No. 16-___

IN THE

Supreme Court of the United States

H&R BLOCK, INC., et al.,

Petitioners,

v.

MANUEL LOPEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Court of Appeals, Western District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts Missouri's new, arbitration-disfavoring rule that a court reviewing an affirmative defense to enforcement of an arbitration agreement, such as unconscionability, has an independent obligation to determine the existence and scope of the agreement—even if neither issue is contested by any party—before considering the defense that has been asserted.

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants-Appellants in the Missouri Court of Appeals, are H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology LLC.

Respondent, who was Plaintiff-Appellee in the Missouri Court of Appeals, is Manuel Lopez.

RULE 29.6 STATEMENT

Petitioners HRB Tax Group, Inc. and HRB Technology LLC are indirect, wholly-owned subsidiaries of Petitioner H&R Block, Inc. H&R Block, Inc. is a publicly held corporation. It has no parent corporations. BlackRock, Inc., through its subsidiaries, is the beneficial owner of 10 percent of the common stock of H&R Block, Inc.* No other publicly held corporation owns 10 percent or more of H&R Block, Inc.'s stock.

* Information as to BlackRock, Inc.'s ownership is as of January 31, 2016 and is furnished in reliance on the Schedule 13G/A of BlackRock, Inc., filed with the Securities and Exchange Commission on February 10, 2016.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology, LLC respectfully petition this Court for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Western District.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Western District is reported at 491 S.W.3d 221 (Mo. Ct. App. 2016), and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a–14a. The court of appeals' order denying rehearing and transfer to the Missouri Supreme Court is unpublished and is reproduced at Pet. App. 55a. The Missouri Supreme Court's order denying transfer is unpublished and is reproduced at Pet. App. 56a. The unreported order of the Circuit Court of Jackson County, Missouri, is reproduced at Pet. App. 39a–54a.

JURISDICTION

The Missouri Court of Appeals, Western District issued its opinion and order on March 8, 2016. Pet. App. 1a. The court of appeals denied Petitioners' motion for rehearing or transfer to the Missouri Supreme Court on May 3, 2016. Pet. App. 55a. Petitioners filed a timely transfer application with the Missouri Supreme Court, which was denied on June 28, 2016. Pet. App. 56a. This Court has jurisdiction over the court of appeals' order affirming the denial of Petitioners' motion to compel arbitration under 28 U.S.C. § 1257(a). *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6–8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution provides, in relevant 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.

U.S. Const. art. VI, cl. 2.

Section 2 of the Federal Arbitration Act ("FAA") provides, in relevant 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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

STATEMENT OF THE CASE

The Missouri courts have established a novel rule of contract law that expressly disfavors arbitration and therefore conflicts with, and is preempted by, the FAA. Specifically, Missouri's new rule requires courts to undertake an independent examination of the existence and scope of an agreement to arbitrate—even where no party has ever challenged

either issue—before considering any potential defenses to enforcement. *See* Pet. App. 10a–11a (holding that "we do not address defenses to enforcement of an arbitration agreement unless we are first satisfied that an arbitration agreement exists and that the subject disputes are within its scope").

Missouri's rule is facially applicable only to arbitration agreements, and has not been applied to other species of contract. It will multiply the obstacles to enforcing agreements to arbitrate, because both courts and parties can always raise new questions about an arbitration agreement's existence and scope. Missouri's rule therefore defies both the FAA's policy favoring arbitration and its mandate that arbitration agreements be treated no differently from—and certainly no less favorably than—other contracts.

No other jurisdiction, as far as Petitioners have been able to discover, has embraced Missouri's novel, arbitration-disfavoring approach. On the contrary, other jurisdictions routinely address defenses to enforcement without first addressing the existence and scope of the underlying arbitration agreement.

Missouri's rule will thwart uniform application of the federal law of arbitration nationwide. The rule manifests the judicial hostility to arbitration that the FAA was enacted to counteract. Moreover, as this Court has recognized, because the FAA does not confer federal jurisdiction, state-court compliance with the FAA's policies and mandates is crucial. *See Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("Given the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a

prominent role to play as enforcers of agreements to arbitrate."). But, in Missouri, a plaintiff suing a non-diverse defendant can now evade the FAA by choosing to plead only state-law claims.

This Court should not allow Missouri's outlier rule to stand. "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015). This Court should therefore grant the petition, summarily reverse the Missouri Court of Appeals' judgment, and remand this case for further proceedings consistent with this Court's precedents applying the FAA. In the alternative, this Court should grant plenary review.

A. Factual Background.

Petitioners have repeatedly sought to enforce an arbitration agreement with Respondent that is, in its terms, entirely unremarkable. And yet, over four years and four separate rounds of litigation, the Missouri courts have refused to compel arbitration on a series of improper grounds—most recently in the decision below, where the court created a novel rule that excepts arbitration agreements from ordinary waiver rules and subjects them to heightened judicial scrutiny.

1. The IRS Return Preparer Initiative.

The putative class action in which this arbitration dispute arose concerns a "compliance fee" paid by customers who purchased tax preparation services in an H&R Block store in 2011 and 2012.

In 2009 and 2010, the IRS launched the IRS Return Preparer Initiative ("RPI"), a series of regulations that, first, brought hundreds of thousands of tax preparers who had not previously been subject to federal regulation under IRS oversight, and, second, imposed a set of costly requirements on these tax preparers. *Loving v. IRS*, 917 F. Supp. 2d 67, 71–72 (D.D.C. 2013). Under the RPI, tax preparers were required to register with the Secretary of the Treasury after passing an exam and paying a fee. *Id.* To maintain a valid registration, tax preparers were required each year to pay an additional fee and complete continuing education courses. *Id.* at 72.

H&R Block employs tens of thousands of such tax preparers nationwide. *See* H&R Block, "Our Company," https://www.hrblock.com/corporate/our-company/, *last visited* Sept. 21, 2016. In response to the RPI and the substantial training and registration burdens that it imposed, H&R Block decided to add an additional fee—termed "compliance fee"—to client invoices. For the 2011 tax season, H&R Block set the compliance fee at $2; for 2012, it adjusted the fee to $4. *See* First Am. Class Action Pet. ¶ 20, Legal File, Vol. III at LF-357 (June 15, 2016).[1]

In January 2013, the U.S. District Court for the District of Columbia found that the IRS lacked statutory authority to regulate tax preparers and enjoined the IRS from enforcing the RPI. *Loving*,

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[1] Citations to the "Legal File" refer to the record on appeal as filed with the Missouri Court of Appeals, Western District, in *Lopez v. H&R Block, Inc.*, No. WD78465.

917 F. Supp. 2d at 80–81. The U.S. Court of Appeals for the District of Columbia affirmed. *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014). H&R Block did not charge the compliance fee in 2013 or any subsequent year. *See* First Am. Class Action Pet. ¶ 25, *in* Legal File, Vol. III at LF-359.

2. The Arbitration Agreement.

In April 2011, Respondent Manuel Lopez came to H&R Block to have his 2010 tax returns prepared and paid the compliance fee. At the time he received his services, he signed a "Client Service Agreement" ("CSA"), as H&R Block requires of all customers before preparing their taxes. First Am. Class Action Pet. ¶ 26, *in* Legal File, Vol. III at LF-359. H&R Block's 2011 CSA contained an arbitration provision that provided, in relevant part:

> ARBITRATION IF A DISPUTE ARISES BETWEEN YOU AND H&R BLOCK
>
> If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party. This third party, known as the Arbitrator, is empowered to settle the matter with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your right to sue H&R Block in

court before a judge and jury, and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled by arbitration. In addition, you specifically agree to waive any right to "class action" arbitration. . . .

Right to Opt-Out of This Arbitration Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our website at www.hrblock.com/goto/optout (if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt-Out, P.O. Box 32818, Kansas City, MO 64171. . . . Your electronic or written opt-out letter will override your signature below regarding arbitration but no other provision of this document.

How Arbitration Works. If you have a complaint against H&R Block that you have been unable to resolve by bringing it to the attention of the office that served you, you may contact the American Arbitration Association (AAA). . . . AAA will appoint a neutral practicing attorney with more than ten years of relevant legal experience to hear your side and H&R Block's side of the issue,

> and make a decision that is binding on both you and H&R Block. . . . **Arbitration Costs.** You will be asked to pay a $5 fee and H&R Block will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you win the arbitration.

Pet. App. 90a–92a. The arbitration provision also specified that arbitration would take place in the federal judicial district where the customer lives; that the arbitrator's award would be final and unappealable except where permitted by the FAA; and that arbitration proceedings would be confidential. Pet. App. 92a. Respondent did not submit an opt-out notification in 2011.

In April 2012, Respondent came to H&R Block to have his 2011 tax returns prepared and again paid the compliance fee. At the time, in accordance with H&R Block's policy that clients sign a new CSA every tax year, he signed the 2012 CSA, which contained a similar arbitration provision to that found in the 2011 CSA, including the opt-out procedures. *See* Pet. App. 94a–99a. Shortly after he received his tax preparation services, Respondent opted out of the 2012 arbitration provision by following those procedures. Pet. App. 5a.

B. Proceedings Below.

Also in April 2012, Respondent filed this putative class action in the Circuit Court of Jackson County, Missouri, alleging that H&R Block had misleadingly described the "compliance fee" that he had paid in both 2011 and 2012 in connection with his purchase

of H&R Block tax preparation services. Class Action Pet., *in* Legal File, Vol. I at LF-13–24. He asserted claims under the Missouri Merchandising Practices Act and Missouri common law principles. First Am. Class Action Pet. ¶¶ 49–72, *in* Legal File, Vol. III at LF-365–68.

Petitioners moved to compel arbitration of Respondent's 2011 claims, pursuant to the arbitration agreement in the 2011 CSA that Respondent had signed.[2] Respondent opposed H&R Block's motion, arguing only that the arbitration provision was unconscionable under Missouri law. Pltf.'s Sugg. in Opp. To Defs.' Mot. to Stay the Case and Compel Arbitration at 15–29, *in* Legal File, Vol. IV at LF-417–31.

The Circuit Court denied Petitioners' motion to compel arbitration. After noting that H&R Block did not guarantee that it would pay arbitration costs in excess of $1,500, the court concluded that "[t]his exposure to additional fees and expenses in excess of $1,500 in a case where the arbitration is focused on a $2 charge, constitutes a substantial obstacle to arbitration and almost necessarily forecloses any challenge to the type of consumer claim asserted by Plaintiff in this litigation." Pet. App. 22a.[3]

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[2] Petitioners stipulated to the fact that Respondent opted out of the 2012 arbitration agreement. Pet. App. 16a n.2.

[3] In fact, in light of the American Arbitration Association rules in effect at the time, arbitration would cost only $5 for H&R Block customers. Under AAA rules, a consumer asserting a claim pursuant to a standard-form arbitration agreement (such as that contained in the CSA) was required to pay only a $200 filing fee for arbitration—which would be covered by H&R

Petitioners appealed, arguing that the Circuit Court's finding that the 2011 arbitration provision was unconscionable contravened *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), and two Missouri Supreme Court cases addressing the relationship between *Concepcion* and Missouri unconscionability law, *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. 2012) (en banc), and *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 495 (Mo. 2012) (en banc). *See* Appellants' Opening Br. at 12–19, *Lopez I* (Dec. 6, 2013).[4] Respondent, defending the trial court's judgment, argued only that the arbitration provision was unconscionable and that no part of it could be enforced. Resp.'s Br. at 15–46, *Lopez I* (Jan. 20, 2014).

The Missouri Court of Appeals, Western District, agreed with Petitioners that the trial court's unconscionability analysis had erroneously disregarded *Concepcion* and the Missouri Supreme Court's related precedents. "The trial court," it

(continued…)

Block's agreement to pay up to $1,500 in arbitration expenses in all cases. *See* American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures, in* Legal File, Vol. XIII at LF-1294, LF-1302–04 (setting forth procedures applicable "to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of . . . services are non-negotiable," and providing table of associated fees).

[4] Citations to "*Lopez I*" refer to the first proceeding before the Missouri Court of Appeals, *Lopez v. H&R Block, Inc.*, No. WD76724 (W.D. Mo. Ct. App.).

explained, "invalidated the arbitration agreement based on the public policy concern that consumers with small-value claims would be deprived of a meaningful remedy." Pet. App. 37a. "*Robinson* specifically rejected such public policy reasoning post-*Concepcion* even if the policy aims to prevent undesirable results to consumers. . . . The trial court clearly erred in finding the arbitration provision in the CSA unenforceable based on [these] public policy concerns." *Id.* Noting that the trial court had not addressed other arguments that Respondent had made in support of his claim that the arbitration provision was unconscionable, the court of appeals "remanded [the case] to the trial court to assess the evidence and determine if the arbitration agreement contained in the CSA is enforceable in light of *Robinson* and *Brewer*." Pet. App. 38a.

On remand before a different trial court judge, *see* Pet. App. 7a n.2, the parties again briefed only the issue of unconscionability. *See* Pltf's Prop. Findings of Fact, Conclusions of Law, and Prop. Order Denying Defs.' Mot. to Compel Arbitration at 14–28, *in* Legal File, Vol. XIV at LF-1361–75; Defs.' Prop. Findings of Fact and Conclusions of Law in Support of Rev'd Mot. to Stay the Case and Compel Arbitration at 12–26, *in* Legal File, Vol. XV at 1389–403. The court addressed the unconscionability question by comparing H&R Block's arbitration provision with the arbitration agreement that the Missouri Supreme Court had held unconscionable in *Brewer*, 364 S.W.3d 486. *See* Pet. App. 48a–52a. The trial court focused on several points of supposed similarity with the *Brewer* agreement that, in the court's view, created a risk that the cost of

arbitration could be greater than the consumer's potential recovery and that "there is [therefore] no practical, viable means of individualized dispute resolution." Pet. App. 51a. On the basis of this finding, as well as other putative similarities with the *Brewer* agreement, the trial court found the 2011 arbitration provision to be unconscionable and thus unenforceable. Pet. App. 53a–54a.

Petitioners again appealed, and again the parties briefed only whether the arbitration provision in the 2011 CSA was unconscionable. Appellants' Am. Op. Br. at 12–39, *Lopez II* (Sept. 2, 2015); Resp.'s Br. at 15–47, *Lopez II* (Oct. 14, 2015); Appellant's Reply Br. at 3–15, *Lopez II* (Oct. 30, 2015).[5] The Missouri Court of Appeals, however, refused to resolve that issue on appeal and instead affirmed on a ground that neither party had raised on appeal and that had not been contested in the proceedings below.

The court of appeals noted at the outset that the trial court had based its conclusions "almost exclusively . . . on comparison of the arbitration provision in the 2011 CSA to the arbitration provision involved in *Brewer*." Pet. App. 8a n. 3. "[I]t should go without saying," the court of appeals stated, "that the trial court would also have been bound to consider Missouri and United States Supreme Court decisions issued after *Robinson* and *Brewer* that have addressed whether and on what

[5] Citations to "*Lopez II*" refer to the proceeding below, which was the second time this case reached the Missouri Court of Appeals, *Lopez v. H&R Block, Inc.*, No. WD78465 (W.D. Mo. Ct. App.).

basis arbitration provisions can be declared unconscionable." *Id.*

Notwithstanding the trial court's failure to do so, and notwithstanding that Respondent had raised no other issues concerning the enforceability of the arbitration provision either on this appeal or during any of the three prior rounds of briefing on Petitioners' motion to compel, the court of appeals declined to resolve the unconscionability issue. Instead, it created a new rule governing resolution of disputes over the enforcement of arbitration agreements: It held that "we *do not address* defenses to enforcement of an arbitration agreement *unless we are first satisfied* that an arbitration agreement exists and that the subject disputes are within its scope." Pet. App. 10a–11a (emphasis added). As the court made clear, under this new rule, courts have an independent "obligation" to inquire into the existence and scope of an arbitration agreement, even where those issues have been waived by the parties. Pet. App. 13a n.8. "We are *required* . . . to affirm the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*," the court of appeals held. Pet. App. 13a–14a (emphasis added).

As required by its new rule, the court of appeals then *sua sponte* scoured the record and invented an alternative basis to affirm that Respondent had never raised, without giving the parties the opportunity to provide evidence or briefing on this issue. Specifically, the court held that the arbitration provision in the 2012 CSA—a separate agreement that the parties had not addressed in their briefing—superseded the arbitration provision

in the 2011 CSA that was actually the subject of the parties' arguments. Pet. App. 11a–13a. The court further held that, because Respondent had opted out of the 2012 arbitration provision, he was not bound to arbitrate his 2011 claims. Pet. App. 13a. On this basis, the court of appeals affirmed the trial court's denial of Petitioners' motion to compel arbitration. Pet. App. 13a–14a.[6]

Petitioners moved for rehearing by the Missouri Court of Appeals or, in the alternative, transfer to the Missouri Supreme Court for review. Petitioners argued that the court of appeals' newly minted rule, which is not applied in Missouri to contracts generally and which disfavors arbitration, conflicts with the FAA. Pet. App. 60a, 66a–68a, 71a. The Missouri Court of Appeals denied Petitioners' motion for rehearing or transfer. Pet. App. 55a.

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[6] The court of appeals based its holding that the 2012 CSA superseded the 2011 CSA on a footnote in an initial brief filed by Petitioners in support of their motion to stay the case and compel arbitration of Respondent's claims. Pet. App. 6a–7a, 11a–12a (discussing Defs.' [First] Mot. to Stay the Case and Compel Arbitration, *in* Legal File, Vol. I at LF-25–28). This brief was subsequently supplanted by a revised motion to compel filed after H&R Block learned that Respondent had opted out of the 2012 arbitration provision; the revised motion, which contained no similar discussion, was the basis for the trial court's disposition of the arbitration issue. Defs.' Revised Mot. to Stay the Case and Compel Arbitration, *in* Legal File, Vols. II & III at LF-264–300; *see also* Defs.' Mot. for Leave to File Revised Mot. to Stay the Case and Compel Arbitration, *in* Legal File, Vol. II at LF-216–17. Respondent himself never asserted any challenge at all to the existence or scope of the 2011 arbitration agreement.

Petitioners then sought review from the Missouri Supreme Court, setting forth the same argument that the court of appeals' rule contravenes the FAA by impermissibly disfavoring and burdening arbitration. Pet. App. 74a, 79a–82a. The Missouri Supreme Court denied review. Pet. App. 56a.

