No.

In the Supreme Court of the United States

SCHUMACHER HOMES OF CIRCLEVILLE, INC.,
Petitioner,

v.

JOHN SPENCER AND CAROLYN SPENCER,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has recognized that parties may include a "delegation provision" in their arbitration agreements; such a provision constitutes "an agreement to arbitrate threshold issues concerning the arbitration agreement" itself—issues that this Court has referred to as ones of "arbitrability." *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 68-69 (2010). Under the Federal Arbitration Act, a clear and unmistakable agreement to delegate questions of arbitrability to the arbitrator must be treated as valid and enforceable in the absence of any challenge specifically directed to the delegation provision. *Id.* at 72.

The Supreme Court of Appeals of West Virginia in this case refused to enforce the parties' express agreement that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute." App., *infra*, 7a.

The question presented is:

> Whether the FAA requires enforcement of an express agreement to delegate to the arbitrator all issues regarding "arbitrability" when the party opposing arbitration has not specifically challenged the delegation provision itself.

RULE 29.6 STATEMENT

Schumacher Homes of Circleville, Inc. is a wholly-owned subsidiary of 50 X 20 Holding Company, Inc., a privately-owned Ohio corporation. No publicly-held company owns 10% or more of Schumacher Homes.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Schumacher Homes of Circleville, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App., *infra*, 1a-40a) is reported at 774 S.E.2d 1. The order of the Supreme Court of Appeals of West Virginia denying rehearing (App., *infra*, 41a) is unreported. The order of the Circuit Court of Mason County, West Virginia (App., *infra*, 42a-50a) is unreported but is available at 2014 WL 7800969.

JURISDICTION

The judgment of the West Virginia court was entered on April 24, 2015. App., *infra*, 1a. The West Virginia court denied rehearing on June 15, 2015. App., *infra*, 41a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, Cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

This case arises from the Supreme Court of Appeals of West Virginia's refusal to enforce an agreement to arbitrate "all issues of arbitrability." After making no secret of its disdain for this Court's interpretation of the FAA, which it called "confounding," "eye-glazing," and "absurd," App., *infra*, 5a, 18a, the West Virginia court held that the term "arbitrability" was too "nebulous" to amount to a clear and unmistakable delegation of such questions to the arbitrator and therefore (in its view) could not be enforced, App., *infra*, 24a.

That holding squarely conflicts with this Court's recent decision in *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63 (2010). There can be no question that the Federal Arbitration Act requires enforcement of the delegation provision in this case. Unless the party opposing arbitration challenges the delegation provision specifically—and it is undisputed that respondents did not do so in this case—a court "must treat it as valid under § 2 [of the Federal Arbitration Act], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72.

The "one caveat" is that the parties' agreement to arbitrate "questions of *arbitrability*" must itself be "clear and unmistakable," because courts may not simply "assume that the parties agreed to arbitrate arbitrability." *Rent-A-Center*, 561 U.S. at 67, 69 & n.1 (emphasis added; quotation marks omitted).

In holding that this caveat had not been satisfied because the parties used the concise term "arbitrability," the court below defied this Court's precedents. "Arbitrability" is the very term that this Court has used on at least five occasions to encompass "threshold questions concerning the arbitration agreement," "such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center*, 561 U.S. at 68-69 (citing *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-85 (2002)); accord, *e.g.*, *BG Group, PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014); *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (citing *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion)).

This Court's usage of the term "arbitrability" is long-standing: Over twenty years ago, this Court articulated the question courts must ask in these circumstances: "Did the parties agree to submit the arbitrability question itself to arbitration?" *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995). When, as here, the parties have expressly agreed to arbitrate "all issues regarding the arbitrability of the[ir] dispute," App., *infra*, 7a, the only conceivable answer is yes. As the justice who authored the dissent below put it, "[i]t is, in fact, difficult to discern a single term, phrase, or description of the issues encompassed in the term 'arbitrability'

that better or more clearly describes those issues than the word 'arbitrability' itself." App., *infra*, 36a.

Because the decision below flouts the settled precedents of this Court, it naturally also conflicts with the overwhelming majority of decisions of lower courts across the country as well. Moreover, if allowed to stand, the decision below would embolden state courts hostile to arbitration to circumvent this Court's precedents under the flimsiest of pretenses.

This Court's review is therefore essential. Indeed, the lower court's defiance of this Court's precedents is so clear that the Court may wish to consider summary reversal.

A. The Arbitration Agreement And Delegation Provision

Petitioner Schumacher Homes of Circleville, Inc. (Schumacher Homes) is a home construction company. On June 6, 2011, respondents John Spencer and Carolyn Spencer entered into a purchase agreement with Schumacher Homes calling for the construction of a new home in Mason County, West Virginia. App., *infra*, 43a.

The purchase agreement includes an arbitration provision that respondents separately acknowledged by placing their initials in the margin of the contract where the provision appears. App., *infra*, 31a-32a. The broadly-worded arbitration agreement provides that "any claim, dispute or cause of action, of any nature, * * * arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its agents or subcontractors,

shall be subject to final and binding arbitration." App., *infra*, 32a.

The arbitration is to be conducted "by an arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association." App., *infra*, 32a. The arbitration agreement also states that it shall not be "interpreted as [a] waiver of Schumacher's mechanic's lien rights." App., *infra*, 30a n.2.

Within the arbitration agreement the parties further specified that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute." App., *infra*, 7a, 32a.

B. The Trial Court Proceedings

In July 2013, respondents brought suit against Schumacher Homes in the circuit court of Mason County, alleging that there were defects in the newly built house and that Schumacher Homes had failed to correct them. App., *infra*, 7a, 43a. The complaint alleged fraud, negligence, breach of the duty of good faith, breach of various express and implied warranties, and that Schumacher Homes violated the Magnuson-Moss Warranty Act and several West Virginia statutes. App., *infra*, 43a.

Schumacher Homes filed a motion to compel arbitration of respondents' claims pursuant to the FAA and requested dismissal of the lawsuit. App., *infra*, 7a, 44a. Respondents "responded to the motion by asserting that the court should find that the entire arbitration clause was unconscionable and unenforceable under state contract law." App., *infra*, 7a.

At oral argument on the motion, and in response to respondents' unconscionability arguments, Schumacher Homes alerted the court to the provision within the arbitration agreement delegating to the arbitrator all issues of arbitrability, arguing that "'[i]t's for the arbitrator to decide whether [the arbitration clause is] unconscionable.'" App., *infra*, 8a (alterations the court's); see also App., *infra*, 32a-33a. Respondents "did not mention the delegation provision" at all in response, instead making an "argument centered solely upon" their position that the arbitration agreement as a whole was procedurally and substantively unconscionable. App., *infra*, 8a.

"Without so much as acknowledging the existence of the delegation provision," App., *infra*, 33a, the circuit court accepted a proposed order—without any substantive changes—prepared by respondents' counsel,[1] ruling that the arbitration agreement as a whole was procedurally and substantively unconscionable, App., *infra*, 48a-49a. The court's ruling was based almost entirely on what it perceived to be a lack of mutuality in the arbitration agreement, because of the statement in the agreement that the agreement shall not be interpreted as a waiver of Schumacher Homes's mechanic's lien rights. *Ibid*.

[1] It is common practice for West Virginia circuit courts to direct the parties to submit detailed proposed orders on dispositive or other important motions. See, *e.g.*, *State ex rel. Ford Motor Co.* v. *Nibert*, 773 S.E.2d 1, 4 (W. Va. 2015); *Cain* v. *Kennedy*, 2013 WL 656622, at *2 (W. Va. Feb. 22, 2013); *Conley* v. *Stollings*, 679 S.E.2d 594, 598 (W. Va. 2009) (per curiam).

C. The Decision Below

A divided Supreme Court of Appeals of West Virginia affirmed the order denying arbitration by a 3-2 vote.

1. At the outset, the West Virginia court sharply criticized this Court's jurisprudence interpreting the FAA. Justice Ketchum's opinion for the majority began:

> In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as "a tad oversubtle for sensible application." The Supreme Court sees its arbitration decisions as a series of "clear instruction[s]." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). But experience suggests that the rules derived from these decisions are difficult for lawyers and judges—and nearly impossible for people of ordinary knowledge—to comprehend.

App., *infra*, 5a (footnotes omitted; alterations in original). Reluctantly stating that it was "constitutionally bound to apply" this Court's decisions, however, "no matter how confounding [they] may seem," *ibid.*, the West Virginia court turned to the threshold question before it: Whether the FAA required enforce-

ment of the parties' delegation provision "[n]estled within the arbitration clause," *ibid*.[2]

2. The court below acknowledged that this Court's decisions, especially *Rent-A-Center*, set forth the rules for answering that question. As the court observed, "[t]he United States Supreme Court has repeatedly interpreted the FAA to require questions about the validity of an arbitration provision to be severed and adjudicated separately" from challenges to the contract as a whole. App., *infra*, 12a & n.6 (citing *Preston* v. *Ferrer*, 552 U.S. 346 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).[3]

The court below further recognized this Court's holding that the severability doctrine applies with equal force to a "delegation provision," which "is nothing more than a * * * 'written provision' to 'settle by arbitration' any question about the validity and enforceability of the arbitration agreement." App., *infra*, 16a (quoting *Rent-A-Center*, 561 U.S. at 70). The "take-away rule from *Rent-A-Center*," the court summarized, is that "under the FAA and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator

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[2] Section 2 of the FAA governs arbitration agreements taking the form of a "*written* provision in * * * a contract *evidencing a transaction involving commerce*." 9 U.S.C. § 2 (emphases added). The West Virginia court acknowledged that both of these conditions were satisfied by the arbitration agreement before it. App., *infra*, 9a & n.3.

[3] Here too the court below criticized this Court's precedents, endorsing the *Prima Paint* dissenters' characterization of that decision as "fantastic." App., *infra*, 12a n.6 (quoting *Prima Paint*, 388 U.S. at 407 (Black, J., dissenting)).

the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's state contract law challenge to the arbitration agreement" as a whole. App., *infra*, 17a. Rather, the court acknowledged, "the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the delegation provision itself." *Ibid.*

But in acknowledging these principles, the West Virginia court again went out of its way to criticize this Court's jurisprudence. It referred to the rule set forth in *Rent-A-Center* as "absurd" and as "an ivory-tower interpretation of the FAA that is as dubious in principle as it is senseless in practice." App., *infra*, 18a (quotation marks omitted).

3. After concluding with evident reluctance that it was "constrained" by *Rent-A-Center*, App., *infra*, 18a, the court below nonetheless held that the parties' delegation to the arbitrator of "all issues regarding the arbitrability of the dispute" was unenforceable. App., *infra*, 22a-24a. Asserting that the term "arbitrability" was "nebulous" and "has legally been limited to mean questions about whether a particular dispute is within the scope of an arbitration agreement," the court held that the parties had not "clearly and unmistakably confer[red] authority to the arbitrator to decide the gateway questions regarding the validity * * * and enforceability of the arbitration clause." App., *infra*, 24a (quotation marks omitted).[4]

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[4] The court also chastised petitioner for not invoking the delegation provision in its initial motion to compel arbitration, App., *infra*, 24a-25a, even though, as Justice Loughry noted in dis-

Finally, having concluded that respondents' unconscionability arguments were properly addressed by the trial court, the court below summarily agreed with the trial court's ruling that the arbitration provision as a whole was unconscionable. App., *infra*, 27a n.13.

