No. 02-215

IN THE

Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN ASSOCIATION OF HEALTH PLANS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.

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BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN ASSOCIATION OF HEALTH PLANS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

The question presented in this case is whether a district court is required to enforce the terms of an arbitration agreement when the agreement expressly precludes a RICO plaintiff from recovering "extracontractual" or "punitive" damages on his RICO claim. *Amici* have a vital interest in the correct resolution of that question, because *amici*'s members have entered into thousands of arbitration agreements that expressly preclude arbitrators from awarding punitive and extracontractual damages. *Amici*'s members will be adversely affected by a decision rendering such agreements unenforceable, because they will be deprived not only of the benefit of their bargains but of the inexpensive, prompt, and expeditious arbitration mechanism they rely upon to resolve many of their business disputes.

The National Association of Manufacturers ("NAM")—18 million people who make things in America—is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The American Association of Health Plans, Inc. ("AAHP") is the national association for the managed health care community. AAHP represents more than 1000 managed health care organizations serving nearly 150 million Ameri-

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

cans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

STATEMENT

1. This case arises from a massive nationwide class action filed on behalf of more than 600,000 physicians against ten of the largest managed care organizations ("MCOs") in the United States. The plaintiff physicians—respondents here—provide treatment to individuals who receive health coverage under employee benefit plans insured or administered by the MCOs. Respondents allege that, for more than a decade, the MCOs have failed to pay them adequate reimbursements for the medical services that respondents have provided to the insureds of the relevant employee benefit plans.

In particular, respondents allege that the MCOs—on their own and as part of a conspiracy with every other defendant MCO—have implemented a plan to "deny, delay and diminish" the reimbursement payments due to physicians. *See* Second Am. Compl. at ¶ 5. The complaint alleges that the MCOs have orchestrated this scheme by using commercially available computer software that, though required to be used in processing reimbursements under Medicare, Tricare and other federal programs, allegedly processes physician bills in a way that artificially reduces the amount the physicians are paid; the complaint also alleges that the MCOs delay payment on claims in order to obtain a "float" on the monies due. Respondents allege that, by engaging in that conduct, the MCOs have conspired to violate, violated, and aided-and-abetted violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and that they have violated state statutes and contractual and quasi-contractual obligations. The RICO claims—which are at issue here—allege that the MCOs are part of an illegal country- and industry-wide "enterprise" that spans virtually every aspect of the health care delivery system in the Nation,

and that the MCOs have engaged in acts of "racketeering"—mail fraud, wire fraud, and extortion—that have harmed the physician class. *See* Second Am. Compl. at ¶¶ 183-98.

For the most part, respondents' right to reimbursement from MCOs arises either from a direct contract entered into by the physician and MCO, or by a contract entered into by the MCO and a provider group, such as an independent physician association or a physician hospital association. The terms of those contracts are heavily negotiated and vary significantly from physician to physician (and from physician group to physician group) over terms as fundamental as the services that will be covered, claim submission provisions, claim payment timeframe requirements, and fee schedules.

Given the tremendous volume of claims for reimbursement that MCOs process every year, many physician groups and MCOs have found it mutually beneficial to include arbitration clauses in their provider contracts. Not every MCO has entered into an arbitration agreement with every physician or physician group, but many MCOs and physician groups are attracted to the arbitration mechanism because it ensures that reimbursement disputes are resolved promptly and efficiently and without the expense of full-blown litigation—attributes that are particularly important in the managed care area, where the cost of litigation can easily exceed the value of disputed reimbursement claims. As with other terms in provider agreements, arbitration clauses vary and are subject to vigorous negotiation.

As part of their agreements to arbitrate, many MCOs and provider groups also may agree to waive any right to recover punitive or extracontractual damages. By limiting recoveries to actual, out-of-pocket losses, MCOs and provider groups can better predict their respective liabilities to one another. The benefits from such waivers are mutual. Overbilling and even fraudulent reimbursement claims are not uncommon in the health care delivery system. *See* United States Government Accounting Office, *Health Care: Consultants' Billing Advice May Lead To Improperly Paid Insurance Claims*,

GAO-01-818 (June 2001). Indeed, the federal government frequently initiates prosecutions for billing abuse and Medicare fraud. *See* United States Department of Justice, *Health Care Fraud Report* (April 2002) (reviewing enforcement efforts). When such overbilling is discovered, MCOs may offset payments or seek affirmative relief against physician groups to obtain monies wrongfully paid. In those disputes, the waiver of punitive relief also operates to cap the damages that can be assessed against a provider or provider group.

2. The provider contracts at issue in this case contain arbitration clauses. Respondent Porth—an orthopedic surgeon in Florida—has entered into a contract with United Healthcare that requires "any disputes about their business relationship" to be resolved through "binding arbitration in accordance with the rules of the American Arbitration Association." Pet. App. 63. Dr. Porth's provider contract also states that the arbitrator shall have no authority to award "extracontractual damages of any kind, including punitive or exemplary damages." *Id.* Respondent Kelly has entered into a similar agreement with United providing that the arbitrator "shall have no authority to award any punitive or exemplary damages." Pet. App. 62. Respondent Breen has similarly entered into an arbitration agreement with PacifiCare Health Systems that precludes the arbitrator from awarding "punitive damages" (Pet. App. 61), and respondent Book has contracted with PacifiCare to submit disputes to an arbitrator authorized to "grant all legal and equitable remedies and [to] award compensatory damages provided by California law, except that punitive damages shall not be awarded" (Pet. App. 60).

