

No. 16-392

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

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

*Petitioners,*

v.

MANUEL H. LOPEZ III,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
Missouri Court of Appeals, Western District

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**RESPONDENT'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED**

Whether the Federal Arbitration Act preempts a decision of a state appellate court holding that arbitration may not be compelled because there is no applicable arbitration agreement, where the trial court's decision rested on a different ground, but the party seeking to compel arbitration conceded at argument that the appellate court could properly consider the existence and scope of the claimed arbitration agreement as part of its de novo appellate review.

**PARTIES TO THE PROCEEDING**

The name of the plaintiff in the courts below, and the respondent in this Court, is Manuel H. Lopez III.

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## INTRODUCTION

After a state trial court declined to compel respondent Manuel H. Lopez III to arbitrate claims against petitioner H&R Block, an intermediate state appellate court affirmed that order on the ground that there was no applicable agreement to arbitrate. Although the trial court's order had rested on a different ground (namely, that the claimed agreement to arbitrate was unconscionable), the question whether there was an applicable arbitration agreement was posed by H&R Block's own trial-court filings, and H&R Block conceded at oral argument that the court of appeals could address the issue.

H&R Block does not now argue that the court of appeals erred in holding that there was no agreement to arbitrate. Instead, it argues, contrary to its concession in the state court, that the state court should not have considered whether there was an agreement to arbitrate in the course of deciding the appeal. Indeed, H&R Block advances the novel and counterintuitive argument that the Federal Arbitration Act (FAA) precluded the state appellate court from even considering whether there was an applicable arbitration agreement in determining whether to reverse the trial court's order refusing to compel arbitration.

H&R Block's petition presents no issue meriting consideration by this Court. The intermediate state appellate court's decision reflects a garden-variety application of the principle that an appellate court can affirm a lower court on alternative grounds that are supported by the record, and H&R Block explicitly agreed below that the Court could consider whether an arbitration agreement existed and applied to the dispute. H&R Block thus waived any argument that

the FAA somehow prohibited the appellate court from considering whether there was an applicable arbitration agreement, and this Court lacks jurisdiction to consider issues not properly preserved in state courts.

H&R Block's assertion that the court of appeals adopted a rule of law hostile to arbitration is in any event meritless. The court of appeals adopted no principle of contract construction that discriminates against arbitration agreements. In addressing the existence and scope of an arbitration agreement before considering defenses to enforceability, the court of appeals followed precisely the procedural pathway laid down by this Court in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299–302 (2010).

H&R Block's claim that the decision conflicts with decisions of other courts is equally groundless. H&R Block can point to no decision of any court holding that the FAA preempts a state appellate court from considering whether an applicable arbitration agreement exists before addressing whether the alleged agreement is unconscionable.

Indeed, the position H&R Block's petition advocates is nonsensical. H&R Block does not assert that the state court's decision that there was no agreement to arbitrate Mr. Lopez's claims was erroneous. This Court has repeatedly held that arbitration under the FAA is strictly a matter of contract, and that a person cannot be compelled to arbitrate any dispute he has not agreed to arbitrate. *See, e.g., Granite Rock*, 561 U.S. at 299. When a state court has ruled that there is no agreement to arbitrate a claim, and the party seeking arbitration no longer contests the correctness of that ruling as a matter of substantive contract law,

the FAA's command that courts enforce agreements to arbitrate cannot possibly preempt the state court's refusal to order arbitration.

### STATEMENT

Respondent Manuel H. Lopez III purchased individual tax-return preparation services from H&R Block in 2011 and 2012. In common with hundreds of thousands of other H&R Block customers, H&R Block charged Mr. Lopez a "Compliance Fee" of \$2 in 2011 and \$4 in 2012. H&R Block deceptively labeled this charge a "Compliance Fee" and misleadingly described it to its customers as an "offset" of the costs incurred by H&R Block to comply with new U.S. tax preparation registration requirements. In fact, H&R Block's Compliance Fee charge was designed as a profit-generating scheme in which H&R Block would eventually collect \$48 million from its customers, but pay a mere \$8 million in actual costs incurred to comply with the new requirements—resulting in H&R Block pocketing a staggering \$40 million in ill-gotten profits.

In both 2011 and 2012, Mr. Lopez signed a standard-form Client Service Agreement (CSA) to have his tax returns prepared by H&R Block. Each agreement contained a dispute-resolution provision providing that any dispute a client had with H&R Block "shall be settled through binding individual arbitration unless you opt-out of this arbitration provision using the process explained ... below." Pet. App. 96a. The dispute-resolution provisions were not limited to disputes arising under the individual agreements containing them. Mr. Lopez did not opt out of the arbitration provision in the 2011 CSA, but did submit a proper and timely opt-out notice after signing the

2012 CSA. Under its plain terms, the 2012 dispute-resolution provision applied to any dispute that a client had with H&R Block, including disputes involving prior tax years, and required arbitration of such disputes only if the client did not opt out.

Mr. Lopez filed this action in a Missouri state court on behalf of a class of Missouri consumers that were victimized by H&R Block's Compliance Fee scheme, asserting claims for violations of Missouri's Merchandising Practices Act as well as common-law claims for money had and received and unjust enrichment. Invoking the 2012 agreement, H&R Block moved to compel arbitration of all of Mr. Lopez's individual claims, including those from both 2011 and 2012. H&R Block explicitly acknowledged that the 2012 agreement's dispute-resolution provision "supersede[s] the 2011 CSA arbitration clause ... and appl[ies] to all of [Lopez's] claims, including those from 2011." Pet. App. 6a.

H&R Block overlooked, however, that Mr. Lopez had opted out of arbitration under the 2012 agreement. When H&R Block belatedly discovered that Mr. Lopez had properly opted out of arbitration under the 2012 agreement, it changed its tune and asserted that the 2011 agreement remained applicable to his 2011 claims, while the 2012 agreement permitting him to litigate if he opted out was limited to the 2012 claims. H&R Block revised its motion to compel arbitration to apply only to the 2011 claims.

Ignoring that the 2012 agreement, by its own terms and by H&R Block's concession, superseded the 2011 agreement, the trial court denied H&R Block's motion to compel arbitration on the ground that the 2011 agreement was unconscionable. The Missouri

Court of Appeals, however, reversed that decision as incompatible with this Court’s decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), as well as Missouri Supreme Court decisions following *Concepcion*, see, e.g., *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. 2012), because it rested largely “on the public policy concern that consumers with small-value claims would be deprived of a meaningful remedy.” Pet. App. 37a.

On remand, the trial court again found the 2011 arbitration agreement unconscionable, this time based on the totality of relevant circumstances implicated by Mr. Lopez’s unconscionability challenge under ordinary state law principles. Pet. App. 48a-54a.

H&R Block again appealed the denial of its motion to compel arbitration. At oral argument before the Missouri Court of Appeals, the court focused considerable attention on the plain terms of the 2012 CSA’s dispute-resolution provision, which applies to all disputes a client has with H&R Block, not just those under that particular CSA, as well as on H&R Block’s initial admission that the arbitration clause of the 2012 CSA superseded the 2011 arbitration clause. Members of the panel therefore questioned “whether there is a contract for arbitration” applicable to Mr. Lopez’s dispute. Opp. App. 5a.<sup>1</sup>

H&R Block’s counsel argued that the 2011 arbitration agreement remained applicable to any dispute concerning the services performed in 2011, although

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<sup>1</sup> The argument was recorded but not officially transcribed. A transcript prepared by a court reporter for respondent’s counsel is reproduced in the Appendix to this brief (cited herein as “Opp. App.”) for the Court’s convenience.

he acknowledged that the 2012 agreement was not limited in its temporal scope and that H&R Block had admitted when it filed its first motion to compel arbitration that the 2012 agreement superseded the one from 2011. Opp. App. 4a–8a. Critically, when pressed by the court, H&R Block’s counsel explicitly conceded that the issue whether there was an operative agreement to arbitrate was properly before the court of appeals as part of its de novo review of the denial of the motion to compel arbitration:

Judge Martin: But now on that point where we’re faced with de novo review on motions to compel arbitrations, correct?

Mr. Adams: Yes.

Judge Martin: And in fact to the preliminary point we don’t even get to the issue of whether or not an arbitration agreement is enforceable or unconscionable unless you can prove that there was an agreement. In fact the disputes are within the scope of the agreement that is [unintelligible]?

Mr. Adams: That’s correct.

Judge Mitchell: And so we’re going to have to look at that issue. Isn’t that part of our obligation on de novo review?

Mr. Adams: You do. ...

Opp. App. 8a–9a.

H&R Block’s counsel did not assert at any point that Mr. Lopez had waived the issue whether, in light of the terms of the 2012 agreement and his valid exercise of his opt-out rights, there was an applicable agreement to arbitrate. Indeed, when he returned to the issue in rebuttal, H&R Block’s counsel again con-

ceded that the issue had been raised below, but was not “pursued” by the parties or raised in the first appeal. *Id.* at 32a. And he again acknowledged that the court of appeals’ review on the point was de novo. *Id.* at 33a.

On March 8, 2016, the Missouri Court of Appeals unanimously affirmed the denial of H&R Block’s motion to compel arbitration on grounds different from those offered by the trial court. Pet. App. 1a–14a. The court concluded that it “need not determine whether the arbitration provision in the 2011 CSA is unconscionable,” because “[a]ll of Lopez’s claims fall within the scope of the arbitration provision in the 2012 CSA as to which Lopez is conceded to have exercised his right to opt out.” *Id.* at 9a.