4. Justices Loughry and Benjamin dissented, with Justice Loughry writing a separate dissenting opinion.

The dissent observed that "[o]nce again, a majority of" the Supreme Court of Appeals of West Virginia had "reveal[ed] its biases and blatant 'judicial hostility' toward arbitration"—this time by "[f]eigning confusion about the term 'arbitrability'" in order to "invalidat[e] a plain and unmistakable agreement between the parties to arbitrate issues regarding whether a claim is subject to arbitration in the first instance." App., *infra*, 29a. In the dissent's view, "the majority's purported 'analysis'" merely reflected its "headlong march toward its ultimate goal of relieving [respondents] of their contractual obligation to arbitrate their claims." App., *infra*, 33a-34a.

The dissent continued that, "[c]ontrary to the majority's position, the parties' delegation provision clearly and unmistakably entails the 'gateway question[] * * * of whether the parties have agreed to arbitrate'" issues of arbitrability. App., *infra*, 35a (quoting *Rent-A-Center*, 561 U.S. at 68-69) (internal quotation marks omitted). Regarding the parties'

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sent, "there was simply no reason to do so" before respondents challenged the enforceability of the arbitration agreement, App., *infra*, 34a. In all events, the majority expressly declined to rest its holding on waiver grounds, instead "assuming [the delegation provision] was properly raised to the circuit court." App., *infra*, 27a.

choice of the word "arbitrability," the dissent noted that this Court "has utilized that precise term itself," including in *Rent-A-Center* and *First Options*. *Ibid*.

The dissent further noted that other courts "have interpreted similar succinct language to evidence a clear and unmistakable intent of parties to delegate the arbitrability decision to an arbitrator and none have found it to be so incapable of comprehension as to render it unenforceable." App., *infra*, 36a (citing *Sadler* v. *Green Tree Servicing, LLC*, 466 F.3d 623, 624 (8th Cir. 2006); *Muigai* v. *IMC Construction, Inc.*, 2011 WL 1743287, at *4 (D. Md. May 6, 2011)). Indeed, the dissent remarked, "[i]t is, in fact, difficult to discern a single term, phrase, or description of the issues encompassed in the term 'arbitrability' that better or more clearly describes those issues than the word 'arbitrability' itself." *Ibid*.

The dissent concluded by lamenting that the court below "has been notoriously chastised by the United States Supreme Court for its failure to uphold valid arbitration agreements and ensure that such agreements are not 'singled out' for hostile treatment or disfavor." App., *infra*, 39a (citing *Marmet*). "The majority's opinion does little to convey that the United States Supreme Court's message was received," the dissent remarked; "in fact, such tortured 'analysis' certainly suggests that a majority of this Court took little heed of it." App., *infra*, 39a-40a.

REASONS FOR GRANTING THE PETITION

The decision below warrants review for several reasons.

First, the West Virginia court defied this Court's settled precedent on the enforceability of delegation

provisions under the FAA. This Court has held in no uncertain terms that a delegation provision contained within an arbitration agreement must be enforced unless the party opposing arbitration specifically challenges the delegation provision. *Rent-A-Center*, 561 U.S. at 72. This case is factually and legally indistinguishable from *Rent-A-Center*: As in *Rent-A-Center*, the party opposing arbitration here claimed only that the arbitration agreement as a whole is unconscionable and unenforceable and never challenged the delegation provision in particular. Thus, under *Rent-A-Center*, the court below was required to "leav[e] any challenge to the validity of the Agreement as a whole for the arbitrator" to decide. *Ibid.*

The West Virginia court's purported distinction between this case and *Rent-A-Center*—that the parties here delegated issues of "arbitrability" while the parties in that case delegated issues of "enforceability" or "validity"—is untenable. In *Rent-A-Center* itself (which involved an unconscionability challenge), this Court used the term "arbitrability" to describe the parties' agreement to arbitrate "threshold issues concerning the arbitration agreement." 561 U.S. at 68-69. This Court has in fact used the term to include challenges to enforceability of arbitration agreements time and time again—making it all the more apparent that, as Justice Loughry recognized in dissent, the majority below was merely "[f]eigning confusion about the term 'arbitrability'" in service of "its ultimate goal of relieving [respondents] of their contractual obligation to arbitrate their claims." App., *infra*, 29a, 33a.

Second, the West Virginia court's manufactured end-run around the FAA and this Court's precedents

directly conflicts with the decisions of numerous other courts that have recognized that parties' delegation of "arbitrability" issues is clear and unmistakable and must be enforced. The decision below, which held that the term "arbitrability" is too "nebulous" to be enforced, is irreconcilable with these cases. App., *infra*, 24a.

Third, the lower court's unconscionability ruling does not insulate from correction by this Court the clear failure to apply *Rent-A-Center*. As the dissenting justices below explained, the delegation clause assigned the unconscionability issue to the arbitrator, and "had the majority properly enforced the delegation provision, which strips the circuit court of its ability to determine unconscionability," then the "unconscionability ruling would be rendered moot." App., *infra*, 29a-30a.

Fourth, the decision below undermines the strong federal policy favoring enforcement of arbitration provisions as written. Congress intended the FAA to allow parties to structure private dispute resolution as they see fit—including the ability to delegate to the arbitrator threshold questions about the validity or enforceability of the arbitration provision. But it is clear that the West Virginia court was unwilling to accept this bedrock principle. Rather, its decision is an undisguised attempt to carve out valid delegation provisions from the FAA, motivated by the very judicial hostility to arbitration that the FAA was enacted to eliminate.

Moreover, this is just the latest effort by the West Virginia Supreme Court of Appeals—along with certain other state courts—to circumvent this Court's precedents, particularly in the arbitration context. See, *e.g.*, *Nitro-Lift Technologies, L.L.C.* v.

Howard, 133 S. Ct. 500 (2012) (per curiam); *Marmet*, 132 S. Ct. 1201. That trend should not be permitted to continue unaddressed. Indeed, as Justice Loughry observed, the decision below "does little to convey that [this] Court's message" in prior cases like *Marmet* "was received." App., *infra*, 39a. Review and reversal of the decision below is warranted to send a clear message and preserve the integrity of this Court and its precedents.

A. The Decision Below Conflicts With The FAA And Defies This Court's Precedents.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (quotation marks omitted); see also *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011)).

This Court has thus stated repeatedly that the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 479 (1989); see also *Doctor's Assocs.* v. *Casarotto*, 517 U.S. 681, 688 (1996); *First Options*, 514 U.S. at 947; *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995).

Reflecting the principle that arbitration is a matter of contract, the FAA also affords parties broad

latitude to allocate issues to an arbitrator. This Court has held that although gateway questions of arbitrability are presumptively for the court to decide, they may be entrusted to the arbitrator if the parties "clearly and unmistakably provide" for that assignment. *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986); see also *Howsam*, 537 U.S. at 83. As the Court has explained, "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. "[W]hen the parties submit[] that matter to arbitration" by express agreement, the court "must defer to an arbitrator's arbitrability decision." *Ibid.*

In order to simplify and expedite the dispute-resolution process, parties to arbitration agreements often agree to arbitrate not only their disputes on the merits, but also gateway questions of "arbitrability." *Rent-A-Center*, 561 U.S. at 68-69. These gateway questions include "'whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.'" *Oxford Health Plans*, 133 S. Ct. at 2068 n.2 (quoting *Bazzle*, 539 U.S. at 452). In some circumstances, parties have (quite reasonably) concluded that litigating in court over the validity and scope of their agreement would squander (or at least dissipate) the primary benefits of arbitration: "efficient, streamlined procedures tailored to the type of dispute." *Concepcion*, 131 S. Ct. at 1749.

Because "arbitration is a matter of contract" (*Rent-A-Center*, 561 U.S. at 69), when parties agree to delegate gateway questions to an arbitrator rather than a court, the FAA requires courts to give full effect to the delegation. See, *e.g.*, *id.* at 69-72 (enforc-

ing provision delegating to arbitrator the "authority to resolve any dispute relating to the * * * enforceability * * * of this Agreement," and compelling arbitration of plaintiff's unconscionability defense); see also *First Options*, 514 U.S. at 943. "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

Finally, because a delegation provision is just a kind of arbitration agreement, the Court's longstanding "severability" doctrine applies equally to its enforcement. This Court has repeatedly held that "'[a]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.'" *Rent-A-Center*, 561 U.S. at 70-71 (quoting *Buckeye*, 546 U.S. at 445); accord, *e.g.*, *Nitro-Lift*, 133 S. Ct. at 503; *Preston*, 552 U.S. at 349; *Prima Paint*, 561 U.S. at 403-04. Thus, a party must "challenge[] the validity under § 2 [of the FAA] of the precise agreement to arbitrate at issue"; "a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center*, 561 U.S. at 70-71.

The Court further explained that it "makes no difference" whether "the underlying contract" being challenged "is itself an arbitration agreement," because "[a]pplication of the severability rule does not depend on the substance of the remainder of the contract." *Rent-A-Center*, 561 U.S. at 72. "[U]nless [the party opposing arbitration] *challenge[s] the delegation provision specifically*, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leav-

ing any challenge to the validity of the Agreement as a whole for the arbitrator." *Ibid.* (emphasis added).[5]

2. The court below purported to recognize these principles. See App., *infra*, 9a-22a. But it proceeded to ignore them by holding that, notwithstanding this Court's precedents and respondents' failure to even mention (much less challenge) the delegation provision, the parties' delegation to the arbitrator of "all issues regarding the arbitrability of the[ir] dispute" was not clear and unmistakable. App., *infra*, 22a-24a.

As a matter of law, the ambiguity that the court below purported to find in the term "arbitrability" does not exist—which likely is why respondents never advanced the argument themselves. Far from being "nebulous" or "legally * * * limited to mean questions about whether a particular dispute is within the scope of an arbitration agreement," App., *infra*, 24a, "arbitrability" is the *very term used by this Court* to encompass challenges—like the one raised by respondents here—to the validity or enforceability of an arbitration agreement.

In *Rent-A-Center* itself, the parties had agreed to arbitrate "any dispute relating to the * * * enforcea-

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[5] Respondents have not challenged the formation—*i.e.*, the making and signing—of any of the agreements at issue. It is undisputed that respondents entered into the purchase agreement and separately acknowledged by signing their initials the paragraph containing the arbitration agreement. App. *infra*, 7a, 31a-32a. "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,'" *Rent-A-Center*, 561 U.S. at 70 n.2, and as in *Rent-A-Center* and *Buckeye*, here the Court need "address only the former." *Ibid.*

bility" of the arbitration agreement. 561 U.S. at 66. This Court recognized that this was an example of an "agree[ment] to arbitrate 'gateway' questions of '*arbitrability*.'" *Id.* at 68-69 (emphasis added). The conclusion of the court below that "arbitrability" is limited to questions of scope to the exclusion of disputes over enforceability is thus completely irreconcilable with this Court's use of the very same term in *Rent-A-Center*.

