No. 09-09-497 OCT 23 2009

Supreme Court of the United States

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

v.

ANTONIO JACKSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 23, 2009

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QUESTION PRESENTED

1. Is the district court required in all cases to determine claims that an arbitration agreement subject to the Federal Arbitration Act ("FAA") is unconscionable, even when the parties to the contract have clearly and unmistakably assigned this "gateway" issue to the arbitrator for decision?

RULE 14.1(b) STATEMENT—PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Antonio Jackson, Plaintiff-Appellant, Respondent on Review.
2. Rent-A-Center, West, Inc., Defendant-Appellee, Petitioner on Review.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Rent-A-Center, West, Inc. is a wholly owned subsidiary of Rent-A-Center, East, Inc., which is a wholly owned subsidiary of Rent-A-Center, Inc., a publicly held company. There are no other parent or publicly held corporations owning 10% or more of the stock of Petitioner Rent-A-Center, West, Inc.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Rent-A-Center, West, Inc. ("Petitioner" or "RAC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting RAC's Motion to Dismiss Proceedings and Compel Arbitration on the grounds that the parties' arbitration agreement clearly and unmistakably vested the arbitrator with the authority to decide the issue of unconscionability is unpublished. (App., *infra* 1a-6a). The Ninth Circuit Court of Appeals, in a published opinion reported at __ F.3d ___ , 2009 U.S. App. LEXIS 20133, 107 Fair Empl. Prac. Cas. (BNA) 254

(9th Cir. Sep. 9, 2009), affirmed in part, reversed in part, and remanded to the district court to determine whether the arbitration agreement was unconscionable. (App., *infra* 7a-20a). Circuit Judge Cynthia Holcomb Hall dissented, stating that the "question of the arbitration agreement's validity should have gone to the arbitrator, as the parties 'clearly and unmistakably provide[d]' in their agreement." (App., *infra* 23a).

JURISDICTION

The Ninth Circuit's judgment was entered on September 9, 2009. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1254(1). *See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (granting certiorari after Court of Appeals affirmed in part and reversed in part order of district court compelling arbitration and remanded to district court for further proceedings).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the FAA are set forth at App., *infra* 35a-36a.

STATEMENT OF THE CASE

This case involves the Ninth Circuit's refusal to enforce the clear and unmistakable terms of an arbitration agreement governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The arbitration agreement expressly states that "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this

Agreement is void or voidable." (App., *infra* 30a). Despite the parties' clear and unmistakable agreement that the arbitrator possessed exclusive authority to decide a claim of unenforceability due to alleged unconscionability, the Ninth Circuit held that, as a matter of law, the unconscionability determination is exclusively for the district court and can never lie within the province of an arbitrator. In this regard, the Ninth Circuit could not have been clearer: "This rule applies even where the agreement's express terms delegate that determination to the arbitrator." (App., *infra* 18a).

The Ninth Circuit's opinion is in direct conflict with opinions of the First, Eighth and Eleventh Circuit Courts of Appeals which permit arbitrators to determine unconscionability when the parties have so agreed and is also at variance with several of this Court's cases holding that clear and unmistakable agreements authorizing arbitrators to decide questions of arbitrability are fully enforceable under the FAA.

STATUTORY FRAMEWORK

Congress enacted the FAA for the central purpose of ensuring that private agreements to arbitrate are enforced according to their terms. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995). Section 2 of the FAA states that a "written provision * * * to settle by arbitration" a controversy arising out of any contract "evidencing a transaction involving commerce" shall be "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Parties to arbitration agreements under the FAA are therefore "generally free to structure their arbitration agreements as they see fit" and can

"specify by contract the rules under which [the] arbitration will be conducted." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989). As a result, this Court has held that arbitration agreements which clearly and unmistakably evince the parties' intent to assign the determination of arbitrability to the arbitrator and not the courts are fully enforceable. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (question of who has the primary power to decide arbitrability "turns upon what the parties agreed about *that* matter" (emphasis in original)); *AT&T Technologies Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) (parties may agree to arbitrate arbitrability).

FACTUAL BACKGROUND

The relevant facts of this case are uncomplicated and not subject to dispute. On or about February 24, 2003, Respondent, Antonio Jackson ("Jackson") and RAC entered into a Mutual Agreement to Arbitrate Claims (the "Arbitration Agreement") arising out of the employment relationship between Jackson and RAC. (App., *infra* 25a-34a). Under the Arbitration Agreement, Jackson and RAC agreed to the resolution of all claims that each might have against the other relating to Jackson's employment or the termination of his employment. (App., *infra* 25a-26a). The Arbitration Agreement clearly stated the "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." (App., *infra* 30a). In signing the Arbitration Agreement,

Jackson acknowledged that he had carefully read it, understood its terms, did not rely upon any representations other than those contained therein and was given the opportunity to discuss its terms with private legal counsel. (App., *infra* 32a-34a).

