

No. 09-497

IN THE
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

**BRIEF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT.**

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
STATEMENT	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
I. Section 4 of the Federal Arbitration Act Requires a Court to Determine Any Issues Regarding the Legal Enforceability of an Arbitration Agreement Before Directing Arbitration.....	5
II. Granting the Arbitrator Authority to Decide Arbitrability Issues Can Affect a Court’s Determination Regarding the Legal Enforceability of the Agreement But Does Not Displace the Court’s FAA Authority and Responsibility to Make That Determination.....	9
CONCLUSION.....	17

TABLE OF AUTHORITIES

Cases:	Page
<i>AT&T Technologies, Inc. v. Communications Workers</i> , 475 U.S. 643 (1986).....	14
<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006).....	11
<i>Doctor’s Associates, Inc. v. Casarotto</i> , 517 U.S. 681 (1996)	7
<i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938 (1995).....	13, 14
<i>Granite Rock Co. v. Int’l Broth. of Teamsters</i> , No. 08-1214 (U.S. argued Jan. 19, 2010)	2
<i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576 (2008).....	10, 11
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79 (2002).....	7
<i>John Wiley & Sons, Inc. v. Livingston</i> , 376 U.S. 543 (1964)	7
<i>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</i> , 388 U.S. 395 (1967).....	7
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984).....	7
<i>Steelworkers v. Warrior & Gulf Nav. Co.</i> , 363 U.S. 574 (1960).....	7, 14

Statutes:

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*:

§ 1	6
§ 2	<i>passim</i>
§ 3	8
§ 4	<i>passim</i>
§ 9.....	8, 10, 11
§ 10	8, 10
§ 11	10

Miscellaneous:

Restatement (Second) of Contracts (1981)

§ 1	7
§ 208	9, 15
<i>Uniform Commercial Code</i> § 2-302(1) (2004)....	9

IN THE
Supreme Court of the United States

RENT-A-CENTER, WEST, INC.,
Petitioner,

v.

ANTONIO JACKSON,
Respondent.

**On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit**

**BRIEF OF THE AMERICAN FEDERATION OF
LABOR AND CONGRESS OF INDUSTRIAL
ORGANIZATIONS AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENT.**

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women.¹ The instant case presents an important question concerning the judicial enforcement of arbitration agreements. The collective bargaining agreements negotiated by affiliates of the AFL-CIO typically provide for the resolution of contract

¹ The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

disputes by arbitration. The AFL-CIO has, therefore, often filed briefs in cases before this Court concerning the enforcement of arbitration agreements. *See, e.g., Granite Rock Co. v. Int'l Broth. of Teamsters*, No. 08-1214 (U.S. argued Jan. 19, 2010).

STATEMENT

Antonio Jackson and Rent-A-Center West, Inc. are parties to an agreement for arbitration of all disputes arising out of Jackson's employment relationship with Rent-A-Center. Pet. App. 2a. Rent-A-Center petitioned to compel arbitration of an employment discrimination claim Jackson had brought to court, and Jackson opposed the petition on the ground that "the arbitration agreement in question is clearly unenforceable in that it is unconscionable." JA 40. Rent-A-Center responded that the unconscionability issue raised by Jackson's opposition to arbitration was solely a matter for the arbitrator to decide under the following provision in the arbitration agreement:

"The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." Pet. App. 9a.

The district court "found that the Agreement to Arbitrate 'clearly and unmistakably provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable.'" Pet. App. 9a. On this basis, the district court "held that 'the question of arbitrability[i.e., the question of unconscionability raised by Jackson] is for the arbitrator'" and issued an order directing arbitration. *Ibid.*

The court of appeals vacated the order directing arbitration and remanded the case to the district court to consider Jackson’s challenge to the legal enforceability of the arbitration agreement. Pet. App. 20a. In this regard, the court of appeals ruled that even “where . . . an arbitration agreement delegates the question of the arbitration agreement’s validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter.” Pet. App. 18a.

SUMMARY OF ARGUMENT

As a precondition to “mak[ing] an order directing the parties to proceed to arbitration,” § 4 of the Federal Arbitration Act requires that a court must first “be[] satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” 9 U.S.C. § 4. If there is such an issue, the court may order arbitration only after “find[ing] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder.” *Ibid.* The FAA § 4 requirement that the court “find that an agreement for arbitration was made” entails a requirement to determine whether a *legally enforceable* agreement was made. The standards for determining whether an arbitration agreement is legally enforceable under the FAA are set forth in § 2 of the Act. Section 2 provides that arbitration agreements “involving commerce” are “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Therefore, whenever a party opposing arbitration places “the making of the arbitration agreement . . . in issue,” *id.* § 4, by raising “grounds . . . for the revocation of [such] contract,” *id.* § 2, the court must determine whether or not the respondent has raised a viable ground for revocation as a precondition for ordering arbitration.

