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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations.[1] The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber has repeatedly participated as *amicus curiae* in cases before this Court addressing arbitration issues, including, most recently, *Granite Rock Co.* v. *International Brotherhood of Teamsters,* No. 08–1214; *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, No. 08–1198; *Arthur Andersen LLP* v. *Carlisle*, 129 S. Ct. 1896 (2009); *14 Penn Plaza, LLC* v. *Pyett*, 129 S. Ct. 1456 (2009); *Vaden* v. *Discover Bank*, 129 S. Ct. 1262 (2009); *Preston* v.

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

Ferrer, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003); and *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105 (2001).

Many members of the Chamber have found that arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Accordingly, these businesses routinely include arbitration provisions as standard features of their business contracts. Based on the legislative policy reflected in the Federal Arbitration Act and this Court's consistent endorsement of arbitration for the past half-century, Chamber members have structured millions of contractual relationships around arbitration agreements. For this reason, the Chamber has a strong interest in ensuring that the federal law of arbitration is appropriately applied and that businesses can rely upon stable arbitration precedent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Whether parties to an arbitration agreement may authorize an arbitrator to decide if their agreement is unconscionable is a question with an easy answer. This Court has repeatedly held that the parties have nearly unfettered freedom to tailor the procedures of arbitration and to allocate decision-making authority to the arbitrator. So long as the agreement to do so is clear and unmistakable, the parties may allow the arbitrator to decide whether the arbitration agreement itself is enforceable—and the parties here clearly and unmistakably agreed to do just that.

In reaching the contrary conclusion, the Ninth Circuit continued a pattern of according the contract defense of unconscionability a special status that is neither warranted nor permitted by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. In the Ninth Circuit's view, the threat of unconscionability so pervades mandatory arbitration that no arbitrator could be trusted with evaluating the defense's contours. That sacrosanct status reflects the increasing use in some courts of the elastic concept of unconscionability as a supremely adaptable means of thwarting agreed-upon arbitration procedures.

This case calls for the Court to evaluate whether the Ninth Circuit properly disregarded a clear and unmistakable allocation to an arbitrator of the authority to determine whether an agreement is unconscionable. In doing so, the Court should be mindful of current developments in the use of the unconscionability defense to defeat arbitration agreements.

The unconscionability defense has taken on a life of its own in the arbitration context. Indeed, the defense now appears more often in arbitration cases than in all others combined. That is, in the federal courts of appeals today, the prospective resolution of a dispute in an arbitral rather than a judicial forum is the drastic "evil" that the doctrine of unconscionability most often is invoked to prevent.

In circumvention of the pro-arbitration policies of the FAA, the unconscionability defense has become the principal means for expressing judicial hostility to the alternative resolution of disputes. No longer a recognizable "ground[] * * * for the revocation of any contract" (9 U.S.C. § 2), unconscionability doctrine has been distorted into a ground for fairness review

(and contractual reformation) of every sub-element of the agreed-upon arbitral procedures.

A future case may present this Court with the opportunity to curtail the broadest misuses of unconscionability doctrine. But the Court should start now by ending the misuse before it.

ARGUMENT

I. The Federal Arbitration Act Requires That Arbitration Agreements Be Enforced As Written, Not Altered To Suit Judicial Policy Preferences.

A. Judicial Predilections Should Not Displace Agreed-Upon Arbitration Procedures.

The "primary purpose" of the Federal Arbitration Act is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Jr. University*, 489 U.S. 468, 479 (1989); see also *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57–58 (1995). In providing that arbitration agreements are "valid, irrevocable, and enforceable" (9 U.S.C. § 2), Congress sought to "ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms and according to the intentions of the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 947 (1995) (citations and internal quotation marks omitted).

In particular, the FAA requires courts to enforce the arbitration procedures set out in the parties' agreement, not procedures that satisfy the preferences of courts or state legislatures. As this Court

reiterated last Term, courts "cannot rely on * * * judicial policy concern[s]" to refuse to honor arbitration agreements. *14 Penn Plaza LLC* v. *Pyett*, 129 S. Ct. 1456, 1472 (2009). Thus, a party that proves the existence of an arbitration agreement addressing the dispute in question is entitled to "an order directing that such arbitration proceed *in the manner provided for in such agreement*." 9 U.S.C. § 4 (emphasis added).