Despite having executed the Arbitration Agreement, Jackson filed a complaint in the United States District Court for the District of Nevada alleging race discrimination and retaliation under 42 U.S.C. § 1981. (App., *infra* 3a, 8a). The district court possessed federal question jurisdiction under 28 U.S.C. § 1331. RAC moved to dismiss Jackson's complaint and to compel arbitration. (App., *infra* 1a).[1] In response, Jackson contended that the Arbitration Agreement that he had signed was procedurally and substantively unconscionable and was hence "invalid" and "unenforceable." (Ninth Circuit Excerpt of Record, p. 50). He contended that the Arbitration Agreement was procedurally unconscionable only because it was "presented to him as a non-negotiable condition of his employment." (App., *infra* 9a). He contended that the Arbitration Agreement was substantively unconscionable because it was allegedly one-sided, placed limits on discovery and contained a provision permitting sharing of the costs of the arbitration procedure if allowed by state law. *Id.*

In support of its motion to compel, RAC's primary argument was that the parties expressly agreed in the Arbitration Agreement that "the Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcea-

[1] In the alternative, RAC sought an order staying the district court proceeding while compelling arbitration. (Ninth Circuit Excerpt of Record, pp. 32-33).

bility or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." *Id.* In the alternative, RAC contended that the Agreement was neither procedurally nor substantively unconscionable. (Ninth Circuit Excerpt of Record, pp. 32-33).

The district court granted RAC's motion on June 7, 2007, compelling arbitration and dismissing Jackson's lawsuit. It found that the Arbitration Agreement "clearly and unmistakenly provides the arbitrator with the exclusive authority to decide whether the Agreement to Arbitrate is enforceable." (App., *infra* 4a). The district court held that "[a]s such, the question of arbitrability is a question for the arbitrator." *Id.*

The district court further ruled that even if it were to determine the issue of unconscionability, "there appears to be a lack of evidence to suggest an unconscionable agreement." (App., *infra* 5a). In so ruling, the district court expressly stated that the cost-sharing provision of the Agreement was not substantively unconscionable. *Id.* However, the district court did not specifically discuss Jackson's two other claims of substantive unconscionability. *Id.* Because Nevada law requires both procedural and substantive unconscionability to render an arbitration agreement unenforceable and because the district court did not identify any substantive unconscionability, the court did not reach the issue of procedural unconscionability. (App., *infra* 5a-6a).

Jackson appealed.[2] In a 2-1 decision, the Ninth Circuit Court of Appeals affirmed in part, reversed in

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

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

Specifically, the Ninth Circuit stated, contrary to decisions of this Court that arbitration agreements giving the arbitrator power to decide arbitrability are fully enforceable, as follows:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator.* (App., *infra* 17a-18a; emphasis added).

Judge Hall dissented, stating that the majority's opinion "will send this case (not to mention all those run-of-the-mill ones) to a mini-trial in the district court to determine an agreement's validity based on just the bare allegation of unconscionability, *even*

when the contract language 'clearly and unmistakably' chooses a different forum for that question." (App., *infra* 22a; emphasis in original). Judge Hall observed that the ruling conflicted with that of the First Circuit in *Awuah v. Coverall North America, Inc.*, 554 F.3d 7 (1st Cir. 2009), and was also contrary to the Supreme Court's decisions in *First Options* and *AT&T Technologies*, making it "difficult to understand what the Supreme Court meant when it said that, although the general rule gives the threshold question of arbitrability to courts, parties may provide for the arbitrator to decide the question instead if they do so 'clearly and unmistakably.'" (App., *infra* 22a). While noting that "everyone agrees that unconscionable arbitration agreements should not be enforced," Judge Hall stated, "[a]t issue here is *who* should decide if the agreement is unconscionable when the parties' agreement gives the question to the arbitrator." (App., *infra* 24a; emphasis in original).

No one can, or does, contest that the language of the arbitration agreement in this case clearly and unmistakably provides the arbitrator with exclusive authority to decide all issues regarding the interpretation, applicability, enforceability or formation of the arbitration agreement, including issues of unconscionability. With no relevant factual disputes and with an unequivocal holding by the Ninth Circuit that the clear and unmistakable contractual provision at issue here will not be enforced, this case presents an excellent vehicle to decide the important issue whether the FAA prohibits an arbitrator from deciding unconscionability even if the parties' agreement expressly requires the arbitrator to do so.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts with this Court's Cases.

