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 THE PETITIONER

MICHAEL T. GARONE
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Ave.
Suites 1600-1900
Portland, OR 97204
(503) 222-9981

RONALD D. DEMOSS
ANDREW TRUSEVICH
MARY HAROKOPUS
RENT-A-CENTER LEGAL DEPARTMENT
5501 Headquarters Drive
Plano, TX 75024
(972) 801-1100

ROBERT F. FRIEDMAN
Counsel of Record
EDWARD F. BERBARIE
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500
Dallas, TX 75201
(214) 880-8100
rfriedman@littler.com

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Blvd.
Suite 600
Walnut Creek, CA 94597
(925) 932-2468

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a district court or an arbitrator should decide claims that an arbitration agreement under the Federal Arbitration Act ("FAA") is unconscionable, when the parties to the agreement have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Rent-A-Center, West, Inc. was the defendant in the district court and the appellee in the court of appeals.

Antonio Jackson was the plaintiff in the district court and the appellant in the court of appeals.

Petitioner Rent-A-Center, West, Inc. previously filed a corporate disclosure statement pursuant to Rule 29.6 with the petition for writ of certiorari. No amendments to the prior statement are necessary at this time.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 09-497

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 THE PETITIONER

Rent-A-Center, West, Inc. ("Petitioner" or "RAC") respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit with instructions to enforce the parties' arbitration agreement as written to permit the arbitrator, and not the district court, to determine the claims of unconscionability advanced by Respondent Antonio Jackson ("Respondent" or "Jackson").

OPINIONS BELOW

The decision of the court of appeals, affirming in part, reversing in part, and remanding to the district court, is published at 581 F.3d 912 (9th Cir. 2009),

and is reproduced at Pet. App. 7a-24a.[1] The opinion of the district court granting RAC's Motion to Dismiss Proceedings and Compel Arbitration on the ground that the parties' arbitration agreement clearly and unmistakably vested the arbitrator with the authority to decide Jackson's claims of unconscionability is unpublished and is reproduced at Pet. App. 1a-6a.

JURISDICTION

The Ninth Circuit's judgment was entered on September 9, 2009. The petition for writ of certiorari was filed on October 27, 2009, and was granted on January 15, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

The appendix to RAC's Petition for a Writ of Certiorari contains the relevant statutory provisions, namely, 9 U.S.C. §§ 2 and 4.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unmistakable terms of an arbitration agreement governed by the Federal Arbitration Act, ("FAA"), 9 U.S.C. § 1 *et seq*. The arbitration agreement in this case expressly states that: "The 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

[1] The Appendix filed by Petitioner with its petition for writ of certiorari is referred herein as "Pet. App." The Joint Appendix filed with this merits brief is referred to herein as "Jt. App."

part of this Agreement is void or voidable." Jt. App. 34a.[2] Despite the parties' clear and unmistakable agreement that the arbitrator possessed exclusive authority to decide a claim of unenforceability due to alleged unconscionability, the Ninth Circuit held, as a matter of law, that the unconscionability determination is exclusively for a court and the parties can never assign that function to an arbitrator in the first instance: "This rule applies even where the agreement's express terms delegate that determination to the arbitrator." Pet. App. 18a. That holding is wrong and should be reversed.

Congress enacted the FAA for the "central purpose" of ensuring that private agreements to arbitrate are enforced according to their terms. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of a "contract evidencing a transaction involving commerce" 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. Parties to arbitration agreements under the FAA are therefore "generally free to structure their arbitration agreements as they see fit" and can "specify by contract the rules under which [the] arbitration may be conducted." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

As a result, this Court has held that arbitration agreements that clearly and unmistakably evince the parties' intent to assign the determination of arbitra-

---

[2] The Arbitration Agreement may also be found at Pet. App. 25a-34a.

bility to the arbitrator and not the courts are fully enforceable. *See First Options of Chicago, Inc. v. Kaplan* ("*First Options*"), 514 U.S. 938, 943 (1995) (question of who has the primary power to decide arbitrability "turns upon what the parties agreed about *that* matter" (emphasis in original)); *AT&T Technologies, Inc. v. Communications Workers* ("*AT&T*"), 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability). The Ninth Circuit's decision in this case dismisses these important principles and requires courts to disregard the plain language of the arbitration agreement merely because one party later claims that the agreement is unfair.

A. The Arbitration Agreement

On February 24, 2003, Jackson and RAC entered into a Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement") arising out of their employment relationship. Jt. App. 29-38. Under the Arbitration Agreement, Jackson and RAC mutually agreed that all claims that each might have against the other relating to Jackson's employment or the termination of his employment would be submitted to binding arbitration. Jt. App. 29-30. In addition to giving the arbitrator the authority to apply the substantive law applicable to the claims asserted in arbitration and to award any remedies to which the claimant might be entitled, the Arbitration Agreement clearly stated: "The 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." Jt. App. 34 (emphasis added).[3]

In signing the Arbitration Agreement, Jackson acknowledged that he carefully read the agreement, understood its terms, and did not rely upon any promises or representations other than those contained therein. Jt. App. 37-38. Jackson additionally acknowledged that he had "BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO." Jt. App. 38 (all capitals in original).

B. RAC's Motion to Compel Arbitration

Despite the fact that he expressly agreed in the Arbitration Agreement that he would arbitrate all claims arising out of his employment with RAC, including claims regarding the validity of the Arbitration Agreement itself, Jackson filed a complaint in the United States District Court for the District of

---

[3] As stated in Judge Hall's dissent below, the Arbitration Agreement in this case is relatively "favorable to the employee * * *." Pet. App. 21a. Thus, the parties can propound requests for production of documents, take depositions and issue subpoenas; they have the right to receive notice of the witnesses and exhibits their opponent will offer at least thirty days prior to hearing; they have the right to fully participate in the selection of fair and unbiased arbitrators under the rules of respected arbitration providers such as the American Arbitration Association ("AAA") and the Judicial Arbitration and Mediation Services ("JAMS"); they have the right to have an attorney represent them; they are entitled to the benefits of all substantive law and legal remedies as if their claims were being pursued in court; and they are entitled to a written award by the arbitrator that includes the factual and legal reasoning upon which it is based. Jt. App. 32-35.

