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 AMICUS CURIAE OF SERVICE EMPLOYEES INTERNATIONAL UNION, LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL EMPLOYMENT LAW PROJECT, WOMEN'S EMPLOYMENT RIGHTS CLINIC, AND THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY IN SUPPORT OF RESPONDENT

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## INTEREST OF THE AMICI

Service Employees International Union ("SEIU"), Legal Aid Society – Employment Law Center ("LAS-ELC"), National Employment Lawyers Association ("NELA"), National Employment Law Project ("NELP"), Women's Employment Rights Clinic ("WERC"), and The Employee Rights Advocacy Institute For Law & Policy submit this amicus brief in support of respondent Antonio Jackson.[1]

SEIU is one of the largest labor organizations in the world, representing 2.2 million working men and women. SEIU has long worked to protect the rights of all low-wage employees, union and non-union alike. The workers represented by SEIU and its local affiliates are heavily concentrated in low-wage industries (including the janitorial, health services, long-term care, and security industries), where workers frequently have limited literacy skills, do not speak English, and, when unorganized, are often compelled by financial circumstances to accept whatever terms and conditions of employment are dictated by their employers.

NELP is a non-profit legal organization with over 30 years' experience advocating for the rights of low-wage and unemployed workers. NELP has litigated and participated in many cases addressing workplace rights under state and federal labor and employment laws. NELP also provides legal assistance to labor unions and worker organizations regarding the workplace rights of immigrant and low-wage workers.

LAS-ELC is a non-profit public interest law firm whose

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel, party, or person other than amici, their members, or their counsel made a monetary contribution to fund its preparation and submission. The parties consent to the filing of this brief.

mission is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, LAS-ELC has represented plaintiffs in employment cases, particularly in cases of special importance to communities of color, women, recent immigrants, individuals with disabilities, LGBT individuals, and the working poor.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA is the country's largest professional organization comprised exclusively of lawyers representing individual workers in cases involving labor, employment, and civil rights disputes.

WERC is a clinical program of the Golden Gate University School of Law that provides comprehensive services for workplace problems. WERC advises and represents low-income and immigrant clients on a variety of employment-related matters.

The Employee Rights Advocacy Institute For Law & Policy is a non-profit public interest organization that advocates for employee rights, equality, and justice through a multi-disciplinary approach combining legal strategies, policy development, grassroots advocacy, and public education.

Amici are each acutely aware, based on their extensive experience working with and representing low-wage workers, that in the two decades since *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), employers have increasingly been imposing mandatory pre-dispute arbitration agreements on workers as a condition of employment, just as petitioner Rent-A-Center did here. Particularly in the current distressed economic climate, low-wage and other vulnerable American workers have no choice about whether to reject or to negotiate over the terms imposed by

such agreements, and often do not understand the consequences of what they have agreed to or what rights they may thereby have waived. In amici's experience, it is all too common for non-unionized employers to take advantage of their grossly superior bargaining power by including one-sided terms in arbitration agreements that impose daunting and sometimes insurmountable barriers to the effective enforcement of the anti-discrimination, minimum wage, and workplace safety protections guaranteed by federal and state law.

Historically, amici and the workers we represent have relied on the state and federal courts as a crucial bulwark against the most egregious overreaching by employers seeking to implement one-sided employment arbitration agreements. While amici have found that the rules and procedures of mandatory employment arbitration are often slanted in favor of the employers who drafted and imposed them, state and federal judges have on innumerable occasions protected workers from the most extreme examples of employer overreaching; and employer awareness of the courts' traditional oversight role in adjudicating gateway issues of contract enforceability has served as a meaningful deterrent to those who might otherwise exploit their economic power for improper exculpatory purposes.

Amici believe that to allow employers to eliminate the courts' vital oversight role by imposing non-negotiable contract terms that vest all decisions concerning contract formation, validity, and enforceability in the employers' chosen arbitrator would make a mockery of the concept of arbitration as "just another forum." Not only would such a result have the practical effect of undermining the ability of low-wage and other workers to vindicate their fundamental, non-waivable workplace rights and the public interests they embody, but for the reasons set forth below, such a ruling would be contrary to the Federal

Arbitration Act and to the basic contract principles under which arbitration operates, including the well-established Nevada contract law principles that govern this case under Section 2 of the FAA, 9 U.S.C. §2.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Amici entirely agree with respondent that Congress, in Sections 2 and 4 of the FAA, required courts, not arbitrators, to resolve all threshold unconscionability challenges to the enforceability of an arbitration agreement. That conclusion flows both from the statutory text and from the contractual nature of the duty to arbitrate; a court cannot compel arbitration without first determining that a valid and enforceable contact to arbitrate exists. Amici write separately to explain that, even if the right to have a court decide threshold challenges to enforceability can be waived through "clear and unmistakable" agreement, a court must still determine as a threshold matter whether a valid and enforceable *delegation agreement* has been made. That preliminary judicial determination requires application of state law contract principles under FAA §2, including the same rules of interpretation and defenses to enforceability that apply to all other contracts under applicable state law. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

Under Nevada contract law, which follows black letter contract law, whether there has been a clear and unmistakable agreement to a contract provision depends not only on the language of the provision itself, but also upon the language and structure of the contract as a whole, the circumstances of its adoption, and any negotiating history. *See, e.g.*, *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42 (1993). For that reason, even if this Court holds, as a threshold matter, that

the FAA does *not* vest all questions of enforceability in the courts without permitting waiver, the Ninth Circuit's remand order should still be affirmed – to enable the district court to determine, under Nevada law, whether Jackson did in fact clearly and unmistakably enter into an enforceable agreement to delegate to the arbitrator the sole and exclusive power to decide unconscionability. Because Rent-A-Center's delegation clause was incorporated into a non-negotiable, mandatory employment arbitration agreement, the district court on remand is likely to find that respondent Jackson did not "clearly and unmistakably" agree to waive his right to pre-arbitration judicial review of threshold enforceability issues; and even if he did, that the delegation clause is legally unenforceable under applicable Nevada law because: 1) the clause is itself unconscionable, *see infra* Part II.B; and 2) the clause is subject to rescission because it rests on the parties' mutual mistake concerning the availability of de novo judicial review, *see infra* Part II.C.

