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 NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*[1]

National Association of Consumer Advocates ("NACA") is a nationwide, non-profit corporation whose over 1,000 members are private and public sector lawyers, legal services and non-profit lawyers, law professors, and law students, whose primary practices or interests involve consumer rights and protection. NACA is dedicated to furthering the ethical and professional representation of consumers. Towards this end, NACA has issued its *Standards and Guidelines for Litigating and Settling Consumer Class Actions*, the revised second edition of which is published at 255 F.R.D. 215 (2009).

NACA also is dedicated to promoting justice for all consumers, and has furthered this interest by appearing as *amicus curiae* in support of consumer interests in cases in federal and state courts throughout the United States. For example, NACA has appeared as *amicus curiae* before this Court in support of consumers in *Cuomo v. Clearing House Ass'n, LLC*, 129 S. Ct. 2710 (2009), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), and *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000), among other cases. In these cases, NACA advocated

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[1] Letters granting blanket consent to the filing of *amicus curiae* briefs have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

for access to justice for consumers by opposing misuses of mandatory arbitration clauses and expansive assertions of federal preemption doctrines that restricted or extinguished consumers' rights.

This case presents a convergence of mandatory arbitration and federal preemption issues with potentially enormous implications for the rights of consumers, employees like Mr. Jackson, and other persons who face mandatory arbitration clauses in their daily lives. Rent-A-Center and its supporting *amici* urge the Court to hold that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, prohibits federal and state courts from deciding a challenge to the validity of an arbitration clause if the clause states that an arbitrator shall decide disputes about its validity. By making arbitration clauses self-enforcing, this new rule would preempt state-law requirements for the existence and enforceability of contracts, notwithstanding the Court's recognition in *Allied-Bruce Terminix Co's, Inc. v. Dobson*, 513 U.S. 265 (1995), and *Doctor's Assoc's, Inc. v. Casarotto*, 517 U.S. 681 (1996), that such state laws would continue to apply to "protect[ ] consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281.

NACA is gravely concerned that, if this position were adopted, there would be no law limiting a company's power to strip consumers and employees of the right to go to court and of the ability to vindicate their legal claims in *any* forum. This is because a self-enforcing arbitration clause would require courts to

give effect to its terms even if they impose prohibitive barriers such as the arbitral forum fees that Jackson challenges here, distant venue requirements, and even designations of arbitral forums whose financial ties to certain industries make a mockery of the notion of arbitration as a system for providing justice. By giving such provisions effect irrespective of any laws prohibiting them, the Court would severely diminish the rights of employees and consumers.

NACA thus submits this brief in support of Jackson urging the Court to reject Rent-A-Center and its *amici*'s proposed interpretive rule authorizing self-enforcing arbitration clauses and the far-reaching consequences that would flow from this. Instead, the Court should affirm the decision below holding that a dispute over whether an arbitration clause is unconscionable or otherwise unenforceable is a threshold matter for a court to decide under the FAA by applying state contract law.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Ninth Circuit correctly held below that, under the FAA, a court must decide a threshold dispute over whether an arbitration clause is enforceable or is unconscionable under applicable state contract law despite the clause's provision for an arbitrator to decide its validity. In urging reversal, Rent-A-Center and its *amici* ask the Court to hold that the FAA allows the

drafter of a mandatory arbitration clause to make the clause self-enforcing simply by writing in that an arbitrator, not a court, shall decide disputes over validity.

This argument is contrary to the letter and purposes of the FAA. The Act provides that written agreements to arbitrate "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. The proposed interpretive rule would make arbitration clauses enforceable *notwithstanding* such grounds for revocation. Moreover, the Court long has recognized that § 2's purpose is to "'place such agreements upon the same footing as other contracts.'" *Allied-Bruce*, 513 U.S. 271 (quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)) (internal citation omitted). The proposed interpretive rule would do just the opposite, creating a federal common law rule of self-enforcement that applies only to arbitration clauses and overrides the state-law requirements applying to all other contracts. Jackson has thoroughly demonstrated how the proposed rule does not comport with the FAA, and NACA joins his arguments in full.