Under the FAA, accordingly, courts must treat an agreement setting out the procedures for dispute resolution as binding contract terms, not as mere suggestions that the court is free to disregard. As this Court has explained, the parties are entitled to "specify *by contract* the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 (emphasis added). Indeed, "procedure" is among the "many features of arbitration" that "the FAA lets parties tailor * * * by contract." *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008).

Consequently, courts should not interfere with terms specifying arbitration procedures or allocating decision-making duties so long as the plaintiff "'effectively may vindicate'" his or her claims through arbitration. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 90 (2000) (quoting *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). And courts may not simply assume that the ability to vindicate claims depends on whether the decision-maker is an arbitrator or a court. As this Court has recognized, "the streamlined procedures of arbitration do not entail any consequential restriction on substantive

rights." *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 232 (1987).

To hold that an issue is beyond arbitral competence would reflect the very "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" that the FAA was enacted to halt. *Mitsubishi*, 473 U.S. at 626–627. A party is entitled to arbitrate "in accordance with the terms of the agreement," not according to a judicially preferred structure for alternative dispute resolution. 9 U.S.C. § 3.

B. No Exception Excuses Enforcing The Arbitration Agreement Here As Written—Including Its Allocation Of Decision-Making Authority.

This Court has identified only a handful of narrow exceptions to the FAA's command that arbitration agreements must be "rigorously enforce[d]." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). None of these limited exceptions allows a court to disregard parties' clear and unmistakable agreement to have issues of enforceability—including an unconscionability defense—decided by an arbitrator.

First, an arbitration agreement cannot conflict with a federal statute. The Court has recognized that Congress might identify certain federal statutory rights as non-arbitrable.[2] See *Randolph*, 531 U.S. at

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[2] But the Court overruled its only decision ever to find that Congress had done so. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (holding that claims under the Securities Act of 1933 may be arbitrated), overruling *Wilko* v. *Swan,* 346 U.S. 427 (1953). The Court has rejected the argument every other time it has been advanced.

89–92. And the Court has held that parties cannot agree to procedures that are "at odds" with "textual features" of the FAA itself. *Hall Street*, 128 S. Ct. at 1404 (limiting parties' ability to contract for judicial review by federal courts). But no federal statutory limitation is at issue here.

Second, when a party challenges the validity of an arbitration clause specifically (rather than the contract as a whole), the Court has held that questions of arbitrability presumptively should be decided by a court. See *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). See generally *First Options*, 514 U.S. at 942–947. The Court reasoned that most contracting parties are unlikely to contemplate "the significance of having arbitrators decide the scope of their own powers," and the FAA does not "force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *First Options*, 514 U.S. at 945.

That presumption, however, can be overridden by the parties' "clear and unmistakable" agreement to have issues of arbitrability decided by the arbitrator. *First Options*, 514 U.S. at 944 (brackets omitted) (quoting *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649 (1985)). As the Court has explained, "the question 'who has the primary power to decide arbitrability' turns upon *what the parties agreed* about *that* matter." *Id.* at 943 (first emphasis added). Thus, the presumption that a court will de-

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See, *e.g.*, *Randolph*, *supra*, 531 U.S. 79 (Truth in Lending Act); *Gilmer*, *supra*, 500 U.S. 20 (age discrimination); *McMahon*, *supra*, 482 U.S. 220 (Securities Exchange Act of 1934); *Mitsubishi*, *supra*, 473 U.S. 614 (antitrust laws).

cide questions of arbitrability applies only when the agreement is silent. *Ibid.* By contrast, "when the parties submit[] that matter to arbitration" by express agreement, the court "must defer to an arbitrator's arbitrability decision." *Ibid.* Here, the parties unquestionably submitted the enforceability of the arbitration agreement to the arbitrator. See Pet. App. 9a.

Third, the Court has held that under the FAA's savings clause, arbitration agreements—like any other contract terms—are subject to "[g]enerally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996) (citing 9 U.S.C. § 2). In the words of Section 2 of the FAA, arbitration agreements shall be "enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The savings clause in Section 2 "places arbitration agreements on equal footing with all other contracts." *Buckeye*, 546 U.S. at 443. Some courts have construed "equal footing" to permit a state to impose any restriction on arbitration so long as it imposes an equivalent restriction on litigation. See, *e.g.*, *Laster* v. *AT&T Mobility LLC*, 584 F.3d 849, 857–858 (9th Cir. 2009), petition for cert. pending *sub nom. AT&T Mobility LLC* v. *Concepcion* (No. 09–893). That view would allow states to proscribe arbitration indirectly by prohibiting any dispute resolution procedure that places limits on discovery or otherwise diverges from the rules of civil procedure. Yet "th[e] objective [of arbitration] would be frustrated," and the FAA undermined, if parties who agreed to arbitrate could be forced to incorporate all of the same procedures that are part and parcel of litigation. *Preston* v. *Ferrer*, 552 U.S. 346, 358 (2008). To condi-

tion enforcement of arbitration agreements on the inclusion of litigation procedures—or the allocation of certain decision-making functions to a court acting as a gatekeeper—amounts to "an attack on the character of arbitration itself." *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 175–176 (5th Cir. 2004).

