No. SC99270

IN THE SUPREME COURT OF MISSOURI

BRIDGECREST ACCEPTANCE CORPORATION,

Plaintiff/Appellant

v.

CHRISTOPHER JONES,

Defendant/Respondent.

Appeal from the Associate Circuit Court of St. Louis County
Honorable Mondonna L. Ghasedi, Circuit Judge
Case No. 20SL-AC05738

AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, AND AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF PLAINTIFF/APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*

Amici are the Chamber of Commerce of the United States of America ("U.S. Chamber"), Missouri Chamber of Commerce and Industry ("Missouri Chamber"), and American Financial Services Association ("AFSA"). *Amici* and their members have a strong interest in the issues raised by this case. Many of *amici's* members regularly employ arbitration agreements in their contracts in reliance on longstanding, fair applications of the Federal Arbitration Act ("FAA"). The ruling below violates this precedent, injecting significant uncertainty as to the enforceability of arbitration agreements in Missouri. Unless overturned, it will deprive Missourians of the many benefits of arbitration. Arbitration resolves disputes promptly and efficiently while avoiding the costs associated with traditional litigation. It is speedy, fair, inexpensive, and less adversarial than litigating in court. These efficiencies lead to a reduction in the costs of doing business, lower prices for consumers, and increased wages for employees.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, including cases involving the enforceability of arbitration agreements and interpretation of the FAA, 9 U.S.C. §§ 1-16.

The Missouri Chamber is the largest business association in Missouri. Representing more than 40,000 employers, the Missouri Chamber advocates for policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates for legislative policy and court outcomes that make Missouri attractive to job creators, and encourage existing job creators to stay and grow within Missouri.

AFSA, founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. AFSA has a broad membership, ranging from large international financial services firms to single-office, independently owned consumer finance companies. For over 100 years, AFSA has represented financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA supports financial education for consumers of all ages. AFSA advocates before legislative, executive, and judicial bodies on issues affecting its members.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f), *amici* requested consent from all parties' counsel to file this brief. Each party agreed to the filing on December 1, 2021.

JURISDICTIONAL STATEMENT

Amici adopt Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

The facts are not in dispute with regard to the issues presented. To the extent needed to support the arguments herein, *amici* adopt Appellant's Statement of Facts.

POINT RELIED ON

The Associate Circuit Court erred in denying Bridgecrest's motion to compel arbitration because the Contract included a valid Arbitration Agreement, in that the parties have a right under Missouri law, U.S. Supreme Court precedent, and the Federal Arbitration Act to define the disputes they agree to resolve through arbitration, which provides a fair, efficient, and inexpensive alternative to litigation.

***AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011)**

***Eaton v. CMH Homes, Inc*., 461 S.W.3d 426 (Mo. banc 2015)**

***State ex rel. Vincent v. Schneider,* 194 S.W.3d 853 (Mo. banc 2006)**

ARGUMENT

I. INTRODUCTION & SUMMARY OF ARGUMENT

Congress, the U.S. Supreme Court, this Court, and the Missouri General Assembly have all repeatedly affirmed the right of parties to enter into an arbitration agreement that defines the disputes the parties agree to resolve through arbitration. For almost a century, the Federal Arbitration Act has made such arbitration agreements "valid, irrevocable, and enforceable" as with any other contract. 9 U.S.C. § 2. The same is true for arbitration agreements under Missouri law. *See* R.S.Mo. 435.350 (also stating they are "valid, enforceable and irrevocable" as with other contracts). Accordingly, the U.S. Supreme Court and this Court have instructed lower courts to "place arbitration agreements on an

equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *see also Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 429 (Mo. banc 2015) (affirming that arbitration agreements are "tested through a lens of ordinary state-law principles that govern contracts"). Yet, as here, some Missouri courts continue to mistakenly impose unique burdens on arbitration agreements, which is not allowed by the FAA.

In this case, it is uncontroverted that Respondent entered into a Retail Installment Contract, which included an arbitration agreement, with Appellant to finance the Respondent's purchase of a car. Respondent does not claim to have not read or not understood the documents. Respondent is seeking to invalidate the arbitration agreement only after accepting Appellant's financing, defaulting on the payments due, and having had Appellant repossess the car pursuant to the terms of the contract. In invalidating the arbitration agreement, the Associate Circuit Court violated longstanding Missouri contract law without explanation. In justifying this ruling, the Court of Appeals issued a Memorandum Supplementing Order Affirming Judgment that is irreconcilable with this Court's explicit directives in *Eaton* and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006). It suggested that the Associate Circuit Court could sever the arbitration clause from the Retail Installment Contract so that the obligations from the contract would not be deemed consideration for the arbitration agreement. Then, rather than apply traditional contract consideration requirements to the arbitration agreement, it allowed the Associate Circuit Court to impose a "mutual arbitration obligation"—a theory under which a court purports to balance the claims each party agrees to arbitrate

(here, each party's "primary remedy") and invalidates the agreement if, in its view, the scales are not even.