The Ninth Circuit has established in this case a blanket rule that only courts possess the authority under the FAA to determine whether an arbitration agreement is unconscionable. According to the Ninth Circuit, the parties' clear and unmistakable agreement to assign contract validity determinations to the arbitrator will be disregarded if one of the parties resists arbitration by merely claiming that the agreement is invalid and unenforceable because it is unconscionable. This blanket rule undermines the paramount federal policy in favor of the enforcement of arbitration agreements as written and is contrary to this Court's holdings. The Ninth Circuit's ruling will likely have profound effects throughout the country as many arbitration agreements, including those that incorporate the rules of the American Arbitration Association ("AAA") and most other major arbitration services, require that issues relating to the arbitrator's jurisdiction, which include issues regarding enforceability and thus procedural and substantive unconscionability, are to be decided by the arbitrator.[3]

A. Unconscionability Is a Gateway Issue.

Normally, in deciding whether to compel arbitration, the trial court is charged with determining two "gateway" issues: (1) whether there is a valid and binding agreement between the parties to arbitrate and (2) whether that agreement covers the particular

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[3] Relevant portions of the commercial and employment arbitration rules of AAA and JAMS are reproduced at App., *infra* 37a-38a.

dispute between them. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).[4] "Thus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Id.* Put another way, the broad question of "whether the parties have a valid arbitration agreement at all" is a classic gateway issue normally to be decided by the court. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003).

While this Court has not specifically addressed whether unconscionability is a "gateway" issue, the Court's opinions in *Howsam* and *Bazzle* make clear that the defense of unconscionability, bearing as it does on whether the arbitration agreement is valid and enforceable, must be included as such. The district court and the Ninth Circuit therefore properly treated Jackson's claim of unconscionability as a gateway issue, the resolution of which would determine the validity and enforceability of the agreement to arbitrate the underlying employment dispute. (App., *infra* 4a, 13a-15a).

B. There Is an Exception to the General Rule Regarding Gateway Issues When the Parties Clearly and Unmistakably Agree They Are for the Arbitrator.

This Court has recognized on several occasions that the parties to an arbitration agreement may agree that "gateway" issues normally decided by the trial court can instead be delegated to the arbitrator.

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[4] This case involves the first "gateway" issue only, as it is beyond dispute that the arbitration provision covers the employment-related claims being advanced by Jackson in this case. (App., infra 2a).

Under the FAA, parties may modify generally applicable rules for interpreting and enforcing arbitration agreements. In *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404 (2008), the Court stated, "[Petitioner] is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, *which issues are arbitrable*, along with procedure and choice of substantive law." (Emphasis added.) As explained in *Volt*: "Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479 (citations omitted).

Accordingly, the general rule that courts, not arbitrators, decide the gateway issues may be superseded when "the parties clearly and unmistakably provide otherwise." *AT&T Technologies*, 475 U.S. at 649; *accord First Options*, 514 U.S. at 943 ("The question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."). That the parties here executed an arbitration agreement that "clearly and unmistakably" gave the arbitrator the authority to decide all gateway issues, including the issue of unconscionability, is undisputed, as the Ninth Circuit acknowledged: "In contrast to *First Options*, we are not presented with 'silence or ambiguity on the "who should decide the arbitrability point."' Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator." (App., *infra* 13a).

C. The Ninth Circuit's Departure from Supreme Court Precedent.

Despite this Court's holdings in *AT&T Technologies* and *First Options* that parties are free to have "gateway" issues decided by the arbitrator and not the trial court, and *Hall Street's* recent reaffirmation that the parties may agree on "which issues are arbitrable," the Ninth Circuit refused to enforce the parties' clear and unmistakable delegation of the contract enforceability issue to the arbitrator. The Ninth Circuit held that "where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court." (App., *infra* 15a). The court further stated:

> [W]e hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. This rule applies even where the agreement's express terms delegate that determination to the arbitrator. We hold that where, as 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 is itself enforceable is nonetheless for the court to decide as a threshold matter. (App., *infra* 18a).

Thus, the Ninth Circuit created, without support, a new "exception to the exception" that swallows most of the exception whole. Under the Ninth Circuit's unique formulation, courts presumptively decide "gateway" issues (the general rule), but parties may

agree "clearly and unmistakably" to delegate such issues to the arbitrator (the *AT&T/First Options* exception to the general rule) unless, as the Ninth Circuit now holds, the "gateway" issue delegated is "the question of the arbitration agreement's validity * * *." (App., *infra* 18a). Dissenting Judge Hall thus legitimately questioned what is left of the *AT&T/ First Options* exception in the wake of the majority's decision, since "[t]he exception begins to look very much like the general rule in that courts will be deciding the question of agreement validity under both scenarios, regardless of what the agreement's language might say about the chosen forum for that question." (App., *infra* 22a).

