No. 06-1463

In the Supreme Court of the United States

ARNOLD M. PRESTON, PETITIONER

v.

ALEX E. FERRER, RESPONDENT

ON WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIVISION ONE

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the rule announced in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), forecloses a plaintiff's attempt to avoid arbitration by challenging the validity of the contract as a whole—not the arbitration provision—in a state administrative proceeding.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This is the latest in a long series of cases in which this Court has been called upon to address increasingly creative efforts by state courts to evade the requirements of the Federal Arbitration Act ("FAA").[1] The FAA creates a rule of substantive federal law that generally requires enforcement of private agreements to arbitrate. See 9 U.S.C. § 2; *Volt Info. Sciences, Inc.* v. *Board of Trs. of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 478 (1989); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987). Consistent with the text and purpose of the FAA, this Court has held that a party to such an agreement cannot avoid arbitration simply by challenging the validity of the contract containing the arbitration provision. As the Court explained in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 449 (2006), "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."

The court below purported to distinguish *Buckeye* on the ground that it did not involve an administrative proceeding. But that distinction makes no difference, because the rule in *Buckeye* does not depend upon the forum employed as an alternative to arbitration. In fact, the reasoning of *Buckeye* compels the

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

conclusion that a litigant may not avoid arbitration by challenging the validity of the contract as a whole in *any* other forum, judicial or administrative. Thus, to the extent that California law requires an administrative agency, rather than an arbitrator, to decide whether the contract is valid and enforceable, California law is preempted by the FAA.

The rule of *Buckeye* is critically important to vindicating the FAA's underlying policies. This Court has recognized that the FAA was intended to "overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270 (1995), and to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). By sidestepping *Buckeye* and allowing respondent to pursue a costly and time-consuming administrative proceeding rather than abide by his agreement to arbitrate, the court below exhibited just the kind of hostility to arbitration that Congress and this Court have clearly (and repeatedly) rejected.

In sum, the decision below cannot be reconciled with the FAA or this Court's decisions applying it, and the decision therefore should be reversed.

This issue is especially important to the Chamber of Commerce of the United States of America—the world's largest business federation, representing more than three million businesses, state and local chambers of commerce, and professional organizations. Many of the Chamber's members routinely enter arbitration agreements because they believe—and recent studies confirm—that arbitration is a relatively fast, fair, and inexpensive method of resolving

disputes with consumers and other contracting parties. Because many Chamber members may be sued in state courts or before administrative agencies, they rely on "rigorous[ ] enforce[ment]" of the FAA to ensure that they will not be deprived of the real benefits of arbitration, benefits for which they have bargained. *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). That is why the Chamber has filed *amicus* briefs in other recent arbitration cases, including *Buckeye*, *supra*, *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Systems, Inc.* v. *Book*, 538 U.S. 401 (2003). In this case too, the Chamber seeks to advance its members' continuing interest in the full vindication of the "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses Cone*, 460 U.S. at 24.

STATEMENT

This case arises from a personal management contract between petitioner Arnold Preston and respondent Alex Ferrer. The contract contained a standard arbitration provision covering not only the substantive dispute between the parties but also any dispute relating to the "validity or legality" of the contract itself. *Ferrer* v. *Preston*, 145 Cal. App. 4th 440, 444-444 (Cal. Ct. App. 2006); *id.* at 448-449 & n.1 (Vogel, J., dissenting). It is undisputed that this contract "evidenc[es] a transaction involving commerce" (9 U.S.C. § 2) and thus is subject to the FAA. It is also undisputed that Ferrer has never specifically challenged the validity of that provision. Nevertheless, Ferrer resisted arbitration of a fee dispute with petitioner on the ground that the contract as a whole was invalid under California's Talent Agencies Act, Cal. Lab. Code §§ 1700 *et seq.* The superior court granted

Ferrer's request to enjoin arbitration proceedings and denied petitioner's motion to compel arbitration.

