No. 14-775

IN THE
Supreme Court of the United States

CASHCALL, INC.,

Petitioner,

v.

ABRAHAM INETIANBOR,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner makes the following disclosure:

CashCall, Inc. is a privately held corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Respondent Abraham Inetianbor argues that there is no circuit split on whether FAA § 5 contains an integrality exception. *See* Resp. Br. 5-10. Inetianbor can deny that there is a circuit split, but the fact remains that the Eleventh Circuit and Seventh Circuit each reviewed the other's caselaw and squarely rejected it. Also, four other circuits are bound by their precedent adopting the integrality exception, despite the fact that all of those cases were based on a single district court decision that was later *overruled* by the Seventh Circuit itself. There is clearly an entrenched circuit split on this issue, and nothing will be gained by waiting to see how other courts may rule.

Inetianbor also asserts that the text and policy of § 5 require an integrality exception, *see* Resp. Br. 15-23, but his arguments fail. The plain language of § 5 clearly applies to what happened here: there was a "lapse" or "vacancy" for "any … reason" in "the naming of an arbitrator," and accordingly the court was required to appoint a substitute. 9 U.S.C. § 5; *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585-87 (2008). Further, Inetianbor fails to rebut Petitioner CashCall's arguments that the malleable integrality exception not only leads to absurd results but also directly undercuts parties' agreements to arbitrate and imposes significant and unnecessary litigation costs.

This petition for a writ of certiorari squarely presents the Court with an opportunity to resolve the circuit split and enforce § 5's plain language.

I. A Meaningful Circuit Split Exists On Whether FAA § 5 Contains An Integrality Exception.

Inetianbor claims that there is no circuit split on the existence of the integrality exception because the Seventh Circuit concluded that arbitration should be denied in a case with a similar arbitration clause. *See Jackson v. Payday Fin., LLC*, 764 F.3d 765 (7th Cir. 2014). This argument should be rejected for several reasons.

The court's opinion below clearly rejected Inetianbor's assertion that the outcome in this case should follow *Jackson*. The Eleventh Circuit majority never once referred to *Jackson* or to Judge Restani's concurring opinion, which relied heavily on *Jackson*. *See* Pet. App. 2a-16a. Rather, the decision below rested *solely* on the existence of an integrality exception to FAA § 5 and then explicitly noted that its holding on this issue conflicts with the decision in *Green v. U.S. Cash Advance Illinois, LLC*, 724 F.3d 787 (7th Cir. 2013). *See* Pet. App. 6a. In other words, the Eleventh Circuit rejected *Green* and did not even address *Jackson*. Also, *Jackson* did not purport to overrule *Green*, and thus the rule announced in *Green*—and explicitly rejected by the Eleventh Circuit below—remains good law in the Seventh Circuit.

CashCall asks this Court to review a decision where the court below acknowledged that its ruling directly conflicts with another circuit's controlling law on that very same issue. This is the epitome of a meaningful

circuit split. Also, four other circuits are bound by their caselaw adopting the integrality exception, *see* Resp. Br. 6, despite the notable fact that all of those cases were based on a district court decision that the Seventh Circuit later overruled, *see Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359 (N.D. Ill. 1990), *overruled by Green*, 724 F.3d at 792. Thus, not only is there a continuing circuit split, but the courts in the majority of that split are stuck with precedent whose foundations have been severely undermined.

Additionally, *Jackson*'s rationale actually highlights the central issue of this petition for certiorari: regardless of how a court frames the issue, does the unavailability of the contractually-selected arbitrator render the entire Arbitration Clause void? As even Inetianbor seems to acknowledge, *Jackson*'s labeling of the arbitration clause in that case as "illusory" was based on the court's conclusion that the "contractually selected forum did not exist." Resp. Br. 8; *see also Jackson*, 764 F.3d at 779-81. In other words, *Jackson* concluded that because the selected arbitrator was unavailable, the arbitration clause was "illusory" and void. But if the unavailability of the arbitrator could render the Arbitration Clause void, then § 5 would serve no purpose. To the contrary, Congress designed it specifically for a situation where the selected arbitrator is not available to hear the parties' dispute for "any … reason." *See* 9 U.S.C. § 5.