Moreover, this expansive reading of the savings clause in Section 2 cannot be reconciled with this Court's recent decision in *Preston*. In that case, the Court held that the FAA preempts a California statute that imposed an administrative exhaustion requirement for certain disputes, even though that requirement applied identically to both judicial and arbitral proceedings. 552 U.S. at 342–359.

Far from permitting such interference, the FAA forbids any measures that frustrate the ability of parties to set the terms and procedures of arbitration, "so long as [the terms allow] the prospective litigant effectively [to] vindicate [his or her] * * * cause of action in the arbitral forum." *Gilmer*, 500 U.S. at 28 (internal quotation marks omitted); see *Randolph*, 531 U.S. at 90. Applying those principles here, the FAA requires lower courts to respect the parties' choice of decision-maker so long as "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232.

The decision below articulated no reason to doubt that the arbitrator will follow the law when weighing plaintiff's unconscionability challenge to the arbitration agreement, and this Court has already held that an arbitrator is permitted to adjudicate a claim that could render his own authority void. See *Buckeye*, 546 U.S. at 448–449; *Prima Paint*, *supra*, 388 U.S.

395. Accordingly, the Court should enforce the parties' agreement according to its terms.

C. Permitting Courts To Override Clear And Unmistakable Allocations Of Decision-Making Authority Would Have Adverse Practical Consequences.

The decision of the Ninth Circuit should be reversed for another reason. Affirmance would have significant and deleterious practical consequences, effectively rewriting millions of contracts and severely undermining the very interests that arbitration was designed to serve. Relying on this Court's opinion in *First Options*, many businesses entered into contracts with their customers or employees that seek to maximize the efficiencies of arbitration by specifying that the arbitrator will decide issues of enforceability. These businesses have embraced arbitration as a means for resolving the full range of contract disputes, including questions of arbitrability. By allowing these disputes to proceed directly to arbitration, businesses can avoid a slow and costly detour through the courts.

Yet by forcing parties instead to address all threshold issues of arbitrability in the courts, the decision below effectively "breed[s] litigation from a statute that seeks to avoid it." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995). Before a dispute could proceed to arbitration, a party resisting arbitration might force a "mini-trial in the district court to determine an agreement's validity" (Pet. App. 22a (Hall, J., dissenting)), which may involve burdensome discovery, formal hearings, and time-

consuming interlocutory appeals.[3] Businesses that have entered into millions of contracts premised on "the relative informality of arbitration" and procedures "more streamlined than federal litigation" (*14 Penn Plaza*, 129 S. Ct. at 1471) nonetheless would be unable to avoid civil litigation.

That result would thwart the parties' reasonable expectations under this Court's precedents. And by injecting "uncertainty as to procedure and outcome" into the decision whether to agree to arbitrate, such a decision would intensify the perceived "risk [of] using arbitration clauses due to the uncertainty present." Gregory C. Cook & A. Kelly Brennan, *The Enforceability of Class Action Waivers in Consumer Agreements*, 40 UCC L.J. 331, 333, 348 (2008). The consequent deterrence of the use of arbitration would frustrate the purpose of the FAA.

* * *

This Court has consistently held that the FAA "compels judicial enforcement of a wide range of written arbitration agreements" according to their terms rather than pursuant to judicial policy prefe-

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[3] As Judge Hall's dissenting reference to a "mini-trial * * * [on] an agreement's validity" suggests (Pet. App. 22a), not every court has heeded this Court's admonition that the FAA "call[s] for an expeditious and summary hearing" on motions to compel arbitration, "with only restricted inquiry into factual issues." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22 (1983). Several courts instead have authorized extensive discovery so that parties resisting arbitration might seek support for their unconscionability arguments. See, *e.g.*, *Coneff* v. *AT&T Corp.*, 620 F. Supp. 2d 1248, 1251 n.1 (W.D. Wash. 2009) (noting that motion to compel arbitration was not heard until after 2½ years of "extensive discovery" and motions practice), appeal pending, No. 09–35563 (9th Cir.).

rences. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 111 (2001). The petitioner here is entitled to invoke the parties' clear and unmistakable agreement to have the arbitrator decide issues of enforcement and arbitrability.