The Ninth Circuit purported to justify its decision to disregard the clear and unmistakable language of the arbitration agreement by its reliance on *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). (App., *infra* 11a-12a). In *Buckeye*, this Court held that when a party challenges the validity of a contract but not specifically its arbitration provisions, the challenge to the contract's validity should be considered by an arbitrator, not a court. *Id.* at 446. The flip side of this rule is that when a party challenges the validity of the arbitration provision itself, apart from the validity of any "container contract," a court normally decides the threshold question of enforceability of the arbitration provision. *Id. See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (claim of fraud in the inducement of the contract as a whole was to be decided by the arbitrator but fraud in the inducement of the arbitration provision itself was for

the court).[5] However, neither *Buckeye* nor *Prima Paint* addressed the issue posed in this case, whether issues regarding the validity of the arbitration agreement can be appropriately delegated to the arbitrator by clear and unmistakable language in the arbitration agreement. The Ninth Circuit's reliance on *Buckeye* stretches the holding in that case beyond its proper limits.[6]

The Ninth Circuit has thus adopted, without support, a blanket rule that a claim that an arbitration agreement is invalid because it is unconscionable

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[5] Unlike *Prima Paint*, this case does not involve any issue regarding the "making of the agreement for arbitration" within the meaning of 9 U.S.C. § 4. *See Prima Paint*, 388 U.S. at 403-04 (allegation of fraud in the inducement goes to the "making" of the agreement). Here, Jackson does not allege fraud in the inducement, nor does he contest the fact that he signed the agreement. He merely alleges that RAC had greater bargaining power than he did and that certain provisions of the Arbitration Agreement were unfair to him. These allegations do not go to the "making" of the Arbitration Agreement. *See Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 710 (5th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (allegations of procedural and substantive unconscionability are not the equivalent of questioning the "making" of the agreement to arbitrate); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 492 n.3 (6th Cir. 2001), *cert. denied*, 535 U.S. 970 (2002) (allegation that arbitration agreement was contract of adhesion did not concern the "making" of the agreement).

[6] The Ninth Circuit also cited to several of its own cases applying *Buckeye*. (App., *infra* 11a). But those cases, unlike this case, do not involve clear and unmistakable contract language giving the arbitrator authority to decide the validity and enforceability of the arbitration agreement. *See, e.g., Davis v. O'Melveney & Myers*, 485 F.3d 1066, 1070-72 (9th Cir. 2007) (arbitration agreement did not give arbitrator authority to decide arbitrability and no party questioned that the determination of validity of the agreement was therefore for the court).

cannot under any circumstances be decided by an arbitrator. This blanket rule is contrary to decisions of this Court holding that the default rule normally requiring "gateway" issues to be decided by the trial court is trumped by a clear and unmistakable agreement that such issues are to be decided by the arbitrator. The Ninth Circuit's decision to create out of "whole cloth" an exception to this Court's holdings for issues of contract validity if there is merely a *claim* of unconscionability creates an important legal issue worthy of this Court's review.

II. There Is a Split Between the Courts of Appeals Over Whether an Arbitrator May Determine Issues of Contract Validity Where the Parties Clearly and Unmistakably So Provide.

The Ninth Circuit's holding in this case that the defense of unconscionability must always be decided by the trial court even when the parties' arbitration agreement clearly and unmistakably states otherwise, is in direct conflict with decisions from the First, Eighth and Eleventh Circuit Courts of Appeals and is inconsistent with the decisions of other courts that fully enforce agreements vesting arbitrators with the authority to decide issues of contract validity. This split between the circuits is deepening and should be resolved by this Court.

