No. 13-55

In the Supreme Court of the United States

TOLL BROS., INC., ET AL., PETITIONERS

v.

MEHDI NOOHI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

KANNON K. SHANMUGAM
Counsel of Record
JAMES M. MCDONALD
BRYANT HALL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

TABLE OF AUTHORITIES

Page

Cases:

Statute:

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Respondents' brief in opposition is conspicuous not for what it says, but for what it does not. Respondents do not dispute petitioners' contention that, if the decision below had invalidated the arbitration provision at issue based on a state-law rule requiring arbitration provisions to have "mutuality of obligation"—that is, to contain mutual promises to arbitrate—then the decision would warrant this Court's review and reversal, because such a rule would plainly be preempted by the Federal Arbitration Act (FAA). Respondents instead take issue only with the premise of that contention. According to respondents, the state-law rule that formed the basis of the decision below did not require arbitration provisions to contain mutual promises to arbitrate, but instead merely required the presence of some form of consideration.

Notably, respondents took exactly the opposite position below. They argued that, under Maryland law, "[a]n

arbitration clause is not enforceable * * * where there has been no exchange of mutual promises to arbitrate." D. Ct. Dkt. 6, at 6 (citing *Cheek* v. *United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003)). Both the district court and the court of appeals ruled in respondents' favor, and permitted this class action to proceed in federal court, based on that understanding of state law. See, *e.g.*, Pet. App. 17a, 22a, 23a, 24a, 38a, 42a.

Even if principles of estoppel did not prevent respondents from changing horses midstream, respondents are wrong now for the same reasons that they were right below. The state-law rule at issue here does require arbitration provisions to contain mutual promises to arbitrate. And in any event, there can be no genuine dispute that the court of appeals applied precisely such a state-law rule in the decision under review. The court of appeals' decision that the FAA does not preempt that rule conflicts both with this Court's decisions, see Pet. 9-15, and with the decisions of other lower courts that have rejected efforts to resurrect the "mutuality of obligation" doctrine as a basis for invalidating arbitration provisions, see Pet. 15-18. And even if respondents were correct that the court of appeals had adopted a requirement that an arbitration provision must contain its own consideration, further review would still be warranted. This Court should grant review and reverse the court of appeals' decision.

1. Respondents devote essentially their entire brief in opposition to the allegation that petitioners "misstate" the state-law rule that the court of appeals applied in the decision under review. See Br. in Opp. 5-13. Respondents contend that the state-law rule applied below does not require arbitration provisions to contain mutual promises to arbitrate, as petitioners contend, but instead merely requires the presence of some form of considera-

tion. See *id.* at 5-7. That contention is demonstrably wrong, and this Court should reject respondents' cynical effort to manufacture an obstacle to further review.

a. In the petition for certiorari, petitioners explained that the decision under review rested on a state-law rule requiring arbitration provisions to contain mutual promises to arbitrate. See Pet. 12-14. Like the court of appeals in the decision below, petitioners described that requirement as a requirement of "mutuality of obligation," which constitutes a more specific, and more stringent, version of the requirement that both parties to a contract provide consideration. See Pet. 13; Pet. App. 17a.

Although respondents did not use the label "mutuality of obligation," they argued in their briefing below that Maryland law required arbitration provisions to contain mutual promises to arbitrate. Most tellingly, in their opposition to the motion for a stay pending arbitration, respondents contended that the arbitration provision at issue here should be invalidated because, under Maryland law, "[a]n arbitration clause is not enforceable * * * where there has been no exchange of mutual promises to arbitrate." D. Ct. Dkt. 6, at 6 (citing *Cheek*, *supra*). In a similar vein, respondents asserted that the arbitration provision here was unenforceable because petitioners "made no mutual promises to arbitrate or to be bound by arbitration." *Id.* at 11.

In ruling for respondents, the district court accepted respondents' characterization of Maryland law. It explained that, "[i]n *Cheek*, the Maryland Court of Appeals determined that the mutual exchange of promises to arbitrate disputes represented the necessary consideration in support of an arbitration agreement." Pet. App. 38a; see *id.* at 42a (adding that, "[a]lthough the obligations need not be identical, each party must promise to arbi-

trate at least some types of disputes"). And in affirming the district court, the court of appeals adopted the same understanding of Maryland law. It explained that, "for an arbitration provision to be valid [under Maryland law], both parties to an arbitration agreement [must] bind themselves to it." Pet. App. 22a; see *id.* at 17a (observing that, "under Maryland law as articulated in *Cheek*, an arbitration provision must be supported by consideration independent of the contract underlying it, namely, mutual obligation"); *id.* at 23a (noting that, "[i]n a basic sense, the *Cheek* rule does single out an arbitration provision in a larger contract, and assess whether that provision binds both parties to arbitrate at least some claims"); *id.* at 24a (stating that *Cheek* "requir[es] that both parties to an arbitration agreement bind themselves to arbitrate at least some categories of claims"); *ibid.* (noting that, "[u]nder Maryland contract law, an arbitration provision must contain a mutually coextensive exchange of promises to arbitrate" (citation omitted)). Thus, as the court of appeals, the district court, petitioners, and respondents (until now) have all recognized, Maryland law requires mutuality of obligation.[1]

b. In their brief in opposition, respondents do not dispute that, if the decision below did in fact invalidate the arbitration provision at issue based on a state-law