The Court also should reject this proposed interpretive rule because it would, despite the absence of any express command by Congress, preempt much if not all of what remains of state contract law after the Court's prior decisions finding preemption by the FAA. In *Allied-Bruce*, 20 state attorneys

general and a national civil rights organization urged the Court to reconsider its ruling in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), that the FAA applies in state courts and preempts state laws restricting arbitration of claims therein. One of their arguments was that a narrower application of the Act "would better protect consumers asked to sign form contracts by businesses." *Allied-Bruce*, 513 U.S. at 280. In rejecting this argument, the Court explained that § 2 of the Act already "gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision[,]" since "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Id*. at 281 (quoting 9 U.S.C. § 2); *see also Doctor's Assoc's*, 517 U.S. at 686 ("Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2.").

This is precisely the type of contract defense that Jackson asserts here. Rent-A-Center's argument that the FAA bars him from doing so *before its arbitration clause is enforced against him* would betray the promise of *Allied-Bruce* and *Doctor's Associates* by preempting the application of state contract law as a condition for enforcing such clauses. This would fundamentally transform the FAA into a sweeping field-preemptive statute leaving no external law in

place, despite the absence of any directive for this by Congress. Unlike the state laws at issue in those cases, which were deemed to conflict with the FAA because they directly restricted arbitration clauses through rules targeting the very requirement of arbitration, Jackson's argument here that Rent-A-Center's arbitration clause is unconscionable based on its mandatory and one-sided terms employs a generally applicable state-law standard. *See*, *e.g.*, *Tandy Comp. Leasing v. Terina's Pizza, Inc.*, 784 P.2d 7, 8 (Nev. 1989). By prohibiting application of this or any other state-law standard as a requirement for enforcing an arbitration clause, Rent-A-Center and its *amici*'s arguments would leave these clauses subject to no law whatsoever, save for the proposed FAA requirement of a piece of paper with the words "arbitrate" and "validity disputes" written on it. The Court should reject this argument as irreconcilable with the FAA.

Rent-A-Center's *amici* do not deny this effect of their proposed interpretive rule, arguing instead that federal and state courts cannot be trusted to apply state contract law because of their alleged hostility towards arbitration. *See*, *e.g.*, Brief of the Chamber of Commerce of the United States as *Amicus Curiae* Supporting Petitioner (hereafter, "Chamber Brief") at 12-27. They contend that studies, including their own, show that a large number of recent court decisions applying the state-law doctrine of unconscionability involve arbitration clauses, and that this demonstrates that federal and state courts are hostile to

arbitration. *See id*. at 16-18. But these studies demonstrate nothing of the sort.

First, to the extent these studies rely on analysis of "federal appellate decisions" (*id*. at 17), they are skewed because the FAA allows direct interlocutory appeals from orders denying arbitration, 9 U.S.C. § 16(a)(1), but *prohibits* most appeals of orders compelling arbitration, 9 U.S.C. § 16(b)(1)-(4). Thus, cases where district courts enforce arbitration clauses never make it into the Chamber's "independent review" allegedly showing judicial hostility to arbitration.

Second, the Chamber ignores an obvious reason why parties and courts might apply state-law unconscionability arguments more often to arbitration clauses than to other types of contracts. In many federal circuits, this is the only external law that can apply to arbitration clauses. This is because these circuits, *including the court below*, have *expanded* the scope of preemption under the FAA so that arbitration clauses are governed *only* by the common law of contracts, *and all other state law is preempted*. While other types of contracts are regulated by statutes, such as those protecting consumers, employees, or small-business franchise owners against overreaching terms common to those settings, the Ninth Circuit and others have held that the FAA preempts these statutes. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) ("It is possible to construe the Supreme Court's holding in *Doctor's Assocs.* as being limited to state statutes that 'single out'

arbitration provisions, as opposed to statutes that affect both arbitration and litigation; however, the Court's reasoning is based on the principle that *only state law that addresses the enforcement of 'contracts generally' is not preempted by the FAA*.") (emphasis added). Thus, the court held that a state franchisee protection statute's prohibition against contracts placing venue out-of-state was preempted even though it did not target arbitration clauses. *Id*.; *see also Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (FAA preempts state consumer protection statute because it applies "only to consumer contracts"); *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffee Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (FAA preempts franchisee protection statute because it "does not apply to all contracts and does not establish a generally applicable contract defense").