Nevada on February 1, 2007, alleging race discrimination and retaliation under 42 U.S.C. § 1981. Jt. App. 6-9. Jackson alleged that RAC initially failed to promote him because of his race, then promoted him, and then terminated his employment a few months after his promotion, allegedly due to retaliation for his prior complaints about not being promoted earlier. Jt. App. 7-8. The district court possessed federal question jurisdiction over Jackson's claims under 28 U.S.C. § 1331.

On March 14, 2007, RAC filed its Motion to Dismiss Proceedings and Compel Arbitration. Jt. App. 10. In support of that motion, RAC relied upon its memorandum of law as well as a declaration from its custodian of records attaching a copy of the signed Arbitration Agreement. Jt. App. 11-38. In its memorandum of law, RAC contended that Jackson's claims of race discrimination and retaliation were "indisputably covered under the clear and unambiguous terms of the Arbitration Agreement signed by Plaintiff, and therefore, must be submitted to binding arbitration." Jt. App. 13.

RAC further argued that "any attempts by Plaintiff to claim that the Arbitration Agreement does not apply to some or all of his claims or is otherwise unenforceable" were not properly before the district court because Jackson had agreed that the arbitrator, and not any court, possessed "*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 the agreement is void or voidable." Jt. App. 14-15 (emphasis in original). In this regard, RAC argued that any attempt by Jackson to claim that the Arbitration Agreement was void or

voidable because of "alleged formation defects or due to alleged unconscionability must also be decided by the arbitrator, and not the Court." Jt. App. 16. After a full discussion of the grounds for enforcement of the Arbitration Agreement under both the FAA and Nevada arbitration law, RAC requested "an order dismissing the lawsuit by Plaintiffs [sic] in its entirety or, in the alternative, staying these proceedings and compelling the arbitration of Plaintiff's claims in accordance with the Arbitration Agreement." Jt. App. 26.

On March 20, 2007, Jackson filed his opposition to RAC's motion to compel arbitration. Jt. App. 39. Jackson did not submit any declarations or other factual support for his opposition, relying solely on his memorandum of points and authorities. *Id.* In his opposition memorandum, Jackson contended that the Arbitration Agreement that he admittedly signed was "unenforceable in that it is unconscionable." Jt. App. 40. Jackson argued both procedural and substantive unconscionability. He contended that the Arbitration Agreement was procedurally unconscionable only because he was allegedly "in a position of unequal bargaining power and was presented with offending contract terms without an opportunity to negotiate * * *." Jt. App. 42. Citing mostly California and not Nevada law regarding unconscionability, Jackson contended that the Arbitration Agreement was substantively unconscionable because it was allegedly one-sided, placed limits on discovery, and contained a provision permitting sharing of the costs of the arbitration procedure if such sharing was permitted by state law. Jt. App. 42-44. Jackson did not address in any way RAC's contention in its motion to compel that any claim that the Arbitration

Agreement was unenforceable was reserved for the arbitrator and not the court. Jt. App. 40-47.

On April 3, 2007, RAC filed its reply to Jackson's opposition. Jt. App. 48. RAC first argued that Plaintiff's opposition "fails to rebut or otherwise address in any way Defendant's argument that the Arbitrator must decide Plaintiff's challenge to the enforceability of the Agreement." Jt. App. 50. RAC therefore urged the district court to grant its motion to compel because the parties had clearly and unmistakably agreed that Jackson's claim that the Arbitration Agreement was unenforceable was reserved exclusively for the arbitrator. Jt. App. 51.

Alternatively, in the event the district court reached the merits of Plaintiff's unconscionability defense, RAC argued that under Nevada law an employer may require an employee to sign an employment contract as a condition of employment. *Id*. Therefore, Plaintiff's allegation that the Arbitration Agreement was procedurally unconscionable merely because it was presented as a condition of employment without negotiation was insufficient as a matter of Nevada law. *Id*. In this regard, RAC noted that Jackson did not allege (1) that RAC misrepresented the terms of the Arbitration Agreement; (2) that he was deprived of an opportunity to review its terms; or (3) that its terms were hidden or inconspicuous. *Id.* RAC also contended that the Arbitration Agreement was not substantively unconscionable because it was bilateral in nature, adopted the law of Nevada regarding arbitration fees and costs, and permitted reasonable discovery by both parties. Jt. App. 52-57.

C. The District Court's Decision

On June 6, 2007, the district court granted RAC's motion, compelling arbitration and dismissing Jackson's lawsuit. Citing *First Options*, the district court found that the Arbitration Agreement "clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." Pet. App. 4a. The district court ruled that "[a]s such, the question of arbitrability is a question for the arbitrator." *Id*.

The district court further ruled that even if it "were to examine the merits of Plaintiff's assertion of unconscionability, there appears to be a lack of evidence to suggest an unconscionable agreement." Pet. App. 5a. Noting that Nevada law requires a showing of both procedural and substantive unconscionability to preclude enforcement of an arbitration agreement, the court held that "there appears to be nothing to suggest substantive unconscionability." *Id.*[4] Because the district court did not find the Agreement to be substantively unconscionable, the court did not reach the issue of procedural unconscionability. Pet. App. 5a-6a.

---

[4] In so ruling, the district court stated that the cost provision of the Arbitration Agreement was not substantively unconscionable because Jackson had "offered no evidence to demonstrate a likelihood of overly burdensome expense." Pet. App. 5a. As further support for its ruling, the district court also noted that the "agreement to arbitrate expressly contains a clause allowing the apportionment of costs to be altered in the event the law requires a different allocation of costs to make the Agreement enforceable." *Id*.