3. Citing those arbitration agreements, on September 22, 2000, petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. ("PacifiCare") and United Healthcare, Inc. and UnitedHealth Group Inc. ("United"), moved to compel arbitration of the claims asserted by Drs. Breen, Kelly, Porth, and Book. The other MCO defendants also sought orders compelling respondents to arbitrate their aiding-and-abetting and conspiracy RICO claims, which sought to hold

the other MCOs derivatively liable for PacifiCare's and United's conduct toward respondents. The other MCOs asserted that those derivative-liability claims had been pleaded in a transparent attempt to avoid the arbitration agreements that respondents had with PacifiCare and United, and that respondents were estopped from attempting to litigate derivative-liability theories in federal court if respondents would be required to arbitrate with the party that was alleged to be primarily liable.[2]

Respondents opposed arbitration, contending first that the limitations on "punitive" and "extracontractual" damages rendered their arbitration agreements with United and PacifiCare unenforceable, because those limitations purportedly deprived respondents of the ability to obtain treble damages on their RICO claims. Respondents also contended that, notwithstanding their agreement to arbitrate any and all claims with United and PacifiCare, they nonetheless were free to pursue conspiracy and aiding-and-abetting claims against *other* MCO defendants—in court—for their participation in United's and PacifiCare's purported misconduct.

4. The district court granted in part and denied in part the motions to compel arbitration. *See* Pet. App. 11-46, 47-54. Rejecting United's and PacifiCare's contentions that such issues should be decided by the arbitrator in the first

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[2] In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994), this Court held that 18 U.S.C. § 2 is not "a general civil aiding and abetting statute," and thus cannot be relied on to assert a aiding-and-abetting cause of action under the Securities Exchange Act of 1934. In light of *Central Bank*, several courts of appeals have concluded that 18 U.S.C. § 2 may not be invoked, as respondents seek to do here, to assert a private cause of action for aiding and abetting a RICO violation. *See, e.g., De Falco v. Bernas*, 244 F.3d 286, 330 (2d Cir. 2001); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir. 1998). The district court has so far permitted the "aiding and abetting" claims to proceed by relying on pre-*Central Bank* Eleventh Circuit authority. *See In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1267 (S.D. Fla. 2001) (citing *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994)).

instance, the district court accepted respondents' claims that the various limitations on "punitive" and "extracontractual" damages rendered the arbitration agreements unenforceable with respect to any claim arising under RICO. Relying primarily on the Eleventh Circuit's decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), the district court reasoned that the "arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief *equivalent* to court remedies." Pet. App. 22 (emphasis added) (citation and quotation omitted). The district court opined that because the exclusions for "extra contractual" and "punitive" damages would preclude an arbitrator from awarding "treble" damages under RICO, it would be impossible for the respondents to obtain "meaningful relief in an arbitration forum." Pet. App. 22-23, 29-32, 40-41.

The district court also denied the MCO defendants' motions to compel arbitration to the extent those motions contended that respondents were required to arbitrate all derivative liability theories if they would be required to arbitrate with the party that was primarily liable. The district court concluded that ordinarily a party can be required to arbitrate "only when there is a signed agreement between the parties." Pet. App. 16-22.

5. The Eleventh Circuit affirmed. To the extent relevant here, the court of appeals "affirm[ed] in its entirety the district court's order for the reasons set forth in its comprehensive opinion." Pet. App. 4.[3]

SUMMARY OF ARGUMENT

The judgment of the court of appeals must be reversed for two independent reasons. First, the court of appeals erred in concluding that the district court—*not* the arbitrator—should determine in the first instance whether the parties'

[3] The court's opinion was primarily devoted to rejecting the MCO defendants' argument that respondents are estopped from litigating the derivative liability claims in court if they agreed to arbitrate with the party alleged to be primarily liable. That issue is not before this Court.

waivers of "punitive" and "extracontractual" damages were valid and enforceable. Under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, a district court reviewing a motion to compel arbitration ordinarily has authority to decide only whether the parties have entered into an arbitration agreement and whether the particular claims at issue fall within that agreement's scope. Any question beyond those threshold issues of arbitrability must be decided by the arbitrator in the first instance. Because the validity of the parties' remedial waivers is not a threshold issue of arbitrability, but rather goes to the subsidiary issue of the relief available to respondents if they ultimately prevail on their RICO claims, that question should have been resolved by the arbitrator—*not* the district court—in the first instance. *See* 9 U.S.C. § 4.

Second, the court of appeals erred in concluding that the parties' arbitration agreements were unenforceable because they would deny the respondents "meaningful relief" on their RICO claims. As a preliminary matter, the court of appeals' holding was premised on a determination that the agreements' limitations on "punitive" and "extracontractual" damages would operate to bar an abitrator from awarding "treble" damages under RICO. That determination cannot be reconciled with this Court's holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), that treble damages under RICO are "remedial"—not "punitive." Properly construed, a contractual prohibition on "punitive" and "extracontractual" damages does *not* preclude an award of RICO treble damages. The court of appeals thus erred as an initial matter in holding that the arbitration agreements limit RICO remedies *at all*.

In any event, even assuming the parties' agreements did preclude an award of treble damages under RICO, those agreements nonetheless would be enforceable. This Court has never held that an otherwise valid agreement to arbitrate will be deemed unenforceable merely because the parties have elected to narrow the set of remedies the arbitrator can award. Instead, this Court has repeatedly held that arbitration

agreements must be enforced according to their terms, absent a clear indication from Congress to the contrary. This Court has already—and emphatically—held that Congress did *not* intend to preclude the arbitration of claims arising under RICO. *See McMahon*, 482 U.S. at 228. Nothing in RICO's text, structure, or legislative history suggests that Congress had precisely the *opposite* intention with respect to RICO cases in which treble damages might be unavailable.