In these circuits, the FAA is deemed to preempt all state law except for the common law of contracts. Thus, individuals trying to challenge overreaching arbitration clause terms dictated by companies have no choice but to argue unconscionability. Yet, the Chamber ignores these courts' over-expansive preemption rulings in its rush to conclude that they are motivated instead by hostility towards arbitration.

In light of the foregoing, the Court should reject Rent-A-Center and its *amici*'s invitation to rewrite the FAA to make arbitration clauses self-enforcing, and thereby preempt whatever state law would

remain applicable to them. Instead, the Court should affirm the decision below as adhering to the letter and purpose of the FAA to place arbitration clauses on the same footing as other contracts in order to facilitate arbitration where it is warranted, while protecting parties against abusive impositions where it is not.

ARGUMENT

I. The FAA Does Not Preempt State Contract Law by Allowing Arbitration Clauses to Be Self-Enforcing.

Rent-A-Center and its *amici*'s proposed rule to make arbitration clauses self-enforcing would eliminate the state-law protection for consumers and employees that the Court recognized in *Allied-Bruce* and *Doctor's Associates*. Rent-A-Center urges the Court to hold that the FAA requires enforcement of any arbitration clause that says an arbitrator decides disputes about the clause's validity, notwithstanding a party's argument that the clause is unconscionable under non-discriminatory state law. This proposed rule, by making arbitration clauses enforceable based solely upon their own terms, would mark a drastic departure from the letter and purposes of the FAA, and transform the Court's prior recognition of implied conflict preemption under the Act into a sweeping field preemption regime that Congress never authorized.

In *Allied-Bruce*, the Court revisited its original holdings in *Southland Corp.* and *Perry v. Thomas*, 482 U.S. 483 (1987), that the FAA applies in state-court cases and preempts state laws that specifically prohibit or limit enforcement of arbitration clauses. Despite the request of 20 state attorneys general and other *amici curiae* to reverse these rulings, the Court did just the opposite. It reaffirmed the FAA's application in state courts and its preemption of state law prohibiting arbitration of claims, and arguably expanded the Act's reach by holding that it applies to the fullest extent allowed by Congress's power to regulate interstate commerce. *Allied-Bruce*, 513 U.S. at 272, 281.

In embracing the broadest possible application of the FAA, the Court recognized and tried to balance the interests of businesses and consumers. With respect to businesses, the Court emphasized in reaffirming *Southland*'s state-court and preemption ruling that, "in the interim, private parties have likely written contracts relying upon *Southland* as authority." *Id*. at 272. With respect to consumers, and by extension employees and other individual parties, the Court rejected the contention that an expansive FAA would leave them vulnerable to pressure to sign form contracts stripping them of their rights. *Id*. at 280. Instead, the Court found that the FAA provided protection against just such an abuse through its express preservation of state law. *Id*. at 281 ("In any event, § 2 gives States a method for protecting

consumers against unfair pressure to agree to a contract with an unwanted arbitration provision.").

By construing § 2's provision for revocation of an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2, as a savings clause for States to apply their general contract laws, *Allied-Bruce* reaffirmed the long-recognized purpose of the Act to place arbitration clauses on equal footing with other contract provisions. 513 U.S. 281; *see also Perry*, 482 U.S. at 492 n.9 ("Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2.") (emphasis in original).

The Court reaffirmed this preemption and savings balance in *Doctor's Associates*. There, the Court held that the FAA preempted a Montana statute that made arbitration clauses unenforceable unless they appeared in underlined capital letters on the first page of a contract. The Court held that, under § 2, "Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Under this framework, the Court again identified state laws that the FAA does not preempt,

echoing *Allied-Bruce* and *Perry* in finding that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id*.; *cf. Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) ("Neither [9 U.S.C. § 3 nor § 4] purports to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them). Indeed § 2 explicitly retains an external body of law governing revocation (such grounds 'as exist at law or in equity').").

Moreover, nothing in the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), allows Rent-A-Center to circumvent the Act's preservation of state contract law by imposing a self-enforcing arbitration clause. Indeed, it would be curious if *First Options* did this since it was decided just four months after *Allied-Bruce* recognized the need for state law to protect consumers against unfair pressure to arbitrate. Regardless, *First Options* does not authorize circumvention of state law. To the contrary, it reaffirms state law's application to arbitration clauses by holding that, "[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts." *Id*. at 944.