## ARGUMENT

### I. A Court Cannot Compel Arbitration Without First Determining that a Valid and Enforceable Contractual Agreement To Arbitrate Exists

At the outset, amici note their agreement with Jackson that the FAA precludes arbitration of unconscionability challenges to an arbitration agreement, and that the "clear and unmistakable" evidence exception announced in *First Options*, 514 U.S. 938, and *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), applies only to disputes concerning scope and coverage. Resp. Br. 23-31. That conclusion is mandated not only by the text of the FAA, as Jackson emphasizes, but also by basic principles of contract law.

"The duty to arbitrate [is] of contractual origin." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547

(1964). Thus, while the FAA "place[s] [arbitration] agreements upon the same footing as other contracts," *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989) (citation omitted), the FAA does itself not create any duty to arbitrate. *See Volt*, 489 U.S. at 474-75. The duty to arbitrate, and the power of the parties' chosen arbitrator to decide the disputes presented, exist only to the extent the parties have entered into a valid contract under "general contract law principles." Consequently, that contractual duty may be enforced only to the extent state contract law permits, and may be invalidated "'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. §2) (emphasis in original). "[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Rent-A-Center's arbitration agreement, which Jackson was required to sign as a non-negotiable condition of his employment, Jt. App. 41, purports to vest in the parties' designated arbitrator the power to decide two categories of threshold disputes concerning the arbitrator's power – disputes that this Court has held are presumptively vested in the courts. The first category encompasses "the validity of the arbitration clause," i.e., issues of enforceability. The second category encompasses disputes over the arbitration contract's "applicability to the underlying dispute between the parties," i.e., issues of scope and coverage. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (describing two kinds of gateway issues). The FAA assigns both categories of "gateway" arbitrability questions to the courts for resolution, as this Court has repeatedly held. *See, e.g.*, *AT&T*, 475 U.S. at 648-49; *see also Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

While this Court has explained that some gateway disputes may be decided by the parties' designated arbitrator upon a showing of "clear and unmistakable" evidence that the parties agreed to delegate those questions to the arbitrator, s*ee First Options*, 514 U.S. at 944; *AT&T*, 475 U.S. at 649, this Court has never held, and cannot hold consistently with the FAA and the purely contractual nature of the right to arbitrate, that an arbitrator may determine the very validity of the arbitration contract that supposedly creates his arbitral authority.

Because a contracting party's duty to arbitrate depends upon the existence of a valid and enforceable contractual agreement to arbitrate, "a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty." *John Wiley & Sons*, 376 U.S. at 547. This is true no matter how "clear and unmistakable" the parties' agreement appears to be. Quite simply, an arbitrator cannot make threshold determinations of contract enforceability because, in the absence of a valid and enforceable contractual agreement to arbitrate, the arbitrator has no authority to resolve that or any other dispute between the parties.

A state law unconscionability challenge to the enforceability of an arbitration agreement is a dispute that only the courts can resolve, regardless of what authority the contract – whose validity is disputed – purports to confer on the arbitrator. Like other common threshold challenges to the enforceability of an arbitration agreement (for example, that it was procured through fraud or duress, or never executed, or that one party lacked capacity or did not receive legally valid consideration), unconscionability challenges go to the validity and enforceability of the agreement itself and call into question the existence of *any* contractual duty to arbitrate. *See, e.g.*, *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 551, 558 (2004)

(finding arbitration clause with unreasonable liquidated damages and costs provisions "void as unconscionable"). Just as in cases involving fraud or duress, unconscionable agreements are invalidated in order to prevent one party from taking undue advantage of another party's weakness. *See Maxwell v. Fidelity Fin. Servs., Inc.*, 184 Ariz. 82, 89 (1995) (unconscionability doctrine permits courts to strike "contract terms so one-sided as to oppress or unfairly surprise an innocent party") (citation omitted).

This Court has recognized that unconscionability, like fraud or duress, constitutes grounds for invalidating an arbitration agreement – as did Congress when it incorporated state contract law principles into FAA §2. *See Doctor's Associates*, 517 U.S. at 687 ("[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2."). Because there can be no judicial order compelling arbitration under FAA §4 without a predicate finding of a valid duty to arbitrate, any challenge to the validity and enforceability of the arbitration agreement – whether based on fraud, unconscionability, duress, or statutory preclusion – must be resolved prior to the issuance of such an order.

Notably, neither FAA §3 nor §4 provides a substantive standard for determining whether a contract was "made" or whether a dispute "is referable to arbitration." Instead, Congress intended the governing standard to be provided by §2, which requires that contracts not be subject to any "ground[] as exist[s] at law or in equity for the revocation of any contract." 9 U.S.C. §2. Were it otherwise, arbitration agreements would be *more* enforceable than other contracts in federal court, contrary to this Court's recognition that the FAA simply places arbitration agreements on the "same footing" as other contracts. *Volt*, 489 U.S. at 474.

Challenges to the scope or coverage of an arbitration agreement do not implicate the validity of the arbitration agreement itself. Those disputes involve the *meaning* of a concededly valid and enforceable arbitration agreement and therefore *may* be submitted to the arbitrator in the first instance (since the parties agree that they must arbitrate, but disagree as a matter of contract interpretation about whether their admittedly valid agreement encompasses the particular dispute at issue).