II. The Decision Below Reflects A Broadening Misuse And Distortion Of Unconscionability Doctrine To Impose Shifting And Insurmountable Hurdles To Arbitration.

As we pointed out in our *amicus* brief in *Granite Rock Co.* v. *International Brotherhood of Teamsters*, No. 08–1214, even in the face of a purported agreement to submit all issues of arbitrability to the arbitrator, a court must "determine[]" at the threshold "that the contract in fact *exists*." Chamber of Commerce Am. Br. 18 (No. 08–1214). Thus, as the petitioner here recognizes, before adhering to the contractual allocation of decision-making responsibility, a court may address the "making [and] signing * * * of the Arbitration Agreement." Pet. Br. 30.[4]

But once the agreement's making and signing are proved, the arbitrator may be assigned all other tasks—including the determination of unconscionability—so long as the allocation is clear and unmistakable. Unconscionability is a "contract defense[]" (*Doctor's Associates*, 517 U.S. at 686–687), not an issue of objective contract formation. See, *e.g.*, *Marin*

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[4] As Judge Easterbrook observed in distinguishing a potentially arbitrable "defense to enforcement" from "a situation in which no contract came into being," a "person whose signature was forged never agreed to anything," nor did one "whose name was written on a contract by a faithless agent who lacked authority." *Sphere Drake Insurance Ltd.* v. *All American Insurance Co.*, 256 F.3d 587, 590–591 (7th Cir. 2001).

Storage & Trucking, Inc. v. *Benco Contracting & Engineering, Inc.,* 89 Cal. App. 4th 1042, 1049, 107 Cal. Rptr. 2d 645, 651 (2001) ("The doctrine of unconscionability is a defense to the enforcement of a contract or a term thereof.").[5] Thus, a finding that a contract is unconscionable "presupposes an existing contract." *Ibid.*

Yet the decision below seized on "a bare allegation of unconscionability" (Pet. App. 22a (Hall, J., dissenting)) as the basis for disregarding the parties' clear and unmistakable agreement to have the arbitrator determine issues of arbitrability. That misuse of the unconscionability defense as a lever to pry issues away from an arbitrator reflects a broader pattern of shifting judicial impediments to arbitration imposed under the accommodating label of "unconscionability."

The assumption that arbitrators are unfit to decide some aspect of a dispute, even when the parties have expressly stated that they intend for the arbitrator to decide the issue, reflects a recurrence of the once-common "hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice." *Circuit City*, 532 U.S. at 111. Although "Congress enacted the FAA 'to overcome judicial resistance to arbitration'" (*Vaden* v. *Discover Bank*, 129

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[5] See also RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (discussing unconscionability as one of several limits on "The Scope of Contractual Obligations" where the requirements for contract formation—capacity, assent, and consideration—are met); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 707 (1973) (unconscionability is a "defensive contractual remedy which serves to relieve a party from an unfair contract or from an unfair portion of a contract").

S. Ct. 1262, 1271 (2009) (quoting *Buckeye*, 546 U.S. at 443) (alteration omitted)), hostility to arbitration persists.

Now, however, that hostility manifests primarily through a finely tuned doctrine of unconscionability that permits courts to screen each term of an arbitration agreement based on state social policy. Commentators have observed that many courts evaluating arbitration agreements now "thrust themselves into the paternalistic role of intervening to change contractual terms that the parties have agreed to, merely because the court believes the terms are unreasonable." Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 486–487. A doctrine that was developed to protect against forfeitures and deprivations of the necessities of life now serves largely as a means to invalidate arbitration agreements.

A. The Unconscionability Defense Has Become Primarily A Means Of Defeating Arbitration Agreements.

1. The Ninth Circuit's use of an unconscionability defense in this case as a reason to override the parties' allocation of decision-making authority to the arbitrator is part of a much broader pattern. A distorted unconscionability doctrine has become the weapon of choice for policy-based attacks on arbitration. The protean concept of unconscionability "provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review." Aaron-Andrew P. Bruhl, *The Unconscionability Game:*

Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. REV. 1420, 1420 (2008).