The Court, of course, proceeded to recognize that parties may agree that arbitrators can decide

"arbitrability" disputes, but only if "there is 'clear and unmistakable' evidence that they did so." *Id*. (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986)). Even here, though, the Court was describing the ability of parties to an enforceable arbitration clause to have an arbitrator decide the scope of its application to different types of disputes, a circumstance the Court easily found not to be present where one party was "forcefully objecting to the arbitrators deciding their dispute." *Id*. at 946. What *First Options* does not say, however, is that a company can impose an arbitration clause that requires an arbitrator to decide its own validity, thereby circumventing the requirements of state contract law that the Court had recognized only four months earlier to be an essential protection for consumers against unwanted pressure to arbitrate.

Even if there were any ambiguity on this point (which there is not), the Court should reaffirm the vital role of state law in protecting individuals against unfair pressure to arbitrate by rejecting the proposal to allow self-enforcing arbitration clauses. The experience of employees, consumers, and other individuals with mandatory arbitration during the past 15 years demonstrates that judicial application of state contract law and other external substantive law has been critical for preserving these parties' ability to vindicate their legal claims in *any* forum. This is because certain companies, given what they saw as a green light to require arbitration, could not resist the temptation to stack the deck by imposing

requirements for arbitration that, if given effect, would have amounted to a get-out-of-jail-free card.

Among the prohibitive requirements for arbitration that courts have found to be unconscionable under state law or contrary to public policy are provisions requiring individual parties to pay prohibitive costs, travel to a distant out-of-state venue, or present their claims to a biased arbitral forum. *See*, *e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 269 (3d Cir. 2003) (invalidating provision requiring refinery workers to pay $800 to $1,000 per day arbitrator fees if they did not prevail as unconscionable under Virgin Islands contract law); *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1289 (9th Cir. 2006) (*en banc*) (invalidating term requiring single franchise operator in California to arbitrate claim in parent company's home state of Massachusetts as unconscionable); *Walker v. Ryan's Family Steakhouses, Inc.*, 400 F.3d 370, 386 (6th Cir. 2005) (invalidating requirement that employee arbitrate before for-profit forum that received 42% of its gross income from the defendant). Under the approach put forth by Rent-A-Center and its *amici*, these individuals would have had to pay several thousand dollars or travel 3,000 miles or submit to a biased arbitration service their claims that these very requirements were unlawful.

Although these abuses of mandatory arbitration are not universal, they are prevalent enough that the prospect of making arbitration clauses self-enforcing would jeopardize not just the existing FAA legal

framework, but also the very notion of arbitration as a system for providing justice. As Respondent highlights in his principal brief, a State Attorney General's investigation recently brought to light evidence that the largest provider of consumer arbitration in the United States, the National Arbitration Forum ("NAF"), which handled over 200,000 consumer-debt claims in the year 2006 alone, was substantially owned by an entity that also had an ownership interest in one of the country's largest debt-collection law firms, which had a significant volume of cases before the NAF. *See* Carrick Mollenkamp, *Turmoil in Arbitration Empire Upends Credit Card Disputes*, Wall St. J., Oct. 15, 2009, at A14. Again, under the approach proposed by Rent-A-Center and its *amici*, a lender could write its arbitration clause so that the consumer would have to go to NAF to arbitrate his or her claim that NAF's ties to the finance industry render the clause's requirement of arbitration before it unconscionable. Surely, this is not what the Court in *First Options* meant to require.

In sum, the arguments for allowing companies to impose arbitration clauses that are self-enforcing based on their own terms, without respect to applicable state law, do not comport with the letter or purposes of the FAA or with the very notion of private contractual arbitration as a system for providing justice. For each of these reasons, the decision below holding that a court must decide allegations challenging the validity of an arbitration clause before it can give the clause effect should be affirmed.

II. Lower Court Case-Law Applying the FAA Shows Greater Hostility Towards State Law Than Towards Arbitration.

Notwithstanding the foregoing, Rent-A-Center and its *amici* try to justify their proposed end-run around judicial application of state contract law on the grounds that courts cannot be trusted to perform this function because of their alleged hostility towards arbitration. In particular, the Chamber of Commerce's *amicus* brief is up-front about its use of this proposed self-enforcing arbitration clause rule to preempt much of existing judicial application of state contract law in cases where the FAA applies. *See*, *e.g.*, Chamber Brief at 14 ("A distorted unconscionability doctrine has become the weapon of choice for policy-based attacks on arbitration. The protean concept of unconscionability 'provides opportunities for courts skeptical of arbitration to use the doctrine to evade the Supreme Court's pro-arbitration directives while simultaneously insulating their rulings from Supreme Court review.'") (quoting Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008)).