Neither of the cases in which the Court announced the "clear and unmistakable" evidence standard involved a challenge to the enforceability of the arbitration agreement itself. In *AT&T*, the parties disputed whether a union grievance regarding layoffs was arbitrable under the language of their collective bargaining agreement. 475 U.S. at 645-46. The appropriateness of allowing parties – particularly parties with equal bargaining power, as in the labor-management context – to assign such questions of contract construction and application to the parties' chosen arbitrator (often selected based on extensive prior experience resolving disputes over the "law of the shop," *see, e.g.*, *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-82 (1960)) is well-established; and in many instances such arbitrators are actually "in a better position than courts to interpret the terms of [an agreement]," *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 (1998). That is why, particularly in the collective bargaining context, it is fairly common for parties "clearly and unmistakably" to agree that issues of scope and coverage should be decided by their designated arbitrator, and not by the courts.[2]

[2] This Court has long recognized that, even if the parties have comparable bargaining power, permitting arbitrators to police their own authority by resolving questions of arbitrability creates serious risks that are acceptable only where the parties' agreement contains "a clear demonstration of that purpose." *Warrior & Gulf Nav. Co.*, 363

*First Options* is even less relevant to the question presented here. The issue in *First Options* was whether the Kaplans had by their conduct entered into a *post-dispute* agreement to arbitrate questions concerning the reach of a prior arbitration agreement between their wholly-owned investment company and First Options. 514 U.S. at 946-47. This Court concluded that the Kaplans had never agreed to arbitrate in their personal capacities, and ordered vacatur of the arbitrator's contrary ruling. *Id.* at 946. *First Options* thus simply reaffirms that courts, not arbitrators, should decide as a threshold matter whether the parties have agreed to arbitrate their disputes, and that a party cannot be bound by an arbitrator's ruling unless the courts independently find a binding agreement to arbitrate.

The dispute in this case centers on the fundamental validity of the arbitration agreement between Jackson and Rent-A-Center, rather than on the meaning of the agreement's provisions or the intended scope of its application. Because an order to compel arbitration under FAA §4 requires the existence of a contract to arbitrate that is valid and enforceable under applicable state law (including the state law of unconscionability), amici agree with Jackson and the Ninth Circuit that this case must be remanded for further consideration of Jackson's contention that the arbitration agreement is unconscionable and therefore unenforceable.

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U.S. at 583 n.7 (citing Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1508-09 (1959)). Nonetheless, the arbitrator's special knowledge of industry practices, the law of the shop, the parties' bargaining history, and the needs of the workplace, *id.* at 581-82; the arbitrator's special role in establishing a "system of self-government" for the parties, *id.* at 581 (citation omitted); and the desire to avoid any industrial strife associated with disputes over arbitrability, *id.* at 578, frequently lead the parties to submit questions of scope and coverage to arbitration.

## II. Under Nevada Law, There Was No Valid Agreement To Permit the Arbitrator To Resolve Jackson's Threshold Unconscionability Challenge

Even if the Court concludes that parties to an arbitration agreement *may* vest the arbitrator with authority to decide whether the arbitration contract is enforceable, still it is for the courts under FAA §§2-4 to determine, as a threshold matter, whether the parties *have* entered into such a clear and unmistakable agreement. In making that threshold determination, courts must apply the same rules of contract interpretation and defenses to contract enforceability that apply under state law to other agreements, except that the parties' intent to arbitrate such issues must be "clear and unmistakable." *First Options,* 514 U.S. at 944-45. Given the serious risks presented by vesting such authority in the arbitrator, *see, e.g.*, *infra* Part II.B (describing unconscionability challenges that cannot be adequately resolved through arbitration), it is important that courts carefully evaluate the existence and validity of the agreement before compelling arbitration.[3]

In this case, there are at least two reasons why, under Nevada law as incorporated under FAA §2, the district

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[3] The Chamber of Commerce argues that the Ninth Circuit's decision vesting threshold enforceability issues in courts will result in unnecessary "mini-trials" and leave companies "unable to avoid civil litigation." Chamber Br. 11. However, even if the Court ultimately rules that threshold issues of unconscionability can be contractually assigned to the arbitrator for decision, civil litigation over the precursor issue concerning whether there was a valid delegation agreement will still be required, because even Rent-A-Center acknowledges that a court must resolve *that* issue before compelling arbitration. Pet. Br. 24. As explained *infra* Part II.A, the court must determine both whether the delegation agreement is "clear and unmistakable" under state law and whether the agreement is legally valid and enforceable under state law.

court on remand could properly conclude that Jackson did not clearly and unmistakably enter a legally binding agreement to have an arbitrator decide unconscionability challenges to Rent-A-Center's mandatory pre-dispute arbitration agree-ment. First, the delegation clause itself may be unconscionable and unenforceable under Nevada law, separate and apart from whether the arbitration contract as a whole is unconscionable. Second, the contract language as a whole demonstrates that the critical "delegation" clause may have been premised on a mutual mistake, which requires its rescission under Nevada law. Because, at a minimum, serious questions exist about the enforceability of Jackson's purported agreement to delegate all threshold issues to the arbitrator, this Court should affirm the Ninth Circuit's decision remanding this case for further proceedings, even if it concludes that an adhesive arbitration agreement can waive the parties' right to have threshold enforceability challenges to that agreement judicially determined.

### A. A District Court May Not Compel Arbitration of Threshold Enforceability Challenges Without First Concluding that the Parties Entered into an Enforceable Agreement To Do So

Rent-A-Center acknowledges that, even under its construction of the FAA, the parties' purported agreement to assign enforceability issues to the arbitrator does not entirely usurp the courts' gatekeeping role; a court must still determine whether the parties actually entered into a contract providing for arbitration of those issues. *See* Pet. Br. 24. In other words, whatever else may be disputed in this case, all parties and their amici agree, at a minimum, that a court must at least adjudicate any preliminary disputes about whether the contracting parties entered into a valid contractual agreement to arbitrate threshold enforceability issues. *First Options*, 514 U.S. at 943.