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[1] Respondents' suggestion (Br. in Opp. 7) that petitioners have somehow forfeited the argument that Maryland law requires mutuality of obligation verges on the frivolous. Petitioners unambiguously argued below that the *Cheek* rule "provides that an entire category of arbitration clauses (clauses that do not apply to all parties to a contract) will not be enforced" and that "[s]uch a rule is inconsistent with the FAA[] and * * * preempted under" *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). Pet. C.A. Reply Br. 4-5; see Pet. C.A. Br. 15-16.

rule requiring arbitration provisions to have "mutuality of obligation," the decision would warrant this Court's review and reversal. Facing that prospect, however, respondents simply turn their backs on the interpretation of Maryland law that they advanced (and prevailed on) below. Instead, respondents now argue that Maryland law "does not address the issue of what kinds or what extent of consideration would suffice to make the agreement enforceable; it only holds that there must be consideration (of some type) from both parties and that consideration must be reflected within the four corners of the severable agreement." Br. in Opp. 6. This Court should reject respondents' effort to evade further review by watering down the rule of Maryland law that the court of appeals actually applied.

i. As an initial matter, the doctrine of judicial estoppel precludes respondents from trading in the position they took below for the one they take today. As this Court has noted, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter * * * assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks and citation omitted). That reasoning is exactly on point here.

ii. On the merits, respondents' characterization of Maryland law is inaccurate and can readily be swept aside. To support their current position that Maryland law merely requires the presence of some form of consideration, respondents seize upon three isolated statements—one from the decision below and two from *Cheek*—that refer generally to consideration. See Br. in Opp. 5 (quoting *Cheek*, 835 A.2d at 669); *id.* at 6 (quoting *Cheek*, 835 A.2d at 662); *id.* at 7 (quoting Pet. App. 20a).

At the outset, it bears emphasizing that the critical question here is what state-law rule the court of appeals announced and applied in the decision below—not what rule the Maryland courts may previously have applied, whether in *Cheek* or in any other case. But in any event, the cited references, whether from the decision below or from *Cheek*, do not aid respondents. It is unsurprising that those decisions refer to consideration, because the "mutuality of obligation" doctrine is often described, and correctly understood, as a specific version of the doctrine of mutuality of consideration. As the Second Circuit has explained, "[a]s applied to arbitration clauses," the "mutuality of obligation" doctrine "has been restated to mean that the consideration exchanged for one party's promise to arbitrate *must be the other party's promise to arbitrate*." *Doctor's Associates, Inc.* v. *Distajo*, 66 F.3d 438, 451 (2d Cir. 1995) (emphasis added; internal quotation marks and citation omitted).

Where mutuality of obligation is lacking, therefore, it is correct (if less precise) to describe the deficiency as one of consideration—which is exactly what the decision below and *Cheek* did in the references cited by respondents. The salient point is that the decision below, like *Cheek* itself, makes clear that, in the context of arbitration provisions, the requisite consideration *must take the form of mutual obligations*. See, *e.g.*, Pet. App. 17a, 22a, 23a, 24a; *Cheek*, 835 A.2d at 665. That is the state-law rule that the court of appeals applied, and that is the rule that respondents do not dispute is preempted by the FAA. The court of appeals' contrary holding warrants this Court's review and reversal.

2. Even if respondents were now correct that the court of appeals applied (and upheld) a rule merely requiring the presence of some form of consideration, further review would still be warranted. Respondents ap-

pear to contend that the court of appeals' reasoning went something like this. First, the court of appeals held that Maryland law requires all contracts to be supported by some form of consideration. (Fair enough; it does.) Second, the court of appeals held, seemingly as a matter of federal law, that a court must sever an arbitration provision from the other provisions in the same contract and analyze whether it would be valid if it were treated as a stand-alone contract; so here, the court must analyze whether the arbitration provision contains its own consideration. Third, the court of appeals determined that, because the arbitration provision at issue here lacked consideration flowing from petitioners in exchange for respondents' promise to arbitrate, it was invalid.

a. To begin with, to the extent respondents contend that the court of appeals held *as a matter of federal law* that an arbitration provision must contain its own consideration, it is difficult to reconcile that contention with the opinion that the court of appeals actually wrote. If it were true that federal law, and not state law, supplied the requirement that an arbitration provision must contain its own consideration, any holding by the state court in *Cheek* as to the scope of that federal requirement would not have been binding on the court of appeals. But that is clearly not how the court of appeals viewed it. To the contrary, the court of appeals plainly believed it was applying a pure requirement of state law—and then deciding whether that requirement was *preempted* by federal law. See, *e.g.*, Pet. App. 25a.

