

## TWO COMES BEFORE FOUR AND FIVE: THE FAA IN *CAMPBELL V. KEAGLE*

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**ABSTRACT**—Contrary to popular opinion, arbitration under the Federal Arbitration Act (FAA) is not intended to be forced or unfair, including in the employment context. Indeed, § 2 of the FAA permits courts to refuse enforcement of arbitration agreements on the basis of generally applicable state contract law defenses, such as unconscionability, in order to safeguard against potential abuse of the arbitral process. Yet decisions such as that of the United States Court of Appeals for the Seventh Circuit in *Campbell v. Keagle* threaten to nullify the FAA’s protections and reinforce the perception of arbitration as an unjust process. The district court in this case found that the parties’ employment arbitration clause was inordinately one-sided in the employer’s favor and that the offending provisions could not be severed under Illinois law to compel arbitration. Thus, the arbitration clause was unenforceable under § 2 of the FAA. The Seventh Circuit reversed, but not on the basis of state contract law. Rather, the court of appeals enforced the parties’ agreement to arbitrate on the basis of subsequent procedural provisions of the FAA, namely §§ 4 and 5. This Essay argues that the Seventh Circuit’s reliance on these provisions to circumvent the district court’s finding of unconscionability under § 2 of the FAA ignores the significance of the FAA’s internal sequencing. An arbitration agreement found unenforceable under § 2—the substantive section of the FAA—cannot escape its fate because of the Act’s subsequent procedural provisions. The Seventh Circuit’s decision also conflicts with Supreme Court jurisprudence and creates a circuit split regarding the interrelationship between §§ 2, 4, and 5 of the Act. This Essay concludes that while the Seventh Circuit enforced the parties’ arbitration agreement in *Campbell v. Keagle*, its reasoning does not benefit FAA arbitration. It sets a dangerous precedent for future cases involving unconscionable arbitration agreements and fuels the growing backlash against employment arbitration under the FAA.

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INTRODUCTION

Arbitration under the Federal Arbitration Act (FAA) has increasingly come under attack for being an unfair and unequal dispute resolution process, especially in the context of employment disputes.<sup>1</sup> Claims that employers use arbitration to evade public and legal accountability have even led to a recent amendment to the FAA banning predispute arbitration agreements in employment-related sexual assault or sexual harassment disputes.<sup>2</sup> Opinions differ on whether this amendment will ease the burden on employees bringing claims against employers.<sup>3</sup> Nevertheless, the amendment was clearly a response to the widely held perception that arbitration in the employment context is a “forced” dispute resolution process that employers

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<sup>1</sup> For present purposes, “employment” disputes do not include labor disputes involving unions, in which context arbitration is frequently used pursuant to other federal statutes, such as the Labor Management Relations Act of 1947 § 301, 29 U.S.C. § 185. The Supreme Court has interpreted this legislation as “express[ing] a federal policy that federal courts should enforce [arbitration] agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.” *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957); *see also* *Century Indem. Co. v. Brooklyn Union Gas Co.*, No. 603405/2001, 2022 WL 761822, at \*10 (N.Y. Sup. Ct. Mar. 14, 2022) (referring to “labor arbitrations pursuant to a collective-bargaining agreement [as] a frequent, recurring activity”).

<sup>2</sup> *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022). This is the first substantive amendment to the FAA since its passage in 1925. David Horton, *The Limits of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 *YALE L.J.F.* 1, 1–2 (2022). Another piece of arbitration-related legislation that recently passed in the House of Representatives is the Forced Arbitration Injustice Repeal (FAIR) Act of 2022, which prohibits predispute agreements requiring arbitration of employment, consumer, antitrust, or civil rights disputes. H.R. 963, 117th Cong. (as passed by House, Mar. 21, 2022).

<sup>3</sup> *Compare* Amy B Wang & Eugene Scott, *Biden Signs Bill Ending Forced Arbitration in Sexual Assault, Harassment Cases*, *WASH. POST* (Mar. 3, 2022, 1:38 PM), <https://www.washingtonpost.com/politics/2022/03/03/biden-signs-new-law-ending-forced-arbitration-sex-assault-harassment/> [<https://perma.cc/7RSF-2ME6>] (citing arguments made by proponents of the amendment), *with* Sarah R. Cole *The End of ‘Forced’ Arbitration Isn’t the Beginning of Corporate Transparency*, *HILL* (Feb. 17, 2022, 11:01 AM), <https://thehill.com/opinion/judiciary/594533-the-end-of-forced-arbitration-isnt-the-beginning-of-corporate-transparency/> [<https://perma.cc/M6KE-L6A8>] (arguing that the secrecy surrounding sexual harassment or abuse claims will not be resolved by this amendment because it emanates from nondisclosure agreements rather than arbitration agreements), *and* Horton, *supra* note 2, at 2 (noting that “the Ending Forced Arbitration Act only applies if the FAA applies. But the FAA contains several exceptions, and if a case falls into one of these fissures in federal arbitration law, it must be decided under state law. In sharp contrast to the conventional wisdom, many states require arbitration in contexts that the FAA does not”).

control and design as they see fit, and then bury in nonnegotiable standard form contracts with big words and small fonts.<sup>4</sup>

But arbitration under the FAA, even before the Act's latest amendment, was never designed to be forced or unfair. Arbitration "is a matter of consent, not coercion,"<sup>5</sup> and arbitration agreements are to be "treated like all other contracts."<sup>6</sup> While the FAA provides that written arbitration agreements "shall be valid, irrevocable, and enforceable,"<sup>7</sup> this statutory requirement to specifically enforce arbitration agreements does not mean that *all* arbitration agreements, no matter their terms or the manner in which they were created, *must* be enforced by the courts. To the contrary, § 2 of the FAA explicitly permits courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>8</sup> The Supreme Court has recognized that this "saving clause" allows courts to refuse to enforce arbitration agreements under state law, on the basis of "generally applicable contract defenses, such as fraud, duress, or unconscionability."<sup>9</sup> Indeed, state and federal courts across the country have routinely held arbitration agreements or specific provisions of those agreements to be unenforceable under § 2's "saving clause," most commonly on the basis of the "generally applicable contract defense" of unconscionability.<sup>10</sup> Such findings of unconscionability have served as

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<sup>4</sup> See, e.g., Horton, *supra* note 2, at 2 (noting that commentators called the amendment "a ringing victory for critics of forced arbitration"); Sheya Rivard, *Leaving "Sex" Out of It: Amending the Federal Arbitration Act to Ensure Bostock's Victory for LGBTQ Employee Rights*, 27 ROGER WILLIAMS U. L. REV. 159, 183 (2022) (noting that the amendment was supported by social movements that share the "conviction that mandatory arbitration protects perpetrators of sexual harassment and leaves victims with no recourse aside from stifling arbitration procedures").

<sup>5</sup> Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1415 (2019).

<sup>6</sup> Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 447 (2006).

<sup>7</sup> 9 U.S.C. § 2. This section is "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>8</sup> 9 U.S.C. § 2. However, such grounds cannot constitute "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

<sup>9</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

<sup>10</sup> See, e.g., *Beltran v. AuPairCare, Inc.*, 907 F.3d 1240, 1263 (10th Cir. 2018) (refusing to enforce a provision of an arbitration agreement allowing the defendant to choose the arbitrator because it was substantively unconscionable); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 270, 272 (3d Cir. 2003) (refusing to enforce an arbitration agreement because it contained unreasonable time limits to submit a claim and had a "loser pays" provision, both of which the court found to be unconscionable); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 171 (5th Cir. 2004) (refusing to enforce an arbitration agreement because it provided for an unconscionable one-sided duty to arbitrate); *In re Checking Acct. Overdraft Litig.*, 485 Fed. App'x 403, 406 (11th Cir. 2012) (refusing to enforce a cost-and-fee-shifting provision of an arbitration agreement on the grounds of unconscionability); *Hadnot v. Bay, Ltd.*, 344 F.3d 474, 478 (5th Cir. 2003) (severing a provision of an arbitration agreement that limited

important safeguards against potential abuse of the arbitral process, precisely as the FAA envisioned.

Yet a recent decision by the United States Court of Appeals for the Seventh Circuit threatens to nullify the protections of § 2’s “saving clause”—creating a circuit split and reinforcing the perception of arbitration as a “forced” dispute resolution mechanism. *Campbell v. Keagle, Inc.* involved an entertainer who sued the bar that employed her and its owner–manager in the U.S. District Court for the Central District of Illinois for violations of federal and state employment statutes.<sup>11</sup> Defendants filed a motion to compel arbitration of plaintiff’s claims pursuant to the parties’ agreement, which contained an arbitration clause providing that any dispute between the parties shall be decided by arbitration pursuant to the FAA.<sup>12</sup> The arbitration clause further provided that defendants had “the right to choose the arbitrator and location of any such proceedings” and that plaintiff “will pay the cost of [her] arbitration and legal costs, regardless of the outcome of any such action.”<sup>13</sup>

Plaintiff argued that the arbitration clause was unconscionable and therefore unenforceable.<sup>14</sup> The district court agreed, finding that the arbitration clause was “inordinately one-sided in Defendant’s favor” and that the unconscionable provisions could not be severed under Illinois law in

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statutory remedies in a way that the court found to be unconscionable); *Al-Safin v. Cir. City Stores, Inc.*, 394 F.3d 1254, 1262 (9th Cir. 2005) (refusing to enforce an arbitration agreement because it was “permeated with unconscionable provisions”); *Ward v. Crow Vote LLC*, No. 21-cv-01110-JVS, 2021 WL 5927803, at \*8 (C.D. Cal. Oct. 7, 2021) (refusing to enforce a confidentiality provision of an arbitration agreement because it was unconscionable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 698–99 (Cal. 2000) (refusing to enforce an arbitration agreement because it provided for an unconscionable one-sided duty to arbitrate); *In re Poly-America, L.P.*, 262 S.W.3d 337, 360–61 (Tex. 2008) (refusing to enforce a provision of an arbitration agreement that limited statutory remedies because it was unconscionable); *Casa Ford, Inc. v. Armendariz*, No. 08-20-00084-CV, 2021 WL 3721718, at \*4 (Tex. Ct. App. Aug. 23, 2021) (refusing to enforce an unconscionable provision of an arbitration agreement that limited remedies afforded by state law).

<sup>11</sup> *Campbell v. Keagle, Inc.*, 553 F. Supp. 3d 492, 494 (C.D. Ill. 2021). For additional commentary on the decision, see Jeremy Telman, *Judge Easterbrook: Arbitration for All!*, LAW PROFESSOR BLOGS NETWORK: CONTRACTSPROF BLOG (Mar. 8, 2022), [https://lawprofessors.typepad.com/contractsprof\\_blog/2022/03/judge-easterbrook-arbitration-for-all.html](https://lawprofessors.typepad.com/contractsprof_blog/2022/03/judge-easterbrook-arbitration-for-all.html) [<https://perma.cc/4YPD-MCPK>].

<sup>12</sup> See *Campbell*, 553 F. Supp. 3d at 494.

<sup>13</sup> The complete arbitration clause read as follows:

Any controversy, dispute or claim arising out of this lease or otherwise from me entertaining at the premises of this club shall be exclusively decided by binding arbitration under the Federal Arbitration Act. The owners of the Silver Bullet Bar reserve the right to choose the arbitrator and location of any such proceedings. I agree that all claims between me and the Silver Bullet Bar, its owners, or management will not be litigated individually and that I will not consolidate or file a class suit for any claim against the Silver Bullet Bar, its owners, or management. I will pay the cost of my arbitration and legal costs, regardless of the outcome of any such action.

*Id.* at 494–95.

<sup>14</sup> *Id.* at 495.

order to compel arbitration.<sup>15</sup> Defendants appealed only the district court's refusal to sever the unconscionable provisions and enforce the parties' agreement to arbitrate.<sup>16</sup>

The Seventh Circuit seemed to suggest that it might have overturned the district court's finding of unconscionability under Illinois law had the defendants appealed it.<sup>17</sup> This suggestion is disconcerting in itself, but it will not be addressed in this Essay because the court ultimately did not decide the issue.<sup>18</sup> More importantly for present purposes, the Seventh Circuit found that the parties' agreement to arbitrate should be enforced.<sup>19</sup> The court's conclusion was based not on Illinois law, but rather on §§ 4 and 5 of the FAA.<sup>20</sup> Section 4 of the FAA authorizes courts to order arbitration in the district where a petition for such an order is filed,<sup>21</sup> while § 5 authorizes courts to appoint an arbitrator in certain circumstances.<sup>22</sup> This Essay focuses

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<sup>15</sup> *Id.* at 498–99.

<sup>16</sup> *Campbell v. Keagle Inc.*, 27 F.4th 584, 586 (7th Cir. 2022) (Defendant “maintains that its only goal is to arbitrate rather than litigate—that the details don’t matter, so the judge may fill in the blanks. This is its sole argument on appeal.”), *reh'g denied*, No. 21-2256, 2022 WL 1009565 (7th Cir. April 4, 2022).

<sup>17</sup> *See id.* at 585–86.

<sup>18</sup> A finding that the arbitration clause at issue in *Campbell v. Keagle* is not unconscionable would have been contrary to previous decisions of both the Illinois state courts and the Seventh Circuit itself, which have found similar provisions in arbitration clauses unconscionable. *See, e.g.*, *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 n.37 (7th Cir. 2014) (noting that the Seventh Circuit has “refused to enforce an arbitration agreement where the obligation was so one-sided as to make any genuine obligation illusory”); *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) (refusing to enforce an arbitration clause because it prohibited “the recovery of attorney’s fees in any situation”); *Potiyevskiy v. TM Transp., Inc.*, No. 1–13–1864, 2013 WL 6199949, at \*8–\*9 (Ill. App. Ct. Nov. 25, 2013) (holding that the arbitration agreement was substantively unconscionable because it required arbitration of disputes outside the employee’s state of residence and because the arbitration fees made claims cost-prohibitive). For other state and federal courts’ findings of unconscionability, see *supra* note 10.

<sup>19</sup> *Campbell*, 27 F.4th at 586–87 (“[T]he mutual assent to arbitration remains, and a federal judge should implement the parties’ decision whenever possible.”).

<sup>20</sup> *See id.* at 586.

<sup>21</sup> This section provides as follows, in relevant part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

9 U.S.C. § 4.

<sup>22</sup> This section provides as follows:

on the Seventh Circuit’s interpretation of §§ 2, 4, and 5 of the FAA, and specifically its reliance on §§ 4 and 5 to enforce an arbitration agreement that the district court had found unenforceable under § 2’s “saving clause.”

In Part I, this Essay briefly summarizes the district court and Seventh Circuit decisions in *Campbell v. Keagle*. It then argues in Part II that the Seventh Circuit’s reliance on §§ 4 and 5 to negate § 2’s “saving clause” conflicts with the text and structure of the FAA and with Supreme Court jurisprudence, rendering the “saving clause” ineffectual in cases involving unconscionable arbitration clauses. Further, the court’s reasoning creates a circuit split regarding the interpretation of these provisions of the FAA, and reinforces concerns raised by opponents of arbitration in the employment context. The Essay concludes that while the Seventh Circuit enforced the parties’ arbitration agreement in *Campbell v. Keagle*, the court’s reasoning does not benefit FAA arbitration. Rather, it sets a dangerous precedent for future cases involving unconscionable arbitration agreements and serves to amplify the growing backlash against employment arbitration.

#### I. THE DISTRICT COURT AND SEVENTH CIRCUIT DECISIONS

Relying on both Illinois and Seventh Circuit case law, the district court in *Campbell v. Keagle* found that the parties’ arbitration clause was “inordinately one-sided” and thus unconscionable.<sup>23</sup> That was so, the court reasoned, primarily because of defendants’ ability to unilaterally control the choice of arbitrator and the prohibition on plaintiff’s recovery of the fees and costs of the arbitration, regardless of the outcome.<sup>24</sup> The district court’s conclusion was reinforced by the other terms of the arbitration clause, which it found “suggestive of bias or one-sidedness,” including defendants’ “exclusive control over the location of arbitration and the arbitration clause’s silence as to rules that may otherwise be determined by Defendants’ choice of arbitrator.”<sup>25</sup> The district court also refused to sever these unconscionable

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If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 5.

<sup>23</sup> *Campbell v. Keagle, Inc.*, 553 F. Supp. 3d 492, 497–98 (C.D. Ill. 2021).

<sup>24</sup> *Id.* at 498.

<sup>25</sup> *Id.*

provisions in order to compel the parties to arbitration. It noted that this was not the purpose of §§ 4 and 5 of the FAA,<sup>26</sup> and that, under Illinois law, the “totality of the unconscionable provisions [was] essential to the arbitration provision such that, absent those provisions, the arbitration provision [was] meaningless.”<sup>27</sup>

Defendants appealed the district court’s decision to the Seventh Circuit. Although defendants did not challenge the district court’s determination that the parties’ arbitration clause was unconscionable, the Seventh Circuit seemed to suggest that the district court’s holding in this regard may have been an error.<sup>28</sup> Indeed, in oral argument, the court noted that defendants’ “strongest argument would be that the district judge was wrong about unconscionability.”<sup>29</sup> But since the district court’s finding of unconscionability was not before the court of appeals, it did not decide this question.

Defendants’ sole argument on appeal was that the district court should have severed the unconscionable provisions, “fill[ed] in the blanks,” and compelled the parties to arbitrate.<sup>30</sup> The Seventh Circuit agreed. With respect to the place of arbitration, the court of appeals found that § 4 of the FAA fills in this particular “blank.”<sup>31</sup> According to the court, § 4 “provides that, in the absence of a contrary agreement, the arbitration takes place in the same judicial district as the litigation—here, the Central District of Illinois.”<sup>32</sup> The “blank” regarding “who pays” may be filled, according to the court, “by some other state or federal statute, such as the Fair Labor Standards Act, on which Campbell’s suit rests.”<sup>33</sup> Yet, the court did not explain whether it based this contention on § 4 of the FAA, or on the FAA at all. As for “the choice of arbitrator—who, once selected, can prescribe the procedures if they are not otherwise determined,” the Seventh Circuit noted that pursuant to § 5 of

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<sup>26</sup> See *id.* at 497, 499.

<sup>27</sup> See *id.* at 499 (quoting Potiyevskiy v. TM Transp., Inc., No. 1–13–1864, 2013 WL 6199949, at \*9 (Ill. App. Ct. Nov. 25, 2013)).

<sup>28</sup> The Seventh Circuit noted in this regard that the district judge “did not find that the contract between Campbell and Keagle [was] one-sided; instead he assumed that a rule applicable to a contract as a whole must be true about each aspect of each clause in it. That’s far from clear to us.” *Campbell v. Keagle Inc.*, 27 F.4th 584, 585 (7th Cir. 2022). However, it was not open to the district court to find that the “contract as a whole” was unconscionable. The “separability doctrine” established by the Supreme Court permits courts to determine only the validity of arbitration clauses rather than the contracts in which they are contained. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967).

<sup>29</sup> Oral Argument at 6:19, *Campbell*, 27 F.4th 584 (No. 21-2256), [http://media.ca7.uscourts.gov/sound/2022/lp.21-2256.21-2256\\_01\\_07\\_2022.mp3](http://media.ca7.uscourts.gov/sound/2022/lp.21-2256.21-2256_01_07_2022.mp3) [<https://perma.cc/8RZY-UZNF>].

<sup>30</sup> *Campbell*, 27 F.4th at 586.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; 9 U.S.C. § 4; see also *supra* text accompanying note 21 (quoting 9 U.S.C. § 4).

<sup>33</sup> *Campbell*, 27 F.4th at 586.

the FAA it is a “judicial duty” for the court to “designate and appoint an arbitrator” and that “a court cannot scuttle arbitration by declining to name an arbitrator.”<sup>34</sup>

Finding that the parties’ “mutual assent to arbitration” survived the district court’s finding of unconscionability, the Seventh Circuit concluded that “a federal judge should implement the parties’ decision whenever possible. That can be done by naming an arbitrator under § 5, and everything else will take its own course.”<sup>35</sup> The court of appeals rejected plaintiff’s position that this approach “uses § 5 to rewrite an arbitration clause.”<sup>36</sup> According to the court, “[i]t would be better to say that § 5 permits (indeed requires) a judge to name an arbitrator, even if the only thing that survives a judge’s encounter with the clause is the fact that the parties have agreed to arbitrate.”<sup>37</sup> Thus, the Seventh Circuit vacated the district court’s decision and remanded the case with instructions to name an arbitrator and to refer the dispute to arbitration.<sup>38</sup>

## II. SEQUENCE MATTERS

Whether certain terms of an arbitration agreement are unconscionable—and if so, whether they should be severed so that arbitration may nonetheless be compelled—are questions of state contract law.<sup>39</sup> However, the Seventh Circuit in *Campbell v. Keagle* did not apply state law to sever those terms of the parties’ arbitration clause that the district court had found unconscionable and refused to sever. Instead, the court of appeals relied on §§ 4 and 5 of the FAA to cure those unconscionable terms and enforce the parties’ arbitration agreement. Yet §§ 4 and 5 cannot bear the weight of the task that the Seventh Circuit assigned to them. Nothing in the language or purpose of these procedural provisions authorizes courts to

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<sup>34</sup> *Id.*; 9 U.S.C. § 5; see also *supra* text accompanying note 22 (quoting 9 U.S.C. § 5).

<sup>35</sup> *Campbell*, 27 F.4th at 586.

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 587.

<sup>39</sup> *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (“the interpretation of private contracts is ordinarily a question of state law”); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009) (“[S]tate law,’ therefore, is applicable to determine which contracts are binding under § 2 and enforceable under § 3 ‘if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’” (alteration in original) (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987))).



enforce arbitration agreements that have been found unenforceable under the FAA's substantive provision, § 2.<sup>40</sup>

Section 4 of the FAA requires a district court to enforce an arbitration agreement through an affirmative order compelling the parties to arbitrate in the district where the court is sitting and where the plaintiff commenced suit.<sup>41</sup> Section 5 of the FAA requires a court to appoint an arbitrator upon the request of a party if an arbitration agreement is silent on the method of appointment, the method provided for is not complied with, or if “for any other reason there shall be a lapse in the naming of an arbitrator.”<sup>42</sup> While both sections are mandatory in nature, courts are to compel arbitration under § 4 and appoint an arbitrator under § 5 *only so long as* the arbitration agreement in question is enforceable under § 2 of the FAA pursuant to state law.<sup>43</sup>

Indeed, an arbitration agreement may “require arbitration of every question under the sun, but that does not necessarily mean the Act authorizes a court to stay litigation and send the parties to an arbitral forum.”<sup>44</sup> Rather, the Supreme Court has clearly held that “[i]f a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.”<sup>45</sup> If the court accepts the challenge and finds the arbitration agreement invalid under state law applicable to any contract, there is simply nothing for it to enforce under § 4. The Supreme Court has applied the same approach to a stay application under § 3 of the FAA.<sup>46</sup>

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<sup>40</sup> *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67–68 (2010) (referring to § 2 as the “primary substantive provision of the Act,” and to subsequent provisions as “procedures by which federal courts implement § 2’s substantive rule”); *Bedgood v. Wyndham Vacation Resorts, Inc.*, No. 6:21-cv-418-PGB-DCI, 2022 WL 1212165, at \*4 (M.D. Fla. Mar. 30, 2022) (“[T]he FAA is structured into two parts. First, Sections 1 and 2 define what agreements can properly be arbitrated, what agreements cannot be arbitrated, and the relevant exceptions. Second, Sections 3, 4, and 5 create mechanisms for the courts to be able to enforce arbitration agreements by, respectively, staying litigation, compelling arbitration, and/or designating a substitute arbitrator. However, ‘the district court can grant the requested relief only if it has the authority to act under the FAA.’” (internal citations omitted) (quoting *Oliveira v. New Prime, Inc.*, 857 F.3d 7, 15 (1st Cir. 2017)).

<sup>41</sup> This section provides, in relevant part, that “the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.” 9 U.S.C. § 4.

<sup>42</sup> 9 U.S.C. § 5.

<sup>43</sup> See *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537–38 (2019).

<sup>44</sup> *Id.*

<sup>45</sup> *Rent-A-Ctr.*, 561 U.S. at 71.

<sup>46</sup> *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (“We conclude that the stay provided in § 3 reaches only those contracts covered by §§ 1 and 2.”).

There is no reason why the same rationale should not also be applied to § 5 of the Act.<sup>47</sup> The meaning of “lapse” in § 5 has long been the subject of a circuit split that emerged in the context of cases where the arbitration forum designated by the parties in their agreement was unavailable.<sup>48</sup> However, the issue in *Campbell v. Keagle* was not that an arbitration forum designated by the parties was unavailable, but rather that their designated method for appointing the arbitrator was found to be unconscionable by the district court.<sup>49</sup> Whatever the scope of § 5 might be, it cannot be read as permitting courts to cure a defect (or multiple defects), rendering an arbitration clause unenforceable under § 2 by appointing an arbitrator and letting “everything else . . . take its own course.”<sup>50</sup> The reason, as with §§ 3 and 4, is that the FAA’s sequencing is “significan[t]” and “antecedent statutory provisions,” including § 2, “limit the scope of the court’s powers” under subsequent sections of the Act.<sup>51</sup>

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<sup>47</sup> Section 5 of the FAA provides, in relevant part, that “if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire.” 9 U.S.C. § 5 (emphasis added).

<sup>48</sup> The Seventh and Third Circuits have found that where the parties’ designated arbitration forum was unavailable, § 5 enabled them to appoint an arbitrator, thereby interpreting the scope of the section broadly. *See, e.g.*, *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 791 (7th Cir. 2013) (interpreting “a lapse in the naming of an arbitrator” in § 5 to mean that “a judge can appoint an arbitrator when for ‘any’ reason something has gone wrong,” including where the designated arbitration forum is unavailable); *Khan v. Dell Inc.*, 669 F.3d 350, 356–57 (3d Cir. 2012) (finding the unavailability of the arbitration forum to be a “mechanical breakdown in the arbitrator selection process” that constituted a “lapse” within the meaning of § 5, and noting that “a narrower construction of Section 5 would be inconsistent with the ‘liberal federal policy in favor of arbitration’ articulated in the FAA”). *But see* *Green*, 724 F.3d at 797 (7th Cir. 2013) (“[W]hat counts as a lapse . . . has divided a few circuits, but no circuit has gone as far as the majority goes here.”) (Hamilton, J., dissenting). In contrast, the Second and Eleventh Circuits have refused to rely on § 5 to appoint an arbitrator when the forum designated by the parties was unavailable, interpreting the scope of the section more narrowly. *See, e.g.*, *Moss v. First Premier Bank*, 835 F.3d 260, 266 (2d Cir. 2016) (recognizing that “there is a difference of opinion among the circuits on this issue” but refusing to appoint an arbitrator under § 5 because doing so would “circumvent the parties’ designation of an exclusive arbitral forum”); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1350, 1354 (11th Cir. 2014) (finding that “[b]ecause the selected forum is unavailable, a substitute arbitrator pursuant to 9 U.S.C. § 5 cannot be appointed,” while noting that “[t]his rule is not without controversy”).

<sup>49</sup> *See Campbell v. Keagle*, 27 F.4th 584, 586 (7th Cir. 2022) (noting that the district court found, and defendants accepted, that the “provision[] for selecting an arbitrator” is unconscionable).

<sup>50</sup> *Id.*

<sup>51</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537–38 (2019). Moreover, § 5 provides that “[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.” 9 U.S.C. § 5. In *Campbell*, the arbitration agreement *did* provide for a method to appoint the arbitrator. The issue was that the specified method was found by the district court to be unconscionable. 27 F.4th at 586.

While the Seventh Circuit brushed aside the unconscionable terms of the parties' arbitration clause as insignificant details that do not disturb the parties' fundamental consent to arbitrate, this reasoning misses the mark. The question before the district court in this case was not whether the arbitration agreement "was ever concluded,"<sup>52</sup> i.e., whether the plaintiff had assented to it. Rather, it was whether the arbitration agreement was *valid* given its allegedly unconscionable terms to which the plaintiff formally assented. This question of the arbitration agreement's validity is to be answered on the basis of state contract law, and the Seventh Circuit has itself recognized that arbitration agreements "are not immune from the general principle that unconscionable contractual provisions are invalid."<sup>53</sup> Even if the parties in this case had agreed to arbitrate in principle, this does not resolve the question of the arbitration clause's enforceability, because a court's authority to enforce an arbitration agreement "doesn't extend to *all* private contracts, no matter how emphatically they may express a preference for arbitration."<sup>54</sup>

The Seventh Circuit's reliance on §§ 4 and 5 of the FAA to circumvent § 2's "saving clause" conflicts not only with the Supreme Court's reading of the FAA, but also with the approach of other federal courts of appeals in similar circumstances, creating a circuit split. For instance, in *Nino v. Jewelry Exchange, Inc.*, the United States Court of Appeals for the Third Circuit held that the parties' employment arbitration agreement was substantively unconscionable under state law because, *inter alia*, it provided for a one-sided arbitrator selection process and for the parties to bear their own attorney's fees, costs, and expenses.<sup>55</sup> Similarly, in *Newton v. American Debt Services, Inc.*, the United States Court of Appeals for the Ninth Circuit held that the parties' consumer arbitration agreement was substantively

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<sup>52</sup> *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1 (2006) (noting that the issue of whether an arbitration agreement "was ever concluded" involved, for instance, whether a party "ever signed the contract," whether a signatory "lacked authority to commit the alleged principal," or whether a signatory "lacked the mental capacity to assent").

<sup>53</sup> See *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 778 n.33 (7th Cir. 2014).

<sup>54</sup> *New Prime*, 139 S. Ct. at 537. The Seventh Circuit in *Campbell* relied on its previous decision in *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013) for the proposition that "§ 5 permits (indeed requires) a judge to name an arbitrator, even if the only thing that survives a judge's encounter with the clause is the fact that the parties have agreed to arbitrate." *Campbell*, 27 F.4th at 586. But *Green* did not involve a finding by the district court that the arbitration agreement was invalid under § 2 of the FAA. Rather, the district court had dismissed the motion to compel arbitration because it found that a substitute arbitrator could not be appointed under § 5 of the Act. *Green v. U.S. Cash Advance Ill., No. 12 C 8079, LLC*, 2013 WL 317046, at \*3 (N.D. Ill. Jan. 25, 2013) (holding that under § 5, "[a] substitute arbitrator may not be appointed . . . if the provision naming the arbitrator was 'an integral part of the agreement']"). In contrast, in *Campbell v. Keagle*, there was an antecedent finding by the district court of invalidity under § 2 of the FAA that the court of appeals then proceeded to cure by appointing an arbitrator under § 5. 27 F.4th at 585–87.

<sup>55</sup> *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 203–05 (3d Cir. 2010).

unconscionable under state law because, *inter alia*, it reserved the selection of an arbitrator solely to the defendant business and increased the consumer's potential liability for attorney's fees.<sup>56</sup> Both courts of appeals further held that, under the relevant state law, these unconscionable terms could not be severed from the parties' arbitration agreements.<sup>57</sup> Neither court, however, proceeded to cure the arbitration agreement's unconscionability by relying on §§ 4 and 5 of the FAA, as the Seventh Circuit did in *Campbell v. Keagle*.

The Seventh Circuit's unusual interpretation of the FAA in *Campbell v. Keagle* might have been motivated by a desire to place the plaintiff "in a better position" by enforcing the parties' arbitration agreement as modified by §§ 4 and 5 of the FAA.<sup>58</sup> Indeed, the court crafted a "better deal" for the plaintiff.<sup>59</sup> But this was not the deal she was offered by the defendants and that she had accepted. *That* deal provided for arbitration at a location of the defendants' choosing, by an arbitrator of the defendants' choosing, and paid for by the plaintiff. These terms, as found by the district court and not contested by the defendants, were unconscionable under state law and, according to the district court, could not be severed from the parties' arbitration agreement under state law. As the Supreme Court has reiterated numerous times, arbitration agreements are to be enforced "according to their terms,"<sup>60</sup> assuming, of course, that those terms are valid under state law applicable to any contract.<sup>61</sup> If, under this law, an arbitration agreement was never created, was entered into illegally, or some or all of its terms are unconscionable and cannot be severed, it will be unenforceable under § 2 of the FAA. Neither § 4 nor § 5 can save such an arbitration agreement from its fate. Therefore, a court of appeals that enforces such an arbitration agreement

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<sup>56</sup> *Newton v. Am. Debt Servs., Inc.*, 549 Fed. App'x 692, 694 (9th Cir. 2013).

<sup>57</sup> *Nino*, 609 F.3d at 207; *Newton*, 549 Fed. App'x at 695.

<sup>58</sup> Oral Argument at 18:12, *Campbell v. Keagle Inc.*, 27 F.4th 584 (7th Cir. 2022) (No. 21-2256), [http://media.ca7.uscourts.gov/sound/2022/lp.21-2256.21-2256\\_01\\_07\\_2022.mp3](http://media.ca7.uscourts.gov/sound/2022/lp.21-2256.21-2256_01_07_2022.mp3) [<https://perma.cc/8RZY-UZNF>].

<sup>59</sup> *See id.* at 17:38.

