"in" contracts or when they involve controversies that "arise out of" *contracts*.

One of Buckeye's *amici* does offer a textual argument from the language of the FAA. The Florida Bankers Association and the American Bankers Association ("the Bankers") argue that Congress must have intended to create a federal preemptive rule of separability, even when the principal purpose of an agreement is criminal, because Section 2 distinguishes between arbitration "provisions" and "contracts." *Amicus* Brief of the Bankers at 4-5. But the Bankers' position is inconsistent with the language of Section 2 that governs this case. The Bankers essentially would read out of Section 2 the language requiring that arbitration agreements be "in" a contract or involve controversies "arising from" a "contract." As they would rewrite Section 2, an arbitration provision or agreement would be enforceable whether or not a contract were present. This reading is contrary to this Court's "cases [that] express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *See, e.g., Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). While the Bankers are correct that Congress distinguished between agreements to arbitrate and the contracts in which they are found, the Bankers disregard the relationship that Congress specified between the two. The Bankers' wish to apply the FAA to cases where there is no "contract" at all is simply at odds with the Act's language.

Buckeye's argument that federal law creates a separability principle that overrides state contract law relating to the formation of contracts also is contrary to this Court's and other courts' decisions interpreting the FAA, which provide that courts rather than arbitrators must

decide certain "gateway questions."[10] Because the existence of a "contract" is a prerequisite for the FAA to apply to an agreement, the determination is a threshold issue that must be resolved *before* a court begins to enforce the FAA. Buckeye wants courts to enforce the FAA without first establishing that the FAA applies in a case. In so arguing, Buckeye puts the cart before the horse: it demands that courts assume that an arbitration provision meets the requirements of § 2 and enforce the clause, before the court has resolved the threshold question of whether a contract exists at all.[11]

In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court indicated that courts, rather than arbitrators, must decide basic issues relating to the existence of a contract. In *Howsam*, this Court unsurprisingly held that an arbitrator, not a court, should determine whether a party violated an arbitration rule. After all, as the Court noted, "the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it." *Id.*

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[10] While these decisions generally do not specify which section or language in the FAA they are applying, they must be understood as interpretations of Section 2 of the FAA because no other provision of the Act appears to relate to the issues addressed therein.

[11] One of the odder complaints in the briefs supporting Buckeye is the Chamber of Commerce's objection that the court below "assumed" that the contract is illegal. Brief for the Chamber of Commerce *et al.*, at 6. This badly mischaracterizes the result below. The court below held that a court must decide the gateway question of whether a contract exists before enforcing the arbitration provision. This is no more assuming a conclusion than it would be for a court to hold that a court – not an arbitrator – must decide the gateway question of whether there is assent to the contract in general, something that even Buckeye agrees is appropriate. Pet. Brief at 1.

at 80. There was no question that the parties were bound by a legally valid arbitration agreement in a contract, however, and this Court explained that disputes on *that* question are for the court. "[A] gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Id.* at 84. This case involves just such a "gateway question."

Similarly, in *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (3d Cir. 2000) (Becker, J.), the court's analysis of the importance of the distinction between void and voidable contracts closely tracked the logic employed by the court below. In *Sandvik*, the court held that a party cannot enforce an arbitration clause while denying that it is bound by the contract containing that clause because, "[e]ven under the severability doctrine [of *Prima Paint*], there may be no arbitration if the agreement to arbitrate is non-existent." *Id*. at 101. The court construed *Prima Paint* as applying only to allegations that would render a contract *voidable*, and held that courts must resolve all allegations that would render an entire contract *void*:

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the *existence* of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or nonexistent, as is contended here, and those that are merely "voidable," as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of the arbitration agreement is in dispute.

Id. at 107. *See also Sphere Drake Ins. Ltd. v. All American Ins. Co*, 256 F.3d 587, 591 (7th Cir. 2001) ("Th[e dispute in

this case does not involve] a defense to enforcement, as in *Prima Paint*; it is a situation in which no contract came into being; and as arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator (unless the parties agree to arbitrate this issue after the dispute arises).").