REASONS FOR GRANTING THE WRIT

Missouri's new rule—to wit, that courts cannot address defenses to the enforcement of an arbitration agreement until they have first independently determined that a valid arbitration agreement covers the dispute at hand—burdens arbitration agreements and singles them out for unfavorable treatment. Missouri has no such rule for contracts in general; and the rule therefore conflicts with, and is preempted by, the FAA. Moreover, no other jurisdiction applies this novel and burdensome rule. This Court's intervention is required both to preserve the FAA's policies and to ensure the uniform nationwide application of federal law governing arbitration. Indeed, since the FAA does not confer federal jurisdiction, state courts are key front-line enforcers of the Act. Where (as here) a state's courts resist the FAA's policies and mandates, this Court must act to ensure that *all* jurisdictions, as the Supremacy Clause requires, abide by the FAA and further its policy of promoting arbitration.

I. THE MISSOURI COURTS' ARBITRATION-DISFAVORING RULE CONFLICTS WITH, AND IS PREEMPTED BY, THE FAA.

The FAA favors arbitration as a matter of federal policy. One of its central tenets is that agreements to arbitrate must be treated no worse than other

types of contracts. Missouri's new rule plainly violates this principle by burdening arbitration agreements and singling them out for unfavorable treatment. It is therefore preempted by the FAA.

A. The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute "was enacted . . . in response to widespread judicial hostility to arbitration agreements," *Concepcion*, 563 U.S. at 339, and it "reflects an emphatic federal policy in favor of arbitral dispute resolution," *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (per curiam).

Under the FAA, arbitration agreements must not only be "rigorously enforced," *Perry v. Thomas*, 482 U.S. 483, 490 (1987), they must also be given effect expeditiously. As this Court has explained, Congress enacted the FAA to ensure "that the arbitration procedure . . . be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983) (holding that the FAA reflects a "statutory policy of rapid and unobstructed enforcement of arbitration agreements"). To allow a party to "ignore the contract and resort to the courts" before being compelled 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.

Accordingly, this Court has repeatedly invalidated state laws and reversed state judicial decisions that multiply the issues that must be litigated or the procedural hurdles that must be cleared before arbitration can commence. *See, e.g.*, *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010) (courts may not require parties to litigate the validity of an arbitration agreement where the parties expressly assigned that determination to the arbitrator); *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (states may not require parties to exhaust administrative procedures before commencing arbitration); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–46 (2006) (state-law severability principles may not be applied to require parties to litigate contract's validity where validity of the arbitration provision itself is not challenged).

Section 2, the FAA's "primary substantive provision," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), furthers these congressional goals by requiring courts to "place arbitration agreements on an equal footing with other contracts," *Concepcion*, 563 U.S. at 339. When Congress enacted the FAA, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in a great variety of devices and formulas . . . ." *Id.* at 342. To overcome this hostility and promote the practice of arbitration, the FAA requires as a general matter that arbitration agreements be treated no worse than other types of contracts. 9 U.S.C. § 2. Any state law or rule that burdens arbitration agreements or singles them out for differential treatment conflicts with, and is preempted by, the FAA. *See Concepcion*, 563 U.S. at

344; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

The FAA constrains state courts just as forcefully as it does other actors. *Southland*, 465 U.S. at 13 (holding that the FAA ensures that parties' "expectations would not be undermined by federal judges or . . . by state courts or legislatures"); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (reaffirming *Southland*'s rule). "[S]tate law, whether of legislative *or judicial origin*, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," but "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2 of the FAA]." *Perry*, 482 U.S. at 492 n.9 (first emphasis added). Accordingly, where a state court adopts a rule of law that unduly burdens arbitration or applies only to arbitration agreements and not to other types of contracts, that rule is preempted by the FAA. *Concepcion*, 563 U.S. at 344; *DIRECTV, Inc.*, 136 S. Ct. at 469–71.

B. The Missouri courts have violated these principles. They have adopted a new rule that singles out arbitration agreements for unfavorable and burdensome treatment.

The Missouri Court of Appeals held that "we *do not address* defenses to enforcement of an arbitration agreement *unless we are first satisfied* that an arbitration agreement exists and that the subject disputes are within its scope." Pet. App. 10a–11a (emphasis added). The court, explaining that this manner of proceeding is an "obligation," deemed it irrelevant that the plaintiff in this case had not

challenged the existence or scope of the arbitration agreement and had made no argument on these points at any stage of the ligitation. Pet. App. 13a–14a & n.8. The Missouri Supreme Court declined Petitioners' request to review this novel rule and correct the conflict that it creates with § 2 of the FAA and with the Act's policy favoring expeditious enforcement of arbitration agreements.

Going forward in Missouri, courts will now be obligated, when adjudicating a dispute over enforcement of an arbitration agreement, to determine first (1) whether a valid agreement to arbitrate exists and (2) whether the dispute falls within the agreement's scope, before they may address any defenses to enforcement. And they must do so regardless of whether any party has ever challenged the existence or scope of the agreement.

There is no such general rule in contract law in Missouri. On the contrary, in an ordinary contract case, where no party challenges the existence or scope of the agreement and the only contested issue is whether a given defense to contract formation applies, Missouri courts consider the contested issue without delving into contract formation and terms. *See, e.g.*, *Dickemann v. Millwood Golf & Racquet Club, Inc.*, 67 S.W.3d 724, 725–26 (Mo. Ct. App. 2002) (refusing to consider challenge to existence of contract because it was not "raised in the pleadings, nor decided at the trial level"); *Hartland Computer Leasing Corp. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. 1989) (where "there exist[ed] no dispute over the execution or the terms of the lease and the guarantee," court of appeals proceeded to address unconscionability without analyzing

existence or scope of agreement); *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854 (Mo. Ct. App. 2009) (similar).

Missouri's new rule is therefore unique to arbitration agreements. Moreover, it operates solely to the detriment of arbitration. Under the new rule, ordinary waiver principles do not apply in litigation over arbitration agreements. Instead, such agreements are *always* subject to invalidation on the grounds that no contract exists or that the claims at issue do not fall within the contract's scope. This means that a party may challenge the existence or scope of an arbitration agreement for the first time on appeal, and the court of appeals will be obliged to consider its arguments. In fact, all courts apparently will be obligated, whenever enforcement of an agreement to arbitrate is at issue, to scour the record in search of possible challenges to the existence or scope of an arbitration agreement—*even where neither party has ever raised, offered evidence about, or briefed such a challenge*—and then, if the court discovers a challenge it deems viable, to invalidate the agreement *sua sponte*.

This discriminatory rule will, in short, cause courts to multiply the obstacles that must be cleared before an arbitration agreement may be enforced. At a minimum, delay of enforcement of arbitration agreements is an inevitable consequence.[7]

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[7] Indeed, because of the discriminatory rule, H&R Block now faces the prospect of still more litigation on remand about whether its run-of-the-mill arbitration provision may be enforced. Respondent has taken the position that, because the court of appeals did not reverse the trial court's judgment, the

Such judicially created, burdensome, arbitration-disfavoring rules contravene the FAA, as this Court has made clear. This case is closely analogous to *DIRECTV*, 136 S. Ct. 463. There, the California Court of Appeal had held that certain language in an arbitration provision rendered the entire provision unenforceable. This Court found that the California court (1) had interpreted the arbitration provision using rules not found in "any contract case from California or from any other State," (2) did not suggest that its approach would be used in any non-arbitration context, and (3) had adopted a rule that "courts are unlikely to accept as a general matter and to apply in other contexts." *Id.* at 469–70. Because the California court's holding "d[id] not place arbitration contracts on equal footing with all other contracts" and "d[id] not give due regard to the federal policy favoring arbitration," this Court held that it was preempted by the FAA. *Id.* at 471.

(continued…)

trial court's legally flawed unconscionability ruling is law of the case. *See* Pltf's Reply in Support of Request for Entry of An Order on Case Management at 2, *Lopez v. H&R Block, Inc.*, No. 1216-CV12290 (Mo. 16th Jud. Cir. Ct. Jackson Cty. Aug. 3, 2016). Respondent argues that the arbitration agreement cannot be enforced against any members of the putative Missouri class—regardless of whether they opted out of arbitration in any year. *Id.* He seeks to proceed immediately to certification of a class that would include myriad H&R Block customers who signed the CSA and who, unlike Respondent, never opted out of arbitration. *Id.* at 2–4. Accordingly, because of the Missouri Court of Appeals' newly invented rule and concomitant refusal to resolve the unconscionability issue, H&R Block must now litigate the enforcement of the arbitration agreement against absent members of the putative class.

The same is true here. The rule adopted below has not been applied in any non-arbitration case; the court of appeals did not suggest that it should be; and courts are unlikely to apply it outside the arbitration context. The rule therefore fails to "place arbitration contracts on equal footing with all other contracts" and is preempted by the FAA for that reason. *Id.*

II. THE RULE ESTABLISHED BY THE COURT BELOW CONFLICTS WITH THE LAW OF OTHER JURISDICTIONS.

Missouri's novel, burdensome, arbitration-disfavoring rule is, unsurprisingly, an anomaly that directly conflicts with the practice of other jurisdictions. Petitioners have discovered no instance of another court adopting a similar requirement. Rather, when considering defenses to enforcement of an arbitration agreement, both federal and state courts routinely apply ordinary waiver principles to the issues of the agreement's existence and scope.

A. Federal courts of appeals routinely pass over the issues of existence and scope where undisputed by the parties and focus their analyses on the defenses to enforcement that have actually been raised. For instance, in *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636, 639 (4th Cir. 2002), the Fourth Circuit, applying Maryland law, examined an agreement where the plaintiff did not "dispute that her claims f[e]ll within the scope of the Arbitration Agreement." As there was no dispute on this issue, the court did not analyze the scope of the agreement. *Id.* But the court *did* analyze the plaintiff's affirmative defenses that the agreement

was *void ab initio*, unconscionable, and void as against public policy. *Id.* at 637–39. Similarly, in *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 392 & n.1 (5th Cir. 2003), the Fifth Circuit did not examine whether the parties had consented to an "enforceable arbitration agreement," "[b]ecause [the plaintiff] did not raise [the argument] in the district court." The court instead directly proceeded to consider the plaintiff's defense that federal law exempted him from arbitration. *Id.* at 393–94. *See also, e.g.*, *Overstreet v. Contigroup Cos.*, 462 F.3d 409, 411–12 (5th Cir. 2006) (applying Georgia law and holding that an arbitration clause was not unconscionable without examining existence or scope).

Other federal courts of appeals take the same approach. *E.g.*, *Guyden v. Aetna, Inc.*, 544 F.3d 376, 379, 382–87 (2d Cir. 2008) (declining to examine existence or scope of agreement where the plaintiff did "not challenge the existence of the arbitration agreement or that it covers most employment-related disputes" and proceeding to adjudicate plaintiff's arguments that her claim was nonarbitrable under the Sarbanes-Oxley Act); *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 289 (3d Cir. 2004) (applying U.S. Virgin Islands law and holding certain provisions unconscionable without examining existence or scope); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1090 (9th Cir. 2009) (applying Oregon law and holding an arbitration clause unconscionable without examining existence or scope). As far as Petitioners have been able to discover, no federal court of appeals, whether applying federal or state law, has even hinted that courts have an independent obligation to examine the existence and

scope of an arbitration agreement, even where not disputed by the parties.

B. State courts, too, routinely pass over questions of existence and scope to analyze defenses to enforcement where the latter are the only issues that the parties have actually raised. For example, in *Taylor Building Corp. of America v. Benfield*, the Ohio Supreme Court stated that, where "[t]he parties do not contend in this court that their claims (or counterclaims) fall outside the scope of the arbitration agreement, . . . we *do not consider* whether any of the claims at issue are beyond the scope of the arbitration agreement." 884 N.E.2d 12, 20 n.2 (Ohio 2008) (emphasis added). The court went on to consider the parties' arguments regarding unconscionability. *Id.* at 20–28. Similarly, in *Parsons v. Halliburton Energy Servs., Inc.*, 785 S.E.2d 844, 849 (W. Va. 2016), the West Virginia Supreme Court explained at the outset of its analysis that "the parties agree that the plaintiff's claims fall within the scope of a clear and unambiguous arbitration agreement." Accordingly, "[t]he *sole question on appeal* [wa]s whether the defendant's actions, viewed under principles of state contract law, served to waive its contractual right to arbitration." *Id.* at 850 (emphasis added); *see also Nationstar Mortg., LLC v. West*, 785 S.E.2d 634, 636 (W. Va. 2016) (holding that an arbitration clause was not unconscionable without examining existence or scope). And in *Duke v. Graham*, the Utah Supreme Court likewise declined to review whether an "arbitrator's award" extended "beyond the scope of [the] agreement," because the parties had not "raise[d] the issue of . . . scope" before the lower court

or before the Utah Supreme Court. 158 P.3d 540, 543 n.2 (Utah 2007). The Utah Supreme Court did not treat this issue as non-waivable or requiring it to undertake an independent inquiry.

Other state courts take the same approach. *See, e.g.*, *Sloan S. Homes, LLC v. McQueen*, 955 So. 2d 401, 402–03 (Ala. 2006) (holding an arbitration cause not unconscionable and reversing lower court decision without examining existence or scope where "the parties join issue on a single question—whether the arbitration clause is unconscionable"); *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 So. 2d 779 (Ala. 2002) (holding an arbitration clause unconscionable without examining existence or scope); *Sanchez v. Valencia Holding Co., LLC*, 353 P.3d 741, 746 (Cal. 2015) (holding an arbitration clause not unconscionable and reversing lower court decision without examining existence or scope); *Crawford v. Results Oriented, Inc.*, 548 S.E.2d 342, 343 (Ga. 2001) (holding an arbitration clause not unconscionable without examining existence or scope); *In re Poly-Am., L.P.*, 262 S.W.3d 337 (Tex. 2008) (conducting extensive unconscionability analysis without examining existence or scope); *Freedman v. Comcast Corp.*, 988 A.2d 68, 76 (Md. Ct. Spec. App. 2010) (refusing to address argument that the "Arbitration Provision may not be binding on Appellant because there is nothing to show that Appellant accepted the . . . Agreement" where "appellant fail[ed] to raise this argument [below]"); *Bowes v. Int'l Pharmakon Labs., Inc.*, 314 N.W.2d 642, 643 (Mich. Ct. App. 1981) (per curiam) (noting that "[t]he parties do not dispute that [the plaintiff] executed an arbitration agreement" and declining to

address *sua sponte* the agreement's existence). Again, Petitioners have discovered no state court decision suggesting that courts have an independent obligation to examine the existence and scope of an arbitration agreement where the issues have not been raised by the parties.

C. It should come as no surprise that no other federal or state court has taken an approach similar to Missouri's outlier rule. Nothing in general contract law suggests that the issues of the existence and scope of an agreement have special status requiring *sua sponte* examination by courts even when the parties have not raised them. *See, e.g.*, *Altronics of Bethlehem, Inc. v. Repco, Inc.*, 957 F.2d 1102, 1107 (3d Cir. 1992) (making no independent inquiry into the formation of a contract where the "Defendant [did] not challenge the existence of a binding contract"); *Ficke v. Wolken*, 868 N.W.2d 305, 310 (Neb. 2015) ("Although we understood [the defendant] at oral argument to raise various assertions regarding the existence of the contract and its terms, *we will not consider errors* which are not properly assigned in a petition for further review and discussed in the supporting memorandum brief." (emphasis added)); *In re Lawrence*, 23 N.E.3d 965, 976 (N.Y. 2014) (in dispute over attorney's contingency fee agreement, holding contract not unconscionable without first examining existence or scope); *W. Res. Acad. v. Franklin*, 999 N.E.2d 1198, 1200, 1202 (Ohio 2013) (in dispute over school enrollment contract, holding contract not unconscionable without first examining existence or scope); *Adams v. John Deere Co.*, 774 P.2d 355, 356 (Kan. Ct. App. 1989) (in dispute over enforceability of

a "no-lost-profits" clause in a dealership agreement, addressing unconscionability first because it is "virtually dispositive of the appeal"; and holding clause not unconscionable without examining existence and scope); *Gray v. Town of Terry*, 196 So. 3d 211, 217 (Miss. Ct. App. 2016) (in dispute over employment separation agreement, holding contract not unconscionable without first examining existence or scope). Indeed, Missouri itself applies ordinary waiver principles in non-arbitration contract disputes. *See supra* Part II.B.

Missouri's new rule is therefore an outlier. It conflicts with the uniform law of other jurisdictions, which have not adopted a special, arbitration-specific rule insulating challenges to the existence and scope of an agreement to arbitrate from waiver and holding that these issues always necessitate *sua sponte* examination by the court.

III. THE DECISION BELOW DEFIES FEDERAL LAW AND CREATES A QUESTION OF NATIONAL IMPORTANCE THAT MERITS THIS COURT'S REVIEW.

In enacting the FAA, Congress adopted an affirmative "national policy favoring arbitration" and thereby "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. Missouri's novel and anomalous rule is the product of a judicial hostility to arbitration that is directly contrary to this federal policy. The need for this Court's intervention to redress this hostility is particularly urgent in this case because, as this Court has noted,

the FAA does not confer federal jurisdiction. State courts are therefore a crucial venue for the enforcement of arbitration agreements. If state courts are not corrected when they thwart arbitration by inventing burdensome, arbitration-disfavoring rules, both the federal policy favoring arbitration and the uniform, nationwide enforcement of the FAA's provisions will be fatally undermined.

A. The Decision Below Manifests a Hostility to Arbitration That Directly Undermines the FAA.

The Missouri courts have adopted a rule that manifests, and will in the future perpetuate, precisely the judicial hostility to arbitration that the FAA was adopted to counteract. "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce*, 513 U.S. at 270. "Section 2 is a congressional declaration of a liberal federal policy *favoring* arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24 (emphasis added). As the history of this case demonstrates, Missouri's new rule contravenes these goals.

The arbitration agreement at issue in this case is typical of arbitration agreements adopted by hundreds of thousands of businesses around the country. As the Missouri Chamber of Commerce detailed in an amicus brief filed in the court of appeals below, the clause was, if anything, *more* favorable to consumers than the majority of such clauses. Mo. Chamber of Commerce Amicus Br. at 6–8, *Lopez II* (Sept. 11, 2015); *see also* Pet. App. 84a–85a (summarizing brief).