A. The Ninth Circuit's Approach Conflicts With the Eleventh and Eighth Circuits' Approaches.

The Ninth Circuit's holding that unconscionability is always for the court and never for the arbitrator is contrary to the Eleventh Circuit's holding in *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432

F.3d 1327 (11th Cir. 2005). In *Terminix*, the party opposing arbitration under the FAA contended that certain restrictions on statutory remedies contained in the arbitration agreement rendered the arbitration agreement invalid and unenforceable. *Id.* at 1329. The Eleventh Circuit stated that such a challenge would ordinarily be decided by the trial court which must "determine whether those remedial restrictions are, in fact, unenforceable—either because they defeat the remedial purpose of another federal statute or because they are *invalid under generally applicable state contract law*" within the meaning of 9 U.S.C. § 2. *Id.* at 1331 (citation omitted; emphasis added). Recognizing that these questions "go to the validity of the arbitration clause itself, which is by default an issue for the court, not the arbitrator," the court nonetheless held that the parties had "contracted around that default rule" by incorporating within their arbitration agreement the rules of the American Arbitration Association. *Id.* at 1333. The court held that, because the AAA rules clearly and unmistakably vested in the arbitrator the authority to decide all issues relating to the validity of the arbitration agreement, it was "unnecessary" for the court to reach these issues. *Id.* at 1332-33. The court therefore enforced the parties' agreement so that the challenge to the remedial restrictions would be decided by the arbitrator and not the court. *Id.* at 1333.[7]

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[7] *See also Regal Lager, Inc. v. Baby Club of Am., Inc.*, No. 1:06-CV-0962-JE, 2006 U.S. Dist. LEXIS 84610, *12-13 (N.D. Ga. Nov. 21, 2006) (citing *Terminix*, court held that a claim that the arbitration agreement was unenforceable due to lack of mutuality was properly for the arbitrator).

By contrast, under the Ninth Circuit's holding in this case, the claim of unconscionability advanced in *Terminix* would have been reserved for the court to decide despite the parties' clear and unmistakable agreement to the contrary. Thus, if the *Terminix* case were brought in the Ninth Circuit and not the Eleventh Circuit, the outcome would have been entirely different.

The Ninth Circuit's approach also conflicts with the Eighth Circuit Court of Appeals' holding in *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8th Cir. 2003). In *Bailey*, the employee plaintiffs contended that the arbitration agreements they had signed were unenforceable because the agreements limited their statutory remedies under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, imposed significantly greater costs upon them than would apply in a judicial forum and did not provide for collective actions as did the FLSA. *Id.* at 822 n.1. However, the arbitration agreement authorized the arbitrator to decide if the agreement was void or voidable and to sever any unenforceable terms. *Id.* at 824 n.3. Despite the existence of this provision, the district court declared the arbitration agreement void and unenforceable because of the procedural terms and remedial limitations to which plaintiffs objected. *Id.* at 823.

The Eighth Circuit reversed, holding that the parties' arbitration agreement "clearly and unmistakably left the issues addressed by the district court to the arbitrators in the first instance." *Id.* at 824. Assuming that the grounds for revocation of the arbitration agreement under section 2 of the FAA, 9 U.S.C. § 2, included the grounds for invalidity posited by plaintiffs, the Eighth Circuit, citing *AT&T* and

First Options, held that the "issues of arbitrability are to be decided by the arbitrator * * *." *Id.*

The Eighth Circuit's decision in *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623 (8th Cir. 2006), also illustrates a fundamental split with the Ninth Circuit. In *Sadler*, the district court refused to compel arbitration of the homeowners' claims against the lender on the grounds that "it would be unconscionable to require [the homeowners] to arbitrate claims" that arose out of the lender's "self-help" in seeking foreclosure. *Id.* at 624. The Eighth Circuit reversed, again citing *First Options*, on the ground that the parties' arbitration agreement required that "[a]ny controversy concerning whether an issue is arbitrable shall be determined by the arbitrator[s]." *Id.* at 624-25.

The Ninth Circuit's holding in this case, that a *mere claim* of unconscionability nullifies clear language giving the arbitrator the power to decide the enforceability of the agreement, stands in stark contrast to the Eighth Circuit's holdings in *Bailey* and *Sadler*. In these cases, the Eighth Circuit gave effect to the clear and unmistakable language of the arbitration agreement as written, just as this Court's precedents require. *See also Fallo v. High-Tech Inst.*, 559 F.3d 874, 878, 880 (8th Cir. 2009) ("We find that the district court erred when it held that it had the authority to determine the question of arbitrability because the parties' incorporation of the AAA Rules is clear and unmistakable evidence that they intended to allow an arbitrator to answer that question.").

B. The Ninth Circuit's Approach Is Also Contrary to Opinions of the First Circuit.

Opinions of the First Circuit Court of Appeals also conflict with the Ninth Circuit's blanket rule that arbitrators have no authority under the FAA to ever decide issues of contract validity in the face of an unconscionability challenge. The First Circuit instead holds that when the parties clearly and unmistakably allow the arbitrator to determine his or her own jurisdiction, as they have done here, then the issue of arbitrability is for the arbitrator to decide. *See Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (International Chamber of Commerce arbitration rules which were incorporated in arbitration agreement "clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose existence and validity is being questioned" (emphasis in original)).