As this Court explained in *First Options*, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." 514 U.S. at 944. That rule, however, is subject to "an important qualification": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear[] and unmistakabl[e]' evidence that they did so." *Id.* (citing *AT&T*, 475 U.S. at 649) (alterations in original). That is because such agreements, like the delegation clause in Rent-A-Center's agreement, depart from typical understandings regarding the proper allocation of judicial and arbitral authority. "[G]iven the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." *Id.* at 945.

Rent-A-Center and its amici assert that, in determining whether there is a valid waiver agreement, "[t]he trial court's role . . . is . . . merely to determine whether the parties' contract expresses in clear and unmistakable *language* that the arbitrator will determine gateway issues of arbitrability." Pet. Br. 24 (emphasis added); *see also* Chamber Br. 12; Equal Employment Advisory Council Br. 9-11; Pacific Legal Foundation Br. 5. However, contract language alone will not be dispositive in many cases, and Nevada law is clear – as is contract law generally – that whether contracting parties have entered into a valid agreement to assign particular issues to an arbitrator or other third-party decisionmaker often requires inquiry that goes beyond the language of the agreement alone.

Under Nevada law, a court construing the meaning and intent of a particular contract clause must consider not only the disputed language but also other related contract provisions, *see, e.g.*, *Ringle v. Bruton*, 120 Nev. 82, 93 (2004); *Siggelkow*, 109 Nev. at 42; extrinsic evidence, such as the circumstances surrounding its adoption, *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215 (2007); and any relevant negotiating history, *see, e.g.*, *Clark County Pub. Employees Ass'n v. Pearson*, 106 Nev. 587, 597 (1990). This holistic approach to contract interpretation is entirely consistent with the black letter common law approach to contract clause interpretation. *See, e.g.*, *Restatement (Second) of Contracts* §202(2) (1981) ("A writing is interpreted as a whole . . . ."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("[A] document should be read to give effect to all its provisions and to render them consistent with each other."). Careful attention to all evidence of a contractual provision's meaning and the contracting parties' intent and understanding is particularly appropriate where, as here, the evidence of the parties' intention to submit the issue to arbitration must be "clear and unmistakable." Under Nevada law, a "clear and unmistakable" waiver requires the parties' "unconditional, voluntary, and absolute acquiescence" in the agreement, *Basic Refractories, Inc. v. Bright*, 286 P.2d 747, 749 (Nev. 1955) – a standard that an employer may be hard-pressed to establish in the context of a non-negotiable, adhesive, never-explained, far-from-intuitive contractual waiver of the right to have an independent judiciary decide threshold issues of enforceability.[4]

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[4] Under Nevada law, not only must the language in a contract be construed against the drafter, *see Anvui, LLC*, 123 Nev. at 216, but the courts must take into account the relative disparity in bargaining power between the contracting parties in determining the enforceability of the provisions of an adhesive form contract. *See Obstetrics*

This Court, as well, has recognized the extent to which the parties' negotiating history and course of conduct can trump seemingly "clear and unmistakable" language as an aid to ascertaining the contracting parties' intent and meaning, most recently in *14 Penn Plaza L.L.C. v. Pyett*, 129 S.Ct. 1456 (2009). In *Pyett*, the collective bargaining agreement included contract language that, on its face, "clearly and unmistakably" required individual bargaining unit members to submit to the collectively bargained grievance and arbitration forum any statutory claim those individuals

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*& Gynecologists v. Pepper*, 101 Nev. 105, 107-08 (1985) (noting that non-negotiable, take-it-or-leave-it contracts entered into with weaker parties are enforceable only if they provide "plain and clear notification of the[ir] terms" and if those terms "fall[] within the reasonable expectations of the weaker . . . party"). In this case, Rent-A-Center presented its mandatory pre-dispute employment agreement to Jackson as a take-it-or-leave-it condition of his employment. Jt. App. 41. Like many low-wage workers, Jackson had no meaningful choice in negotiating the terms of his employment contract, a practical consequence of the economic disparity in the workplace that Congress fully appreciated when it enacted the FAA in 1925, the heyday of the "yellow dog contract." *See, e.g.*, *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 before a Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) (Senator Walsh: "The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all . . . . It is the same with a good many contracts of employment. A man says, 'There are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all."). Indeed, just six years after enacting the FAA, Congress in enacting the Norris-LaGuardia Act declared that "under prevailing economic conditions, . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . ." Norris-LaGuardia Act, ch. 90, §2, 47 Stat. 70 (1932), *codified at* 2f102.

might have under the ADEA. *Id.* at 1466. However, this Court did *not* find clear and unmistakable waiver, because the plaintiff and his amici (including the local union that negotiated the bargaining agreement) presented bargaining history showing that the meaning of that clause was the subject of legitimate dispute. *See id.* at 1473 (citing Resp. Br. 44-47); Resp. Br. at 46-47, *Pyett* (No. 07-581); SEIU Local 32BJ Br. at 9-14, *Pyett* (No. 07-581) (citing the drafting history that showed why the seemingly clear CBA language did not encompass such disputes); *see also Wright*, 525 U.S. at 81. Thus, this Court's case law as well supports the principle that, in determining whether a party has clearly and unmistakably agreed to delegate certain dispute resolution powers to an arbitrator, contract language is only the starting point for the judicial inquiry.