The court emphasized that in deciding a motion to compel arbitration, courts must consider whether an arbitration agreement exists, whether the dispute is within its scope, and whether there are defenses to its enforcement under applicable contract principles. *Id.* at 10a. The court further observed that “we do not address defenses to enforcement of an arbitration agreement unless we are first satisfied that an arbitration agreement exists and that the subject disputes are within its scope.” *Id.* at 10a–11a.

Addressing the antecedent question whether an arbitration agreement was applicable to the dispute, the court concluded that there was not. The court held that the 2012 agreement, which permitted Mr. Lopez to litigate disputes against H&R Block given his valid exercise of his opt-out rights, superseded the 2011 arbitration agreement. The court based its holding on the plain terms of the 2012 dispute-resolution provision, which H&R Block had conceded at argu-

ment was not limited in temporal scope to disputes arising under that contract. *Id.* at 11a.

The court also emphasized that H&R Block had admitted in its initial motion to compel that the 2012 agreement superseded the 2011 agreement with respect to arbitration. *Id.* at 6a, 12a. The court “agree[d] with H&R Block’s [initial] construction of the arbitration provision in the 2012 CSA,” and pointed out that “that construction was not subject to change merely because” H&R Block later realized that “Lopez exercised his right to opt-out after signing the 2012 CSA.” *Id.* at 12a. The court emphasized that the 2012 provision expressly “provides that all disputes ‘shall be settled through binding individual arbitration unless you opt-out of *this* arbitration provision.’” *Id.* at 13a (emphasis added by court).

The court concluded:

We are left with the inexorable conclusion that based on the plain language of the arbitration provision in the 2012 CSA, Lopez’s exercise of the right to opt-out following execution of the 2012 CSA operated as an opt-out for all disputes within the scope of the 2012 CSA’s arbitration provision. By necessary implication, that includes all of the claims Lopez has asserted in his lawsuit.

*Id.*

In so holding, the court explicitly observed that both parties had informed the court at argument that the issue had been raised below. *Id.* For that reason, the court concluded, it was appropriate for it to reach the issue given that its review was de novo and granted it authority “to affirm the trial court’s order and

judgment refusing to compel arbitration on any basis supported by the record.” *Id.* at 14a.

H&R Block unsuccessfully petitioned the court of appeals to rehear the case or transfer it to the Missouri Supreme Court. Pet. App. 55a. H&R Block then asked the Missouri Supreme Court to exercise its discretion to transfer the case to itself, and that court likewise denied discretionary review. Pet. App. 56a.<sup>2</sup>

### REASONS FOR DENYING THE WRIT

**I. H&R Block waived any argument that the court of appeals lacked authority to decide whether there was an applicable agreement to arbitrate, and this Court lacks jurisdiction under 28 U.S.C. § 1257 to address an issue waived before the state courts.**

The Missouri Court of Appeals’ decision to address whether the 2011 arbitration agreement had been superseded before resolving potentially difficult issues about its unconscionability rested on the propositions that Missouri appellate courts review trial courts’ decisions on motions to compel arbitration *de novo*, and that an appellate court may affirm a trial court’s judgment on alternative grounds supported by the

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<sup>2</sup> Although H&R Block asserts that the implication of the court’s decision may be that the trial court will adhere to its unconscionability judgment on remand and find the CSA’s arbitration provision unenforceable against the class, Pet. 20–21 n.9, the decision of which H&R Block seeks review here is confined to whether Mr. Lopez’s *individual* claims are subject to arbitration, and does not address either the certification of a class or whether any other members of the putative class are bound by the CSA’s arbitration provision.

record, regardless of the correctness of the trial court's own reasoning. *See* Pet. App. 9a. H&R Block did not contest either proposition below, and even now does not explicitly challenge them. H&R Block asserts in its petition, however, that the state court's application of those principles to reach the issue whether there was an agreement to arbitrate is preempted by the FAA.

At argument before the court of appeals, however, H&R Block expressly agreed that the court of appeals could and, indeed, should reach the issue as part of its *de novo* review. Opp. App. 8a–9a. In extensive questioning by the court on the issue, H&R Block's counsel never once suggested that the court could not address whether the dispute fell within the scope of any operative agreement to arbitrate in light of Mr. Lopez's valid exercise of his opt-out rights under the 2012 agreement. Nor did H&R Block then argue that Mr. Lopez had waived the issue. Rather, H&R Block's counsel argued the point on the merits, and explicitly conceded that the issue had been raised in the trial court and was within the scope of the appeals court's *de novo* review. *Id.* at 4a–9a, 32a–33a.

H&R Block's express concession that the question whether the 2011 arbitration agreement remained applicable was properly before the court of appeals bars it from now asserting that the FAA precluded the court of appeals from considering the issue. *See, e.g., Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013). Indeed, the timely presentation of a federal issue is a jurisdictional requirement in cases in which a state court's judgment is reviewed under 28 U.S.C. § 1257. *See Adams v. Robertson*, 520 U.S. 83 (1997). Missouri courts, in common with most appel-

late courts, treat concessions at oral argument as binding on a party, *see, e.g., Mercantile Trust Co. Nat'l Ass'n v. Jaeger*, 457 S.W.2d 727, 733 (Mo. 1970); *State ex rel. Chastain v. City of Kan. City*, 968 S.W.2d 232, 238 (Mo. Ct. App. 1998). It follows that points conceded at argument before the state court were not properly preserved below. Accordingly, H&R Block's agreement at argument below that the court of appeals was not barred from considering the existence and scope of an arbitration agreement before addressing unconscionability deprives this Court of jurisdiction over the question it now seeks to present.

This case, moreover, does not involve a mere failure to raise a timely objection below: H&R Block expressly told the court at argument that it could consider the existence and scope of an arbitration agreement as part of its *de novo* review, but now asserts that the FAA precluded it from doing so. Even leaving aside the question of jurisdiction under § 1257, this Court does not generally sit to address “problem[s] of the petitioner’s own making.” *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016). Missouri state courts likewise do not permit litigants to complain of supposed errors into which they have led the courts. *Morgan v. Kroger Grocery & Baking Co.*, 154 S.W.2d 44, 52 (Mo. 1941). Having told the state court it could address the issue, H&R Block cannot now ask this Court to say that the court erred in doing so.

**II. The state court did not adopt a rule of contract law that is hostile to arbitration or that conflicts with rulings of other courts on issues of federal law.**

Aside from being waived, H&R Block's claim that the decision in this case is preempted by the FAA be-

cause it is hostile to or discriminatory against arbitration is meritless and unworthy of review.

**A. The decision below adheres to this Court’s FAA jurisprudence and standard principles of appellate practice.**

This Court has held that under section 2 of the FAA, courts considering whether to enforce an arbitration agreement may not apply principles of state contract law that fail to put arbitration agreements on an equal footing with other contracts, or that reflect hostility to or discrimination against arbitration. *See, e.g., Concepcion*, 563 U.S. at 339–43. H&R Block does not claim that the substantive principles of contract law that the state court applied in holding that no arbitration agreement between the parties was in effect are hostile to or discriminatory against arbitration. Indeed, H&R Block does not now assert that the court’s decision on the merits was even incorrect.<sup>3</sup>

Instead, H&R Block contends that the state court erred in even considering the issue of the existence and scope of the claimed arbitration agreement before

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<sup>3</sup> H&R Block’s argument is thus fundamentally different from the arguments made by the petitioner in *Kindred Nursing Centers LP v. Clark*, No. 16-32, in which the Court granted certiorari on October 28, 2016, and the petition in *TAMKO Building Products, Inc. v. Hobbs*, No. 15-1318, which the Court appears to be holding pending a decision in *Kindred*. In both those cases, the petitioners assert that the state courts’ contract formation decisions reflected application of principles of *substantive* law that are hostile to arbitration. Regardless of whether the petitioner’s argument in *Kindred* is meritorious, the decision in *Kindred* will not control the outcome here, where H&R Block does not contest the substantive validity of the lower court’s decision that there is no applicable arbitration agreement.

considering defenses to its enforceability. But an appellate court’s consideration of whether there is an applicable arbitration agreement between the parties when it adjudicates an appeal from a decision declining to compel arbitration shows no hostility to or incompatibility with arbitration. Rather, considering that issue before determining whether arbitration should be compelled is entirely consistent with this Court’s holdings that “[t]he FAA reflects the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). Arbitration “is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

Based on these principles, this Court has expressly endorsed the exact procedure applied by the lower court in this case: Under “the proper framework for deciding when disputes are arbitrable under our precedents ..., a court may order arbitration of a particular dispute *only where the court is satisfied that the parties agreed to arbitrate that dispute.*” *Granite Rock*, 561 U.S. at 297 (emphasis added). Thus, “the court *must* resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce,” and the issues before the court “*always* include whether the arbitration clause was agreed to.” *Id.* (emphasis added).

Accordingly, when there is a genuine issue over whether an arbitration agreement exists or applies, a court’s consideration of whether to compel arbitration cannot be limited to whether the purported arbitration agreement is unconscionable or otherwise unen-

forceable, but must include whether there is an applicable agreement to arbitrate: “[O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties’ arbitration agreement *nor* ... its enforceability or applicability to the dispute is in issue.” *Id.* at 299. The intermediate state appellate court applied exactly that rule in this case. Despite *Granite Rock*’s express endorsement of the approach followed by the state court here, H&R Block does not even cite *Granite Rock*.