And yet over the course of four years of litigation, the Missouri courts have refused to honor this run-of-the-mill arbitration agreement, in defiance of federal law. First, the trial court held it unconscionable "based on the public policy concern that consumers with small-value claims would be deprived of a meaningful remedy"—a ground that, as a panel of the Missouri Court of Appeals subsequently recognized, is precluded by *Concepcion*. Pet. App. 37a. On remand, a different trial court judge ignored applicable precedents of this Court and held the agreement unconscionable for similar—and similarly improper—reasons. *Compare* Pet. App. 51a (relying on finding that the potential costs of arbitration, relative to the value of the consumers' claims, mean "that there is no practical, viable means of individualized dispute resolution"), *with American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013) (stating that, in *Concepcion*, this Court "specifically rejected the argument that class arbitration [is] necessary to prosecute claims 'that might otherwise slip through the legal system'" and held "that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims") (citing 563 U.S. at 351).

On the second appeal, the court of appeals acknowledged that the trial court's unconscionability analysis was deficient; but it avoided reversing by fashioning a novel rule of law that allowed affirmance on an alternative ground never raised by Respondent. The court of appeals held itself *required* to affirm the denial of arbitration on this ground—notwithstanding the fact that the issue on which the

court based its decision had never been raised by Respondent in four rounds of briefing. This rule was transparently invented to allow the court of appeals to refuse to enforce H&R Block's arbitration agreement, even where Respondent's challenge to its validity failed under the precedents of this Court.

Going forward, Missouri's new rule will enable hostile state-court judges to continue to place obstacles in the way of arbitration. A trial court judge or appellate panel hostile to arbitration can rely on the *Lopez II* rule as a mandate to scour the record independently searching for reasons to deny a motion to compel arbitration. Even a neutral judge or panel will be obligated to take this course. Missouri courts will thereby deny parties expeditious access to arbitration without giving them the opportunity to present evidence and argument regarding the courts' grounds for doing so. And a party resisting arbitration who thinks of a challenge to the arbitration agreement's existence or scope that the party previously forfeited can cite *Lopez II* and argue—correctly—that the rule compels the court of appeals to consider its brand new argument, and thereby further delay the expeditious commencement of arbitration.

Congress has made a judgment that arbitration, with its "streamlined proceedings and expeditious results," is beneficial. *Preston*, 552 U.S. at 357. Accordingly, it adopted the FAA "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270. That congressional purpose has been flouted here by the Missouri courts.

B. Such State-Court Hostility to Arbitration Cannot Be Left Unchecked if the FAA Is to Have Uniform Nationwide Application.

The Missouri courts' resistance to the FAA is especially problematic because, in the context of arbitration, state courts have a uniquely important role to play in the enforcement of federal law and the furtherance of federal arbitration policy.

As this Court has recognized, the FAA is unusual among federal statutes because, though it creates a "body of federal substantive law . . . equally binding on state and federal courts," it "bestows no federal jurisdiction." *Vaden*, 556 U.S. at 59. Where there is no "independent jurisdictional basis" providing "access to a federal forum," parties must rely on state courts to effectuate the FAA's guarantee that agreements to arbitrate will receive no worse treatment than other types of contracts. *Id.* In light of these aspects of the FAA, "state courts have a prominent role to play as enforcers of agreements to arbitrate," and it is therefore crucial that state courts enforce the FAA according to its terms and in keeping with this Court's decisions. *Id.*

If state courts are allowed to disregard their obligations under the Supremacy Clause as the Missouri courts have done, the policies of the FAA will be undermined and the benefits of the FAA will not be uniformly available throughout the nation. Instead, the availability of expeditious arbitration, and the consistent application of the FAA, will be dependent on whether there is a basis for federal jurisdiction in a given case. *See Vaden*, 556 U.S. at

59. A plaintiff will be able to curtail the FAA's reach by choosing to assert only state-law claims.

This case provides a striking example. This same arbitration provision has been enforced *twice* in diversity actions in the U.S. District Court for the Western District of Missouri in the face of similar challenges to its validity. *See Perras v. H&R Block, Inc.*, No. 12-00450-CV-W-BP, 2013 WL 11541919, at *3–4 (W.D. Mo. Nov. 13, 2013) (rejecting argument that arbitration provision contained in H&R Block's 2011 CSA was unconscionable under California law); *Stern v. HRB Digital, LLC*, No. 4:13-cv-00175-GAF, slip op. (W.D. Mo. Aug. 12, 2013) (applying *Italian Colors Restaurant*, 133 S. Ct. 2304, and *Concepcion*, 563 U.S. at 343, and rejecting argument that substantively identical arbitration provision contained in H&R Block software license agreement is invalid because it precludes class action proceedings). But, in this case, filed in a state court that falls within the boundaries of that same federal judicial district, there is no diversity of citizenship and Respondent asserts only state-law claims. As a result, and because of the Missouri courts' hostility to arbitration, Petitioners have been unable, over the course of four years of litigation, to obtain expeditious enforcement of this straightforward arbitration provision.

This situation is untenable under the FAA. "Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases." *Allied-Bruce Terminix*, 513 U.S. at 272. This Court should intervene in order to make clear that under the Supremacy Clause, the FAA and the federal policy

favoring arbitration that it embodies must be respected, not resisted, in state courts.

IV. SUMMARY REVERSAL IS WARRANTED IN THIS CASE.

In light of the Missouri rule's obvious contravention of the FAA, its outlier status, and the importance of state-court compliance with the FAA in keeping with the Supremacy Clause, this Court should grant the petition, summarily reverse the court of appeals' ruling, and restore arbitration agreements to equal footing with other contracts in the state of Missouri.

To be sure, summary reversal is generally "reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). But those factors are all present here.

First, it has long been settled that "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of § 2 of the FAA]" and is preempted. *Perry*, 482 U.S. at 492 n.9. There is no doubt about this rule. *See supra* Part II.A.

Second, no factual dispute complicates the application of this straightforward principle in this case. Rather, at issue is whether the *legal* rule established by the Missouri Court of Appeals conflicts with the FAA.

Third, the rule's conflict with the FAA, and the Missouri courts' error in declining to fix it, are clear. The new rule, on its face, burdens arbitration

agreements and subjects them to different, and less favorable, treatment than other species of contract. It is therefore clearly improper under the FAA and is preempted. *See Concepcion*, 563 U.S. at 341 (holding that a rule that "disfavors arbitration" agreements relative to other contracts is prohibited under the FAA). Underscoring the Missouri courts' error is the fact that no other jurisdiction has adopted a comparable approach.

In sum, Missouri's new rule is "flatly contrary to this Court's controlling precedent," and summary reversal is warranted. *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam). In similar cases in recent years—when confronted with legislatively or judicially created rules that plainly conflict with the FAA and this Court's holdings applying it—this Court has not hesitated to employ summary reversal to ensure respect for federal policy favoring arbitration and uniform enforcement of the FAA nationwide.

For example, when the Oklahoma Supreme Court "ignored a basic tenet of the [FAA]'s substantive arbitration law" and insisted on applying state-law severability principles to allow courts, not arbitrators, to decide challenges to the validity of contracts as a whole, this Court summarily reversed. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Similarly, this Court summarily reversed when the West Virginia Supreme Court, "by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law" and instead held that agreements to arbitrate personal injury and wrongful death claims against nursing homes are

void on public policy grounds. *Marmet Health Care Ctr., Inc.*, 132 S. Ct. at 1202. And when a Florida appellate court decision "failed to give effect to the plain meaning of the [FAA]" and ignored this Court's holding that courts must compel arbitration of arbitrable claims, even when the result is that separate proceedings will go forward in separate forums, this Court summarily reversed. *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam). *See also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (per curiam) (summarily reversing Alabama Supreme Court's departure from well settled precedent establishing that the FAA invokes "the broadest permissible exercise of Congress's Commerce Clause power").

Similarly here, summary reversal is warranted to correct a self-evident conflict with the FAA that is the product of state-court hostility to arbitration. In the alternative, this Court should grant plenary review.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted. The Court should either summarily reverse or set the case for plenary review.

Respectfully submitted,

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SEPTEMBER 26, 2016

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APPENDIX

APPENDIX A

IN THE
MISSOURI COURT OF APPEALS
WESTERN DIVISION

MANUEL H. LOPEZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	)	**WD78465**
Respondent,	)	**OPINION FILED: March 8, 2016**
v.	)	
H&R BLOCK, INC., ET AL.,	)	
Appellants.	)	

Appeal from the Circuit Court of Jackson County, Missouri

The Honorable S. Margene Burnett, Judge

Before Division Two: Cynthia L. Martin, Presiding Judge, Mark D. Pfeiffer, Judge and Karen King Mitchell, Judge

H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology, LLC (collectively "H&R Block") appeal a trial court order denying a motion to compel arbitration because the arbitration provision is unconscionable. H&R Block argues that the

arbitration provision set forth in a 2011 Client Service Agreement signed by Manuel H. Lopez ("Lopez") is not unconscionable. H&R Block alternatively argues that unconscionable terms in the arbitration provision, if any, should have been severed. Because all of Lopez's claims are within the scope of a separate arbitration agreement as to which Lopez exercised the right to opt-out of arbitration, we will not address whether the arbitration provision in the 2011 Client Service Agreement is unconscionable. We affirm the trial court's order denying H&R Block's motion to compel arbitration, though on grounds other than those relied on by the trial court.

Procedural History

This is the second appeal from a trial court order denying H&R Block's motion to compel arbitration. In *Lopez v. H & R Block, Inc.*, 429 S.W.3d 497, 503 (Mo. App. W.D. 2014) ("*Lopez I*"), we reversed an order refusing to compel arbitration because the trial court based its decision solely on "the public policy concern that consumers with small-value claims would be deprived of a meaningful remedy" because of a class action waiver clause, in contravention of the decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). However, because arbitration provisions are otherwise subject to general state law contract defenses so long as neutrally applied, we remanded the case to the trial court to assess the evidence and to determine whether the arbitration provision at issue was "enforceable in light of *Robinson* and *Brewer*." *Lopez I*, 429 S.W.3d at 503 (citing *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 514-15 (Mo. banc 2012); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 488 (Mo. banc 2012). On

remand, the trial court once again denied H&R Block's motion to compel arbitration, finding the arbitration provision to be unconscionable.

Factual Background

On April 14, 2011, Manuel Lopez ("Lopez") visited an H&R Block office in Kansas City to have his 2010 tax returns prepared. Lopez was required to sign a standard form Client Service Agreement ("2011 CSA"). The 2011 CSA was a single page agreement that identified the professional services H&R Block agreed to provide, and the documents and information Lopez agreed to provide to permit H&R Block to perform its services. The 2011 CSA contained an arbitration provision. The arbitration provision appeared approximately half way down the page, and provided in part as follows:

> **ARBITRATION IF A DISPUTE ARISES BETWEEN YOU AND H&R BLOCK**
>
> If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party. This third party, known as the Arbitrator, is empowered to settle the matter with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your rights to sue H&R Block in court before a judge and jury, and to waive any

right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled by arbitration. In addition, you specifically agree to waive any right to "class action" arbitration . . . . If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision; except that in the event that the waiver of class action rights is deemed invalid or unenforceable, any claim seeking relief on behalf of a class must be brought in a court of proper jurisdiction and not in arbitration.

Right to Opt–Out of This Arbitration Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our website at www.hrblock.com/goto/optout (if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt–Out, P.O. Box 32818, Kansas City, MO 64171. The letter you send us should include your printed name, Social Security Number of yourself and joint filer, if any, and the most recent date you were served by H&R Block, whether or not you want a written confirmation and the words "Reject Arbitration." Your electronic or written opt-out letter will override your

signature below regarding arbitration but no other provision of this document.

The arbitration provision continued with clauses explaining "How Arbitration Works," and "Other Arbitration Terms & Information." These clauses advised that arbitration would be administered by the American Arbitration Association ("AAA"); that AAA would name an experienced neutral arbitrator; and that AAA rules were available by mail or on the internet, with appropriate addresses provided. The clauses explained that to initiate arbitration, a customer "will be asked to pay a $5 fee, and H&R Block will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you win the arbitration."

Lopez did not exercise his right to opt-out of arbitration after signing the 2011 CSA.

On April 4, 2012, Lopez returned to an H&R Block location to have his 2011 tax returns prepared. By then, Lopez had consulted with counsel, and counsel had contacted H&R Block questioning a $2 compliance fee Lopez was charged in 2011. When Lopez returned to H&R Block to have his 2011 tax returns prepared, he was again required to sign a Client Service Agreement ("2012 CSA"). This time, however, Lopez timely exercised his right to opt-out of arbitration, using the on-line address set forth in the 2012 CSA. He did so on April 13, 2012.

On April 16, 2012, Lopez filed a class action lawsuit against H&R Block on behalf of himself and a class of similarly situated H&R Block customers in

Missouri. The petition alleged that H&R Block prepared Lopez's tax returns in both 2011 and 2012 and that Lopez paid a $2 or $4 "compliance fee" both years. The petition alleged that H&R Block engaged in a scheme in violation of the Missouri Merchandising Practices Act ("MMPA") and state common law by misrepresenting that the "compliance fee" was charged to comply with IRS requirements. The petition acknowledged that H&R Block's Client Service Agreement form contained an arbitration provision but alleged that the provision "is unconscionable and cannot be enforced."

On July 23, 2012, H&R Block filed a motion to compel arbitration of all of Lopez's claims. In its suggestions in support of the motion, H&R Block alleged that "all of the claims [Lopez] raises . . . are subject to a binding arbitration agreement contained in the [2012 CSA]." [L.F. 29] The suggestions disputed Lopez's unconscionability contention because the arbitration provision in the 2012 CSA contained an "opt-out" clause. [L.F. 30] Specifically, H&R Block alleged that "[a]lthough [Lopez] was certainly aware of the opt-out clause—indeed he was represented by counsel who reviewed the arbitration clause *during the opt-out period*—[Lopez] declined to opt-out." [L.F. 30] H&R Block also alleged that the 2011 CSA "contains an arbitration clause that is substantially similar to the 2012 CSA arbitration clause," but that the "2012 CSA arbitration clause . . . supersede[s] the 2011 CSA arbitration clause . . . and appl[ies] to all of [Lopez's] claims, including those from 2011." [L.F. 31, n.3]

On October 24, 2012, three months after the motion to compel arbitration was filed, and more

than six months after Lopez's petition was filed, H&R Block filed a pleading advising the trial court that it had just discovered that Lopez timely exercised his right to opt out of arbitration following execution of the 2012 CSA. Based on a stipulation between the parties, the trial court entered an order on December 28, 2012, permitting H&R Block to withdraw its original motion to compel arbitration. The stipulation and related trial court order authorized H&R Block to re-file the *identical* motion to compel and supporting suggestions, which H&R Block did on January 3, 2013.[1] The stipulation and related order also required H&R Block to secure leave to file a revised motion to compel, which H&R Block did on January 29, 2013. The revised motion to compel arbitration was expressly limited to Lopez's claims regarding the 2011 compliance fee and relied exclusively on Lopez's execution of the 2011 CSA. H&R Block agreed that Lopez's claims relating to the 2012 compliance fee are not subject to arbitration. [L.F. 268, n.2]

On remand, Lopez and H&R Block argued the merits of the revised motion to compel arbitration relying on evidence previously submitted.[2] Lopez argued that the arbitration provision in the 2011 CSA was unconscionable and unenforceable because: (1) the 2011 CSA was non-negotiable; (2) the

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[1] The re-filed motion to compel thus again relied exclusively on the 2012 CSA and took the position that the 2012 CSA superseded the 2011 CSA and covered all of Lopez's claims in the litigation.

[2] Following our remand in *Lopez I*, Lopez's case was reassigned to a different judge due to the retirement of the judge who originally denied H&R Block's motion to compel arbitration.

arbitration provision in the 2011 CSA was difficult to understand; (3) the 2011 CSA was the product of H&R Block's superior bargaining position; (4) the arbitration provision in the 2011 CSA was extremely one-sided and disproportionately favored H&R Block; and (5) consumers would not be able to locate counsel willing to pursue small monetary claims to recover the "compliance fee," leaving consumers with no practical, viable means of individualized dispute resolution. H&R Block argued that the arbitration provision in the 2011 CSA was not unconscionable for any of these reasons and that the opt-out right described in the arbitration provision negated a finding of unconscionability. Lopez argued that the opt-out clause was illusory because it was susceptible to ineffective exercise as evidenced by H&R Block's failure to timely confirm that Lopez had exercised his opt-out right after signing the 2012 CSA.

On March 12, 2015, the trial court again denied H&R Block's motion to compel arbitration, finding the arbitration provision in the 2011 CSA to be unconscionable and unenforceable.[3] The trial court also concluded that the opt-out right described in the arbitration provision was illusory.

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[3] The trial court's conclusions were almost exclusively based on comparison of the arbitration provision in the 2011 CSA to the arbitration provision involved in *Brewer*. *Lopez I* did direct the trial court to determine whether the arbitration provision at issue was "enforceable in light of *Robinson* and *Brewer*." *Lopez I*, 429 S.W.3d at 503. However, it should go without saying that the trial court would also have been bound to consider Missouri and United States Supreme Court decisions issued after *Robinson* and *Brewer* that have addressed whether and on what basis arbitration provisions can be declared unconscionable.

H&R Block timely appealed the trial court's order denying its motion to compel arbitration.

Standard of Review

"Whether the trial court should have granted a motion to compel arbitration is a question of law that this Court reviews *de novo*." *Robinson*, 364 S.W.3d at 510; *Brewer*, 364 S.W.3d at 492. "We will affirm the trial court's judgment if it is 'cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.'" *Motormax Financial Services Corp. v. Knight*, 474 S.W.3d 164, 168 (Mo. App. E.D. 2015) (quoting *Gemini Capital Group, LLC v. Tripp*, 455 S.W.3d 583, 587 (Mo. App. S.D. 2013)). "Our primary focus is on whether the trial court reached the correct result, rather that the route taken to reach it." *Knight*, 474 S.W.3d at 168 (citing *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 435 (Mo. App. W.D. 2010)).

Analysis

H&R Block asserts in its first and second points on appeal that the trial court erred in denying its motion to compel arbitration because the arbitration provision in the 2011 CSA is not unconscionable, particularly in light of the opt-out right described in the provision. H&R Block alternatively asserts in its third point on appeal that any unconscionable terms in the arbitration provision should have been severed.

We need not determine whether the arbitration provision in the 2011 CSA is unconscionable. All of Lopez's claims fall within the scope of the arbitration provision in the 2012 CSA as to which Lopez is conceded to have exercised his right to opt out.