D. The Ninth Circuit's Decision

Jackson appealed the district court's order and judgment dismissing his case and compelling arbitration to the Ninth Circuit.[5]

In a 2-1 decision, the court of appeals affirmed in part, reversed in part, and remanded to the district court. Pet. App. 20a. The Ninth Circuit acknowledged that it was undisputed that the agreement clearly and unmistakably assigned the question of contract validity to the arbitrator. Pet. App. 13a. However, in reversing the order to arbitrate, the court held that the *mere allegation* that an arbitration agreement is unconscionable required the district court, and not the arbitrator, to determine that issue, notwithstanding the parties' express agreement to the contrary. Pet. App. 15a. The court affirmed the district court's finding that the Arbitration Agreement's cost provision was not substantively unconscionable but remanded for the district court to rule on Jackson's two other substantive unconscionability claims, holding that if Jackson demonstrated the provisions were substantively unconscionable, the district court should address his claim of procedural unconscionability. Pet. App. 18a-20a.

Specifically, the Ninth Circuit ruled:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even*

---

[5] The Ninth Circuit possessed appellate jurisdiction under 28 U.S.C. § 1291.

where the agreement's express terms delegate that determination to the arbitrator.

Pet. App. 17a-18a (emphasis added).

Judge Hall dissented, stating that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, even when the contract language 'clearly and unmistakably' chooses a different forum for that question." Pet. App. 22a (emphasis in original). Judge Hall observed that the ruling was contrary to this Court's decisions in *First Options* and *AT&T Technologies*, making it "difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'" Pet. App. 22a. While noting that "everyone agrees that unconscionable arbitration agreements should not be enforced," Judge Hall stated, "[a]t issue here is *who* should decide if the agreement is unconscionable when the parties' agreement gives the question to the arbitrator." Pet. App. 24a, n. 5 (emphasis in original).

SUMMARY OF ARGUMENT

The FAA's primary purpose is to enforce arbitration agreements in accordance with their terms. *Volt*, 489 U.S. at 479. Congress enacted the FAA to overcome historic judicial hostility to arbitration and replace that hostility with a "liberal federal policy favoring arbitration agreements * * *." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24 (1983).

Arbitration agreements covered by the FAA "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. Thus, courts must enforce agreements to arbitrate "in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4. This Court has held that where, as here, the parties "clearly and unmistakably" agree to delegate the issue of arbitrability to the arbitrator, their agreement must be honored. *First Options*, 514 U.S. at 943-44; *AT&T*, 475 U.S. at 649. The Ninth Circuit disregarded these principles in refusing to enforce the parties' agreement, on a mere assertion of unconscionability, even though that agreement "clearly and unmistakably" referred the issue of contract enforceability to the arbitrator in the first instance.

What this Court has stated plainly is that courts must decide whether the parties objectively revealed their intent to submit the arbitrability issue to the arbitrator and if they have, then arbitration is the proper forum for deciding those issues. *First Options*, 514 U.S. at 944. The point of the *AT&T*/*First Options* requirement that issues normally reserved for the court can be referred to the arbitrator only by clear and unmistakable language is that, absent such language, it will be presumed that the parties did not intend to refer such issues to the arbitral forum. *Id*. at 945.

Unless that presumption is irrebuttable, which it clearly is not, then this Court's statements in *AT&T* and *First Options* mean that if the parties are crystalline in expressing their intention to have enforceability issues decided by the arbitrator, then the courts should respect that judgment. Otherwise, those

statements are meaningless and the numerous arbitration agreements that have been entered into in reliance on them have been rendered equally meaningless.

Both the district court and the Ninth Circuit concluded that the parties' agreement "clearly and unmistakably" committed the unconscionability issue to the arbitrator. Pet. App. 4a, 13a. When the Ninth Circuit refused to enforce that language based on a *mere allegation* of unconscionability, it created a rule that the whim of a party opposing arbitration was sufficient to erase the words contained in the arbitration agreement. This approach embodies nothing less than the historical hostility to arbitration that led to the passage of the FAA in the first place.

Jackson argued in opposition to RAC's petition for certiorari that arbitrators simply cannot be trusted to rule on the validity of the contract to arbitrate. Opp. 8-9. However, this argument runs contrary to the FAA's rejection of the presumption of arbitral bias, which had enflamed judicial hostility to arbitration prior to the Act's passage. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

It is very difficult to understand the Ninth Circuit's logic in placing beyond the power of an arbitrator decisions on mundane issues of state law, such as unconscionability, when this Court has held that Congress is completely comfortable allowing the enforcement of fundamental anti-discrimination statutes, such as Title VII and the Age Discrimination in Employment Act, to be resolved through the arbitral process. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (Congress did not intend to preclude arbitration of ADEA claims). The whole

point of arbitration is that it is a different forum for resolving the same substantive issues that courts decide. There certainly is no reason to believe that an arbitrator would be more or less capable of deciding whether the contract was unconscionable than whether Jackson was the victim of race discrimination or retaliation. Accordingly, other than the impermissible and long discredited presumption of arbitral bias Respondent urges upon this Court, no valid statutory or policy reason exists for refusing to enforce the language contained in the parties' agreement.

In this case, there is no dispute that Jackson (1) signed the Arbitration Agreement; (2) it covers his claims for relief; (3) it refers the issue of unconscionability to the arbitrator; and (4) it does so in clear and unmistakable language. Accordingly, the court of appeals erred in refusing to enforce the agreement in accordance with its terms, as required by sections 2 and 4 of the FAA. 9 U.S.C. §§ 2 and 4.

ARGUMENT

A. Under the FAA, Arbitration Agreements Are Enforced as Written.

At stake in this case are the FAA's core principles, found both in its text and this Court's long-standing interpretations of that statute. The "primary purpose" of the FAA is "ensuring that private agreements to arbitrate are enforced according to their terms." *Volt*, 489 U.S. at 479. *See also Mastrobuono*, 514 U.S. at 53-54 (1995) (enforcement of arbitration agreements "according to their terms" is the "central purpose" of the FAA); *Dean Witter Reynolds Inc. v. Bryd*, 470 U.S. 213, 220 (1985) (passage of the FAA "was motivated, first and foremost, by a congres-

sional desire to enforce [arbitration] agreements into which parties had entered"). "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'" *Hall Street Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S 576, 581 (2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of a transaction in interstate commerce "*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). Section 2 of the FAA "is the primary substantive provision of the Act * * *." *Moses H. Cone*, 460 U.S. at 24. It is the "centerpiece provision" of the FAA, *Mitsubishi Motors Corp*., 473 U.S. at 625, and sets forth a "broad principle of enforceability," *Perry v. Thomas*, 482 U.S. 482, 489 (1987).

"Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24. The liberal federal policy embodied in section 2 "is at bottom a policy *guaranteeing* the enforcement of private contractual arrangements * * *." *Mitsubishi Motors*, 473 U.S. at 625 (emphasis added). *See also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co*., 529 U.S. 193, 201 (2000) (the FAA sets forth a "statutory policy of rapid and unobstructed enforcement of arbitration agreements" (quoting *Moses H. Cone*, 460 U.S. at 23)). Thus, the "preeminent concern of Congress in passing the Act" requires courts to

"rigorously enforce agreements to arbitrate * * *." *Dean Witter Reynolds, Inc.*, 470 U.S. at 221.

The effect of section 2 "is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Perry*, 482 U.S. at 489, (quoting *Moses H. Cone*, 460 U.S. at 24). Thus, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25. More than 20 years ago, this Court held: "By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc.*, 470 U.S. at 218 (emphasis in original). And in deciding whether an "agreement to arbitrate is unenforceable," courts should be ever "mindful of the FAA's purpose" to reverse the longstanding judicial hostility to arbitration agreements. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89 (2000).

That arbitration agreements may be structured to commit particular issues to the arbitrator likewise cannot be doubted. This core principle finds direct textual support in the FAA. For example, section 4 of the Act provides that a party may obtain an order compelling arbitration "in the manner provided for in [the parties'] agreement." 9 U.S.C. § 4. Similarly, section 3 of the FAA authorizes federal courts to stay litigation until the arbitration has been conducted "in

accordance with the terms of the [parties' arbitration] agreement * * *." 9 U.S.C. § 3.

As this Court only recently reiterated, it "is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, *including* the way arbitrators are chosen, what their qualifications should be, *which issues are arbitrable*, along with procedure and choice of substantive law." *Hall Street Associates, L.L.C.*, 552 U.S. at 586 (emphasis added). As explained in *Volt*: "Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted * * *." *Volt*, 489 U.S. at 479 (citations omitted).

By its frequent holdings emphasizing that the central purpose of the FAA is the enforcement of the parties' agreement as written, this Court has created a strong presumption of enforceability of arbitration agreements, which can only be overcome by clearly enunciated federal law militating against enforcement. *See, e.g., Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 78 n.1 (1998) (citing *Mitsubishi Motors*, the Court stated that "we have also discerned a presumption of arbitrability under the FAA"); *Gilmer*, 500 U.S. at 26 (1991) ("having made the bargain to arbitrate, the party should be held to it" unless it can shoulder the burden "to show that Congress intended to preclude a waiver of a judicial forum * * *"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989) ("the party opposing arbitration carries the burden of showing that Congress intended in a separate statute to preclude a waiver of judicial remedies * * *").

For example, in *Hall Street*, this Court held that sections 9, 10 and 11 of the Act, 9 U.S.C. §§ 9, 10, 11, constituted "textual features at odds with enforcing a contract to expand judicial review following the arbitration" and that these textual features overcame the "general policy of treating arbitration agreements as enforceable * * *." *Hall Street Assocs., L.L.C.*, 552 U.S. at 586. However, barring situations in which the "statutory text" of the FAA or some other federal law prohibits enforcement of the terms of the arbitration agreement, nothing in *Hall Street* or any other case from this Court weakens the well-established and long-standing principle that the parties are otherwise free to tailor the features of their arbitration agreement as they see fit, including the issue of "which issues are arbitrable," and that their agreement will be fully enforceable. *Id.*

These core principles are at stake in this case because Jackson has done nothing to overcome the strong presumption that the Arbitration Agreement here is fully enforceable according to its terms. Jackson signed the Arbitration Agreement on February 24, 2003, and he has asserted no issues regarding its execution. The document he signed plainly is an "agreement" to arbitrate disputes relating to his employment with RAC. Jackson acknowledged that he carefully read the agreement, understood its terms and had the opportunity to discuss it with counsel of his choice; he concedes that the agreement covers the claims raised in his complaint; and, pertinent to the issue before this Court, he concedes that the enforceability of the agreement or whether any portion of it was void or voidable was clearly and unmistakably committed to the arbitral forum. Indeed, as to this last point, the Ninth Circuit recognized the clear import of the agreement itself. *See*

Pet. App. 13a.[6] In sum, Jackson does nothing to shoulder his burden of establishing that the arbitral forum is unavailable to him or that the enforceability issues he has raised are unsuitable for arbitration. *See Randolph*, 531 U.S. at 91-92 (party opposing arbitration must establish that it is unable to vindicate its rights in the arbitral forum or that the claims at issue "are unsuitable for arbitration").

Despite the lack of any showing by Jackson, and notwithstanding the clarity of the agreement and its undisputed reference of the unconscionability issue to the arbitrator, the Ninth Circuit refused to enforce the contract in accordance with its terms, holding instead "that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator*." Pet. App. 17a-18a (emphasis added).

The Ninth Circuit's ruling does clear violence to the FAA as interpreted by this Court's decisions outlined above. To support its conclusion, the Ninth Circuit

---

[6] The Ninth Circuit stated that "Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator." Pet. App. 13a. Therefore, the only issue before this Court is the validity *vel non* of the agreement of the parties to assign unconscionability to the arbitrator; no other issues were raised by Jackson in the district court, the court of appeals or in his opposition to certiorari. *See 14 Penn Plaza LLC v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456, 1473-74 (2009) (rejecting argument made for the first time before this Court that the contract did not "clearly and unmistakably" require respondents to arbitrate ADEA claims).

relied upon its own view of "the proper role of cooperative federalism," Pet. App. 15a, but this is just an expression of judicial hostility to arbitration in another guise. Congress clearly did not believe that the same arbitrators who were fully capable of deciding federal issues of overriding significance, including those arising under antidiscrimination and antitrust laws, lacked the capability or authority to decide ordinary questions of state law, like unconscionability. The Ninth Circuit's effort to elevate unconscionability above all other issues, and to place it as a matter of law beyond the arbitrator's authority to decide simply has no basis in the FAA or this Court's holdings.