The characterization of "arbitrability" in *Rent-A-Center* was hardly an aberrant use of the term. Just last year, this Court reiterated that "disputes about 'arbitrability'" "include questions such as 'whether the parties are bound by a given arbitration clause,'" not just "'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Group*, 134 S. Ct. at 1206 (quoting *Howsam*, 537 U.S. at 84). Two years ago, the Court similarly observed that questions of "'arbitrability' * * * 'include certain gateway matters, such as whether parties have a valid arbitration agreement at all *or* whether a concededly binding arbitration clause applies to a certain type of controversy.'" *Oxford Health Plans*, 133 S. Ct. at 2068 n.2 (emphasis added) (quoting *Bazzle*, 539 U.S. at 452). As the Court held in *Howsam*, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability.'" 537 U.S. at 84 (citing *First Options*, 514 U.S. at 943-46).[6]

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[6] Remarkably, the court below viewed this language from *Howsam* as "legally * * * limit[ing]" the term "arbitrability" to disputes over the scope of an arbitration provision. App., *infra*, 23a-24a. But the obvious error in that reading is revealed by the very next sentence in the *Howsam* opinion, which explains that questions of arbitrability *also* include "a disagreement

Finally, the court's conclusion that the delegation provision was ambiguous was based on the type of naked hostility to arbitration that this Court has repeatedly declared out of bounds under the FAA. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 266 (2009); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Indeed, the majority below did not even bother to hide its disdain for this Court's interpretations of the FAA. In summarily reversing an opinion authored by the Justice who wrote the majority opinion in this case, this Court recently criticized the West Virginia court's failure to adhere to the "clear instruction in the precedents of this Court." *Marmet*, 132 S. Ct. at 1203. But the decision below characterizes this Court's precedents as "complicated," "confounding," "eye-glazing," and "difficult for any lawyer—or any person—to accept"—just in the opinion's opening paragraph. App., *infra*, 5a & n.2 (quotation marks omitted). With respect to *Rent-A-Center*—the governing decision here—the court below further disparaged this Court's holding as "absurd" and as "an ivory-tower interpretation of the FAA 'that is as dubious in principle as it is senseless in practice.'"

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about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." 537 U.S. at 84. If "a gateway dispute about whether the parties are bound by" an arbitration agreement was in fact a dispute over scope, as the court below would have it, there would have been no reason for this Court to differentiate such disputes from the disputes over scope described in the following sentence. See also, *e.g.*, *BG Group*, 134 S. Ct. at 1206; *Oxford Health Plans*, 133 S. Ct. at 2068 n.2.

App., *infra*, 18a (quoting *Young* v. *United Parcel Service, Inc.*, 135 S. Ct. 1338, 1361 (2015) (Scalia, J., dissenting)).

As Justice Loughry rightly summarized, "[o]nce again, a majority of [the West Virginia] Court reveal[ed] its biases and blatant 'judicial hostility' toward arbitration by invalidating a plain and unmistakable agreement between the parties to arbitrate issues regarding whether a claim is subject to arbitration in the first instance." App., *infra*, 29a.

That approach is unacceptable. "'[O]nce the Court has spoken, it is the duty of other courts to respect [the Court's] understanding of the governing rule of law.'" *Nitro-Lift*, 133 S. Ct. at 503 (quoting *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). The West Virginia court's outright defiance of this Court's precedents cries out for this Court's intervention here.

3. Respondents cannot credibly argue that this clear conflict with *Rent-A-Center* is immune from this Court's review because the West Virginia court's ruling on unconscionability is an independent and adequate state-law ground for the decision below.

If the parties' delegation provision had been properly enforced under the FAA, then the courts would not have addressed unconscionability at all: The purported unconscionability of the arbitration agreement was for the arbitrator, not the courts, to decide. See *Rent-A-Center*, 561 U.S. at 72-74 (refusing to entertain unconscionability arguments directed at the arbitration provision as a whole). As Justice Loughry put it in his dissent below, "had the majority properly enforced the delegation provision, which strips the circuit court of its ability to deter-

mine unconscionability, the circuit court's unconscionability ruling would be rendered moot." App., *infra*, 29a-30a. A decision by this Court directing enforcement of the delegation provision would therefore necessarily vitiate the court's unconscionability ruling.

Moreover, although the merits of respondents' unconscionability arguments are not before this Court, Justice Loughry's dissent explains convincingly why the conclusion reached by the West Virginia circuit court on that point was erroneous as well. App., *infra*, 30a n.2. Thus, there is no reason to think that an arbitrator would agree with the court below that the arbitration agreement is unconscionable.

B. The Decision Below Conflicts With Numerous Decisions Of Lower Courts.

In light of the patent incompatibility of the decision below with this Court's precedents, it should be no surprise that the West Virginia court's insistence that the FAA does not require enforcement of an agreement to delegate to the arbitrator all issues of "arbitrability," App., *infra*, 22a-24a, conflicts with numerous decisions of courts around the country. These other courts have held, in conformity with this Court's decisions, that parties who have agreed to arbitrate questions of "arbitrability" have clearly and unmistakably delegated to the arbitrator the authority to decide challenges to the validity or enforceability of the parties' arbitration agreement as a whole.

The Eighth Circuit has held that a substantially similar agreement to arbitrate "[a]ny controversy concerning whether an issue is arbitrable" clearly and unmistakably delegated enforceability issues to

the arbitrator. *Sadler*, 466 F.3d at 624-25. Applying this Court's holding in *First Options*, the Eighth Circuit correctly identified its task as "look[ing] to the Agreement to see if the parties affirmatively addressed the question of who decides arbitrability." *Id.* at 625 (citing *First Options*, 514 U.S. at 943). The court had little difficulty "conclud[ing] that the answer must be 'yes'" under the "unequivocal agreement to have the arbitrator resolve '[a]ny controversy concerning whether an issue is arbitrable.'" *Ibid.*; cf. *Perez* v. *Qwest Corp.*, 883 F. Supp. 2d 1095, 1114 (D.N.M. 2012) (contrasting the purported delegation provision before it with the "more specific" one in *Sadler*, which "expressly refers to arbitrability").

Several federal district courts have enforced similar delegation provisions. See, *e.g.*, *Swinerton Builders* v. *Am. Home Assurance Co.*, 2013 WL 2237885, at *4-5 (N.D. Cal. May 21, 2013) (finding clear and unmistakable delegation in agreement that the arbitrators have "exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability"); *Nat'l Union Fire Ins. Co.* v. *Las Vegas Professional Football Ltd. P'ship*, 2009 WL 4059174, at *5 (S.D.N.Y. Nov. 17, 2009) (same), aff'd, 409 F. App'x 401 (2d Cir. 2010); *Raytheon Co.* v. *Nat'l Union Fire Ins. Co.*, 306 F. Supp. 2d 346, 356-57 (S.D.N.Y. 2004) (same); see also, *e.g.*, *Considine* v. *Brookdale Senior Living, Inc.*, 2015 WL 4999897, at *5 (D. Conn. Aug. 21, 2015) (same for agreement to arbitrate "any dispute concerning the arbitrability of any such controversy or claim"); *Int'l Union* v. *Dallas Airmotive, Inc.*, 2015 WL 196300, at *4 (W.D. Mo. Jan. 15, 2015) (same for agreement that "[d]ecision on the issue or issues to be heard or the arbitrability shall be made by the arbitrator before either party may proceed with the merits of the case"); *Muigai*,

2011 WL 1743287, at *4 (same for agreement that "the Arbitrator(s) shall have the exclusive power to determine issues of arbitrability").

In addition, the Fourth Circuit has observed on multiple occasions that "[t]hose who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the *arbitrability* of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect." *Peabody Holding Co.* v. *United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 102 (4th Cir. 2012) (emphasis added) (quoting *Carson* v. *Giant Food, Inc.*, 175 F.3d 325, 330-31 (4th Cir. 1999)). In other words, whether a delegation provision like the one in Schumacher Homes's arbitration agreement is enforceable in West Virginia depends entirely upon whether the motion to compel arbitration is pending in federal or state court. Cf. *DirecTV, Inc.* v. *Imburgia*, 135 S. Ct. 1547 (2015) (granting review when the California state courts and the Ninth Circuit had conflicting readings of equivalent contract language).

Similarly, the Fifth Circuit recently remarked that "an arbitration agreement need not recite verbatim that the 'parties agree to arbitrate arbitrability' in order to manifest 'clear and unmistakable' agreement." *Houston Refining, L.P.* v. *United Steel, Paper & Forestry, Rubber, Mfg.*, 765 F.3d 396, 410 n.28 (5th Cir. 2014). Accordingly, in that court's view, doing what the parties did here—agreeing "verbatim" to arbitrate "arbitrability"—is in fact the *clearest* form of delegation. That common-sense view was also echoed by the dissent below: "It is, in fact, difficult to discern a single term, phrase, or description of the issues encompassed in the term 'arbitrability' that

better or more clearly describes those issues than the word 'arbitrability' itself." App., *infra*, 36a.

Given the deep chasm separating the decision below from the other jurisdictions that have addressed this precise issue—*i.e.*, whether the FAA requires enforcement of an agreement to arbitrate issues of "arbitrability," cf. App., *infra*, 22a-24a—certiorari and reversal are plainly warranted.

C. The Decision Below Is Exceptionally Important.

Finally, review and reversal by this Court is critical, because without examples of this Court's intervention to point to, lower court's departures from federal law would surely multiply.

1. This Court repeatedly has intervened when state courts have ignored or refused to apply controlling precedents interpreting the FAA. This Court intervention is especially warranted in the arbitration context: Because "[s]tate courts rather than federal courts are most frequently called upon to apply the * * * FAA," "[i]t is a matter of great importance * * * that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift*, 133 S. Ct. at 501. Indeed, this Court has granted certiorari and summarily reversed or vacated the judgment below in at least four such state-court cases.

In *Marmet*, this Court summarily vacated and remanded where "the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." 132 S. Ct. at 1202; see also *id.* at 1203 ("The West Virginia

court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In *Nitro-Lift*, this Court summarily vacated the Oklahoma Supreme Court's decision refusing to apply this Court's severability doctrine and instead declaring the underlying contract containing the arbitration provision null and void—a decision which blatantly "disregard[ed] this Court's precedents on the FAA." 133 S. Ct. at 503. The Court further reminded lower courts that "'[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Ibid.* (quoting *Rivers*, 511 U.S. at 312).

In *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam), this Court summarily vacated the Florida court's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter* [*Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985)]."

Finally, in *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam), this Court summarily reversed the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995).

2. The West Virginia Supreme Court of Appeals has with disturbing frequency ignored, sidestepped, or outright rejected this Court's holdings on questions of federal law in other contexts as well. See *Youngblood* v. *West Virginia*, 547 U.S. 867, 870

(2006) (per curiam) (summarily vacating and remanding decision of West Virginia Supreme Court of Appeals that did not consider a "clearly presented * * * federal constitutional *Brady* claim"); *Flippo* v. *West Virginia*, 528 U.S. 11, 11-12 (1999) (per curiam) (summarily reversing denial of motion to suppress evidence seized in warrantless search because it squarely contradicted two-decades-old Supreme Court precedent, where West Virginia Supreme Court of Appeals had denied discretionary review); *National Mines Corp.* v. *Caryl*, 497 U.S. 922, 924 (1990) (per curiam) (summarily reversing trial court's decision that "failed to consider the constitutionality of the taxes assessed against National in light of [this Court's] decision in *Armco*" *Inc.* v. *Hardesty*, 467 U.S. 638 (1984), after denial of review by Supreme Court of Appeals); *Ashland Oil, Inc.* v. *Caryl*, 497 U.S. 916, 921 (1990) (per curiam) (summarily reversing decision of Supreme Court of Appeals on similar grounds); *U.S. Dep't of Labor* v. *Triplett*, 494 U.S. 715, 726-27 (1990) (reversing finding that federal limitations on attorney fees in black-lung cases violated due process, and noting that "[i]t is not clear to us what the West Virginia Supreme Court of Appeals meant by what it described as its 'independent basis' for finding a due process violation" that was irreconcilable with this Court's precedent).