In short, not only does the language of the FAA require that a court find that a "contract" exists *before* attempting to enforce the FAA, but the decisions of this Court and other courts have recognized that it is crucial that courts resolve this "gateway" question before attempting to implement this statute.

2. Under Florida Law, an Agreement to Commit a Crime is Void *Ab Initio*, and No Part of Such an Agreement May Be Enforced.

As was just established, Section 2 requires that a contract exist before an arbitration provision in it is "enforceable." In this case, no such contract existed. The court below held that, under Florida law,[12] courts may not enforce *any* part of a contract that violates a state statute. P.A. 6a.[13] The court below rooted this holding in several

[12] Part III.B, below, establishes that the FAA generally entrusts questions of whether a contract exists to state contract law.

[13] Many of the Florida cases dealing with illegal contracts make clear that courts will strike down the entire contract – including any and all provisions found therein – only where the "principal purpose" or the "essence" of the contract is illegal. *See, e.g.*, *Slusher v. Greenfield*, 488 So.2d 579, 582 (Fla. Dist. Ct. App. 1986) (where illegal compensation provision related to the "one object and purpose" of employment contract, entire contract was void for illegality); *cf. United Nat'l Bank of Miami v. Airport Plaza Ltd. P'ship*, 537 So.2d 608, 610-11 (Fla. Dist. Ct.

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cases, including one that dates back more than 50 years. *Id.* (citing *Wechsler v. Novak*, 26 So.2d at 887 (1946)).

The court below easily could have quoted from scores of other Florida cases establishing these points. Florida law has long recognized, and has recognized in many different contexts, that agreements that violate Florida criminal laws and the public policy expressed in those laws are illegal and void *ab initio*, and cannot be enforced:

> The right to contract is subject to the general rule that the agreement must be legal and if either its *formation* or its performance is criminal, tortious or otherwise opposed to public policy, the contract or bargain is illegal. *See* 11 Fla. Jur. 2d, Contracts 81, Restatement of the Law, Contracts 512. . . . Where a statute imposes a penalty for an act, a contract founded upon said act is considered void in Florida.

Thomas v. Ratiner, 462 So.2d 1157, 1159 (Fla. Dist. Ct. App. 1984), *reh'g denied* (1985).[14] By contrast, "[i]t is

App. 1989) (multimillion dollar real estate sale not void where illegal brokerage service term "d[id] not go to the essence" of the contract).

[14] Many of the cases relied upon by Buckeye, by contrast, assume, without citing to any authority, that illegality is not related to contract formation. In *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), for example, the court acknowledged that arbitration clauses are not to be enforced when they are embedded in contracts that are void *ab initio* because one party did not have the authority to sign the contract. The court then implicitly created a new rule of federal law (in an area plainly governed by state law), that illegal contracts are subject to a different rule because the issue of illegality only goes to "the *content* of the contracts, not their *existence*." *Bess*, 294 F.3d at 1305. The *Bess* opinion never explains the rationale or cites any authority for this conclusory statement. In fact, as this section makes clear, Florida's generally applicable contract law is to the contrary. Under Florida law,

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axiomatic that fraudulent inducement renders a contract voidable, not void." *Mazzoni Farms, Inc. v. E.I. DuPont DeNemours & Co.*, 761 So.2d 306, 312 (Fla. 2000).

Under general principles of Florida contract law, the rule against the enforcement of void contracts is not a partial one that selectively invalidates parts of contracts. Instead, it is an absolute rule that invalidates void contracts in their entirety. "[I]t must be held that as a matter of law any contract made in violation of [the Act's] terms, provisions or requirements is void and confers *no enforceable rights* on the contracting parties." *Umbel v. Foodtrader.com, Inc.*, 820 So.2d 372, 374 (Fla. Dist. Ct. App. 2002) (emphasis added) (citing *Edwards v. Trulis*, 212 So.2d 893, 895 (Fla. Dist. Ct. App. 1968) and *Buehler v. LTI Int'l, Inc.*, 762 So.2d 530 (Fla. Dist. Ct. App. 2000)). *See also T.C.B. v. Florida Dep't of Children & Families*, 816 So.2d 194, 196 (Fla. Dist. Ct. App. 2002) (a contract is void as against public policy when it is injurious to the interest of the public, or contravenes some established interest of society).[15]

The Florida Supreme Court has explained the corrosive effect upon the legal system of treating an illegal

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allegations that a contract is illegal and thus void *ab initio* go to the formation of a contract in the first instance.