Moreover, this Court has long recognized that the FAA requires arbitration agreements to be put on an "equal footing" with other contracts. It is axiomatic that, in federal court, parties could agree to waive treble damages, consistent with the long-standing rule that "'[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.'" *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (quoting *Shutte v. Thompson*, 15 (Wall.) 151, 159 (1873)). Because no congressional or federal policy would prohibit such waivers in federal court, the FAA requires that they be enforceable in arbitration. The court of appeals' judgment to the contrary reflects the very hostility to arbitration agreements that the FAA was enacted to prevent. Indeed, even if respondents could carry the heavy burden of demonstrating that the background presumption of waivability does not apply here, the appropriate remedy would not be invalidation of the arbitration agreements, but merely severance of the offending waiver provisions. For all of these reasons, the judgment of the court of appeals must be reversed.

ARGUMENT

I. THE ARBITRATOR, NOT THE COURT, SHOULD HAVE DECIDED IN THE FIRST INSTANCE WHETHER THE PARTIES' WAIVER OF "PUNITIVE" DAMAGES APPLIES TO RICO AND IS VALID.

The court of appeals fundamentally erred by deciding, in the first instance, the issue whether a contractual limitation on "punitive" and "extracontractual" damages encompasses treble damages under RICO and whether, if so construed, the

waiver is valid. In ruling upon a motion to compel arbitration, a district court ordinarily is authorized to determine *only* threshold issues of arbitrability—*i.e.*, whether the parties entered into a valid agreement to arbitrate that covers the dispute at hand. Because the validity of a remedial limitation in an arbitration agreement does *not* present a threshold issue of "arbitrability," but instead goes to the downstream, subsidiary issue of the measure of relief available to the plaintiff in the event he ultimately is successful, the arbitrator—*not* the district court—must decide it in the first instance under the FAA. *See* 9 U.S.C. § 4.

A. The District Court Should Have Decided Threshold Issues Of Arbitrability Only.

The Federal Arbitration Act was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In particular, Congress sought to ensure "that the arbitration procedure, when selected by parties to a contract, 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).

Section 4 of the FAA governs the disposition of motions to compel arbitration and makes clear that a district court's authority to review those motions is heavily circumscribed. It provides that upon petition 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.

9 U.S.C. § 4 (emphasis added). As this Court has instructed, "[b]y its terms, [Section 4] leaves no place for the exercise of

discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

This Court's cases make clear that Section 4 is designed to ensure that a district court decides *only* those issues relating to whether the arbitration agreement was validly made, and whether the particular claims at issue between the parties fall within the scope of that agreement. The Court has referred to those questions as threshold issues of "arbitrability," and has held that the authority to decide those threshold issues rests presumptively with the courts. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

1. The seminal case construing Section 4 of the FAA is *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). At issue in *Prima Paint* was whether the district court or the arbitrator should consider in the first instance a claim by a party resisting arbitration that the agreement in which the arbitration provision was contained had been induced by fraud. 388 U.S. at 402. Prima Paint entered into a consulting agreement with the Flood & Conklin Manufacturing Company in connection with its acquisition of Flood & Conklin's assets. The agreement contained an arbitration clause. When it became clear that Flood & Conklin would be unable to fulfill its contractual obligations, and that it had misrepresented its financial condition, Prima Paint sued, alleging that the consulting arrangement was void because it had been fraudulently induced. Flood & Conklin moved under Section 3 of the FAA to stay Prima Paint's suit pending arbitration.[4] Prima Paint opposed the stay—and sought an order enjoining arbitration—on the ground that the issue of whether the parties' agreement had been fraudulently induced should be decided by the court—not the arbitrator—in the first instance.

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[4] Section 3 authorizes courts to stay judicial proceedings in any matter that is properly referable to arbitration. *See* 9 U.S.C. § 3.

This Court explained that "Congress ha[d] provided an explicit answer" to the allocation of decision-making authority between courts and arbitrators "in Section 4 of the Act." *Id.* at 403. The Court emphasized that Section 4 authorizes a "federal court [to] consider only issues relating to the *making* and performance of the agreement *to arbitrate*," and that a district court had identical authority when acting pursuant to Section 3. *Id.* 404 (emphasis added). By limiting the district court's focus to the "making" of the arbitration agreement, the Court explained, Section 4 "does not permit the . . . court to consider claims of fraud in the inducement of the contract *generally*," and thus Prima Paint's fraudulent inducement claim would have to be submitted to the arbitrator. *Id.* The Court noted, however, that had Prima Paint asserted a claim for "fraud in the inducement *of the arbitration clause itself*," an issue which the Court described as "go[ing] to the 'making' of the agreement to arbitrate," the district court would have been empowered to adjudicate the claim. *Id.* at 403 (quoting 9 U.S.C. § 4) (emphasis added).

Prima Paint draws a clear line between issues that relate to the "'making' of the agreement to arbitrate" or the validity of "the arbitration clause itself"—threshold arbitrability issues that presumptively should be decided by courts—and all other issues, which must be submitted in the first instance to arbitration. *Id.* at 404. This Court's arbitration cases—both before and after *Prima Paint*—are fully in accord with that principle.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), for example, an employer sought to resist arbitration on the ground that the union had not complied with the notice and exhaustion requirements that the parties' collective bargaining agreement imposed as a prerequisite to arbitration. *Id.* at 555-56. The Court concluded that the parties were bound by a valid arbitration agreement, but held that the employer's procedural defenses to arbitration should be decided by the arbitrator in the first instance. "Once it is determined . . . that the parties are obligated to submit the *subject matter* of the dispute to arbitration," the Court reasoned, other

"questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557 (emphasis added). The Court took particular care to note that, in reviewing motions to compel arbitration, courts should consider only those issues that might "operate to bar arbitration altogether," and *not* issues whose resolution would "merely limit or qualify an arbitral award." *Id.* at 558. Similarly, in *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972), the Court held that whether arbitration was barred by laches was a question for the arbitrator to decide because the agreement called for arbitration of "any difference" between the parties. The Court noted that courts ordinarily are responsible only for determining "whether a union and employer have agreed to arbitration" as well as "the scope of the arbitration clause." *Id.* at 491. But "once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that the agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement." *Id.* at 491-92.