The Ninth Circuit's ruling is flatly incompatible with the *AT&T/First Options* rule that clear and unmistakable agreements to commit gateway issues to the arbitral forum are fully enforceable under the FAA. In fact, the ruling below, which would require a preliminary "mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability," Pet. App. 22a (dissenting opinion), even when that issue has been assigned to an arbitrator, runs further afoul of the FAA by "unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 275 (1995). Rather than requiring such a mini-trial, proper application of the FAA should result in "unobstructed enforcement" of the parties' agreement to submit any disputes regarding contract validity or enforceability to the arbitrator for a prompt and fair decision. *Moses H. Cone*, 460 U.S. at 23.

B. The *AT&T/First Options* Rule Governs this Case.

1. Contract Validity Is a Gateway Issue that Can Be Submitted to the Arbitrator by Clear and Unmistakable Language in the Arbitration Agreement.

While there is a heavy presumption in favor of the enforcement of arbitration agreements and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Mitsubishi Motors*, 473 U.S. at 626, this Court has nonetheless recognized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit," *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). The *AT&T/First Options* rule has thus been applied to ensure that "gateway" questions of arbitrability that would normally be decided by the court will not be submitted to the arbitrator unless the parties clearly and unmistakably agree. This rule furthers the FAA's central purpose of enforcing arbitration agreements as written and has direct application in this case, where it is undisputed that the Arbitration Agreement in no uncertain terms authorized the arbitrator to decide issues of contract enforceability.

Normally, in deciding whether to compel arbitration, a trial court is charged with determining two "gateway" issues: (1) whether there is an agreement between the parties to arbitrate; and (2) whether that agreement covers the particular dispute between them. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). "Thus, 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*. Put another way, the broad question "whether the parties have a valid arbitration agreement at all" is a classic gateway issue normally to be decided by the court. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

Inasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (unconscionability is a "generally applicable" contract defense); *Bazzle*, 539 U.S. at 452 (courts decide issue of arbitration agreement's validity unless parties clearly and unmistakably provide otherwise). Stated differently, absent anything in the agreement on the issue, the parties would have expected the question to be one for the court and not an arbitrator. The district court and the Ninth Circuit therefore properly treated Jackson's claim of unconscionability as a gateway issue, which would normally, but for the parties' agreement, be decided by the court. Pet App. 4a, 13a-15a.

The Ninth Circuit erred, however, when it failed to follow the *AT&T/First Options* rule, and instead created out of whole cloth an exception to that rule for *any* claim of unconscionability, no matter how weak. That holding is indefensible.

In *AT&T*, a labor arbitration case, this Court stated, in reliance on the *Steelworkers Trilogy*,[7] that

---

[7] The *Steelworkers Trilogy* consists of *Steelworkers v. American Manufacturing Co*., 363 U.S. 564 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593 (1960); and *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574 (1960).

"the question of arbitrability—whether a collective—bargaining agreement creates a duty for the parties to arbitrate the particular grievance-is undeniably an issue for judicial determination." *AT&T*, 475 U.S. at 649. However, citing a long line of prior cases, the Court in *AT&T* stated an exception to this general rule: "*Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* (emphasis added). By its statement of the exception to the general rule, the Court in *AT&T* made clear that the parties possessed the power to vest the arbitrator by clear contract language with the authority to decide arbitrability and thus "determine his own jurisdiction * * *." *Id.* at 651.

In *First Options*, this Court applied the *AT&T* rule to an arbitration proceeding under the FAA and described in detail the role of the court when deciding whether a party has agreed to arbitrate arbitrability. *First Options*, 514 U.S. at 944. This Court held, citing *AT&T*, that courts "should not assume that the parties agreed to arbitrate arbitrability" in the absence of clear and unmistakable evidence that they did so. *Id.*[8] Instead, the trial court "should apply ordinary state-law principles that govern the formation of contracts" to determine if this clear and unmistakable evidence exists. *Id.* In *First Options*, "[t]he relevant state law here, for example, would require the court to see whether the parties objec-

[8] The requirement that the language be "clear and unmistakable" exists because "[a] party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S. at 945.

tively revealed an intent to submit the arbitrability issue to arbitration." *Id*.

The trial court's role as articulated in *First Options* is therefore merely to determine whether the parties' contract expresses in clear and unmistakable language that the arbitrator will determine gateway issues of arbitrability. Here, both courts below held that the language of this Arbitration Agreement contains such language giving the arbitrator the power to decide issues of contract enforceability, including unconscionability. *See* Pet. App. 4a ("The Agreement to Arbitrate clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable."); Pet. App. 13a ("In contrast to *First Options*, we are not presented with 'silence or ambiguity on the "who should decide the arbitrability point."' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator.") The *AT&T/First Options* principle thus controls and the Arbitration Agreement should be enforced as written, with the issue of contract enforceability determined by the arbitrator.

2. The Ninth Circuit's Holding Is Incompatible With *AT&T/First Options*

By concluding that, notwithstanding clear and unmistakable terms, a mere allegation of unconscionability prevents those terms' enforcement, the Ninth Circuit created an exception to *AT&T/First Options* that swallows the rule. As Judge Hall stated in dissent, "The exception [created by the majority] begins to look very much like the general rule in that courts will be deciding the question of agreement validity under both scenarios, regardless of what the

agreement's language might say about the chosen forum for that question." Pet. App. 22a.

In support of its holding, the Ninth Circuit relied on *Buckeye*. Pet. App. 11a-12a. In *Buckeye*, this Court held that, when a party challenges the validity of a contract, but not specifically its arbitration provisions, the challenge to the contract's validity should be considered by an arbitrator, not a court. *Buckeye*, 546 U.S. at 446. The flip side of this rule is that when a party challenges the validity of the arbitration provision itself, separate from the validity of the overall contract, a court normally decides the threshold question of enforceability of the arbitration provision. *Id. See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in the inducement of the contract as a whole was to be decided by the arbitrator but fraud in the inducement of the arbitration provision itself was for the court).

