

No.

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IN THE  
**Supreme Court of the United States**

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BUCKEYE CHECK CASHING, INC.,

*Petitioner,*

v.

JOHN A. CARDEGNA AND DONNA REUTER,

*Respondents.*

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**On Petition for Writ of Certiorari  
to the Supreme Court of Florida**

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**PETITION FOR WRIT OF CERTIORARI**

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### **QUESTION PRESENTED**

Whether the Florida Supreme Court erred by holding, consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals, that the Federal Arbitration Act allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality.

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Buckeye Check Cashing, Inc. hereby states that it has no parent corporation, and that no publicly traded company owns 10% or more of its stock.

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## INTRODUCTION

Almost forty years ago, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), this Court held that the Federal Arbitration Act (“FAA”) does not allow a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) was fraudulently induced. Such a claim, the *Prima Paint* Court explained, must be presented to the arbitrators in the first instance, because there was no question that the parties had actually made an agreement to arbitrate. Thus, once it is clear that “the making of the agreement for arbitration ... is not in issue,” a court may not entertain a challenge to the validity of the underlying contract.

That principle is controlling here, because respondents are challenging the validity of their underlying contracts with petitioner, but their challenge does not implicate “the making of the agreement for arbitration.” Respondents neither deny that they assented to an arbitration agreement, nor challenge the arbitration agreement itself as illegal. Rather, respondents contend only that the underlying contracts are illegal as usurious. Under *Prima Paint*, that challenge must be resolved in the first instance by an arbitrator, not a court.

The Florida Supreme Court (like the Alabama Supreme Court in *Alabama Catalog Sales v. Harris*, 794 So. 2d 312, 314 n.2, 316-17 (Ala. 2000)), however, attempted to distinguish *Prima Paint* on the ground that the challenge there (fraud in the inducement) would have rendered the underlying contract *voidable* under state law, whereas the challenge here (illegality) would render the underlying contract *void* under state law. But, as Justice Cantero noted in dissent below (and as Justices See and Lyons noted in dissents in the Alabama case), that is a distinction without a difference. Whether the underlying contract is alleged to be voidable or void as a matter of *state* law has nothing to do the real issue—whether the challenge to the underlying contract implicates “the making of the agreement

for arbitration” as a matter of *federal* law. Not surprisingly, thus, all six federal courts of appeals that have considered this issue have concluded that a party cannot avoid arbitration under *Prima Paint* by challenging the underlying contract (as opposed to the arbitration clause itself) as illegal. See *Jenkins v. First Am. Cash Advance of Ga., LLC*, No. 03-16329, \_\_\_ F.3d \_\_\_, 2005 WL 388269 (11th Cir. Feb. 18, 2005); *Bess v. Check Express*, 294 F.3d 1298, 1304-06 (11th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (4th Cir. 2002); *Burden v. Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (6th Cir. 2001); *Harter v. Iowa Grain Co.*, 220 F.3d 544, 550 (7th Cir. 2000); *3H & Assocs., Inc. v. Hanjin Eng’g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at \*2 (9th Cir. Sept. 3, 1998) (unpublished); *Lawrence v. Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (5th Cir. 1987). As these courts recognize, *Prima Paint* establishes as a matter of *federal* law that the validity of the arbitration clause is severable from the validity of the underlying contract.

Accordingly, this petition squarely presents a conflict on whether the FAA allows a party to avoid arbitration by challenging the underlying contract as illegal, and hence void *ab initio*, under state law. The Florida and Alabama Supreme Courts have answered that precise question of federal law in a manner that (as the dissent below noted) “disregards controlling federal law and the federal preference for enforcing arbitration clauses,” App. 26a. And given that the Eleventh Circuit is among the contrary federal jurisdictions, the upshot is the intolerable situation that a defendant in Florida or Alabama can enforce its federal arbitration rights in the face of an illegality challenge if sued in a federal court, but not in the state court down the street. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (noting that such disuniformity would “encourage and reward forum shopping” antithetical to the FAA). Because the decision below not only deepens an entrenched conflict between state courts of last resort and federal appellate courts

on a matter of federal law, but also evinces the very hostility to arbitration that motivated the FAA in the first place, this Court's review is warranted.

### **OPINIONS BELOW**

The Florida Supreme Court's decision is reported at \_\_\_ So. 2d \_\_\_, 2005 WL 106966, and reprinted in the Appendix ("App.") at 1a-26a. The Florida District Court of Appeal's decision is reported at 824 So. 2d 228, and reprinted at App. 27a-32a. The Florida trial court's unreported decision denying petitioner's motion to compel arbitration is reprinted at App. 33a-34a.

### **JURISDICTION**

The Florida Supreme Court rendered its decision on January 20, 2005. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **PERTINENT STATUTORY PROVISIONS**

Section 2 of the Federal Arbitration Act provides in pertinent part:

A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 4 of the Federal Arbitration Act provides in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any ... court ... for an order directing that such arbitration

proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration ... 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. ... If the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof.