A divided panel of the California Court of Appeal affirmed the superior court's ruling. The majority held that Ferrer's challenge to the validity of the contract as a whole must be determined in the first instance by the Labor Commissioner, not an arbitrator. *Ferrer*, 145 Cal. App. 4th at 446. According to the majority, California law grants the Labor Commissioner *exclusive* jurisdiction over controversies arising under the Talent Agencies Act, subject to an appeal to the superior court. See *id.* at 444-447.

To reach this result, the court below had to distinguish this Court's recent decision in *Buckeye*, *supra*, which held that a party cannot avoid arbitration by attacking the validity of the contract as a whole. But the only reason the court gave for distinguishing *Buckeye* was that it "did not involve an administrative agency with exclusive jurisdiction over a disputed issue" and "did not consider whether the FAA preempts application of the exhaustion [of administrative remedies] doctrine." *Ferrer*, 145 Cal. App. 4th at 447.

As the dissent pointed out, the majority's holding that Ferrer could take his challenge to the administrative agency effectively rewrote the parties' contract and denied petitioner the benefits of arbitration rights for which he had bargained: "Instead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, [the majority has] permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures. That is not how it is supposed to work." *Id.* at 451 (Vogel, J., dissenting) (citation omitted).

SUMMARY OF ARGUMENT

As explained in Section I below, *Buckeye* controls this case and requires reversal. This Court made clear in *Buckeye* that *any* challenge to the validity of the contract containing an arbitration provision must be resolved by the arbitrator. The fundamental propositions on which that conclusion depend are not affected by the fact that the alternative forum to arbitration is an administrative forum rather than a judicial one. When *Buckeye* reserved to the arbitrator authority to determine the validity of the contract as a whole, it precluded any other decisionmaker from making that determination. To the extent that California law requires a contrary result in cases involving contracts covered by the FAA, California law is preempted by that statute, as definitively construed in *Buckeye*.

As shown in Section II, the decision below also undermines the core objectives of the FAA. Indeed, by ignoring *Buckeye* and allowing Ferrer to avoid his clear agreement to arbitrate, the decision below requires the parties to employ a more expensive and time-consuming dispute resolution procedure than the one for which they freely bargained. The decision below thus reflects the very kind of judicial hostility to arbitration that the FAA, and this Court's decisions construing it, were designed to eradicate.

If left in place, moreover, the decision below will deprive litigants throughout California—and any other states that adopt the approach of the court below—of the substantial benefits of arbitration, which Congress sought to protect when it enacted the FAA. Those benefits include the ability to resolve legal disputes more quickly and at a lower cost than the par-

ties could do in most courts. Recent data demonstrate that these benefits remain as important today as they were when the FAA was enacted. And a reversal is necessary to ensure that those benefits are not lost as a result of residual judicial hostility to arbitration.

ARGUMENT

I. Under Settled Law, Challenges To The Validity Of The Contract As A Whole Must Be Resolved By The Arbitrator, Not An Administrative Agency.

There can be little doubt that the decision below is flatly contrary to *Buckeye*. Although *Buckeye* did not involve an administrative action, the Court's reasoning, as we explain below, compels the conclusion that any challenge to the validity of the contract as a whole must be decided by the arbitrator alone—not a court *or* an administrative agency. And any state law that would otherwise require a different result—in this case California's Talent Agencies Act—is to that extent preempted by the FAA.

A. Under the FAA, as construed in *Buckeye* and other decisions, a challenge to the validity of the contract as a whole must be resolved by the arbitrator.

Buckeye relied heavily upon this Court's decision in *Prima Paint* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967), which held that a federal court considering a petition to compel arbitration under Section 4 of the FAA or an application for a stay pending arbitration under Section 3 "may consider only issues relating to the making and performance of the *agreement to arbitrate*." (Emphasis added.) More specifically, the Court explained that

"if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 403-404 (footnote omitted). Thus, under *Prima Paint*, a litigant in federal court could not resist arbitration by attacking the validity of the contract as a whole.