[15] In Florida, as in many other states, "where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it." *Hooten v. Lake County*, 177 So.2d 696, 701 (Fla. Dist. Ct. App. 1965); *see also Solomon v. Gilmore*, 731 A.2d 280, 289 (Conn. 1999) (citing longstanding rule articulated that "every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract, though the statute does not mention that it shall be so"); *Mitchell v. Smith*, 1 Binn. 110, 1804 WL 966, at *6 (Pa. 1804) (same).

contract as merely voidable, rather than void. *E.g., Chandris, S.A. v. Yanakaksis*, 668 So.2d 180, 185 (Fla. 1995), *reh'g denied* (1996) (citation omitted) (treating an illegal contract as merely voidable would "afford viability to an unregulated contract of the very kind that we have determined to be in the public interest to regulate"). *See also Gonzalez v. Trujillo*, 179 So.2d 896, 897-98 (Fla. Dist. Ct. App. 1965) ("there rests upon the courts the affirmative duty of refusing to sustain that which is by the valid laws of the state, statutory or organic, has been declared repugnant to public policy. To do otherwise would be for the law to aid in its own undoing.") (citations omitted)

Under generally applicable Florida contract law, therefore, if the principal purpose of an agreement is to violate Florida's public policy as expressed in its criminal law, that agreement is void *ab initio*; no contract ever comes into existence. Accordingly, *Prima Paint* and the FAA are not helpful to Buckeye here: under normal and generally applicable principles of state contract law, this case involves the threshold question of whether a contract exists at all.

B. The FAA Entrusts the Contract Law Issues Involved Here to Generally Applicable State Laws of the Sort Applied by the Court Below.

1. Under the FAA, State Law Determines When Contracts Are Formed, as Long as It Treats Arbitration Provisions in the Same Way as Other Contract Terms.

Buckeye's argument that the FAA implicitly preempts Florida state law of contract formation fails for a second

and independent reason: the FAA creates no substantive rules of federal law governing questions of contract formation. The FAA says nothing about when a contract is or is not formed. While Congress required that an arbitration provision be "in" a "contract," it did not define the term "contract."[16] Where federal law creates no standard for a term such as "contract," there is no basis for preempting state law defining what constitutes a contract.

The Congress that enacted the FAA in 1925 obviously was aware that a substantial body of state law existed defining what was and was not a contract. If Congress had intended to define what "contracts" were for purposes of the FAA, it could have done so. Instead, the FAA simply uses the word "contract" without further elaboration. "The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to 'stand by both concepts and to tolerate whatever tension there [is] between them.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 167 (1989) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

Far from creating a federal rule that might conflict with Florida law in this case, the FAA *entrusts* states with determining the law in this area. Buckeye and its *amici* repeatedly discuss the law of arbitration in a manner as though this field is entirely governed by federal law. Nothing could be further from the truth. Instead, this

[16] *Cf. Volt*, 489 U.S. at 474, 476 n.5 (noting absence of federal law for interpreting contracts in a setting involving "multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate").

Court repeatedly has stressed that arbitration clauses are governed by state, not federal, contract law except in those instances where state law targets arbitration clauses for treatment that is inferior to other types of contracts. *E.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (in cases involving the FAA, courts "should apply ordinary state-law principles that govern the formation of contracts"); *Volt*, 489 U.S. at 474 ("the interpretation of private contracts is ordinarily a question of state law"). In addition, this Court has held that principles of state contract law provide the primary source of protection for consumers against corporate over-reaching in cases governed by the FAA. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) ("In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' ").