* * *

Emboldened by the decision below, other courts hostile to arbitration might follow the West Virginia court's lead and manufacture untenable evasions of the FAA and this Court's precedents. If the decision below is allowed to stand, it would replace the FAA's uniform federal policy favoring arbitration—a policy

that understandably has invited reliance on the part of parties and affected how they have structured their contractual relationships with one another—with an uneven patchwork of "one-off," unprincipled carve-outs from the FAA that differ from state to state.

The Court should grant review and reverse the judgment below, to send a needed reminder that federal law as interpreted by this Court remains the supreme law of the land no matter which court is tasked with applying the law.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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SEPTEMBER 2015

APPENDICES

APPENDIX A

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2015 Term
No. 14-0441

SCHUMACHER HOMES OF CIRCLEVILLE, INC.,
a foreign corporation,
Defendant Below, Petitioner

v.

JOHN SPENCER
and CAROLYN SPENCER,
Plaintiffs Below, Respondents

Appeal from the Circuit Court of Mason County
The Honorable David W. Nibert, Judge
Civil Action No. 13-C-116

AFFIRMED

Submitted: March 11, 2015
Filed: April 24, 2015

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JUSTICE KETCHUM delivered the Opinion of the Court.

JUSTICE BENJAMIN dissents, and reserves the right to file a separate opinion.

JUSTICE LOUGHRY dissents, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syllabus Point 1, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013).

2. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract." Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012).

3. "Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of

an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause. However, the trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract." Syllabus Point 4, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W.Va. 125, 717 S.E.2d 909 (2011).

4. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syllabus Point 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

5. A "delegation provision" is a clause, within an agreement to arbitrate, which explicitly states that the parties to the agreement give the arbitrator the sole power to decide the validity, revocability or enforceability of the arbitration agreement under general state contract law.

6. Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevoca-

ble or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's state contract law challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the delegation provision itself.

7. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement." *Syllabus Point 9, Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012).

8. Under the Federal Arbitration Act, 9 U.S.C. § 2, there are two prerequisites for a delegation provision to be effective. First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself not be invalid, revocable or unenforceable under state contract law.

Justice Ketchum:

In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses that is politely described as "a tad oversubtle for sensible application."[1] The Supreme Court sees its arbitration decisions as a series of "clear instruction[s]." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1203 (2012). But experience suggests that the rules derived from these decisions are difficult for lawyers and judges – and nearly impossible for people of ordinary knowledge – to comprehend.[2] Still, no matter how confounding the Supreme Court's arbitration decisions may seem, we are constitutionally bound to apply them to arbitration clauses that involve interstate transactions.

We now attempt to peel back a few of the onion layers of the Supreme Court's arbitration decisions. We are asked to apply the Supreme Court's rulings to a construction contract which contains an arbitration clause. Nestled within the arbitration clause is what the Supreme Court terms a "delegation provision." Under the Federal Arbitration Act, the validity and enforceability of the arbitration clause is normally determined by a circuit court applying state

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[1] Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. 435, 519 (2011).

[2] The rulings of the Supreme Court in this field are "difficult for any lawyer—or any person—to accept." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 87, 130 S.Ct. 2772, 2787 (2010) (Stevens, J., dissenting).

contract law. However, the contracting parties may incorporate a delegation provision into the arbitration clause saying that the validity and enforceability of the arbitration clause under state contract law will be decided by the arbitrator. We are specifically asked to enforce an alleged delegation provision in the parties' construction contract.

When a party invokes a delegation provision, United States Supreme Court cases interpreting the Federal Arbitration Act require that the language of the written delegation provision reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. The burden is on the party who opposes enforcement of the delegation provision to challenge the provision in the trial court. The party opposing enforcement must show why under precepts of state contract law that the delegation provision itself is invalid, revocable or unenforceable.

The Circuit Court of Mason County entered an order refusing to enforce the arbitration clause that contained a delegation provision after finding the arbitration clause was unconscionable. On appeal of that order, we find that the delegation provision does not clearly and unmistakably reflect an intention by the parties to assign to the arbitrator all questions about the enforceability of the arbitration clause. As set forth below, we affirm the circuit court's order.

I.
FACTUAL AND PROCEDURAL BACKGROUND

In June 2011, plaintiffs John and Carolyn Spencer signed a form contract with defendant Schumacher Homes of Circleville, Inc. ("Schumacher"), for

the construction of a house in Milton, West Virginia. The contract contains an arbitration clause by which the parties agreed "that any claim, dispute or cause of action, of any nature . . . shall be subject to final and binding arbitration by an arbitrator[.]"

Within the arbitration clause is a provision that Schumacher contends is a "delegation provision" saying that the parties agreed to delegate, from the courts to an arbitrator, any question about the enforceability of the arbitration clause. A delegation provision is a written agreement, usually nestled within the arbitration clause, to vest the arbitrator with sole authority to resolve any dispute over the validity, revocability or enforceability of the arbitration clause under state contract law. The provision in Schumacher's form contract that it alleges is a delegation provision states:

> The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.

In July 2013, the plaintiffs brought suit against Schumacher in the circuit court claiming that there were defects in the newly-built house. In August 2013, Schumacher filed a motion asking the circuit court to dismiss the plaintiffs' suit and to compel the plaintiffs to participate in arbitration. Neither Schumacher's motion nor its legal memorandum supporting the motion made any mention of the delegation provision. The plaintiffs responded to the motion by asserting that the court should find that the entire arbitration clause was unconscionable and unenforceable under state contract law.

Six months later, at a hearing in February 2014, Schumacher asserted for the first time that the arbitration clause contained a delegation provision. Oral-

ly (and not in writing), Schumacher argued to the circuit court that, because of the delegation provision, the court had no power to weigh the unconscionability of the arbitration clause. Schumacher stated that upon invocation of a delegation provision, "that's really the end of the inquiry" and "[i]t's for the arbitrator to decide whether [the arbitration clause is] unconscionable." The plaintiffs, apparently caught off guard, did not mention the delegation provision in their oral argument to the circuit court. The plaintiffs' argument centered solely upon the unconscionable aspects of the arbitration clause.

In an order dated March 6, 2014, the circuit court denied Schumacher's motion to dismiss and compel arbitration. The circuit court found that, as a whole, the arbitration clause was procedurally and substantively unconscionable. The circuit court's order did not address the delegation provision.

Schumacher now appeals the circuit court's order.

II.
STANDARD OF REVIEW

"An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syllabus Point 1, *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013). Because the circuit court's ruling denied Schumacher's motion to dismiss, we review the circuit court's order *de novo*. *See* Syllabus Point 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998) ("When a party, as part of an appeal from a final judgment, assigns as error a circuit court's denial of

a motion to dismiss, the circuit court's disposition of the motion to dismiss will be reviewed *de novo*.").

III.
ANALYSIS

The issue we focus upon concerns the effect of a "delegation provision" buried within an arbitration clause in a larger contract. Our discussion of the issue is controlled by the Federal Arbitration Act ("the FAA") because the parties' contract reflects a transaction affecting interstate commerce.

Schumacher argues that the arbitration clause in its form contract contains a delegation provision. The provision says that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute." Schumacher argues that the trial court erred in finding the arbitration clause unconscionable, and should have enforced the delegation provision and referred all of the parties' claims about "arbitrability" to arbitration. As we discuss below, we disagree.

The primary substantive provision of the FAA is Section 2,[3] which we have interpreted as follows:

> Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by

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[3] 9 U.S.C. § 2 [1947] states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

> arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.

Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011) ("*Brown I*") (overruled on other grounds by *Marmet Health Care Center, Inc. v. Brown*, 132 S.Ct. 1201 (2012)).

The FAA recognizes that an agreement to arbitrate is a contract. The rights and liabilities of the parties are controlled by the state law of contracts. But if the parties have entered into a contract (which is valid under state law) to arbitrate a dispute, then the FAA requires courts to honor parties' expectations and compel arbitration.[4] Conversely, a party cannot be forced to submit to arbitration any dispute which he or she has not agreed to submit. A court may submit to arbitration "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, 115 S.Ct. 1920, 1924 (1995). *See also State ex rel. Richmond American*

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[4] Syllabus Point 7 of *Brown I*, 228 W.Va. at 656-57, 724 S.E.2d at 260-61, states this principle:

> The purpose of the Federal Arbitration Act, 9 U.S.C. § 2, is for courts to treat arbitration agreements like any other contract. The Act does not favor or elevate arbitration agreements to a level of importance above all other contracts; it simply ensures that private agreements to arbitrate are enforced according to their terms.

Homes of West Virginia v. Sanders, 228 W.Va. 125, 129, 717 S.E.2d 909, 913 (2011) (same).

A. *Doctrine of Severability*

When a lawsuit is filed implicating an arbitration agreement, and a party to the agreement seeks to compel arbitration, the Supreme Court has interpreted the FAA to require application of the doctrine of "severability" or "separability." The gist of the doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately. The doctrine "treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the 'container contract.'" Stephen J. Ware, *Arbitration Law's Separability Doctrine After Buckeye Check Cashing, Inc. v. Cardegna*, 8 Nevada L.J. 107, 109 (2007). Under the doctrine, arbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability. In Syllabus Point 4 of *State ex rel. Richmond American Homes v. Sanders*, 228 W.Va. at 129, 717 S.E.2d at 913, we said in part:

> Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause.

However, we went on to hold that the FAA requires a severed arbitration clause to be evaluated under precepts of contract law applicable to any con-

tract (not just arbitration agreements).[5] Hence, we concluded in Syllabus Point 4 of *Richmond American Homes* that:

> [T]he trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

228 W.Va. at 129, 717 S.E.2d at 913. In other words, in determining if the severed arbitration clause is enforceable under generic principles of contract law, the trial court can look at other parts of the contract that relate to, support, or are otherwise entangled with the operation of the arbitration clause.

The United States Supreme Court has repeatedly interpreted the FAA to require questions about the validity of an arbitration provision to be severed and adjudicated separately from any other contractual question.[6] 'This doctrine is essentially a pleading

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[5] Syllabus Point 8 of Brown I, 228 W.Va. at 657, 724 S.E.2d at 261, states this rule:

> A state statute, rule, or common-law doctrine, which targets arbitration provisions for disfavored treatment and which is not usually applied to other types of contract provisions, stands as an obstacle to the accomplishment and execution of the purposes and objectives of the Federal Arbitration Act, 9 U.S.C. § 2, and is preempted.

[6] The doctrine has its beginnings in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967). In *Prima Paint*, the plaintiff and defendant entered into a consulting agreement that contained an arbitration clause. The plaintiff later sued the defendant, claiming the entire agreement was

standard' that holds that 'only if a party explicitly challenges the enforceability of an arbitration clause within a contract is a court then permitted to consider challenges to the arbitration clause.'" *Richmond American Homes*, 228 W.Va. at 134, 717 S.E.2d at 918 (quoting *Brown I*, 228 W.Va. at 675, 724 S.E.2d at 279).