In addition to being fully consistent with, if not directly commanded by, *Granite Rock*’s construction of the FAA, the lower court’s decision followed from normal principles of appellate review that are in no sense hostile to or incompatible with arbitration. The proposition that an appellate court can affirm a lower court’s ruling on an alternative ground supported by the record and presented to the lower court has broad acceptance among both federal and state appellate courts, including both this Court, *see Jennings v. Stephens*, 135 S. Ct. 793 (2015), and the Missouri appellate courts, *see, e.g., Rouner v. Wise*, 446 S.W.3d 242, 249 (Mo. 2014); *Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 437 (Mo. 2013); *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. 2010). H&R Block does not suggest, nor could it, that this principle of appellate practice reflects impermissible hostility to arbitration.

The lower court’s decision also reflected the uncontested rule of Missouri appellate practice that trial court decisions on motions to compel arbitration are subject to *de novo* review on appeal. *See Robinson*, 364 S.W.3d at 510. That rule is also followed by feder-

al appellate courts, *see, e.g., Smallwood v. Allied Van Lines, Inc.*, 660 F.3d 1115, 1120 (9th Cir. 2011); *Donaldson Co., Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 730 (8th Cir. 2009); *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 531 (3d Cir. 2005); *Webb v. Investacorp*, 89 F.3d 252, 257 (5th Cir. 1996). Again, there can be no suggestion that this standard of appellate review is preempted by the FAA as somehow hostile to arbitration.

Together, these established principles—that arbitration cannot be compelled in the absence of an applicable agreement, that appellate review of an order disposing of a motion to compel arbitration is plenary, and that a trial court’s order can be affirmed on any proper basis supported by the record—establish the propriety of the court of appeals’ decisions to consider whether the dispute fell within the scope of any extant agreement to arbitrate before addressing unconscionability, and to affirm the order denying arbitration on the alternative ground that there was no applicable agreement to arbitrate.

**B. The state court did not adopt an inflexible rule of procedure that discriminates against arbitration agreements.**

Despite the consistency of the decision below with this Court’s FAA jurisprudence and normal principles of appellate procedures, H&R Block contends that the state court adopted a rule of decision that is preempted by the FAA because it treats arbitration clauses differently from other contracts. Specifically, H&R Block contends that the decision adopted an inflexible rule that an appellate court must always explicitly address the existence and scope of an arbitration agreement before considering an unconscionability

issue. H&R Block further argues that Missouri courts do not apply that supposed rule of appellate decision-making to other kinds of contracts, and that the rule conflicts with procedures applied by other state and federal courts. None of those erroneous contentions suffices to establish the existence of an issue meriting review by this Court.

H&R Block's assertion that the decision below reflects the definitive adoption by Missouri of the inflexible rule of procedure H&R Block reads into it is wrong. The court of appeals did not hold, as H&R Block suggests, that an appellate court must always *expressly* address whether there is an applicable arbitration agreement before resolving questions concerning an agreement's enforceability or unconscionability. A court can be satisfied that there is an applicable arbitration agreement if its existence and applicability is conceded, if the record contains no arguable support for the view that there is no applicable agreement, or, potentially, if a party is found to have waived any argument that there is no applicable agreement.<sup>4</sup> Read in the context of the proceeding in this case—not to mention common sense—the court of appeals' holding is simply that if there is substantial reason to doubt the existence of an applicable

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<sup>4</sup> H&R Block's repeated assertions that the court held that parties may not waive challenges to the existence and scope of arbitration agreements are flatly incorrect. The court nowhere mentioned any such rule, and H&R Block did not even assert that the issue had been waived when the issue arose at argument. Moreover, the court noted that both parties informed it that the issue had been raised in the trial court, Pet. App. 13a, and it emphasized that it could affirm only on a "basis supported by the record." *Id.* at 14a.

agreement to arbitrate, and the issue has been raised below sufficiently to create a record adequate to resolve it, the appellate court should satisfy itself that there is an applicable agreement before addressing unconscionability or other difficult questions concerning whether the agreement should be enforced.

In any event, the decision is only that of an intermediate state court, and the Missouri Supreme Court's denial of discretionary review, while rendering the lower court's decision final for purposes of this Court's jurisdiction, does not reflect a precedential ruling adopting the lower court's opinion, nor freeze the opinion in place as the law of the state of Missouri. Other districts of the Missouri Court of Appeals could disagree with the decision if they thought it announced the rule H&R Block attributes to it, and the Missouri Supreme Court could take up the matter if a conflict among the lower courts arose or if the state high court otherwise thought the issue was one of sufficient public importance.

H&R Block, moreover, has no basis for its assertion that Missouri courts would adopt different practices in an appeal in a case involving some contract other than an arbitration agreement. H&R Block cites no case where a Missouri appellate court has held that it may not address a significant question presented by the trial court record as to the formation, existence, or application of a contract before addressing defenses to enforceability such as unconscionability.

H&R Block's invocation of *Dickemann v. Millwood Golf & Racquet Club, Inc.*, 67 S.W.3d 724, 725–26 (Mo. Ct. App. 2002), is far off-point. There, in addressing one challenge to a contract's enforceability, the appellate court declined to reach another unpreserved

challenge to its validity, not its existence. And even then, the court noted that it had as a matter of discretion examined the record to see if it could find plain error with respect to the issue. *See id.* at 726 n.2. And *Hartland Computer Leasing Corp. v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. 1989), is simply an example of a case, unlike this one, where there was no reason to question the uncontested fact that the parties had executed an agreement—but even then, the court made clear that it was satisfied of the agreement’s existence before proceeding to address the claimed defense to its enforceability. Finally, in *Repair Masters Constr., Inc. v. Gary*, 277 S.W.3d 854 (Mo. Ct. App. 2009), the court thoroughly examined the circumstances surrounding the execution of the contract and noted that they would not suffice to establish that no contract was formed, *before* proceeding to find that the harsh terms of the contract rendered it substantively unconscionable. H&R Block’s assertion that the ruling below rests on principles of appellate procedure unique to cases involving arbitration agreements thus rests only on speculation.

Even if Missouri courts would apply different procedural rules to appeals involving arbitration agreements and appeals involving other contracts, nothing in this Court’s jurisprudence suggests that the consequence should be FAA preemption. This Court has held that in determining the existence and enforceability of arbitration agreements, states may not apply substantive rules of law different from the ones they apply to other types of contracts. *See, e.g., Concepcion*, 563 U.S. at 339–43. But the Court has not held that states must use the same *procedures* in cases involving enforcement of arbitration agreements and cases involving other contracts.

Indeed, the FAA itself provides very different procedures to enforce arbitration agreements than are available for other contracts. Specifically, the FAA provides for summary trial court proceedings to enforce arbitration agreements, specific enforcement of such agreements, stays pending arbitration, and streamlined provisions for confirmation of arbitration awards. *See* 9 U.S.C. §§ 3, 4, 9. And, significantly, the FAA provides for distinctly different treatment of appeals of arbitration issues than appeals of other contractual issues: Specifically, it allows interlocutory appeals of decisions declining to compel arbitration (but not of decisions compelling arbitration), *see* 9 U.S.C. § 16, subject to de novo appellate review. *See* cases cited *supra*, at 14. Missouri’s arbitration statute contains similar provisions singling out arbitration agreements for special procedural treatment. *See* Mo. Rev. Stat. §§ 435.355; 435.400; 435.440 subd. 1(1).

Considering whether there is an arbitration agreement applicable to a dispute is an inherent aspect of an appellate court’s de novo review of an appeal from an order declining to compel arbitration. *See Granite Rock*, 561 U.S. at 299–303. Far from disfavoring arbitration in some way that implicates FAA preemption, such appellate review is a consequence of the FAA’s own singling out of arbitration agreements for procedural treatment distinct from that given other contracts.

Moreover, considering whether an applicable arbitration agreement exists before affirming or reversing an order declining to compel arbitration cannot possibly be “hostile” to arbitration in any sense that could give rise to FAA preemption. As this Court has repeatedly emphasized, the FAA’s fundamental policy is

enforcement of agreements to arbitrate. *Id.* at 299 & n.6. Assuring that such an agreement exists carries out that policy, while compelling arbitration in the absence of an agreement is directly contrary to the FAA. *Id.* at 302. Thus, it is H&R Block’s position that an appellate court should ignore the absence of an applicable arbitration agreement that is at odds with the FAA.

**C. There is no conflict among lower courts over the issue H&R Block raises here.**

H&R Block’s claim that the decision below “conflicts” with other federal and state decisions that have not engaged in analysis of the existence or scope of an arbitration agreement before addressing challenges to its enforceability is specious. H&R Block cites no decisions that conflict with the decision below on the issue of federal law H&R Block seeks to assert in its petition: whether the FAA precludes an appellate court from considering the existence of an arbitration agreement in circumstances similar to those here. H&R Block does not even pretend that any of the decisions it cites holds that the FAA preempts state courts from adopting the principle that, where the record indicates that there is no applicable arbitration agreement, an appellate court should address that question as part of its *de novo* review of a decision denying a motion to compel arbitration.

Instead, H&R Block cites a grab-bag of cases in which courts considered various challenges to the enforceability of an arbitration agreement without explicitly addressing the existence or scope of the agreement. *See* Pet. 22–26. The existence of such cases is neither surprising nor in tension with—let alone actual conflict with—the decision below. In

many, if not most, arbitration cases, the existence of an applicable agreement is not subject to serious dispute, and in such cases, courts obviously need not explicitly analyze the question in their opinions. Nothing in the decision below suggests otherwise.

The proposition that a court need not expressly address the existence of an applicable agreement to arbitrate where the record provides no basis for doubt on the point does not imply that a court must skip over the issue where the record reveals an obvious basis for concluding that there is no agreement. Once again, *Granite Rock* makes exactly this point. Rejecting the argument that this Court's opinions allow courts to address questions of arbitration without considering the existence or applicability of an arbitration agreement, *Granite Rock* points out that the fact that "some of [this Court's] cases ... do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was needed." 561 U.S. at 300. The same is true of the cases H&R Block cites.