In the instant case, the party resisting arbitration asserted that the arbitration agreement is legally unenforceable on grounds of unconscionability. The arbitration agreement in question provides the arbitrator with authority to decide challenges to the agreement's enforceability. Taking account of this provision in the arbitration agreement, the court of appeals held that "where . . . an arbitration agreement delegates the question of the arbitration agreement's validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is nonetheless for the court to decide as a threshold matter." Pet. App. 18a. Accordingly, the court of appeals remanded the case to the district court to make this determination.

The ruling of the court of appeals gives full effect to the provision in the arbitration agreement giving arbitrators the authority to resolve disputes over the agreement's enforceability. At the same time, that ruling is faithful to the requirements of the Federal Arbitration Act. The only question presented here is whether the court of appeals erred in directing the district court to determine the enforceability of the arbitration agreement, taking into account the provision making enforcement itself an arbitrable issue. That ruling of the court of appeals is correct and should be affirmed.

ARGUMENT

The sole question presented by the petition for certiorari is:

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

The court of appeals answered this question as follows:

“[W]here . . . an arbitration agreement delegates the question of the arbitration agreement’s validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability[,i.e., to arbitrate issues concerning the legal enforceability of the arbitration agreement] is itself enforceable is nonetheless for the court to decide as a threshold matter.” Pet. App. 18a.

The court of appeals’ ruling is entirely correct. As we show in point I below, that ruling is dictated by the requirements expressly stated in § 4 of the Federal Arbitration Act for a court to grant a petition for an order directing arbitration. In point II below, we show that the court of appeals’ ruling takes proper account of the arbitration agreement’s provision giving the arbitrator authority to resolve arbitrability disputes and does so in the manner indicated by this Court’s FAA precedents.

I. Section 4 of the Federal Arbitration Act Requires a Court to Determine Any Issues Regarding the Legal Enforceability of an Arbitration Agreement Before Directing Arbitration.

A. Section 4 of the Federal Arbitration Act sets out the procedure for petitioning for an order directing arbitration and the issues the court must decide in determining whether or not to issue such an order. Under FAA § 4, to initiate such a proceeding, “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition” any district court having jurisdiction “for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

The court, in assessing such a petition and as a precondition to “mak[ing] an order directing the parties to pro-

ceed to arbitration,” must first “be[] satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.” 9 U.S.C. § 4. If the court finds that “the making of the arbitration agreement or the failure, neglect, or refusal to perform the same [is] in issue, the court [must] proceed summarily to the trial thereof.” *Ibid.* If the court then “find[s] that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder,” the court “shall . . . dismiss[]” the proceeding. *Ibid.* On the other hand, if the court “find[s] that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.” *Ibid.*

In other words, FAA § 4 mandates that a court faced with a petition for an order directing arbitration must make two determinations as a precondition to issuing such an order: first, that the arbitration agreement the court is asked to enforce is a legally enforceable contract; second, that one of the parties has breached that contract by refusing to arbitrate a particular matter covered by the agreement.

As this Court has recognized, the FAA § 4 determination of whether an “agreement for arbitration was made” is, in essence, a determination of whether the parties’ agreement is one that is *legally enforceable* under the FAA. In this regard, the FAA does not empower the courts to enforce agreements for arbitration that do not involve “maritime transaction[s]” or other “transaction[s] involving commerce.” 9 U.S.C. § 2. *See id.* § 1 (defining “maritime transactions” and “commerce” and stating “exceptions to [the FAA’s] operation”). Similarly, FAA § 4 does not empower the courts to enforce agreements for arbitration that are legally unenforceable on such

grounds as “fraud, duress, or unconscionability.” *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Thus, as this Court has observed, “[u]nder § 4, . . . [a] claim [of] fraud in the inducement of the arbitration clause itself [would be] an issue which goes to the ‘making’ of the agreement to arbitrate.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

FAA § 4’s two requirements follow directly from the basic principle that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002), quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). An FAA § 4 order directing arbitration is an order that enforces a contract. And, as a matter of basic contract law, before a court can enter an order enforcing a contract, the court must determine that the contract is legally enforceable and that the requested order remedies a breach of the contract. *See Restatement (Second) of Contracts* § 1 (1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”). As this Court succinctly put the matter, “The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the . . . agreement does in fact create such a duty.” *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964).

