

STEVENS, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 09–497

RENT-A-CENTER, WEST, INC., PETITIONER *v.*  
ANTONIO JACKSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT

[June 21, 2010]

JUSTICE STEVENS, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting.

Neither petitioner nor respondent has urged us to adopt the rule the Court does today: Even when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator—the so-called “delegation clause.”

The Court asserts that its holding flows logically from *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), in which the Court held that consideration of a contract revocation defense is generally a matter for the arbitrator, unless the defense is specifically directed at the arbitration clause, *id.*, at 404. We have treated this holding as a severability rule: When a party challenges a contract, “but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract.” *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 446 (2006). The Court’s decision today goes beyond *Prima Paint*. Its breezy assertion that the subject matter of the contract at issue—in this case, an arbitration agreement and nothing more—“makes no difference,” *ante*, at 7, is simply wrong. This written

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arbitration agreement is but one part of a broader employment agreement between the parties, just as the arbitration clause in *Prima Paint* was but one part of a broader contract for services between those parties. Thus, that the subject matter of the agreement is exclusively arbitration makes *all* the difference in the *Prima Paint* analysis.

## I

Under the Federal Arbitration Act (FAA), 9 U. S. C. §§1–16, parties generally have substantial leeway to define the terms and scope of their agreement to settle disputes in an arbitral forum. “[A]rbitration is,” after all, “simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 943 (1995). The FAA, therefore, envisions a limited role for courts asked to stay litigation and refer disputes to arbitration.

Certain issues—the kind that “contracting parties would likely have expected a court to have decided”—remain within the province of judicial review. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79, 83 (2002); see also *Green Tree Financial Corp. v. Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion); *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 649 (1986). These issues are “gateway matter[s]” because they are necessary antecedents to enforcement of an arbitration agreement; they raise questions the parties “are not likely to have thought that they had agreed that an arbitrator would” decide. *Howsam*, 537 U. S., at 83. Quintessential gateway matters include “whether the parties have a valid arbitration agreement at all,” *Bazzle*, 539 U. S., at 452 (plurality opinion); “whether the parties are bound by a given arbitration clause,” *Howsam*, 537 U. S., at 84; and

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“whether an arbitration clause in a concededly binding contract applies to a particular type of controversy,” *ibid.* It would be bizarre to send these types of gateway matters to the arbitrator as a matter of course, because they raise a “question of arbitrability.”<sup>1</sup> See, e.g., *ibid.*; *First Options*, 514 U. S., at 947.

“[Q]uestion[s] of arbitrability” thus include questions regarding the existence of a legally binding and valid arbitration agreement, as well as questions regarding the scope of a concededly binding arbitration agreement. In this case we are concerned with the first of these categories: whether the parties have a valid arbitration agreement. This is an issue the FAA assigns to the courts.<sup>2</sup> Section 2 of the FAA dictates that covered arbitration agreements “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. “[S]uch grounds,” which relate to contract validity and formation, include the claim at issue in this case, unconscionability. See *Doctor’s Associates, Inc. v. Casarotto*, 517 U. S. 681, 687 (1996).

Two different lines of cases bear on the issue of *who* decides a question of arbitrability respecting validity, such as whether an arbitration agreement is unconscionable. Although this issue, as a gateway matter, is typically for the court, we have explained that such an issue can be delegated to the arbitrator in some circumstances. When

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<sup>1</sup>Although it is not clear from our precedents, I understand “gateway matters” and “questions of arbitrability” to be roughly synonymous, if not exactly so. At the very least, the former includes all of the latter.

<sup>2</sup>Gateway issues involving the scope of an otherwise valid arbitration agreement also have a statutory origin. Section 3 of the FAA provides that “upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement,” a court “shall . . . stay the trial of the action until such arbitration has been had.” 9 U. S. C. §3.

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the parties have purportedly done so, courts must examine two distinct rules to decide whether the delegation is valid.