Critically, *Granite Rock* emphasized that although this Court did not analyze the existence and scope of the applicable arbitration agreement in every case where it required arbitration, *all* of the Court's decisions have compelled arbitration "only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable." *Id.* That principle of appellate review is exactly the one applied by the court of appeals in this case. Even if some lower court decisions had taken a different approach, *Granite Rock* would lay to rest any notion that the FAA

preempts the state court's decision here. Indeed, *Granite Rock* strongly suggests that the FAA may require the approach taken by the court below.

Even apart from *Granite Rock*, H&R Block's claim of FAA preemption is fundamentally incoherent. The aspect of the FAA that this Court has held to be preemptive of conflicting state laws is its substantive requirement that agreements to arbitrate be enforced. 9 U.S.C. § 2; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). A holding that a court should determine whether there is an applicable arbitration agreement before compelling arbitration *cannot* in itself conflict with that directive. Unless the court determines the agreement's existence and scope using substantive principles that are hostile to arbitration—which H&R Block does not allege here—a proper determination that there is *no applicable arbitration agreement* cannot lead to a violation of section 2's command that arbitration agreements be enforced according to their terms.

### **III. H&R Block's claims of pervasive "hostility" to arbitration are unfounded.**

H&R Block complains at length that the decision below reflects systemic hostility toward arbitration among the Missouri courts, and it accuses those courts of refusing to allow it to enforce an arbitration agreement that has been enforced by federal courts in Missouri. Pet. 32. Notably, however, in the federal cases cited by H&R Block the challenge to the arbitration agreement was either based on an unconscionability defense that failed under California law (which unlike Missouri law requires a finding of both procedural and substantive unconscionability) or addressed different aspects of a different arbitration agreement.

In any event, the appellate decision below did not hold H&R Block's arbitration agreement unenforceable; rather, it declined to enforce it against a specific person *who was not subject to it*. H&R Block does not contend that the decision that Mr. Lopez's claims are not subject to arbitration under the 2011 arbitration agreement was itself incorrect or based on substantive principles of contract law that are in any way antithetical to or discriminatory against arbitration. The appellate court's refusal to compel arbitration rested not on hostility to arbitration, but on H&R Block's own bad judgment in seeking to enforce against Mr. Lopez an agreement that, *by its own admission*, had been superseded by an agreement under which he was *not* required to arbitrate.

Thus, this case is light years away from the decisions H&R Block cites in support of its extraordinary assertion that this Court should summarily reverse the decision below. In each of those cases, a court refused to enforce an arbitration agreement that applied to the dispute before it on grounds that ignored the FAA's "substantive arbitration law." Pet. 34 (citing *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012)). Here, there is no conceivable violation of substantive arbitration law.<sup>5</sup> The FAA's substantive arbitration law *prohibits* a court from compelling arbitration of a claim that does not fall within

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<sup>5</sup> That there is continuing disagreement among the Justices of this Court as to whether the FAA's *substantive* requirements even apply in state courts, see *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting), only underscores how extraordinary it would be to hold that the FAA somehow preempts principles of state appellate practice concerning what issues are properly before a court of appeals.

the scope of an applicable arbitration agreement. Here, H&R Block paradoxically asserts that the FAA *requires* arbitration of a claim that does not fall within the scope of an applicable arbitration agreement. H&R Block cites no decisions of this Court that even suggest that a state court violates the FAA by considering whether an alleged arbitration agreement exists and applies to a dispute before compelling arbitration, let alone any decision summarily reversing a state court for engaging in such an inquiry.

### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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December 2016

## **APPENDIX**

**Unofficial Transcript Of Recorded Argument**  
IN THE  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT

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

Appeal from the Circuit Court of Jackson County,  
Missouri  
The Honorable S. Margene Burnett, Judge

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

Due to the quality of the recorded media portions  
may have been unable to be transcribed. The tran-  
script may also include misinterpreted words. The  
transcriber was not present at the time of the record-  
ing; therefore, this transcript should not be consid-  
ered verbatim.

PROCEEDINGS

JUDGE MARTIN: But, in light of that, we will re-  
sume the docket. And we will go ahead and call the

third case on the docket, which is WD78465, Manuel Lopez on behalf of himself and all others similarly situated versus H&R Block, Inc.

(SHORT SILENCE.)

MR. SIEGEL: Did The Court want respondent's two cents on the case prior to respondent's portion of the argument or everything at the end?

JUDGE MARTIN: What we would typically do is have the appellant give two-cents worth and then when the respondent is, is prepared to argue it (unintelligible) that's something that you want to add or (unintelligible) you can do that (unintelligible) at the end of your argument.

MR. SIEGEL: Okay. Thank you.

JUDGE MARTIN: Thank you.

(SHORT SILENCE.)

MR. ADAMS: Good morning. May it please The Court. Ladies and gentleman, my name is Robert Adams and I represent the people at H&R Block. And I want to talk a little bit about the facts of this case. I brought the document that is at issue in this case. This essentially is a contract case dealing with the defense of unconscionability. And the underlying facts are that in 2011 Mr. Siegel's client, Mr. Lopez, went into H&R Block in order to obtain tax services. He was presented with a document that is presented to all H&R Block customers. And this is called the Client Service Agreement.

The Client Service Agreement says that it will explain what you should expect from us and what we need from you to deliver the great service you require from H&R Block. What is at issue in this case is really

the focus is on the arbitration mentioned within this document.

The document goes on in bold. It says: Arbitration, if a dispute arises between you and H&R Block. And then it goes on to say if a dispute arises between you and H&R Block the dispute shall be settled through binding individual arbitration unless you opt out of this arbitration provision using the process explained below.

Underneath here is what's called an opt out provision. And in large type it says: Right to opt out of this arbitration provision. H&R Block does not require you to accept arbitration, even though you must sign upon its service agreement. It goes on to explain how if a consumer like Mr. Lopez or anybody else does not want to have any dispute subject to arbitration then they have the right to opt out of this provision within 30 days after they thought about it. They can go online and or they can send a letter to H&R Block.

In 2011 Mr. Lopez did not opt out. In 2012 he went back to H&R Block again to get tax services. He was presented with this same document. This time, however, Mr. Lopez chose to opt out. And when he chose to opt out he even directed that the confirming email go to his attorneys. And that happened.

Well, what happened then is that three days later Mr. Lopez filed — with Mr. Siegel they filed a class action lawsuit in Jackson County on behalf of all Missouri consumers for 2011 and 2012. And that was filed in Jackson County Court and the Judge at that time was Judge Mesle. Well, after that H&R Block filed a motion to compel arbitration. Judge Mesle denied that; finding that the waiver of the class action provision that's in this document was unconscionable.

After that H&R Block appealed it in this court with a different panel sitting, found that Judge Mesle erred and reversed her decision; finding that it was inappropriate for her to find a class action waiver unconscionable.

The case was remanded back down to circuit court where the trial court judge had then changed and Judge Burnett then heard the case, made additional findings, and concluded, again, that this was an unconscionable term. So, we are now on our second appeal dealing with Judge Burnett's findings that these provisions within this arbitration agreement are unconscionable.

(SHORT SILENCE.)

MR. ADAMS: And again, may it please the Court. The trial court erred in declaring that the arbitration agreement was unconscionable and thus unenforceable.

JUDGE PFEIFFER: So, you're referring to this 2011?

MR. ADAMS: Yes.

JUDGE PFEIFFER: Correct?

MR. ADAMS: Yes.

JUDGE PFEIFFER: Is the 2011 agreement within the scope of the 2012 agreement?

MR. ADAMS: They are similar

JUDGE PFEIFFER: Are they but is, is the 2012 later a subsequent contract? Is it effectively subsume the 2011?

MR. ADAMS: It does not. They are, they are separate stand-alone agreements. And Mr. Lopez signed

both of the agreements in 2011 and, and then again the agreement in 2012.

JUDGE MARTIN: — I'm sorry. Go ahead.

MR. ADAMS: The only difference is that in 2012 he opted out and in 2011 he did not. Everything else is the same.

JUDGE MARTIN: In these arbitration cases it's somewhat fluid with regards to the law. Of course we, we talk about unconscionability which really goes to the enforcement of arbitration agreements. But I think all agree that there are a couple of preliminary questions that State Courts remain authorized to determine; that is whether there is a contract for arbitration. And the scope of that contract with some exceptions to be complied with.

And on, on that point the language in the 2012 Client Service Agreement, and I realize that's one where you acknowledged there has been an opt-out and arbitration cannot be imposed. It's essentially the same as the language in the 2011 Client Service Agreement in defining what disputes must be submitted to arbitration?

MR. ADAMS: Correct.

JUDGE MARTIN: And so to the extent it says that if a dispute arises between you and H&R Block that dispute shall be settled and binding under the law of arbitration.

And we all agree that the disputes that are asserted in Mr. Lopez's lawsuit are disputes between you and H&R Block.

MR. ADAMS: Yes.

JUDGE MARTIN: And I think the reason I ask the question is just it goes to a fundamental issue. And that is whether or not the disputes whether they arose out of Mr. Lopez's visit in connection with the 2011 CSA or out of the 2012 CSA. Why are they not all disputes between you and H&R Block? That would be subsumed in the 2012 Client Service Agreement as to which he exercised the right to opt out?

MR. ADAMS: Well, they need to be treated separately. They're separate contracts and again the decision is that while all the facts remain the same between the agreements in 2011 and 2012, Mr. Lopez opted out in 2012. Therefore, he may procedurally have the right to file a class action lawsuit in the Circuit Court. But in 2011 that is not true.