In *Awuah,* the First Circuit adhered to its broad pronouncement in *Apollo Computer* that parties to an arbitration agreement can "contract for the arbitrator to decide challenges to his own authority," but refined the rule in the narrow and unusual context of challenges, not that the terms of the arbitration agreement were unconscionable, but that the arbitral remedy was "illusory." *Awuah*, 554 F.3d at 11-12.[8]

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[8] In deciding to adhere to its ruling in *Apollo Computer*, the First Circuit in *Awuah* noted that "the Supreme Court has not said definitively whether the arbitrator gets to decide [a dispute about the validity of the arbitration clause] where, as here, arbitration rules incorporated in the contract say that the arbitrator should decide whether the arbitration clause is valid." *Awuah*, 554 F.3d at 11. The court speculated that this Court might

In *Awuah*, the First Circuit ruled that the parties' arbitration agreement, which incorporated AAA rules giving the arbitrator authority to decide issues regarding the "existence, scope or validity of the arbitration agreement," met the "clear and unmistakable" standard set down by this Court and was entitled to enforcement. *Id.* at 11. However, despite this ruling, the First Circuit held that the trial court would nonetheless be tasked with the duty to determine whether the opponent of arbitration could meet the "high" standard of establishing "whether the arbitration regime here is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." *Id.* at 13 (emphasis in original).

Significantly, the First Circuit stated that it was not reserving for judicial decision the issue of unconscionability, which "was essentially a fairness issue." *Id.* at 13. Instead, the First Circuit directed the trial court not to determine unconscionability, an issue that the parties' agreement placed squarely within the arbitrator's province, but to engage in a "refocused" and therefore narrower inquiry "as to whether the arbitration remedy in this case is illusory." *Id.* The First Circuit's concern was that, "if the terms for getting an arbitrator to decide the issue are impossibly burdensome," arbitration prevents

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permit the arbitrator to decide the issue based on "*Howsam*'s principle of party autonomy." *Id.* On the other hand, the court speculated that this Court might "conceivably" view "the validity of the arbitration clause as a special case in which challenges should be decided by the judge, either as a matter of policy or because of statutory language." *Id.* This discussion underscores the unsettled state of the law and provides strong support for a grant of the petition in this case.

plaintiffs from vindicating their rights and "is no longer a valid alternative to traditional litigation." *Id.* at 13. Therefore, only if the arbitration remedy was "truly illusory" should the court refrain from ordering that all issues be decided by the arbitrator according to the express terms of the arbitration agreement. *Id.* at 13.

The First Circuit's decision in *Awuah* that arbitration must be ordered unless it was an "illusory" process is wholly consistent with this Court's decision in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). In *Randolph*, the Court refused to declare unenforceable an arbitration agreement that was silent about who would pay the costs of the arbitration. Focusing on whether "the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum" and rejecting "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" the Court placed on the party resisting arbitration the burden of showing the likelihood of incurring prohibitive expense and establishing that the claims at issue were therefore unsuitable for arbitration. *Id.* at 89-90 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), and *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). Absent such a showing, the Court, applying the "liberal federal policy favoring arbitration agreements," held that the arbitration agreement was enforceable. *Randolph*, 531 U.S. at 91, quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Citing *Randolph*, the First Circuit in *Awuah* placed a similar burden on parties resisting arbitration: to demonstrate that "in practical effect they have no real

opportunity to get issues, including unconscionability, resolved in arbitration." *Awuah*, 554 F.3d at 12.

Awuah played a prominent role in the Ninth Circuit's analysis of Jackson's claims herein. Like this case, the plaintiffs in *Awuah* contended that the arbitration agreement was unconscionable. Unlike this case, the *Awuah* plaintiffs also contended that the arbitral remedy was illusory. The Ninth Circuit rejected the First Circuit's view that under the "clear and unmistakable" language of the arbitration agreement all issues regarding the validity of the arbitration agreement were for the arbitrator, including garden-variety unconscionability claims, unless the party resisting arbitration met the high standard of demonstrating "impossibly burdensome" restrictions that rendered the arbitration remedy illusory. (App., *infra* 18a). Recognizing that the First Circuit "was careful to state" that its concern was not with unconscionability, which was "essentially a fairness issue," the Ninth Circuit distinguished its own broad holding in favor of judicial intervention and against arbitral authority from the very narrow holding of the First Circuit, noting that:

> However, while the First Circuit stated that the threshold inquiry it mandated did not encompass unconscionability, we hold that where a party specifically challenges arbitration provisions as unconscionable and hence invalid, whether the arbitration provisions are unconscionable is an issue for the court to determine, applying the relevant state contract law principles. *This rule applies even where the agreement's express terms delegate that determination to the arbitrator.* (App., *infra* 17a-18a; emphasis added).