1. *Buckeye* held that the same rule applies to litigants resisting arbitration by resorting to state courts. See 546 U.S. at 449. The plaintiffs there had filed a putative class action in Florida state court, alleging that a check-cashing company charged usurious interest rates and that its contract with the plaintiffs was illegal on its face. See *id.* at 443. The plaintiffs sought to avoid their written agreement to arbitrate on the ground that the contract as a whole was void *ab initio*, such that the arbitration agreement was unenforceable. See *ibid.* The trial court denied the defendant's motion to compel arbitration, and the state supreme court affirmed that ruling. See *ibid.*

This Court reversed, explaining that *Prima Paint*, together with *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), establish three fundamental propositions of federal arbitration law: *first*, that "an arbitration provision is severable from the remainder of the contract"; *second*, that "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"; and *third*, that "this arbitration law applies in state as well as federal courts." *Buckeye*, 546 U.S. at 445-446. Applying these bedrock principles, the

Court in *Buckeye* held that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

2. The court below purported to distinguish *Buckeye* on the ground that the Talent Agencies Act allows respondent to ask the Labor Commissioner to determine (preliminarily) the validity of the management contract as a whole. But *Buckeye* cannot be dismissed so easily.

For one thing, notwithstanding the administrative-agency wrinkle, this is still a case, like *Buckeye*, in which a state court has now allowed a litigant to avoid his arbitration agreement based on his challenge to the validity of the contract as a whole—a result that *Buckeye* plainly forbids. See 546 U.S. at 446.

Moreover, the fact that Ferrer asked an administrative agency rather than a court to determine the validity of the contract as a whole is irrelevant. None of the three propositions of arbitration law on which *Buckeye* depends is affected by the identity of the alternative forum. The point of *Buckeye* (and *Prima Paint*) is that the arbitration agreement is severable from the remainder of the contract, and disputes relating to the remainder of the contract "must go to the arbitrator. *Id.* at 449. Thus, the fact that California law allowed Ferrer to file a petition with the Labor Commissioner is no ground on which to distinguish *Buckeye*. Under the FAA, it is for the arbitrator—and no one else—to decide whether the man-

agement contract as a whole is a valid, enforceable contract.[2]

The court below failed to identify any characteristic of administrative procedure that would distinguish this case from *Buckeye* in any material respect. And this Court has already rejected the argument that the prominence of an administrative agency in enforcing statutory rights counsels against enforcing arbitration agreements. See *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991) (citing *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987), and *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). Indeed, this Court has held that a federal age discrimination claim may be arbitrated, notwithstanding the important role of the EEOC in enforcing the Age Discrimination in Employment Act, because "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Gilmer*, 500 U.S. at 28-29.

So too here: the "mere involvement" of the California Labor Commissioner is plainly "not sufficient to preclude arbitration" under this Court's precedents.

B. The FAA preempts any state law, including California's Talent Agencies Act, that would require a result contrary to *Buckeye*.

The court below rested its contrary conclusion on California case law holding that the Talent Agencies

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[2] Indeed, this Court itself has declined to interpret a contract where the FAA committed the issue to the arbitrator. See *Bazzle*, 539 U.S. at 451-453.

Act confers upon the Labor Commissioner *exclusive* jurisdiction to resolve disputes involving that statute in the first instance. See 145 Cal. App. 4th at 444-447 (citing *Styne* v. *Stevens*, 26 P.3d 343 (Cal. 2001), and *Buchwald* v. *Superior Court*, 254 Cal. App. 2d 347 (Cal. Ct. App. 1967)). But even assuming that the Talent Agencies Act was properly invoked in this case,[3] that statute—as applied by the court below—frustrates Congress' purpose in enacting the FAA and is therefore preempted.

1. This Court has described Section 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements, *notwithstanding any state substantive or procedural policies to the contrary*. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses Cone*, 460 U.S. at 24 (emphasis added). And it is by now well settled that the FAA is "enforceable in both state and federal courts." *Perry*, 482 U.S. at 489; see also *Doctor's Associates* v. *Casarotto*, 517 U.S. 681, 684-686 (1996); *Allied-Bruce*, 513 U.S. at 272; *Southland*, 465 U.S. at 12, 15.[4] In-

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[3] The parties executed a personal management contract, not a talent agent's contract. Nevertheless, Ferrer invoked the Talent Agencies Act by "claim[ing] the agreement is not what it appears to be." 145 Cal. App. 4th at 450 (Vogel, J., dissenting).