The first line of cases looks to the parties' intent. In *AT&T Technologies*, we stated that "question[s] of arbitrability" may be delegated to the arbitrator, so long as the delegation is clear and unmistakable. 475 U. S., at 649. We reaffirmed this rule, and added some nuance, in *First Options*. Against the background presumption that questions of arbitrability go to the court, we stated that federal courts should "generally" apply "ordinary state-law principles that govern the formation of contracts" to assess "whether the parties agreed to arbitrate a certain matter (including arbitrability)." 514 U. S., at 944. But, we added, a more rigorous standard applies when the inquiry is whether the parties have "agreed to arbitrate arbitrability": "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."<sup>3</sup> *Ibid.* (internal quotation marks and brackets omitted). JUSTICE BREYER's unanimous opinion for the Court described this standard as a type of "revers[e]" "presumption"<sup>4</sup>—one in favor of a judicial, rather than an arbitral, forum. *Id.*, at 945. Clear and unmistakable "evidence" of agreement to arbitrate arbitrability might include, as was urged in *First Options*, a course of conduct demonstrating assent,<sup>5</sup> *id.*, at 946, or, as

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<sup>3</sup>We have not expressly decided whether the *First Options* delegation principle would apply to questions of arbitrability that implicate §2 concerns, *i.e.*, grounds for contract revocation. I do not need to weigh in on this issue in order to resolve the present case.

<sup>4</sup>It is a "revers[e]" presumption because it is counter to the presumption we usually apply in favor of arbitration when the question concerns whether a particular dispute falls within the scope of a concededly binding arbitration agreement. *First Options*, 514 U. S., at 944–945.

<sup>5</sup>In *First Options* we found no clear and unmistakable assent to delegate to the arbitrator questions of arbitrability, given the parties'

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is urged in this case, an express agreement to do so. In any event, whether such evidence exists is a matter for the court to determine.

The second line of cases bearing on who decides the validity of an arbitration agreement, as the Court explains, involves the *Prima Paint* rule. See *ante*, at 6. That rule recognizes two types of validity challenges. One type challenges the validity of the arbitration agreement itself, on a ground arising from an infirmity in that agreement. The other challenges the validity of the arbitration agreement tangentially—via a claim that the entire contract (of which the arbitration agreement is but a part) is invalid for some reason. See *Buckeye*, 546 U. S., at 444. Under *Prima Paint*, a challenge of the first type goes to the court; a challenge of the second type goes to the arbitrator. See 388 U. S., at 403–404; see also *Buckeye*, 546 U. S., at 444–445. The *Prima Paint* rule is akin to a pleading standard, whereby a party seeking to challenge the validity of an arbitration agreement must expressly say so in order to get his dispute into court.

In sum, questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. But questions of arbitrability may go to the arbitrator in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part.

## II

We might have resolved this case by simply applying the

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conduct. Respondents in that case had participated in the arbitration, but only to object to proceeding in arbitration and to challenge the arbitrators' jurisdiction. That kind of participation—in protest, to preserve legal claims—did not constitute unmistakable assent to be bound by the result. *Id.*, at 946–947.

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*First Options* rule: Does the arbitration agreement at issue “clearly and unmistakably” evince petitioner’s and respondent’s intent to submit questions of arbitrability to the arbitrator?<sup>6</sup> The answer to that question is no. Respondent’s claim that the arbitration agreement is unconscionable undermines any suggestion that he “clearly” and “unmistakably” assented to submit questions of arbitrability to the arbitrator. See Restatement (Second) of Contracts §208, Comment *d* (1979) (“[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms”); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O’Connor, J., concurring in judgment and dissenting in part) (“[A] determination that a contract is ‘unconscionable’ may in fact be a determination that one party did not intend to agree to the terms of the contract”).<sup>7</sup> The fact

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<sup>6</sup> Respondent has challenged whether he “meaningfully agreed to the terms of the form Agreement to Arbitrate, which he contends is procedurally and substantively unconscionable.” 581 F.3d 912, 917 (CA9 2009). Even if *First Options* relates only to “manifestations of intent,” as the Court states, see *ante*, at 5–6, n. 1 (emphasis deleted), whether there has been meaningful agreement surely bears some relation to whether one party has manifested intent to be bound to an agreement.