However, neither *Buckeye* nor *Prima Paint* addressed the issue posed in this case, whether a question regarding the validity of a few clauses contained within an arbitration agreement can be appropriately delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. Therefore, the Ninth Circuit's reliance on *Buckeye* stretches the holding in that case beyond its proper limits and creates a false tension with the principles of *AT&T* and *First Options*, which fully support enforcement of the parties' express agreement.[9]

---

[9] Unlike *Prima Paint*, this case does not involve any issue regarding the "making of the agreement for arbitration" under 9 U.S.C. § 4. *See Prima Paint*, 388 U.S. at 403-04 (allegation of fraud in the inducement "goes to the 'making' of the agreement

The Ninth Circuit adopted, without precedent, a blanket rule that a claim that an arbitration agreement is invalid because it is unconscionable cannot under any circumstances be decided by an arbitrator. This blanket rule is contrary to decisions of this Court holding that the default rule normally requiring "gateway" issues to be decided by the trial court is trumped by a clear and unmistakable agreement that such issues are to be decided by the arbitrator. The Ninth Circuit's decision to create out of "whole cloth" an exception to this Court's holdings if there is merely a *claim* of unconscionability conflicts directly with the core principles of the FAA, namely, that agreements must be enforced in accordance with their terms, that arbitrators may decide gateway issues if these issues are clearly and unmistakably referred to arbitration, that arbitration can be trusted as a means for resolving disputes, and that courts must refer parties to arbitration "in the manner provided for" in their agreement. 9 U.S.C. § 4.

While Jackson may argue that the Ninth Circuit's rule is more limited because it only applies where an individual claims he had no real choice but to agree to a contract's terms, the dissent exposed the fallacy of this argument by noting that the Ninth Circuit's

---

to arbitrate * * * "). In this case, Jackson does not allege fraud nor does he allege that he did not execute the Arbitration Agreement. *See Buckeye*, 546 U.S. at 444 n.1 ("[t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded"). Rather, he merely alleges that the fact that the Agreement was required as a condition of employment and contains a few provisions that he claims are unfair makes the agreement unenforceable. Whether he is correct in that claim is a matter that an arbitrator unquestionably is as suited to decide as a court.

new rule is triggered by "just the bare allegation of unconscionability," whether procedural or substantive. Pet. App. 22a. Thus, "clear and unmistakable" language vanishes from the agreement at the whim of a party resisting arbitration. Moreover, there is clearly nothing in the statute that distinguishes between various parties in deciding what issues can be decided by an arbitrator. In trying to make such a distinction, the decision below merely reflects the majority's doubts that an arbitrator will decide the issue "correctly." But this is just another indication of the court's hostility to arbitration.

The aim of *AT&T* and *First Options* is that gateway issues ordinarily committed to the court and perhaps not expected to be subject to arbitration may nonetheless be sent to arbitration so long as the language of the agreement makes it clear that arbitration is the forum for resolution of that dispute. Those gateway issues include the very issues (contract validity and coverage) that Jackson claims cannot, but this Court has held may, be entrusted to arbitrators. *See Bazzle*, 539 U.S. at 452 ("whether the parties have a valid arbitration agreement at all" is a gateway issue).

3. Other Courts of Appeals Apply the *AT&T/First Options* Rule to Claims of Unconscionability.

Rather than creating without statutory or other support a broad exception to the *AT&T/First Options* rule as the Ninth Circuit has done, other courts of appeals have respected and followed the rule even when the question of arbitrability involves a claim of unconscionability. *See, e.g., Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 13 (1st Cir. 2009) (court held that unconscionability, which is "essentially a

fairness issue," is delegated to the arbitrator by clear and unmistakable language); *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 624-25 (8th Cir. 2006) (contention that "it would be unconscionable" to arbitrate is delegated to the arbitrator by clear and unmistakable evidence); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1331 (11th Cir. 2005) (argument that "remedial restrictions [in arbitration agreement] are, in fact, unenforceable-either because they defeat the remedial purpose of another federal statute * * * or because they are invalid under generally applicable state contract law" is for the arbitrator); *Bailey v. Ameriquest Mortgage Co*., 346 F.3d 821 (8th Cir. 2003) (assuming that the grounds for revocation under section 2 of the FAA included plaintiff's claims that the agreement was invalid based on alleged unfairness of various substantive provisions, court concluded that these claims were for the arbitrator).

First Options and *AT&T* hold that issues such as contract coverage and validity, normally for the court, can be sent to arbitration by the parties. Other circuits uniformly recognize that "clear and unmistakable" language in an arbitration agreement sending these issues to the arbitrator is not erased by a mere claim of unconscionability. The Ninth Circuit stands alone in creating, without support in the statutory language or this Court's precedents, an exception to the *AT&T*/*First Options* rule which permits clear and unmistakable contract language to be rendered a nullity not where the party is deprived of an opportunity to have its unconscionability defense decided by an arbitrator but simply because

of a bare claim that a provision in the agreement may be unfair.[10]

4. The Ninth Circuit's "Meaningful Assent" Test Is Unsupportable.

Jackson argued below that he should not be held to the terms of the Arbitration Agreement because "of the parties' unequal bargaining power, the fact that the Agreement was presented as a non-negotiable condition of his employment, and the absence of any meaningful opportunity to modify the terms of the agreement * * *." Pet. App. 14a. Thus, he contended that "he did not meaningfully assent to the Agreement." *Id*. This argument motivated the Ninth Circuit to "hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to

---

[10] The Ninth Circuit's attempt to find support in the First Circuit's decision in *Awuah* is misplaced. Pet. App. 17a. *Awuah* fully embraces the principle that parties can clearly and unmistakably vest the arbitrator with power to "decide challenges to his own authority," including claims of unconscionability. *Awuah*, 554 F.3d at 11. However, the court further held that, where the party opposing arbitration contends that the arbitral remedy is "illusory," the trial court would be tasked to determine whether the opponent of arbitration could meet the "high" standard of establishing that the arbitration regime was "structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." *Id*. at 13 (emphasis added). *Awuah* cannot support the Ninth Circuit's decision here because Jackson made no showing below that the arbitral remedy was "illusory" or that he had no opportunity to obtain a decision from an arbitrator regarding his unconscionability defense.