This Court has recently reiterated the importance of state contract law under the FAA's scheme. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), a bank argued that the FAA preempted South Carolina's state contract laws as they applied to the question of whether an arbitration could proceed as a class action. This Court rejected that federal preemption argument and stated that

the question of contract interpretation is "a matter of state law. . . ." *Id.* at 447.[17]

Buckeye argues that the FAA creates a federal rule that overrides the Florida law at issue here. Buckeye's argument is contrary to this Court's decisions instructing that federal policy regarding arbitration is simply one of enforcing contracts and that the FAA merely places arbitration agreements on the same footing as other agreements. *See Prima Paint*, 388 U.S. at 404 n.12 ("the purpose of Congress [in enacting the FAA] in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so."); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement 'upon the same footing as other contracts, where it belongs,' H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).").

This principle of neutrality was central to this Court's holding in *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002), where this Court

[17] The Court in *Bazzle* also held that the contract interpretation question was a matter for the arbitrator to decide. This is not surprising, given that there was no dispute that the arbitration contract there was legal and binding. The Court stated that "[t]he question here . . . [does not] concern[ ] . . . the validity of the arbitration clause. . . . " 539 U.S. at 452. "Rather the relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, . . . [i]t concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question." *Id.* (emphasis omitted). This case, by contrast, involves the validity of the arbitration clause (because the provision here does not meet Section 2's requirement that it be in a "contract" or relate to a controversy that arises out of a "contract"). Also, unlike *Bazzle*, this case involves a number of state statutes.

refused to enforce an arbitration provision in an employment contract in a case where claims were asserted by a federal agency that was not a party to that contract. In *Waffle House*, the lower court had effectively treated arbitration clauses as some sort of super contract especially favored under federal law. This Court rejected the notion that the FAA embodied a policy goal that would form arbitration agreements in circumstances where no other type of contract could be formed. *Id*. at 280. Instead, this Court directed, the FAA requires courts to place arbitration agreements on equal footing with other contracts, but it "does not require parties to arbitrate when they have not agreed to do so." *Id*. (quoting *Volt*, 489 U.S. at 478). *See also Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a state statute that imposed specific disclosure requirements applicable only to arbitration agreements; and echoing the Court's earlier decisions in explaining that, through the FAA, Congress precluded states from singling out arbitration provisions for suspect treatment, requiring instead that such provisions be placed upon the same footing as other contracts). The Court summarized the governing principle in *Dobson*, 513 U.S. at 281:

> States may regulate contracts, including arbitration clauses, under general contract law principles. . . . What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress' intent.

The neutrality principle recognized in these cases prevents states from undermining the FAA's purpose of placing arbitration agreements on the same footing as other contractual provisions. Ironically, Buckeye's arguments here would undermine the FAA's purpose by placing a thumb on the contract law scale in favor of arbitration in circumstances where no other contract provision could be enforced. The Court should reject these arguments as contrary to the purposes of the FAA itself.

2. The Florida Contract Law Applied Below Applies to All Contracts and Is Consistent With the Contract Law of Many Jurisdictions.

Buckeye's attempt to extend *Prima Paint* here also is untenable because the Florida State law relied upon by the court below is applicable to the formation of all contracts, and therefore is fully in keeping with the FAA. Buckeye and its *amici* allege that the decision below arises from a hostility to arbitration. *E.g.,* Pet. Br. at 2. This charge is palpably untrue: the decision of the court below arises from basic rules of Florida state contract law that date back many years, and that have been applied repeatedly in settings that have nothing to do with arbitration. For example, *Thomas v. Ratiner*, 462 So.2d at 1158, which established that, if a contract is criminal, it is void under Florida law, did not arise in an agreement to arbitrate, and instead involved the enforcement of a lawyer's retainer agreement. Similarly, *Umbel v. Foodtrader.com*, 820 So.2d at 373, which established that illegal contracts give rise to no enforceable rights, did not involve an agreement to arbitrate, but rather whether a partnership agreement violated state securities laws. *Gonzalez v.*

Trujillo, 179 So.2d at 898, which held that Florida courts have an affirmative duty not to enforce illegal contracts, involved a contract to pay a refugee to bring assets out of Cuba. Even Buckeye recognizes that the decision of the court below on Florida contract law is consistent with the statement of law contained in a Florida legal encyclopedia. Pet. Br. at 11.

