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

PETITIONER'S REPLY BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari and incorporated in the opening brief remains correct.

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PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Respondent Antonio Jackson ("Jackson") signed an arbitration agreement covering his claims against Petitioner Rent-A-Center, West, Inc. ("RAC"). The agreement states that any issues relating to its "enforceability" are within the "exclusive authority" of the arbitrator. Jt. App. 34. Because the primary purpose of the Federal Arbitration Act ("FAA") is to enforce arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985), the agreement is presumptively enforceable, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

To rebut the presumption, Jackson must establish that Congress, either in the FAA or some other federal statute, intended to preclude enforcement of the agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). To this end, Jackson makes three primary arguments, but both individually and in concert, they do not overcome the FAA's strong presumption of enforceability.

First, Jackson argues that Section 2 of the FAA, 9 U.S.C. § 2, bars parties from voluntarily delegating contract enforceability issues to the arbitrator. However, while Section 2 sets forth the FAA's central policy favoring enforcement of arbitration agreements, it contains no language assigning the determination of enforceability to any specific forum or, as is relevant here, categorically withholding it from the arbitrator.

Similarly, Jackson argues that Section 4 of the FAA, 9 U.S.C. § 4, requires that courts decide all challenges to the enforceability of the arbitration agreement. However, Section 4 says no such thing and states instead that issues regarding the "making" of the agreement to arbitrate, a limited term applicable to factual issues of formation, may be determined by a judge or a jury under appropriate circumstances. Where, as here, no "making" issue is presented, Section 4 mandates that the court direct the parties to arbitration "in accordance with the terms" of their agreement.

Finally, Jackson advances various speculative and exaggerated policy arguments that do not rebut the FAA's textual presumption in favor of the enforcement of arbitration agreements. The judgment of the court of appeals should be reversed.

II. ARGUMENT

A. An Arbitration Agreement That Clearly and Unmistakably Delegates Contract Enforceability Issues to an Arbitrator Does Not Violate Section 2.

Paying scant attention to *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) ("*AT&T*"), *or First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) ("*First Options*"), which authorize delegation of arbitrability issues to the arbitrator, Jackson argues that the language of Section 2 compels the conclusion that parties to an arbitration agreement may *never* delegate questions of contract validity or enforceability to the arbitral forum and that only courts can assess Section 2's enforcement criteria. Brief for Respondent ("Resp. Br.") 10-11, 14-15.

However, Section 2 provides no textual support for Jackson's claims. This Court will "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29 (1997). Yet, Jackson requests that the Court do just that by adding a requirement that only courts may decide the validity and enforceability of an arbitration agreement. But Section 2 does not address "who decides"; it only declares the overriding federal policy of enforceability which must be applied whether it is a federal court, state court or an arbitration panel that is deciding the enforceability issue. *See, e.g., Vaden v. Discover Bank*, __ U.S. __, 129 S. Ct. 1262, 1271 (2009) ("The 'body of federal substantive law' generated by elaboration of FAA § 2 is equally binding on state and federal courts." (citations omitted)).

Without any express language to support his claim that Section 2 compels the result he advocates, Jackson resorts to fanciful inferences. Jackson refers to what he characterizes as Section 2's "three basic requirements" for enforcement of an arbitration agreement: "First, there must be a written agreement. Second, the clause must relate to a transaction involving interstate commerce. And third, the clause must not be subject to invalidation on ordinary contract-law grounds." Resp. Br. 11. From this, Jackson jumps to the conclusion that the court is the exclusive arbiter of each condition.

However, there are conspicuous omissions from Jackson's summary which defeat his argument. For example, Section 2's requirement of a written agreement addresses "an agreement in writing to submit to arbitration an existing controversy *arising out of* such a contract * * * ." 9 U.S.C. § 2 (emphasis added). Jackson omits this language. He omits similar language from his description of Section 2's interstate commerce requirement, as the statute actually makes enforceable "a written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of* such contract * * * ." *Id*. (emphasis added).

The language of Section 2 omitted from Jackson's summary is critical because that language plainly relates to the scope of the agreement to arbitrate, *i.e*., the dispute must be one "arising out of" the underlying contract. This Court held, however, in *AT&T* and *First Options* that issues regarding the scope of an arbitration clause may be delegated to the arbitrator by clear and unmistakable language. *AT&T*, 475 U.S. at 649; *First Options*, 514 U.S. at 944. Jackson, as he must, concedes this principle. Resp. Br. 24.