But assuming, *arguendo*, that the court of appeals did hold *as a matter of federal law* that an arbitration provision must contain its own consideration, such a holding would cry out for this Court's review. It is true that federal law treats an arbitration provision as "severable" from other contractual provisions for purposes of

determining who decides certain types of validity-based challenges—the court or the arbitrator. See, *e.g.*, *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 444-445 (2006); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-403 (1967). But that is a far cry from saying that a court must treat an arbitration provision as if it were a stand-alone contract and proceed to analyze whether all of the essential elements of a contract, including consideration, can "be found within its four corners." Br. in Opp. 6.

Not surprisingly, at least two other courts of appeals have rejected the argument that federal law imposes such a formalistic and absurd requirement. Instead, those courts have held that, as long as an arbitration provision is supported by consideration within the contract, it is enforceable, regardless of where that consideration is located. In *Wilson Electrical Contractors* v. *Minnotte Contracting Corp.*, 878 F.2d 167 (1989), the Sixth Circuit considered whether this Court's decision in *Prima Paint* "require[d] separate consideration for an arbitration provision contained within a valid contract." *Id.* at 169. The court recognized that *Prima Paint* could "arguably be interpreted as implying that an arbitration clause is an independent contract that is separable from the main contract in which it is found and therefore must have all of the essential elements of a contract, including consideration." *Ibid.* But the court rejected that reading, concluding that "[s]uch an interpretation of *Prima Paint* would * * * clearly be inappropriate given the Supreme Court's recent decisions" citing the strong federal policy in favor of arbitration. *Ibid.* In *Distajo*, *supra*, the Second Circuit reached the same conclusion, explaining that "[a] doctrine that required separate consideration for arbitration clauses might risk running afoul of" the federal pro-arbitration policy. 66 F.3d at 453. To

the extent that the court of appeals held as a matter of federal law that an arbitration provision must contain its own consideration, its decision would be in direct conflict with the decisions of those circuits.[2]

b. Finally, to the extent that the court of appeals were read to have held *as a matter of state law* that an arbitration provision must contain its own consideration, such a decision would suffer from the same flaw as the decision the court of appeals actually wrote. Such a state-law rule would "singl[e] out arbitration provisions for suspect status" by subjecting arbitration provisions to a requirement that would not apply to other contractual provisions. *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996); see *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1746, 1748 (2011).

That would not be the case, respondents contend, because such a rule would apply to "all contract provisions which are severable and independently enforceable." Br. in Opp. 8. But respondents fail to identify a single category of contractual provisions other than arbitration provisions that would be subject to the rule—or to identi-

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[2] Respondents contend that other lower courts have held that "a state-law contract formation rule requiring mutuality of consideration is not preempted by the FAA, even when applied in the context of an arbitration agreement." Br. in Opp. 11. The cases respondents cite, however, are unavailing. *Hull* v. *Norcom, Inc.*, 750 F.2d 1547, 1551 (11th Cir. 1985), was based on a New York mutuality requirement that has since been overruled. See *Randolph* v. *Green Tree Financial Corp.*, 991 F. Supp. 1410, 1421 (M.D. Ala. 1997) (citing *Sablosky* v. *Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (N.Y. 1989)), rev'd, 178 F.3d 1149 (11th Cir. 1999), aff'd in part and rev'd in part, 531 U.S. 79 (2000). And the remaining cases cited by respondents invalidated arbitration provisions not for lack of mutuality, but for unconscionability. See, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 166-170 (5th Cir. 2004).

fy a single case in which a Maryland court has applied such a rule to invalidate such a contractual provision.[3] And even if respondents could identify some other category of contractual provisions that would be subject to the rule, a rule that applies to all arbitration provisions, but only to a subset of other provisions, would not be arbitration-neutral. See *AT&T Mobility*, 131 S. Ct. at 1747.

Even if it were true that the Fourth Circuit had applied an exclusively state-law requirement that an arbitration provision must contain its own consideration, therefore, such a requirement would be preempted by the FAA. *A fortiori*, the state-law requirement that the Fourth Circuit did apply—a requirement that an arbitration provision must have mutuality of obligation, even though contracts ordinarily need not—is plainly preempted. Hard as respondents try to conjure one up, there is no conceivable scenario in which the court of appeals' decision can be reconciled with this Court's previous decisions on the scope of FAA preemption. The court of appeals itself seemingly recognized that this Court might reach a contrary conclusion on the federal preemption question, but explicitly shifted the burden to the Court to do so. See Pet. App. 25a. The Court should accept the court of appeals' invitation, grant review, and reverse the court of appeals' seriously flawed decision.

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[3] The best respondents can do is to cite *Questar Builders, Inc.* v. *CB Flooring, LLC*, 978 A.2d 651 (Md. 2009)—a case that did not involve any severable contractual provisions and that, by respondents' own admission, actually upheld the validity of the contract at issue. Br. in Opp. 8-9; see *Questar*, 978 A.2d at 674.

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The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the case for briefing and oral argument.

Respectfully submitted.

KANNON K. SHANMUGAM
JAMES M. MCDONALD
BRYANT HALL
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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