This Court also should be very reluctant to find that federal law preempts the decision of the court below because the principles of Florida contract law identified in the decision below are black-letter law in many other jurisdictions. This Court would be overriding not only Florida law on these issues, but also overriding standard principles of contract law recognized by a great many courts and other authorities throughout the nation for many years.

Many courts have recognized, for example, the following propositions embedded in the decision below: (1) agreements that are void *ab initio* never form "contracts"; (2) there is a significant difference between contracts that are void *ab initio* and those that are merely voidable; (3) agreements that violate statutes are void *ab initio*; and (4) where the principal purpose of an agreement is illegal, courts recognize an anti-separability principle and will enforce no provision of the contract.

First, most authorities acknowledge the general principle relied upon by the court below that an agreement that is void *ab initio* is one that "has at no time had any legal validity." Black's Law Dictionary (6th ed. 1991); *see also* Corbin on Contracts, § 1.7, at 20 (rev. ed. 1983) ("In the term 'void contract' there is self-contradiction. This is because the term 'contract' is always defined so as to

include some element of legal enforceability."). If something is "void," it has "total absence of legal effect." *Id.; see also* Restatement of Contracts (Second) § 7, comment (1981) ("Second Restatement") (a "void contract . . . is not a contract at all").

Second, the new preemptive rule advanced by Buckeye would overturn longstanding decisions recognizing a significant distinction between agreements that are void *ab initio* and those that are merely voidable. *See, e.g., Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 59 (1891) (explaining that a contract of a corporation that exceeds the powers conferred on it by the state legislature "is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it *could not* make it.") (emphasis added); *Langley v. FDIC*, 484 U.S. 86, 93-94 (1987) (recognizing as decisive a distinction between void contracts and merely voidable contracts, such as those where conduct "constitute[s] only fraud in the inducement"); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 387 (1970) (statute read as making certain contracts "voidable," rather than "void" (in which case it would "compel the conclusion that the contract is a nullity"), in order to avoid imposing harm upon innocent plaintiffs); *Still v. Norfolk & W. Ry. Co.*, 368 U.S. 35, 40-41 (1961) (there is a "normal distinction between 'void' and 'voidable' contracts"); *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 589 (1875) (setting forth the distinction between "absolutely void," or "void *ab initio*" contracts, and those that are "voidable"; holding that a purchase may be ratified where it was merely voidable).

Third, notwithstanding Buckeye's call for a new federal preemptive rule to the contrary, the principle that

a contract prohibited by statute can never be validly formed is also a widely accepted rule of contract law throughout the nation. *See, e.g.*, *In re Donnay*, 184 B.R. 767, 784-85 (Bkrtcy. D. Minn. 1995) ("A void contract is no contract at all; it binds no one and is a mere nullity. Thus, an action cannot be maintained on the contract, nor can the contract later be validated. . . . [I]f the contracts in this case are deemed usurious [under Minnesota law], they in essence *never existed*.") (emphasis added); *Solomon v. Gilmore*, 731 A.2d 280, 289 (Conn. 1999) ("every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract"); *Illinois State Bar Ass'n Mutual Ins. Co. v. Coregis Ins. Co.*, 821 N.E. 2d 706 (Ill. Ct. App. 2004) ("[I]if the subject matter of the contract is illegal, that contract is void *ab initio*."); *Fowler v. Scully*, 72 Pa. 456, 1872 WL 11551, at *9 (Pa. 1872) ("a contract in violation of the provisions of a statute . . . is null").

Fourth, contrary to Buckeye's insistence on a federal rule of separability in all contexts, many jurisdictions have embraced a principle of non-separability for illegal contracts: where the principal purpose of an agreement is illegal, courts will enforce no part of it. In *McMullen v. Hoffman*, 174 U.S. 639, 654 (1899), this Court considered a proposal akin to what Buckeye urges here: that the Court isolate and enforce one provision of a contract of which the principal purpose was illegal – in that case, a partnership provision of an agreement between two nominal competitors to secretly submit fictitious construction bids. This Court rejected the argument that the term was enforceable:

> [T]he plaintiff . . . cannot refer to one portion only of the contract upon which he proposes to

> found his right of action, but that the whole of the contract must come in, although the portion upon which he founds his cause of action may be legal.