Critically, Inetianbor's claims about the "illusory" nature of the selected arbitrator are completely

irrelevant under § 5. When the selected arbitrator is not available, § 5 requires the district court to appoint a substitute arbitrator, who would then apply substitute arbitration rules if necessary.[1] This moots any claims that the *original* arbitral details were somehow unfair or a sham; the replacements mandated by § 5 will have completely superseded those original details. The arbitrator's unavailability for "any … reason" is all that matters—Inetianbor cannot circumvent § 5 merely by labeling the unavailability as "unconscionable," "illusory," "mistaken," or "fraudulent." *See* Resp. Br. 19-21, 23-25.[2]

Further, *Jackson*'s labeling of the arbitration clause in that case as "illusory" was based in part on its heavy reliance on the district court's factual findings in *Inetianbor*—the case *sub judice*. *See Jackson*, 764 F.3d at 770-71. *Jackson*'s reliance on the facts in this very case cannot prevent this Court from reviewing the Eleventh Circuit's decision.

This case squarely and cleanly presents the question whether there is an integrality exception to § 5—an

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[1] Either the district court or the arbitrator would determine the procedural rules to be applied during the arbitration. *See, e.g.*, *Green*, 724 F.3d at 793; *Schulze & Burch Biscuit Co. v. Tree Top, Inc.*, 831 F.2d 709, 715-16 (7th Cir. 1987).

[2] Similarly, it is irrelevant whether the Arbitration Clause here is "atypical." Resp. Br. 26 (quotation marks omitted). *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for" holding the clause unenforceable).

important and interesting issue on which the circuit courts are openly in disagreement.

II. The Integrality Exception Is Inconsistent With The FAA's Text And Policy.

Section 5 mandates that the court "shall" appoint a substitute whenever there is a "lapse" or "vacancy" for "any … reason" in "the naming of an arbitrator." 9 U.S.C. § 5. Enforcing § 5 as written, which means refusing to recognize the integrality exception, makes eminent sense, given the importance of maintaining streamlined arbitration procedures. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011).

Inetianbor argues that the text and purpose of the FAA actually *require* the integrality exception. Resp. Br. 15-23. These arguments boil down to the claim that parties who expressly agree to arbitrate *all* of their disputes would rather litigate in federal court than before a substitute arbitrator. That argument not only strains credulity, it also squarely contradicts the text and purpose of the FAA, as discussed below.

1. Inetianbor argues that § 5 applies only to lapses and vacancies in the naming of an "arbitrator," not in the naming of an "arbitration forum." Resp. Br. 18-19. Inetianbor never explains the difference between these two concepts. His argument is nothing more than an attempt to divert attention from the obvious conclusion that the plain language of § 5 applies here.

The Court's "analysis begins and ends with the text" of § 5, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014), which covers any contractual provision pertaining to the "method of naming or appointing an arbitrator," and explains what to do when there is a "lapse" or "vacancy" for "any … reason" "in the naming of an arbitrator." 9 U.S.C. § 5. That language directly covers what happened here: the Arbitration Clause listed a method of naming an arbitrator, by which Inetianbor would choose between "(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council." Pet. App. 23a. The district court found that those arbitrators were not available to hear the parties' dispute. Accordingly, there was a "lapse" or "vacancy" for "any ... reason" in the naming of an arbitrator. 9 U.S.C. § 5. Section 5 therefore required the court to "designate and appoint an arbitrator" as substitute. *Id.* That did not happen.[3]

Inetianbor next claims that the phrase "any ... reason" does not cover a situation where the arbitrator "is nonexistent." Resp. Br. 18. In other words, Inetianbor argues that "any reason" actually does not mean "any reason." *See Webster's New International Dictionary of the English Language* 101 (1st ed. 1925)

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[3] Inetianbor's argument about the alleged difference between an "arbitrator" and an "arbitration forum" is especially irrelevant given that the Arbitration Clause never uses the phrase "arbitration forum"—in fact, the relevant section is titled "Choice of *Arbitrator*." C.A. App. Tab 53-2 at 6 (emphasis added). Inetianbor's argument is also contrary to *Green*, which applied § 5 even though the parties' arbitration clause did not name a specific person to conduct the arbitration. *See* 724 F.3d at 789-93.