As discussed, the Chamber tries to support these allegations aimed at much of the judicial system by referencing studies, including its own, that purport to show disproportionate application of the state-law doctrine of unconscionability to arbitration clauses, and concluding from this that plaintiffs and federal and state courts are animated by hostility towards

arbitration. *See*, *e.g.,* Chamber Brief at 16-18. Respectfully, the Court should not take the Chamber's "evidence" or its conclusion at face value.

As discussed, the Chamber's evidence is problematic because its own "independent review" of the results of "federal appellate decisions," *id*. at 17, excludes the multitude of federal district court decisions that order arbitration and stay proceedings under 9 U.S.C. § 3. These cases never make it into the Chamber's study because they are not appealable under 9 U.S.C. § 16(b). Since the FAA does, however, allow direct appeals from orders *denying* arbitration, 9 U.S.C. § 16(a)(1), the Chamber's "independent" review of federal appellate case law involves a limited sample skewed towards cases with arbitration clauses whose terms previously were found to be problematic.

This flaw aside, the Court also should reject the Chamber's conclusion that cases applying state law of unconscionability demonstrate a lower-court hostility towards arbitration because this ignores what these courts are actually doing. When lower-court decisions are assessed properly, not by counting them, but by analyzing their substance, a very different picture emerges than the one painted by the Chamber. Indeed, a review of how numerous federal circuit courts have expanded the preemption holdings of *Allied-Bruce* and *Doctor's Associates* reveals a far greater hostility towards state substantive law than towards arbitration.

As discussed, both *Allied-Bruce* and *Doctor's Associates* held that the FAA preempts state laws that directly restrict arbitration clauses based on their requirement of arbitration, but does not pre-empt general state contract law. *Allied-Bruce*, 513 U.S. at 281; *Doctor's Assocs.*, 517 U.S. at 687. Since the Court had previously recognized that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration," *Volt Info. Sciences*, 489 U.S. at 477, these decisions applied principles of implied conflict preemption in finding that the preempted laws would "place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and intent." *Allied-Bruce*, 513 U.S. at 281 (quoting *Volt Info Sciences*, 489 U.S. at 474).

But these decisions finding preemption of state anti-arbitration law and savings of generally applicable state contract law do not address a third type of state law that is more prevalent than either or both of the first two. This is state law, typically statutes, enacted to regulate a specific type of transaction, such as a consumer sale or a business franchise operation. These statutes often contain provisions regulating contract terms, such as a prohibition against contracts waiving statutory rights of consumers or against requiring a franchise operator to travel to a distant venue in the event of a legal dispute. *See* Cal. Civ. Code § 1751 (consumer anti-waiver provision); R.I. Gen. Laws § 19-28.1-14 (franchisee distant-venue prohibition). Under the Court's

implied conflict preemption analysis in *Allied-Bruce* and *Doctor's Associates*, these state laws would not be preempted if applied to arbitration clauses because they do not target the requirement of arbitration. Rather, they address the adjoining types of provisions discussed above that strip parties of statutory rights or impose distant venue requirements, *and thus could not be enforced in any other part of a franchise or consumer contract*.

Despite the absence of any conflict between this type of state law and the FAA, the lower federal courts have repeatedly held that the FAA preempts these laws. The Ninth Circuit, for example, has held that the FAA preempts both state consumer and franchisee protection statutes *wholesale* simply because these statutes do not apply to all contracts. In *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001), the court addressed a carpet-cleaning franchise operator's argument that the parent company's arbitration clause violated the California Franchise Relations Act *not* by requiring arbitration, but by imposing a distant venue outside the franchisee's home state. *Id*. at 888 (addressing Cal. Bus. & Prof. Code § 20040.5). The district court applied the state statute, invalidated the distant venue requirement, and ordered arbitration to take place in California. *Id.* The Ninth Circuit reversed the district court's venue ruling on the grounds that the FAA preempts the state statutory provision. *Id*. at 890.