9 U.S.C. § 4.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner Buckeye Check Cashing, Inc. provides check-cashing and payroll advance services across the country, including Florida. These services allow consumers to obtain immediate cash, either by cashing a check that is deposited forthwith or by writing a check to be cashed at some future date against forthcoming income. Petitioner is licensed to do business in Florida under that State's Check Cashing and Foreign Currency Exchange Act, Fla. Stat. § 560.301, and its conduct is comprehensively regulated under the State's Deferred Presentment Act, Fla. Stat. § 560.401 *et seq.*

Respondents John A. Cardegna and Donna Reuter entered into separate deferred presentment transactions with petitioner. As part of those transactions, the parties signed a Deferred Deposit and Disclosure Agreement that contained an arbitration clause providing in pertinent part:

Arbitration Provisions. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement ... or the validity, enforceability, or

scope of this Arbitration Provision or the entire Agreement (collectively “Claim”), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration Provision. ... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. Sections 1-16.

App. 2a, 27a-28a.

### **B. Proceedings Below**

Notwithstanding that broad arbitration clause (which expressly encompasses “[a]ny claim, dispute, or controversy ... relating to ... the validity, enforceability, or scope of ... the entire Agreement,” App. 2a, 27a), respondents filed this putative class action against petitioner in Florida state court in February 2001. The complaint charges petitioner with “shylocking,” Compl. ¶ 61, and challenges the validity of the underlying contracts between respondents and petitioner under Florida law. Petitioner promptly moved to compel arbitration under the arbitration clause of those contracts.

The Florida trial court (Barkdull, J.) summarily denied the motion. App. 33a-34a. The court did not deny that respondents’ claims fell within the plain language of the arbitration clause, but relied on two Florida intermediate appellate decisions holding that a court, not an arbitrator, must resolve a challenge to the legality of the underlying contract. App. 34a (citing *Party Yards, Inc. v. Templeton*, 751 So. 2d 121 (Fla. Dist. Ct. App. 2000), and *FastFunding v. Betts*, 758 So. 2d 1143 (Fla. Dist. Ct. App. 2000)).

Petitioner immediately appealed that order, and the intermediate appellate court reversed. *See* App. 27a-32a. The court noted that respondents “did not argue that they did not

enter into the arbitration agreement, nor did they challenge the validity of the terms of the arbitration agreement.” App. 32a. Rather, the court explained, respondents “contend that the underlying contract is void ab initio because it is criminally usurious and, therefore, never existed at all.” App. 30a. Relying on the Eleventh Circuit’s decision in *Bess* (which in turn relied on this Court’s decision in *Prima Paint*), the court held that respondents’ challenge to the validity of the underlying contract must be resolved by an arbitrator, not a court, in the first instance. *See* App. 31a-32a.

Respondents then appealed that decision to the Florida Supreme Court, which—in a divided decision—again reversed. App. 1a-26a. The majority held that “an arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio.” App. 1a. *Prima Paint* was not controlling, the majority held, because the challenge to the underlying contract there (fraud in the inducement) would have rendered the contract *voidable* under state law, whereas the challenge to the underlying contract here (illegality) would have rendered the contract *void* under state law. App. 5a-6a. The majority acknowledged that this holding conflicted with the Eleventh Circuit’s decision in *Bess*, but asserted that “the case presently before us is distinguishable because *Bess* was expressly resolved under federal law, not state law principles.” App. 7a.

Justice Bell concurred specially to acknowledge “that the issue before us is one of federal law.” App. 9a. Justice Bell proceeded, however, to “disagree with the conclusions that have been reached” by every federal appellate court to consider the issue. *Id.* According to Justice Bell, “[t]he issue of the underlying contract’s legality must be determined by the courts before any claim or dispute arising out of the contract may be

referred to arbitration pursuant to the contract’s arbitration clause.” App. 12a.

Justice Cantero dissented, noting that “[t]he issue in this case is not whether a check-cashing contract is void as usurious,” but “*who decides* whether the contract is void—the arbitrator, as provided in the contract itself, or the court.” App. 13a (emphasis in original). That issue, Justice Cantero explained, is one of *federal* law under *Prima Paint*. App. 14a. Justice Cantero further noted that the void/voidable distinction on which the majority relied “is arbitrary and totally disconnected” from the language of the FAA. App. 17a. Indeed, he pointed out, “[i]n the last three years no fewer than three federal courts of appeals have decided the precise issue we confront today—whether, under the FAA, the issue of whether a check-cashing transaction is void as usurious is for the court or the arbitrator to decide,” and “[*e*]very one unanimously has held that the issue is one for the arbitrators.” *Id.* (referring to *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-38; and *Burden*, 267 F.3d at 489-90; emphasis in original). Justice Cantero concluded that “[w]e should follow *Bess*, *Snowden*, and *Burden*, which considered the identical issue under identical facts and held that, under the plain language of the FAA, the issue of whether a check-cashing transaction is usurious must be determined by the arbitrators.” App. 20a.

This petition follows.