"When faced with a motion to compel arbitration, we must consider three factors." *Frye*, 321 S.W.3d at 434. "First, we must 'determine whether a valid arbitration agreement exists.'" *Id.* (quoting *Nitro Distrib., Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006) (citations omitted)). "Second, if a valid arbitration agreement exists, we must determine 'whether the specific dispute falls within the scope of the arbitration agreement.'" *Frye*, 321 S.W.3d at 434 (quoting *Nitro Distrib., Inc.*, 194 S.W.3d at 345). "Third, if a valid arbitration contract exists, and if the subject dispute is within the scope of the arbitration provision, then we must determine whether the arbitration agreement is subject to [defenses against its enforcement] under applicable contract principles." *Frye*, 321 S.W.3d at 434-35.

The defense of unconscionability[4] raised by Lopez in response to H&R Block's motion to compel arbitration plainly implicates the third step in our required *de novo* analysis. However, we do not

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[4] Though we are now directed by *Brewer*, 364 S.W.3d at 492, n.3, to determine whether unconscionability impacts the formation of a contract, unconscionability remains an affirmative defense as to which the party asserting the defense bears the burden of proof and persuasion. *Eaton*, 461 S.W.3d at 432 (holding that court "'will analyze the issues in this appeal to determine if, under the factual record presented,' Mr. Eaton 'has established a[n unconscionability] defense to the formation of the agreement's arbitration clause") (quoting *Brewer*, 364 S.W.3d at 492 (holding that court would "determine if, under the factual record presented, Brewer has established a defense to the formation of the agreement's arbitration clause"); *In re Estate of Looney*, 975 S.W.2d 508, 520 (Mo. App. S.D. 1998) (holding that unconscionability is an affirmative defense and that the party asserting the defense has the burden of proof).

address defenses to enforcement of an arbitration agreement unless we are first satisfied that an arbitration agreement exists and that the subject disputes are within its scope.

Here, it is uncontested that arbitration agreements were formed by virtue of Lopez's execution of both the 2011 CSA and the 2012 CSA. However, the parties conceded during oral argument that the scope of those agreements--the second inquiry required by our *de novo* analysis--remains unresolved.

The arbitration provisions in the 2011 CSA and the 2012 CSA are identical in their description of the disputes within their scope. Both provide that "[i]f ***a dispute*** arises between you and H&R Block, ***the dispute*** shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below." (Emphasis added.)

Lopez's claims against H&R Block involve a compliance fee he was charged in both 2011 and 2012. Lopez's claims plainly involve "a dispute" between Lopez and H&R Block. Lopez's claims plainly fall, therefore, within the scope of the arbitration provision in both the 2011 CSA and the 2012 CSA.

When asked about this issue, H&R Block took the position during oral argument that the 2011 CSA and the 2012 CSA are "stand alone" agreements, each limited in scope to disputes that relate to services provided contemporaneous with the execution of each agreement. However, H&R Block conceded that neither of the arbitration provisions include a temporal reference limiting "a dispute" or "the dispute" to that year's tax preparation services. It is

noteworthy, in fact, that when H&R Block filed its initial motion to compel arbitration in July 2014, it sought only to enforce the arbitration provision in the 2012 CSA. H&R Block asserted that "the 2012 CSA arbitration clause . . . appl[ies] to all of [Lopez's] claims, ***including those from 2011***" because "the 2012 CSA arbitration clause ***applies to the same subject matter*** as the 2011 CSA arbitration clause."[5] [L.F. 31, n.3] (Emphasis added.)

We agree with H&R Block's construction of the arbitration provision in the 2012 CSA. And that construction was not subject to change merely because Lopez exercised his right to opt-out after signing the 2012 CSA. No clause in the arbitration provision in the 2012 CSA purports to limit the disputes covered by the provision should a customer exercise the right to opt out.[6] To the contrary, the

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[5] After H&R Block realized that Lopez exercised the right to opt-out following execution of the 2012 CSA, H&R Block withdrew its initial motion to compel arbitration, then re-filed an *identical* motion to compel arbitration in January 2015, re-asserting the position that the scope of the arbitration provision in the 2012 CSA included all of Lopez's claims, including those from 2011. [L.F. 175] H&R Block later secured leave to file a revised motion to compel, where, for the first time, it relied only on the arbitration provision in the 2011 CSA and sought its application only to Lopez's 2011 claims. The revised motion to compel was the subject of the trial court's order and judgment refusing to compel arbitration both here and in *Lopez I*.

[6] The record includes a copy of H&R Block's 2013 CSA. The arbitration provision in the 2013 CSA has been significantly modified when compared to the arbitration provisions contained in the 2011 and 2012 CSA's. The 2013 CSA now provides that "[t]his Arbitration Agreement shall supersede all prior arbitration agreements between you and H&R Block unless you are a member of a putative or certified class in a class lawsuit

arbitration provision provides that all disputes "shall be settled through binding individual arbitration unless you opt-out of ***this*** arbitration provision." (Emphasis added.) We are left with the inexorable conclusion that based on the plain language of the arbitration provision in the 2012 CSA, Lopez's exercise of the right to opt-out following execution of the 2012 CSA operated as an opt-out for all disputes within the scope of the 2012 CSA's arbitration provision. By necessary implication, that includes all of the claims Lopez has asserted in his lawsuit.

The parties advised during oral argument that the issue as to whether all of Lopez's claims fall within the scope of the arbitration provision in the 2012 CSA was raised below.[7] However, the trial court was apparently not encouraged to determine that issue either before *Lopez I*[8] or in the order and judgment giving rise to this appeal. We are required, however,

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against H&R Block on the date you sign the CSA, in which case any prior arbitration agreement you signed shall remain in force and effect for any claims currently asserted in that class action lawsuit. If you opt out of this Arbitration Agreement, any prior arbitration agreement shall remain in full force and effect." We express no opinion about the legal effect of this language to limit the scope of the disputes that are subject to resolution under the 2013 CSA or any other form of CSA.

[7] We find no reference in the legal file to suggest that the scope issue was raised with the trial court. It is possible, of course, that the issue was addressed in off-the-record discussions between counsel and the trial court or in pleadings or proceedings that have not been included in the legal file.

[8] It is true we did not address the issue of the scope of the arbitration provisions in *Lopez I*. However, that does not relieve us of the obligation to do so here consistent with our standard of review.

to determine whether the trial court should have granted H&R Block's motion to compel arbitration *de novo* and to affirm the trial court's order and judgment refusing to compel arbitration on any basis supported by the record. We are also required to limit our exercise of appellate jurisdiction to the resolution of "real, substantial, presently-existing controvers[ies]." *Jackson County Bd. of Election Comm'rs v. City of Lee's Summit*, 277 S.W.3d 740, 743 (Mo. App. W.D. 2008) (internal quotation omitted). Appellate courts are not in the business of rendering advisory opinions. We do not determine "speculative issues for the benefit of some other case at some other time." *Id.* at 743 (internal quotation omitted). Although the parties may have strategic interests that would be furthered by resolving whether the arbitration provision in the 2011 CSA is unconscionable, the resolution of that issue is detached from Lopez's claims, all of which fall within the scope of the arbitration provision in the 2012 CSA as to which Lopez exercised his right to opt-out.

Conclusion

The trial court's order denying H&R Block's motion to compel arbitration of Lopez's claims is affirmed for the reasons set forth in this Opinion.

s/ Cynthia L. Martin
Cynthia L. Martin, Judge

All concur.

APPENDIX B

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

MANUEL H. LOPEZ, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	**CASE NO 1216-CV12290**
v.	)	**DIVISION 7**
H&R BLOCK, INC., et al.,	)	
Defendants.	)	

ORDER

Pending before the Court is Defendants' Revised Motion to Stay the Case and Compel Arbitration, filed January 29, 2013. Defendants argue that this Court should compel the Plaintiff to pursue his claims in arbitration as required under an arbitration agreement between the parties. For the reasons stated below, the Court denies the motion.

Statement of Facts[1]

- In 2011 and 2012, Plaintiff hired Defendants to prepare his tax returns.
- In both years, Defendants charged Plaintiff a "compliance fee," which totaled $2 in 2011 and $4 in 2012.
- In both years, the Plaintiff signed a Client Service Agreement (CSA) in conjunction with hiring the Defendants for the tax services.
- The CSA signed by the Plaintiff in 2011 [2] contained an arbitration agreement that required Plaintiff to individually arbitrate any dispute that Plaintiff has with Defendants.
- The arbitration agreement states in relevant part:

> If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party This third party,

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[1] The Parties were allowed time to complete discovery only on the issue of whether arbitration should be enforced. Therefore, the facts are deemed to be facts solely for this issue.

[2] The 2012 CSA also contained an arbitration agreement, but the Defendants stipulate to the fact that Plaintiff successfully opted out of the 2012 arbitration agreement. Therefore, the Defendants only argue that the Plaintiff's claims pertaining to the work done in 2011 must be arbitrated.

known as the Arbitrator, is empowered to settle the matter with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your rights to sue H&R Block in court before a judge and jury, and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled in arbitration. In addition, you specifically agree to waive any right to "class action" arbitration. If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision; except that in the even that the waiver of class action rights is deemed invalid or unenforceable, any claim seeking relief on behalf of a class must be brought in a court of proper jurisdiction and not in arbitration.

- The Opt-Out provision, which follows the above arbitration agreement, is typed in bold face and is bordered by a box. It states:

  Right to Opt-Out of This Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our

> **website at www.hrblockcom/goto/optout (if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt-Out, P.O. Box 32818, Kansas City, MO 64171. The letter you send us should include your printed name, Social Security Number of yourself and joint filer, if any, the most recent date you were served by H&R Block, whether or not you want a written confirmation and the words "Reject Arbitration." Your electronic or written opt-out letter will override your signature below regarding arbitration but no other provision of this document.**
>
> - Pursuant to the terms of the arbitration provision of the contract, the customer is required to pay $5 to initiate arbitration. Pursuant to the Client Service Agreement for the Tax Season 2012, H&R Block "will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you prevail in the claim you bring in the arbitration."

Standard of Review

Neither party disputes that the Federal Arbitration Act (FAA) governs the validity of arbitration agreements. According to the FAA, arbitration agreements "shall be valid, irrevocable,

and enforceable, save upon such grounds that exist at law or in equity for the revocation of any contract." 9 U.S.C, § 2. The Supreme Court has stated that the FAA displays both "a liberal federal policy favoring arbitration," and "the fundamental principle that arbitration is a matter of contract." *AT&T Mobility, LLC v. Conception*, 131 S. Ct. 1740, 1745 (2011). "In the context of motions to compel arbitration brought under the [FAA] . . . the court applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171,175 (2d Cir. 2003). Courts "must 'rigorously enforce' arbitration agreements according to their terms" *American Express Company, et al. v. Italian Colors Restaurant et al.*, 133 S. Ct. 2304 (2013).[3]

Judgment will be affirmed if it is supported by substantial evidence, is not against the weight of the evidence and does not erroneously declare or apply the law. *Woods v. QC Financial Services, Inc.* 280 S.W.3d 90, 94 (Mo. App. 2008). The issue of whether dispute is subject to arbitration is subject to review de novo. *Id.*

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[3] In *American Express*, the Supreme Court rejected an argument that a class-notice requirement should be dispensed with because of the prohibitively high cost of compliance. It further affirmed the enforcement of a waiver of class arbitration, despite a claim that there was no economic incentive to purse an antitrust claim individually through arbitration. Addressing directly the "effective vindication" exception, the Court held that the exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable". *See also In re American Express Merchants' Litigation*, 667 F.3d 204, 214 (CA2 2012).

Discussion

Generally, an arbitration agreement is "not valid 'unless it reflects the essential contract elements required under Missouri law.'" *Clemmons v. Kansas City Chiefs Football Club, Inc.*, No. WD75329, 2013 Mo, App, LEXIS 224, *5 (Mo. Ct. App. 2013) (internal citation omitted). A valid contract requires an offer, acceptance and bargained for consideration. *Id.* Arbitration agreements can be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (internal citation omitted).

In this case, the Plaintiff's main argument opposing arbitration is that the 2011 CSA arbitration agreement is unconscionable and that it will not, therefore, be enforceable. *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 856-61 (Mo. Banc. 2006). There are procedural and substantive aspects to unconscionability. Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo. App. E.D. 2008). Substantive unconscionability refers to undue harshness in the contract terms. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App, 2005).

The doctrine of unconscionability is meant to guard against one-sided contracts, oppression, and unfair surprise. *Brewer v. Mo. Title Loans*, 364 S.W.3d 486,

492-93 (Mo. 2012). The Missouri Supreme Court, for purposes of the review of unconscionability as it relates to arbitration agreements governed by the FAA, has limited the "review of the defense of unconscionability to the context of its relevance to contract formation.[4]" *Id.* at n. 3. Among other reasons, the *Brewer* court cited the disparity in bargaining power and the disparity between the consumer's remedial options and the corporation's remedial options as strong evidence of unconscionability. *Id.* at 495.

In the present situation, the Court questions whether the agreement is equally binding on both parties. The Defendants, arguing that the language of the agreement is mutually binding, point the Court to the phrase: "If a dispute arises between you and H&R Block, *the dispute* shall be settled through binding individual arbitration unless you opt-out of this arbitration provision . . ." *Supra* Statement of Facts, paragraph 5 (emphasis added). The Defendants argue that the words "the dispute" show that it is disputes between the consumer and Defendants that are committed to arbitration, not a party that is committed. The Court finds this

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[4] The *Brewer* court notes that an analysis of unconscionability used to entail a discussion of whether procedural or substantive unconscionability existed in the agreement but that the United States Supreme Court limits the review of unconscionability for arbitration agreements. *Brewer*, 364 S.W.3d at n.3 (citing *Conception*; 131 S. Ct. at 1755). Thus, according to the *Brewer* court, there no longer exists the need to examine whether an arbitration agreement is procedurally and/or substantively unconscionable.

reading questionable, but at this time does not need to make a determination as to this language.

The Court directs its attention to the contract provision that provides that arbitration of the dispute is limited to the individual dispute of the consumer. Pursuant to the terms of the agreement, in order to arbitrate the $2 charge which is at issue in this case, Plaintiff would be required to pay an initial fee of $5. While Defendant agrees to pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500, there is no agreement by the Defendant to pay expenses in excess of that amount. Above $1,500 in expenses and fees, Defendant only agrees that it will consider paying fees in excess of $ 1,500 in the event Plaintiff is successful in litigating its claims. This exposure to additional fees and expenses in excess of $1,500 in a case where the arbitration is focused on a $2 charge, constitutes a substantial obstacle to arbitration and almost necessarily forecloses any challenge to the type of consumer claim asserted by Plaintiff in this litigation. *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct 2304 (2013).

The Defendants next argue that it does not matter if the agreement is unconscionable because there was an opt-out provision that cures any unconscionable defect, and points to a plethora of case law from other jurisdictions that purportedly support that contention. Defendant did not provide information at all concerning whether the opt-out procedure was reasonably effective at actually allowing parties to opt out. Plaintiff presented at least some evidence that Defendant did not keep dependable records identifying consumers who had opted out of

arbitration. At this stage in the proceedings, the showing by the Plaintiff is sufficient to overcome the argument by the Defendant that viable opt-out procedure existed and prevents any claim of unconscionability[5].

In conclusion, because the fees Plaintiff might have to pay creates a substantial obstacle to litigating this $2 charge, and because the Plaintiff has presented sufficient evidence that the opt-out procedure was not effective, the agreement to arbitrate between the parties was unconscionable. Therefore, the Court will DENY the Defendant's motion to compel arbitration.

WHEREFORE, IT IS HEREBY ORDERED that Defendants' Revised Motion to Stay the Case and Compel Arbitration is **DENIED**.

IT IS SO ORDERED.

July 31, 2013	/s/ Ann Mesle
Date	The Honorable Ann Mesle
	Circuit Court Judge

I certify that the copies were distributed on this 31 day of July, 2013 to:

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[5] The Court recognizes the fact that Plaintiff was able to opt out of his 2012 CSA arbitration clause, but notes that Defendant vehemently denied that Plaintiff had opted out for a long period of time during this suit, and it was several months into this litigation before the Defendants were capable of discovering that Plaintiff had in fact opted out. Thus, the Plaintiff's accomplishment of opting out of the 2012 CSA is merely a testament to the difficulty and uncertainty inherent in the Defendant's opt-out procedure.

Norman Siegel
James Griffin
Scott Schutte

/s/ Jamie Maggard
Jamie Maggard, Law Clerk, Division 7

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MANUEL H. LOPEZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,	)	
Respondent,	)	WD76724
vs.	)	Opinion filed: May 6, 2014
H&R BLOCK, INC., ET AL.,	)	
Appellants.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE ANN MESLE, JUDGE

Before Division Two: Victor C. Howard, Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

H&R Block, Inc., HRB Tax Group, Inc., and HRB Technology LLC (collectively "H&R Block") appeals

from an order of the trial court denying its motion to compel arbitration. The court found that an arbitration agreement contained in its Client Service Agreement is unconscionable and unenforceable. H&R Block contends that the order is contrary to controlling precedent from the Missouri Supreme Court and the United States Supreme Court. The order is reversed, and the case is remanded with directions.

Factual and Procedural Background

The trial court found that the class action waiver in the parties' agreement "constitutes a substantial obstacle to arbitration" foreclosing any reasonable remedy for a consumer plaintiff. We must decide whether this basis was sufficient to deny H&R Block's motion to compel arbitration.

On April 14, 2011, Manuel Lopez visited an H&R Block office in Kansas City to have his tax returns prepared. Before receiving tax preparation services, Mr. Lopez was required to sign a standard form Client Service Agreement (CSA). The CSA contained an arbitration provision requiring individual arbitration. Specifically, the arbitration provision provided, in pertinent part:

> If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party This third party, known as the Arbitrator, is empowered to settle the matter

> with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your rights to sue H&R Block in court before a judge and jury, and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled in arbitration. In addition, you specifically agree to waive any right to "class action" arbitration. . . . If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision; except that in the even that the waiver of class action rights is deemed invalid or unenforceable, any claim seeking relief on behalf of a class must be brought in a court of proper jurisdiction and not in arbitration.