(defining "any" as "[o]ne indifferently out of a number"); *New Standard Dictionary of the English Language* 127 (1st ed. 1931) (defining "any" as "a single person, thing, or part, of whatever kind, degree, or quantity, from among a number, class, or total").[4] If Inetianbor were correct, then § 5 would serve no purpose. Congress specifically designed it to apply when the parties' selected arbitrator does not exist to hear their dispute. As *Green* observed, under § 5, "a court could … assume that a reference [in a contract] to an unavailable means of arbitration is equivalent to leaving the issue open." 724 F.3d at 792.

"Instead of fighting the text" of the FAA, *Hall Street*, 552 U.S. at 588, it makes much more sense to interpret § 5 as meaning exactly what it says: the court "shall" appoint a substitute whenever there is a "lapse" or "vacancy" for "any … reason" in "the naming of an arbitrator." 9 U.S.C. § 5.

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[4] Further, dictionaries from the period when Congress passed the FAA in 1925 show that the ordinary meanings of the words "lapse" and "vacancy" certainly cover what happened here. *See Webster's New International Dictionary of the English Language* 1214, 2261 (1st ed. 1925) (defining a "lapse" as the "termination or failure of a right or privilege … through failure of some contingency"; and a "vacancy" as "an unoccupied office or position"); *New Standard Dictionary of the English Language* 1389, 2625 (1st ed. 1931) (similar); *Black's Law Dictionary* 1794 (3d ed. 1933) (noting that "vacancy" "applies not only to an interregnum in an existing office, but it aptly and fitly describes the condition of an office when it is first created, and has been filled by no incumbent").

2. Inetianbor also asserts that the general proposition that courts should "enforce arbitration agreements according to their terms" should trump the specific rule of § 5. *See* Resp. Br. 15-17, 22-23. Inetianbor overlooks the "general/specific canon," which states that a "specific provision is treated as an exception to the general rule." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012). That is, the specific rule of arbitrator substitution pursuant to § 5 is treated as an exception to the general rule that courts should strictly enforce arbitration clauses pursuant to their terms. *See Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014).

Regardless, appointing a substitute arbitrator *would* enforce the "wishes of the contracting parties." Resp. Br. 16 (quotation marks omitted); *see Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (the FAA "'requires courts to enforce the bargain of the parties to arbitrate'"). The parties here clearly bargained to arbitrate all of their disputes, as shown by their comprehensive Arbitration Clause, with its Severance and Survival Provisions. *See* Pet. Br. 6 & n.3. Appointing a substitute arbitrator would honor that intent: "Section 5 allows judges to supply details in order to make arbitration work." *Green*, 724 F.3d at 793.

Further, as this Court held in *Hall Street*, courts cannot enforce an arbitration clause in a way that would violate a mandatory FAA provision. *See* 552 U.S. at 585-87. Inetianbor attempts to distinguish *Hall Street* by arguing that it dealt with FAA § 9, "which

addresses the power of courts under the FAA," Resp. Br. 21, while this case deals with § 5, which "tells a court what to do just in case the parties say nothing else," *id.* at 22 (alteration and quotation marks omitted). This alleged distinction makes little sense. Both § 9 and § 5 speak to what a court "shall" or "must" do. *Compare Hall Street*, 552 U.S. at 587 ("'must grant'" (quoting § 9)), *with* 9 U.S.C. § 5 ("shall … appoint"). The logic of *Hall Street* is fatal to Inetianbor's argument. The FAA's mandatory language cannot be trumped by the parties' agreement, *see Hall Street*, 552 U.S. at 585, and that is precisely the same logic for why parties cannot contract around § 5's mandatory language "address[ing] the power of courts under the FAA" to appoint a substitute arbitrator, Resp. Br. 21.