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procured by fraud. The Supreme Court ruled that, under the FAA, the arbitration clause was presumed valid and enforceable unless the plaintiff proved that, separately from the rest of the consulting agreement, the clause had also been procured by fraud. Because the plaintiff did not sever the arbitration clause from the overall contract and challenge it exclusively, the Supreme Court ordered that the case be sent to arbitration. 388 U.S. at 401-404, 87 S.Ct. at 1804-1806.

The three dissenting justices in *Prima Paint* summarized the majority's interpretation of the FAA as creating a procedure that "compels a party to a contract containing a written arbitration provision to carry out his 'arbitration agreement' even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement." 388 U.S. at 407, 87 S.Ct. at 1808 (Black, J., dissenting). They therefore labeled the *Prima Paint* decision "fantastic" because "Congress did not impose any such procedures in the Arbitration Act." *Id*.

The *Prima Paint* severability doctrine, which was a procedural rule that initially applied only to federal courts, became a mainstay of the Supreme Court's arbitration jurisprudence in 2006 when it was interpreted to be a substantive rule applicable in state courts. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46, 126 S.Ct. 1204, 1209 (2006) ("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."). *See also*, *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 984 (2008) ("attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause alone, are within the arbitrator's ken.")

> The doctrine of severability means this: If a party challenges the enforceability of the entire contract (including the arbitration clause)—that is, the party does not sever the arbitration clause from the rest of the contract and make a discrete challenge to the validity of the arbitration clause—then the court is completely deprived of authority and only an arbitrator can assess the validity of the contract, including the validity of the arbitration clause.

Brown I, 228 W.Va. at 675, 724 S.E.2d at 279 (2011) (quotations and footnotes omitted).

Once the arbitration clause has been severed out for scrutiny, the FAA limits the trial court to considering only two threshold questions: (1) Under state contract law, is there a valid, irrevocable, and enforceable arbitration agreement between the parties? And, (2) Does the parties' dispute fall within the scope of the arbitration agreement? This second question must be weighed in view of the FAA being a "congressional declaration of a liberal federal policy favoring arbitration agreements," and establishing that "any doubts concerning the scope of arbitrable[7] issues should be resolved in favor of arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983) (footnote added). As we said in Syllabus Point 2 of *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010):

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[7] We discuss the ambiguous meaning of the word "arbitrable" later in this opinion.

> When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.

With the concept of severance of arbitration clauses in mind, we now turn to the United States Supreme Court's jurisprudence concerning delegation provisions.

B. *Delegation Provisions and Severability*

A "delegation provision" is a clause, within an agreement to arbitrate, which explicitly states that the parties to the agreement give the arbitrator the sole power to decide the validity, revocability or enforceability of the arbitration agreement under general state contract law. For example, in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66, 130 S.Ct. 2772, 2775 (2010) ("*Rent-A-Center*") the Supreme Court examined a delegation provision in an arbitration agreement that provided:

> 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.

A delegation provision within an arbitration agreement reflects the principle that arbitration is

purely a matter of contract. In their contract, the parties may agree that questions about the validity, revocability or enforceability of an arbitration agreement under state contract law will be delegated from a court to an arbitrator. "Because 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." *Bruni v. Didion*, 160 Cal.App.4th 1272, 1286, 73 Cal.Rptr.3d 395, 407 (2008).[8]

The United States Supreme Court extended the severability doctrine to a delegation provision within an arbitration agreement in *Rent-A-Center*. The Supreme Court decided that a properly-drafted delegation provision is nothing more than a narrow "written provision" to "settle by arbitration" any question about the validity and enforceability of the arbitration agreement. 561 U.S. at 70, 130 S.Ct. at 2777-78

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[8] Effective July 1, 2015, in Senate Bill 37, the Legislature adopted the Revised Uniform Arbitration Act, *W.Va. Code* §§ 55-10-1 to -33. In *W.Va. Code* § 55-10-8(c), the Act provides that every "decision as to whether the arbitration agreement is enforceable shall be made by a court of competent jurisdiction" regardless of what the parties may have otherwise agreed. We note that, as to contracts affecting interstate commerce, Section 8(c) conflicts with the Supreme Court's holdings that any state statute which impedes an arbitration agreement and targets it for treatment not usually applied to other kinds of contracts is preempted by the FAA. *See* Syllabus Point 8, *Brown I*, 228 W.Va. at 657, 724 S.E.2d at 261; *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S.Ct. 852, 861 (1984) (the FAA "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements."). Under the holdings of the United States Supreme Court, this provision in Senate Bill 37 is preempted by the FAA if the arbitration agreement contains a valid and enforceable delegation clause.

(quoting 9 U.S.C. § 2). Succinctly, a delegation clause is "a distinct mini-arbitration agreement divisible from the contract in which it resides — which just so happens also to be an arbitration agreement." 561 U.S. at 85, 130 S.Ct. at 2787 (Stevens, J., dissenting). Hence, "the FAA operates on this additional arbitration agreement just as it does on any other," and a delegation provision is valid under the FAA "save upon such grounds as exist at law or in equity for the revocation of any contract." 561 U.S. at 70, 130 S.Ct. at 2777-78 (quoting 9 U.S.C. § 2).

Rent-A-Center stands for the proposition that a delegation provision is a mini-arbitration agreement divisible from both the broader arbitration clause and the even broader contract in which the delegation provision and arbitration clause are found. Therefore, a party must specifically object to the delegation provision in order for a court to consider the challenge. A party resisting delegation to an arbitrator of any question about the enforceability of an arbitration agreement must challenge the delegation provision exclusively.

The take-away rule from *Rent-A-Center* is this: under the FAA and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's state contract law challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court may only consider a challenge that is directed at the validity, revocability or enforceability of the delegation provision itself.

We recognize that this rule seems absurd, "something akin to Russian nesting dolls," and suggests "an infinite severability rule" that is "difficult for any lawyer — or any person — to accept, but this is the law[.]" 561 U.S. at 85-87, 130 S.Ct. at 2787 (Stevens, J., dissenting).[9] It is an ivory-tower interpretation of the FAA "that is as dubious in principle as it is senseless in practice." *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1361 (2015) (Scalia, J., dissenting). But unless or until the United States Supreme Court alters its interpretation of the FAA, we are constrained by that Court's rulings.

The facts in *Rent-A-Center* demonstrate the application of this delegation provision rubric. An employee, Jackson, filed an employment discrimination suit against his employer, Rent-A-Center. The employer filed a motion to compel arbitration under an arbitration agreement. Furthermore, the employer asserted that the agreement had a provision delegating to the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability" of the arbitration agreement. *Rent-A-Center*, 561 U.S. at 66, 130 S.Ct. at 2775. The employee did not apply the doctrine of severability, and opposed the motion to compel on the ground that the entire employment contract, including the arbitration agreement, was unconscionable and unenforceable. The employee did

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[9] A leading arbitration scholar called the rule "intricate and recondite to a degree that seems wholly unnecessary," such that it will "place too great of a strain on minds not prepared to deal with it;" "a tad oversubtle for sensible application;" and "carving up the available universe pretty fine, and requires line drawing that may seem artificial to the vanishing point." Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. Int'l Arb. at 517-19.

not challenge the arbitration agreement separate from the overall contract, and did not challenge the delegation provision separate from the arbitration agreement.

The Supreme Court determined that "unless Jackson challenged the delegation provision specifically, we must treat it as valid [under the FAA] . . . and must enforce it . . . leaving any challenge to the validity of the [Arbitration] Agreement as a whole for the arbitrator." 561 U.S. at 72, 130 S.Ct. at 2779. Jackson addressed the "validity of the contract as a whole," but failed to "even mention the delegation provision" in his arguments to the trial court. *Id*. On these facts, the Supreme Court concluded that the delegation provision was enforceable, and that the trial court should have referred Jackson's arguments about the unconscionability of the arbitration agreement to an arbitrator.

C. *Challenging a Delegation Provision*

To be clear, it is still possible to oppose enforcement of a delegation provision. The FAA does not require all claims to be sent to arbitration merely because there is a delegation provision. As the Supreme Court stated, merely because delegation clauses and "agreements to arbitrate are severable does not mean that they are unassailable." 561 U.S. at 71, 130 S.Ct. at 2778. Severance is merely a speedbump on the road to deliberating the enforceability of the provision.

A party seeking to enforce an arbitration clause, or a party resisting arbitration, must begin any argument with the recognition that arbitration is purely a matter of contract. If a party seeks to establish the validity and enforceability of a delegation provi-

sion in an arbitration clause, then there must first be "clear and unmistakable evidence" that the parties agreed to send questions about the enforceability of the arbitration clause to the arbitrator.

In the context of whether the parties have agreed to arbitrate the merits of a dispute — that is, the "arbitrability" of a question — the United States Supreme Court said, "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 944, 115 S.Ct. at 1924. Likewise, this Court has found that "parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate," and that an "agreement to arbitrate will not be extended by construction or implication." Syllabus Point 10, *Brown I*, 228 W.Va. at 657, 724 S.E.2d at 261. The "clear and unmistakable" test reflects a "heightened standard" of proof of the parties' "manifestation of intent." *Rent-A-Center*, 561 U.S. at 70 n.1, 130 S.Ct. at 2778 n.1. The heightened standard was adopted

> because the question of who would decide the unconscionability of an arbitration provision is not one that the parties would likely focus upon in contracting, and the default expectancy is that the court would decide the matter. Thus, the Supreme Court has decreed, a contract's silence or ambiguity about the arbitrator's power in this regard cannot satisfy the clear and unmistakable evidence standard.

Ajamian v. CantorCO2e, L.P., 203 Cal.App.4th 771, 782, 137 Cal.Rptr.3d 773, 782 (2012) (citations omitted).

Questions about the validity, revocability, and enforceability of a provision delegating a problem with the enforceability or scope of an arbitration clause are resolved by looking to state contract law. "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944, 115 S.Ct. at 1924. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement." Syllabus Point 9, *Brown I*, 228 W.Va. at 657, 724 S.E.2d at 261. State contract law requires a trial court examining the enforceability of a contract provision to weigh the challenged provision in context, and consider other parts of the contract that relate to, support, or are otherwise intertwined with the operation of the challenged provision. *Richmond American Homes*, 228 W.Va. at 135, 717 S.E.2d at 919. Those same state-law contract defenses principles may be employed to invalidate a severed delegation provision within an arbitration agreement.

To summarize, when a party seeks to enforce a delegation provision in an arbitration agreement against an opposing party, under the FAA there are two prerequisites for the delegation provision to be effective. First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. Second, the delegation provision must itself not be invalid,

revocable or unenforceable under state contract law. Typical contract defenses such as laches, estoppel, waiver, fraud, duress, or unconscionability may be asserted.[10] Under general principles of state contract law, the trial court may consider the context of the delegation provision within the four corners of the contract. In other words, in determining if the delegation provision is enforceable under generic principles of contract law, the trial court can look at other parts of the contract that relate to, support, or are otherwise entangled with the operation of the delegation provision.