Even before its revival as a means for thwarting arbitration agreements, unconscionability was understood to be an infinitely malleable doctrine—"a vague concept" and "open-ended[]" in the words of a leading treatise. 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:8 (4th ed. 2009). As Judge Younger remarked, "[i]n the area of unconscionability, there is very little logic." Irving Younger, *A Judge's View of Unconscionability*, 13 JUDGES' J. 32, 33 (1974). Rather, the law of unconscionability "seems to add up merely to the proposition that a judge's conscience is his only guide." *Ibid.*

In the arbitration context, unconscionability has become untethered from its moorings. At first, the unconscionability defense provided only a very rare and narrow bulwark against extraordinary unfairness, applied only to contract provisions "that were so unfair as to shock the conscience of the court." E. ALLEN FARNSWORTH, CONTRACTS § 4.27 (4th ed. 2004) (internal quotation marks omitted); see also JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 246 (1835). As Justice Story explained, the doctrine applies only to "bargains of such an unconscionable nature, and of such gross inequality, as naturally lead to the presumption of fraud, imposition, or undue influence * * * as no man in his senses and not under delusion would make." *Id.* § 244.

But now many courts use unconscionability to strike down a vast number of arbitration agreements—including many agreements that, "at the time of formation, [were] arguably in the interests of both parties to the agreement." Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. &

ECON. 293, 306 (1975). In the run of cases, arbitration "benefits society as a whole by reducing process costs and, in particular, benefits most consumers, employees and other adhering parties." Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 264, 264–268 (2006). As the Court observed in the related context of forum-selection provisions, "passengers who purchase tickets containing a forum clause * * * benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991); see *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (noting that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause").

The unconscionability doctrine now used to strike down arbitration agreements bears little resemblance to the traditional and generally applicable unconscionability doctrine. Unconscionability was not meant to allow a party to avoid making good on its promises simply because it (or its lawyer) dislikes the consequences after some particular dispute arises. The courts that deny enforcement to some or all aspects of arbitration agreements on unconscionability grounds often have distorted this doctrine to impose their judicial policy preferences.

2. Unconscionability challenges to arbitration agreements have been steadily increasing. Although less than one percent of arbitration cases in the early 1990s involved an unconscionability challenge, unconscionability defenses more recently appear in 15 to 20 percent of all arbitration cases. Bruhl, *supra*, at

1440–1441. Two recent studies found that more than two-thirds of all unconscionability decisions have addressed arbitration clauses. Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 44–48 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004).

Indeed, arbitration continues to provide the primary setting for the unconscionability doctrine in the courts of appeals. Our independent review shows that more than 60 percent of the federal appellate decisions that adjudicated claims of unconscionability between 2005 and 2009 involved challenges to arbitration agreements.[6]

In addition, unconscionability challenges succeed much more often in arbitration cases than in other settings. One study of unconscionability cases decided in 2002–2003 found that courts are twice as likely to declare arbitration agreements unconscionable as they are other types of contract provisions.

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[6] We searched Westlaw's U.S. Courts of Appeals database (CTA) for all unconscionability challenges to contract provisions in decisions issued from 2005 through 2009, using the following search string: di(unconscionab!) & (contract! agreement!). The di() modifier limits the search to the Westlaw-supplied digest field, which helps to avoid cases that make only some incidental reference to unconscionability without actually analyzing an unconscionability claim, but also limits the search to published cases plus a few nonprecedential cases that Westlaw chose to report in the Federal Appendix. Review of the 160 cases identified by that search revealed 98 decisions adjudicating unconscionability on the merits, of which 61 involved challenges to arbitration agreements.

Randall, *supra*, at 196.[7] Another study of all California state-court decisions from 1986 through 2006 found that unconscionability challenges to arbitration provisions were successful in 58 percent of all cases, while unconscionability challenges to all other contract provisions succeeded only 11 percent of the time. Broome, *supra*, at 44–48.[8]

These studies attribute the disparity to the use of substantially different unconscionability standards in arbitration cases. See Broome, *supra*, at 52–65; Randall, *supra*, at 198, 214–216. Any such use of differing standards, of course, would violate the FAA's prohibition on "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356 (citing *Doctor's Associates*, 517 U.S. at 687).

B. The Decision Below Illustrates How Unconscionability Doctrine Has Become A Universal Shield Against Arbitration.

1. The present case provides insight into the transformation of unconscionability doctrine into a means to defeat arbitration agreements based on principles and policies that are applicable only to the

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[7] See also, *e.g.*, *Tillman* v. *Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 375 (N.C. 2008) (Newby, J., dissenting from refusal to enforce arbitration agreement) ("For the first time in our history, a North Carolina appellate court has found a contract to be unconscionable.").