<sup>7</sup> The question of unconscionability in this case is one of state law. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1987). Under Nevada law, unconscionability requires a showing of “both procedural and substantive unconscionability,” but “less evidence of substantive unconscionability is required in cases involving great procedural unconscionability.” *D. R. Horton, Inc. v. Green*, 120 Nev. 549, 553–554, 96 P.3d 1159, 1162 (2004). I understand respondent to have claimed, in accord with Nevada law, that the arbitration agreement contained substantively unconscionable provisions, and was also the product of procedural unconscionability as a whole. See Brief for Respondent 3 (“[Respondent] argued that the clause is procedurally unconscionable

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that the agreement’s “delegation” provision suggests assent is beside the point, because the gravamen of respondent’s claim is that he never consented to the terms in his agreement.

In other words, when a party raises a good-faith validity challenge to the arbitration agreement itself, that issue must be resolved before a court can say that he clearly and unmistakably intended to *arbitrate* that very validity question. This case well illustrates the point: If respondent’s unconscionability claim is correct—*i.e.*, if the terms of the agreement are so one-sided and the process of its making so unfair—it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate. Accordingly, it is necessary for the court to resolve the merits of respondent’s unconscionability claim in order to decide whether the parties have a valid arbitration agreement under §2. Otherwise, that section’s preservation of revocation issues for the Court would be meaningless.

This is, in essence, how I understand the Court of Appeals to have decided the issue below. See 581 F. 3d 912, 917 (CA9 2009) (“[W]e hold that where, as here, a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to

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because he was in a position of unequal bargaining power when it was imposed as a condition of employment”); *id.*, at 3–4 (identifying three distinct provisions of the agreement that were substantively unconscionable); accord, 581 F. 3d, at 917.

Some of respondent’s arguments, however, could be understood as attacks not on the enforceability of the agreement as a whole but merely on the fairness of individual contract terms. Such term-specific challenges would generally be for the arbitrator to resolve (at least so long as they do not go to the identity of the arbitrator or the ability of a party to initiate arbitration). Cf. Restatement (Second) of Contracts §208 (1979) (providing that “a contract or term thereof [may be] unconscionable” and that in the latter case “the remainder of the contract without the unconscionable term” may be enforced).

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the agreement, the threshold question of unconscionability is for the court”). I would therefore affirm its judgment, leaving, as it did, the merits of respondent’s unconscionability claim for the District Court to resolve on remand.

### III

Rather than apply *First Options*, the Court takes us down a different path, one neither briefed by the parties nor relied upon by the Court of Appeals. In applying *Prima Paint*, the Court has unwisely extended a “fantastic” and likely erroneous decision. 388 U. S., at 407 (Black, J., dissenting).<sup>8</sup>

As explained at the outset, see *supra*, at 3–7, this case lies at a seeming crossroads in our arbitration jurisprudence. It implicates cases such as *First Options*, which address whether the parties intended to delegate questions of arbitrability, and also those cases, such as *Prima Paint*, which address the severability of a presumptively valid arbitration agreement from a potentially invalid contract. The question of “Who decides?”—arbitrator or court—animates both lines of cases, but they are driven by different concerns. In cases like *First Options*, we are concerned with the parties’ intentions. In cases like *Prima Paint*, we are concerned with *how* the parties challenge the validity of the agreement.