Id. at 656; *see also Evans v. Jeff D.*, 475 U.S. 717, 727 n.13 (1986) ("If the performance as to which the agreement is unenforceable as against public policy is an essential part of the agreed exchange, . . . the *entire* agreement is unenforceable.") (quoting Second Restatement § 184 (internal quotations and parentheses omitted, emphasis added)); *Hargrave v. Canadian Valley Elec. Coop.*, 792 P.2d 50, 60 (Okla. 1990) ("If the invalid contractual provision is an essential part of the agreement and the parties would not have agreed absent that provision, then the *entire* contract is unenforceable.") (emphasis added); *Santa Clara Valley M. & L. Co. v. Hayes*, 18 P. 391, 393 (Cal. 1888) (where "the very *essence* and *mainspring* of the agreement" is illegal, "it cannot be separated, and leave any subject-matter capable of enforcement.") (emphasis added).

While Buckeye asks this Court to read the FAA to preempt the rule of non-separability for illegal contracts recognized by the court below, this non-separability principle is rooted in at least two fundamental policies of contract law that have been recognized by numerous courts around the country. First, to enforce a right arising from an illegal contract is to reward, and thus to encourage, unlawful – and in some cases criminal – behavior. Thus, it is black-letter law that "one who has participated in a violation of the law will not be allowed to assert in court any right based upon or directly connected with the illegal transaction." Williston on Contracts § 12:4, p. 24 (rev. ed. 1995).

Second, many courts have held that the integrity of the courts themselves would be compromised by the judicial sanction of unlawful contracts. This Court has said:

> [N]o court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country, how can they then become auxiliary to the consummation of violations of the law?

Bank of the U.S. v. Owens, 27 U.S. 527, 1829 WL 3157, at *9 (1829); *see also Armstrong v. Toler*, 24 U.S. 258, 264 (1826) ("[W]here contract . . . is connected with[ ] an illegal or immoral act, a Court of justice will not lend its aid to enforce it. . . . "); *Coppell v. Hall*, 74 U.S. 542, 559 (1868) ("the law will not lend its support to a claim founded on its violation."); *Hunt's Heirs v. Robinson's Heirs*, 1 Tex. 748, 1847 WL 3502, at *7 (Tex. 1847) ("Courts are organized under the law and are required to administer it, and it would seem to be an anomaly were they so far to sanction its violation as to give effect to a contract forbidden by the very law that they are bound to respect and enforce."); *Jamieson v. Iles*, 219 Ill. App. 432, 1920 WL 1231 at *8 (Ill. Ct. App. 1920) (courts refuse to enforce illegal contracts "not on account of any solicitude for the parties, but as a duty they owe the cause of justice and the integrity of its courts"); *Bank of the South v. Korner*, 323 So.2d 197 (La. Ct. App. 1975) ("We simply are unwilling to allow the courts to be used to enforce contracts with an illegal purpose. . . . [T]he contract, which bargained for the performance of an illegal act [has] no existence in law."); *Fowler*, 1872 WL 11551 at *10 ("[O]ur courts will not lend their aid to enforce illegal contracts. . . . The contract is illegal, being founded on a breach of the law, and of

consequence is a void contract and cannot be enforced in a court of law. . . . [C]ourts of justice will not assist an illegal transaction in any respect.") (internal citations and quotations omitted).

In short, the decision of the court below is hardly rooted in some anti-arbitration animus, but instead arises from a long-standing and nationally accepted wellspring of wisdom about the formation of contracts. This Court should reject Buckeye's invitation to invent a new rule of federal law that would override this history.

IV. PUBLIC POLICY SUPPORTS THE DECISION BELOW.

A. Buckeye's Proposed Extension of *Prima Paint* Would Lead to Absurd Results.

The state law principles applied by the court below are not only widely accepted and venerable, they also make good sense. Buckeye's argument that they are preempted by a federal rule that arbitration clauses are exempt from this well-established body of law could readily lead to absurd results. Imagine hypothetical agreements providing for the sale of cocaine, or the making of child pornography, or a murder-for-hire, that include (a) a liquidated damages provision; and (b) an arbitration agreement. In these hypotheticals, the principal purpose of the agreements is to violate criminal laws, and the liquidated damages and arbitration provisions are subsidiary provisions, filling in details relating to implementation of the criminal agreement.