The Ninth Circuit's holding is thus completely at odds with the First Circuit's more limited view and writes out of the arbitration agreement the clear and unmistakable language giving the arbitrator authority to determine contract enforceability.

In dissent, Judge Hall correctly recognized that, while the majority cited *Awuah*, it "then expands the district court's inquiry" beyond what that case envisioned. (App., *infra* 24a). Judge Hall objected to this expansion of judicial inquiry because it was directly contrary to the language of the arbitration agreement, language that cases like *First Options* hold is fully enforceable. (App., *infra* 23a-24a).

Eschewing the more limited approach to judicial involvement taken by the First Circuit, an approach that gives effect to the words used in the arbitration agreement and respects this Court's precedents supporting party autonomy, the Ninth Circuit's decision strikes out on its own and renders the language of the arbitration agreement a nullity upon a mere claim of unconscionability. The Ninth Circuit's decision is in direct conflict with the First Circuit, a conflict which should be resolved by this Court.[9]

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[9] While not dealing with issues of unconscionability like the First, Eighth and Eleventh Circuits, the Second Circuit has also enforced clear and unmistakable language in arbitration agreements to assign the issue of contract validity to the arbitrator, varying the default rule that would otherwise apply absent the parties' agreement. In *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), the Second Circuit held that where the parties incorporated the AAA rules giving the arbitrator the power to determine his own jurisdiction, including objections to the existence, scope or validity of the arbitration agreement, "it is the province of the arbitrator to decide whether a valid arbitration agreement exists." *Id.* at 211. Since the determination of whether an arbitration agreement is procedurally and/or subs-

C. The Federal Circuit Takes A Different Approach.

In *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006), the Federal Circuit Court of Appeals took a very different approach. In that case, the court concluded that the arbitration agreement established the parties' clear and unmistakable intent to delegate arbitrability decisions to an arbitrator but held that the trial court must nonetheless resolve the opposing party's assertions that the claim of arbitrability was "wholly groundless." The court stated:

> A district court's inquiry in order to be "satisfied" pursuant to section 3 of the FAA begins with the question of who has the power to determine the arbitrability of a dispute between the parties. If the court concludes that the parties clearly and unmistakably intended to delegate the power to an arbitrator, then the court should also inquire as to whether the party's assertion of arbitrability is "wholly groundless."

Id. at 1374.

The Federal Circuit's "wholly groundless" test lies somewhere between the Ninth Circuit's blanket holding herein that "clear and unmistakable" language can be completely disregarded based upon a mere claim of unconscionability and the First Circuit's holding in *Awuah* that arbitrators possess authority to decide arbitrability under such language unless the party opposing enforcement of the arbitra-

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tantively unconscionable is nothing more than a determination of the contract's validity and enforceability, the Second Circuit's holding appears to include unconscionability within its ambit.

tion agreement can meet the high burden of establishing that the arbitral remedy is truly illusory. On the other hand, the Eighth and Eleventh Circuits do not appear to place any limits upon the enforceability of contract language vesting the arbitrator with the power to determine arbitrability. These disparate views show the sharp divisions among the circuits on the important legal issue presented in this petition and argue strongly in favor of this Court's review.[10]

III. State Courts Are Also In Serious Conflict Over This Legal Issue.

It is not only the federal courts that are in conflict over the issue presented. State courts interpreting the FAA are also in conflict. For example, a district of the California Court of Appeals recently held that a clause in an arbitration agreement governed by the FAA giving the arbitrator exclusive authority to

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[10] Federal district courts are also in conflict over the issue presented by this petition. Some courts hold that clear and unmistakable language in the arbitration agreement vests the arbitrator with the authority to determine claims of unconscionability. *See, e.g., Vidrine v. Balboa Ins. Co.*, 597 F. Supp. 2d 687, 690 (S.D. Miss. 2009) (issue of unconscionability for the arbitrator under agreement that authorized arbitrator to decide issues of validity and enforceability); *Pantel v. TMG of Ill., LLC*, No. 07C7252, 2008 U.S. Dist. LEXIS 106745, *9 (N.D. Ill. Nov. 17, 2008) (the same); *Taylor v. Rent-A-Center*, No. 5:06CV2228, 2007 U.S. Dist. LEXIS 57689, *5 (N.D. Ohio Aug. 8, 2007) (the same); *Stewart v. Paul. Hastings, Janofsky & Walker*, 201 F. Supp. 2d 291, 292 (S.D.N.Y. 2002) (arbitrator given authority to determine if agreement was void or voidable). However, this view is not universally shared. *See Allen v. Regions Bank*, No. 2:09cv70KS-MTP, 2009 U.S. Dist. LEXIS 89055, *10-11 (S.D. Miss. Sep. 10, 2009) (question of whether a valid contract exists is for the court despite the existence of a "*First Options* clause" requiring arbitrator to determine questions of arbitrability).