[8] Our own review, see n.6, *supra*, revealed that 41 percent of unconscionability challenges to arbitration clauses succeed in the courts of appeals generally (25 of 61), but the success rate is 73 percent in the Ninth Circuit (19 of 26). In cases not involving arbitration clauses, the success rate is 11 percent overall (4 of 37), and zero in the Ninth Circuit (11 cases).

context of dispute resolution rather than to contracts generally. As the California Supreme Court observed, "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz* v. *Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 119, 6 P.3d 669, 771 (2000). This "peculiar"—that is, consciously idiosyncratic—approach cannot be reconciled with this Court's holding that the FAA preempts any state law that "imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356.

California law provides the most striking example of the transformation of unconscionability doctrine in the arbitration context. It is that state's law that in large part provides the basis for the unconscionability contentions that the Ninth Circuit held were beyond an arbitrator's competence notwithstanding the parties' clear and unmistakable agreement to refer those issues to arbitration.[9]

As the Ninth Circuit put it in the decision below, "[s]ubstantive unconscionability arises when contract terms are one-sided." Pet. App. 18a. But "one-sided" has become a justification for a term-by-term analysis of arbitration agreements to determine whether each term not only applies equally to each party, but benefits each party equally—an exaggerated point-

[9] The respondent here relied primarily on California law in contending that certain provisions in the arbitration agreement were unconscionable. See J.A. 42–45; see also Pet. App. 19a (examining the Supreme Court of Nevada's decision in *D.R. Horton. Inc.* v. *Green*, 120 Nev. 549, 557–558, 96 P.3d 1159, 1165 (2004) (per curiam), including its citation of the Ninth Circuit's California-law decision in *Ting* v. *AT&T*, 319 F.3d 1126 (9th Cir. 2003)).

by-point mutuality requirement that most certainly does *not* apply to contracts generally.

Indeed, as the dissent below recognized, the core of the respondent's unconscionability defense was the notion that the arbitration agreement "lacks mutuality." Pet. App. 21a. That asserted ground of unconscionability—the supposed one-sidedness of the scope of the clause—illustrates the trend. Although the scope of the clause is the same for both parties, respondent contends that, because not all issues are referable to arbitration—workers' compensation claims and injunctive relief against trade secret theft and the like are excluded—the agreement unfairly requires an employee to arbitrate most of his or her claims while allowing the employer relatively more effective access to the courts. See J.A. 42–43. That contention finds support in California precedent. State courts have held that any agreement requiring arbitration of some but not all possible claims arising from the same set of transactions is unconscionable because it lacks mutuality. See *Mercuro* v. *Superior Court*, 96 Cal. App. 4th 167, 176–177, 116 Cal.Rptr. 2d 671, 677 (2002) (citing *Armendariz*, 24 Cal. 4th at 120, 6 P.3d at 772).

Similarly, the respondent contended that the arbitration clause's fully reciprocal discovery limitation (subject to the arbitrator's ordering further discovery) was unconscionably one-sided although it applied equally to each party. See J.A. 43–44. Again, California jurisprudence supports that claim. See, *e.g.*, *Ontiveros* v. *DHL Express (USA), Inc.*, 164 Cal. App. 4th 494, 511–513, 79 Cal. Rptr. 3d 471, 486–487 (2008), cert. denied, 129 S. Ct. 1048 (2009).

Similarly enhanced mutuality requirements have led California courts addressing the question pre-

sented here to hold that a "provision for arbitrator determinations of unconscionability is also *itself* substantively unconscionable." *Murphy* v. *Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 145, 67 Cal. Rptr. 3d 120, 125 (2007) (emphasis added). The stated basis for this holding was that the allocation of decision-making authority is "entirely one-sided because defendant cannot be expected to claim that it drafted an unconscionable agreement." *Ibid.* See also *Ontiveros*, 164 Cal. App. 4th at 505, 79 Cal. Rptr. 3d at 480–481.

Reflecting the breadth of this arbitration-specific mutuality requirement, the California courts also have held that a requirement that both parties pursue their claims in individual arbitration rather than using class action procedures is unconscionable because that part of the arbitration clause (in the courts' view) benefits a business more than a consumer or employee. The California Supreme Court held that "class action or arbitration waivers are indisputably one-sided," explaining its unique view of point-by-point mutuality in these terms: "Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits." *Discover Bank* v. *Superior Court*, 36 Cal. 4th 148, 161, 113 P.3d 1100, 1109 (2005) (quoting *Szetela* v. *Discover Bank*, 97 Cal. App. 4th 1094, 1101, 118 Cal. Rptr. 2d 862, 867 (2002)).