In addition to the requirement that any agreement to assign threshold enforceability issues to the arbitrator must be "clear and unmistakable" under relevant state law principles of contract interpretation, such an agreement, like any other contract, must also be legally valid and enforceable under state law. Accordingly, if a delegation clause is itself unconscionable or otherwise unenforceable under state contract law due to, for example, duress or fraud (or being illusory, as with mandatory arbitration agreements that give the employer unilateral power to change contract terms without notice, *see, e.g.*, *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002)), that clause cannot be enforced and the court, not the arbitrator, must retain full authority to resolve all threshold arbitrability issues. *See Doctor's Assocs., Inc.*, 517 U.S. at 687 ("unconscionability[] may be applied to invalidate arbitration agreements. . . ."); *Allied-Bruce Terminix Companies*, 513 U.S. at 281. Especially in the coercive context of non-negotiable, mandatory arbitration agreements imposed upon employees as a condition of their employment, delegation clauses like that in Rent-

A-Center's arbitration agreement must be carefully scrutinized for evidence of unconscionability, fraud, or duress.

Under applicable Nevada state contract law, there are several reasons why the district court on remand might conclude that the parties did *not* enter into an enforceable agreement to assign threshold issues of arbitrability to the arbitrator. *See* Resp. Br. 54-61. We address two of those reasons.[5]

### B. The Delegation Clause May Be Unconscionable Under Nevada Law

On remand, the district court might first conclude that the delegation clause in Rent-A-Center's mandatory arbi-

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[5] Rent-A-Center admits that "the validity *vel non* of the agreement of the parties to assign unconscionability to the arbitrator" is properly before this Court, Pet. Br. 19 n.6, so this Court should consider all challenges to that agreement's validity – including its possible unconscionability. Jackson's challenge to the existence of a "clear and unmistakable" agreement is also properly before the Court for the reasons stated in Respondent's Brief at 55-57, as neither court below determined that the parties had entered into a valid, "clear and unmistakable" delegation agreement.

In any event, this Court may affirm the Ninth Circuit's decision on any ground supported by the record, *see Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989), and the exceptional circumstances here warrant consideration of these issues. In the courts below, Jackson reasonably relied upon this Court's prior decisions in concluding that enforceability issues cannot be delegated to an arbitrator. *See, e.g.*, *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 10-11 (1st Cir. 2009) (noting conflicting signals in this Court's prior decisions and stating that "[i]f the matter were completely open in this circuit, we are not certain of the outcome"). Should the Court hold that threshold enforceability issues *may* be assigned to an arbitrator by the parties' clear and unmistakable agreement, Jackson should have an opportunity to demonstrate to the district court that no valid agreement exists in this case.

tration agreement is unenforceable because it is unconscionable under Nevada law.

Section 2 of the FAA requires the district court to apply Nevada unconscionability law in determining whether to enforce a delegation clause independently from the rest of the agreement. *See Doctor's Associates, Inc.*, 517 U.S. at 687; *Allied-Bruce Terminix Companies*, 513 U.S. at 281. "Generally," under Nevada law, "both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a . . . clause as unconscionable.'" *D.R. Horton*, 120 Nev. at 553 (quoting *Burch v. Dist. Ct.*, 118 Nev. 438, 442 (2002)). "However, less evidence of substantive unconscionability is required in cases involving great procedural unconscionability." *Id.* at 553-54 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 114 (2000)). Under this "sliding scale" approach to unconscionability analysis, "'the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.'" *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006) (en banc) (citing *Armendariz*, 24 Cal.4th at 114); *see also D.R. Horton*, 120 Nev. at 558 ("Although the one-sidedness of the provision is not overwhelming, it does establish substantive unconscionability, especially when considered in light of the great procedural unconscionability present in this case.").[6]

[6] Because adhesive arbitration agreements are most common in the consumer and employment setting, they are more likely to be challenged as unconscionable in those circumstances, in contrast to cases where the contracting parties have comparable bargaining power. It is the adhesive nature of these agreements that enables the stronger party to take advantage of its relative strength by imposing oppressive or unreasonably one-sided terms upon the weaker party.

The Nevada Supreme Court has largely incorporated California's approach to unconscionability, relying upon decisions of the California Supreme Court as well as Ninth Circuit decisions applying California law, especially in the context of non-negotiable form contracts imposed by a stronger party upon a party with little or no bargaining power. *See, e.g.*, *D.R. Horton*, 120 Nev. at 554 nn.12-13, 15 (citing *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003); *Circuit City Stores*, *Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), *cert. denied*, 535 U.S. 1112 (2002); and *Armendariz*, 24 Cal.4th 83). Accordingly, those California appellate decisions, although not binding, may still inform the district court's unconscionability analysis.

**1. Procedural Unconscionability**

Under Nevada law, "[a] clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." *D.R. Horton*, 120 Nev. at 554. Here, Jackson's challenge to the delegation clause would unquestionably satisfy this procedural unconscionability standard. That clause was included in a form arbitration agreement that Rent-A-Center presented to Jackson and required him to accept on a non-negotiable basis as a condition of his employment. Jt. App. 41. Jackson had no meaningful choice given the enormous disparity of bargaining power between him and his employer: "[I]n the case of preemployment arbitration contracts, the economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a

job because of an arbitration requirement." *Armendariz*, 24 Cal.4th at 115.

Like many employees, Jackson also lacked any meaningful opportunity to negotiate over, or even to become aware of the implication and reach of, the delegation clause, which was deeply buried within his employer's mandatory agreement and was neither highlighted nor explained to him. Rather than being prominently included in its own section with its own heading, or even within the "judicial review" section of the agreement where it logically would have appeared, that delegation language – without being identified as language of waiver – was presented in a single sentence tucked into the middle of the third paragraph of a seven-paragraph section that was generally entitled "Arbitration Procedures." Jt. App. 32-35. *Cf. D.R. Horton*, 120 Nev. at 555 (finding procedural unconscionability where the relevant provision was identified by a separate heading printed in capital letters but remained "inconspicuous").