**REASON FOR GRANTING THE WRIT****The Florida Supreme Court Erred By Holding, Consistent With The Alabama Supreme Court But In Direct Conflict With Six Federal Courts Of Appeals, That The FAA Allows A Party To Avoid Arbitration By Claiming That The Underlying Contract Containing An Arbitration Clause (But Not The Arbitration Clause Itself) Is Void For Illegality.**

The Florida Supreme Court erred by holding, consistent with the Alabama Supreme Court but in direct conflict with six federal courts of appeals, that the FAA allows a party to avoid arbitration by claiming that the underlying contract containing an arbitration clause (but not the arbitration clause itself) is void for illegality. That holding contravenes this Court's seminal decision in *Prima Paint*, which—as a matter of the “*federal substantive law of arbitrability*,” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added)—divests courts of authority to entertain a challenge to the validity of a contract that does not implicate “the making of an agreement for arbitration.”

Indeed, this Court granted *certiorari* in *Prima Paint* to decide “whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators.” 388 U.S. at 402. That issue previously had divided the lower courts. The Second Circuit had held that “arbitration clauses as a matter of *federal law* are ‘separable’ from the contracts in which they are embedded, and that where no claim is made that fraud was directed at the arbitration clause itself, a broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced by fraud.” *Id.* at 402 & n.8 (emphasis added; citing, *inter alia*, *In re Kinoshita & Co.*, 287 F.2d 951 (2d Cir. 1961); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362

U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960)). The First Circuit, in contrast, had held that “the question of ‘severability’ is one of *state* law, and that where a State regards such a clause as inseparable a claim of fraud in the inducement must be decided by the court.” *Id.* at 403 & n.9 (emphasis added; citing *Lummus Co. v. Commonwealth Oil Ref. Co.*, 280 F.2d 915, 923-24 (1st Cir. 1960)).

The *Prima Paint* Court squarely endorsed the Second Circuit’s approach. As the Court explained, “Congress has provided an explicit answer” to the question in the FAA, *id.* at 403, which directs courts to compel arbitration where “the making of the agreement for arbitration ... is not in issue,” 9 U.S.C. § 4. Under that provision, the Court held, “the making of the agreement for arbitration ... is not in issue” as a matter of *federal* law where a party to such an agreement challenges the validity of the underlying contract (as opposed to the validity of the arbitration clause itself). *See* 388 U.S. at 404 (“[T]he statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.”). Justice Black dissented on this point, noting that “[t]he Court here holds that the [FAA], *as a matter of federal substantive law*, compels a party to a contract containing a written arbitration provision to carry out his ‘arbitration agreement’ even though a court might ... hold the entire contract—including the arbitration agreement—void because of fraud in the inducement.” *See id.* at 407 (dissenting opinion; emphasis added).

In light of *Prima Paint*, it is not surprising that all six federal courts of appeals that have addressed the issue (the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits) have held that a party cannot avoid arbitration by challenging the legality of the underlying contract (as opposed to the arbitration clause itself). *See, e.g., Jenkins*, \_\_\_ F.3d at \_\_\_, 2005 WL 388269, at \*11-13; *Bess*, 294 F.3d at 1304-06; *Snowden*, 290 F.3d at 636-

38; *Burden*, 267 F.3d at 489-90; *Harter*, 220 F.3d at 550; *3H & Assocs.*, 1998 WL 657722, at \*2; *Lawrence*, 833 F.2d at 1161-62. Such a challenge, these courts have recognized, implicates “the *content* of the contracts, not their *existence*.” *Bess*, 294 F.3d at 1305 (emphasis in original); *see also Burden*, 267 F.3d at 490 (challenge based on illegality of underlying contract involves “the substance, rather than the existence” of that contract). Whether the underlying contract is deemed voidable or void as a matter of *state* law, thus, is beside the point. The only relevant question is whether, as a matter of *federal* law, the challenge implicates “the making of an agreement to arbitrate”; if not, *Prima Paint* requires the challenge to be resolved by an arbitrator, not a court, in the first instance.

The Florida Supreme Court (like the Alabama Supreme Court), however, expressly rejected that approach. According to the majority below, “[t]here is a key distinction between the claim in *Prima Paint* and the claim presently before us: in *Prima Paint*, the claim of fraud in the inducement, if true, would have rendered the underlying contract merely *voidable*,” whereas the claim of illegality here, if true, would render the contract “*void* from the outset” under state law. App. 5a-6a (emphasis modified); *see also Alabama Catalog Sales*, 794 So. 2d at 314 n.2, 316-17. The majority did not explain why that distinction should make any difference under the *federal* severability analysis adopted in *Prima Paint*. Rather, the majority asserted that the distinction between voidable and void contracts was meaningful as a matter of *state* law, on the ground that “if the underlying contract is held entirely void as a matter of law, all of its provisions, including the arbitration clause, would be nullified as well.” App. 6a; *see also id.* at 7a (“We conclude that Florida public policy and contract law prohibit breathing life into a potentially illegal contract by enforcing the included arbitration clause of the void contract.”).