Prima Paint, *John Wiley*, and *Flair Builders* stand for the proposition that claims that can be characterized as going to the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 400), or the "'making' of the agreement to arbitrate" (*id.* at 404), should generally be decided by courts in the first instance, but that any *other* issues ordinarily must be submitted to the arbitrator. This is true even where, as in *John Wiley* and *Flair Builders*, the claim asserted by the party resisting arbitration, if meritorious, could preclude the need for arbitration at all. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 n.27 (1983) (because Congress intended to "speed[] the procedure under § 3 [and] § 4," "some issues that might be thought relevant to arbitrability are themselves arbitrable").

2. This Court also has confined the inquiry under Section 4 to threshold issues of arbitrability in cases where the party resisting arbitration has challenged the propriety of

submitting *statutory* claims to arbitration. In recent years, many plaintiffs have resisted arbitration on the asserted ground that Congress sought to override the FAA's mandate by exempting particular statutes from the FAA's scope. Although this Court has suggested that Congress could conceivably pass statutes that make clear that certain statutory rights are unsuitable for arbitration, it has made clear that any such "congressional command" must be "deducible from [the statute's] text, or legislative history, from an 'inherent conflict' between arbitration and the . . . [statute's] underlying purposes." *See McMahon*, 482 U.S. at 226-27. This Court has been particularly reluctant to find such "statutory directives," and it already—and squarely—has determined that Congress did *not* evidence any such intent in RICO. *Id.* at 226.

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), the Court considered—and rejected—the claim that treble-damages actions under the Sherman Act are nonarbitrable. Building on the analysis in *Mitsubishi*, this Court has also concluded—in a holding directly controlling here—that Congress did not intend to prohibit arbitration of RICO claims. *See McMahon*, 482 U.S. at 242. The *McMahon* Court explained, first, that "there is nothing in the *text* of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *Id.* at 238 (emphasis added). Second, the Court determined that "[t]here [wa]s no hint in the[] *legislative debates* that Congress intended for RICO treble-damages claims to be excluded from the ambit of the . . . [Federal Arbitration] Act." *Id.* (emphasis added). Third, the Court concluded that there was no "irreconcilable conflict between arbitration and RICO's underlying purposes" (*id.* at 239), and that "the public interest in the enforcement of RICO" did not preclude arbitration of RICO claims. *Id.* at 236-40.

McMahon is hardly an outlier. In recent years, this Court has upheld arbitration agreements relating to claims

arising under a variety of other statutes.[5] Indeed, since the overruling of *Wilko* in *Rodriguez de Quijas*, it can be said that this Court has not discerned an intention by Congress to preclude the arbitration of *any* federal statutory claim. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 S. CT. REV. 331, 377 (1996) ("In light of *Mitsubishi*, *Rodriguez de Quijas* [and] *Gilmer* . . . it is not clear that there remains any private claim of federal right that cannot be diverted into an arbitral tribunal").

In each of these cases, this Court has adhered to the rule in *Prima Paint*—and to the text of Section 4—by entertaining, at the motion to compel stage, the threshold issue of whether Congress intended claims arising under the statute at issue to be arbitrable at all. It did not engage in a searching inquiry of the particular terms of the parties' agreements, nor review the merits of the asserted claims. As in *Prima Paint*, *John Wiley*, and *Flair Builders*, it merely sought to determine the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 400) by ascertaining whether Congress sought to preclude arbitration of every single claim under the statute in question.

3. Aside from being compelled by the statutory text and this Court's precedents, the presumptive division of authority between courts and arbitrators reflected in Section 4 and in this Court's cases serves important federal interests. First, the presumption ensures that federal courts will not be required to resolve legal and factual issues prematurely. By confining its consideration to only those issues that will determine in which forum a dispute will be heard, a court avoids entanglement with factual and legal merits-related issues that the arbitral proceeding might render ultimately unnecessary to decide.

Here, for example, the issue that the district court decided—the validity of waiving some of RICO's remedies—

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[5] *See, e.g.*, *Gilmer*, 500 U.S. at 24 (ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).

may never need to be considered if respondents do not prevail in arbitration on the merits of their RICO claims. Even then, the arbitrator might conclude that the punitive damages exclusion does not apply to RICO "treble" damages or that the waiver is legally unenforceable, as respondents contend. Like the ripeness doctrine, the presumption therefore operates "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," particularly when those disagreements are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Prod. Corp.*, 473 U.S. 568, 580-81 (1985).[6]

Second, the presumption helps to effectuate the FAA's purpose "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Requiring district courts to entertain any and every claim that could conceivably bear on arbitrability would transform the expedited review contemplated by Section 4 into a slow, cumbersome process, leading to "delay and obstruction" in the courts (*Prima Paint*, 388 U.S. at 404), and "frustrat[ing] the statutory policy of rapid and unobstructed enforcement of arbitration agreements" (*Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23). By requiring a district court to consider only the threshold arbitrability issues of the existence and scope of an arbitration agreement, however, Congress' goal to provide prompt enforcement of arbitration agreements will be advanced.

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[6] Section 10 of the FAA affords courts an opportunity to review arbitral awards, albeit under a deferential standard of review. *See* 9 U.S.C. § 10 (enumerating grounds on which district court may set aside an arbitration award and stating that awards can be vacated if arbitrators "exceeded their powers"); *see also* 9 U.S.C. § 11 (listing grounds for modifying and correcting arbitral awards). This Court has recognized that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232).

Third, the presumption advances the likely intentions of the parties. By entering into an arbitration agreement, the parties "grant[] to the arbitrator the authority to interpret the meaning of their contract's language." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 61 (2000). Part of what the parties have "'bargained for' [is] the 'arbitrator's construction' of their agreement." *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)). To give effect to that bargain, this Court has made clear that it will "set aside the arbitrator's interpretation of what their agreement means only in rare instances." *Eastern Associated Coal Corp.*, 531 U.S. at 62. Section 4 respects the intentions of the parties by limiting the district court's consideration to threshold issues of arbitrability only and by assigning to the arbitrator the task of interpreting the parties' agreement in the course of resolving the merits of their dispute.