D. *Applying the Rules*

We now turn to the arbitration clause in the parties' contract, and examine the clause that Schumacher asserts is a delegation provision. Our standard of review in this case is *de novo*. Syllabus Point 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998). We therefore give

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[10] To be clear, this list is not exclusive. Misrepresentation, duress, mutuality of assent, undue influence, or lack of capacity, if the contract defense exists under general common law principles, then it may be asserted to counter the claim that a delegation provision binds the parties. Even lack of consideration is a defense. *But see Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 164-65, 756 S.E.2d 493, 498-99 (2014) (clarifying that the focus should not be on whether the arbitration clause was supported by separate consideration, but whether the entire contract was supported by consideration); Syllabus Point 6, *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012) ("So long as the overall contract is supported by sufficient consideration, there is no requirement of consideration for each promise within the contract . . . in order for a contract to be formed."). The nutshell rule is that, whatever defense is asserted, the defense must be aimed at showing why the delegation provision is unenforceable.

the arbitration clause and the delegation provision a plenary review, and apply the same legal standards to that review as the circuit court.

Schumacher's arbitration clause contained a provision assigning to an arbitrator "all issues regarding the *arbitrability* of the dispute." "Regrettably, 'arbitrability' is an ambiguous term that can encompass multiple distinct concepts." *Bruni v. Didion*, 160 Cal.App.4th at 1286, 73 Cal.Rptr.3d at 407. *See also GGIS Ins. Servs., Inc. v. Lincoln Gen. Ins. Co.*, 773 F.Supp.2d 490, 504 (M.D. Pa. 2011) ("The term "arbitrability" is, by[] itself, ambiguous."). The term "arbitrability" is generally seen "in the sense of the *scope* of the arbitration provisions," *Bruni*, 160 Cal.App.4th at 1286, 73 Cal.Rptr.3d at 407, and asks whether a particular dispute is subject to the parties' arbitration agreement. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588 (2002), the Supreme Court grappled with the vagueness of the word "arbitrability," and resolved that legally it has a narrow meaning:

> Linguistically speaking, one might call any potentially dispositive gateway question a "question of arbitrability," for its answer will determine whether the underlying controversy will proceed to arbitration on the merits. The Court's case law, however, makes clear that . . . the phrase "question of arbitrability" has a far more limited scope. . . .
>
> 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.

537 U.S. at 83-84, 123 S.Ct. at 591-92.[11]

After carefully examining Schumacher's delegation provision and applying our holdings above, we find it does not "clearly and unmistakably" confer authority to the arbitrator to decide the gateway questions regarding the validity, revocability, and enforceability of the arbitration clause. The provision refers to the arbitrator only questions about "arbitrability," a nebulous term that has legally been limited to mean questions about whether a particular dispute is within the scope of an arbitration agreement. "Arbitrability" in this case would mean the ultimate issue in dispute — namely, whether the house built by Schumacher for the plaintiffs was defective. We see nothing in the arbitration clause that restricts to the arbitrator questions concerning its own validity, revocability, or enforceability; the arbitration clause is silent as to these threshold inquiries. Because the delegation provision does not meet the first prerequisite of our test, it cannot and should not be enforced.

Two final issues trouble us about the delegation provision.

First, we are troubled by the way Schumacher raised the delegation provision to the circuit court. Neither Schumacher's motion to compel arbitration nor its memorandum of law in support of the motion

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[11] *See also* Douglas H. Yarn, Gregory Todd Jones, *Georgia Alternative Dispute Resolution*, § 9:11 (2014) ("'Arbitrability' is an ambiguous term referring generally to the jurisdiction of the arbitrator. In keeping with the voluntary, contractual nature of arbitration, matters parties agreed to arbitrate are within the arbitral jurisdiction (arbitrable) while matters they did not agree to arbitrate are without (nonarbitrable).").

mentioned the delegation provision, let alone sought its enforcement. The delegation provision was not raised as an issue until the motion was orally argued to the circuit court seven months after the plaintiffs filed suit. The plaintiffs were never put on notice that, in their opposition to the motion to compel, they might need to address the enforceability of the delegation provision. By its actions, Schumacher both ambushed the plaintiffs and failed to meet the heightened "clear and unmistakeable" test."[12]

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[12] In somewhat similar cases, parties have been found to have waived, abandoned, or failed to establish a right to enforcement of an arbitration clause. *See*, *e.g.*, *In re Checking Account Overdraft Litig.*, 754 F.3d 1290, 1298 (11th Cir. 2014) (party seeking to compel arbitration "waived its delegation clause argument when it waited to raise the issue until after it had asked the district court to decide arbitrability—and lost"); *Mercadante v. Xe Servs.*, LLC, 864 F. Supp. 2d 54 (D.D.C. 2012) (defendant could not raise for first time in their reply brief claim that arbitrator had exclusive authority to determine validity of contract); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig.*, 838 F. Supp. 2d 967 (C.D. Cal. 2012) (because Toyota litigated case for 11 months before seeking enforcement of delegation provision, it waived right to arbitration); *Hartley v. Superior Court*, 196 Cal.App.4th 1249, 1260, 127 Cal.Rptr.3d 174, 182-83 (2011) (moving party seeking arbitration did not raise delegation provision until its reply brief, failing to put non-moving party on notice and thereby failing its "burden to meet the heightened 'clear and unmistakable' test"); *Katz v. Anheuser-Busch, Inc.*, 347 S.W.3d 533, 540 (Mo. Ct. App. 2011) (party seeking to compel arbitration failed to raise delegation provision until after trial court denied motion to compel arbitration, thereby waiving issue for appeal); *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1213 (11th Cir. 2011) (it is invited error for a party to not raise a delegation provision until after a trial court has ruled on the arbitrability of a suit); *M Homes, LLC v. Southern Structural, Inc.*, 281 Ga. App. 380, 383, 636 S.E.2d 99, 101 (2006) (a party that fails to

Second, we are troubled that the plaintiff-homeowners violated the *Rules of Appellate Procedure* in their brief to this Court. Rule 10(d) of the *Rules of Appellate Procedure* [2010] required the plaintiffs (as respondents) to specifically address each of Schumacher's assignments of error. Rule 10(d) states, in pertinent part:

> Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue.

The petitioner's brief by Schumacher clearly delineated and argued seven assignments of error. The plaintiffs' brief in response is nothing more than a generic rehash of the plaintiffs' brief to the circuit court. The plaintiffs' appellate brief failed to specifically respond to *any* of Schumacher's seven assignments of error; importantly, the brief makes no mention of Schumacher's assertion of the delegation provision. A respondent who files a brief that fails to respond to each of the petitioner's assignments of error

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assert a delegation provision "may waive an agreement to arbitrate by taking actions that are 'inconsistent with the right of arbitration.'").

The right to arbitration, like any other contract right, can be waived. "To demonstrate waiver of the right to arbitrate, a party must show: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts." *U.S. v. Park Place Associates, Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009) (citation omitted).

does so at their peril. On these briefs, this Court would be within its bounds to assume the plaintiffs' brief conceded the correctness of Schumacher's arguments. In the exercise of our discretion, we decline to do so in this case.

In summary, we find that the circuit court did not err in its failure to enforce Schumacher's so-called delegation provision. Even assuming it was properly raised to the circuit court, the delegation provision does not reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration clause to an arbitrator.[13]

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[13] Schumacher raises six other issues on appeal that we find have little merit, and therefore decline to address. First, Schumacher asserts the circuit court erred in relying on West Virginia law when the contract stated it was to be construed under Ohio law. However, Schumacher concedes in its brief that "defenses to contracts are similar in Ohio as in West Virginia." Our research confirms this, and we find no error in applying West Virginia's substantive contract law to find the arbitration clause unconscionable. Second, Schumacher incorrectly claims the circuit court failed to apply the severability doctrine — an argument belied by the court's conclusion that only the arbitration clause (read in the context of the overall contract) was unconscionable. The third, fourth, fifth and sixth arguments by Schumacher pertain to the circuit court's findings of unconscionability, based partly on the finding that the arbitration clause requires the plaintiffs to arbitrate all claims but allows the contractor to pursue mechanic's liens in state court. This provision of the contract is of no small moment: the only reason a contractor is likely to go to court against a homeowner is to get paid for his/her work. But this provision simultaneously prevents the homeowner from going to court to dispute paying the contractor for that same work. Whether the contractor charged too much, charged for disputed add-ons, or shouldn't be paid for poor or incomplete workmanship, the homeowner must seek arbitration. On this record, we cannot say the circuit court

Therefore, the circuit court was correct in deciding that the arbitration provision was unenforceable under West Virginia contract law.

IV.
CONCLUSION

We find no reversible error in the circuit court's determination that the arbitration clause in Schumacher's contract was unenforceable against the plaintiffs. We therefore affirm the circuit court's March 6, 2014, order refusing to compel arbitration.

Affirmed.

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erred. *See Kirby v. Lion Enterprises, Inc.*, 233 W.Va. 159, 168, 756 S.E.2d 493, 502 (2014) (Ketchum, J., concurring) (construction contract allowed contractor to pursue some claims in court, while requiring home owner to arbitrate all claims; the arbitration "provision lacks any modicum of bilaterality or mutuality of obligation. A contract that lacks mutual reciprocal obligations (for instance, a contract which requires the weaker party to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts) may be so one-sided and unreasonably unfair to one party that it is unconscionable."; *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 290, 737 S.E.2d 550, 559 (2012) ("[I]t is well-settled that a contract which requires the weaker party to arbitrate any claims he or she may have, but permits the stronger party to seek redress through the courts, may be found to be substantively unconscionable.").

No. 14-0441 - Schumacher Homes of Circleville, Inc. v. John Spencer and Carolyn Spencer

LOUGHRY, Justice, dissenting:

Once again, a majority of this Court reveals its biases and blatant "judicial hostility"[1] toward arbitration by invalidating a plain and unmistakable agreement between the parties to arbitrate issues regarding whether a claim is subject to arbitration in the first instance. Feigning confusion about the term "arbitrability," the majority concludes that the circuit court can decide whether the claims of the respondent homeowners, the Spencers, are subject to arbitration and then leaves untouched the circuit court's wildly unsupported conclusion that they are not.

Before delving into the erroneous nature of the slim conclusion that the majority actually did reach in its opinion, it is necessary to first address the complete inadequacy of the majority's opinion as it pertains to the issues properly on appeal. Despite the petitioner, Schumacher Homes of Circleville, Inc. ("Schumacher"), appealing both the circuit court's disregard of the delegation provision–a threshold issue to be determined before a decision on the enforceability of the arbitration agreement is reached–and the circuit court's findings of unconscionability, the majority limits its opinion to the delegation provision. Certainly, had the majority properly enforced the delegation provision, which strips the circuit court of its ability to determine unconscionability, the circuit court's unconscionability ruling would be

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[1] *AT&T Mobility LLC v. Concepcion*, _U.S._, 131 S.Ct. 1740 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

rendered moot. Once the delegation provision is triggered, those issues belong to the arbitrator–not to the circuit court, nor to this Court–and the majority's refusal to address these issues would be proper in that event.