JUDGE MARTIN: And on that point if I could

MR. ADAMS: — arbitration

JUDGE MARTIN: — and there's two things. And I know we need to talk about unconscionability, but would you agree with me that the language in the discussion of the disputes regarding the arbitration it's not temporal in this sense?

MR. ADAMS: The language is not temporal in, in the sense that it says if a dispute arises between you and H&R Block. So in other words the dispute I think from what the Court is getting at there is no time limit on the dispute. Again, it applies to any dispute under the separate agreements from 2011 and 2012.

JUDGE MARTIN: And in light of that argument, how then would you explain H&R Block's initial position in this case and its original motion to compel arbitration where it took the position that the 2012 CSA arbitration clause would supersede the 2011 CSA ar-

bitration clause and apply to all the plaintiff's claims including those from 2011?

MR. ADAMS: The that one was one of the positions taken in the original motion I will state for the record. I'm sure that the Court saw this that at the time the original motion was filed by H&R Block it was believed that Mr. Lopez had also not opted out in 2012. That was due to a record keeping error that was later corrected and clarified. And then the motion would arise just to address the enforceability of

(Talking over each other; unable to transcribe.)

JUDGE PFEIFFER: — at a time when H&R Block believes that no opt out provision has in fact been exercised. That the position that is represented, a legal position being represented to the trial court at that time is that this 2012 agreement covers everything. It covers the 2011 and the 2012 dispute. And it is only after H&R Block discovers that there was an opt out that was exercised by Mr. Lopez that they abandoned that position in fact, and say, we didn't we didn't mean that.

MR. ADAMS: Well, again, Your Honor, that was due to a clerical error. The information

JUDGE PFEIFFER: — but that that's a legal argument is not a clerical error. A legal argument is that the document speaks for itself and the interpretation that is being argued and being asserted by H&R Block is that the 2012 agreement subsumes the 2011 agreement. And which frankly makes perfect legal sense in that there is no temporal gauge in either one of the agreements. And the most recent agreement is the 2012 agreement. And in fact that had been opted out of; why are we here?

MR. ADAMS: Well, again, Your Honor, we believe that they are separate contracts that have to be considered separately. And

JUDGE MARTIN: Do you have some legal authority for the proposition that they are not subsumed by the second contract?

MR. ADAMS: Well, I, I guess the legal authority in part would be this, this Court's decision in the first Lopez case where it had before it the same type of argument, but went on to address the 2011 agreement separately from the 2012, even though that argument had been addressed and raised at the court below. So obviously a, a different panel in the Western District did go on to address the 2011 agreement separately and apart from the 2012.

JUDGE MARTIN: But that issue was raised before?

MR. ADAMS: I believe it was (unintelligible).

JUDGE MARTIN: In the Court of Appeals?

MR. ADAMS: At the Court of Appeals I, I do not believe it was raised in the actual briefing, but it had been raised below. So I don't believe that either side had addressed that at the Court of Appeals before. But again, the

JUDGE MARTIN: But now on that point where we're faced with de novo review on motions to compel arbitrations, correct?

MR. ADAMS: Yes.

JUDGE MARTIN: And in fact to the preliminary point we don't even get to the issue of whether or not an arbitration agreement is enforceable or unconscionable unless you can prove that there was an

agreement. In fact the disputes are within the scope of the agreement that is (unintelligible)?

MR. ADAMS: That's correct.

JUDGE MITCHELL: And so we're going to have to look at that issue. Isn't that part of our obligation on de novo review?

MR. ADAMS: You do. You have to look at the well, 2011 contract to determine whether Judge Burnett properly decided the issue of unconscionability. And it's our position that under de novo review she did not. And there's three reasons why she did not.

First, in terms of the 2011 client service agreement doesn't alter any individual substantive rights. It is a practical, viable means of individualized dispute resolution. This case is far different than the Brewer case that Judge Burnett relied upon. In Brewer there was not a single consumer that ever went to arbitration.

Here, the record reflects that this is viable and practical. And in fact since 2008 there have been 100 consumers who have gone to arbitration with H&R Block. There have been 36 consumers that have gone to arbitration with H&R Block under this exact agreement between 2012 and 2013. So the facts of this case are far different than Brewer.

The second reason why the

JUDGE MARTIN: May I ask you a question on that point

MR. ADAMS: Yes.

JUDGE MARTIN: Please forgive me for interrupting you.

MR. ADAMS: No problem.

JUDGE MARTIN: But I guess that's our province; that's why we're here.

MR. ADAMS: Yes.

JUDGE MARTIN: But, are you then suggesting that although attributes of the arbitration provision as between this clause and Brewer might have been the same? In other words, it appears to be, you know, a document that can't be negotiated. It's you know, it has those kinds of adhesive contract principles that once it becomes dispositive for her this is a determining unconscionability is whether or not consumers then take advantage of the arbitration provisions.

MR. ADAMS: Okay.

JUDGE MITCHELL: But that would be significant evidence in weighing against finding what would otherwise be a one-sided or a non-negotiable term unconscionable or not.

MR. ADAMS: Obviously it is. It is, it is — I believe the most important factor and Judge Teitelman commented upon that in the Brewer decision and found I think the utmost significance in the fact that no consumer under the contract in the Brewer case, no consumer had ever been to arbitration.

And on that point I just happen to have another blow up dealing with the facts of Brewer and showing that the facts of Brewer are far different. The factors involved in Brewer are far different than what we have in this case.

In Brewer there was as I said before, in Brewer no consumer had ever been to an arbitration. And here again we have the record shows 36 in 2008 I'm sorry 36 in a one-year period of 2012-2013. And over 100 since 2008. You can see and this is contained in our

brief that under each of the different factors that are laid out in the Brewer decision the agreement in this case is far different.

And we believe that not only does this agreement provide a practical, viable means for dispute resolution directed by the number of arbitrations done, but it actually makes arbitration easier, faster, and better than filing a case in the circuit court.

JUDGE MARTIN: One of the factors noted on your chart, and I want to direct your attention to for just a moment is the opt out provision.

MR. ADAMS: Yes.

JUDGE MARTIN: And I'm not aware please correct me if I'm wrong that there has been no Missouri cases addressing the import of opt out provisions and arbitration clauses?

MR. ADAMS: That is correct. We cited, and this Court I'm sure is familiar with, we cited a couple of decisions from federal courts saying that the opt out provision is in fact dispositive of the issue of unconscionability. In other words, if the consumer is given the option to opt out then the terms of the agreement cannot be unconscionable. Here it has as an example Mr. Lopez

JUDGE MARTIN: — which case are you relying on for the proposition?

MR. ADAMS: On the federal court case. We cited two cases in our brief. One is the Cicle case and then the other case is the case decided by Judge Gaitan dealing with the same type of opt out provision saying that that, that the fact about about that provision exists means that it's not unconscionable. And I'm sorry, Judge?

JUDGE MARTIN: No, I'm sorry. That of course would not be true if, if the opt out provision was illusory, which is what essentially what the trial Court found?

MR. ADAMS: It is what the trial court found and that was a legal conclusion that she reached. And we believe it is inappropriate and this Court is entitled to a de novo review of that. Essentially what the court relied upon was some confusion about from some consumers, a very limited set of consumers, and, and who are studied a 2006 document. And the ultimate conclusion of that document was that the language in this agreement, including the opt out provision, was clear, concise, and easy to understand.

This Court does not need to engage in the type of gymnastics that Judge Chrysler (sic) referred to in the Brewer case in order to find that this agreement is unconscionable. Under the clear language of the opt out provision it clearly directs the consumer that if they want to reject arbitration they merely have to

(Talking over each other; unable to transcribe.)

JUDGE MARTIN: — is that correct? Mr. Lopez in fact exercises his opt-out —

MR. ADAMS: Yeah, and and we believe that that is in part of the greatest proof in this case that the opt out provision is not illusory because Mr. Lopez himself opted out.

JUDGE MARTIN: And I do understand that. And on that point, the second part of the trial court's analysis with respect to the illusory nature of the opt-out. Let me ask you a preliminary question just in a hypothetical situation. Do you agree with the proposition that a provision in a contract even if it's clear and not

buried in text, an opt out provision could be found to be illusory based upon the subsequent conduct of the promisor and effectively negating the benefit of that provision?

MR. ADAMS: Well, first of all under a contract (unintelligible) first the provision has to be examined within the four corners of the language of the document. And if it's clear that the Court does not refer to extrinsic evidence

JUDGE MARTIN: — and assuming one finds that the opt out provision in this clause was exactly as you started. Clear, not very inappropriate font, and the whole etc., etc. Do you agree or disagree with the proposition that H&R Block's subsequent conduct in acknowledging, exercising the opt out would be relevant to determining whether the effect of a clause, even if facially clear is illusory?

MR. ADAMS: We disagree with that. In essence the Court needs to examine the four corners of the document. And if it's clear under the four corners of the document you do not refer to extrinsic evidence. In this case

(Talking over each other; unable to transcribe.)

JUDGE MITCHELL: If the company makes it difficult for a consumer to use an opt out provision why would the Court not be able to consider that?

MR. ADAMS: Well, we just to be clear, Your Honor, the company did not in any way make it difficult for consumers to use the opt out. What happened factually is that the data that showed that consumers did opt out it did exist, but it existed in two different places. So, while there was some initial confusion as to whether Mr. Lopez opted out there was a record that

he did in fact opt out. And that was later discovered and later corrected.