decide enforceability issues is itself unconscionable under California law and is therefore unenforceable. *Ontiveros v. DHL Express (USA), Inc.*, 164 Cal. App. 4th 494, 506 (Cal. App. 2008), *rev. denied*, No. A114848, 2008 Cal. LEXIS 12259 (Cal. Oct. 16, 2008), *cert. denied*, 129 S. Ct. 1048 (2009), following *Murphy v. Check 'N Go of California, Inc.*, 156 Cal. App. 4th 138, 145 (Cal. App. 2007).[11]

But the Texas Court of Appeals held to the contrary, determining that an arbitration clause that reallocates traditional court functions to the arbitrator, including the authority to determine unconscionability, is enforceable under the FAA. *Ernst & Young LLP v. Martin*, 278 S.W.3d 497, 500 (Tex. App. Houston 14th Dist. 2009). Citing *First Options* and *Howsam*, the court decided that the "rule that courts usually decide issues of arbitrability is a default rule" that can be varied by the parties' mutual agreement. *Id.* *See also CitiFinancial Corp., L.L.C. v. Peoples*, 973 So. 2d 332, 340 (Ala. 2007) (Supreme Court of Alabama reversed lower court's ruling that claims were not arbitrable because the arbitration provision clearly and unmistakably established the parties' intent to submit issues of arbitrability to the arbitrator); *Berkley v. H & R Block Eastern Tax Servs., Inc.*, 30 S.W.3d 341, 344 (Tenn. Ct. App. 2000), *rev. denied*, No. E1999-00379-SC-R11-CV, 2000 Tenn.

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[11] However, even within California, there is conflict. *See Parada v. Superior Court*, 176 Cal. App. 4th 1554, 1565 (Cal. App. 2009) (another district of the California Court of Appeals declined to decide "the question whether parties to a contract can agree to have the arbitrator decide unconscionability" while noting California appellate cases finding that "[b]ecause the parties are the masters of their collective fate, they can agree to arbitrate almost any dispute—even a dispute over whether the underlying dispute is subject to arbitration."

LEXIS 621 (Tenn. Nov. 6, 2000), *cert. denied*, 532 U.S. 971 (2001) (where arbitration agreement "specifically states that the parties agreed to arbitrate the question of the validity or enforceability of the arbitration agreement," question of arbitrability was for the arbitrator).

When considered along with the serious conflicts among the federal circuit courts of appeals, these conflicts among state courts interpreting the FAA highlight the extremely unsettled nature of the law.

CONCLUSION

As it stands today, the treatment of arbitration provisions that unmistakably vest arbitrators with the authority to decide all "gateway" issues of arbitrability, including unconscionability, depends on the jurisdiction in which the case is heard, creating a patchwork of varying approaches rather than a uniform and consistent rule of federal law. This Court should grant this petition to bring clarity and certainty to this important legal issue and to determine the enforceability of countless arbitration agreements throughout the United States that either expressly state that arbitrators may decide all issues of arbitrability or which incorporate the rules of arbitration services such as AAA that similarly give arbitrators such broad authority.

The central purpose of the FAA is to enforce agreements to arbitrate according to their express terms. The Ninth Circuit's decision in this case undermines this purpose and invites parties resisting arbitration to avoid the clear terms of the arbitration agreement by simply claiming unconscionability. The Ninth Circuit's decision is fundamentally at odds with prior decisions of this Court holding that parties

can agree to vest the arbitrator with broad authority to decide issues of arbitrability, despite the default rule that courts normally decide these issues. The Ninth Circuit's decision also conflicts with the holdings of cases from the First, Second, Eighth, Eleventh, and Federal Circuit Courts of Appeals, holdings which accord much greater dignity to the language of the parties' agreement authorizing arbitral authority to decide arbitrability and which are more faithful to this Court's precedents.

The current split in the circuits and state courts on the issue presented in this petition should be reconciled into one rule of law, and only this Court has the power to do so. For the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 23, 2009