The opt-out process was explained as follows in bold type:

> **Right to Opt-Out of This Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our website at www.hrblock.com/goto/optout (if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt-Out, P.O. Box 32818, Kansas City, MO 64171. The letter you**

> **send us should include your printed name, Social Security Number of yourself and joint filer, if any, the most recent date you were served by H&R Block, whether or not you want a written confirmation and the words "Reject Arbitration," Your electronic or written opt-out letter will override your signature below regarding arbitration but no other provision of this document.**

The agreement further provided that arbitration would be administered by the American Arbitration Association and included the following provision on arbitration costs:

> You will be asked to pay a $5 fee, and H&R Block will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you win the arbitration.

The following year on April 4, 2012, Mr. Lopez returned to an H&R Block location to have his tax return prepared. He again signed a CSA, which included the same arbitration agreement and opt-out provision as in the 2011 CSA. On April 13, 2012, three days before filing this suit, Mr. Lopez opted out of the 2012 Arbitration Agreement via the website disclosed in the agreement.

On April 16, 2012, Mr. Lopez filed a class action lawsuit against H&R Block alleging on behalf of himself and a class of similarly situated H&R Block customers in Missouri that H&R Block engaged in a scheme to charge a deceptive "compliance fee," $2 in

2011 and $4 in 2012, in connection with its sale of tax return preparation services in violation of the Missouri Merchandising Practices Act and state common law. He claimed that H&R Block represented that the fee was charged to comply with IRS requirements but that the fee was not mandatory and not charged by the IRS.

H&R Block originally sought to compel arbitration of Mr. Lopez's claims relating to the 2011 and 2012 compliance fee. Three months later, however, H&R Block notified the trial court that it had made an error in determining that Mr. Lopez had not opted out of the arbitration agreement in the 2012 CSA and that it had discovered that he had in fact opted out of the 2012 arbitration agreement. It requested leave to file a revised motion to compel arbitration, which the trial court granted. In its revised motion, H&R Block sought to compel arbitration of Mr. Lopez's claims relating to the 2011 compliance fee only.

Mr. Lopez opposed H&R Block's motion to compel arguing that the arbitration provision in the 2011 CSA was unconscionable and, therefore, unenforceable under general principles of Missouri contract law. Specifically, Mr. Lopez presented evidence that he claimed showed (1) the CSA was non-negotiable and had never been renegotiated by a consumer, (2) the CSA, including the arbitration and opt-out provisions, was difficult to understand and was objectively confusing, (3) the CSA was the product of H&R Block's superior bargaining position, and (4) the terms of the arbitration provision were extremely one-sided and disproportionately favored H&R Block in a variety of aspects.

The trial court entered an order denying H&R Block's revised motion to compel. It focused its attention on the provision that limits arbitration to the individual dispute of the consumer. It noted that to arbitrate the $2 charge in this case, Mr. Lopez would be required to pay an initial fee of $5 and that while H&R Block would cover the next $1,500, there is no agreement by H&R Block to pay expenses in excess of that amount. The court found, "This exposure to additional fees and expenses in excess of $1,500 in a case where the arbitration is focused on a $2 charge, constitutes a substantial obstacle to arbitration and almost necessarily forecloses any challenge to the type of consumer claim asserted by [Mr. Lopez] in this litigation." The trial court also questioned whether the arbitration agreement was equally binding on both parties but expressly stated that it was not making such determination. Finally, the trial court noted that Mr. Lopez presented some evidence that H&R Block did not keep dependable records identifying consumers who had opted out of arbitration, which was sufficient to overcome H&R Block's argument that a viable opt-out procedure existed and cured any unconscionable defect. The trial court found that the arbitration agreement in the CSA was unconscionable because "the fees [Mr. Lopez] might have to pay creates a substantial obstacle to litigating this $2 charge, and because [Mr. Lopez] has presented substantial evidence that the opt-out procedure was not effective." This appeal by H&R Block followed.

Standard of Review

The judgment of the trial court will be affirmed unless there is no substantial evidence to support it,

it is against the weight of the evidence, or it erroneously declares or applies the law. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 510 (Mo. banc 2012). "Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate." *Id.* (internal quotes and citation omitted). Whether the trial court should have granted the motion to compel arbitration is a question of law that the appellate court reviews *de novo*. *Id.*

Points on Appeal

H&R Block raises three points on appeal challenging the trial court's denial of its revised motion to compel arbitration. It contends that the trial court erred in denying the motion on the ground that the cost of arbitration might exceed the value of Mr. Lopez's claim because the Federal Arbitration Act (FAA) preempts such theory. It also argues that even if the FAA allowed the trial court to treat the agreement as unenforceable, the trial court should have severed the cost provision under the severance provision of the agreement. Finally, H&R Block contends that the trial court erred in denying the motion on the ground that the agreement lacked a viable opt-out provision because its recordkeeping errors are legally irrelevant. Because the first point is dispositive, the other points are not addressed.

In its first point on appeal, H&R Block contends that the trial court erred in denying its motion to compel arbitration on the ground that the cost of arbitration might exceed the value of Mr. Lopez's claim. It argues that the FAA preempts such theory because it stands as an obstacle to enforcing arbitration agreements according to their terms. To

support its argument, H&R Block relies on two recent Missouri Supreme Court cases, *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. banc 2012), and *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012), which analyzed the United States Supreme Court case, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Concepcion held that the FAA preempted a California judicial rule that deemed unconscionable most collective arbitration waivers in consumer contracts "because the rule was 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting the FAA." *Robinson*, 364 S.W.3d at 512 (quoting *Concepcion*, 131 S. Ct. at 1753). *See also Brewer*, 364 S.W.3d at 489-90. *Concepcion* reasoned that the rule "violated the spirit of the FAA by undermining the FAA's intent to place arbitration agreements on equal footing with other contracts and to enforce arbitration agreements by their terms." *Robinson*, 364 S.W.3d at 512 (citing *Concepcion*, 131 S. Ct. at 1745-46).

While *Concepcion* instructs clearly that a court cannot invalidate an arbitration agreement on the sole basis that it contains a class waiver, it does not require that a court must simply declare an arbitration agreement containing a class waiver enforceable. *Id.* at 514-15. It acknowledged that the FAA's "saving clause" allows an arbitration agreement to be declared unenforceable on any ground that exists at law or in equity for revocation of a contract. *Id.* at 513 (citing 9 U.S.C. § 2). *See also Brewer*, 364 S.W.3d at 490. "[A]s such, the FAA's 'saving clause' permits arbitration agreements 'to be

invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Robinson*, 364 S.W.3d at 513 (quoting *Concepcion*, 131 S. Ct. 1746). *See also Brewer*, 364 S.W.3d at 490.

However, *Concepcion* instructs that an arbitration agreement may not be invalidated by any defense that singles out or disfavors arbitration. *Robinson*, 364 S.W.3d at 515 (citing *Concepcion*, 131 S. Ct. at 1746, 1748). In other words, "no state-law rule that is 'an obstacle to the accomplishment of the FAA's objectives' should be applied to invalidate an arbitration agreement." *Id.* (quoting *Concepcion*, 131 S. Ct. at 1748). "As such, post-*Concepcion*, a court should not invalidate an arbitration agreement in a consumer contract simply because it is contained in a contract of adhesion or because the parties had unequal bargaining power, as these are hallmarks of modern consumer contracts." *Id.* (citing *Concepcion*, 131 S. Ct. at 1750). "Moreover, post-*Concepcion*, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers." *Id.* at 515-16 (citing *Concepcion*, 131 S. Ct. at 1753, which rejected consumers' public policy concerns about small-dollar claims slipping through the legal system). *See also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013)(emphasizing that, following *Concepcion*, "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."). The question of whether a state law defense, including an unconscionability defense, stands as an obstacle to the accomplishment of the

FAA's objectives requires analysis of the particular facts of the case. *Brewer*, 364 S.W.3d at 491, 492.

In *Robinson*, the Missouri Supreme Court applied *Concepcion* to reverse the trial court's judgment finding that a consumer arbitration agreement was unconscionable and unenforceable because its class action waiver deprives borrowers of a meaningful remedy. *Robinson*, 364 S.W.3d at 506-07, 517. The Court explained that under the FAA's saving clause, the trial court instead should have assessed whether the arbitration agreement was enforceable in light of the plaintiff's unconscionability claims based on Missouri contract law. *Robinson*, 364 S.W.3d at 506, 517. It noted that the plaintiff presented evidence regarding her lack of sophistication and her lack of understanding of the agreement; the agreement's print size, location, and clarity; and the high rate of interest available under the loan contract. *Id*. at 508. The Court found that because the trial court's judgment adjudicated only the plaintiff s claim of unconscionability based on the class waiver, factual issues remained that were relevant to determining whether the arbitration agreement was properly declared unconscionable under ordinary state law principles that govern contracts. *Id*. Thus, the Court remanded the case for such determination. *Id*.

In *Brewer*, the trial court found the class arbitration waiver in a loan agreement unconscionable and unenforceable but also found that a number of other aspects of the clause rendered the agreement unconscionable when considered as an individual action. 364 S.W.3d at 488. The Missouri Supreme Court held that under *Concepcion*, the presence and enforcement of a class arbitration

waiver did not make the arbitration clause unconscionable. *Id*. at 487. It explained that because, unlike in *Robinson*, the trial court did reach other factual issues in determining that the arbitration clause was unconscionable, the record was sufficient for it to determine the conscionability of the arbitration clause. *Id*. at 492. It, therefore, applied traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision. *Id*. It explained that "[t]he purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise." *Id*. at 492-93. It continued:

> Oppression and unfair surprise can occur during the bargaining process or may become evident later, when a dispute or other circumstances invoke the objectively unreasonable terms. In either case, the unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms.

Id. at 493. The Court found that the evidence in the case supported a determination that the agreement's arbitration clause was unconscionable. *Id*. at 493. Specifically, it identified evidence that (1) the entire loan agreement including the arbitration clause was non-negotiable and was difficult for the average consumer to understand, (2) no consumer had ever successfully renegotiated the terms of the title company's arbitration agreement, (3) the title company was in a superior bargaining position, (4) the terms of the agreement were extremely one-sided

in that the title company never pays the costs of arbitration or attorney's fees for the customer, even if the customer wins, and could seek to recover attorney's fees in defending the claim from the customer, (5) there was a lack of available counsel to pursue individual claims,[1] and (6) the agreement did not bilaterally provide that any and all disputes between the parties must be decided by binding, individual arbitration but instead bound the consumer to individual arbitration for all claims against the company while reserving the company's right to obtain its primary remedies through the court system. *Id.* at 493-95. Because the entire arbitration agreement was unconscionable and unenforceable, the Court affirmed the judgment of the trial court. *Id.* at 496.

In this case, Mr. Lopez raised multiple arguments challenging the enforceability of the arbitration agreement in the CSA based on Missouri contract law prohibiting unconscionable agreements. As noted above, he presented evidence that he claimed showed (1) the CSA was non-negotiable and had never been renegotiated by a consumer, (2) the CSA, including the arbitration and opt-out provisions, was difficult to understand and was objectively confusing, (3) the CSA was the product of H&R Block's superior bargaining position, and (4) the terms of the

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[1] *Brewer* recognized that *Concepcion* makes it clear that unavailability of counsel is not alone sufficient to invalidate the requirement of individual arbitration but stated that it remains one of the relevant considerations in assessing the overall conscionability of an arbitration clause because in some cases, it is related to whether the FAA's interest in dispute resolution will be satisfied. *Id.* at 494.

arbitration provision were extremely one-sided and disproportionately favored H&R Block in a variety of aspects. On the other hand, H&R Block argued that a viable opt-out procedure existed and cured any unconscionable defect, and evidence was presented regarding the opt-out provision. The trial court, however, invalidated the arbitration agreement based on the public policy concern that consumers with small-value claims would be deprived of a meaningful remedy. Specifically, the trial court found, "This exposure to additional fees and expenses in excess of $1,500 in a case where the arbitration is focused on a $2 charge, constitutes a substantial obstacle to arbitration and almost necessarily forecloses any challenge to the type of consumer claim asserted by [Mr. Lopez] in this litigation." *Robinson* specifically rejected such public policy reasoning post-*Concepcion* even if the policy aims to prevent undesirable results to consumers. 364 S.W.3d at 515-16. *See also Brewer*, 364 S.W.3d at 487, 488 (the FAA does not permit finding an arbitration agreement unconscionable on the basis of a class action waiver alone). *Robinson* explained, "Applying state-law policy considerations as the basis for invalidating an arbitration agreement is preempted by the FAA because it creates an impermissible 'obstacle to the FAA's objective of enforcing arbitration agreements according to their terms.'" *Id*. at 516 (quoting *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-13 (11th Cir. 2011)). The trial court clearly erred in finding the arbitration provision in the CSA unenforceable based on public policy concerns regarding class waivers. While the trial court questioned whether the arbitration

agreement was equally binding on both parties, it expressly stated that it was not making such determination at the time. And while it did note that Mr. Lopez presented evidence that would call the sufficiency of the opt-out procedure into question, the court did not make a definitive finding as to the sufficiency of that procedure nor did it make any other findings on the other evidence or adjudicate Mr. Lopez's other claims of unconscionability under ordinary state law principles. Consequently, as in *Robinson*, there remain factual issues relevant to Mr. Lopez's other claims. Thus, the case is remanded to the trial court to assess the evidence and determine if the arbitration agreement contained in the CSA is enforceable in light of *Robinson* and *Brewer*.

For the foregoing reasons, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

VICTOR C. HOWARD, JUDGE

All concur.

APPENDIX D

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

MANUEL H. LOPEZ, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	**CASE NO 1216-CV12290**
v.	)	**DIVISION 7**
H&R BLOCK, INC., et al.,	)	
Defendants.	)	

ORDER

Pending before the Court is Defendants' Revised Motion to Stay the Case and Compel Arbitration, filed January 29, 2013.[1] Defendants (herein after

[1] On July 30, 2013, this Court entered an order denying Defendants' Revised Motion to Stay the Case and Compel Arbitration. Defendant subsequently appealed the order to the Missouri Court of Appeals - Western District. On May 28, 2014, the Court of Appeals — Western District issued its mandate reversing the order and remanding the case with instructions to this Court to determine if the arbitration agreement contained in the CSA is enforceable in light of *Robinson v. Title Lenders*,

referred to as "H&R Block") argue that this Court should compel the Plaintiff to pursue his claims in arbitration as required under an arbitration agreement between the parties. For the reasons stated below, the Court denies the motion.

Statement of Facts

1. In 2011 and 2012, Plaintiff hired Defendants to prepare his tax returns.
2. In both years, Defendants charged Plaintiff a "compliance fee," which totaled $2 in 2011 and $4 in 2012.
3. In both years, Plaintiff signed a Client Services Agreement (CSA) in conjunction with hiring Defendants for the tax preparation services.
4. The CSA signed by the Plaintiff in 2011 [2] contained an arbitration agreement that required Plaintiff to individually arbitrate any dispute that Plaintiff has with Defendants.
5. The arbitration agreement states in relevant part:

> If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative

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Inc., 364 S.W.3d 505 (Mo. Banc 2012) and *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012).

[2] The 2012 CSA also contained an arbitration agreement, but the Defendants stipulate that Plaintiff successfully opted out of the 2012 arbitration agreement. Therefore, only Plaintiff's claims pertaining to the work performed in 2011 are at issue before this Court.

to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party. This third party, known as the Arbitrator, is empowered to settle the matter with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your rights to sue H&R Block in court before a judge and jury, and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled in arbitration. In addition, you specifically agree to waive any right to "class action" arbitration. lf any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision; except that in the event that the waiver of class action rights is deemed invalid or unenforceable, any claim seeking relief on behalf of a class must be brought in a court of proper jurisdiction and not in arbitration.

6. The Opt-Out provision, which follows the above arbitration agreement, is typed in bold face and is bordered by a box. It states:

Right to Opt-Out of This Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our website at www.hrblock.com/goto/optout

(if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt-Out, P.O. Box 32818, Kansas City, MO 64171. The letter you send us should include your printed name, Social Security Number of yourself and joint filer, if any, the most recent date you were served by H&R Block, whether or not you want a written confirmation and the words "Reject Arbitration." Your electronic or written opt-out letter will override your signature below regarding arbitration but no other provision of this document.

7. Pursuant to the terms of the arbitration provision of the contract, the customer is required to pay $5 to initiate arbitration. Pursuant to the Client Service Agreement for the Tax Season 2012, H & R Block "will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H & R Block may consider paying arbitration costs that exceed $1,500 but only if you prevail in the claim you bring in the arbitration."

Standard of Review

Both parties agree that the Federal Arbitration Act (FAA) governs the validity of arbitration agreements. The FAA dictates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the

revocation of any contract."[3] The Supreme Court has stated that the FAA displays both "a liberal federal policy favoring arbitration," and "the fundamental principle that arbitration is a matter of contract."[4] In the context of a motion to compel arbitration brought under the FAA, the court is to apply a standard similar to that applicable for a motion for summary judgment.[5] Moreover, Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate.[6] Whether a trial court should have granted the motion to compel arbitration is a question of law that the appellate court reviews *de novo*.[7]

Discussion

Generally, an arbitration agreement is not valid unless it demonstrates the essential contract elements required under Missouri law.[8] A valid contract requires an offer, acceptance and bargained for consideration.[9] Arbitration agreements may be invalidated by generally applicable contract defenses, such as duress, fraud, or unconscionability, but not by defenses that apply solely to arbitration or that

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[3] 9 U.S.C. § 2

[4] *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

[5] *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003).

[6] *Robinson*, 364 S.W.3d at 510 (Mo. Blanc 2012).

[7] *Id.*

[8] *Clemmons v. Kansas City Chiefs Football Club, Inc.,* 397 S.W.3d 503, 506 (Mo. App. W.D. 2013).

[9] *Id.*

derive their meaning from the sole fact that an agreement to arbitrate is at issue.[10]

In this case now pending before this Court, Plaintiff argues that the arbitration agreement contained in the CSA in unconscionable and therefore, should not be enforced. Historically, Missouri Courts looked at both the procedural and substantive aspects to unconscionability. [11] Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions. [12] Substantive unconscionability refers to undue harshness in the contract terms.[13] Missouri does not allow an unconscionable contract or clause to be enforced. [14] However, *Concepcion* requires that review on the basis of unconscionability be limited to the *formation* of the contract.[15]

The purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise.[16] Oppression and unfair surprise can occur during the bargaining process or may become

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[10] *Concepcion*, 131 S. Ct. at 1746 (2011).

[11] *Robinson*, 364 S.W.3d at 508, n2 (*citing State ex. Rel. Vincent v. Schneider,* 194 S.W.3d 853, 858 (Mo. Blanc 2006)).