Thus, Jackson's contention that all issues posed by Section 2 are for the court in all instances is inconsistent with this Court's precedents. Because the "arising out of" language in Section 2 relates to the scope of an agreement to arbitrate, then even the narrow area to which Jackson would confine *AT&T* and *First Options* falls away—if no Section 2 issue is arbitrable, then, as Jackson would have it, scope is not arbitrable, because scope is *also* addressed in Section 2. If Jackson prevails, therefore, the *AT&T*/*First Options* rule withers to nothing.

Indeed, another case given little attention by Jackson directly responds to his argument that contract validity and enforceability issues are outside the coverage of *AT&T*/*First Options*. In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003), the Court states *exactly* the opposite:

> In certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary). *AT&T* [, 475 U.S. at 649]. These limited instances typically involve matters of a kind that "contracting parties would likely have expected a court" to decide. *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83, 154 L. Ed. 2d 491, 123 S.Ct. 588 (2002). They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy. * * *.
>
> The question here—whether the contracts forbid class arbitration—does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the

> underlying dispute between the parties. Unlike *First Options*, the question is not whether the parties wanted a judge or an arbitrator to decide *whether they agreed to arbitrate a matter*.

(Italics in original; underlining added.) *See also Howsam*, 537 U.S. at 83-84 ("a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide" unless the parties clearly and unmistakably provide otherwise).

In the present case, the parties have "agreed to arbitrate a matter," *Bazzle*, 539 U.S. at 452, which qualifies as a "question of arbitrability," *Howsam*, 537 U.S. at 84, that can be delegated to the arbitrator under *AT&T/First Options*, namely, the enforceability of their arbitration agreement. They have done so clearly and unmistakably, as found by the district court, Pet. App. 4a, and by the court of appeals, Pet. App. 13a.

First Options holds: "Courts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence that they did so*." 514 U.S. at 944 (emphasis added). It reaffirms "the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration * * *." *Id.* at 945.[1]

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[1] Jackson cites *Green Tree Fin. Corp.–Ala. v. Randolph* ("*Randolph*"), 531 U.S. 79, 83 n.1 (2000), for the proposition that this Court rejected application of a broad delegation clause to contract validity questions (Resp. Br. 29), when, in fact, in *Randolph* the applicability of the delegation clause never came up. *Randolph* cannot be relied on as precedent for an issue it never addressed. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to

Following the *AT&T/First Options* rule, courts have routinely upheld arbitration clauses that clearly and unmistakably delegate contract enforceability issues, including unconscionability, to the arbitrator. Pet. Brief 27-29.

Additionally, countless private parties have contracted in reliance on the *AT&T/First Options* rule. *See*, *e.g.*, American Arbitration Association ("AAA") Commercial and Employment Arbitration Rules and Mediation Procedures; JAMS Comprehensive and Employment Arbitration Rules & Procedures. Pet. App. 37a, 38a. To adopt Jackson's position that Section 2 outright bars parties to arbitration agreements from ever permitting arbitrators to decide contract enforceability issues disrupts economic relationships formed in reliance on the *AT&T/First Options* rule. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (where "private parties have likely written contracts relying" on Court's prior precedent, it is "inappropriate to reconsider what is by now well-established law").

RAC has never claimed, as Jackson contends, that the unconscionability defense is avoided by the delegation of contract enforceability issues to the arbitrator. Resp. Br. 11. Rather, RAC has argued at every level that the unconscionability issue goes to the arbitrator for decision. *See*, *e.g.*, Jt. App. 17 (district court); Pet. App. 13a (court of appeals); Pet. Brief 14 (Supreme Court). If RAC prevails, the arbitrator will decide Jackson's unconscionability claims.[2]

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the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

[2] Jackson's analogy to a forum selection clause in a non-arbitration contract breaks down because it is based on the false premise that absent court review, an arbitration agreement

Jackson's Section 2 argument, based as it is on writing words into the statute that are not there and omitting words that are, should be rejected.