Even if the delegation clause had been flagged by Jackson's supervisor at Rent-A-Center, the delegation language would still create procedural unconscionability concerns under Nevada law because the meaning and significance of that critically important clause were never explained – and the contract language is far from self-explanatory. Nowhere in that clause (or elsewhere in the agreement), for example, did Rent-A-Center specifically list unconscionability challenges as subject to determination by the arbitrator. Nor did Rent-A-Center explain to Jackson that, by accepting that clause, he was waiving his otherwise-available statutory right under the FAA to a judicial determination of all threshold questions of enforceability, no matter how much more appropriate they may be for a neutral court to decide than a potentially self-interested arbitrator. And, as explained below, the

"judicial review" clause of the arbitration agreement affirmatively *misled* Jackson as to the bottom-line consequences of the delegation clause – even if he understood its import – on his right to obtain de novo judicial review of any dispute concerning unconscionability. *Cf. Burch*, 118 Nev. at 443 (finding procedural unconscionability where plaintiffs were unsophisticated and did not understand the agreement's terms, and where relevant disclaimers were inconspicuous); *Gentry v. Super. Ct.*, 42 Cal.4th 443, 471 (2007) (finding procedural unconscionability based on the "highly distorted picture of the arbitration" offered under the arbitration agreement); *Vasquez-Lopez v. Beneficial Or., Inc.*, 210 Or.App. 553, 567-69 (2007) (finding procedural unconscionability where plaintiffs were misled as to the effect of the arbitration rider). These features of the delegation clause could lead the district court on remand to conclude that Jackson "lack[ed] a meaningful opportunity to agree to the clause terms" within the meaning of Nevada law. *D.R. Horton*, 120 Nev. at 554.

**2. Substantive Unconscionability**

Delegation clauses like Rent-A-Center's are also frequently oppressively one-sided in operation. Most notably, such clauses can prevent claimants from vindicating their rights by assigning to arbitrators various enforceability challenges that can only be resolved in a judicial forum. Accordingly, the district court might conclude on remand that the delegation clause in Rent-A-Center's mandatory arbitration agreement is also substantively unconscionable under Nevada law.

Substantive unconscionability under Nevada law (and contract law generally) "focuses on the one-sidedness of the contract terms," *D.R. Horton*, 120 Nev. at 554 (citations omitted), and on whether the terms of an agreement are unduly oppressive to one party, *see Burch*, 118 Nev. at

444; *see also Maxwell*, 184 Ariz. at 89 ("Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.") (citation omitted); *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 12 (1988) (substantive unconscionability "entails an analysis of the substance of the bargain to determine whether the terms were unreasonably favorable to the party against whom unconscionability is urged"). Here, "[b]ecause the procedural unconscionability in this case is so great, less evidence of substantive unconscionability is required to establish unconscionability." *Burch*, 118 Nev. at 444.

Because the delegation clause encompasses all potential "enforceability" challenges, it necessarily encompasses unconscionability challenges that a designated arbitrator should never be permitted to decide, or for which the designated arbitration forum could not provide an adequate remedy. For example, this clause would require an employee bound by its mandatory provisions to challenge *in arbitration* a requirement that renders the arbitration procedure impossible to initiate or complete, or that makes arbitration so costly or inconvenient that the arbitration agreement is exculpatory in operation and thereby undermines the enforcement of all applicable statutory rights. *See, e.g.*, *Engalla v. Permanente Med. Group, Inc.*, 15 Cal.4th 951, 975-76 (1997) (company's self-administered arbitration system was designed to create significant delays, including average delay of two years between demand for arbitration and appointment of neutral arbitrator); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 249, 254 (N.Y. App. Div. 1998) (requirement that consumers pay a $4,000 up-front fee, of which $2,000

was non-refundable, to arbitrate claims generally valued at less than $1,000); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (2001) (arbitration agreement required Virginia purchaser of used car to arbitrate warranty claims in Los Angeles); *cf.* C.A. App. 26, 29, 54, 74-79, *in EEOC v. Waffle House*, 534 U.S. 279 (2002) (No. 99-1823) (mandatory employment agreement incorporating AAA Commercial Arbitration Rules required short-order cook earning $5.50 per hour to pay $2,000 filing fee to initiate arbitration and to split ongoing daily forum and arbitrator fees in order to pursue ADA claim); *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 345-46 (8th Cir. 1985) (refusing to enforce forum selection clause requiring use of Iranian courts because "litigation of the dispute in the courts of Iran would . . . be so gravely difficult and inconvenient that McDonnell Douglas would for all practicable purposes be deprived of its day in court"). None of these challenges can be adequately remedied through arbitration: The basis for the challenge is that the challenged requirements stand as an actual impediment – or, at a minimum, a substantial chill – to arbitration.

Rent-A-Center's delegation clause also contains no exception for challenges based upon the personal and structural bias or self-interest of the arbitrator or arbitral forum, of which many examples exist. *See, e.g.*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (employer created list of potential arbitrators and was "free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management"); *Vedachalam v. Tata Am. Int'l Corp.*, 477 F.Supp.2d 1080, 1083 (N.D. Cal. 2007) (agreement required arbitration of California plaintiffs' statutory claims before two arbitrators of employer's choosing in Mumbai, India); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So.2d 779, 783-85 (Ala. 2002) (agreement gave one party sole authority to appoint arbi-

trator); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006) (agreement permitted "president of the Home Builder Association of Greater St. Louis" to choose arbitrator in dispute between home builder and home purchasers); *see also* Resp. Br. 52 & n.18 (noting allegations that National Arbitration Forum and debt collection firms that arbitrated thousands of cases before it were owned by the same entity).