[4] As recently as 2001, this Court reaffirmed the essential holding of *Southland*. See *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 122 (2001) ("The question of *Southland*'s continuing vitality was given explicit consideration in *Allied-Bruce*, and the Court declined to overrule it"). Even Justice O'Connor, who dissented in *Southland*, concurred in *Allied-Bruce* based on "considerations of *stare decisis*." 513 U.S. at 283-284 ("I acquiesce in today's judgment because there is no 'special justification' to overrule *Southland*. It remains now for Congress to correct this

deed, "[i]n creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland*, 465 U.S. at 16 (footnote omitted).

Accordingly, this Court has held that the Supremacy Clause requires enforcement of the FAA rather than a contrary state law. Although "[t]he FAA contains no express pre-emptive provision" and does not "occupy the entire field of arbitration," "state law may nonetheless be pre-empted * * * to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Volt*, 489 U.S. at 477 (1989) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). Thus, "[i]n recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms," this Court has held that "the FAA pre-empts state laws which require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Id.* at 478 (quotations omitted).

The Court has repeatedly applied that principle in other contexts. For example, in *Perry* v. *Thomas*, *supra*, this Court held that another provision of California's Labor Code, Section 229, could not be applied to arbitration agreements. That section provided that actions for collection of wages could be pursued in state court "without regard to the existence of any private agreement to arbitrate." 482 U.S. at 484. But the Court held that this anti-arbitration provision stood in "unmistakable conflict" with the FAA,

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interpretation if it wishes to preserve state autonomy in state courts") (citation omitted).

and concluded that "under the Supremacy Clause, the state statute must give way." *Id.* at 491. Similarly, in *Doctor's Associates* v. *Casarotto*, *supra*, the Court held that the FAA preempted a Montana statute providing that a contract containing an arbitration provision must give notice of that provision on the first page of the contract. 517 U.S. at 686-688.

These decisions make clear that where a state law impedes the simple enforcement of arbitration agreements according to their terms, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and is therefore preempted by the FAA. *Volt*, 489 U.S. at 477; *Hines*, 312 U.S. at 67.

2. Undoubtedly, the Talent Agencies Act (as interpreted by California courts) impedes the accomplishment of congressional objectives in the FAA in two ways. *First*, under the decision below, that Act requires the Labor Commissioner to determine the validity of the management contract as a whole, even though the arbitration agreement and the FAA (as interpreted in *Buckeye* and *Prima Paint*) commit that determination to the arbitrator alone.

Second, the Talent Agencies Act purports to supplement the requirements of the FAA. Construing Section 2 of the FAA, this Court has explained that the FAA recognizes "only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: [1] they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and [2] such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" *Southland*, 465 U.S. at 10-11 (footnote omitted). Here, the

contract undisputedly evidences a transaction involving commerce, and respondent has not claimed that the arbitration provision is invalid under any generally applicable principle of law or equity.

The Talent Agencies Act itself recognizes the validity of arbitration provisions in contracts to which it applies. But it conditions the validity of such provisions on the parties' agreeing to give notice to the Labor Commissioner and to allow his attendance at any arbitration hearings. Cal. Lab. Code § 1700.45(c)-(d). Because this provision thus purports to impose "additional limitations" on arbitration agreements, it conflicts with the FAA for that reason as well. *Southland*, 465 U.S. at 10-11; see also *Doctor's Assocs.*, 517 U.S. at 683; *Perry*, 482 U.S. at 491.

Given the "unmistakable conflict" (*Perry*, 482 U.S. at 491) between the Talent Agencies Act and the FAA, the court below was required to apply the FAA and this Court's decision in *Buckeye*, notwithstanding anything to the contrary in the Talent Agencies Act. As the Supremacy Clause itself provides: "the Laws of the United States * * * 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." U.S. Const. art. VI (emphasis added). State administrative proceedings are thus not excepted from the Clause's comprehensive scope.

For all these reasons, the court below erred in concluding that the Labor Commissioner must determine, in the first instance, the validity of the agreement at issue here, and the decision below must therefore be reversed.