B. An Arbitration Agreement That Clearly and Unmistakably Delegates Contract Enforceability Issues to an Arbitrator Does Not Violate Section 4.

As with his interpretation of Section 2, Jackson attempts to re-make Section 4 into a statute that precludes delegation of contract enforceability issues to the arbitrator. But Section 4 contains no language that would preclude enforcement of a clear and unmistakable agreement to delegate such issues. Section 4 states that a district court that otherwise possesses subject-matter jurisdiction shall, upon petition by a party to the arbitration agreement, direct "the parties to proceed to arbitration in accordance with the terms of the agreement" if the court is satisfied that the "making of the agreement for arbitration * * * is not in issue." 9 U.S.C. § 4. If the "making of the arbitration agreement" is "in issue" the district court "shall hear and determine such issue," unless a timely demand for jury trial is made, in which case the jury determines whether "an agreement in writing for arbitration was made * * *." *Id*. If the jury finds no written agreement to arbitrate was "made," the petition to compel arbitration "shall be dismissed," while if "the jury find that an agreement for arbitration was made in writing," the district court "shall make an order summarily directing the

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becomes self-enforcing. Resp. Br. 31-34. However, resolution of the merits of the underlying dispute will not occur until the arbitrator first decides Jackson's unconscionability defense.

parties to proceed with the arbitration in accordance with the terms thereof." *Id.*

Jackson and certain of his *amici* argue that the terms "making" and "made" as used in Section 4 are coextensive with the phrase "valid, irrevocable, and enforceable" as used in Section 2 and thus only a court may determine the validity and enforceability of the agreement to arbitrate and an arbitrator may never do so. Resp. Br. 18; *Amicus* Brief of AFL-CIO 8. Thus, Jackson rewrites Section 4 to expand the "making" of a contract to include its "validity, revocability, and enforceability." He correspondingly distorts Section 4's later references to a jury's factual findings as to whether a written arbitration agreement was "made" also to include a legal determination whether the agreement was valid, irrevocable, and enforceable, which it seems unlikely Congress meant to delegate to juries.

Moreover, Jackson ignores that, if Congress meant Section 2 and Section 4 to be coextensive, it would have used identical terms in each provision. Because it did not, the different terms used must be given different meanings. *See Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 418 (1998) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion"). Jackson's suggestion that the words "making" and "made" as used in Section 4 are identical to the phrase "valid, irrevocable, and enforceable" as used in Section 2 must be rejected.

In fact, the words "making" and "made" as used in Section 4 indicate an inquiry that is nowhere near as broad as the inquiry whether a contract is valid

and/or enforceable. As recognized in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006), "[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." The words "making" and "made" as used in Section 4 embrace the latter inquiry focusing on distinctly factual issues susceptible to a jury's determination: whether the parties entered into an agreement to arbitrate their dispute and whether their mutual assent to arbitrate was adequately memorialized in writing. For example, existential issues such as whether the party resisting arbitration actually signed an agreement go to whether an agreement to arbitrate was in fact concluded, but these issues are fundamentally different from whether an agreement already formed is enforceable in whole or in part. *See Buckeye Check Cashing*, 546 U.S. at 444 n.1 (suggesting the same).

The distinction between issues involving the *very existence* of an agreement to arbitrate, which may be subsumed within the words "making" and "made" under Section 4, and contract enforceability issues, which are not (but which under *First Options* are presumptively determined by the court absent clear and unmistakable language to the contrary) is supported by well-established principles of contract law. The word "agreement" is defined as the "manifestation of mutual assent on the part of two or more persons." Restatement (Second) of Contracts ("Restatement") § 3. "Agreement has in some respects a wider meaning than contract, bargain or promise" and "contains no implication that legal consequences are or are not produced." Restatement § 3, cmt. a. Therefore, under the Restatement, which has been adopted in Nevada, *Laxalt v. McClatchy*, 116 F.R.D.

438, 448 (D. Nev. 1987), the "making" inquiry under Section 4 is whether, viewed objectively, the parties mutually assented to an arbitration agreement, not whether a "made" agreement was legally valid and/or enforceable.