B Section 4 itself does not state the standard for determining whether the parties have made a legally enforceable agreement for arbitration. Rather, it is FAA § 2 that states the standard for determining “the enforceability of arbitration provisions.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Section 2 states the test for what constitutes an “enforceable” arbitration agreement as follows:

“A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2.

Aside from the “commerce” requirement, the substantive requirement for a legally “enforceable” arbitration agreement is that the contract not be subject to revocation “upon such grounds as exist at law or in equity for the revocation of any contract.” *Ibid.* In other words, whether an arbitration agreement subject to the FAA is legally “enforceable” turns on whether the agreement is subject to “revocation” on grounds that would apply to “any contract.”

In sum, “the find[ing] that an agreement for arbitration was made” called for by FAA § 4 as a precondition for “directing the parties to proceed with the arbitration,” 9 U.S.C. § 4, is a finding that a “valid, irrevocable, and enforceable” agreement for arbitration was made, *id.* § 2. That being so, a court faced with a petition to enforce an arbitration agreement by issuing an order directing arbitration must, as a precondition to issuing such an order, address and decide any “grounds . . . for the revocation of [that] contract” asserted in opposition to the petition. 9 U.S.C. § 2.²

² The FAA does not provide a procedure by which a party may petition for revocation of an arbitration agreement. Thus, the only way to raise the issue of revocation prior to an arbitration award being issued is as a defense to a § 3 petition for a stay of proceedings pending arbitration or to a § 4 petition for an order compelling arbitration. 9 U.S.C. §§ 3 & 4. After an award has been issued, revocation of the underlying agreement can be raised as a defense to a petition to confirm the award or as a ground for vacating the award. 9 U.S.C. §§ 9 & 10.

In responding to Rent-A-Center’s petition for an order directing arbitration, Jackson raised an issue concerning “the making of the agreement for arbitration,” 9 U.S.C. § 4, by maintaining that “the arbitration agreement in question is clearly unenforceable in that it is unconscionable.” JA 40. Unconscionability is one of the “grounds [that] exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. *See, e.g., Restatement (Second) of Contracts* § 208 (“If a contract . . . is unconscionable at the time the contract is made a court may refuse to enforce the contract”); *Uniform Commercial Code* § 2-302(1) (2004) (“If the court as matter of law finds the contract . . . to have been unconscionable at the time it was made, the court may refuse to enforce the contract”). Thus, the courts below were required by FAA § 4 to address and decide Jackson’s unconscionability defense as a precondition to granting Rent-A-Center’s petition for an order directing arbitration.

II. Granting the Arbitrator Authority to Decide Arbitrability Issues Can Affect a Court’s Determination Regarding the Legal Enforceability of the Agreement But Does Not Displace the Court’s FAA Authority and Responsibility to Make That Determination.

A. Rent-A-Center acknowledges that “[i]nasmuch as unconscionability is a defense to the enforcement of an agreement, the default rule would be that unconscionability is a gateway issue for the court to decide” in ruling on an FAA § 4 petition for an order directing arbitration. Pet. Br. 22. However, the Company maintains that, where the arbitration agreement in question contains “language giving the arbitrator the power to decide issues of contract enforceability, including unconscionability,” the court must grant the petition to direct arbitration

without itself addressing “the issue of contract enforceability.” Pet. Br. 24.

Rent-A-Center’s position is that, because its arbitration agreement with Jackson “contains language consigning the arbitrability question to the arbitrator,” the courts below could “consider only that Jackson signed the Agreement” and could not consider any other issue regarding the legal enforceability of that agreement. Pet. App. 15a. Reduced to its essential point, Rent-A-Center’s argument is that the parties to an arbitration agreement may contract out of FAA § 4’s requirement that a court “find that an agreement for arbitration was made” – in the sense of an agreement that is “valid, irrevocable, and enforceable” under the standards established by FAA § 2 – as a precondition to issuing a § 4 order “directing the parties to proceed with the arbitration.” 9 U.S.C. § 4.

This Court recently held that the parties to an arbitration agreement may not contractually alter the standard of review provided in FAA §§ 10 and 11 in proceedings to enforce or vacate arbitration awards under § 9. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The same reasons that led the Court to conclude that the parties to an arbitration agreement may not contractually alter the provisions of FAA §§ 10 & 11 lead to the conclusion that the parties to an arbitration agreement may not contractually alter the provisions of FAA § 4 requiring that a court must find that the arbitration agreement in question is a legally enforceable agreement under the FAA as a precondition to issuing a § 4 order directing arbitration under that agreement.