II. Reversal Is Necessary To Eliminate Remaining Judicial Hostility To Arbitration And To Ensure That Businesses And Others Can Enjoy The Benefits Of Arbitration.

In disregarding this Court's decision in *Buckeye* and allowing Ferrer to avoid his clear agreement to arbitrate, the decision below represents only the latest example of some state courts' continuing hostility to private arbitration agreements—the very problem that the FAA was intended to overcome. As a result of that decision, the parties in this case have been deprived of the opportunity to realize the economies and efficiencies of private dispute resolution for which they bargained. As the dissent below put it, "[i]nstead of the speedy, efficient, and relatively inexpensive procedure contemplated by the parties' contract, [the majority below has] permitted Ferrer to cause a delay of years and triple or quadruple the parties' expenditures." 145 Cal. App. 4th at 451 (Vogel, J., dissenting). Reversal will not only help root out remaining judicial hostility to arbitration, but will also ensure that businesses and other parties to arbitration agreements can realize the significant advantages of arbitration over litigation.

A. The decision below reflects continuing judicial hostility to arbitration.

Given the implausibility of its legal reasoning, the decision below can only be understood as the latest example of that "longstanding judicial hostility to arbitration agreements" that the FAA was intended to overcome. *Gilmer*, 500 U.S. at 24.

1. As explained in a 1924 congressional report issued in connection with the FAA, "[s]ome centuries

ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction." H.R. Rep. No. 68-96, at 1-2 (1924) (cited in *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510 n.4 (1974)); see S. Rep. No. 68-536, at 2 (1924). This practice "became firmly embedded in the English common law and was adopted with it by the American courts." H.R. Rep. No. 68-96, at 2. Justice Story explained the traditional practice in *Tobey* v. *County of Bristol*, 23 F. Cas. 1313, 1321 (C.C. Mass. 1845):

> It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards.

Citing *Tobey* as a leading example, this Court later observed that "[t]he federal courts—like those of the states and of England—have, both in equity and at law, denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes. They have declined to compel specific performance, or to stay proceedings on the original cause of action." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 120-121 (1924) (citations omitted). "It [was] very old law," a Senate Report explained, "that the performance of a written agreement to arbitrate would not be enforced in equity * * * * [S]uch agreements were in large part inef-

fectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy." S. Rep. No. 68-536, at 2.

Congress enacted the FAA in 1925 specifically to "overcome [this] judicial resistance to arbitration." *Buckeye*, 546 U.S. at 443; see *Circuit City*, 532 U.S. at 111 ("the FAA was a response to hostility of American courts to the enforcement of arbitration agreements, a judicial disposition inherited from then-longstanding English practice"); *Allied-Bruce*, 513 U.S. at 270 (1995) ("the basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate"); *Scherk*, 417 U.S. at 510 (the FAA "revers[ed] centuries of judicial hostility to arbitration agreements"). As this Court explained in *Southland*, "[t]he problems Congress faced were * * * twofold: the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." 465 U.S. at 14. With the FAA now more than 80 years old, institutional hostility to arbitration agreements should be a relic of the past.

2. Unfortunately, this hostility remains apparent in other recent decisions from California courts. For example, California courts have refused to enforce arbitration provisions in health care service plans based on failure to comply with unique statutory disclosure requirements.[5] California courts have also

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[5] *E.g.*, *Robertson* v. *Health Net of Cal., Inc.*, 132 Cal. App. 4th 1419 (Cal. Ct. App. 2005); *Imbler* v. *PacifiCare of Cal., Inc.*, 103 Cal. App. 4th 567 (Cal. Ct. App. 2002); *Smith* v. *PacifiCare Behavioral Health of Cal., Inc.*, 93 Cal. App. 4th 139 (Cal. Ct. App. 2001).

recently invoked the amorphous doctrine of unconscionability to give plaintiffs a way out of their arbitration agreements.[6] Indeed, California courts have applied a stricter form of unconscionability analysis in arbitration cases, and as a result, "unconscionability challenges succeed more frequently when the contractual provision at issue is an arbitration agreement." Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 47 (2006) (finding that courts found at least a portion of an arbitration provision unconscionable in 68 out of 114 cases, while courts found non-arbitration contract provisions unconscionable in only 5 out of 46 cases).