"When the process used to select the arbitrator is fundamentally unfair, . . . the arbitral forum is not an effective substitute for a judicial forum. . . ." *McMullen v. Meijer, Inc.*, 355 F.3d 485, 494 n.7 (6th Cir. 2004). This Court has long recognized the serious issues of fairness and due process presented by a decisionmaker's conflicts of interest, *see, e.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57, 59-62 (1972), as well as the fact that such conflicts can only be addressed fairly through a procedure in which a non-involved decisionmaker determines whether disqualification is necessary – and sometimes not even then. *Id.* at 61 (citing Ohio Rev. Code Ann. §2937.20 (Supp. 1971)). The delegation clause here provides even less assurance of impartiality than existed in *Ward*, because this clause permits the arbitrator himself to determine whether bias prevents him from fairly presiding over the dispute between the parties. Indeed, just last Term, this Court recognized that where a decisionmaker must be the sole judge of his or her own bias, "there may be no adequate protection against a [decisionmaker] who simply misreads or misapprehends the real motives at work in deciding the [matter]." *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252, 2263 (2009) (finding due process violation where justice failed to recuse himself from appeal brought by primary contributor to judicial election campaign).

Rent-A-Center's delegation clause may also be challenged as substantively unconscionable because it forces

the arbitrator in many instances to expand or constrict his own jurisdiction as a consequence of striking or modifying a substantively unconscionable contract provision – an act that the arbitrator might perceive as beyond his authority. An arbitrator's powers are, of course, defined by and limited to the contractually authorized powers set forth in the arbitration agreement from which they are derived. *See, e.g.*, *AT&T*, 475 U.S. at 648-49 ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration."). For the arbitrator in this case to require Rent-A-Center to arbitrate its currently carved-out trade-secret and non-competition claims (or, correspondingly, to limit which claims are *not* carved out), or to order different provisions regarding costs or discovery that the agreement does not contemplate; or for an arbitrator in a different case to strike a punitive damages provision,[7] invalidate a class action prohibition,[8] or expand a contractually shortened statute of limitations period (especially one that had already expired),[9] would

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[7] *Cf.*, *e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 267-68 (3d Cir. 2003) (arbitration agreement limited damages to "net pecuniary damages"); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1994).

[8] *Cf.*, *e.g.*, *Dale v. Comcast Corp.*, 498 F.3d 1216, 1222-24 (11th Cir. 2007) (finding class action waiver unconscionable); *Discover Bank v. Super. Ct.*, 36 Cal.4th 148, 162-63 (2005) (same).

[9] *Cf.*, *e.g.*, *Alexander*, 341 F.3d at 266-67 (arbitration agreement required notification of claims within 30 days); *Nyulassy v. Lockheed Martin Corp.*, 120 Cal.App.4th 1267, 1283 (2004) (arbitration agreement shortened statute of limitations for some claims by more than three years); *cf. Pearson Dental Supplies, Inc. v. Super. Ct.*, 82 Cal.Rptr.3d 154, 158-59 (Cal. Ct. App. 2008), *petition for review granted*, 85 Cal.Rptr.3d 693 (2008) (arbitrator dismissed claim as time-barred under terms of arbitration agreement without considering claimant's assertion that the time-bar in question was unconscionable).

arguably be to expand the arbitrator's jurisdiction beyond what the contract permits. *See, e.g.*, *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement. . . ."); *Carpenters Local 1027 v. Lee Lumber & Bldg. Material Corp.*, 2 F.3d 796, 798-99 (7th Cir. 1993) (upholding vacatur of arbitrator's decision holding union liable for back pay where agreement did not permit imposition of remedies against union). Nothing in Rent-A-Center's delegation clause or in any other section of its agreement provides the arbitrator with the authority to change the contract terms or to expand his contractually limited jurisdictional powers, even where such an expansion would be required by the state law of unconscionability. *Cf. Enterprise Wheel & Car Corp.*, 363 U.S. at 597 (explaining that, if the arbitrator's choice of remedy was "based solely upon the arbitrator's view of the requirements of enacted legislation . . . he exceeded the scope of the submission"). To that extent as well, the delegation clause is oppressive and could therefore be found substantively unconscionable by the district court on remand.

The delegation clause may also be challenged as substantively unconscionable under Nevada law on the separate ground that it is unduly one-sided. Rent-A-Center drafted the arbitration agreement and presented it to Jackson as a non-negotiable condition of his employment. Logic (and case law) suggest that Rent-A-Center itself will never be affected by the delegation clause, because the stronger party that drafted an adhesive form contract – here, Rent-A-Center – "cannot be expected to claim that it drafted an unconscionable agreement." *Murphy v. Check 'N Go of Cal., Inc.*, 156 Cal.App.4th 138, 145 (2007). By contrast, *all* of Jackson's potential enforceability challenges are covered by this clause, from

allegations of fraud or duress to the unconscionability challenges discussed in the previous paragraphs. Under Nevada law, "'parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope,'" but "'the doctrine of [substantive] unconscionability limits the extent to which a stronger party may impose the arbitration forum on the weaker party without accepting that forum for itself.'" *D.R. Horton*, 120 Nev. at 558 (quoting *Ting*, 319 F.3d at 1149) (alterations omitted).

Notably, both the Chamber of Commerce and the federal appellate courts recognize that at least *some* of the unconscionability challenges described above must be resolved by courts, not arbitrators.[10] The Chamber – mindful of this Court's warning that certain requirements in an arbitration agreement, including "the existence of large arbitration costs[,] could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum," *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) – acknowledges that pre-arbitration judicial review must at least be available to determine whether a plaintiff "effectively may vindicate his or her claims through arbitration." Chamber Br. 5 (citation omitted); *see also* Transcript of Oral Argument at 19-21, *Randolph*, 531 U.S. 79 (No. 99-1235) (colloquy between Chief Justice Rehnquist and attorney for Green Tree regarding need for pre-arbitration determination if costs are unconscionably excessive). The First Circuit in *Awuah*, 554 F.3d 7, similarly held that courts, before compelling arbitration, must at least determine "whether the arbitration regime . . . is structured so as to *prevent* a liti-

[10] Accordingly, the question before the Court is simply *which* challenges to an arbitration agreement must be resolved by courts rather than arbitrators. The answer is necessarily provided by FAA §2 and its incorporation of state law principles of contract enforceability and validity.

gant from having access to the arbitrator to resolve claims . . . ." *Id.* at 13. Nonetheless, the delegation clause in Rent-A-Center's contract encompasses both of these challenges. Where a delegation clause in an adhesive contract, as in Rent-A-Center's agreement, does not by its own terms preserve the weaker party's access to a judicial forum to make *any* of these challenges, but instead funnels all enforceability challenges without limitation, restriction, or explanation to a designated arbitrator, that clause is sufficiently unconscionable that the district court, using Nevada's sliding scale approach, could find it legally unenforceable in its entirety.