the agreement, the threshold question of unconscionability is for the court." Pet. App. 15a.[11]

The Ninth Circuit's holding is flawed, finds no basis in the language of the FAA, and is out of step with this Court's precedents. As stated above, nothing in the FAA provides that an agreement to vest the arbitrator with the power to decide issues of arbitrability, including issues of contract validity, is not subject to the FAA's "broad principle of enforceability." *Perry*, 482 U.S. at 489. In fact, the *AT&T/First Options* rule establishes that such an agreement is fully enforceable so long as it is manifested, as it is here, objectively in a "clear and unmistakable" manner under generally applicable state contract law. *First Options*, 514 U.S. at 944.

The Ninth Circuit's application of a subjective "meaningful assent" test despite there being no issue raised over the making, signing, clarity or applicability of the Arbitration Agreement or its clause sending unconscionability issues to the arbitrator is unsupportable. Indeed, it sets up a hurdle to the enforcement of the parties' agreement, based on one party's alleged subjective impressions, that does not exist in generally applicable Nevada law, which

---

[11] Jackson merely *asserted* these points below without any evidence. The facts in the record do not support the argument. The agreement conspicuously solicited Jackson's acknowledgement that he read and understood its terms and further reminded him that he could speak to his private legal counsel to the extent he wished to do so. Jt. App. 37-38. He did not submit an affidavit or declaration in his own behalf in the proceedings below. It was his burden, not met here, to establish his defense to enforcement of the Arbitration Agreement. *See Randolph*, 531 U.S. at 92 (party seeking to invalidate agreement based on claim that arbitration would be prohibitively expensive bears burden of proof in that regard).

follows an objective approach to contract formation. *See Bergman v. Electrolux Corp.*, 558 F. Supp. 1351, 1353 (D. Nev. 1983) (under Nevada law mutual assent was manifested by the signatures on the written agreement); *James Hardie Gypsum (Nevada), Inc. v. Inquipco*, 929 P.2d 903, 906 (Nev. 1996) (contract cannot be avoided based on the subjective intentions or understandings of a party; "[t]he fact finder should look to objective manifestations of intent to enter into a contract."), *overruled on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 35 P.3d 964, 968 & n.6 (Nev. 2001); *Campanelli v. Conservas Altamira, S.A.*, 477 P.2d 870, 872 (Nev. 1970) ("Parties to a written arbitration agreement are bound by its conditions regardless of their subjective beliefs at the time the agreement was executed."). Thus, the "relevant state law here * * * would require the court to see *whether the parties objectively revealed an intent* to submit the arbitrability issue to arbitration." *First Options*, 514 U.S. at 944 (emphasis added). In this case, they clearly did so. *See also Restatement (Second) of Contracts* § 2(1) cmt. B (1981) ("manifestation of intention" adopts an "external or objective standard for interpreting conduct; *it means the external expression of intention as distinguished from undisclosed intention*." (emphasis added)).

Moreover, Jackson cannot argue that state law of general applicability prohibits enforcement of clear and unmistakable language sending the unconscionability issue to the arbitrator. First, generally applicable Nevada contract law, even assuming that the agreement was, as Jackson alleged, a nonnegotiable condition of employment and hence adhesive, does not make the agreement unenforceable on the mere allegation that it is unconscionable. *See Mallin v.*

Farmers Ins. Exch., 839 P.2d 105, 118 (Nev. 1992) ("adhesion contracts are not unenforceable per se"); *cf. Kindred v. Second Judicial Dist. Court*, 996 P.2d 903, 907 (Nev. 2000) ("We have never applied the adhesion contract doctrine to employment cases.").

Second, "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. *The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act*." *Moses H. Cone*, 482 U.S. at 489 (emphasis added). *AT&T* and *First Options* are part of that "body of federal substantive law of arbitrability," which cannot be overridden by inconsistent state law.

Additionally, Jackson cannot credibly argue that the Arbitration Agreement, even if required as a "condition of his employment," Pet. App. 14a, conferred upon him no benefits in exchange for his agreement to arbitrate and was hence unsupported by consideration. For one thing, the Arbitration Agreement includes mutual promises to arbitrate, consideration enough to form a contract. Jt. App. 29. Likewise, taking his arguments at face value, Jackson received highly valuable consideration in exchange for his agreement to arbitrate—employment. A claim that he did not "meaningfully assent" to arbitrate when that agreement was, as he also alleges, a "condition of his employment" can only illogically mean that he did not "meaningfully assent" to become employed, a claim that is belied by the allegations that RAC gainfully employed him after he signed the agreement to arbitrate his disputes.

Moreover, the Arbitration Agreement by itself confers valuable benefits, such as "a speedy, impartial, final, and binding dispute-resolution procedure." Jt. App. 29. When Congress enacted the FAA, it had the interests of individuals, as well as businesses, in mind. *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 280 (addressing the FAA's legislative history). As the Court observed regarding an agreement to arbitrate employment disputes: "Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Most recently, this Court in *14 Penn Plaza* stated that "the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza*, 129 S. Ct. at 1471.

The Ninth Circuit's position is internally inconsistent as well. The court of appeals recognized that on remand the district court should determine whether the agreement was substantively unconscionable and, *only if so*, whether the agreement *also* is procedurally unconscionable. Pet. App. 20a n.3. Thus, on the one hand the Ninth Circuit refused to enforce the clear and unmistakable language of the agreement sending the issue of contract enforceability to the arbitrator because there was no "meaningful assent" to it but then recognized that the question whether the agreement to arbitrate was unenforceable due to procedural unconscionability had yet to be determined and might never even be reached if no substantive unconscionability were

found. It is thus clear that the Ninth Circuit's "meaningful assent" test is itself an illusion because, if the substantive terms of the agreement are held not to be harsh and impermissibly one-sided, no amount of "procedural unconscionability" will render the arbitration agreement unenforceable. *See D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004) (party opposing enforcement of arbitration agreement based on unconscionability must establish both procedural and substantive unconscionability).