[12] *Id. See also Woods v. OC Financial Services, Inc.* 280 S.W. 3d 90, 94 (Mo.App. E.D. 2008).

[13] *Id.*

[14] *Id.*

[15] *Brewer*, 364 S.W.3d at 492, n2.

[16] *Cowbell, LLC v Borc Building and Leasing Corp.,* 328 S.W.3d 399, 405 (Mo. App. W.D. 2010).

evident later, when a dispute or other circumstances invoked the objectively unreasonable terms.[17] In either case, the unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to objectively unreasonable terms.[18]

In *Brewer*, the Missouri Supreme Court analyzed whether an arbitration agreement could be declared unenforceable based on the doctrine of unconscionability in light of *Concepcion*.[19] The Court found that while the arbitration was governed by the FAA, the FAA did not prevent the application of traditional Missouri contract law to the enforcement of the arbitration agreement at issue.[20] In other words, the FAA did not preclude the Court from determining the issue of enforceability under the doctrine of unconscionability.[21]

In analyzing the enforceability of the arbitration agreement, the *Brewer* court looked at several factors.[22] First, the court looked at the bargaining powers of each party.[23] The court found that the entire agreement was non-negotiable and difficult for the average consumer to understand. The court also found that the defendant was in a superior

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[17] *Brewer*, 364 S.W.3d at 493.

[18] *Id.*

[19] *Id.*, at 491.

[20] *Id.*

[21] *Id.*

[22] *Id.*, at 493.

[23] *Id.*

bargaining power and that no customer had ever successfully renegotiated the terms of the arbitration contract.[24]

Next, the court looked at the terms of the agreement.[25] The court found that the terms of the agreement were extremely one-sided because: (1) the agreement provided that the parties were to bear their own costs; (2) the defendant did not waive it's right to seek reimbursement for attorney's fees incurred in defending a claim; (3) the fact that no consumer ever has arbitrated a claim against the defendant; and (4) the agreement did not provide an attorney fee multiplier or guaranteed minimum recovery if the consumer was awarded more than the title company's last offer.[26] The court also noted that the agreement was drafted by the defendant title company.[27] In light of all of these facts, the Court found that the arbitration agreement stood as a "substantial obstacle not just to arbitration but also to the resolution of any consumer disputes against the [defendant]."[28]

Additionally, the Court looked at whether consumers could retain counsel to pursue individual claims in light of the small amount of damages at issue.[29] The Court cautioned that although the

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[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

majority opinion in *Concepcion* made clear that the unavailability of counsel was not alone sufficient to invalidate an arbitration agreement, it remained one of the relevant considerations in determining the overall conscionability of the arbitration contract.[30] The Court found that because of the small damages at issue, it was unlikely that attorneys would find sufficient financial incentive to represent consumers in individual small dollar claims.[31] Additionally, the Court found compelling that no consumer ever has filed an individual claim for arbitration against the defendant.[32]

Finally, the Court looked at rights given up by the parties and the remedies available to each party.[33] The Court found that the defendant title company reserved "its right to obtain its primary remedies through the court system while requiring [the consumer] to obtain her only meaningful remedy—monetary compensation for the alleged violation of consumer protection laws—through individual arbitration."[34] In other words, the consumer's only remedy was arbitration, while the defendant title company could seek repossession of the collateral by force or through suit in court rather than using arbitration.[35] The Court ultimately found that under

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[30] *Id.*, at 494.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

the circumstances, the arbitration clause of the agreement was unconscionable and unenforceable.[36]

In *Robinson* (decided at the same time as *Brewer*), the Missouri Supreme Court also analyzed whether an arbitration agreement containing a class action waiver was unconscionable in light of *Concepcion*.[37] First, the Court noted that *Concepcion* instructs clearly that a court cannot invalidate an arbitration agreement solely on the basis that the agreement contains a class waiver.[38] The Court also noted that *Concepcion* still allows arbitration agreements containing class waivers to be deemed unenforceable based on state-law principles governing contracts.[39] The Court found that "an arbitration agreement could be declared unenforceable if a generally applicable contract defense, such as fraud, duress, or unconscionability, applied to concerns raised about the agreement."[40] The Missouri Supreme Court remanded the case back to the trial court to determine whether the arbitration agreement was unenforceable in light of state-law principles governing contracts.[41]

Analysis

In the case now pending before this Court, there are several facts similar to those facing the court in

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[36] *Id.*, at 495.

[37] *Robinson*, 364 S.W.3d at 506.

[38] *Id.*, at 514.

[39] *Id.*

[40] *Id.*, at 515.

[41] *Id.*, at 518.

Brewer which guides this Court's determination that the motion should be denied. First, the entire CSA and arbitration agreement signed by Plaintiff was drafted by Defendants.[42] Defendants require all customers to sign the CSA prior to the Defendants rendering services.[43] The terms were non-negotiable[44] and there is some evidence to show that the agreement was difficult to understand for the average consumer[45] and even some of the Defendants' employees.[46] Therefore, this Court finds that Defendants were in a superior bargaining position in that: (1) Defendants drafted the CSA; (2) Defendants required all customers to sign the CSA; (3) no customer has ever successfully negotiated the terms of the CSA; and (4) the arbitration provision was difficult to understand for both customers and Defendants' employees.

Additionally, much like in *Brewer*, the terms of the agreement were extremely one-sided. While the agreement states that "if a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration . . .,"[47] there is some ambiguity as to whether H&R Block is bound to individual arbitration. Looking further into the terms of the agreement, it becomes clear that the consumer is waiving a number of rights while H&R

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[42] Legal file, pg. 460.

[43] Legal file, pg. 464-65.

[44] Legal file, pg. 467.

[45] Legal file, pg. 506-29.

[46] Legal file, pg. 896-924.

[47] C.S.A.

Block makes no such waivers. The agreement states that the consumer "agrees to waive [their] rights to sue H&R Block in court before a judge and jury and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled by arbitration."[48] Furthermore, the consumer waives any right to participate in "class action arbitration." [49] When viewing the agreement as whole, it is evident that the terms are extremely one-sided in favor of Defendants. This Court finds compelling the fact that H&R Block reserves the right to collect debt through the use of third party services.[50] Specifically, H&R Block has contractual agreements with Telecheck and IRS Recovery Services for the collection of debts from consumers.[51] These contractual agreements contemplate the filing of lawsuits and criminal complaints, albeit with the express prior written consent of H&R Block.[52]

Much like in *Brewer*,[53] the amount of damages at issue are minimal and thus render it difficult for consumers to obtain counsel. According to the CSA, Plaintiff was required to pay an initial fee of $5 to arbitrate his claim challenging a $2 compliance fee. Plaintiff obtained unchallenged testimony of an experienced consumer lawyer who stated that a consumer would likely be unable to obtain qualified

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[48] *Id.*

[49] *Id.*

[50] Legal file, pg. 737-833.

[51] *Id.*

[52] *Id.*

[53] 364 S.W.3d at 493.

legal representation to pursue the type of claim at issue in the case now pending before this court.[54] Although the unavailability of counsel is not dispositive on the issue of unconscionability, the *Brewer* court held that it is still a relevant consideration.[55]

Unlike in *Concepcion*, and much like in *Brewer*, the CSA at issue in this case did not provide for an attorney fee multiplier or guaranteed minimum recovery if the consumer is awarded more than Defendant's last offer.[56] Additionally, the arbitration provision does not require Defendant to reimburse Plaintiff for arbitration-related expenses, such as expert witness fees and costs.[57] The CSA states that although the consumer must first pay a $5 fee, H&R Block will pay all other expenses and fees up to $1,500.[58] It further provides that H&R Block may consider paying costs that exceed $1,500, but only if the consumer wins.[59] Therefore, this Court finds that the arbitration provision demonstrates that there is no practical, viable means of individualized dispute resolution in that: (1) there is no guaranteed minimum recovery, (2) there is no attorney fee multiplier; and (3) there is no guaranty that H&R Block will pay the cost of arbitration even if the consumer is successful in pursuing his or her claim.

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[54] Legal file pg. 889-894.

[55] 364 S.W.3d at 494.

[56] C.S.A. *See also*, *Brewer*, 364 S.W.3d at 493.

[57] *Id*.

[58] *Id*.

[59] *Id*.

Furthermore, the CSA does not equally bind both parties to arbitration. Much like in *Brewer*,[60] the arbitration agreement only unilaterally binds the consumer to arbitration. As discussed above, the CSA required customers to waive several "rights"[61] while H&R Block contracted with third parties to collect debts owed to H&R Block by consumers.[62] Even though H&R Block argues that it has never consented to a third party filing a lawsuit,[63] the contracts between H&R Block and the third party debt collectors clearly evidences H&R Block's belief that H&R Block is not bound to arbitrate disputes that H&R Block has with consumers. Therefore, this Court finds that the CSA is not equally binding on both parties.

Finally, Defendants argues that despite everything outlined above, the opt-out provision in the CSA cures any unconscionability of the agreement at issue. First, Plaintiff provided a study conducted by H&R Block evidencing that the opt-out clause of the arbitration provision is difficult for the average customer to understand.[64] Next, Plaintiff demonstrated that H&R Block employees had difficulty explaining and understanding the opt-out

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[60] 364 S.W.3d at 494.

[61] *See* CSA. (Customer waives right to sue H&R Block in court before a judge and jury); (Customer waives right to participate in class action lawsuit): and (Customer waives right to participate in class action arbitration).

[62] Legal file, pg. 737-833.

[63] Legal file, pg. 738.

[64] Legal file, pg. 506-529.

clause.[65] There is also some doubt as to whether or not the opt-out process effectively records which customers chose to opt-out and which customers did not. In fact, the record of this case demonstrates that it was not until several months after this case began that H&R Block was able to locate and acknowledge Plaintiff's opt-out notice.[66] When asked by Plaintiff's counsel at deposition, H&R Block's corporate representative explained that H&R Block did not have a process for ensuring the accuracy of the Reporting Database which contained the customers who had chosen to opt-out of the arbitration agreement.[67] Therefore, this Court finds that the opt-out provision is illusory.

Conclusion

When analyzed under Missouri law, [68] the arbitration provision in the CSA is unconscionable and should therefore not be enforced. First, the CSA was drafted by Defendant H&R Block. The CSA terms were non-negotiable and H&R Block was in a superior bargaining position. Additionally, the terms of the agreement were extremely one-sided. Plaintiff waived numerous rights to pursue remedies other

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[65] Legal file, pg. 895-924.

[66] Legal file, pg. 26. *See* Defendants' Suggestions in Support of Defendants' Motion to Stay the Case and Compel Arbitration.

[67] Legal File, pg. 470.

[68] Defendants urged this Court to follow the opinion of the Honorable Beth Phillips in *Perras v. H&R Block, Inc., et al*., Case No 1200450-CV-W-BP. While well-reasoned and insightful, Judge Phillips concluded that California law applied to the arbitration agreement at issue in that case. Therefore, the Court finds that opinion is inapplicable to the case at bar.

than arbitration, while Defendant did not waive such rights and contracted with third parties to collect debts. Furthermore, a consumer would likely be unable to obtain qualified legal representation to pursue the type of claim at issue in this case. In addition, the CSA failed to contain an attorney fee multiplier or guaranteed minimum recovery even if the consumer was successful in pursuing his or her claim. Also worth noting is that H&R Block was not required to pay any arbitration fees or costs that exceeded $1,500, even if the consumer was victorious in arbitration. Finally, the opt-out provision in the CSA was ambiguous, difficult to understand, and not efficient at identifying customers that had chosen to opt-out of arbitration. For all the reasons herein, and in light of *Concepcion*, *Brewer*, and *Robinson*, this Court holds that Defendant's Motion to Stay the Case and Compel Arbitration should be **DENIED**.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Stay and Compel Arbitration is **DENIED**.

IT IS FURTHER ORDERED that this case is set for Case Management Conference on the 22th day of April, 2015 at 1:00 p.m.

IT IS SO ORDERED.

I hereby certify that a copy of the foregoing was delivered through the electronic filing system, on this 12th day of March, 2015, to all attorneys of record.

s/ Adrien Cave
Law Clerk, Division 7

APPENDIX E

Missouri Court Of Appeals
WESTERN DISTRICT
May 3, 2016

IMPORTANT NOTICE

To: All Attorneys of Record

Re: MANUEL H LOPEZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, RESPONDENT,

vs.

H&R BLOCK, INC., ET AL., APPELLANTS.

WD78465

Please be advised that Appellants' motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

/s/ Terence G. Lord
Terence G. Lord
Clerk

cc: LINDSAY TODD PERKINS
TODD MICHAEL MCGUIRE
CHRISTOPHER DAVID DANDURAND
NORMAN ELI SIEGEL
BRIAN AUGUST BUNTEN
JEFFREY JOHN SIMON
JENNIFER JEAN ARTMAN
ROBERT THOMAS ADAMS
DEREK TODD TEETER

APPENDIX F

SUPREME COURT OF MISSOURI
EN BANC

SC95718

WD78465

May Session, 2016

Manuel H. Lopez, on behalf of himself
and all others similarly situated,

Respondent,

vs. (TRANSFER)

H&R Block, Inc., et al.,

Appellants.

Now at this day, on consideration of the appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Bill L. Thompson, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2016, and on the 28th day of June 2016, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 28th day of June, 2016.

/s/ Bill Thompson Clerk

/s/ _____ Deputy Clerk

APPENDIX G

CASE NO. WD78465

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MANUEL H. LOPEZ,
Respondent,
v.
H&R BLOCK INC., et al.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI
HONORABLE S. MARGENE BURNETT
CIRCUIT COURT NO. 1216CV12290

APPELLANTS' MOTION FOR REHEARING AND APPLICATION FOR TRANSFER TO THE MISSOURI SUPREME COURT

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GROUNDS FOR TRANSFER

1. The panel in this case created a conflict with the law of this and other districts of the Missouri Court of Appeals when it held that it is "*required … to affirm* the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*." Op. at 11 (emphases added). The other districts, in contrast, follow ordinary waiver principles and generally will not consider arguments not raised by a party in the court below or on appeal. This case should be transferred to reexamine the law and answer a question of general interest that arises in virtually every appeal.

2. The panel opinion contravenes the Federal Arbitration Act ("FAA") by holding that Missouri courts have a duty to *sua sponte* address the existence and scope of an arbitration agreement, even when not contested by the party resisting arbitration, before addressing any defenses to enforcement. No such rule applies to other types of contracts, and the FAA mandates that arbitration agreements be treated no worse than other contracts. The decision thus runs afoul of the FAA and is preempted by the Supremacy Clause of the United States Constitution. It also creates a conflict with decisions of the other districts of the Court of Appeals, which have espoused no such rule. This case should be transferred to reexamine the law and resolve this conflict.

3. This case raises an important question of general interest concerning whether and when an agreement to arbitrate is unconscionable. The circuit court applied an analysis contrary to the decisions of the Missouri and United States Supreme Courts, and

intervention by the Missouri Supreme Court is necessary.

GROUNDS FOR REHEARING

1. Under Missouri law, an appellate court is not required to address a nonjurisdictional issue that respondent fails to raise both before the circuit court and on appeal. An issue that respondent leaves undisputed is waived and not considered. In finding otherwise, the panel overlooked or misinterpreted material legal principles.

2. Under the FAA, a court must review and enforce an arbitration agreement in the same manner that it reviews and enforces any other contract. By refusing to resolve the unconscionability question raised on appeal, and *sua sponte* adjudicating an undisputed question about the scope of the agreement, the panel created a new rule targeted at arbitration agreements. That rule misinterprets material legal principles.

3. Under Missouri law, an arbitration agreement is unconscionable only when it is one that no person in his senses and not under delusion would make. The commonplace arbitration clause in this case falls well outside of that narrow definition. In failing to address whether the arbitration clause here is unconscionable, the panel overlooked or misinterpreted material legal principles.

STATEMENT OF FACTS

In 2012, Respondent Manuel Lopez ("Lopez") brought this lawsuit alleging violations of Missouri law relating to separate and distinct tax-preparation services that H&R Block provided in 2011 and 2012. Appellants (collectively, "H&R Block") moved to

compel arbitration of the claims relating to the 2011 services, pursuant to the arbitration clause in a Client Service Agreement that Lopez had signed in 2011 ("the arbitration clause"). Lopez opposed the motion on the sole ground that the arbitration clause was unenforceable because it was unconscionable, and the circuit court adopted Lopez's argument. H&R Block appealed, and this Court reversed and remanded for reconsideration only of the unconscionability question. *Lopez v. H&R Block, Inc.*, 429 S.W.3d 497 (Mo. Ct. App. 2014) ("*Lopez I*").

On remand, Lopez again argued only that the arbitration clause was unconscionable, and the circuit court agreed. H&R Block appealed for a second time, and for a second time the parties briefed only the issue of unconscionability. This time, however, the panel refused to consider whether the arbitration clause was unconscionable. Instead, it held that "it was *required … to affirm* the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*." Op. at 11 (emphases added). It further held: "We *do not address* defenses to enforcement of an arbitration agreement *unless we are first satisfied* that an arbitration agreement exists and that the subject disputes are within its scope." Op. at 9 (emphases added). Despite the fact that no party had ever disputed the existence or scope of the 2011 arbitration agreement—before either the circuit court or the Court of Appeals—the panel *sua sponte* found that Lopez's 2011 claims were not governed by the arbitration clause and affirmed on that ground alone, never considering the unconscionability issue raised and briefed by the parties.

DISCUSSION

Pursuant to Missouri Supreme Court Rule 84.17(a)(1), H&R Block respectfully requests rehearing of the panel opinion filed March 8, 2016. In the alternative, pursuant to Missouri Supreme Court Rule 83.02, H&R Block respectfully requests transfer of this case to the Missouri Supreme Court.

I. REHEARING IS WARRANTED BECAUSE THE PANEL OPINION OVERLOOKS OR MISINTERPRETS THE LAW.

This Court should grant rehearing because the panel "overlooked or misinterpreted" multiple "material matters of law." *See* Mo. S. Ct. Rule 84.17.

A. The Panel Opinion Misinterprets Or Overlooks The Proper Scope of Appellate Review And Vitiates The Rule Of Waiver.

Rehearing is warranted because the panel incorrectly determined that it was "*required … to affirm* the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*." Op. at 11 (emphases added). While an appellate court generally may affirm on any ground *properly pressed by the respondent*, this general principle does not *require* an appellate panel to affirm on a basis never asserted, and thus waived, by the respondent. An appellate court has no obligation to, and generally should not, reach out and decide a question ignored by the parties, unless that question goes to the court's jurisdiction.