B. The Validity Of A Remedial Waiver Is Not A Threshold Issue Of Arbitrability.

Respondents' attack on the parties' waiver has *nothing* to do with the "making" of the agreement to arbitrate, or with the validity of the arbitration clause itself, but rather goes to the subsidiary (and manifestly contingent) issue of the remedies available to respondents in the event they ultimately prevail on their RICO claims. Section 4—as interpreted by *Prima Paint* and its progeny—requires that issue to be decided by the arbitrator in the first instance.

1. Respondents seek to avoid that conclusion by relying on the "two-step inquiry" undertaken in *Mitsubishi*, *McMahon*, and *Gilmer*. *See* Resp. Br. in Opp. at 9-10. Respondents rely principally on the passage in *Mitsubishi* stating:

> In sum, the Court of Appeals correctly concluded a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the par-

> ties' agreement foreclosed arbitration of those claims.

Mitsubishi, 473 U.S. at 627-28; *see also Gilmer*, 500 U.S. at 20-21; *McMahon*, 482 U.S. at 226-27. According to respondents, the second step of that inquiry authorizes courts—when reviewing a motion to compel arbitration under Section 4—to entertain *any* challenge to an arbitration agreement, so long as it is assertedly founded on external "legal constraints," and in particular respondents' generalized assertions of congressional "policy" or "intent." Opp. 12 n.3.

Respondents' reading of the second step of the *Mitsubishi* inquiry is vastly overbroad and cannot be reconciled with the text of Section 4 or with *McMahon*. To begin with, the core holding of *McMahon* is that *no* "external" "legal constraint" prohibits arbitration of RICO claims. The "two-step inquiry" to which respondents advert has already been undertaken—and resolved against respondents—in *McMahon*.

In any event, the second step of the *Mitsubishi* inquiry does not authorize courts to engage in a free-wheeling inquiry into every conceivable defense to arbitrability. *See McMahon*, 482 U.S. at 227 (stating that issue is limited to whether "Congress intended to make an exception to the Arbitration Act for claims arising under . . . the statute" in question); *Gilmer*, 500 U.S. at 26 (issue is whether "Congress intended to preclude a waiver of a judicial forum for" claims arising under the statute at issue). The second-step of the *Mitsubishi* inquiry asks only whether any limitation grounded in positive law *categorically* exempts particular statutory claims from the reach of the FAA. *See McMahon*, 482 U.S. at 227; *see also Gilmer*, 500 U.S. at 26. It does not confer unbridled discretion on district courts to entertain case-by-case "public policy" defenses to arbitrability grounded on the particular terms of the parties' agreement.

That is why respondents err in suggesting that the *Mitsubishi* "two-step inquiry" expands the limited scope of issues that can be considered under Section 4. The defenses to arbitration asserted in *Gilmer*, *McMahon*, and *Mitsubishi* are best

understood as having been directed to the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 402), because each of those cases was concerned with whether Congress by "statutory directive" had foreclosed arbitration for the *entire* "category" (*Mitsubishi*, 473 U.S. at 627) of claims that could be asserted under the statute in question. What the Court sought to determine was whether "[C]ongress[] inten[ded] to make an exception to the Arbitration Act for RICO claims," Sherman Act claims, and ADEA claims (*McMahon*, 482 U.S. at 242)—an exception that would make *any* agreement to arbitrate those claims invalid. That question presented a threshold issue of arbitrability in the most basic sense. Respondents' challenges to limitations on the damages that might ultimately be recoverable in an arbitration proceeding, by contrast, are analytically distinct from the contention that Congress intended to preclude any claims under the statute at issue from being arbitrated *at all*.

Indeed, virtually *any* defense to arbitration could be inventively recharacterized as a defense emanating from abstract "congressional policies." The multiplicity of issues that could be raised at the motion to compel stage under such a regime would contradict the text of Section 4 and frustrate Congress' goal "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22; *cf. Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) ("prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate").

2. Nor can respondents find support for their position in *Green Tree Financial*. *Green Tree Financial* held that the mere fact that an arbitration clause is silent with respect to the allocation of costs does not by itself render the arbitration agreement unenforceable. 531 U.S. at 91. Because the case was decided on appeal from an order denying a motion to compel arbitration, respondents suggest that the Court implicitly accepted the proposition that "public policy" defenses to arbitration can appropriately be raised with the district court in the first instance. Opp. at 8. But *Green Tree Finan-*

cial cannot be read as establishing a blanket rule that any defense to arbitration founded on an asserted federal or congressional "policy" should be decided by courts in the first instance. To begin with, the issue of whether the arbitrator should decide the "expense" argument was not raised in *Green Tree Financial*. Thus, *Green Tree Financial* cannot be dispositive on that question. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) ("questions which merely lurk in the record are not resolved, and no resolution of them may be inferred").

More importantly, *Green Tree Financial* involved a claim that the arbitral forum itself was not reasonably available to one of the parties, because of costs associated with arbitration. Requiring a party to raise such an "accessibility" argument in a tribunal that party alleges is not accessible would potentially deprive that party of the opportunity to raise its challenges to the arbitration agreement. That claim—which essentially challenges the arbitration clause *itself* as unconscionable—is analogous to the type of inquiry permitted by *Prima Paint*. In any event, that principle simply has no application here. Here, there is *no* risk that the party resisting arbitration will be deprived of an opportunity to assert its challenges to the arbitration agreement. Indeed, in a ruling from which respondents did not appeal, the district court found that respondents are "sophisticated actors" and was "unpersuaded" that respondents' "statutory claims will not be vindicated in an arbitration forum due to excessive filing fees and costs." *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 998 (S.D. Fla. 2000). Respondents may not be able to obtain *judicial* review of their challenge to the punitive damage waiver until the arbitration has been concluded, but the forum accessibility concerns that justified front-end judicial review under Section 2 in *Green Tree Financial* are not present here. *Green Tree Financial* simply does not advance respondents' cause.