Under the *Prima Paint* inquiry, recall, we consider whether the parties are actually challenging the validity of the arbitration agreement, or whether they are chal-

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<sup>8</sup>Justice Black quite reasonably characterized the Court’s holding in *Prima Paint* as “fantastic,” *id.*, at 407 (dissenting opinion), because the holding was, in his view, inconsistent with the text of §2 of the FAA, 388 U. S., at 412, as well as the intent of the draftsmen of the legislation, *id.*, at 413–416. Nevertheless, the narrow holding in that case has been followed numerous times, see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440 (2006), and *Preston v. Ferrer*, 552 U. S. 346 (2008), and, as the Court correctly notes today, neither party has asked us to revisit those cases, *ante*, at 6.

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lenging, more generally, the contract within which an arbitration clause is nested. In the latter circumstance, we assume there is no infirmity *per se* with the arbitration agreement, *i.e.*, there are no grounds for revocation of the arbitration agreement itself under §2 of the FAA. Accordingly, we commit the parties' general contract dispute to the arbitrator, as agreed.

The claim in *Prima Paint* was that one party would not have agreed to contract with the other for services had it known the second party was insolvent (a fact known but not disclosed at the time of contracting). 388 U. S., at 398. There was, therefore, allegedly fraud in the inducement of the contract—a contract which also delegated disputes to an arbitrator. Despite the fact that the claim raised would have, if successful, rendered the embedded arbitration clause void, the Court held that the merits of the dispute were for the arbitrator, so long as the claim of “fraud in the inducement” did not go to validity of “*the arbitration clause itself.*” *Id.*, at 403 (emphasis added). Because, in *Prima Paint*, “no claim ha[d] been advanced by Prima Paint that [respondent] fraudulently induced it to enter into the agreement to arbitrate,” and because the arbitration agreement was broad enough to cover the dispute, the arbitration agreement was enforceable with respect to the controversy at hand. *Id.*, at 406.

The *Prima Paint* rule has been denominated as one related to severability. Our opinion in *Buckeye*, set out these guidelines:

“First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” 546 U. S., at 445–446.

Whether the general contract defense renders the entire

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agreement void or voidable is irrelevant. *Id.*, at 446. All that matters is whether the party seeking to present the issue to a court has brought a “discrete challenge,” *Preston v. Ferrer*, 552 U. S. 346, 354 (2008), “to the validity of the . . . arbitration clause.” *Buckeye*, 546 U. S., at 449.

*Prima Paint* and its progeny allow a court to pluck from a potentially invalid *contract* a potentially valid *arbitration agreement*. Today the Court adds a new layer of severability—something akin to Russian nesting dolls—into the mix: Courts may now pluck from a potentially invalid *arbitration agreement* even narrower provisions that refer particular arbitrability disputes to an arbitrator. See *ante*, at 6–7. I do not think an agreement to arbitrate can ever manifest a clear and unmistakable intent to arbitrate its own validity. But even assuming otherwise, I certainly would not hold that the *Prima Paint* rule extends this far.

In my view, a general revocation challenge to a stand-alone arbitration agreement is, invariably, a challenge to the “‘making’” of the arbitration agreement itself, *Prima Paint*, 388 U. S., at 403, and therefore, under *Prima Paint*, must be decided by the court. A claim of procedural unconscionability aims to undermine the formation of the arbitration agreement, much like a claim of unconscionability aims to undermine the clear-and-unmistakable-intent requirement necessary for a valid delegation of a “discrete” challenge to the validity of the arbitration agreement itself, *Preston*, 552 U. S., at 354. Moreover, because we are dealing in this case with a challenge to an independently executed arbitration agreement—rather than a clause contained in a contract related to another subject matter—any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement.<sup>9</sup> They are

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<sup>9</sup>As respondent asserted in his opposition to petitioner’s motion to compel arbitration, “the lack of mutuality regarding the type of claims

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one and the same.

The Court, however, reads the delegation clause as a distinct mini-arbitration agreement divisible from the contract in which it resides—which just so happens also to be an arbitration agreement. *Ante*, at 6–7. Although the Court simply declares that it “makes no difference” that the underlying subject matter of the agreement is itself an arbitration agreement, *ante*, at 7, that proposition does not follow from—rather it is at odds with—*Prima Paint*’s severability rule.