First, numerous decisions hold that, far from being obligated to scour the record for issues not raised by the parties, appellate courts generally should not raise issues on their own accord. Where the parties

fail to raise a question before the circuit court or on appeal, and that question is nonjurisdictional, a court should treat the question as settled. *See Kottman v. Missouri State Fair*, 451 S.W.3d 331, 335 n.2 (Mo. Ct. App. 2014) ("Although an appellate court may affirm the trial court if it is correct on any ground, not just the grounds given by the trial court, it does not go beyond the grounds asserted in the motion and briefed on appeal to look for other reasons to affirm."); *Comstock v. Walsh*, 848 S.W.2d 7, 9 (Mo. Ct. App. 1992) (similar); *Lynch v. Missouri Dept. of Corr.*, 267 S.W.3d 796, 799 (Mo. Ct. App. 2008) (similar); *Cupp v. Nat'l R.R. Passenger Corp.*, 138 S.W.3d 766, 772-73 (Mo. Ct. App. 2004) (similar); *see also Lowe v. Hill*, 430 S.W.3d 336, 350 (Mo. Ct. App. 2014) ("[W]hile it is true that we may affirm a trial court's judgment if cognizable under any theory … the alternative theory must have been pled and supported by evidence."); *Hellmann v. Walsh*, 965 S.W.2d 198, 200 (Mo. Ct. App. 1998) ("We decline to affirm a judgment on a ground that was not presented or supported by the motion to dismiss and that could have been presented to and considered by the trial court."); *Prop. Exch. & Sales, Inc. v. King*, 822 S.W.2d 572, 574 (Mo. Ct. App. 1992) (similar); Mo. S. Ct. R. 84.13(a) ("Apart from questions of jurisdiction of the trial court over the subject matter, allegations of error not briefed or not properly briefed shall not be considered in any civil appeal ….").

Second, where a party fails to raise an argument before the trial court or on appeal, he waives that argument. *See, e.g.*, *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 784 (Mo. Ct. App. 2008) ("[I]ssues not raised in an appellant's opening

brief … are not properly preserved."); *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. Ct. App. 1996) ("A party cannot raise an argument against a grant of summary judgment for the first time on appeal."). To be sure, respondent does not waive the argument that a circuit court's order is correct by failing to brief it on appeal. *See Barber v. Jackson Cty. Ethics Comm'n*, 984 S.W.2d 127, 129 (Mo. Ct. App. 1998). But respondent does waive *alternative* grounds for affirmance by failing to raise them—either on appeal or before the circuit court. *See id.* ("As respondent in the first appeal, Mr. Barber was compelled to raise every argument in support of the judgment that the subpoena was invalid and, therefore, unenforceable"; unraised arguments were "waived"). And the doctrine of waiver is fundamentally inconsistent with the panel's holding that it is *required* to consider any argument that presents an alternative basis for affirmance, irrespective of whether the respondent raised it. Indeed, the panel's holding would make it impossible for a party that prevails below to *ever* waive a winning alternative argument, vitiating the law of waiver and imposing the precise burdens on courts that the doctrine was designed to ease. This Court should grant rehearing to correct this error.[1]

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[1] The panel's opinion also conflicts with the prior panel opinion in this case, which reversed and remanded the circuit's ruling on unconscionability *without* analyzing the existence and scope of the arbitration agreement. *See Lopez I*, 429 S.W.3d 497.

B. The Panel's Novel Rule Misinterprets Or Overlooks The FAA.

In holding that the existence and scope of an arbitration agreement must be evaluated even if not disputed by the parties, the panel created a new legal rule that applies only to arbitration agreements—and that disfavors arbitration. In doing so, the panel overlooked that the FAA preempts any state law treating agreements to arbitrate worse than other contracts. Rehearing is required to rectify this conflict with federal law.

The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). The FAA permits states to apply to arbitration agreements their own laws regarding the "validity, revocability, and enforceability of contracts *generally*." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis added). But it preempts any state rule that "disfavors arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). The FAA does not tolerate any state law that singles out arbitration agreements for adverse treatment—that is, any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Perry*, 482 U.S. at 492 n.9. Courts must "place arbitration agreements on an equal footing with other contracts." *Concepcion*, 563 U.S. at 339.

The panel opinion disregards this central FAA tenet. It held that "*we do not address* defenses to

enforcement of an arbitration agreement *unless we are first satisfied* that an arbitration agreement exists and that the subject disputes are within its scope." Op. at 9 (emphases added). Invoking an inapposite analogy to jurisdiction—which a court *must* consider because it goes to the court's *power* to hear a dispute, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)—the panel deemed it irrelevant that Lopez had not challenged the existence or scope of the arbitration agreement. *Id*. at 12. The panel thereby established a rule that a court *cannot* consider any defense to enforcement of an arbitration agreement without first addressing the existence and scope of the agreement—*regardless* whether the parties disputed either issue. But the panel's rule is "unique" to arbitration agreements; it is "restricted to that field." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015).

There is no similar rule in Missouri for other types of contract cases. On the contrary, in an ordinary contract case, where the only contested issue is whether a given defense to enforcement applies, courts will consider the contested issue without delving into formation and scope of the agreement. *See, e.g., Dickemann v. Millwood Golf & Racquet Club, Inc.*, 67 S.W.3d 724, 725-26 (Mo. Ct. App. 2002) (refusing to consider challenge to existence of contract because it was not "raised in the pleadings, nor decided at the trial level"); *Hartland Computer Leasing Corp., Inc. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. 1989) (where "there exist[ed] no dispute over the execution or the terms of the lease and the guarantee," court addressed

unconscionability without analyzing existence or scope of agreement); *Repair Masters Construction, Inc. v. Gary*, 277 S.W.3d 854, 857-59 (Mo. Ct. App. 2009) (similar).

The panel's rule operates solely to the detriment of arbitration. Under the rule, agreements to arbitrate are always subject to review on the grounds that no contract exists or that the claims at issue do not fall within the contract's scope. This means that a party could dispute the existence or scope of an arbitration agreement for the first time on appeal, and an appellate court would be obliged to consider its arguments. It even means that an appellate court, like the panel here, could—indeed, must—scour the record in search of a possible challenge to the existence or scope of an arbitration agreement that neither party has *ever* raised. This rule, which will always benefit the party seeking to avoid arbitration, improperly manifests "judicial hostility towards arbitration," *Concepcion*, 563 U.S. at 342, and "singl[es] out arbitration provisions for suspect status," *Doctor's Associates*, 517 U.S. at 687.

The panel's rule "does not place arbitration contracts on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 471. It is unique, and uniquely hostile, to arbitration agreements. Because "state law principles that purport to apply special rules for the formation of contracts containing promises to arbitrate are preempted by, and must be disregarded under, the FAA," *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 778-79 (Mo. banc 2014), this Court should grant rehearing to correct the panel's error.

C. The Unconscionability Question Should Be Resolved.

Because the panel inappropriately affirmed on a ground waived by Lopez, it never considered the unconscionability question that was presented. And that question cries out for resolution, because the opinions of the Missouri Court of Appeals, the Missouri Supreme Court, and the Supreme Court of the United States establish that the arbitration clause was not unconscionable and should be enforced.

Under Missouri law, a contract term is unconscionable only where it is one "that no man in his senses and not under delusion would make." *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 495 (Mo. banc 2012); *accord Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015).

The arbitration clause, which adopts terms commonly found in arbitration agreements, does not fail this demanding standard. It preserves all substantive rights and remedies. It provides arbitration on terms more favorable to Lopez than would be available to him in civil litigation, including lower fees. It provides an easier, faster, and less expensive means for H&R Block and its customers to resolve disputes. These attributes differentiate this run-of-the-mill arbitration clause from an unconscionable one. *See Eaton*, 461 S.W.3d 426; *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. banc 2012); *Brewer*, 364 S.W.3d 486.

The arbitration clause also gives anyone who prefers not to be bound to arbitrate disputes 30 days to communicate that preference to H&R Block and

thereby exempt himself from the clause's effect. The opt-out clause—considered alone or together with the rest of the arbitration clause—renders the arbitration clause conscionable. *See, e.g., Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009); *Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052 (9th Cir. 2013) (en banc); *In re H&R Block IRS Form 8863 Litig.*, No. 4:13-MD-02474, 2014 WL 3401010, at *4 (W.D. Mo. July 11, 2014).

In any event, even if some portion of the arbitration clause is unconscionable, that portion should be severed and the remaining terms enforced. *See* Mo. Rev. Stat. § 435.350 *et seq.*; *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 811-12 (Mo. banc 2006).

The circuit court's denial of the motion to compel, and the panel's affirmance of that order, overlooked and misinterpreted this settled law. Rehearing is necessary.

II. IN THE ALTERNATIVE, THIS COURT SHOULD TRANSFER THIS CASE TO THE MISSOURI SUPREME COURT

In the alternative, this Court should transfer this case to the Missouri Supreme Court so that it can reexamine the law and settle the important questions presented here. *See* Mo. S. Ct. Rule 83.02.

First, the panel's holding that it is "*required … to affirm* the trial court's order and judgment refusing to compel arbitration on *any basis supported by the record*," Op. at 11 (emphases added), conflicts with the law of the other districts of the Missouri Court of Appeals. Those districts do not search the record for reasons to affirm the decision below if not raised by

the parties. *See, e.g., Lynch*, 267 S.W.3d at 799 (Mo. Ct. App. 2008); *Cupp*, 138 S.W.3d at 772-73; *Schwartz*, 926 S.W.2d at 493. Transfer is warranted so that the Missouri Supreme Court may reexamine the law and resolve the judicial conflict about this important legal issue.

Second, the panel's novel rule that courts must address the existence and scope of an arbitration agreement before addressing any defenses to enforcement raises an important question concerning the application of the FAA in Missouri courts. "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Imburgia*, 136 S. Ct. at 468. And "[t]he Federal Arbitration Act is a law of the United States, and … the judges of every State must follow it." *Id*. As set forth above, however, the panel created a rule applicable only to arbitration agreements that *disfavors* arbitration. *See id*.; *Concepcion*, 563 U.S. at 339; *see also, e.g*., *Dickemann*, 67 S.W.3d at 725-26; *Hartland Computer*, 770 S.W.2d at 526-27; *Repair Masters*, 277 S.W.3d at 857-59. Moreover, the panel's rule has not been adopted by the other districts of the Court of Appeals. This Court should transfer this case to the Missouri Supreme Court so that it can reexamine the law and decide whether the panel's rule is contrary to the FAA.

Third, the question whether the arbitration clause is unconscionable is an important issue of general interest meriting review by the Missouri Supreme Court. The circuit court's ruling on unconscionability strays far beyond the bounds of settled law. *See, e.g.,*

Brewer, 364 S.W.3d 486; *Robinson*, 364 S.W.3d 505; *Eaton*, 461 S.W.3d 426; *Cicle*, 583 F.3d 549; *Kilgore*, 718 F.3d 1052; *In re H&R Block*, 2014 WL 3401010; Mo. Rev. Stat. § 435.350 *et seq.; Hewitt*, 461 S.W.3d at 811-12. The panel recognized that the circuit court improperly ignored applicable precedent, *see* Op. 7 n.3, and yet it failed to correct the error. Transfer is called for to address this important issue.

CONCLUSION

For the foregoing reasons, this Court should grant Appellants' motion for rehearing or, in the alternative, its application for transfer to the Missouri Supreme Court.

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APPENDIX H

GROUNDS FOR TRANSFER

1. To avoid addressing the circuit court's flawed unconscionability analysis, the Western District decided this case on the basis of an issue never raised by the parties, on the remarkable concept that it was "*required . . . to affirm* the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*," Op. at 11 (emphases added). This holding creates a conflict with decisions of other districts and this Court, *see infra* at 4-6, which follow the well-established rule that appellate courts do not adjudicate nonjurisdictional questions never raised by the parties. This Court should grant transfer to resolve the split of authority on this important question of law.

2. The Western District's decision contravenes the Federal Arbitration Act ("FAA") by holding that Missouri courts have a duty to address *sua sponte* the existence and scope of an arbitration agreement, even when not contested, before addressing any defenses to enforcement. No such rule applies to other types of contracts. The FAA, this Court, and the U.S. Supreme Court mandate that arbitration agreements be treated no less favorably than other contracts. *See infra* at 6-9 (citing cases). The decision thus runs afoul of the FAA and is preempted. This Court should grant transfer to resolve the judicial conflict on this question of general interest and importance.

3. The Western District improperly avoided correcting the circuit court's erroneous unconscionability analysis, which is contrary to precedent and would invalidate many standard arbitration agreements. *See infra* at 9-12 (citing cases). This Court should grant transfer to resolve this question of general interest and importance and restore consistency to Missouri unconscionability law.

STATEMENT OF FACTS

Plaintiff-Respondent Manuel Lopez ("Lopez") brought this lawsuit alleging violations of Missouri law relating to H&R Block tax-preparation services he purchased in 2011 and 2012 pursuant to two separate agreements. Defendants-Appellants (collectively, "H&R Block") moved to compel arbitration of the claims relating to the 2011 services, pursuant to the arbitration clause in the 2011 agreement ("the arbitration clause"). Lopez opposed the motion on the sole ground that the arbitration clause was unconscionable, and the circuit court agreed. H&R Block appealed, and the Court of Appeals reversed and remanded for reconsideration only of the unconscionability question. *Lopez v. H&R Block, Inc.*, 429 S.W.3d 497 (Mo. Ct. App. 2014).

On remand, Lopez again argued only that the arbitration clause was unconscionable, and the circuit court again agreed H&R Block appealed for a second time, and for a second time the parties briefed only unconscionability. This time, the Court of Appeals refused to consider the sole contested issue. Instead, it held that it was "required . . . to affirm the trial court's order and judgment refusing to compel arbitration on any basis supported by the record." Op. at 11. It further held, "we do not address defenses to

enforcement of an arbitration agreement unless we are first satisfied that an arbitration agreement exists and that the subject disputes are within its scope," *id.* at 9—notwithstanding the fact that three courts, including a prior panel of the Court of Appeals, had found it proper to address unconscionability. Then, despite the fact that Lopez had never disputed the existence or scope of the 2011 arbitration agreement before *any* court, the Court of Appeals *sua sponte* found that Lopez's 2011 claims were not governed by the 2011 arbitration clause because a later agreement superseded it, and affirmed on that ground. H&R Block timely moved for rehearing and applied for transfer to this Court. The Court of Appeals denied H&R Block's motion and application on May 3, 2016.

DISCUSSION

There is no basis in Missouri law to find the arbitration agreement in this case unconscionable: it is more favorable to consumers than most such agreements. Indeed, the Court of Appeals acknowledged that the circuit court's unconscionability analysis improperly ignored governing precedent. *See* Op. at 7 n.3. But notwithstanding this acknowledgment-and despite the fact that both the parties and the Missouri Chamber of Commerce as *amicus curiae* urged the court to settle the unconscionability issue—the court refused to correct the circuit court's error. It instead announced a novel rule that it was "required" to affirm the order refusing to compel arbitration if it could find "any basis" for doing so. This new rule not only conflicts with established principles about the scope of appellate review and the rule of waiver, it

also singles out arbitration agreements for uniquely unfavorable treatment and therefore contravenes the FAA. H&R Block respectfully applies for transfer so that this opposition to arbitration agreements, and the legal conflicts thereby created, can be corrected.

I. THE OPINION BELOW IS CONTRARY TO THE WELL-ESTABLISHED RULE THAT APPELLATE COURTS DO NOT ADJUDICATE QUESTIONS NEVER RAISED BY THE PARTIES.

The Court of Appeals held that it was "*required* . . . *to affirm* the trial court's order and judgment refusing to compel arbitration *on any basis supported by the record*." Op. at 11 (emphases added). The court accordingly affirmed on an alternative ground that Lopez had never raised. Indeed, because it perceived an alternative ground to affirm, the court held that it lacked the *power* to resolve the unconscionability question that the parties had briefed, stating that it was "not in the business of rendering advisory opinions." *Id*. The court's decision conflicts with longstanding legal principles.

First, numerous decisions hold that, far from being *obligated* to scour the record for grounds not raised by the parties, appellate courts *do not* raise issues on their own; rather, where the parties fail to raise a nonjurisdictional question before the circuit court or on appeal, appellate courts treat the question as settled. *See, e.g.*, Mo. S. Ct. R. 84.13(a) ("Apart from questions of jurisdiction . . . , allegations of error not briefed or not properly briefed shall not be considered in any civil appeal . . .."); *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016) (where there was no "dispute that the parties' arbitration agreement, if

valid, covers the claims . . ., the only issue before this Court is whether the arbitration agreement is valid"); *Kottman v. Missouri State Fair*, 451 S.W.3d 331, 335 n.2 (Mo. Ct. App. 2014) (appellate court "does not go beyond the grounds asserted in the motion and briefed on appeal to look for other reasons to affirm"); *Comstock v. Walsh*, 848 S.W.2d 7, 9 (Mo. Ct. App. 1992) (similar); *Lowe v. Hill*, 430 S.W.3d 346, 350 (Mo. Ct. App. 2014) ("While it is true that we may affirm a trial court's judgment if cognizable under any theory . . . the alternative theory must have been pled and supported by evidence."); *Lang v. Goldsworthy*, 470 S.W.3d 748, 750 (Mo. bane 2015) ("If the motion to dismiss cannot be sustained on any ground alleged in the motion, the trial court's ruling will be reversed.").

Second, courts do not lose the *power* to decide a challenge to a circuit court's judgment simply because there may be some alternative basis on which to affirm. Where (as here) a respondent fails to advance any alternative ground for affirmance, appellate courts decide the issue presented by the parties. *See, e.g., Kottman*, 451 S.W.3d 331; *Comstock*, 848 S.W.2d 7; *Lowe*, 430 S.W.3d 346.