3. In short, this Court's decisions in *Mitsubishi*, *McMahon*, *Gilmer*, and *Green Tree Financial* do not establish any sort of "exception" to Section 4 of the FAA. Like *Prima*

Paint, *John Wiley*, and *Flair Builders*, those cases stand only for the proposition that courts should decide threshold issues of arbitrability, leaving other issues to the arbitrator to resolve in the first instance. Under *no* reading of Section 4 can respondents' challenge to the contractual limitations on the remedies that ultimately might be—or might not be—awarded be construed as going to the validity "of the arbitration clause itself" (*Prima Paint*, 388 U.S. at 402). Accordingly, respondents' challenge does not constitute a threshold issue of arbitrability and should not have been decided by the district court in the first instance. The court of appeals' conclusion to the contrary must be reversed.

II. AGREEMENTS THAT PRECLUDE ARBITRATORS FROM AWARDING "PUNITIVE" DAMAGES ARE VALID AND ENFORCEABLE IN BOTH ARBITRAL AND JUDICIAL PROCEEDINGS.

Even if it had been proper for the court of appeals to rule upon the validity of the parties' waivers of "punitive" and "extracontractual" damages, reversal nonetheless would be warranted. The court of appeals erred in concluding that the arbitration agreements preclude the arbitrator from awarding treble damages on respondents' RICO claims. By their terms, the parties' agreements do not even purport to deprive any party of the right to seek "treble damages" under RICO—they ban "punitive" and "extracontractual" damages only—and thus the agreements can be enforced according to their terms without implicating any congressional "policy" about the waiver of statutory remedies. In any event, even assuming the parties' agreements *did* preclude an award of treble damages under RICO, those agreements would be valid and enforceable—in both arbitral and judicial proceedings.

A. The Parties' Agreements, When Properly Construed, Do Not Preclude An Award Of Treble Damages.

The court of appeals' conclusion that the parties' arbitration agreements violate congressional "policy" was premised on its determination that the arbitration agreements forbid the award of treble damages to a RICO plaintiff. That determination was erroneous. Properly construed, the parties' arbitration agreements do *not* preclude the arbitrator from awarding treble damages under RICO. Instead, the agreements preclude arbitrators from awarding "punitive or exemplary damages" ((Pet. App. 62) (Kelly-United)), "extracontractual damages of any kind, including punitive or exemplary damages" ((Pet. App. 63) (Porth-United)), and "punitive damages" ((Pet. App. 60-61) (Breen-PacifiCare and Book-PacifiCare)).

As this Court recognized in *McMahon*, treble damages under RICO are primarily designed to *compensate* an injured party rather than to punish a wrongdoer. *See McMahon*, 482 U.S. at 240. In rejecting the contention that arbitration of RICO claims would undermine the "public policy" goals served by the statute, the Court explained that RICO's treble-damages provision serves a private, "remedial" role and that its "policing function, although important," was "secondary." *Id.* at 241-42; *see also id.* at 240 ("The legislative history of § 1964(c) reveals [an] emphasis on the remedial role of the treble-damages provision"). Indeed, the Court distinguished RICO claims from Sherman Act claims in that respect, noting that the "private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff" because RICO actions "are seldom asserted against the archetypal intimidating mobster" in an effort to advance the statute's aim to "fight against organized crime," but are instead most commonly "brought against legitimate enterprises." 482 U.S. at 241-42 (quotations and citations omitted). The fact that RICO allows for accumulated recovery simply does not convert its otherwise "remedial" scheme into a "punitive" one.

McMahon makes clear that treble damages under RICO are not properly characterized as "punitive" or "exemplary" damages within the meaning of the parties' arbitration agreements. Indeed, the distinction between punitive and treble damages makes sense "from the standpoint of the parties' expectations when they entered the arbitration agreement." *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 317 (5th Cir. 2002). "[S]tatutory multiple damages differ from . . . common law punitive damages in that punitive damages involve no fixed sum or limit." DAN B. DOBBS, LAW OF REMEDIES § 3.12 at 543 (2d ed. 1993). Common law punitive damages "are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded," while treble damages "represent a mere mathematical expansion of the actual damages calculated by the arbitrator." *Investment Partners*, 298 F.3d at 317. For that reason, private parties might well exclude common law punitive damages but nonetheless vest the arbitrator with authority to award any treble damages authorized by statute. Construing the terms "punitive" and "exemplary" as excluding RICO treble damages thus is consistent with this Court's construction of RICO (*see McMahon*, 482 U.S. at 241) and with the parties' likely intentions.[7]

Each of the arbitration agreements in this case could plausibly be read to permit an arbitrator to award every form of relief afforded by RICO, *including* treble damages. By so interpreting the parties' arbitration agreements, respondents' objections to arbitration would be rendered irrelevant, and the arbitration agreements could be enforced according to their terms without implicating any "public policy" concerns about limitations on statutory remedies.

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[7] Similarly, the term "extracontractual" is a term of art that would preclude the arbitrator from awarding non-economic damages on contract-based claims but would not prevent an award of treble damages under RICO. *See* DAN B. DOBBS, LAW OF REMEDIES § 12.1(1) at 753 (2d ed. 1993) ("Punitive damages and mental anguish damages are . . . considered 'extracontractual'").