And going back to your question, Judge Martin, I don't believe that that type of conduct or those set of facts can in any way cause a court to determine

(Talking over each other; unable to transcribe.)

JUDGE MARTIN: — so let me give you a hypothetical. Let's assume that your arbitration provisions, you're the one that appears in the CSA, will be found by this Court to be clear on its terms. And that in the four corners of the document it is not an illusory provision. It's easy to understand, easy to find, easy to exercise.

What if the evidence is that the website address afforded to consumers in the H&R Block contract never has been activated. Every single time I go to that website address it is not an active address. And so the effect is that H&R Block's conduct, notwithstanding a facially clear opt out provision renders the ability to exercise that right illusory. Why wouldn't that be evidence that we're entitled to look at?

MR. ADAMS: That could be evidence.

JUDGE MARTIN: But it's extrinsic

MR. ADAMS: — that is extrinsic evidence and that goes more to the performance and the effectiveness of the terms under the contract. Here, the evidence that Judge Burnett looked at was far different. She looked at the evidence after the fact and this is dealing with 2012, after the fact when an employee did not originally look at the correct body of data to find out that Mr. Lopez actually did opt out. That — again that data existed.

And the fact remains, again, that he clearly did opt out and his lawyer was given an email immediately after the opt out showing that it occurred. So in essence there is no legal effect of that.

Now, your hypothetical does show a legal effect. Because there the consumer did not properly effectuate the opt out. Here, Mr. Lopez did that. There was simply a glitch in the record keeping data. There are cases and we did not cite them to the Court, but there are cases in Missouri dealing with the payment of a premium to an insurance company. The fact that the insurance company may have had a bookkeeping error that in their mind indicated that the premium was not paid. That does not mean that the consumer is not entitled to coverage under the policy. Because the fact remained that the premium existed.

There are also cases dealing with debts. The fact that a bank may not have an accurate record that that was paid does not mean in fact that a consumer did not pay the debt.

JUDGE PFEIFFER: Mr. Adams, I want to make sure I'm clear on this. So, is it your position pardon me that when we're looking to see whether the four corners of this document as compared to the Brewer case if there's a distinction between the two we need to lay, lay the documents down on the table and we're not to look at other extrinsic evidence in evaluating either of these items?

Or, are you saying that we should be, but that the trial court should be looking at extrinsic evidence?

MR. ADAMS: Well, our position is is that none of the terms of this agreement are ambiguous. All of the terms are clear on its face. And so there is no need to

JUDGE PFEIFFER: Well, in Brewer, I mean, the terms were clear they were just merely not very good for the consumer whatsoever.

MR. ADAMS: Yeah.

JUDGE PFEIFFER: But, I mean, so that's not the only issue that we're, we're looking at. But, but I thought what I heard you say at different times in the argument today is that the distinction, the cornerstone distinction that, that we have in this case, the H&R Block case, versus the Brewer case is that you have evidence that hundreds or some hundred or more consumers have actually arbitrated cases with H&R Block.

MR. ADAMS: That's true.

JUDGE PFEIFFER: And, and so it seems to me that you're saying on the one hand you're making the argument out of the gate that we should go outside the four corners of the document and we should look at the extrinsic evidence that distinguished Brewer. And that the extrinsic evidence is that there is evidence that it had worked. That people had arbitrated. And Judge Teitelman said in Brewer that nobody would arbitrate no (unintelligible) consumer would arbitrate the Brewer case.

And then when there's other extrinsic evidence that the trial court could have considered, and in fact it appears did consider in this case, you're arguing that the trial court cannot go outside of the four corners of the document. So, my question simply is which is it?

MR. ADAMS: Well, it is true that in the Brewer case that the court did in fact focus on whether there are facts indicating that the arbitration agreement in

Brewer provided a practical, viable means for arbitration.

So of course they analyzed those terms. They analyzed the facts surrounding the use of that arbitration provision. The trial court did that in this case as well. And I believe that that is an appropriate examination of the evidence to determine whether it was a practical and viable means of arbitration. Again, as I said earlier, here it is undisputed that it is, because consumers have used it as opposed to the agreement in Brewer.

I see my time is up.

JUDGE MARTIN: We'll talk with you again in rebuttal. Thank you.

(SHORT SILENCE.)

MR. SIEGEL: May it please The Court if I could just give a few minute response on (unintelligible) I should say.

(SHORT SILENCE.)

MR. SIEGEL: (unintelligible)

(Laughter.)

MR. SIEGEL: But the facts the procedural facts that Mr. Adams laid out I won't quibble with here. But I, I want to talk about that I, I do think (unintelligible). What I do want to talk about is, is another step back. And that is and what's the case about substantively. And I do think it's important that everyone appreciate, especially the students here, the impact that forced arbitrations have on the justice system.

I think this Court is probably quite busy with various arbitration cases as is the Supreme Court. And

when we think about the legacy of Justice Scalia and his opinions in *Concepcion* and *Italian Colors*, you can look and draw a clear line to *Brewer*, which you've already heard about. We're talking about Missouri Supreme Court too up after *Concepcion*, but also a myriad of cases that have come up since where this issue of forced arbitration front and center.

So really it is an issue that the courts are grappling with. And it is occupying a lot of the docket time I think is fair to say. So, quickly on this case. So as Mr. Adams mentioned Mr. Lopez, my client, went to H&R Block to have his taxes done and was charged a fee. Let's say that fee was \$200. In addition to that \$200 charge to have his taxes done there was an additional charge identified as a compliance fee. And that fee was \$2 in 2011 and \$4 in 2012.

And this compliance fee was represented by H&R Block as something that was necessary to pay for new regulations that the IRS was imposing that had some cost (unintelligible). And the evidence which has been developed in the trial courts both in Missouri and in federal court where there's a parallel case. Is that H&R Block \$2 at a time in 2011 nationwide collected 16 million dollars in those fees. In 2012 that doubled, they collected 32 million dollars in fees for a total of 48 million dollars.

So, \$2 at a time or \$4 at a time it obviously added up to quite a bit of money. Well, why do we care? It's our theory, and the case alleges, and we're not quite to that state yet because we've been litigating this issue now for almost four years. But our, our theory what we've alleged in the case is that fee violates in Missouri the Missouri Merchandise Practices Act that it's improperly characterizes compliance fees that

does not pay for what H&R Block says it pays for, which is this new IRS program. It is not a pass-through, in fact was a profit center for H&R Block.

So, that, that's what the case is about substantively. But as Mr. Adams mentioned despite the fact that we filed this case in April of 2012 it this issue of forced arbitration that has been front and center in the court. So now we are entering nearly our fourth year in dealing with this arbitration issue. And I'll swing around here and, and ask the Court to make (unintelligible).

So with that, may it, may it please The Court it's a, it's a pleasure to be before this panel today. I want to quickly start with some of the questions this Court raised with Mr. Adams. I, I think that the first concept; did the 2012 agreement sort of supersede the 2011 agreement and by opt-out of that and have the right to bring all these claims. I think the short answer is yes. We raised it below. And so that is an issue that the Court it's appropriate for The Court to address.

I, I also want to quickly get into to the opt out issue. And I think a critical component of this opt out issue and the way Mr. Adams presented it I think everyone agrees is a preliminary matter that it must be a reasonably effective mechanism to opt out.

And in examining on the unconscionability of that opt out provision I think it's important to remind ourselves Brewer and the other Missouri Supreme Court cases that talk about the fact that although you're examining sort of the contract formation when you're talking about conscionability, Brewer post-Brewer that unconscionability can manifest itself later. It doesn't necessarily show up the day you sign the con-

tract. The unconscionability may show up later when you go to opt out and H&R Block says they have no record of your opt out.

JUDGE MARTIN: And on that point the, the argument that's been made by H&R Block here is that the presence of the opt out provision, which would at least on its face appear to give a consumer an opportunity not to see forced arbitration claims. It negates in fact is a matter of law any claim of unconscionability in the arbitration division. And what is your response to that point?

MR. SIEGEL: There is no circuit case that says that of course. And in all the cases cited by H&R Block the agreement was found to be otherwise conscionable. In other words, it was one factor to be considered. And that really is the principle of Brewer, of Robinson, and subsequent arbitration cases. You don't look at a single term. You don't look at any specific single term of the agreement. And no single term they already checked it off of the contract is conscionable you must look at the agreement as a whole. That's what Brewer says and cases subsequent to Brewer.

So even if the opt out was fairly delivered with both the terms of substance and execution, it would not mean that it wipes away the unconscionability of the rest of the agreement. And there's a couple of reasons why that opt out agreement, both at the time of contracting and of course later, is unconscionable.

First, we have this readability study, okay? And I think, although the Court correctly stated it's been de novo review as to arbitrability, there, there is a question that we believe gets deference and those are the factual findings of the trial court.

(Audio distorted; unable to transcribe.)

(Talking over each other; unable to transcribe.)

JUDGE MITCHELL: — a factual issue or is it

(Audio distorted; unable to transcribe.)

MR. SIEGEL: Well, I, I think it is a factual issue in a sense that according to Lopez One dispatched the trial court to go make factual findings under this agreement consistent with Brewer. And then it asks the question about the opt out

(Audio distorted; unable to transcribe.)

MR. SIEGEL: — and then Judge Burnett on remand did exactly that. And those findings are entitled to deference. And then, with respect to the opt-out clauses, one of the findings that the court made below, which I think is relevant to this opt out question, at the time of contracting, is whether it was confusing and to the average consumer, which is a test.