The Ninth Circuit's reliance on the purported lack of "meaningful assent" to the "clear and unmistakable" language of the parties' Arbitration Agreement has its response in *AT&T/First Options*: The "assent" to submit the issue to the arbitrator becomes "meaningful" when the parties' agreement, as here, "clearly and unmistakably" resolves that issue. Because in this case it is indisputable that the language at issue meets that test, the *AT&T/First Options* rule must be applied and the agreement enforced as written.

C. Arbitrators Are Fully Capable of Fairly Deciding the Issues Presented Here.

With no basis in either the text of the FAA or this Court's cases interpreting that statute, Jackson is forced to rely on purported public policy concerns to justify the Ninth Circuit's refusal to enforce the Arbitration Agreement as written. However, even assuming that these concerns could override the FAA's presumption in favor of contract enforcement, which they cannot, they, in any event, have no substance. *See, e.g., Hall Street Assocs., L.L.C.*, 552 U.S. at 589 (whatever the policy "consequences of our holding," the Court is bound by the "statutory text" of the FAA).

Here, there are no adverse public policy consequences in permitting the arbitrator to determine the unconscionability claims being made by Jackson. Jackson made straightforward, garden variety claims below that the agreement was substantively unconscionable because it allegedly "contained one-sided coverage and discovery provisions and a provision specifying that the arbitrator's fee was to be equally shared by the parties." Pet. App. 9a. The Ninth Circuit easily addressed one of these issues in a few paragraphs. Pet. App. 18a-20a. There is no reason why an arbitrator could not do likewise.

However, in his opposition to the petition for writ of certiorari, Jackson claims that "public policy" requires that arbitrators not be trusted with these decisions because they have a "financial interest" in prolonging cases rather than disposing of them early. Opp. 8-9. At the outset, this argument proves too much because taken to its logical conclusion arbitrators then would be mistrusted when it comes to deciding *any* dispositive motion (including motions that a defendant might ordinarily bring, such as motions to dismiss or for summary judgment), because if granted, a case would terminate well short of a more "lucrative" trial-type hearing. *See, e.g., Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001) (under NASD rules, dispositive motions available in arbitration).

Following Jackson's argument, arbitrators likewise could not be trusted to decide whether an ambiguous agreement permits or precludes class actions, because there is a vast difference in complexity, and presumably, the amount of arbitrator's fees, between a single plaintiff case and one in which a plaintiff is allowed to represent the interests of tens, hundreds

or thousands of others. Of course, this Court just a few years ago committed that very issue of contract interpretation to the arbitral forum in *Bazzle*, holding that "[a]rbitrators are well suited to answer that question." *Bazzle*, 539 U.S. at 453.

Jackson's "public policy," if adopted, might also lead courts to hold that arbitrators, based on the assumption of self-interest and bias, cannot be trusted to render interim rulings relating to the scope of discovery, the length of a hearing, limitations on witnesses and the like because the arbitrator would be biased against simplicity and expedition in favor of a prolonged, unnecessarily complex case. The premise of the FAA, as addressed *supra*, is exactly the opposite: arbitration is supposed to be speedier and less costly than going to court.

In effect, Jackson's argument threatens to devastate arbitration by requiring frequent interlocutory interventions by a supervising court. If arbitrators "are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987), the arbitrator selected by the parties in this case can decide the relatively simple legal issue of whether certain parts of the Arbitration Agreement are unconscionable.[12] Clearly, Congress

---

[12] Indeed, arbitrators (many of whom are former members of the judiciary) may decide cases under the Truth in Lending Act, the Securities Act of 1933, the Securities and Exchange Act of 1934, the Racketeer Influenced and Corrupt Organizations Act, and the Sherman Act, and they certainly can decide what the dissent below characterized as "run-of-the-mill" cases like Jackson's. Pet. App. 22a. *See Randolph*, 531 U.S. at 89 (gathering cases).

did not intend to allow arbitrators to enforce fundamentally important federal statutes like Title VII or the Sherman Act only to flatly prohibit them from deciding state law questions of unconscionability.

Moreover, Jackson's public policy argument conflicts with an unbroken line of this Court's cases rejecting the presumption of arbitrator bias. "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp*., 473 U.S. at 634. *See also Randolph*, 531 U.S. at 89-90 ("generalized attacks" resting on "suspicion of arbitration" must be rejected); *Gilmer*, 500 U.S. at 30 (the "host of challenges to the adequacy of arbitration procedures" advanced by the employee constitute generalized attacks based on suspicion and are "far out of step with our current strong endorsement" of arbitration); *Rodriguez de Quijas*, 490 U.S. at 481 ("outmoded presumption of disfavoring arbitration proceedings" must be set aside). Indeed, "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232. That false assumption underlies the "public policy" suggested by Jackson, but it is itself contrary to public policy embodied in the FAA.

Enforcement of the express terms of the Arbitration Agreement in this case violates no provision of the FAA or other federal law. Nor does it violate any public policy. In fact, enforcement does the opposite: it furthers the strong federal policy in favor of arbitration and supports the salutary goals of the arbitration process, to bring about the expeditious, efficient, and final resolution of disputes while insuring principles of fundamental fairness.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL T. GARONE
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW Fifth Ave.
Suites 1600-1900
Portland, OR 97204
(503) 222-9981

RONALD D. DEMOSS
ANDREW TRUSEVICH
MARY HAROKOPUS
RENT-A-CENTER LEGAL DEPARTMENT
5501 Headquarters Drive
Plano, TX 75024
(972) 801-1100

ROBERT F. FRIEDMAN
Counsel of Record
EDWARD F. BERBARIE
LITTLER MENDELSON, P.C.
2001 Ross Avenue
Suite 1500
Dallas, TX 75201
(214) 880-8100
rfriedman@littler.com

HENRY D. LEDERMAN
LITTLER MENDELSON, P.C.
1255 Treat Blvd.
Suite 600
Walnut Creek, CA 94597
(925) 932-2468

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner