

SUPREME COURT OF FLORIDA

CASE NO. SC-10-19

JAMES PENDERGAST,
Individually and on behalf
of all others similarly situated,

Lower Tribunal No. 09-10612

Appellant,

v.

Sprint NEXTEL CORPORATION,
Sprint SOLUTIONS, INC., and
Sprint SPECTRUM, L.P.,

Appellees.

**BRIEF *AMICUS CURIAE* OF CTIA—THE WIRELESS ASSOCIATION®
IN SUPPORT OF APPELLEES**

QUESTIONS CERTIFIED FROM THE UNITED STATES
ELEVENTH CIRCUIT COURT OF APPEALS

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STATEMENT OF IDENTITY AND INTEREST

CTIA—The Wireless Association® (“CTIA”) is an international nonprofit membership organization representing all sectors of the wireless communications industry—cellular, personal communication services, and enhanced specialized mobile radio. CTIA has a strong interest in this proceeding because many of its members have adopted as standard features of their business contracts provisions that require the parties to pursue disputes in bilateral arbitration rather than courts of general jurisdiction. The elimination of bilateral arbitration agreements may cause CTIA’s members to abandon arbitration in consumer contracts, driving up costs and prices.

SUMMARY OF THE ARGUMENT

The Federal Arbitration Act (FAA) was enacted to reverse judicial hostility to the enforcement of commercial agreements to arbitrate and to ensure that such agreements are enforced according to their terms. In this case, Appellant agreed to an arbitration clause in his contract with Sprint for wireless telephone service. That clause provided that all arbitration would occur on a bilateral basis—with no class proceedings. Appellant now claims that the clause is substantively unconscionable, frustrates the remedial purposes of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and is contrary to Florida public policy.

Unconscionability is a limited exception to the freedom of contract that

weighs the fairness of a contract to the parties at the time of formation. A contract is substantively unconscionable only if it would be non-sensical for a party to have taken the deal. That is not the case here. The benefits of a bilateral arbitration agreement—including lower prices resulting from a company’s lower litigation costs—make it more than reasonable for Appellant to have accepted the bargain.

To the extent that Florida public policy or the FDUTPA would prohibit enforcement of the arbitration clause, they are preempted by the FAA. To allow state public policy or the FDUTPA to nullify Sprint’s arbitration clause would contravene the substantive command of Section 2 that arbitration agreements are valid, irrevocable, and enforceable as written. Moreover, the text and history of Section 2 make clear that only defects in contract formation are a proper basis for refusing to enforce an arbitration clause.

ARGUMENT

I. SPRINT’S BILATERAL ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE.

A. The Doctrine of Unconscionability Is An Exception To The General Rule of Freedom of Contract That Focuses On The Fairness To The Parties At The Time Of Contracting.

This Court has long been clear that “[f]reedom of contract is the general rule.” *State ex rel. Fulton v. Ives*, 167 So. 394, 412 (Fla. 1936). “[I]t is a matter of great public concern that freedom of contract be not lightly interfered with.” *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101 (Fla. 1944). “[R]estraint is

the exception, and when it is exercised to place limitations upon the right to contract, . . . it can be justified only by exceptional circumstances.” *Ives*, 167 So. at 412. Ordinarily, “parties are masters of their own contract, and then servants to its ultimate terms.” *Fla. Dept. of Fin. Servs. v. Freeman*, 921 So. 2d 598, 607 (Fla. 2006) (Cantero, J., concurring). The principle is as vital today as when it was first recognized in English common law. *See, e.g., Green v. Life & Health of Am.*, 704 So. 2d 1386, 1391 (Fla. 1998).¹

The unconscionability doctrine provides a limited, “infrequently used” exception to the rule of freedom of contract. *Steinhardt v. Rudolph*, 422 So. 2d 884, 890 (Fla. 3d DCA 1982). A court may “with great caution” invoke the doctrine in extraordinary circumstances to refuse to enforce a contract or certain contract provisions. *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 284 (Fla. 1st DCA 2003). “Synonyms for the term unconscionable include ‘shocking to the conscience’ and ‘monstrously harsh.’” *Garrett v. Janiewski*, 480 So. 2d 1324, 1326 (Fla. 4th DCA 1985). Unconscionability does not permit a court to correct “contractual terms which are unreasonable or impose an onerous hardship.” *Steinhardt*, 422 So. 2d at 890; *see also Belcher v. Kier*, 558 So. 2d

¹ *See also Hill v. Deering Bay Marina Ass’n, Inc.*, 985 So. 2d 1162, 1166 (Fla. 3d DCA 2008) (“[C]ourts do not rewrite contracts.”); *Fla. Windstorm Underwriting v. Gajwani*, 934 So. 2d 501, 506 (Fla. 3d DCA 2005) (“The court should not strike down a contract, or a portion of a contract, on the basis of public policy grounds except in very limited circumstances.”).

1039, 1043 (Fla. 2d DCA 1990) (noting “legal distinction between ‘unreasonable’ and ‘unconscionable’”); *Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) (“[C]ourts may not rewrite a contract . . . to relieve one of the parties from the apparent hardship of an improvident bargain.”).

The doctrine focuses on the procedural and substantive fairness of the contract *to the parties at the time of contracting*. A contract is procedurally unconscionable if a party lacked “a ‘meaningful choice’ at the time the contract was entered.” *Tropical Ford, Inc. v. Major*, 882 So. 2d 476, 479 (Fla. 5th DCA 2004); *accord, e.g., Pearce v. Doral Mobile Home Villas, Inc.*, 521 So. 2d 282, 283 (Fla. 2d DCA 1988). A substantively unconscionable contract is one that “no man in his senses and not under delusion would make on one hand, and [that] no honest and fair man would accept on the other.” *Premier Real Estate Holdings, LLC v. Butch*, 24 So. 3d 708, 711 (Fla. 4th DCA 2009) (quoting *Bland ex rel. Coker v. Health Care & Retirement Corp. of Am.*, 927 So. 2d 252, 256 (Fla. 2d DCA 2006)). In all cases, a court must examine the agreement “in the light of the circumstances that existed when it was made.” *Fotomat Corp. of Fla. v. Chanda*, 464 So. 2d 626, 631 (Fla. 5th DCA 1985).

B. Sprint’s Bilateral Arbitration Agreement Is Not Substantively Unconscionable Because Of The Benefits To Consumers.

Sprint’s bilateral arbitration agreement is far from a contract that “no man in his senses and not under delusion would make on one hand, and [that] no honest

and fair man would accept on the other.” *Bland*, 927 So. 2d at 256. Taking into account the significant benefits that Appellant reaped *when he agreed* to bilateral arbitration, it is more than plausible to conclude that a reasonable person would have willingly accepted the bargain.

Because arbitration is quicker and cheaper than litigation, a bilateral arbitration agreement often allows for greater consumer recovery. Without arbitration, “the typical consumer who has only a small damages claim” might not recover because “the costs and delays of [court] could eat up the value of an eventual small recovery.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995). By “trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration,” consumers reduce those prohibitive costs. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); *accord Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, --- S. Ct. ---, 2010 WL 1655826, at *13 (Apr. 27, 2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution . . .”).

Perhaps more importantly, bilateral arbitration agreements result in lower consumer prices. Bilateral arbitration “reduces the business defendant’s process costs—the time and legal fees spent on pleadings, discovery, motions, trial or hearing, and appeal”—and these “savings benefit consumers . . . who receive better

prices.” Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 258 (2006); *see also Boomer v. AT&T Corp.*, 309 F.3d 404, 419 (7th Cir. 2002) (“[A]rbitration offers cost-saving benefits to telecommunication providers and these benefits are reflected in a lower cost of doing business that in competition are passed along to customers.”).

A class-arbitration waiver is critical to these benefits. “[T]hat certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer simplicity, informality, and expedition.” *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (internal quotation marks omitted). “[C]lass-action arbitration changes the nature of arbitration,” and the “relative benefits of class-action arbitration are much less assured.” *Stolt-Nielsen*, 2010 WL 1655826, at *13. Indeed, grafting class procedures onto arbitration “subjects arbitration to the very judicial burden that the contracting parties sought to avoid through arbitration.” Lindsay R. Androski, *A Contested Merger: The Intersection of Class Actions and Mandatory Arbitration Clauses*, 2003 U. CHI. LEGAL F. 631, 649 (2003).²

² *See also* Jonathan R. Bunch, *To Be Announced: Silence from the United States Supreme Court and Disagreement Among Lower Courts Suggest an Uncertain Future for Class-Wide Arbitration*, 2004 J. DISP. RESOL. 259, 272 (2004) (“[T]he greatest advantages of arbitration are in many instances the greatest disadvantages of litigation, yet class-wide arbitration . . . lessens the distinction

Accordingly, by accepting a bilateral arbitration agreement, Appellant received price benefits, as well as access to a low-cost and streamlined dispute resolution forum, while sacrificing only the ability to aggregate small claims *if* such claims were to arise and were appropriately aggregable.³ *See Metro East Ctr. For Conditioning & Health v. Qwest Commc'ns Int'l, Inc.*, 294 F.3d 924, 927 (7th Cir. 2002) (“Customers . . . are compensated through lower rates for any net loss they may experience in arbitration.”). This deal is hardly one that “no man in his senses and not under delusion would make.” *Bland*, 927 So. 2d at 256. It was perfectly reasonable at the time of contracting for Appellant to trade the chance of earning a paltry sum someday in a yet-to-exist class arbitration for the benefits of bilateral arbitration. *See Ware, supra*, at 268-69. After all, class action plaintiffs—as opposed to their attorneys—rarely receive large recoveries. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting the “relatively paltry potential recoveries” for class action plaintiffs); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2 § 2(a)(3), 119 Stat. 4 (“Class members often receive little or no benefit from class actions, and are sometimes harmed.”).

between the two processes.”).

³ As a plurality of the Supreme Court recently made clear, the ability to proceed by class is merely a matter of procedure that “leaves the parties’ legal rights and duties intact and the rules of decision unchanged.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010).

Many courts have recognized the fairness of this bargain to the consumer and have refused substantive unconscionability challenges to bilateral arbitration agreements.⁴ Those courts that have disagreed have, like Appellant, erroneously considered only whether a class arbitration waiver might effectively bar consumers from making small-value contract claims. As noted above, that premise is false—bilateral arbitration may enhance consumer as opposed to attorney welfare.

In any event, the proper question is whether the costs *and benefits* of the bargain are something that a reasonable consumer might have accepted at the time of contracting. Viewed in that light, Sprint’s arbitration agreement is not substantively unconscionable. Even if the agreement did effectively foreclose some small value claims, which it does not,⁵ it is more than plausible that a consumer would accept that speculative cost in exchange for lower prices and an

⁴ See, e.g., *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Walther v. Sovereign Bank*, 872 A.2d 735, 750 (Md. 2005); *Med. Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. App. 2001); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001); *Ranieri v. Bell Atlantic Mobile*, 304 A.D.2d 353 (NY 2003); *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003). Although Appellant claims that there is a “consensus among courts nationwide [against] class action bans,” Appellant’s Br. 18, a case that he cites acknowledges that “a majority of state and federal courts have enforced class action waivers and found them *not* unconscionable,” *Coady v. Cross Country Bank*, 729 N.W.2d 732, 746 (Wis. Ct. App. 2007) (emphasis in original).

⁵ The agreement provides customers a number of ways to pursue small value claims. See Appellee’s Br. 46-48.

efficient method for resolving disputes.⁶

C. Substantive Unconscionability Does Not Concern The Hypothetical Effects Of A Contract On Third Parties.

Appellant's main argument is that Sprint's arbitration agreement is substantively unconscionable because "it acts as an exculpatory clause for corporate wrongdoers." Appellant's Br. 10. In his view, the class-arbitration waiver "ensures that [Sprint] is insulated from responsibility for its actions because no single loss will ever have the economic value to deter Sprint's misconduct," and "state governments simply do not have the resources to police all potential corporate wrongdoers." *Id.* at 11, 16. As Sprint notes, no evidence shows that this is so, *see* Appellee's Br. 48-52, nor is there evidence of increased consumer fraud or decreased consumer satisfaction in states that allow class-arbitration waivers.

Appellant's assertion that a court can find unconscionability "if the

⁶ Appellant's suggestion that a contract of adhesion is procedurally unconscionable *per se*, Appellant's Br. 25 n.17, 33, must be rejected. Nearly every District Court of Appeal has explained that the adhesive nature of a contract is just one factor in determining procedural unconscionability. *See, e.g., Gainesville Health Care Ctr.*, 857 So. 2d at 284 (listing as a factor for procedural unconscionability "whether the terms were merely presented on a 'take-it-or-leave-it' basis"); *Murphy v. Courtesy Ford, L.L.C.*, 944 So. 2d 1131, 1134 (Fla. 3d DCA 2006) (same); *Estate of Perez v. Life Care Ctrs. of Am.*, 23 So. 3d 741, 742 (Fla. 5th DCA 2009) (same); *Voicestream Wireless Corp. v. U.S. Comm'ns, Inc.*, 912 So. 2d 34, 40 (Fla. 4th DCA 2005) ("[T]he presence of an adhesion contract alone does not require a finding of procedural unconscionability."). Moreover, adopting Appellant's suggestion would render essentially every consumer agreement in the State of Florida procedurally unconscionable, a sweeping conclusion inconsistent with the principle that the unconscionability doctrine is to be applied infrequently.

[arbitration] clause at issue is sufficiently exculpatory or frustrates the remedial purpose of a statute,” Appellant’s Br. 21, conflates two distinct lines of Florida case law. “There are two frameworks which courts have used when confronted with th[e] issue [of the enforceability of an arbitration agreement]: (1) whether the arbitration clause is void as a matter of law because it defeats the remedial purpose of the applicable statute, or (2) whether the arbitration clause is unconscionable.” *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1023 (Fla. 4th DCA 2005). All the cases that Appellant cites to support his novel “exculpatory clause test” for unconscionability, Appellant’s Br. 26-30, come within the first framework. The cases do *not* find unconscionability; indeed, Appellant readily acknowledges that he is asking this Court to import into unconscionability doctrine a legal principle that already exists “under a different name.” *Id.* at 26.⁷ As explained below, the question whether bilateral arbitration clauses act as exculpatory clauses and should be barred is at bottom a legislative one for Congress.

II. THE FAA PREEMPTS FLORIDA PUBLIC POLICY OR THE FDUTPA FROM PROHIBITING ENFORCEMENT OF SPRINT’S BILATERAL ARBITRATION AGREEMENT.

To the extent Appellant relies not on unconscionability, but rather on Florida

⁷ One of the cases cited by Appellant, *see* Appellant’s Br. 30 n.22, expressly states that “holding a contractual provision unenforceable because it defeats the remedial provisions of a statute, and is thus contrary to public policy, *is distinct from finding unconscionability.*” *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 299 (Fla. 4th DCA 2005) (emphasis added).

public policy or the FDUTPA to render the arbitration agreement unenforceable, its arguments are precluded by the FAA. Congress enacted the FAA to “revers[e] centuries of judicial hostility to arbitration agreements,” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974), and “to ensure that private agreements to arbitrate are enforced according to their terms,” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (internal quotation marks omitted). Section 2 of the FAA states 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 Supreme Court has explained that “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. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). State law or policy that conflicts with the FAA is preempted.

A. The FAA Preempts The Use Of Florida Public Policy To Invalidate Sprint’s Bilateral Arbitration Agreement.

Even if Sprint’s bilateral arbitration clause is inconsistent with Florida public policy (which it is not, *see* Appellee’s Br. 55-56), that public policy cannot be used to nullify the arbitration clause. To use state public policy as a basis for refusing to enforce Sprint’s arbitration agreement would conflict in a number of ways with the substantive command of Section 2 of the FAA. Under the Supremacy Clause, the FAA must supersede Florida law in these circumstances.

“[T]he central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms.” *Stolt-Nielsen*, 2010 WL 1655826, at *11 (internal quotation marks omitted). A court cannot use state public policy to overcome that federal policy and conclude that arbitration agreements must include certain terms, such as provisions for class arbitration, in order to be enforceable. *See, e.g., Allied-Bruce Terminix Cos.*, 513 U.S. at 281 (“What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such *state policy* unlawful” (emphasis added)).

Indeed, the Supreme Court recently made clear that there is no policy imperative to ignore the terms of an arbitration agreement and insist on the availability of class procedures. In *Stolt-Nielsen*, the Court held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” 2010 WL 1655826, at *13. The Court explained that “parties are generally free to structure their arbitration agreements as they see fit” and that “it is . . . clear from our precedents and the contractual nature of arbitration that parties may specify *with whom* they choose to arbitrate their disputes.” *Id.* at *12. Both “courts and arbitrators,” the Court emphasized, “must not lose sight of” their task “to give effect to the intent of the parties.” *Id.* They “ha[ve] no general charter to

administer justice for a community which transcends the parties.”” *Id.* (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)).⁸

Moreover, to allow courts to rely on state public policy to re-write or nullify arbitration agreements would directly contravene Congress’s goal of precluding courts from striking down arbitration agreements based on common law hostility toward arbitration. Congress enacted the FAA in direct response to a state public policy that permitted courts to ignore arbitration agreements. *See* Wesley A. Sturges, *A Treatise on Commercial Arbitrations and Awards* § 15 at 45 (1930). It would be absurd to conclude that the FAA guarantees that arbitration agreements shall be “valid, irrevocable, and enforceable, *as a matter of federal law*,” *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (emphasis in original), yet simultaneously permits the survival of state public policy that voids some or all of an arbitration agreement.

Finally, failure to enforce Sprint’s bilateral arbitration agreement on the basis of state public policy in favor of class procedures would be precisely the sort of “judicial hostility to arbitration agreements” that the FAA was enacted to reverse. *Scherk*, 417 U.S. at 511. Arbitration is meant to be different from court—

⁸ The Supreme Court has instructed the Second Circuit to reconsider its decision invalidating a class-arbitration waiver on public policy grounds in *In re Am. Express Merchants’ Litigation*, 554 F.3d 300 (2d Cir. 2009), in light of *Stolt-Nielsen. Am. Express Co. v. Italian Colors Restaur.*, --- S. Ct. ---, 2010 WL 1740528 (May 3, 2010).

its primary goal is to be swifter and less expensive. Finding that bilateral arbitration is tantamount to an exculpatory clause would signal to the lower courts that certain judicial mechanisms are to be preferred over bilateral arbitration. If this Court elevates the class-action form in this way, nothing will prevent the lower courts from finding that more formal discovery is necessary in arbitration, or that a jury of six arbitrators must come to a unanimous “verdict” in order to render arbitration fair and consistent with state public policy.

B. The FAA Preempts The FDUTPA From Prohibiting Enforcement Of Sprint’s Arbitration Clause.

Similarly, even if Sprint’s bilateral arbitration clause conflicts with the FDUTPA (which it does not, *see* Appellee’s Br. 56-59), that state statute cannot be applied to prohibit enforcement of the arbitration clause. “By enacting [Section] 2 [of the FAA], Congress precluded States from singling out arbitration provisions,” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), and “place[d] arbitration agreements ‘upon the same footing as other contracts,’” *Scherk*, 417 U.S. at 510-11 (quoting H.R. Rep. No. 68-96, at 1 (1924)). “[S]tate law, whether of legislative or judicial origin, is applicable [in the sense that it would affect the validity of an arbitration agreement, only] *if* that law arose to govern issues concerning the validity, revocability and enforceability of contracts generally.” *KKW Enters. Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 50-51 (1st Cir. 1999) (quoting *Perry*, 482 U.S. at 492 n.9).

Numerous federal courts of appeal have found that the FAA preempts the invalidation of arbitration clauses under state statutes that apply only to certain types of contract. For example, the First Circuit rejected an attempt to nullify an arbitration clause under a Rhode Island statute that voided forum selection clauses in franchise agreements that require venues outside the state. *Id.* The court explained that the state statute “purports to restrict the enforcement of only one sort of contract provisions, forum selection clauses, in only one type of contract, franchise agreements,” “d[id] not apply to all contracts,” and was thus preempted. *Id.* at 52.⁹ In other words, state law may not target arbitration clauses for special treatment or attempt to impose a judicial model on arbitration. *See Doctor’s Assocs.*, 517 U.S. at 687.

Because the FDUTPA applies on its face only to contracts in “trade or commerce,” *see* Fla. Stat. §§ 501.203-204, and under Appellant’s argument the FDUTPA invalidates only arbitration agreements in certain consumer contracts and not in contracts generally, the statute cannot be used to strike down Sprint’s bilateral arbitration agreement. To do so would contravene Section 2 of the FAA and Congress’s intent that arbitration agreements be on “the same footing as other contracts.” *Scherk*, 417 U.S. at 510-11 (internal quotation marks omitted).

⁹ *See also OPE Int’l LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 447 (5th Cir. 2001); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 889-90 (9th Cir. 2001); *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998).

C. Under The FAA, Courts May Only Consider Formation Defects In Assessing The Validity Of An Arbitration Agreement.

In addition to the reasons already discussed, the plain text of Section 2 provides an independent basis for concluding that the FAA preempts the FDUTPA or Florida public policy from prohibiting enforcement of Sprint’s arbitration agreement. The text and history of Section 2 of the FAA make clear that only a defect in contract formation may nullify an arbitration agreement.

Section 2 of 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. Each adjective describing the status of arbitration agreements—“valid, irrevocable, and enforceable”—must be assigned a distinct meaning. *See Conn. Dep’t of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985) (“It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute.”). And it follows that the noun “revocation”—like its adjectival antonym, “irrevocable”—must be given a different meaning from “valid” and “enforceable.” A contemporaneous treatise and pre-FAA case law confirm that Congress would have understood these terms to refer to distinct aspects of contract law.

At the time of the FAA’s enactment, the term “revocability” had two meanings. In the context of arbitration agreements, “revocability” referred specially to a contracting party’s ability to repudiate such an agreement at will.

See Sturges, supra, § 15 at 45. A party to an arbitration agreement was permitted: (1) to proceed with a contract action in court irrespective of any arbitration provision to the contrary; or, equivalently, (2) to “terminate the powers of the other party” under an arbitration provision. *Id.* The rule was “based upon a public policy which [was] said to be violated by contracts to oust the courts of their jurisdiction.” *Id.* (internal quotation marks omitted). This doctrine of “revocability” of arbitration clauses was part of the judicial hostility to their enforcement that led to the FAA.

Outside the context of arbitration agreements, “revocability” appears to have referred to the more limited ability of a party to nullify a contract based on formation defects. This can be inferred from pre-FAA cases that, in criticizing the special rule of “revocability” in the arbitration context, suggested that arbitration agreements should be revocable only for the usual reasons applicable to any contract. One such court opined:

An agreement [to arbitrate] induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure might well be . . . disregarded But when the parties stand upon an equal footing, and intelligently and deliberately . . . provide for an amicable adjustment of any difference that may arise, either by arbitration, or otherwise, it is not easy to assign at this day any good reason why the contract should not stand

Id. at 47 (quoting *Del. & H. Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872)).

The court further stated, “Were the question *res nova*, I apprehend that a party

would not now be permitted, *in the absence of fraud or some peculiar circumstances entitling him to relief*, to repudiate his agreement to submit to arbitration” *Del. & H. Canal Co.*, 50 N.Y. at 258 (emphasis added).

The terms “valid” and “enforceable” had altogether different meanings. *See, e.g., U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915) (distinguishing between the terms “valid” and “enforceable”). According to Sturges, the term “unenforceable” was synonymous with the term “void,” Sturges, *supra*, § 22 at 82, while an agreement was “invalid” if it was “contrary to public policy,” *id.* Indeed, the legislative history of the FAA confirms that the concept of “validity” was distinct from the concept of “enforceability.” *See Arbitration of Interstate Commercial Disputes*, Joint Hearings Before the Subcomms. of the Comms. of the Judiciary on S. 1005 and H.R. 646, 68th Cong. 38 (1924) (distinguishing between the terms “validity” and “enforceability”).

The distinct meaning of the terms “revocability,” “invalidity,” and “unenforceability” at the time Congress enacted the FAA makes clear that only defects in contract formation are proper bases for refusing to enforce arbitration agreements. Section 2 states that arbitration agreements must be honored as a matter of federal law “save upon such grounds as exist at law or in equity for the *revocation of any contract.*” 9 U.S.C. § 2 (emphases added). The use of only the term “revocation” highlights that courts may not declare arbitration agreements

“contrary to public policy” or “void” on the grounds of “invalidity” or “unenforceability.” *See id.* And the specific reference to “any” contract underscores that courts may not rely on any analogue to the special rule of “revocability” that existed in the context of arbitration agreements.

As the D.C. Circuit has explained, “the language of [Section] 2 . . . indicates that Congress created an exception to the general rule (that an arbitration clause will be enforced by its terms) only when there is a flaw in the formation of the agreement to arbitrate.” *Nat’l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990).¹⁰ Courts retain the authority to examine an arbitration agreement under general principles of revocability applicable to any contract. What they cannot do is strike down an arbitration clause based on public policy or other concerns unrelated to defects in contract formation. *See id.* (“[A] public policy issue that may preclude enforcement of [an arbitration clause] is not such a ‘ground[] as exist[s] at law or in equity for the revocation of any contract’ within the meaning of [Section] 2.” (quoting 9 U.S.C. § 2)).

This reading of Section 2 is not only true to its plain text and history, but also vindicates the FAA’s “basic precept that arbitration is a matter of consent, not

¹⁰ *See also Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979) (explaining that Section 2 preempts any law of judicial or statutory origin that “restrict[s] the validity or enforceability of arbitration agreements,” but “does not displace state law on the general principles governing formation of the contract itself”).

coercion.” *Stolt-Nielsen*, 2010 WL 1655826, at *11 (internal quotation marks omitted). The limitation prevents courts from using state public policy or their own sense of fairness to force parties to arbitrate on terms not agreed to. At the same time, courts have the power to ensure that, as in any contract, there has been true consent in the formation of the arbitration clause. As shown in Sprint’s brief, there was no defect in contract formation here. The express agreement to bilateral arbitration should therefore be enforced according to its terms.

CONCLUSION

For the foregoing reasons, CTIA requests this Court hold that Sprint’s bilateral arbitration agreement must be enforced according to its terms.

Respectfully submitted,

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May 17, 2010

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I HEREBY CERTIFY that the foregoing has been prepared using Times
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/s/ Elbert Lin

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