B. In Any Event, No Congressional Policy Precludes Parties From Agreeing To Waive Treble Damages Under RICO.

Even assuming that the parties' agreements are best read as preventing an arbitrator from awarding treble damages to a RICO plaintiff, those agreements would be enforceable. As this Court has repeatedly recognized, one of "[t]he preeminent concern[s] of Congress in passing the [Federal Arbitration] Act" was to ensure that arbitration agreements were "rigorously enforce[d]" (*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)), like other contracts, "*according to their terms*, and according to *the intentions of the parties*" (*First Options*, 514 U.S. at 947 (citation and quotation omitted) (emphases added)).

1. This Court has repeatedly held that under the FAA parties are free "to structure their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). In *Volt*, for example, this Court held that the FAA did not preempt a California statute authorizing a trial court to stay arbitration proceedings pending resolution of related litigation, because the parties had agreed that their arbitration agreement would be governed by California law. Indeed, even though the FAA did not authorize a trial court to enter a stay in such circumstances, and even though such a stay would have deferred prompt and expeditious resolution of the arbitrable claims, this Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" and that "the federal policy is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate." *Id.* at 476 (emphasis added). To invalidate the election of California law in the parties' agreement, the Court concluded, "would be quite inimical to the FAA's primary purpose." *Id.* at 479.

Volt is merely illustrative of the deference afforded to parties to structure their arbitration agreements "as they see fit" (*Volt*, 489 U.S. at 479) under the FAA. Parties are obviously free to exclude claims from an agreement to arbitrate

(*see Mitsubishi*, 473 U.S. at 625), and they are free to specify that an *arbitrator*—not a court—must decide threshold issues of arbitrability in the first instance (*see First Options*, 514 U.S. at 943). Indeed, this Court has concluded—at least with respect to state-law claims—that parties can freely waive their right to punitive recoveries. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57 (1995) ("if the contract [in effect] says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). As the lower courts have recognized, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.) (collecting authorities).

What the FAA does *not* permit is the invalidation of arbitration agreements under "laws applicable *only* to arbitration provisions." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). The entire purpose of the FAA was "'to revers[e] centuries of judicial hostility to arbitration agreements [by] plac[ing] arbitration agreements upon the *same footing* as other contracts.'" *McMahon*, 482 U.S. at 225 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)) (emphasis added). Thus, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Any legal principle—including 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." *Casarotto*, 517 U.S. at 685 (internal brackets and quotation omitted).

The FAA's nondiscrimination principle seeks to ensure equal treatment between agreements to arbitrate and any other agreements enforceable in federal (or state) court. Thus, the district court and court of appeals erred in suggesting that arbitration agreements are merely forum selection

clauses that cannot contain any substantive waivers of statutory rights. *See* Pet. App. 22 (stating that remedies in arbitration must be "equivalent" to court remedies). Although this Court has stated that "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral, rather than a judicial, forum" (*Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628)), it was merely describing the ordinary consequences of an arbitration agreement, *not* declaring a federal policy prohibiting parties from waiving any substantive rights in arbitration. Congress has *never* evidenced that intention—under the FAA, RICO, or any other federal statute.

To the contrary, the FAA's nondiscrimination principle makes clear that if parties can lawfully waive substantive rights in federal court, they also can waive those rights in an arbitration agreement. Indeed, to deny enforcement in an arbitration agreement of a waiver that would be enforceable in federal court would be to indulge the very "hostility" and "outmoded" suspicion of arbitration agreements the FAA was enacted to eradicate. *Rodriguez de Quijas*, 490 U.S. at 481; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). Such a rule "would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent." *Casarotto*, 517 U.S. at 686 (quotation and citation omitted).

2. That principle controls this case. This Court has long recognized that—in cases litigated in a judicial forum—"'[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.'" *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (quoting *Shutte v. Thompson*, 15 (Wall.) 151, 159 (1873)). Indeed, "absent some affirmative indication of Congress' intent to preclude waiver, [this Court] ha[s] presumed that statutory provisions are subject to waiver by *voluntary agreement of the parties*." *Mez-*

zanatto, 513 U.S. at 201 (emphasis added).[8] RICO was enacted against this background "presumption of waivability" (*id.* at 204), and thus a RICO plaintiff is as much at liberty to waive his right to treble damages as is a criminal defendant to waive protections afforded by the Constitution.

This Court has repeatedly held that parties in a judicial forum are free to waive their right to statutorily prescribed remedies. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), for example, the Court concluded that a private plaintiff could validly waive his right to an award of attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 ("Fees Act"), as part of a negotiated settlement. The Court explained that nothing in the text or legislative history of the Fees Act "support[ed] . . . the proposition that Congress intended to ban all fee waivers," notwithstanding the fact that Congress had established fee awards "as an integral part of the remedies necessary to obtain compliance with civil rights laws" and to add "to the arsenal of remedies available to combat violations of civil rights." *Id.* at 730-32. The Court rejected the contention that such waivers could "deter attorneys from representing plaintiffs in civil rights suits," noting in particular that fee proponents had "not offered to *prove* that petitioners' tactics [in proposing a settlement with no fee award] . . . implemented a . . . policy designed to frustrate the objectives of the Fees Act." *Id.* at 740 (emphasis added).

As was true of the Fees Act in *Evans*, there is nothing in RICO's text or legislative history to suggest that Congress intended to preclude parties from waiving the right to recover

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[8] In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), this Court held that employees could not waive the statutory entitlement to liquidated damages recoverable from an employer who violates the minimum wage or maximum hour requirements of the Fair Labor Standards Act of 1938 ("FLSA") because "the structure and legislative history of the FLSA evinced a specific 'legislative policy' of 'preventing private contracts' on such matters." *Mezzanatto*, 513 U.S. at 206 n.4 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 706). Nothing in the text, structure or history of RICO evinces a similar intention to prevent private bargaining.

treble damages. *See McMahon*, 482 U.S. at 240-42. Indeed, at no stage in this case have respondents ever identified the source in positive law that ostensibly "evidences" a congressional "policy" to preclude arbitration of RICO claims when treble damages are unavailable. The mere fact that Congress *authorized* a treble-damages remedy under RICO does not mean that Congress deemed that remedy to be so indispensable to RICO's goals that it intended to preclude arbitration whenever that remedy was unavailable, just as the fact that Congress expressly authorized a judicial forum for resolution of claims under Section 12(2) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 did not mean that Congress intended to preclude non-judicial resolution of those claims. *See Rodriguez de Quijas*, 490 U.S. at 482; *McMahon*, 482 U.S. at 227-28.