Yet the requirement of such precise mutuality—not only of obligation, but of the effects and benefits of particular mutual obligations—is truly "peculiar to the arbitration context." *Armendariz*, 24 Cal.4th at

119, 6 P.3d at 771. The general rule of contract law is to the contrary: "If the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged, or mutuality of obligation." *Foley* v. *Interactive Data Corp.*, 47 Cal. 3d 654, 672 n.14, 765 P.2d 373, 381 n.14 (1988) (internal quotation marks omitted). See RESTATEMENT (SECOND) OF CONTRACTS § 79 (using identical language). Indeed, "the so-called requirement of mutuality of obligation is now widely discredited. 2 JOSEPH M. PERILLO & HELEN HADJIYANNIKAS BENDER, CORBIN ON CONTRACTS § 6.1 (rev. ed. 1995); see also RESTATEMENT (SECOND) OF CONTRACTS § 363, cmt. c (although "[i]t has sometimes been said that there is a requirement of 'mutuality of remedy[]' * * *, the law does not require that the parties have similar remedies in case of breach").

This Court has suggested that the FAA requires the same holistic analysis that applies to contracts generally: no court may "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." *Allied-Bruce Terminix*, 513 U.S. at 281. That is, an arbitration agreement must be enforced unless the entire contract is so unfair as to fall afoul of generally applicable contract law doctrine; a court may not dissect the fairness of the arbitration provision viewed in isolation, much less some isolated aspect of the arbitration agreement. Certainly the limited savings clause in Section 2 does not authorize courts to pick apart each element of agreed-upon arbitration procedures and eliminate—or deny enforcement based on—any feature that the court considers more beneficial to one side.

At the core of the evolving arbitration-specific unconscionability doctrine is lingering judicial mistrust and hostility toward the arbitral forum. Courts increasingly treat arbitration itself—particularly the informal, individual arbitration that the FAA contemplates—as a grave harm from which a solicitous judiciary must bend every effort within its common-law powers to protect consumers and employees. That is, a requirement to arbitrate rather than litigate is itself a harm so substantial that it raises the specter of unconscionability whenever it is imposed. See generally Broome, *supra*; Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61.

These courts no longer use generally applicable contract doctrines to invalidate shockingly oppressive contracts that happen to involve arbitration. Rather, they have distorted background principles of unconscionability law in a misguided attempt to protect parties from the arbitral forum. Neither the FAA nor the jurisprudence of this Court permits reliance on the premise that arbitration is itself a detriment.

2. The decision below reflects the status of the Ninth Circuit as "the circuit most hospitable to state unconscionability rulings" that restrict arbitration (Bruhl, *supra*, at 1481), no doubt because that Circuit includes California. For example, the Ninth Circuit has held that the mere presence of an arbitration clause in an employment contract creates a "rebuttable presumption of substantive unconscionability." *Ingle* v. *Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 (9th Cir. 2003). It is difficult to imagine a clear-

er manifestation of the "judicial suspicion of the desirability of arbitration" that the FAA was intended to dispel. *Mitsubishi*, 473 U.S. at 626–627. And any such presumption of unconscionability falls afoul of this Court's admonition in *Gilmer* that the "[m]ere inequality in bargaining power" between employers and employees provides no basis for heightened judicial scrutiny of arbitration agreements in employment contracts. 500 U.S. at 33.

To the same effect, the Ninth Circuit—again applying California law—recently held that agreements to arbitrate on an individual rather than a class-wide basis are unconscionable, even if the arbitration agreement is structured to "essentially guarantee that [a] company will make any aggrieved consumer whole who files a claim." *Laster*, 584 F.3d at 856 n.9. That is, state public policy favoring class actions prevails over the federal public policy that permits parties to "trade[] the procedures * * * of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628.