Contrary to the above, the majority concludes that the delegation provision, which was never challenged below, is *not* enforceable. Inexplicably, the majority then fails to address substantively the circuit court's conclusions regarding unconscionability–all of which were on appeal to this Court. After castigating the Spencers for failing to respond to the issues raised on appeal in contravention of our Rules of Appellate Procedure, the majority then does little more than the Spencers by barely acknowledging Schumacher's remaining assignments of error. In fact, the majority disposes of all remaining issues in a single footnote, devoting four whole sentences to the alleged unconscionability of the arbitration agreement—the entire basis of the circuit court's order.[2]

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[2] Even assuming arguendo that the issue of unconscionability is reached, the majority's terse conclusion that the arbitration agreement is unconscionable is not only unsupported but is facially incorrect. The majority summarily concludes that because the arbitration agreement provides that it shall not be "interpreted as [a] waiver of Schumacher's mechanic's lien rights[,]" the agreement lacks mutuality or bilaterality, rendering it unconscionable. I disagree.

In syllabus point nine of *Dan Ryan Builders, Inc. v. Nelson*, 230 W.Va. 281, 737 S.E.2d 550 (2012), we held that "[a] court in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability." In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W.Va. 341, 752 S.E.2d 372 (2013), we

Turning now to the complete fallacy underlying the majority's holding, a brief factual overview is necessary for context. On June 6, 2011, the Spencers entered into a contract with Schumacher for the construction of their home in Mason County, West Virginia. This contract contained an arbitration agreement, which the Spencers separately and expressly acknowledged by placing their initials in the margin of the contract where the arbitration agreement ap-

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acknowledged that courts have found a variety of acceptable exclusions in arbitration agreements that do not render the agreements unconscionable, such as when those exclusions concern mechanisms, such as security interests. *Id.*, at 365-66, 752 S.E.2d at 396-97. Similarly, in the case at bar, the preservation of Schumacher's mechanic's lien rights is simply not so harsh or unfair as to provide a sufficient basis for finding the arbitration agreement to be unconscionable.

The majority's erroneous "conclusion" is likely occasioned by its disregard of yet another assignment of error: the circuit court's failure to address the choice of law provision in the parties' contract which provides that their contract will be construed under Ohio law. We have previously "recognized the presumptive validity of a choice of law provision, (1) unless the provision bears no substantial relationship to the chosen jurisdiction or (2) the application of the laws of the chosen jurisdiction would offend the public policy of this State." *Manville Personal Injury Settlement Trust v. Blankenship*, 231 W.Va. 637, 644, 749 S.E.2d 329, 336 (2013). The majority ignores the presumptive validity of this choice of law provision and merely states that it applies West Virginia's substantive contract law because it is similar to that in Ohio.

The significance of this "oversight" is overwhelming. Schumacher states that the mechanic's lien exclusion in the arbitration agreement is entirely in conformity with Ohio law. As such, the majority's lone basis for the conclusion that the agreement was unconscionable is Schumacher's incorporation of a term required under Ohio law, which law it expressly elected under its choice of law provision.

pears. The plainly-written arbitration agreement provides:

> The Parties agree that any claim, dispute or cause of action, of any nature, including but not limited to, those arising in tort, contract, statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its agents or subcontractors, *shall be subject to final and binding arbitration* by an arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association and judgment may be entered on the award in a court of appropriate venue. . . . *The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute*. . . .

(emphasis added).

Notwithstanding their clear agreement to arbitrate, the Spencers filed a civil action in the circuit court against Schumacher alleging defects in their home. In reliance upon the plain language of the arbitration agreement, Schumacher filed a motion to dismiss the complaint and to compel arbitration. In response, the Spencers challenged the validity of the arbitration agreement, arguing that it was unconscionable. During the hearing held before the circuit court on Schumacher's motion, and in response to

the Spencers submitting to the circuit court the issue of whether the claim was subject to the arbitration agreement, Schumacher raised the "delegation provision" within the arbitration agreement, which provides that issues of arbitrability, *i.e.*, whether the claim is subject to arbitration, must likewise be decided by the arbitrator. Without so much as acknowledging the existence of the delegation provision, which clearly stripped the circuit court of the authority to decide the issue placed before it by the Spencers, the circuit court concluded that the arbitration agreement as a whole was unconscionable and, therefore, unenforceable.

While the majority devotes nearly all of its opinion to this delegation provision,[3] it ultimately misinterprets and invalidates this provision, straining to find one word within–"arbitrability"–to be ambiguous in its headlong march toward its ultimate goal of relieving the Spencers of their contractual obligation to arbitrate their claims. The United States Supreme Court has stated that "unless [the party opposing arbitration] challenge[s] the delegation provision specifically, we must treat it as valid under [9 U.S.C.] § 2, and must enforce it under [9 U. S.C.] §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63, 72 (2010). This Supreme Court precedent instructs that once parties empower the arbitrator to decide arbitrability through a delegation provision, the only challenge left for a court to

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[3] lndeed, it is the only substantive analysis within the majority opinion. As previously indicated, the majority pays little more than lip service to the other issues in this matter, collapsing them into a single footnote without any analysis of the law or the facts pertinent to those issues.

decide is the validity of a delegation clause itself, but only when that provision is specifically challenged by the party opposing arbitration. *Id*.

Here, however, the Spencers did not do so—either in their complaint, during the hearing on Schumacher's motion to compel arbitration, or even before this Court.[4] Ironically, the majority attempts to chastise Schumacher for failing to raise the delegation provision in its initial motion to compel arbitration. However, as illustrated above in the procedural summary, there was simply no reason to do so at that juncture. Schumacher's initial motion to compel arbitration was based on the plain, unopposed (at that time) language of the arbitration agreement. Once the Spencers responded, seeking to place the issue of enforceability in front of the circuit court, the delegation provision became pertinent and was properly relied upon by Schumacher during oral argument before the circuit court.

As to the majority's purported "analysis," which concludes that the term "arbitrability" is too vague to

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[4] If the Spencers' counsel was not prepared to challenge the validity of the delegation provision during the hearing held before the circuit court, counsel could easily have asked the circuit court for a brief continuance for the purpose of considering such a challenge. The hearing transcript in the appendix record reflects that not only did the Spencers' counsel fail to make such a request, counsel dove head first into his procedural and substantive unconscionability arguments regarding the arbitration agreement, as a whole, completely ignoring Schumacher's arguments concerning the "delegation provision." The circuit court echoed the unconscionability arguments of the Spencers' counsel in its order denying Schumacher's motion to compel arbitration, likewise failing to address in any fashion the delegation provision in the parties arbitration agreement.

be enforced, the majority relies upon dicta in a single California Court of Appeals case[5] to conclude that this "nebulous" term does not reflect a clear and unmistakable intent of the parties to confer upon the arbitrator "the gateway questions regarding the validity, revocability, and enforceability" of their arbitration agreement. However, the United States Supreme Court has utilized that precise term itself, stating that "parties can agree to arbitrate 'gateway' questions of '*arbitrability*,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. *Rent-a-Center, Inc.*, 561 U.S. at 68-69 (emphasis added). The Supreme Court further explained that "'[c]ourts should not assume that the parties agreed to arbitrate *arbitrability* unless there is "clea[r] and unmistakabl[e]" evidence that they did so.'" *Rent-a-Center, Inc.*, 561 U.S. at 69 n.1, citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)) (emphasis added). Clearly, the United States Supreme Court does not find the word "arbitrability" to be nebulous and, unlike this majority, understands that it simply means "subject to or susceptible to arbitration."

Contrary to the majority's position, the parties' delegation provision clearly and unmistakably entails the "'gateway' question[] of . . . whether the parties have agreed to arbitrate 'arbitrability of the dispute[.]'" *Rent-a-Center, Inc.*, 561 U.S. at 68-69. The arbitration agreement, which the Spencers initialed, clearly states: "The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute."

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[5] *Brunt v. Didion*, *Bruni v. Didion*, 73 Cal.Rptr.3d 395 (Cal. Ct. App. 2008).

Other courts have interpreted similar succinct language to evidence a clear and unmistakable intent of parties to delegate the arbitrability decision to an arbitrator and none have found it to be so incapable of comprehension as to render it unenforceable. *See Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 624 (8th Cir.2006) (finding provision that "[a]ny controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s)[]" was clear and unmistakable); *Muigai v. IMC Const., Inc.*, No. PJM 10-1119, 2011 WL 1743287, *4 (D. Md. May 6, 2011) (recognizing that question of arbitrability is issue for judicial determination unless parties clearly and unmistakably provide otherwise and finding that delegation provision stating that "the Arbitrator(s) shall have the exclusive power to determine issues of arbitrabilty[]" evidenced parties' intent to submit arbitrability decision to arbitrator). It is, in fact, difficult to discern a single term, phrase, or description of the issues encompassed in the term "arbitrability" that better or more clearly describes those issues than the word "arbitrability" itself.

In addition to the subject delegation provision discussed above, I observe that the parties have included a second delegation provision through their incorporation of the "Construction Industry Rules of the American Arbitration Association" into their arbitration agreement. *See Malone v. Superior Court*, 173 Cal.Rptr.3d 241, 245 (Cal. Ct. App. 2014) (finding second delegation clause was incorporated into arbitration agreement by reference to applicable American Arbitration Association rules which provide that "'[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."). Although not spe-

cifically argued by Schumacher, as seen below, a vast majority of courts have found that the inclusion of American Arbitration Association ("AAA") rules evidences a clear and unmistakable delegation of the question of arbitrability to the arbitrator.

In *Fadal Machining Centers, LLC v. Compumachine, Inc.*, 461 F.App'x 630 (9th Cir. 2011), the United States Court of Appeals for the Ninth Circuit addressed a challenge to the district court's conclusion that the arbitration clause in the parties' contract clearly established an agreement to submit all disputes, including the question of arbitrability, to an arbitrator. Relying upon the arbitration clause's incorporation of "the AAA's Commercial Arbitration Rules, which provide that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement[,]'" the appellate court concluded that "the arbitration clause clearly and unmistakably delegated the question of arbitrability to the arbitrator." *Id.* at 632. *See also Contec Corp. v. Remote Solution, Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005) (recognizing its prior holding that "when . . . parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("Consequently, we conclude that the arbitration provision's incorporation of the AAA Rules . . . constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Oracle America, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) ("Virtually every circuit to have considered the issue has deter-

mined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir.2005) ("By incorporating the AAA Rules . . . into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid."); *Haire v. Smith, Currie & Hancock LLP*, No. 12-749, 2013 WL 751035 at *5 (D.D.C. Cir. Feb. 28, 2013) (holding that incorporation of AAA Commercial Rules is clear and unmistakable delegation of arbitrability and noting that "a recent D.C. Circuit opinion strongly suggests that the D.C. Circuit would view incorporation of the AAA Rules as satisfying the requisite standard"); *Yellow Cab Affiliation, Inc. v. New Hampshire Insur. Co.*, No. 10cv6896, 2011 WL 307617 at *4-5 (N.D. Ill. Jan. 28, 2011) (finding that "by specifically incorporating the Commercial Arbitration Rules of the American Arbitration Association into their agreement, the parties clearly and unmistakably evidenced their intention to grant the arbitrator the authority to determine whether their dispute is arbitrable."); *GHA Technologies Inc. v. McVey*, No. 1 CA-SA 11-0304, 2012 WL 209024 at *2 (Ariz. Ct. App. Jan. 24, 2012) (finding that delegation of authority to arbitrator may be express or implied and citing other authority for proposition that parties' agreement to adhere to AAA rules evidenced their agreement that arbitrator would decide validity of arbitration agreement); *In re Application of R D Management Corp.*, 766 N.Y.S.2d 304 (N.Y. Sup. 2003) (recognizing that express agreements to proceed under AAA rules, which grant arbitrator power to decide scope of arbitration clause, have been con-

strued as delegation of issue of arbitrability to arbitrator and finding that any questions regarding arbitrability must be resolved by arbitration panel). Accordingly, in addition to the specific delegation provision relied upon by Schumacher, the foregoing line of cases further compels the conclusion that the parties clearly and unmistakably delegated the question of arbitrability to an arbitrator through their incorporation of the AAA rules into their arbitration agreement.