This principle is consistent with this Court's statement in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04 (1967), that fraud in the inducement involves the "making" of an agreement to arbitrate. Fraud in the inducement is present when "a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying * * *." Restatement § 164(1). Thus, where the misrepresentation "substantially contributed to [the party's] decision to make the contract," the defense will apply. Restatement § 167, cmt. a. Whether the misrepresentation induces the party to manifest assent is a question of fact. Restatement § 164, cmt. c.

Unconscionability, on the other hand, is based upon a policy decision that an agreement that has unquestionably been "made" is unenforceable because of the substantive unfairness of its terms. Restatement § 208 ("If a contract or term thereof is unconscionable at the time the contract is *made* a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." (emphasis added)). Before the FAA's enactment, this Court recognized that unconscionability is concerned with whether a "made" contract is enforceable. *See*, *e.g.*, *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236 (1892) ("To stay the arm of a court of equity from

enforcing a contract it is by no means necessary to prove that it is invalid; from time to time immemorial it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive or iniquitous contracts; and to turn the party claiming the benefit of such a contract to a court of law.") After the FAA's enactment, and in accordance with *AT&T*/*First Options*, an arbitrator can play the same role.

Unlike fraud in the inducement, which questions the very existence of mutual assent and may be decided as a factual matter by a jury under Section 4 without interpretation of the contract's substantive terms, unconscionability depends on an analysis of those terms to determine if they are so unfair that they will not, as a matter of policy, be enforced.[3] This determination is made as a matter of law. *See*, *e.g.*, Farnsworth, E. Allan, *Farnsworth on Contracts* 579-80 (3d ed. 2004) ("unconscionability was historically a matter for equity where there was no jury * * *"); Restatement § 208, cmt. f (a "determination that a contract or term is unconscionable is made by the court in the light of all the material facts" and any "findings of fact are made by the court, rather than by a jury * * *").

[3] The procedural component of unconscionability does not rise to the level of contract-negating defenses such as fraud and duress. That is why there must be a determination that the contract at issue contains substantively unconscionable terms for the court to refuse to enforce it. *See*, *e.g.*, *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev. 2004) (Nevada law requires substantively unconscionable terms).

Treating unconscionability as relevant to whether an arbitration agreement has been "made" is therefore inconsistent with the text of Section 4, which states that "making" issues are for the jury to decide if a timely demand is made. It is also inconsistent with the FAA's legislative history, which establishes that Section 4 was intended to provide "a method for the summary trial of any claim that no arbitration agreement ever was made * * *." H.R. Rep. No. 68-96, at 2 (1924). This provision was included to protect the right to a jury trial and to prevent a party from being bound to an arbitration agreement which was never entered into. Thus, the following colloquy took place between Senator Sterling, the Chairman of the Joint Subcommittee holding hearings on the FAA and Julius Cohen, the principal drafter of the FAA:

> Mr. Cohen: The one constitutional provision we have got is that you have a right of trial by jury. But you can waive that. And you can do that in advance. Ah, but the question whether you waive it or not depends on whether that is your signature to the paper, or whether you authorized that signature, or whether the paper is a valid paper or not, whether it was delivered properly. So there is a question there which you have not waived the right of trial by jury on.
>
> The Chairman: The issue there is whether there is an agreement to arbitrate or not.
>
> Mr. Cohen: Exactly. Now, if you come in there you can demand a trial by jury, right away, summarily, and that is the issue that is passed on.

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and House Subcomms. of the Comms. on the Judiciary, 68th Cong., at 17 (1924).

The right to a jury trial provided in Section 4 is therefore limited to determining whether the party indeed entered into an agreement to arbitrate, and the word "made" is directed to the physical execution of a "paper" which memorializes that assent. *Id.* Section 4 does not grant the party a right to a jury trial regarding an equitable defense such as unconscionability. Rather, the jury trial right protected by Section 4 applies only when there are factual issues regarding the existence of the agreement itself. *See*, *e.g.*, *Mazera v. Varsity Ford Mgmt. Services*, 565 F.3d 997, 1001-02 (6th Cir. 2009) (claims that arbitration agreement was invalid based on, *inter alia*, allegations of disparate bargaining power, language problems and lack of consideration do not go to the "making" of the agreement); *Drews Distributing, Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001) (jury trial is limited to situations where there has been an unequivocal denial, supported by evidence, that an arbitration agreement was entered into).[4]