Third, the opinion below conflicts with the established Missouri rule that, where a party fails to raise an issue before the trial court and again on appeal, he waives the argument. *See, e.g., Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 784 (Mo. Ct. App. 2008) ("[I]ssues not raised in an appellant's opening brief . . . are not properly preserved."); *Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. Ct. App. 1996) ("A party cannot raise an argument against a grant of summary

judgment for the first time on appeal."). In particular, the cases hold that a respondent waives alternative grounds for affirmance by failing to ever raise them. *See Barber v. Jackson Cty. Ethics Comm'n*, 984 S.W.2d 127, 129 (Mo. Ct. App. 1998) ("[Respondent] was compelled to raise every argument in support of the judgment"; unraised arguments were "waived"). The Court of Appeals' holding that it was *required* to consider *any* argument providing an alternative basis to affirm, even if never raised by the respondent, is fundamentally inconsistent with this rule of waiver. Indeed, the Court's holding would make it impossible for a respondent ever to waive an alternative ground, vitiating the law of waiver and imposing upon courts the exact burdens the doctrine was designed to ease.

This Court should grant transfer to eliminate the anomaly created by the decision below and to resolve the proper scope of appellate review and bounds of waiver.

II. THE OPINION BELOW CREATES A NOVEL RULE THAT CONFLICTS WITH THE FAA AND DECISIONS OF THE U.S. SUPREME COURT AND THIS COURT.

In holding that the existence and scope of an arbitration agreement must be evaluated even if not disputed by the parties, the panel created a new legal rule that applies only to arbitration agreements—and that disfavors arbitration. This rule is preempted by the FAA, as decisions of both the U.S. Supreme Court and this Court make clear. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (holding that the FAA preempts arbitration-specific rules that disfavor arbitration); *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015) (same).

The FAA provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal policy in favor of arbitral dispute resolution." *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). The FAA permits states to apply to arbitration agreements their own laws—both judge-made and legislative—regarding the "validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). But the FAA does not tolerate any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue." *Id.* In particular, it preempts any state rule that "disfavors arbitration." *Concepcion*, 563 U.S. at 341. Courts must "place arbitration agreements on an equal footing with other contracts." *Id.* at 339.

The decision below disregards this central FAA tenet. The panel held that "we *do not address* defenses to enforcement of an arbitration agreement *unless we are first satisfied* that an arbitration agreement exists and that the subject disputes are within its scope." Op. at 9 (emphases added). Invoking an inapposite analogy to justiciability—which an appellate court *must* consider because it goes to the court's authority to hear a case—the panel deemed it irrelevant that Lopez had not challenged the existence or scope of the agreement. *See id.* at 11. The panel thereby established a rule that a court *cannot* consider any defense to enforcement of an arbitration agreement without first addressing the

existence and scope of the agreement—even if both issues are undisputed.

There is no similar rule in Missouri for other contracts. On the contrary, in other contract cases, where the only contested issue is whether there is a defense to enforcement, courts consider the contested issue without delving into formation and scope issues. *See, e.g., Dickemann v. Millwood Goff & Racquet Club, Inc.*, 67 S.W.3d 724, 725-26 (Mo. Ct. App. 2002) (refusing to consider challenge to existence of contract not "raised in the pleadings, nor decided at the trial level"); *Hartland Comput. Leasing Corp., Inc. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. 1989) (where "there exist[ed] no dispute over the execution or the terms of the lease," court addressed unconscionability without analyzing contract's existence or scope).

Further, the panel's rule operates solely to the detriment of arbitration. Under it, the party resisting arbitration can always dispute the existence or scope of an arbitration agreement for the first time on appeal, and an appellate court would be obligated to consider those arguments. Indeed, it means an appellate court must scour the record in search of a challenge to the existence or scope of an arbitration agreement neither party *ever* raised. This rule, which will always benefit the party seeking to avoid arbitration, "singl[es] out arbitration provisions for suspect status." *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

The panel's improper holding is closely analogous to the state court rule found preempted in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). There, the California Court of Appeal had held that certain

language in an arbitration provision rendered the entire provision unenforceable. The U.S. Supreme Court found that the California court (1) had interpreted the arbitration provision using rules not found in "any contract case from California or from any other State," (2) did not suggest that its approach would be used in any non-arbitration context, and (3) had adopted a rule that "courts are unlikely to accept as a general matter and to apply in other contexts." *Id.* at 469-70. Because the California court's holding "d[id] not place arbitration contracts on equal footing with all other contracts" and "d[id] not give due regard to the federal policy favoring arbitration," it was preempted by the FAA. *Id.* at 471 (alteration omitted).

The same is true here. The rule adopted below has not been applied in any non-arbitration case; the panel did not suggest that it should be; and courts are unlikely to apply it outside the arbitration context. The Court of Appeals' rule therefore fails to "place arbitration contracts on equal footing with all other contracts" and is preempted. *Id.* "[T]he Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Id.* at 468. This Court should grant transfer to resolve the conflict between state and federal law.

III. TRANSFER IS NECESSARY TO RESTORE COHERENCE TO MISSOURI'S LAW OF UNCONSCIONABILITY.

To avoid considering the circuit court's flawed unconscionability analysis, the Court of Appeals created a novel and incorrect holding that it lacked

power to resolve the question actually presented on appeal and affirmed on a ground waived by Lopez. The Court of Appeals' failure to repudiate the circuit court's error cries out for immediate review to restore the coherence and consistency of Missouri unconscionability law.

Under Missouri law, a contract is unconscionable only where it is one "that no person in his senses and not under delusion would make." *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 495 (Mo. banc 2012). A party claiming unconscionability must show "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *Eaton*, 461 S.W.3d at 432. Far from satisfying this demanding standard, H&R Block's agreement with Lopez is a standard arbitration contract that should have been enforced as a matter of course.

First, the arbitration clause did not alter any substantive rights or remedies. *See* A14 (authorizing the arbitrator "to settle [any dispute] with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs."). Instead, it provided customers with the option of an easier, less expensive, and faster means of obtaining relief in any dispute with H&R Block. The $5 filing fee is considerably less than the filing costs in state court—for example, the filing fee in the instant lawsuit was $112. Op. Br. 19. And in contrast to the norms of ordinary civil litigation, H&R Block agreed to pay all arbitration expenses up to $1500 regardless of who prevails. *See* A14. Moreover, any arbitration was guaranteed to take

place in a location convenient to the consumer and to be conducted by a "neutral" arbitrator approved by the American Arbitration Association ("AAA"), under the streamlined and efficient AAA rules. A14. These attributes differentiate this benign arbitration clause from an unconscionable one. *See Eaton*, 461 S.W.3d 426; *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. banc 2012); *Brewer*, 364 S.W.3d 486. In light of these protections and advantages, it is unsurprising that many consumers have resolved disputes with H&R Block through arbitration. LF1258.

Second, there is nothing remarkable about this arbitration clause. Consumer arbitration provisions are now so common that "an average person would reasonably expect that disputes arising out of an agreement [between a company and a customer] might have to be resolved in arbitration." *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107-08 (Mo. Ct. App. 2003). Nor do the terms of this arbitration clause set it apart: As the Missouri Chamber of Commerce detailed in its amicus brief, the arbitration clause is if anything more favorable than the majority of such clauses. Chamber Br. 6-8. For example, it (1) not only placed no limitations on damages recoverable in arbitration, but also allowed injunctive and other equitable relief; (2) not only explained the procedures applicable to disputes, but also informed consumers that they were giving up a jury trial; and (3) contained a clearly marked opt-out provision. *Id.* To hold that such an unremarkable (indeed, favorable) arbitration agreement is unconscionable is to render vast numbers of arbitration agreements unconscionable. Such a ruling is contrary to the FAA. *See Robinson*, 364

S.W.3d at 515 ("[N]o state-law rule that is 'an obstacle to the accomplishment of the FAA's objectives' should be applied to invalidate an arbitration agreement." (quoting *Concepcion*, 131 S. Ct. at 1748)).

Third, the circuit court's ruling improperly disfavors arbitration agreements in several ways, contrary to the FAA. As an initial matter, the circuit court relied on the waiver of class action procedures in the arbitration clause, directly contrary to this Court's holdings in *Robinson* and *Brewer*. *Compar*e A9 *with Robinson*, 364 S.W.3d at 514-15, *and Brewer*, 364 S.W.3d at 488. The circuit court similarly focused on the fact that the arbitration clause did not guarantee a minimum recovery or provide for automatic cost-shifting if the consumer prevails, *see* A9-10; but *Robinso*n and *Concepcion* teach that courts may not hold arbitration agreements to higher standards than other types of contracts—which are never held unconscionable on this basis, *see Robinson*, 364 S.W.3d at 515. And the circuit court dwelled on the supposed superior bargaining power of H&R Block. A8, A12. But this Court has held that inequality of bargaining power is a "hallmark[] of modern consumer contracts generally," and that courts should not invalidate arbitration agreements on this basis. *Robinson*, 364 S.W.3d at 515; *accord Swain*, 128 S.W.3d at 108.

Fourth, the circuit court never mentioned the governing legal standard—that an unconscionable agreement is one that "no person in his senses and not under delusion would make." *Brewer*, 364 S.W.3d at 495. (Moreover, it failed to perform a severability analysis as required. *See State ex rel. Hewitt v. Kerr*,

461 S.W.3d 798, 812-13 (Mo. banc 2015).) Instead, in finding the entire arbitration agreement unenforceable, it relied solely on a series of erroneous analogies to the agreement found unconscionable in *Brewer* and ignored other applicable precedents, as the panel below recognized, Op. at 7 n.3. H&R Block's arbitration clause, however, is much more favorable to the consumer than the agreement in *Brewer*. For example, while the agreement in *Brewer* specifically reserved the company's right to pursue self-help and judicial remedies, H&R Block's arbitration clause bound the company to arbitrate all disputes with consumers who did not opt out. *Compare Brewer*, 364 S.W.3d at 494, *with* A14 ("If a dispute arises between you and H&R Block, the dispute *shall* be settled through binding individual arbitration . . . ." (emphasis added)). And the arbitration clause at issue included clearly explained opt-out procedures highlighted in bold type, whereas the agreement in *Brewer* contained no opt-out provision. *Compare* A14 *with Brewer*, 364 S.W.3d at 493. The circuit court's legal conclusion that the arbitration clause is analogous to the agreement in *Brewer* is entitled to no deference, *see Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. banc 2005) (ruling on motion to compel arbitration reviewed de novo), and should be reversed.

The question whether the arbitration clause is unconscionable is an important issue of general interest, and the circuit court's ruling strays far beyond settled law. The panel recognized that the circuit court improperly ignored applicable precedent, and yet it failed to correct the error. Transfer is called for to address this important issue.

CONCLUSION

For the foregoing reasons, this Court should grant this application for transfer.

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APPENDIX I

CLIENT SERVICE AGREEMENT
TAX SEASON 2011 – W2 Year 2010

WELCOME TO H&R BLOCK

Thank you for coming to H&R Block, the leader in professional tax services. For over 50 years, H&R Block has been committed to providing unmatched service and advice for your financial needs. Whether visiting one of our nearly 11,000 offices, or using our online or software products, H&R Block has professionals to help you. This Client Service Agreement (CSA) will explain what you should expect from us and what we need from you to deliver the great service you require from H&R Block.

As used in this CSA, "H&R Block" means HRB Tax Group, Inc., H&R Block Bank or their respective parents, subsidiaries, affiliates and/or the franchisees of any of them, as applicable, H&R Block Bank provides services in accordance with its bank charter and does not provide any tax preparation services.

PROFESSIONAL TAX OR OTHER SERVICES

H&R Block services are delivered to you for the limited purpose of preparing your tax return(s) or providing other products and services you request. If you come to us for tax return preparation, we will prepare your federal, state and/or local tax return(s) using systems we have designed to deliver

professional tax services at a reasonable price. We will (1) interview you to team details of your financial life that affect your taxes, and (2) ask you for documents such as your W-2 statement(s) that help us accurately record your income, credits and deductions. You agree to (1) provide your W-2 and other information that affects your tax situation and to verify the accuracy of this information (including any W-2 you download for pick-up in the tax office), and (2) return to us for an amended return if you later remember or discover information that could affect the accuracy of the tax return(s) we prepared. If an amendment is required, there may be an additional charge.

If we prepare your tax return(s), HRB Technology LLC (HRBT), an affiliate of HRB Tax Group, Inc., will provide you technology services pursuant to this CSA in order to facilitate e-filing and other tax preparation-related technology services (collectively "Facilitation Services") on your behalf.*

*HRBT owns all right, title and interest in the Facilitation Services, including but not limited to, all methods, processes, content formats, designs and URLs together with any and all inventions, patents, other intellectual property rights and derivative works and improvements pertaining thereto. No copyrights, patent rights, trademarks, licenses or other intellectual property rights are granted by HRBT (either expressly or by implication) to you. Any Facilitation Services performed by HRBT under this CSA shall be deemed to take place in the State of Missouri and shall be governed by the laws of the State of Missouri without regard to its or any other states' conflict of laws principles.

ARBITRATION IF A DISPUTE ARISES BETWEEN YOU AND H&R BLOCK

If a dispute arises between you and H&R Block, the dispute shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained in bold type below. This alternative to traditional lawsuits may cost you only $5 to have your dispute with H&R Block decided by a third party. This third party, known as the Arbitrator, is empowered to settle the mailer with the same set of remedies available in court including compensatory, statutory, and punitive damages, injunctive and other equitable relief, and attorneys' fees and costs. However, you agree to waive your rights to sue H&R Block in court before a judge and jury, and to waive any right to participate in any "class action" lawsuit regarding any issue that could otherwise be settled by arbitration. In addition, you specifically agree to waive any right to "class action" arbitration. As used in this arbitration provision, "H&R Block" shall also include the officers. directors, agents and employees of the respective H&R Block companies referenced under the section entitled "Welcome to H&R Block." If any portion of this Arbitration Provision is deemed invalid or unenforceable, it will not invalidate the remaining portions of the Arbitration Provision; except that in the event that the waiver of class action rights is deemed invalid or unenforceable, any claim seeking relief on behalf of a class must be brought in a court of proper jurisdiction and not in arbitration.

Right to Opt-Out of This Arbitration Provision: H&R Block does not require you to accept arbitration even though you must sign this Client Service Agreement (CSA) to receive service from us today. You may opt-out (reject) arbitration within the first 30 days after you sign this CSA by visiting our website at www.hrblock.com/goto/optout (if you provide an email address, you will receive an immediate confirmation) or by sending a signed letter to H&R Block Arbitration Opt-Out, P.O. Box 32818, Kansas City, MO 64171. The letter you send us should include your printed name, Social Security Number of yourself and joint filer, if any, the most recent date you were served by H&R Block, whether or not you want a written confirmation and the words "Reject Arbitration." Your electronic or written opt-out letter will override your signature below regarding arbitration but no other provision of this document.

How Arbitration Works. If you have a complaint against H&R Block that you have been unable to solve by bringing it to the attention of the office that served you, you may contact the American Arbitration Association (AAA) at 1633 Broadway, Floor 10, New York, NY 10019. AAA will appoint a neutral practicing attorney with more than ten years of relevant legal experience to hear your side and H&R Block's side of the issue, and make a decision that is binding on both you and H&R Block. The American Arbitration Association's rules of arbitration are available by mail from AAA or on the Internet at www.adr.org. **Arbitration Costs**. You

will be asked to pay a $5 fee, and H&R Block will pay all other filing, administrative, hearing and miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you win the arbitration.

Other Arbitration Terms & Information. Your arbitration will take place in the federal judicial district where you live. The Arbitrators award will be final and not subject to appeal except as permitted by the Federal Arbitration Act. Except as required by law, neither you nor H&R Black nor the Arbitrator may disclose the existence, context or results of your arbitration without prior written consent from the other two parties.

Note: This arbitration provision shall not apply to purchasers of the Peace of Mind product who are within the scope of the classes proposed in *Lorie J. Marshall et al. v. H&R Block Tax Services, Inc.*, pending as Case No. 08-591-MJR in the United States District Court for the Southern District of Illinois; and *Desiri Soliz v. H&R Block, Inc., et al.*, pending as Case No. 03-032-D in Kleberg County, Texas, as to claims that are the subject matter of these cases.

Note: If you apply for a Refund Anticipation Loan (RAL) or RAC in a state that prohibits arbitration or class action waivers for RAL or RAC-related claims, this provision will not apply to claims relating to your RAL or RAC transaction.

Note: If you are a Covered Borrower, as that term is defined in 32 C.F.R. Part 232.3, this provision will not apply to claims relating to your RAL transaction.

My/our signature(s) below confirms that I/we understand and voluntarily agree to the terms of the Arbitration Provision described above, as well as all other terms, conditions and disclosures presented in this Client Service Agreement.

/s/ Manuel H. Lopez	4/14
Client Signature	Date
Spouse's Signature (required only if MFJ status and spouse is present)	Date
/s/ M. Monteleone	4/14/11
H&R Block Representative Signature (as witness)	Date

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APPENDIX J

MANUEL H LOPEZ III

CLIENT SERVICE AGREEMENT
TAX SEASON 2012 - W2 Year 2011

H&R BLOCK®

WELCOME TO H&R BLOCK

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PROFESSIONAL TAX OR OTHER SERVICES

H&R Block services are delivered to you for the limited purpose of preparing your tax returns(s) or providing other products and services you request. If you come to us for tax return preparation, we will prepare your federal, state and/or local tax return(s)

using systems we have designed to deliver professional tax services at a reasonable price. We will (1) interview you to learn details of your financial life that affect your texts, and (2) ask you for documents such as your W-2 statement(s) that help us accurately record your income, credits and deductions. You agree to (1) provide your W-2 and other information that affects your tax situation and to verify the accuracy of this information (including any W-2 you download for pick-up in the tax office), and (2) return to us for an amended return if you later remember or discover information that could affect the accuracy of the tax return(s) we prepared. If an amendment is required, there may be an additional charge. If you obtain a refund anticipation check ("RAC") from us, your fees are not due and payable until our services are complete, which is when your RAC funds are disbursed to you.

If we prepare your tax return(s), HRB Technology LLC ("HRBT"), an affiliate of HRB Tax Group, Inc., will provide you technology services pursuant to this CSA in order to facilitate e-filing and other tax preparation-related technology services (collectively "Facilitation Services") on your behalf.*

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American Arbitration Association's rules of arbitration are available by mail from AAA or on the Internet at www.adr.org. **Arbitration Costs**. You will be asked to pay a $5 fee, and H&R Block will pay all other filing, administrative, hearing end miscellaneous arbitration expenses up to $1,500. H&R Block may consider paying arbitration costs that exceed $1,500 but only if you prevail in the claim you bring in the arbitration.

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/s/ Manual H. Lopez	4/4/2012
Client Signature	Date
Spouse's Signature (required only if MFJ status and spouse is present)	Date