As these examples make clear, "the same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle—but equally hostile—form," at least in California. Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. Disp. Resol. 61, 61 (2005); see *Gentry*, 42 Cal. 4th at 473 (Baxter, J., dissenting) (noting the California Supreme Court's "continuing effort to limit and restrict

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[6] *E.g.*, *Gentry* v. *Superior Court*, 42 Cal. 4th 443 (Cal. 2007); *Discover Bank* v. *Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005); *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000); *Fitz* v. *NCR Corp.*, 118 Cal. App. 4th 702 (Cal. Ct. App. 2004); *Abramson* v. *Juniper Networks, Inc.*, 115 Cal. App. 4th 638 (Cal. Ct. App. 2004); *O'Hare* v. *Municipal Res. Consultants*, 107 Cal. App. 4th 267 (Cal. Ct. App. 2003); *Flores* v. *Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846 (Cal. Ct. App. 2001).

the terms of private arbitration agreements, which enjoy special protection under both state and federal law"). And because California's economy is the largest in the Nation and, indeed, the eighth-largest economy in the world (with a gross state product exceeding $1.6 trillion), continuing hostility to arbitration in California is a significant problem for businesses nationwide. See California Legislative Analyst's Office, *2006 Cal Facts: California's Economy and Budget in Perspective*, available at http://www.lao.ca.gov/2006_cal_facts/pdf.

B. The decision below deprives both businesses and individuals of the substantial benefits of arbitration.

Such hostility often deprives businesses and individuals of the substantial benefits of arbitration—benefits that are often at the heart of an arbitration contract.

1. The "preeminent concern" of Congress when it enacted the FAA was "to enforce private agreements into which parties had entered." *Dean Witter Reynolds*, 470 U.S. at 221. Accordingly, the Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478; accord *Circuit City*, 532 U.S. at 111 ("the FAA compels judicial enforcement of a wide range of written arbitration agreements"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (the FAA manifests "a policy guaranteeing the enforcement of private contractual agreements"); *Southland*, 465 U.S. at 10 ("Congress has * * * mandated the enforcement of arbitration agreements"). Because "[a]rbitration under the Act is a matter of con-

sent, not coercion," the parties may "structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; see *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995) (the parties may decide which issues should be submitted to the arbitrator). But, however the parties structure their agreement, the FAA commands that a court must *enforce* that agreement according to its terms.

The decision below undermines this fundamental objective of the FAA. The parties' agreement in this case could not be clearer: "[A]ny dispute under or relating to the terms of [the management contract], or the breach, validity, or legality thereof" must be resolved through arbitration rather than litigation. Ferrer has never challenged the validity or the scope of this agreement. Instead, his sole defense to arbitration is the allegation that the management contract as a whole is invalid under the Talent Agencies Act. But that is just a "dispute * * * relating to * * * the breach, validity, or legality" of the management contract, which the parties expressly agreed should be resolved in arbitration. 145 Cal. App. 4th at 449 n.1.

By relieving Ferrer of his contractual duty to arbitrate issues relating to the validity or legality of the management contract, the decision below fails to enforce the parties' bargained-for agreement. And to make matters worse, the decision below undermines, for businesses and individuals throughout California, Congress' "preeminent" purpose in enacting the FAA.

2. Congress and this Court have identified several compelling reasons why contracting parties frequently prefer arbitration to litigation. Shortly before enactment of the FAA, Congress heard testimony

that "arbitration saves time, saves trouble, [and] saves money. * * * It preserves business friendships. * * * It maintains business honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts." *Joint Hrgs. Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong., 1st Sess. 7 (1924) (Statement of Charles L. Bernheimer, Chamber of Commerce of New York). Similarly, a House Report explained that "the costliness and delays of litigation * * * can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. Rep. No. 68-96, at 2. And a Senate Report concluded that action was needed because "[t]he desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536, at 3.