Had the parties in this case executed only one contract, on two sheets of paper—one sheet with employment terms, and a second with arbitration terms—the contract would look much like the one in *Buckeye*. There would be some substantive terms, followed by some arbitration terms, including what we now call a delegation clause—*i.e.*, a sentence or two assigning to the arbitrator any disputes related to the validity of the arbitration provision. See *Buckeye*, 546 U. S., at 442. If respondent then came into court claiming that the contract was illegal as a whole for some reason unrelated to the arbitration provision, the *Prima Paint* rule would apply, and such a general challenge to the subject matter of the contract would go to the arbitrator. Such a challenge would not call into question the making of the arbitration agreement or its invalidity *per se*.

Before today, however, if respondent instead raised a challenge specific to “the validity of the agreement to arbitrate”—for example, that the agreement to arbitrate was void under state law—the challenge would have gone to the court. That is what *Buckeye* says. See 546 U. S., at 444. But the Court now declares that *Prima Paint*’s plead-

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that must be arbitrated, the fee provision, and the discovery provision, so permeate the Defendant’s arbitration agreement that it would be impossible to sever the offending provisions.” App. 45.

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ing rule requires more: A party must lodge a challenge with even greater specificity than what would have satisfied the *Prima Paint* Court. A claim that an *entire* arbitration agreement is invalid will not go to the court unless the party challenges the *particular sentences* that delegate such claims to the arbitrator, on some contract ground that is particular and unique to those sentences. See *ante*, at 8–10.

It would seem the Court reads *Prima Paint* to require, as a matter of course, infinite layers of severability: We must always pluck from an arbitration agreement the specific delegation mechanism that would—but for present judicial review—commend the matter to arbitration, even if this delegation clause is but one sentence within one paragraph within a standalone agreement. And, most importantly, the party must identify this one sentence and lodge a specific challenge to its validity. Otherwise, he will be bound to pursue his validity claim in arbitration.

Even if limited to separately executed arbitration agreements, however, such an infinite severability rule is divorced from the underlying rationale of *Prima Paint*. The notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for any lawyer—or any person—to accept, but this is the law of *Prima Paint*. It reflects a judgment that the “national policy favoring arbitration,” *Preston*, 552 U. S., at 353, outweighs the interest in preserving a judicial forum for questions of arbitrability—*but only when questions of arbitrability are bound up in an underlying dispute*. *Prima Paint*, 388 U. S., at 404. When the two are so bound up, there is actually no gateway matter at all: The question “Who decides” is the entire ball game. Were a court to decide the fraudulent inducement question in *Prima Paint*, in order to decide the antecedent question of the validity of the included arbitration agreement, then it would also, necessarily, decide the merits of the underly-

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ing dispute. Same, too, for the question of illegality in *Buckeye*; on its way to deciding the arbitration agreement's validity, the court would have to decide whether the contract was illegal, and in so doing, it would decide the merits of the entire dispute.

In this case, however, resolution of the unconscionability question will have no bearing on the merits of the underlying employment dispute. It will only, as a preliminary matter, resolve who should decide the merits of that dispute. Resolution of the unconscionability question will, however, decide whether the arbitration agreement *itself* is “valid” under “such grounds as exist at law or in equity for the revocation of any contract.” 9 U. S. C. §2. As *Prima Paint* recognizes, the FAA commits those gateway matters, specific to the arbitration agreement, to the court. 388 U. S., at 403–404. Indeed, it is clear that the present controversy over whether the arbitration agreement is unconscionable is *itself severable* from the merits of the underlying dispute, which involves a claim of employment discrimination. This is true for all gateway matters, and for this reason *Prima Paint* has no application in this case.

#### IV

While I may have to accept the “fantastic” holding in *Prima Paint, id.*, at 407 (Black, J., dissenting), I most certainly do not accept the Court's even more fantastic reasoning today. I would affirm the judgment of the Court of Appeals, and therefore respectfully dissent.