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[4] In this regard, Jackson's claim that RAC's position permits enforcement of forged agreements fails for two reasons. Resp. Br. 13. First, if Jackson claimed he never signed the arbitration agreement, a "making" issue under Section 4 is placed "in issue" and either the court or the jury, if one is demanded, summarily tries that factual issue. *See Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509-10 (7th Cir. 2003) (allegation of forged signature on arbitration agreement required a trial over the "making" of the agreement). Second, as a threshold issue, a court faced with a claim under *First Options* that the parties clearly and unmistakably agreed to arbitrate arbitrability must first determine that such an agreement does, in fact, exist. *First Options*, 514 U.S. at 944. Under either scenario, one who did not enter into an agreement to arbitrate will not be compelled to arbitrate.

However, if unconscionability goes to whether a contract was "made," the fears of dissenting Judge Hall below are realized because "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 based on just the bare allegation of unconscionability," Pet. App. 22a., breeding litigation out of a statute designed to prevent it. Because Jackson's interpretation of Section 4 undermines the FAA's central principle of enforceability and interferes with the rapid and unobstructed reference of his claims to the arbitral forum, this Court should adopt the views of those lower courts that have held that unconscionability does not involve the "making" of an agreement to arbitrate. *See*, *e.g.*, *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (party resisting enforcement of arbitration agreement on basis of procedural and substantive unconscionability was not entitled to jury trial because issues are not "the equivalent of questioning the 'making' of an arbitration agreement"); *Madrigal v. New Cingular Wireless Servs*., 2009 U.S. Dist. LEXIS 72416, *20-21 (E.D. Cal. Aug. 17, 2009) (plaintiffs' allegation of unconscionability disputes "the validity of the agreement made, not that they ever made an arbitration agreement to begin with" and hence provision affording arbitrator exclusive authority to determine issue is not precluded by Section 4).[5]

[5] The "separability doctrine" of *Prima Paint*/*Buckeye* does not assist Jackson because in neither case did this Court address the issue of a "clear and unmistakable" agreement authorizing the arbitrator to determine enforceability of the arbitration agreement.

Like his Section 2 argument, Jackson's Section 4 argument is without merit. Because Jackson never challenged the "making" of the Arbitration Agreement, Section 4 mandates that the court direct "the parties to proceed with the arbitration in accordance with the terms" of the agreement. 9 U.S.C. § 4. While other "non-making" issues such as unconscionability would have otherwise gone to the court because the parties would ordinarily have expected a court to decide them, here the parties "clearly and unmistakably" agreed that these issues should instead be decided by the arbitrator. *First Options*, 514 U.S. at 944-45. The FAA requires enforcement of this agreement.

C. Jackson's Speculation That Continued Implementation Of The *AT&T/First Options* Rule Will Result In Abuses Is Insufficient To Deny Enforcement Of The Arbitration Agreement.

Without textual support for his position, Jackson relies on various public policy arguments which do not assist the Court in its statutory interpretation. *See Hall Street Assocs, L.L.C. v. Mattel, Inc*., 552 U.S. 576, 589 (2008) (the policy consequences of the Court's holding gives it "no business" to expand the statute's text). Jackson's arguments proceed as follows: (1) some arbitration agreements contain unconscionable terms, Resp. Br. 36-39; (2) arbitrators should not be permitted to determine unconscionability because this invites abuse and post-award review is inadequate, Resp. Br. 44-49; and (3) allowing arbitrators a role in the development of unconscionability doctrine is ineffective, Resp. Br. 49-50.

While Jackson's first point is undoubtedly true, he concedes that arbitration clauses have only "on occasion" been abused and that cases striking down arbitration agreements are in the "minority." Resp. Br. 37, 43. What he omits is that private parties and leading ADR services such as AAA and JAMS have relied on the *AT&T*/*First Options* rule for many years to permit parties to clearly and unmistakably authorize arbitrators to determine unconscionability. While Jackson catalogs a number of court decisions rejecting enforcement of arbitration agreements on the ground of unconscionability, he ignores that arbitrators themselves have done the same. *See Amicus* Brief of Pacific Legal Foundation 14-15.