Respondents thus are left to contend that "the restricted remedies afforded by the arbitration clause" somehow conflict with the "public policy" interest in RICO enforcement. Opp. 11. But *McMahon* itself makes clear that RICO's treble-damages provision was enacted primarily for the "remedial" purpose of providing *compensation* to injured parties, and that the goal of fighting organized crime through private civil claims was merely "secondary." *Id.* at 242. Indeed, Congress has not deemed the treble-damages remedy to be so critical to RICO's deterrent aims that it has authorized the Attorney General to seek such relief. *See* 18 U.S.C § 1964(c); *United States v. Bonnano*, 879 F.2d 20, 26 (2d Cir. 1989) (concluding that "Congress did not intend to authorize treble damage actions by the United States pursuant to 1964(c)").[9]

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[9] Indeed, if any congressional "policy" has been contravened in these proceedings, it is the policy forbidding parties to circumvent otherwise enforceable arbitration agreements through strategic pleading exercises. *See* 9 U.S.C. § 2. Respondents have effectively thwarted the FAA's policy favoring arbitration by asserting boilerplate conspiracy and aiding-and-abetting claims against nonsignatories to the arbitration agreements. Respondent Dr. Breen, for example, entered into contracts containing arbitration clauses with Blue Cross of California, Healthnet, and peti-

In any event, whatever incidental effect enforcement of RICO's treble-damages provision might have on the public interest does not render that provision unwaivable, for it simply "is *not* true that any private right that also benefits society cannot be waived." *New York v. Hill*, 528 U.S. 110, 117 (2000) (emphasis in original). The vindication of *every* statutory right ordinarily confers at least *some* benefit on the public, but those incidental effects do not overcome "the background presumption of waivability" (*Mezzanatto*, 513 U.S. at 206) applicable to rights enacted for the benefit of private parties. Society's interest in enforcement of RICO's treble damages provision simply is not "part of the unalterable statutory policy" of RICO (*Hill*, 528 U.S. at 117) (quotation and citation omitted)—as *McMahon* expressly and emphatically held. That is why the statutory entitlement to treble damages can be waived in federal court, and why *a fortiori* it can be waived in an agreement to arbitrate. *See* 9 U.S.C. § 2; *Casarotto*, 517 U.S. at 687. Like any other agreement enforceable in federal court, the parties' arbitration agreements should have been enforced "according to their terms." *First Options*, 514 U.S. at 947. The court of appeals' failure to do so warrants reversal.

C. Respondents' RICO Claims Must Be Arbitrated Even If The Remedial Waivers Are Unenforceable.

In any event, even assuming that the remedial waivers in the parties' arbitration agreements are unenforceable, respondents would still be required to arbitrate their RICO claims. The principles of severance applicable to contracts

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tioner PacifiCare. Yet by asserting RICO conspiracy and aiding-and-abetting allegations against each defendant for facilitating the other defendants' alleged breach of their contractual obligations to Breen, Breen is permitted to litigate RICO claims against *all three* defendants, effectively depriving *all three* defendants of the principal benefit of their respective arbitration agreements—*i.e.*, the speedy and economical arbitral resolution of their business disputes with physicians.

governed by the FAA would require the limitations provisions to be severed from the rest of the arbitration agreement. The parties thus would remain obliged to arbitrate the RICO claims, but the arbitrator would be empowered to award treble damages.

The FAA "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the meaning of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. That body of federal arbitrability law requires application of "the ordinary state-law principles that govern the formation of contracts" (*First Options*, 514 U.S. at 944), but with due regard for the "liberal"—indeed, the "emphatic" (*Mitsubishi*, 473 U.S. at 631)—"federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

Those principles require, in the event the remedial limitations are deemed unenforceable, that the offending provisions be severed either in accordance with the applicable state's contract law (*see Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680-82 (8th Cir. 2001) (concluding that, under Missouri law, provisions barring award of punitive damages were severable)), or—if state law would not provide for severance in the circumstances—by operation of the federal common law of arbitrability, which demands that arbitration agreements be construed liberally in favor of arbitrability. *See First Options*, 514 U.S. at 945. Indeed, a state law that did *not* authorize severance likely would be preempted by the force of the FAA's command to give effect to the parties' unambiguous selection of an arbitral forum. *See Southland Corp.*, 465 U.S at 16 ("Congress intended to foreclose state [law] attempts to undercut the enforceability of arbitration agreements").

The district court and court of appeals held—apparently as a matter of federal common law—that an arbitration agreement that contains a purportedly invalid limitation on punitive damages renders the agreement to arbitrate itself unenforceable. That rule is predicated on the Eleventh Circuit's

belief that to enforce arbitration agreements notwithstanding such infirmities would create incentives "to include unlawful provisions in . . . arbitration agreements." *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001). But taken to its logical conclusion, the Eleventh Circuit's severance rule would require invalidation of arbitration agreements whenever those agreements contained *any* unenforceable terms. That result cannot possibly be reconciled with this Court's oft-repeated command to construe agreements in favor of arbitrability, particularly when—as is true here—the agreements leave no room to doubt that the parties intended to resolve "any disputes" (Pet. App. 62-63) through *arbitration*. The invalidation of the parties' remedial waivers would do *nothing* to vitiate the parties' unmistakable election of an arbitral over a judicial forum, and to honor that contractual intent requires arbitral resolution of the RICO claims *even if* the remedial waivers are deemed invalid.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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