<sup>60</sup> *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) ("[W]e have said on numerous occasions that the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'"); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (recognizing "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms"); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97–98 (2012) (holding that § 2 of the FAA "requires courts to enforce agreements to arbitrate according to their terms"); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) ("[C]ourts must 'rigorously enforce' arbitration agreements according to their terms."). Section 4 of the FAA similarly provides that "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

<sup>61</sup> *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.").

on the basis of §§ 4 and 5 ignores the safeguards provided by § 2’s “saving clause” and “stand[s] as an obstacle to the accomplishment of the FAA’s objectives”<sup>62</sup>—the enforcement of *valid* arbitration agreements. The *Campbell v. Keagle* outcome not only misapplies the FAA as interpreted by the Supreme Court, but also encourages employers to include similar unconscionable provisions in standard form employment contracts, safe in the knowledge that even if an employee sues, the offending provisions will be severed, and arbitration will still be compelled.<sup>63</sup>

#### CONCLUSION

Section 2 of the FAA embodies a “liberal federal policy favoring arbitration agreements.”<sup>64</sup> This liberal federal policy, however, is “at bottom a policy guaranteeing the enforcement of private contractual arrangements.”<sup>65</sup> Arbitration agreements are thus to be treated as “valid, irrevocable, and enforceable”—but only so long as no grounds that “exist at law or in equity for the revocation of any contract” require their nonenforcement.<sup>66</sup> *Campbell v. Keagle* involved an arbitration clause found by the district court to be unenforceable under § 2 of the FAA, because it contained multiple unconscionable terms that were not severable under state law. The Seventh Circuit’s resort to §§ 4 and 5 of the FAA to uphold the only surviving element of the parties’ arbitration clause—their “mere agreement to arbitrate”—constituted “extensive reformation of the arbitration agreement.”<sup>67</sup> Such reformation flouts the Supreme Court’s admonition that “we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated.”<sup>68</sup>

Moreover, §§ 4 and 5, which appear in the FAA after § 2, are not designed to restructure arbitration agreements found unenforceable under § 2 so that they can nonetheless be enforced. Rather, only once an arbitration

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<sup>62</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

<sup>63</sup> See Steven L. Brenneman, *Urbana Bar Dodges Bullet as Court Orders Another Round in Arbitration*, GREAT LAKES EMP. L. LETTER (Bus. & Learning Res., Brentwood, Tenn.), June 2022 (“One takeaway from the 7th Circuit’s decision might be that employers may load up [arbitration] agreements with one-sided provisions and then waive those terms if faced with pushback challenging them as unconscionable.”).

<sup>64</sup> *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

<sup>65</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

<sup>66</sup> 9 U.S.C. § 2.

<sup>67</sup> See *Newton v. Am. Debt Servs., Inc.*, 549 Fed. App’x 692, 695 (9th Cir. 2013); see also *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 800 (2013) (Hamilton J., dissenting) (cautioning that the majority was “decid[ing] all of the basic questions about arbitration”).

<sup>68</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

agreement survives the “saving clause” of § 2 must a court assist the parties by enforcing it according to its terms under § 4 and, if need be, appointing an arbitrator under § 5. This much is clear from the Supreme Court’s holding that “antecedent statutory provisions” of the FAA, including § 2, “limit the scope of the court’s powers” under subsequent sections of the Act.<sup>69</sup>

The Seventh Circuit’s decision also conflicts with the Supreme Court’s latest FAA jurisprudence. The Court has recently reiterated the limits of the FAA’s “policy favoring arbitration,” holding that it is “about treating arbitration contracts like all others, not about fostering arbitration.”<sup>70</sup> Accordingly, the Supreme Court directed that “a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation.”<sup>71</sup> Yet that is precisely what the Seventh Circuit did in *Campbell v. Keagle*—it devised a novel rule according to which arbitration clauses found unconscionable and unenforceable under state law could simply be redrafted and enforced under the FAA. Similarly, the Supreme Court has recently reemphasized that the interpretation of the FAA must be grounded in its text.<sup>72</sup> Nothing in the text of §§ 4 and 5, however, suggests that these sections permit courts to circumvent § 2’s “saving clause” by redrafting parties’ arbitration agreements. To the contrary, both sections explicitly state that such agreements are to be enforced as written.<sup>73</sup>

While the Seventh Circuit seems to be an outlier in allowing §§ 4 and 5 of the FAA to defeat § 2’s “saving clause,” the court’s holding creates a circuit split regarding the internal relationship between these sections of the Act. Time will tell whether the Seventh Circuit’s reasoning will be adopted by other courts in future FAA cases, paving the way to the doorstep of the Supreme Court. Though the Court would likely adhere to its previous jurisprudence that subsequent procedural sections of the FAA cannot render enforceable an arbitration agreement found unenforceable under state law pursuant to § 2 of the Act, *Campbell v. Keagle* creates uncertainty for parties to arbitration agreements in the Seventh Circuit and beyond.

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<sup>69</sup> *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 537 (2019).

<sup>70</sup> *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022).

<sup>71</sup> *Id.*

<sup>72</sup> *Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022) (referring to the need for “textual support” in interpreting §§ 4, 9, and 10 of the FAA with regard to federal subject matter jurisdiction).

<sup>73</sup> Section 4 states that courts are to direct arbitration to proceed “in the manner provided for in such agreement,” while § 5 states that the method for appointing an arbitrator provided for in the parties’ agreement “shall be followed.” 9 U.S.C. §§ 4, 5.