Jackson's second argument, that it is unfair for parties to agree to have unconscionability decided by an arbitrator, is ill-founded. In support, Jackson trots out a "parade of horribles" in which parties will be forced to travel to faraway locales and pay exorbitant costs as a condition of participation in arbitration. Resp. Br. 45-47. Missing from Jackson's attack is any empirical evidence that reliance on the *AT&T*/*First Options* rule to permit arbitrators to determine unconscionability has in fact resulted in the inequities predicted.

But more fundamentally, Jackson exaggerates the reach of RAC's argument. If a party meets the high hurdle of proving that the agreement does not provide access to arbitration and that the unconscionability defense hence cannot be decided in that forum, the court, as a threshold matter, could refuse to compel arbitration either in reliance upon this Court's decision in *Randolph* or upon a finding that there is no "clear and unmistakable" agreement to arbitrate arbitrability under *First Options*. Thus, in

Awuah v. Coverall North America, Inc., 554 F.3d 7, 12-13 (1st Cir. 2009), the First Circuit, citing *Randolph*, held that the issue whether the "arbitration regime * * * is structured so as to prevent a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses," is for the court to decide. However, the First Circuit distinguished these situations where access to arbitration was "impossibly burdensome" from unconscionability, "essentially a fairness issue," which could be delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. *Id.*

Jackson proffered no evidence that he will be unable to obtain a decision on his unconscionability challenge before a mutually selected arbitrator. Rather, he makes only "garden-variety" claims that the arbitration agreement contains some unfair provisions.[6]

In this regard, Jackson is in no better position than the parties who unsuccessfully resisted arbitration in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), and *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). In *Vimar*, the

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[6] In making these claims, Jackson selectively quotes the arbitration agreement, deleting language unfavorable to him. Resp. Br. 2-3. He ignores that the fee and cost-splitting provision (which was held conscionable by both the district court, Pet. App. 5a, and the court of appeals, Pet. App. 18a-19a) states that, "[i]n the event the law of the jurisdiction in which the arbitration is held requires a different allocation of fees and costs for this Agreement to be enforceable, then such law shall be followed." Jt. App. 36. Regarding discovery, Jackson similarly ignores that the agreement permits additional discovery "where the arbitrator selected so orders." Jt. App. 32.

Court held that an arbitration agreement was enforceable even though the resisting party feared that the assigned foreign arbitral panel would not abide by controlling federal law because "[a]t this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claims or that petitioner will receive diminished protection as a result." *Vimar*, 515 U.S. at 540. Similarly, in *PacifiCare*, the resisting party speculated that the arbitration agreement might limit RICO's remedial provisions. *PacifiCare*, 538 U.S. at 406-07. The Court, following *Vimar*, held that the arbitration should go forward because it did "not know how the arbitrator" would construe the agreement. *Id*. at 407. *See also Randolph*, 531 U.S. at 91 ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement."). An inchoate fear, thus, does not suffice to deny enforcement of the parties' arbitration agreement.

The same can be said here. The arbitrator may find the agreement wholly conscionable or wholly unconscionable or the arbitrator may sever any unfair terms and enforce the balance of the agreement.

This leads to Jackson's next argument: that the arbitrator should not be permitted to determine unconscionability because judicial review of the arbitration decision is too limited. As this Court has recognized, a remedy for a party victimized by an arbitrator's failure and refusal to enforce controlling federal law is accessible at the award enforcement stage. *Vimar*, 515 U.S. at 540. This is so because, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

Ignoring these principles, Jackson attacks the *AT&T/First Options* rule, arguing that the limited grounds for appeal of an arbitrator's ruling on unconscionability are insufficient to guarantee fairness. Resp. Br. 45-49. His attack fails for several reasons. First, in *First Options*, this Court was cognizant of the different standards of judicial review, depending on whether a court or arbitrator was delegated responsibility to decide an issue of arbitrability. *First Options*, 514 U.S. at 943. Considering the fact that the arbitrator's decision was more difficult to reverse, the Court required a "clear and unmistakable" agreement. *Id.* at 942-44.

Second, Jackson exaggerates the limited scope of judicial review of the arbitrator's award. While this Court in *Hall Street* held that Section 10, 9 U.S.C. § 10, provides the exclusive grounds for vacatur of an arbitration award under the FAA, 552 U.S. at 581, it did not hold that other standards of review, such as "manifest disregard" of the law, *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), or "public policy," *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766 (1983), did not come within Section 10's purview. It is therefore by no means settled that an aggrieved party will be deprived of meaningful review, as Jackson asserts.