Unwilling to be geographically constrained in applying California's arbitration-specific unconscionability doctrine, the Ninth Circuit has refused to enforce clear and otherwise-valid choice-of-law provisions when the designated forum permits arbitration procedures that California deems unconscionable. See *Omstead* v. *Dell, Inc.*, ___ F.3d ___, No. 08–16479, 2010 WL 396089, at *3–4 (9th Cir. Feb. 5 2010) (holding that choice of Texas law violated California's fundamental public policy because Texas enforces agreements to arbitrate on an individual ba-

sis).[10] See also *Masters* v. *DirecTV, Inc.*, No. 08–55825, 2009 WL 4885132 (9th Cir. Nov. 19, 2009) (unpublished) (applying California law to invalidate arbitration agreements by customers nationwide). By imposing California unconscionability law even upon contracts that expressly adopt the law of another state, the Ninth Circuit has struck down arbitration clauses that other states—and other circuits—would enforce.[11]

The willingness of the court below to override clear and unmistakable contract terms based on a "bare allegation of unconscionability" (Pet. App. 22a) underscores the doctrine's special status as a silver bullet to defeat obligations to arbitrate. Cf. *Randolph*, 531 U.S. at 91 (unsubstantiated "'risk' that [a claimant] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement"). This case provides an appropriate point to begin rolling back that improper development in the law.

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[10] The result in *Omstead* accords with a California state court decision, *Klussman* v. *Cross Country Bank*, 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728 (2005), that preceded the application of the Class Action Fairness Act of 2005.

[11] See, *e.g.*, *Pleasants* v. *American Express Co.*, 541 F.3d 853 (8th Cir. 2008) (Missouri law); *Gay* v. *CreditInform*, 511 F.3d 369 (3d Cir. 2007) (Pennsylvania and Virginia law); *Caley* v. *Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law); *Jenkins* v. *First American Cash Advance of Georgia, LLC*, 400 F.3d 868, 877–878 (11th Cir. 2005) (Georgia law); *Iberia Credit Bureau*, *supra*, 379 F.3d 152 (Louisiana law); *Snowden* v. *CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); cf. *Livingston* v. *Associates Finance, Inc.*, 339 F.3d 553, 559 (7th Cir. 2003).

3. By contrast with the expansive use of unconscionability doctrine as a means to alter or invalidate arbitration agreements, this Court's decisions indicate that a party resisting arbitration on grounds of unconscionability should rarely succeed. As the Court has observed, arbitration agreements function as "a specialized kind of forum-selection clause." *Scherk*, 417 U.S. at 519. Indeed, forum-selection clauses seek to provide many of the same benefits that motivate businesses to enter into arbitration agreements, including "the salutary effect of dispelling any confusion about [how disputes] arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions * * * and conserving resources that otherwise would be devoted to deciding those motions." *Carnival Cruise Lines*, 499 U.S. at 593–594. And as this Court's forum-selection decisions show, a party challenging such an agreement as unconscionable or unreasonable must satisfy a demanding test.

In *M/S Bremen* v. *Zapata Off-Shore Co.*, this Court held that forum-selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. 1, 10 (1972). The Court went on to explain that the party opposing enforcement "bear[s] a heavy burden," and that it would be "incumbent on th[at] party * * * to show that trial in the contractual forum will be *so gravely difficult and inconvenient* that he will for all practical purposes be *deprived of his day in court*." *Id.* at 17, 18 (emphasis added). "Absent that," the Court held, "there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Id.* at 18. In a subsequent decision, the Court affirmed that the same rule applies to

forum-selection clauses in "form contract[s] the terms of which are not subject to negotiation," and where the parties lack "bargaining parity." *Carnival Cruise Lines*, 499 U.S. at 593.

These decisions, and decisions under the FAA, make clear that an arbitration clause should not be refused enforcement merely for perceived, general unfairness unless one party would be effectively deprived of access to the tribunal (for example, by excessive fees) or would be unable to vindicate his claims (for example, because of excessive restrictions on remedies). See, *e.g.*, *Randolph*, 531 U.S. at 90–91; *Gilmer*, 500 U.S. at 28; *Mitsubishi*, 473 U.S. at 637. But if both parties have access to an arbitral proceeding in which each will be able to vindicate its claims, the mere submission of a dispute (or an issue) to an arbitrator cannot trigger any valid, generally applicable contract defense within the meaning of Section 2.

In the absence of some special hardship far beyond any of the procedural simplifications routine in the arbitral forum, generally applicable unconscionability law—the only type cognizable under Section 2 of the FAA—should not pose any impediment to the enforcement of arbitration agreements. And once illicit suspicion of the arbitrator's decision-making integrity is removed from the equation, no hurdle bars enforcement of the allocation to an arbitrator of the responsibility to decide whether the arbitration agreement is unconscionable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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