And what H&R Block's own readability study said about that was that most customers do not grasp that they agree not to sue H&R Block pursuant to this arbitration provision. And, that they have a way to opt out of this if they choose to. So even the language of the

JUDGE MARTIN: — on that point, if, if we're going to get down in the weeds in terms of the evidence relative to whether the opt out provision was understood or was not. The evidence that was admitted included evidence that Mr. Lopez admitted that several thousands of people exercised the opt out provision in 2011 and 2012 alone. Which would suggest an understanding of the provision.

MR. SIEGEL: I, I would quibble with that, Your Honor. And here's why. If you look at the evidence and what their corporate representatives actually testified to about that that that is a list we have no idea whether that list is actually people that opted out.

Their corporate representative have been testified there was no mechanism to confirm. And, and I'm sorry I don't remember the, if it was Judge Martin or Judge Mitchell that asked this hypothetical

JUDGE MARTIN: I get confused all of the time (Laughter.)

MR. SIEGEL: Not by me. I should be able to keep it straight. But I think that the question to ask (unintelligible). That's essentially record keeping. There was no corporate representative that could testify how this list matched up to people who stood in their line and signed up here. And that's exactly what happened in this case. So H&R Block was giving these positions after Mr. Lopez had opted out in 2012 that were accusing Mr. Lopez — Mr. Lopez's counsel, that would be me, of dirty tricks.

JUDGE MARTIN: Let me

MR. SIEGEL: You know

(Talking over each other; unable to transcribe.)

JUDGE MARTIN: Let's assume for the sake of argument that on its face, just what we're trying that the opt out provision is clear and concise. It's not buried, etc. Is that game over in terms of unconscionability analysis?

MR. SIEGEL: It, it no, of course not. First of all, the Court would have to be making a finding that Judge Burnett's (unintelligible) was against the weight of the evidence that Judge Burnett found. If

you did that it still doesn't cure, again, a, an agreement that is otherwise unconscionable. It is one ingredient.

JUDGE PFEIFFER: Two things on that topic. One, it is undisputed that numerous, perhaps hundreds of consumers did actually invoke or participate in arbitration. And two, are we to consider that extrinsic evidence? Or is the trial court, and this Court, are we to consider such extrinsic evidence in deciding whether or not this agreement was unconscionable or conscionable?

MR. SIEGEL: Yeah, I think with respect to the first question, Judge Pfeiffer. The affidavit or declaration that was submitted by H&R Block supported the, this idea that people are arbitrating claims. It doesn't say that it's this agreement at issue. It doesn't, it doesn't designate the 2011, 2012 agreement. So I would, the evidence before the Court is unclear on that point whether or not those cases are being arbitrated by the millions of H&R Block customers.

JUDGE PFEIFFER: Let's go back to the 2011 and I think the 2012 agreement which is, is again as Judge Martin pointed out and (unintelligible). It's not temporal in nature. And so (unintelligible) when we got a 2012 agreement that has no time constraint. It doesn't say this agreement relates to the agreement between parties from the tax year 2011 that you are entering into in 2012 that we're going to file your taxes for 2011, your tax return, in April of 2012.

It only relates to any disputes that would arise as a result of our preparation of the tax return that's actually 2011. It doesn't say that in the document. It says if any disputes arise between the parties it is the most

recent document as I understand between the parties is the 2012 agreement.

And it is undisputed, is it not, that Mr. Lopez did in fact opt out with regard to that 2012 claim? If that is in fact the case if Mr. Lopez has opted out and if we were to conclude, I don't know what we will conclude, but if we were to conclude that the 2011 agreement is in fact subsumed by the 2012 agreement doesn't, doesn't that end the debate before we get to it, at least on the topic of unconscionability because if he's opted out, he's opted out, there's no arbitration.

MR. SIEGEL: Right. And I think I think that's yes, correct. I think the next time the Court may face that issue is at class certification right, because it will determine who's in the class. It's our view that a individual who opts out can represent customers of H&R Block whether or not they opted out, my suspicion, that H&R Block will argue the opposite. And therefore we may be back in front of this Court for a third time talking about unconscionability with respect to absent class members who did not opt out. Judge Martin?

JUDGE MARTIN: A couple of questions if we could because there are a whole host of issues that arise in this case and a number of them we won't have to deal with. But on the issue of comparison of this agreement to the Brewer agreement, it does appear that the trial court in her judgment essentially laid out what she perceived to be attributes that were similar between the Brewer arbitration agreement and the H&R Block arbitration agreement. Is that correct?

MR. SIEGEL: That, that's absolutely correct, yes.

JUDGE MARTIN: Do do you think that the cases subsequent to Brewer and I'm referring specifically to

Eaton and to Hewitt add an evidentiary burden that must be established by the party who is opposing the motion to compel arbitration with respect of the ability of this Court to rely on attributes of an adhesion contract to find that provision unconscionable?

MR. SIEGEL: No. I the those subsequent opinions have done nothing to Brewer. In fact, they cite Brewer as the standard they are applying.

JUDGE MARTIN: Do you believe for example in Eaton

MR. SIEGEL: Right.

JUDGE MARTIN: — because Eaton makes it very clear that the hallmarks in adhesion contract that it's not critical that one of the parties has superior bargaining position. That the terms are essentially one-sided. Those kinds of things that are the hallmarks of modern consumer contracts according to the Eaton Court. That you have to have in addition to that some evidence that the agreement has been rendered unfair as a result of those attributes in order for that to be a factor in assessing unconscionability.

And so I guess my point is yes, Eaton cites Brewer, but to the extent Eaton and Hewitt after it clarify that in addition to those modern hallmarks of consumer contract there has to be some evidence that the contract is rendered unfair. What would be that evidence in this case?

MR. SIEGEL: Well, two things. First of all, I, I think Eaton which was focusing on non-mutuality concluded ultimately that it is still a critical factor to consider and talk about whether or not this agreement is mutual or not. It clearly isn't and that's one of the many things that has been fixed in 2013 with a

subsequent agreement as long as you're considering extrinsic evidence.

I think Judge Abuja in the Manfredi case said look in that case the contract that was subsequently repaired it is at least some evidence of the problems of the prior contract. That's what we have here with the 2013 agreement. The reason I wanted to mention briefly to you guys is that the case that Mr. Adams mentioned the, that Judge Gaitan recently decided was under the 2013 agreement.

And Judge Gaitan found unsurprisingly given the changes in 2013 all of the defects found this case that that was a conscionable contract H&R Block case where he's reviewing that fixed agreement. So I do want to mention that.

With respect to these other problems, the court below, again, I, I think given the instructions of this or prior look at Brewer look at Robinson

(Talking over each other; unable to transcribe.)

JUDGE MARTIN: — we did tell the trial court to look at Brewer, but he would not have been suggesting to trial court that that trial court look at Brewer to the exclusion of cases after Brewer that might have impacted the evidentiary requirements to establish unconscionability.

MR. SIEGEL: Of course. There's nothing. There's nothing in the subsequent cases which changed the depth or breadth of the evidentiary (unintelligible) here.

JUDGE MARTIN: On the issue of mutuality and you mentioned Eaton does talk about mutuality. Eaton makes clear that the mere fact that the obligation to arbitrate is not mutual, which is an attribute

you do argue in this case. But that is not sufficient to declare a contract unconscionable. Is that correct?

MR. SIEGEL: That's right. It's one factor of a whole bucket of factors that Brewer has.

JUDGE MARTIN: And in that case the court noted that for the lack of an obligation to arbitrate to be a factor at least in that case did couple that lack of mutual obligation to arbitrate with another arbitration provision that had the effect of placing a consumer in the dreadful position of dual track litigation with potential inconsistent results.

I take it that that's not something that's been argued as a possibility here?

MR. SIEGEL: I don't think that specific factor would be present here, but there's myriad other problems with this agreement that we pointed out. And that Judge Burnett found. For example, the cost provision. You've got something else they fixed in 2013.

H&R Block has this ludicrous position in this arbitration agreement which they (unintelligible) that says, you know, we're going to pay \$1,500 for this arbitration. We may pay more in our sole discretion if we feel like it, but only if you win. And the only evidence in the trial court which you have on rebuttal was that the, a one-day hearing before the AAA would be \$2000. So there are, there are numerous other problems

JUDGE MARTIN: Let me ask you a question

MR. SIEGEL: — that the courts found

JUDGE MARTIN: — one of the things that struck me about the arbitration provision is that it does expressly provide that the consumer will be able to pursue any and all claims by statutory or common law

and recover fee damages that would otherwise otherwise be recoverable in this case. Is that relevant to the discussion that you're addressing with respect to cost?

Because, for example, in the MMPA claim provisional lawsuit (unintelligible) would permit recovery costs, attorney's fees, and punitive damages. And this arbitration provision permits recovery of those same things via an MMPA claim. How would there be any difference in the ability to recover?

MR. SIEGEL: I see my time's up. May I respond?

JUDGE MARTIN: Please.

MR. SIEGEL: So, what, what you have is a you have a contractual burden, according to H&R Block, two parties at arm's length contracting for this agreement. Where you're saying you cannot automatically be entitled to an award that, that's provided for under the MMPA including his costs.

In other words, H&R Block contractually is retaining the right to decide whether or not it's going to do that. And what they, what they're really asking for in the envelope of severability is a re-write of the contract from this Court. And that you're passing that from the Supreme Court where you're sort of blue penciling some onerous provisions of arbitration agreements subsequent to Brewer. But, but really, Block is asking for (unintelligible) ability to recover those damages and costs and numerous other things is a complete re-write of the arbitration agreement which would look something like the 2013 agreement. And we think that is wholly inappropriate. And again, because nothing has changed since Brewer that it's this Court's obligation to consider the arbitration, this agreement as a whole and consider its conscionability on all those terms. We think Judge Burnett got it ex-

actly right that mandate for this Court and therefore ask this Court too.