But even if only a very narrow review of the arbitrator's award is permitted, Jackson does not articulate why this is unfair. What he is left with is only the *possibility* that an arbitrator and a judge would reach different conclusions regarding the

enforcement of the arbitration agreement and that a different standard of judicial review would apply depending on who decided the issue. But these possibilities affect both parties equally, so RAC would have the same difficulty vacating an arbitral finding of unconscionability as Jackson would have vacating an award enforcing the agreement. And since only *denials* of a petition to compel arbitration are automatically appealable, not orders compelling arbitration, 9 U.S.C. § 16(a)(1)(B), Jackson would be forced to arbitrate the merits of his case regardless whether his unconscionability arguments are rejected by a court *or* an arbitrator.

Jackson's final policy argument, that permitting arbitrators to rule on unconscionability would be ineffective, is also groundless. Resp. Br. 49. While Jackson raises the specter of arbitral bias, he ignores the fact that the FAA contains a specific provision permitting vacatur for "evident partiality," 9 U.S.C. § 10(a)(2). Moreover, his claims and those of his *amici* are infected with the same type of suspicion and mistrust of arbitrators that this Court's decisions have guarded against. *See* Pet. Br. 37 (discussing cases).

The FAA creates "a body of federal substantive law." *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). The *AT&T/First Options* rule, which permits parties to an arbitration contract to delegate issues of arbitrability to the arbitrator so long as their agreement does so "clearly and unmistakably," is part of that body of federal law.[7] Jackson's speculative

[7] Thus, Jackson's reliance on the Revised Uniform Arbitration Act (Resp. Br. 40-41) is misplaced, as the framers recognized that this Court's "case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting con-

public policy arguments cannot override that law and should be rejected by this Court.

D. There Is No Legitimate Debate Whether The Arbitration Agreement Clearly And Unmistakably Commits The Unconscionability Issue To The Arbitrator.

Jackson concludes by contending that the Arbitration Agreement did not clearly and unmistakably commit the issue of contract enforceability to the arbitrator. Resp. Br. 54-61. Importantly, Jackson makes no claim that he raised this specific issue below, admitting it first surfaced in his opposition to the petition for certiorari in this Court. Resp. Br. 54 n.19. Under these circumstances, this argument is waived. *See 14 Penn Plaza LLC v. Pyett*, __ U.S. __, 129 S. Ct. 1456, 1473-74 (2009) (where respondents failed to contest in either the district court or the court of appeals that they had clearly and unmistakably agreed to arbitrate and where this Court "granted review of the question presented based on that understanding," respondents' "alternative arguments for affirmance were forfeited").

But even if it was not waived, Jackson's argument is without merit. Incredibly, Jackson contends that neither the district court nor the Ninth Circuit found a clear and unmistakable agreement to arbitrate "arbitrability." Resp. Br. 55-57. But the district court could not have been clearer: "The Agreement to Arbitrate *clearly and unmistakably provides the arbi-*

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tractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA." Nat'l Conference of Comm'rs of Uniform State Laws, *Uniform Arbitration Act*, Prefatory Note, p. 2.

trator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." Pet. App. 4a (emphasis added). The Ninth Circuit was equally clear, stating that "*Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator*." *Id*. at 13a (emphasis added). Jackson's claim that no findings were made does not withstand scrutiny.

Belatedly contesting these findings, Jackson and his *amici* attempt to inject irrelevant factual issues regarding the circumstances surrounding the agreement, the parties' intent and their subjective understanding of the agreement's terms. Resp. Br. 58, 60; *Amicus* Brief of SEIU 14-15, 20, 29-30. However, because the delegation clause here is "clear and unmistakable" on its face, no fact-finding is appropriate under *AT&T/First Options*. In any event Jackson's irrelevant, speculative and previously unpresented allegations are not appropriately raised before this Court. *See 14 Penn Plaza, LLC*, 129 S. Ct. at 1474 (court typically will not affirm on alternative grounds not presented).

III. CONCLUSION

The judgment of the court of appeals should be reversed, and Jackson should be compelled to arbitrate his claims.

Respectfully submitted,

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