For all these reasons, Rent-A-Center's delegation clause may be sufficiently one-sided and unfair in the context of this non-negotiable, pre-dispute mandatory arbitration agreement to be found unconscionable under Nevada law. *Cf. D.R. Horton*, 120 Nev. at 558 (arbitration agreement substantively unconscionable where only one party was required to pay liquidated damages for choosing to forego arbitration); *Burch*, 118 Nev. at 444 (arbitration agreement substantively unconscionable where agreement gave one party "unilateral and exclusive right to decide the rules that govern the arbitrators and to select the arbitrators"). That conclusion is particularly likely if the district court concludes, in applying Nevada law, that the Nevada Supreme Court would follow California law in deciding this issue (just as the Nevada Supreme Court has already followed *Armendariz* and *Ting*). *See supra* Part II.A. The California Courts of Appeal have already found that a delegation clause in an adhesive agreement that channels all disputes over enforceability to the designated arbitrator may be substantively unconscionable under the *Armendariz* line of cases. *See Ontiveros v. DHL Exp. (USA), Inc.*, 164 Cal.App.4th 494, 505 (2008), *cert. denied*, 129 S.Ct. 1048 (2009); *Murphy*, 156 Cal.App.4th at 145. Given the

Nevada Supreme Court's previous reliance upon California unconscionability law, these California decisions provide an additional reason why the district court on remand might determine that the delegation clause in this adhesive agreement is unconscionable and unenforceable under Nevada's general contract law.

### C. The Delegation Clause May Be Unenforceable Because It Was Premised on a Mutual Mistake

The district court might also conclude on remand that the delegation clause is unenforceable because it is premised on the parties' mutual mistake regarding the availability of de novo judicial review.

As Jackson notes, the arbitration agreement between Jackson and Rent-A-Center includes two closely related provisions governing the courts' role in policing the fairness of the agreement's terms and ensuring the integrity of the adhesive arbitral process. Rather than eliminating de novo judicial review of Jackson's unconscionability claims altogether, the contracting parties sought to replace the usual *pre*-arbitration judicial review of unconscionability questions with unusual *post*-arbitration analysis of those questions under a de novo standard of review. Resp. Br. 59-61; *see also D.R. Horton*, 120 Nev. at 553 ("Whether, given the trial court's factual findings, a contractual provision is unconscionable is a question of law subject to de novo review."). However, this "time-shifting" approach to judicial review appears to be prohibited by the FAA. Resp. Br. 59. Thus, to the extent *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), holds that the FAA precludes de novo post-arbitration judicial review under the FAA of an arbitrator's legal conclusions, it necessarily follows that the parties to the Rent-A-Center agreement were mutually mistaken in their belief that they could contractually provide for de novo review of the arbitrator's unconscionability rulings.

Jackson explains why this mistake demonstrates the absence of a "clear and unmistakable" agreement to delegate threshold issues of unconscionability to the arbitrator. Resp. Br. 60-61. However, Nevada law provides another basis for equitable rescission or invalidation of the delegation clause here — mutual mistake. *See, e.g.*, *Tarrant v. Monson*, 96 Nev. 844, 845 (1980). "Mutual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain." *Gramanz v. Gramanz*, 113 Nev. 1, 8 (1997). Here, the district court on remand might reasonably find such mutual mistake in the parties' mutual misunderstanding concerning their ability to contractually guarantee post-arbitration de novo judicial review of any arbitral ruling on unconscionability. *See Miller v. Thompson*, 40 Nev. 35, 160 P. 775, 780 (1916) (applying "mutual mistake" rule to parties' misunderstanding of their rights under federal law); *see also Tarrant*, 96 Nev. at 845 (citing *Miller*); *cf. Restatement (Second) of Contracts* §151 cmt. b (1981) (noting that modern law of mistake does not distinguish between mistakes of fact and mistakes of law). Given the dramatic departure from the parties' mutual intent, the district court reasonably might conclude that the parties' mutual misunderstanding is material to the enforceability of the initial delegation clause, and thus requires its rescission.[11]

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[11] Because an unconscionable arbitration agreement does not give rise to any valid duty to arbitrate and thus cannot confer upon the arbitrator any authority to resolve the parties' dispute, an arbitrator's conclusions regarding unconscionability *may* be subject to de novo judicial review under FAA §10(a)(4), which permits the courts to vacate an arbitration award where the arbitrators "exceeded their powers." 9 U.S.C. §10(a)(4). *See* Brief for Resp. Manuel Kaplan at *22, *in First Options*, 514 U.S. 938 (No. 94-560) ("Review of arbitrability under [FAA §§10(a)(4) and 11(b)] should be de novo."); *but see First Options*, 514 U.S. at 943 (suggesting, in dicta, that "a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."). On remand, the district court should

## CONCLUSION

For the foregoing reasons, amici respectfully request that the Court affirm the circuit court's decision vacating the district court's order and remanding for further proceedings.

Respectfully submitted.
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be instructed to determine the extent to which de novo review of unconscionability remains available under §10(a)(4), as that determination may inform the court's resolution of the "mutual mistake" issue.