JUDGE MITCHELL: Okay. Just one more question.

MR. SIEGEL: Yes, please!

(Laughter.)

JUDGE MITCHELL: You indicated and argued that we look at this agreement as a whole and consider various factors. Under the individual arbitration agreement. Post *Robinson and Eaton* can we continue to consider the fact there is a class action coefficient in the arbitration in determining whether or not it's conscionable?

MR. SIEGEL: You know, *Brewer* kind of makes reference to that. And I think the short answer is it's not necessarily in this case, because of all of the other problems that permeate this arbitration agreement. I don't think it's a good idea for this Court to be leaning into whether class actions still have (unintelligible) agreement of somewhere in the distance after Judge *Scalia* has exercised his writing prowess in *Italian Colors* and *Concepcion*.

I will say this though, there is an expressed statements clause in *Italian Colors* which conceptionally says, you know, *Italian Colors*. It's an antitrust case. The plaintiffs there said wait a minute. It's going to cost \$500,000 to have an economist tell us how we're going to prove our antitrust case. This is a this is a claim that we need to bring as a class action. Otherwise, I have my whatever it was a \$1,000 claim that I want to bring against *American Express*. It's going to cost me \$500,000 in one expert and that might, that cost is shared by bringing the case as a class action.

What Judge Scalia says is, you know, expressed in-difference in that dynamic. What he did say, and this (unintelligible), that there may be situations where the, the price of poker is so high that it, it, it does present a limitation which the court would find problematic in analyzing whether arbitration is appropriate.

For example, if the arbitration fee was a million dollars, all right? That's, that's clearly left open. You can look at the facts of this case and line that up with Italian Colors if you wanted to. You have a \$2 claim, you have a \$5 fee, you have everything in excess of \$1,500 in costs that you are going to give hoping it's untaxed. And so you, you could fit that in, but it's not necessary given all the other problems found below in light of, of Brewer and —

(Audio is distorted; unable to transcribe.)

MR. SIEGEL: No, that's all right.

JUDGE MARTIN: (unintelligible) You would agree that Italian Colors changes in some fashion

(Audio distorted; unable to transcribe.)

JUDGE MARTIN: — pursued those claims addressed in Brewer, (unintelligible) Brewer.

MR. SIEGEL: That, that

JUDGE MARTIN: — there's some impact?

MR. SIEGEL: There's no question that there's a difference. I think is a fair way to say it by the Supreme Court. Yeah, it's not something I'm enamored with; as someone who tries to represent consumers in claims like this. So sure, that has some impact in the analysis, but not when that impairs the decision below or, or should impair the Court's analysis.

(SHORT SILENCE.)

JUDGE MITCHELL: Thank you very much. We appreciate it.

MR. SIEGEL: Thank you very much.

JUDGE MARTIN: Rebuttal?

MR. SIEGEL: I'll, I'll ask again that the, that this Court affirm the lower court.

(SHORT SILENCE.)

MR. ADAMS: Thank you, Your Honor. Go back to the question that you asked, Judge Mitchell, and to answer it directly, clearly, now after Italian Italian Colors — Hewitt, Eaton, and Judge Wilson's recent decision in the Ellis case, clearly that the Court should not consider whether a provision like this has a class action waiver in it. It is irrelevant. (unintelligible) for the Italian Colors case which was cited by this panel before in the prior decision says that the Federal Arbitration Act trumps any public policy concerns about pursuit of a low value dollar claim.

Now, and make no mistake about it, as Mr. Siegel said this is not a low value claim that they're asserting. They're seeking punitive damages, attorney's fees, and disgorgement and he talked about millions of dollars.

Judge Mitchell, to go back to your questions about the rights and remedies that are provided under this agreement. All of the rights and remedies that a consumer can get by paying much more in terms of a filing fee, if they wanted to file in Jackson County, about \$120. They can get those same exact rights except they cannot bring a class action case.

In going back to the law in this State and the law of the United States Supreme Court that is not a relevant consideration. They can file the MMPA case and

that can be heard by a neutral arbitrator at a cost of only \$5. And it's undisputed if you look at the Carother's affidavit that is in the record at no time has a consumer under any of these hundreds of arbitrations at no time has a consumer ever had to pay more than \$5 to have their rights adjudicated under a new, by a neutral arbitrator under the rules of the AAA.

That goes to the exact issue that is the heart of this case. The heart of this case and if you look at Brewer or any of the decisions because does this agreement provide for a practical, viable means of individualized dispute resolution. And it is undisputed that it does and it has for hundreds of people.

The other issue that I wanted to address briefly. Going back to this issue about whether the 2012 agreement would actually subsume the 2011 agreement. Again, this is not an issue that was raised by either in the first appellate decision or it was not raised in a briefing here. The agreement and it's in the record but the agreement clearly states that it applies to the 2011 customer service agreement. We do not

JUDGE PFEIFFER: — was raised below though

MR. ADAMS: It was it was raised

JUDGE PFEIFFER: — was it raised before the trial court?

MR. ADAMS: It, it I believe there was briefing on that at the time when H&R Block — again because of a clerical error — that there was briefing on that issue. It was never pursued either by Mr. Siegel and his client or H&R Block at the appellate court

JUDGE PFEIFFER: And there may be some you know, there may be strategic reasons to pursue or not

pursue because of those arguments, but as with respect to our review is it de novo?

MR. ADAMS: It is a de novo review, Your Honor. That is correct. I would also point out that the discussion that you have had with Mr. Siegel, clearly there has been changes and advancements of law after the decision

JUDGE MARTIN: Well, let me ask you a question that I asked Mr. Siegel. In view of do you believe that Eaton and/or Hewitt had an evidentiary burden to a consumer who was attempting to defend against a motion to file arbitration with respect to our reliance on the adhesive contract attribute so the hallmarks of modern consumer contracts?

MR. ADAMS: Absolutely.

JUDGE MARTIN: And what do you think that administrative burden is?

MR. ADAMS: Well, the, the line of cases again with Heath (sic) or with Hewitt and with Eaton and then with Ellis in the line of the Supreme Court cases clearly stand for the proposition that you cannot single out arbitration provisions and treat them any differently than the contractual terms that if it were to exist in any other types of contracts.

So, clearly a lot of the points that were relied upon, Judge, by Judge Burnett and her conclusion that this agreement was unconscionable are inappropriate for (unintelligible) legally, but they were inappropriate under the law of Brewer.

For example, she, she commented on page nine she actually commented that this agreement contains a waiver of a right to a class action. That's inappropriate. It was inappropriate to consider it then under

Brewer and it's also inappropriate under the Robinson and other case.

She also pointed out that and relied upon the fact that supposedly small damage claims at issue might not be pursued. Again, that's precluded by footnote 4 of the Italian Colors case. She also commented that this agreement does not provide for minimum recoveries or automatic cost shifting. There's an example of where she has violated all of these lines of cases that hold that you have to treat an arbitration provision just like a contract. She is holding an arbitration provision to higher standards because it does not does not have minimum recoveries

(Talking over each other; unable to transcribe.)

JUDGE PFEIFFER: — facts of the contract, but we would look and review in reviewing the efficacy of that contract, we're going to look at the four corners (unintelligible). But again I think what I hear you saying is the reason that you are able to conclude that this four corners of this contract are not unconscionable is because we should we look at the extensive evidence in which the consumers that have participated in arbitration have spent no more than \$5 a piece. Which it appears as though there is some dispute in the record as to whether or not those were agreements that were either 2011 or 2012. But you're asking us to look at disputed evidence that is at minimum is extrinsic evidence.

MR. ADAMS: I think that there is a distinction, Your Honor. The distinction is that under the Brewer case you can evaluate evidence to determine whether it's a practical and viable means of arbitration. Here for example when the Judge is looking at the language

of the opt out provision she then jumps to this 2006 study.

We don't believe that that was appropriate to do because the language of the opt out is clear and unambiguous. Even if you assume it is appropriate for her there clearly is not substantial evidence to show that the opt out

JUDGE PFEIFFER: Let's, let's say this let's say so is it your position then that this opt out provision has to let's say it's in every contract for decades. And the clear evidence and undisputed evidence is that (unintelligible) opt out provision is in there. Not one single consumer in the history of any Client Service Agreement has ever opted out. Would that be relevant evidence to determining whether or not that opt out provision was ambiguous, unambiguous, conscionable or unconscionable?

MR. ADAMS: I think it would be relevant (unintelligible) to determine whether it's practical and viable. And again, I think under Brewer it could be considered. Here, here by the way, the only evidence and Mr. Siegel cited a 2006 study 2006 study that was done with 19 consumers where the ultimate conclusion of the report was that the language in this document was clear and concise and easy to understand.

He talked about confusions on the opt out. We have on record we have in the record and it is undisputed thousands of customers have used this very opt out agreement to opt out of arbitration. They have chosen and H&R Block has given them the choice that if they don't want to accept the term you've got 30 days and then you can opt out. And thousands of people have done that.

And we would submit that it was inappropriate for the court to use that evidence to show to somehow find that the opt out was illusory. I see that my time's up. Any other questions?

JUDGE MARTIN: Thank you, Mr. Adams. Thank you counsel for a very well argued case. We appreciate it very much. The case is submitted.

(Whereupon, the above proceeding adjourned.)

#### CERTIFICATE OF TRANSCRIPTIONIST

I, ANN H. JONES, within and for the State of Missouri, do hereby certify that the tape transcription in the foregoing tape was transcribed to the best of my ability and therefore reduced to typewriting under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this tape was taken, and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

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