The *Hall Street* Court noted that “expanding the detailed categories [contained in §§ 10 & 11 for vacating or modifying an award] would rub too much against the grain of the § 9 language, where provision for judicial confirmation carries no hint of flexibility.” 552 U.S. at 587.

The Court found it significant that § 9 provides, “[o]n application for an order confirming the arbitration award, the court ‘must grant’ the order ‘unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.’” *Ibid.* In this regard, the Court observed that “[t]here is nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.” *Ibid.*

The language of § 4 similarly “carries no hint of flexibility.” Section 4 provides that “[i]f [there is a] find[ing] that no agreement in writing for arbitration was made . . . the proceeding *shall* be dismissed.” 9 U.S.C. § 4 (emphasis added). “There is nothing malleable about [‘shall be dismissed’] which unequivocally tells courts,” 552 U.S. at 587, on finding that parties have not made a legally enforceable arbitration agreement under the standards set forth in FAA § 2, to dismiss the petition for an order directing arbitration under that agreement.

“Instead of fighting the text,” the *Hall Street* Court concluded that “it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review need to maintain arbitration’s essential virtue of resolving disputes straightaway.” 552 U.S. at 588. In the same way, it makes the best sense to see §§ 2 & 4 as substantiating the FAA’s central policy of “plac[ing] arbitration agreements on equal footing with all other contracts.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). FAA § 2 provides that an arbitration contract is subject to revocation on the same “grounds as exist at law or in equity for the revocation of any contract.” As a result, whenever a party responds to a petition for an order directing arbitration by advancing a ground, such as duress or unconscionability, for dismissing such a peti-

tion, § 4 requires the court to decide that issue going to the making of a legally enforceable agreement for arbitration in determining whether to grant or dismiss the petition.

Of equal moment, nothing in the text of FAA § 4 or in the law of contracts provides any basis for exempting “agreements to arbitrate arbitrability” from § 4’s pre-conditions – judicial determinations that the arbitration agreement in question is a legally enforceable agreement and that the agreement requires the parties to arbitrate the particular matter in question – for a judicial order directing arbitration. For the point of FAA § 4 – and of the law of contracts – is that a judicial order directing an unwilling party to arbitrate a particular matter must be based on a judicial determination that there is a legally enforceable agreement requiring that party to arbitrate that matter. That point applies with equal force to orders directing arbitration under agreements to arbitrate merits disputes and to orders directing arbitration under “agreements to arbitrate arbitrability.”

B. As we have just shown, arbitration agreements that confer on the arbitrator the authority to decide arbitrability issues do *not* strip the courts of their FAA § 4 authority and responsibility to determine – as a precondition to issuing an order directing arbitration – whether the arbitration agreement the court is being asked to enforce is legally enforceable and whether the respondent has breached that agreement by refusing to arbitrate a particular matter. That is not to say, however, that conferring such authority on the arbitrator has no effect of a court’s FAA § 4 determinations as to the legal enforceability and coverage of the arbitration agreement. To the contrary, contract language conferring such authority on the arbitrator can be highly relevant to the court’s legal enforceability and coverage determinations. This Court’s opinion

in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), points the way in this regard.

The *First Options* opinion begins its analysis by recognizing that “three types of disagreement” can arise with respect to a dispute arguably covered by an arbitration clause. 514 U.S. at 942. The first type concerns “the *merits* of the dispute,” for instance whether substantive term of the contract has been breached or an applicable substantive law has been violated. *Ibid.* (emphasis in original). The second type concerns “the *arbitrability* of the dispute,” i.e., whether the merits dispute is subject to arbitration. *Ibid.* (emphasis in original). “Third, [the parties may] disagree about *who should have the primary power to decide the second matter.*” *Ibid.* (emphasis in original).

First Options then goes on to explain that “the answer to the ‘who’ question,” i.e., the question of who decides arbitrability, “is fairly simple.” 514 U.S. at 943. That answer derives from the arbitration agreement itself:

“Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration.” *Ibid.* (citations omitted; emphasis in original).