The benefits of arbitration are clear and widely recognized. As one court has explained:

> Parties agree to arbitrate to secure "streamlined proceedings and expeditious results [that] will best serve their needs." The arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. . . . Further, the adversarial nature of litigation diminishes the possibility that the parties will be able to salvage their relationship. For these reasons parties agree to arbitrate and trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999) (internal citations omitted). This Court has been notoriously chastised by the United States Supreme Court for its failure to uphold valid arbitration agreements and ensure that such agreements are not "singled out" for hostile treatment or disfavor. *See Marmet Health Care Center v. Brown*, 132 S. Ct. 1201 (2012). The majority's opinion does little to convey that the United States Supreme Court's message was received; in fact, such tortured

"analysis" certainly suggests that a majority of this Court took little heed of it.

Accordingly, I respectfully dissent.

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th of June, 2015, the following order was made and entered:

Schumacher Homes of Circleville, Inc.,
a foreign corporation, Defendant Below,
Petitioner

v.) No. 14-0441

John Spencer and Carolyn Spencer,
Plaintiffs Below, Respondents

The Court, having maturely considered the petition for rehearing filed by Schumacher Homes of Circleville, Inc., by Don C. A. Parker, Nicholas P. Mooney, II and Sarah B. Smith, his attorneys, is of opinion to and hereby refuse said petition for rehearing. Justice Benjamin and Justice Loughry would grant.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

APPENDIX C

IN THE CIRCUIT COURT OF MASON COUNTY, WEST VIRGINIA

JOHN SPENCER and
CAROLYN SPENCER,

Plaintiffs,

SCHUMACHER HOMES OF
CIRCLEVILLE, INC., a foreign corporation,
DAVIS HEATING & COOLING
COMPANY, INC., a West Virginia corporation,

Defendants.

Civil Action No. 13-C-116
Judge David W Nibert

ORDER DENYING SCHUMACHER HOMES OF CIRCLEVILLE, INC.'S MOTION TO DISMISS THIS PROCEEDING AND COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO STAY THIS PROCEEDING PENDING ARBITRATION

On February 7, 2014 defendant Schumacher Homes of Circleville, Inc.'s Motion to Dismiss This Proceeding and Compel Arbitration or, in the Alternative, to Stay This Proceeding Pending Arbitration ("Motion to Dismiss") came on for hearing before the Court. After considering the arguments of counsel and all pleadings filed, the Court was of the opinion to, and does hereby **ORDER** that said Motion to

Dismiss is **DENIED** and makes the following findings of fact and conclusions of law:

1. On June 6, 2011, John Spencer and Carolyn Spencer ("plaintiffs") entered into a purchase agreement with Schumacher Homes of Circleville, Inc. ("Schumacher") whereby Schumacher agreed to construct the residence and improvements for the plaintiffs on property located at Lot 207, Pleasant Street, Milton, Mason County, West Virginia, 25541.

2. The plaintiffs have filed a Complaint alleging that the home constructed by Schumacher is defective; that such defects have prevented the plaintiffs from being able to move into the subject home; that Schumacher failed to correct the defects despite being contacted to do so; that the subject home violates expressed and implied warrantees; including warrantees set forth in the Uniform Commercial Code as adopted in Chapter 46 of the West Virginia Code; that Schumacher fraudulently induced the plaintiffs to purchase said home; that the plaintiffs have suffered annoyance, inconvenience, mental anguish and extreme frustration; that the actions of Schumacher were in violation of the Magnuson-Moss Warranty Act, 15 U.S. Code § 2308; that the actions of Schumacher violated the West Virginia Consumer Credit and Protection Act, Chapter 46A, West Virginia Code; that Schumacher breached the duty of good faith implied in the transaction pursuant to the Uniform Commercial Code, West Virginia Code § 46-1-203; and that the plaintiffs are entitled to various consequential damages, incidental damages, compensatory damages, punitive damages, costs, attorney's fees and interest, along with the imposition of statutory penalties against Schumacher.

3. Schumacher has filed its Motion to Dismiss citing Section 27 of the Purchase Agreement which generally provides that any claim, dispute or cause of action shall be subject to final and binding arbitration.[1]

In its Motion to Dismiss Schumacher summarized the claims asserted by the plaintiffs as follows: (1) revocation of acceptance of the Contract; (2) breach of express and implied warranties, including the Magnuson-Moss Warranty Act, 15 U.S.C. § 2308; (3) breach of the implied warranty of merchantability; (4) breach of the implied warranty of fitness for a particular purpose; (5) breach of the duty of good faith pursuant to West Virginia Code § 4-6-1-203; (6) unfair and deceptive acts and practices in violation of section 6-102 of the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq*. ("WVCCPA"); (7) unconscionable purchase price; (8) fraud (including actual, constructive, innocent misrepresentation, and negligent misrepresentation); (9) negligence; and (10) civil conspiracy. (Motion to Dismiss, ¶ 4)

4. In its Motion to Dismiss, Schumacher has cited the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. ("FAA") as requiring enforcement of the arbitration provision in the Purchase Agreement.

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[1] The Court does note that in its Motion to Dismiss Schumacher stated in paragraph number three thereof that it would waive for purposes of this lawsuit the clause in the Purchase Agreement providing that arbitration must be "venued exclusively in Stark County, Ohio" and that Schumacher stated that it would agree to arbitrate the plaintiffs' claims at a location in Mason County, West Virginia where the plaintiffs reside.

5. The FAA, in combination with relevant West Virginia Supreme Court jurisprudence, has made clear that any state law or common law doctrine purporting to regulate arbitration provisions will be preempted by the FAA. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 at 275-76 (W. Va. 2011).

6. The FAA, as interpreted by the Fourth Circuit Court of Appeals regarding the issue of whether a court should compel arbitration when there is a clause in a contract which calls for arbitration, laid out a four part test. The movant who desires to compel arbitration under the FAA must demonstrate:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.

Adkins v. Labor Ready, Inc., F. 3d 496, 500-01 (4th Cir. 2002) quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991).

7. In addition to the pertinent language under 9 U.S.C. §2 of the FAA and the four part test cited in *Adkins v. Labor Ready, Inc.*, 9 U.S.C. §2 of the FAA provides a "savings clause" that allows state courts to apply general principles of contract law, even when dealing with arbitration clause provisions. The pertinent language of this code section, as quoted by the West Virginia Supreme Court, states:

> [a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter

> arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 274 (W. Va. 2011) (citing 9 U.S.C. §2).

8. Under the "savings clause" the arbitration provision in the Contract between the plaintiffs and Schumacher constitutes an unconscionable provision pursuant to West Virginia contract and case law. In *Brown v. Genesis* the court noted

> [t]he doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness, or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written.

Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 284 (W. Va.. 2011) (citing *McGinnis v. Cayton*, 312 S.E.2d 765, 776 (W. Va. 1984)). Additionally, the Court made clear

> [t]he concept of unconscionability must be applied in a flexible manner, taking into. consideration all of the facts and circumstances of a particular case... [a]n analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.

Id. (citing *Troy Min. Corp. v. Itman Coal Co*., 346 S.E. 2d 749 (W. Va. 1986)). The standard for unconscionability includes two component parts: procedural unconscionability and substantive unconscionability. *Id*. (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986)),

9. Substantive unconscionability involves unfairness in the terms of the contract. *Brown*, 724 S.E.2d 250, 287 (W. Va. 2011). The West Virginia Supreme Court has found substantive unconscionability in several cases where the more powerful party either: (1) reserves the right to judicial action while requiring that the other party arbitrate any matter that may arise or (2) is not likely to need judicial oversight because they will only have one claim (usually the collection of money by a business from a customer). *Id*. at 265 (W. Va. 2011); *Grayiel v. Appalachian Energy Partners*, 2012 W. Va. LEXIS 825, 736 S.E.2d 91 (W. Va. 2012).

10. Procedural unconscionability can be described as the inequities and unfairness present in the bargaining process when forming a contract. Id. (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986), *Nelson v. McGoldrick*, 127 Wash.2d 124, 896 P.2d 1258 (Wash. 1995)). Procedural unconscionability involves the lack of a meaningful choice considering all of the circumstances that surround the transaction. Id.

11. Syl. Pt. 20 of *Brown* holds

> "[a] contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination:

> the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa."

[*overruled in part on other grounds by Marmet Health Care Center, Inc. v Brown*, 132 S.Ct. 1201, (2012) (per curiam).] Syl. Pt. 9, *Brown v Genesis Healthcare Corp.*, 729 S.E.2d 217 (W.Va. 2012); *Credit Acceptance Corp. v Front*, 2013 WL 3155993 (W.Va. 2013).

12. An arbitration provision may be found to be unenforceable where one party has promulgated egregiously unfair arbitration rules, such a giving itself the right to bring suit in court while granting no such right to the other party. *Hooters of America, Inc. v Phillips*, 173 F.3d 933 (1991).

13. Schumacher's arbitration provision in its Contract with the plaintiffs is procedurally unconscionable.

14. Schumacher's arbitration provision in its Contract with the plaintiffs is substantively unconscionable.

15. Schumacher has removed the possibility of an equitable or fair result for the plaintiffs with regard to arbitration. The pertinent language of the arbitration provision requires the plaintiffs to arbitrate any matters that arise under the Contract. Schumacher reserved to itself the right to file suit to enforce a mechanic's lien. Realistically, Schumacher would not need judicial intervention for anything other than the collection of money under a contract of this nature. With mechanic's liens being the most effective action to take on this matter, Schumacher

understands that it has effectively eliminated its need for arbitration while simultaneously requiring arbitration for the plaintiffs.

16. While there does not need to be an equal finding of procedural and substantive unconscionability in order to find an arbitration clause unconscionable, there is overwhelming evidence that indicates a need to strike the arbitration clause that would force this matter out of court. *Brown*, 724 S.E.2d 250, 284 (W. Va. 2011) (citing *McGinnis*, 312 S.E.2d 765, 777 (W. Va. 1986)).

17. The Uniform Commercial Code, adopted as Chapter 46 of the West Virginia Code, provides that a lease contract or any clause of a leased contract may be voided if it is either procedurally or substantively unconscionable. *West Virginia Code* § 46-2A-108. The plaintiffs' Complaint includes claims under the Uniform Commercial Code.

18. The plaintiffs' claims against Schumacher include claims under the West Virginia Consumer Credit and Protection Act, Chapter 46A of the *West Virginia Code*. Section 46A-2-121 thereof provides that a contract may be voided if it was "induced by unconscionable conduct" or if the agreement or transaction was "unconscionable at the time it was made."

The Court accordingly does **ORDER** that the Motion to Dismiss of Schumacher is **DENIED**.

The objections of Schumacher are noted for the record.

The Clerk of the Court is hereby directed to send a certified copy of this Order to counsel of record.

ENTERED:

/s/
David W. Nibert, Judge

Prepared By:

/s/
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