Nearly 60 years after the FAA was enacted, Congress observed that "[t]he advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." H.R. Rep. No. 97-542, at 13 (1982). Thus, decades of experience under the FAA regime have only confirmed that arbitration is fundamentally beneficial for parties engaged in commerce.

This Court likewise has recognized the benefits of arbitration as well, explaining that "it is often a judg-

ment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies." *Mitsubishi Motors*, 473 U.S. at 633. Thus, parties to arbitration agreements elect to trade "the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer*, 500 U.S. at 31.

3. The assessments of Congress and this Court accurately reflect the perceptions of private parties considering alternative methods of dispute resolution as well as relevant empirical data.

Survey research confirms that participants in arbitrations perceive distinct advantages to this method of dispute resolution. For example, in a 2005 survey conducted by Harris Interactive on behalf of the Chamber's Institute for Legal Reform, most respondents described the arbitrations in which they participated as faster (74 percent), simpler (63 percent), and less expensive (51 percent) than litigation. See *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 5 (Institute for Legal Reform, April 2005).[7] Not surprisingly, about two-thirds of respondents said they would likely use arbitration again. See *ibid.*

These perceptions of the benefits of arbitration find ample support in available empirical research. For example, the authors of one study comparing ar-

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[7] Available at www.instituteforlegalreform.org/resources/ArbitrationStudyFinal.pdf.

bitration and litigation of employment-related claims concluded that "[b]y any measure, the arbitrations terminated more quickly than the litigations. The mean and median times in arbitration ranged from about seven to 13 months. The mean and median litigation times in both federal and state courts all exceeded 20 months." Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58-Jan. Dispute Resolution J. 44, 51 (2004). Another commentator reported in 1998 that "[t]he average case in arbitration is resolved in 8.6 months, less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998).

Data on pending court cases confirm this conclusion. For example, as of September 30, 2006, more than 40 percent of all civil cases pending in the federal district courts had been pending for one year or longer. See Federal Judicial Center, *Judicial Business of the United States Courts 2006*, at 195-197 (Table C-6). Eleven percent of cases had been pending for *three years* or longer. See *id.* at 195. The median interval from filing to disposition of civil cases resolved by trial was 23.5 months—significantly longer than the average arbitration. See *id.* at 192-104 (Table C-5).

4. The financial and other risks created by the decision below to other California litigants are well illustrated by the facts of this case. Under California law, Ferrer's administrative proceeding is apparently only a prelude to further litigation. Section 1700.44(a) provides that "[i]n cases of controversy arising under [the Talent Agencies Act], the parties involved shall refer the matters in dispute to the La-

bor Commissioner, who shall hear and determine the same, subject to an appeal within 10 days after determination, to the superior court where the same shall be heard *de novo*." And to take the case to the superior court for this trial *de novo*, the aggrieved party must post a bond of at least $1,000 and up to twice the amount of any judgment approved by the Commissioner. See Cal. Lab. Code § 1700.44(a).

Thus, by allowing Ferrer to litigate the validity of the management contract before the Labor Commissioner rather than the arbitrator, the decision below actually exacerbates the harm caused by Ferrer's refusal to arbitrate. In the typical case, a party seeking to compel arbitration might be forced into state-court litigation, costly and time-consuming as that may be. But the result in this case is even worse, because the decision below forces petitioner to spend *additional* time and money merely to satisfy a *condition precedent* to state-court litigation, perhaps including another appeal.

This case thus calls to mind this Court's admonition that allowing a litigant to evade his agreement to arbitrate "could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7. Reversal will spare petitioner—and other California litigants—from that perverse fate.

* * * * *

This Court has recognized "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. Indeed, Congress intended "to move the parties to an arbitrable

dispute out of court and into arbitration as quickly and easily as possible." *Moses Cone*, 460 U.S. at 22; see *Southland*, 465 U.S. at 7. Yet the court below ratified Ferrer's "delay and obstruction," thereby depriving petitioner of the full benefits of arbitration and, at the same time, providing a blueprint for eviscerating the FAA and *Buckeye* in other state courts, in California and elsewhere. For businesses subject to suit in those jurisdictions, that is an intolerable result.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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