The response of the court below to these hypotheticals is clear: under normal principles of Florida contract law, these agreements are void *ab initio*, and the court must

disregard them in their entirety. No part of any such agreement constitutes a "contract" under Florida law.

Under Buckeye's reasoning, however, Florida state courts must enforce the arbitration clauses, but not the liquidated damages provisions, in these hypothetical agreements. That cannot be so, and surely cannot be what the FAA requires. Buckeye suggests that there is no harm in this result, because courts can assume that any arbitrator will hold that the sale of cocaine, making of child pornography or murder is illegal. Pet. Br. at 17-18. But Buckeye provides no reason why Congress would want this result, much less impose it on every state court.

Buckeye's response to these hypotheticals also ignores the traditional reasoning that underlies the state laws relating to illegal contracts. As set forth above, the Florida contract law that criminal contracts are void *ab initio* in their entirety (which is reflected in the law in a number of other jurisdictions as well) arises from a need to protect the courts themselves as institutions: it would be corrosive of a court's authority and dignity to enforce even a part of a murder-for-hire contract. The assertion that federal law requiring the enforcement of an arbitration provision in a "contract" requires courts to recognize and enforce provisions in a criminal agreement is offensive and absurd.

Buckeye's response to this hypothetical also fails in light of this Court's direction that arbitration provisions are to be as enforceable – but no more so – as other types of contract provisions. By insisting that an arbitration clause in an agreement for the sale of cocaine is enforceable (but not the rest of the agreement), Buckeye is asking this Court to create a rule of law that makes arbitration clauses more enforceable than all other types of contracts.

It is obvious, for example, that no Florida court (and probably no other court) would – or should – ever enforce a liquidated damages provision contained in a contract for the sale of cocaine or the making of child pornography. Even though liquidated damages provisions (like arbitration provisions under the FAA) are normally enforceable and favored, because a criminal agreement is void *ab initio*, the entire agreement – including *all* of the provisions found therein – would be unenforceable. Under the position advocated by Buckeye, however, the arbitration clause would somehow be different from and better than all other provisions in this wholly illegal contract, and the arbitration clause would be enforced.

B. The Policy Arguments of Buckeye and Its *Amici* Are Irrelevant, Exaggerated and Unpersuasive.

Instead of recognizing the dangers in their approach, Buckeye and its *amici* make a number of heated policy arguments to support the preemption of Florida law in this case. These arguments generally fall into two categories. First, Buckeye and its *amici* argue that the FAA embodies an urgent policy in favor of arbitration. As Buckeye and its allies conceive of this policy, it is not the one expressed in the language of the statute – that arbitration provisions are to be enforced if they are "in" contracts or if they involve controversies that "arise out of" contracts, subject to generally applicable contract law – but it is a broader mandate to remove as many cases as possible from courts and to move them into arbitration. Buckeye and its allies go further to argue that the affirmance of the opinion of the court below will undermine the enforcement of arbitration clauses in a large number of

cases. *E.g.,* Pet. Br. 20 ("Virtually all contracts can be challenged as illegal.") Second, several of Buckeye's *amici* ask this Court to believe that the payday lending industry is a wonderful boon to the nation's poor, and that any state laws that might regulate it are misguided. These policy arguments are wrong and unpersuasive on several levels.

First, policy arguments cannot justify a refusal to follow the language of the FAA itself. Even if one assumes for the purposes of argument that it was unwise for Congress to draft the FAA in a way that requires that arbitration agreements be in a contract or involve controversies arising out of a contract to fall within the Act, or even if one assumes for the purposes of argument that it was not wise for Congress to limit the reach of §§ 3 and 4 to the federal courts, this Court is not free to embrace Buckeye's arguments. *See, e.g., Brogan v. United States*, 522 U.S. 398, 408 (1998) ("Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so. . . .").