3. Inetianbor barely addresses the practical concerns that the integrality exception creates, *see* Pet. Br. 20-22, including the fact that it would require a burdensome "case by case … tally[ing of] the costs and burdens" to each party. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311-12 (2013).[5] Inetianbor claims that the logic of *Italian Colors* is inapplicable because the FAA requires case-by-case determinations in other instances. *See* Resp. Br. 22-23. That misses the point, which is that the burdens imposed by the integrality exception *far exceed* the

[5] Indeed, after Justice Thomas requested that Inetianbor respond to CashCall's application to recall the mandate in this case, Inetianbor conceded that the integrality exception requires a "fact-specific" determination. Resp. Br. to Mot. to Stay Mandate 6.

burdens required to address simple "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

This very case illustrates those burdens. The district court attempted to determine integrality using the text of the Arbitration Clause. *See* Pet. App. 53a-56a. The result is that, after two years of litigation, the courts have concluded that an arbitrator *that both parties have disclaimed* is actually so important that they *must* arbitrate before that arbitrator—or not at all. Holding a jury trial on integrality, as Inetianbor requests, *see* Resp. Br. 23, would only waste even more resources and time: "The process would be lengthy, expensive, and inconclusive to boot." *Green*, 724 F.3d at 792.

Neither the FAA's text nor purpose support imposing such significant burdens, especially given that the results are unpredictable and often absurd.

III. This Case Is An Excellent Vehicle.

This case is an excellent vehicle to resolve the integrality issue, even apart from the circuit split discussed above in Part I. Inetianbor concedes that while this Court has decided many cases addressing the FAA, "none of those cases speak to the interpretation of Section 5." Resp. Br. 19. This lack of Court guidance highlights the need for the Court to act now and resolve the split.

Additionally, the Court should disregard Inetianbor's claim that there is a theoretical possibility that the Eleventh Circuit might affirm on alternative grounds if the case is remanded. *See* Resp. Br. 23-25. This Court should not be concerned with hypothetical scenarios of what could happen after remand, especially given that the majority below never addressed the argument that the Arbitration Clause is unconscionable. In any event, Inetianbor is wrong: if this Court concludes that there is no integrality exception, then the courts below would appoint a substitute arbitrator and thereby moot any argument that the *original* arbitrator was allegedly "unconscionable" or "illusory."

Further, as evidenced by Inetianbor's lengthy and irrelevant digression into alleged "bad behavior" by CashCall, *see* Resp. Br. 26-30, this case shows precisely how "judicial resistance to arbitration" often turns on the unpopularity of the defendant, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), especially when courts are applying a malleable and unprincipled test like the integrality exception. This is the perfect case to show that the FAA's text means what it says, *regardless of who the parties are*.

The Court should grant the petition because this case cleanly and squarely presents a clear opportunity to resolve an entrenched circuit split on an important issue of arbitration law.

IV. The Court Should Also Grant The Severance Provision Issue.

This Court should also grant review of the second question presented. *See* Pet. Br. 25-30. There is inconsistency among the circuits as to the standard that courts should use when determining whether to enforce a severance provision within an arbitration clause. *Compare, e.g.*, *Hadnot v. Bay, Ltd.*, 344 F.3d 474 (5th Cir. 2003), *with* Pet. App. 11a-12a.

Additionally, Inetianbor never disputes CashCall's argument that the Eleventh Circuit's decision below directly contravened this Court's precedent, which has made clear that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *accord Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *see also* Sup. Ct. R. 10(c). Indeed, Inetianbor's insistence that courts "'rigorously enforce arbitration agreements according to their terms,'" Resp. Br. 23, actually favors enforcing the parties' Severance Provision and therefore supports granting review on this question presented, as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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