Having laid that groundwork, the opinion makes the point – that is critical for present purposes – that as a threshold matter it is the “court [that] should decide whether the parties have agreed to submit the arbitrability issue to arbitration.” *Id.* at 944. And, in this regard, *First Options* adds that, “when courts decide whether a party has agreed that arbitrators should decide arbitrability[, they] should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmis-

takabl[e]’ evidence that they did so.” *Ibid.*, quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986).³

Under the analytical framework laid out in *First Options*, contract language giving the arbitrator the authority to decide which merits disputes are arbitrable does *not* negate the court’s FAA § 4 authority and responsibility to determine whether the arbitration agreement the court is being asked to enforce covers the particular matter the respondent refuses to arbitrate. But granting the arbitrator that authority does shape the arbitrability issue presented to the court for resolution. In such a case, instead of determining whether the parties have agreed to submit a particular *merits* dispute to arbitration, the court’s responsibility is to determine whether the parties have agreed to submit a particular *arbitrability* dispute to arbitration, namely a dispute as to which merits disputes are arbitrable. In so doing, the court is exercising its FAA § 4 authority and responsibility to determine the scope of the arbitration agreement’s coverage, but the court makes that determination by taking proper account of the agreement’s definition of arbitrable disputes as including not only merits disputes but also arbitrability disputes.

If follows from *First Options* that contract language giving the arbitrator authority to decide issues related to the legal enforceability of the arbitration agreement does *not* negate the court’s FAA § 4 authority and responsibili-

³ By contrast, when a court is called upon to determine whether a merits dispute is subject to arbitration, the court applies a “presumption of arbitrability in the sense that ‘[a]n order to arbitrate the particular [merits dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’” *AT&T*, 475 U.S. at 650, quoting *Warrior & Gulf*, 363 U.S. at 582-83.

ty to determine – applying the standards of FAA § 2 – the legal enforceability of the agreement the court is being asked to enforce. But contract language granting the arbitrator such authority can shape the enforceability issue presented to the court for resolution.

Take, for example, Jackson’s objection in this case that the arbitration agreement is substantively unconscionable due to its limitations on discovery regarding the parties’ merits dispute over whether Jackson had suffered illegal employment discrimination. Pet. App. 20a. If that were Jackson’s only basis for challenging the legal enforceability of the agreement, a court could determine – without addressing the merits of Jackson’s objection to the limitations on discovery – that the contract language providing the arbitrator with “authority to resolve any dispute relating to the interpretation, applicability [or] enforceability . . . of this Agreement,” *id.* at 9a, saves the agreement from revocation on the asserted ground. The court could reasonably construe this contract language to give the arbitrator the sort of authority possessed by a common law court to strike any “term [of a contract found to be] unconscionable,” and “enforce the remainder of the contract without the unconscionable term, or [to] limit the application of any unconscionable term as to avoid any unconscionable result.” *Restatement (Second) of Contracts* § 208.⁴ On that reading of the agreement, the

⁴The court considering an FAA petition for an order directing arbitration may not have less authority than the arbitrator to reform an arbitration agreement “to avoid any unconscionable result.” *Ibid.* The FAA provides that, if the court finds “that an agreement for arbitration was made . . . and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration *in accordance with the terms thereof.*” 9 U.S.C. § 4 (emphasis added). The emphasized statutory language may preclude judicial reformation of an arbitration agreement in ruling on an FAA § 4 petition for an order directing arbitration.

court could determine that the arbitration agreement, taken as a whole, is not unconscionable without itself deciding whether the limitation on discovery is unconscionable.

Other unconscionability objections might not be similarly addressed by contract language giving the arbitrator authority to resolve disputes over application and enforceability of the agreement. For instance, it is difficult to see how an unconscionability objection based on apparent arbitrator bias could be adequately addressed by allowing the arbitrator to resolve that issue. If the arbitrator is, in fact, biased, giving him authority to decide that matter does not alleviate the asserted bias problem. Thus, the court would most likely have to resolve any dispute over the alleged bias of the arbitrator before ordering arbitration.⁵

In this case, the courts below did not decide the revocation issue raised by Jackson. Rather, the court of appeals remanded this case for the district court to determine “whether the agreement to arbitrate arbitrability is itself enforceable.” Pet. App. 18a. Thus, the effect of providing the arbitrator with authority to resolve disputes over interpretation and enforceability of the agreement on how the district court was to decide Jackson’s unconscionability objection was not addressed by the courts below and is not encompassed in the question presented. The only issue before this Court is whether the court of appeals was correct in ruling that, even “where . . . an arbitration agreement delegates the question of the arbitration agreement’s validity to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself

⁵ Similarly, assertions that the arbitration agreement was entered into under duress or as a result of fraud must be addressed by the court, since the arbitrator has no authority to resolve any dispute if objections of that sort are sustained.

enforceable is nonetheless for the court to decide as a threshold matter.” Pet. App. 18a. That ruling is entirely consistent with the requirements of the Federal Arbitration Act.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

LYNN K. RHINEHART
JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337

Of Counsel:

LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