Similarly, any policy arguments of the payday lending industry about its supposed economic merits are not addressed to the proper forum.[18] If Buckeye's *amici* are right in their policy prescriptions, that is an argument that states should repeal their criminal loan sharking laws or exempt payday lenders from those laws, not that this

[18] While this brief will not focus in detail on those arguments, some of them are rather curious. The industry's main evidence as to its societal value is to survey persons who are in the process of obtaining payday loans and ask them if they are satisfied to receive the loans. *E.g., Amicus* Br. of the CFSA at 4-5. One wonders how many customers of even the worst and most predatory loan sharks in America's history would have answered such a question from an agent of the loan shark, immediately after receiving a loan, in the negative.

Court may wipe away those state statutes without a plain statement from Congress calling for such preemption.

Buckeye employs a great deal of high-octane rhetoric to argue that the entire structure of the FAA will come undone if courts rather than arbitrators decide whether contracts are illegal. This argument ignores the unique nature of the allegations in this case. Civil plaintiffs regularly argue that some particular conduct of a defendant breaches a contract or gives rise to a remedy under some remedial statute, but it is quite rare to encounter a civil plaintiff arguing that an entire line of business is prohibited by a statute and is per se illegal. It is particularly rare to see a case, such as this, where there are substantive arguments that the entire enterprise is *criminal*. A ruling for Plaintiffs will have no effect upon traditional banks, or any other legitimate business enterprise. A ruling for Plaintiffs here will only affect businesses whose contracts are wholly illegal, such as the Defendants here, or the cocaine sellers hypothesized above. The ruling of the court below is highly unlikely, as a practical matter, to be applicable in many cases.

Buckeye and some of its *amici* complain that the Florida Supreme Court used overly broad language to phrase its holding, when it held that a contract could not be enforced where it violates "public policy." *E.g.,* Pet. Br. 21. That phrase must be understood in the context of this case: the state's public policy forbidding the contract at issue *here* is expressed through the state's criminal statutes. This case is not about some mild policy preferences of individual judges; it is about the civil legal implications of criminal conduct. As set forth in the Statement of the

Case, Plaintiffs have alleged that the mere act of entering the agreements at issue here is a felony;[19] under Florida Law, the agreement documents themselves are "contraband," and a Florida statute specifically provides that loan sharking agreements are unenforceable. Notwithstanding the "sky is falling" rhetoric of Buckeye, this case involves a very narrow fact pattern that is not likely to recur regularly in commercial settings.

Buckeye's final policy argument is equally unpersuasive. It argues that this Court should override the generally applicable law of contract formation (except as it relates to assent), because there is a great need for federal law to create nationwide uniformity in the laws relating to the formation of contracts containing arbitration agreements. This argument fails for three reasons. First, courts may not preempt state laws merely because parties make rote assertions that uniformity is needed. *See, e.g., Bates*, 125 S. Ct. at 1802-03 ("Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding. . . . We have been pointed to no evidence that such tort suits led to a 'crazy-quilt' of FIFRA standards or otherwise created any real hardship for manufacturers or for EPA.") Second, as this Court has made clear in other preemption cases, there is little need for uniform federal law here, because the law of contracts is largely consistent from state to state. *See American Airlines v. Wolens*, 513 U.S.

[19] The payday lenders' trade association scoffs at this notion. *See Amicus* Brief of the CFSA at 3. There is, however, no federal law basis for this Court to second guess or override a state legislature's judgment that if a lender (that is not a national bank) charges interest rates of up to 1,300%, this act is criminal loan sharking.

219, 232 n.8 (1995) ("contract law is not at its core 'diverse, nonuniform, and confusing' "), quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992). Third, even if nationwide uniformity of contract law were desirable, that could not justify rewriting the FAA's statutory scheme. Where, as here, a statute preserves a role for states, that reflects a congressional intention to accept some degree of disuniformity. *Cf. UNUM Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 n.9 (1999) (disuniform state regulations "are the inevitable result of the congressional decision [in ERISA] to save local insurance regulation.")

In short, if this Court finds that the FAA does not preempt normal principles of contract law in this case, that holding will hardly undermine the widespread enforcement of arbitration agreements in most circumstances. Buckeye's policy arguments to the contrary are misplaced and greatly exaggerated.

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CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the Florida Supreme Court.

Respectfully submitted,

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