To reach this conclusion, the Ninth Circuit in effect held that the FAA preempts all state statutory

law that applies to some but not all contracts. The court rejected the argument that *Allied-Bruce* and *Doctor's Associates* only found preemption of state laws prohibiting or singling out arbitration clauses, ruling instead that their "reasoning is based on the principle that *only state law that addressed the enforcement of 'contracts generally' is not preempted by the FAA*," so that the Franchise Relations Act provision is preempted because it "applies only to forum selection clauses and only to franchise agreements; it therefore does not apply to 'any contract.'" *Id*. (emphasis added).

In so ruling, the Ninth Circuit followed the identical analyses of other circuits that previously reached the same conclusion as to the FAA's sweeping preemptive effect. *See*, *e.g.*, *KKW Enterprises, Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999) (holding that FAA preempts Rhode Island Franchise Investment Act because statute's "prohibition of non-Rhode Island venues purports to restrict the enforcement of only one sort of contract provision, forum selection clauses, in only one type of contract, franchise agreements. Under § 2 of the FAA, that is impermissible."); *Doctor's Assoc's, Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (state law prohibiting franchise contracts imposing distant venue "applies to one sort of contract provision (forum selection) in only one type of contract (a franchise agreement). Therefore, to the extent [state law] can be read to invalidate arbitral forum selection clauses in franchise agreements, it is

preempted by the FAA.") (citing *Management Recruiters Int'l v. Bloor*, 129 F.3d 851, 856 (6th Cir. 1997)).

Nor are these rulings limited to the state franchise statute provisions specifically at issue. The Ninth Circuit followed these cases and applied their analysis to hold that the FAA also preempts state consumer protection statutes for exactly the same reason. In *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003), the court addressed a consumer's argument that a phone service's mandatory arbitration clause terms imposing an abridged limitations period for filing suit and prohibiting class action proceedings violated the California Consumer Legal Remedies Act's provision prohibiting "[a]ny waiver by a consumer of the provisions of this title." Cal. Civ. Code § 1751. The Ninth Circuit again held that the FAA preempts the consumer protection statute, not because it prohibits arbitration (it does not), but because it "does not apply to commercial or government contracts, or to contracts formed by nonprofit organizations and other non-commercial groups" and "also is inapplicable to rental agreements." 319 F.3d at 1148. As in the above cases, the Ninth Circuit held that, "[b]ecause the CLRA applies to such a limited set of transactions, we conclude that it is not a law of 'general applicability'" and therefore is preempted. *Id*. (citation omitted).

These circuit court decisions holding that the FAA preempts virtually all state statutory law belie the Chamber of Commerce's accusation that these very same courts somehow are animated by a hostility

towards arbitration. To the extent the Chamber is complaining that parties and courts have used the state-law doctrine of unconscionability disproportionately to challenge arbitration clauses, it has these decisions holding that the FAA preempts virtually *every other state law* to blame. Indeed, the courts issuing these broad preemption rulings appear to have recognized that the primary or sole law they were leaving in place for parties to invoke in challenging unfair pressure and overreaching arbitration clause terms was the doctrine of unconscionability. *See*, *e.g.*, *Bradley*, 275 F.3d at 890 n.7 ("Our holding today is not in conflict with our decision in *Ticknor* [*v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001)], where we held that the FAA did not preempt Montana law governing the unconscionability of adhesion contracts."); *Ting*, 319 F.3d at 1152 (after holding consumer protection statute preempted, applying state law of unconscionability to invalidate same challenged contract terms).

In light of the foregoing, the Court should reject Rent-A-Center's proposed rewriting of the FAA to make arbitration clauses self-enforcing and the main policy argument put forth by its *amici* in support of this new law. The accusation that the court below and other federal and state courts have been motivated by hostility towards arbitration in applying the doctrine of unconscionability is baseless, and is belied by the significant body of circuit court case-law misconstruing this Court's decisions to hold that the FAA preempts virtually all state statutory law. Since the arguments for making arbitration clauses

self-enforcing fail as a matter of law and fact, and of sound public policy, the Court should reject these arguments and affirm the decision below holding that a dispute over whether an arbitration clause is unconscionable or otherwise unenforceable is a threshold matter for a court to decide under the FAA by applying state contract law.

CONCLUSION

For the reasons set forth herein, the United States Court of Appeals for the Ninth Circuit's decision should be affirmed.

Respectfully submitted,

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