This Court has already unequivocally rejected these devices for invalidating arbitration agreements, which are not consistent with the FAA. In *Eaton*, the Court affirmed that one must look to the contract "as a whole" to determine whether consideration is adequate, not just "the consideration given for the agreement to arbitrate." 461 S.W.3d at 429, 433. In *Vincent* and again in *Eaton*, the Court rejected the mutuality of obligation requirement, calling it a "dead letter in contract law" and stating that "[t]here is no reason to create a different mutuality rule in arbitration cases." *Vincent*, 194 S.W.3d at 859; *Eaton*, 461 S.W.3d at 434 ("The lack of mutuality as to the arbitration agreement does not itself invalidate that arbitration agreement."). Missouri courts must not be allowed to set aside *Vincent* and *Eaton* or to create any false dichotomy, as the Court of Appeals suggested in its Memorandum, between rules governing unconscionability and rules governing contract formation. Such a distinction is not supported by Missouri law and does not lead to divergent outcomes. Under either theory, "[a]s long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other." *Vincent*, 194 S.W.3d at 859.

Here, the Court must once again step in "to reverse the longstanding hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). It should make clear that the ruling below conflicts not only with the FAA and with U.S. Supreme Court and Missouri Supreme Court precedent, but with liberal federal and state policies favoring arbitration as a fair, efficient, and less expensive alternative to

litigation. *See Concepcion*, 563 U.S. at 339. The decision below runs afoul of that policy, reflects hostility to arbitration, and upsets settled expectations.

II. CONGRESSIONAL AND JUDICIAL POLICIES FAVORING ARBITRATION REFLECT THE FACT THAT ARBITRATION IS A FAIR, EFFICIENT, AND INEXPENSIVE ALTERNATIVE TO LITIGATION THAT BENEFITS BUSINESSES AND INDIVIDUALS.

The Court should overturn the ruling below and give effect to the pro-arbitration policy established by Congress, the U.S. Supreme Court, this Court and the General Assembly. This policy favoring arbitration reflects the fact that arbitration has proven over the years to be a faster, cheaper alternative to litigation that is fair and beneficial to businesses and individuals. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (explaining the "advantages of arbitration," including that "it is usually cheaper and faster than litigation," is often simpler, more flexible, and less hostile); *Vincent*, 194 S.W.3d at 858 (stating "Missouri's preference for the arbitrability of disputes"). These benefits can be realized only if courts can be relied upon to uphold these agreements after the dispute arises.

Nearly a century ago, Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts." *Gilmer*, 500 U.S. at 24. Congress's intent was "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, at 1 (1924)). The House Report accompanying the FAA stated that "the costliness and delays of litigation . . . can be eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable." H.R. No. 68-96, at 2. The Senate

Report similarly stated that the FAA helps "avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924). Even then, Congress recognized that expenses and delays associated with litigation tend to increase over time. *See id.* So, it precluded courts from "singling out arbitration provisions for suspect status." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

More than a half-century later, Congress reiterated and expounded on the "many" benefits of arbitration. H.R. Rep. No. 97-542, at 13 (1982). It emphasized that arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices." *Id.* Congress also explained that "arbitration could relieve some of the burdens on the overworked" courts. *Id.* The U.S. Supreme Court has repeatedly recognized these benefits: "'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) (quoting *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Importantly, Congress and the courts have recognized that consumers realize the benefits of arbitration too; it is fair to both parties. *See Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 280 ("We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind.").

Modern data confirms that arbitration benefits consumers in several significant ways, particularly as litigation has become significantly more expensive, contentious, and entrepreneurial. First, empirical research confirms that arbitration is faster and less expensive, and produces better results for consumers, than litigation in courts. A study of "publicly available data from two of the largest consumer arbitration providers and a national litigation database" found that consumers are more likely to win and to receive higher awards in arbitration than in court, as well as resolve disputes faster. Nam. D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, ndp analytics (Nov. 2020).[1] This study, which was conducted for the U.S. Chamber Institute for Legal Reform, looked at 101,244 consumer disputes that terminated between January 1, 2014 and June 30, 2020. It concluded as follows:

1. **Consumers are more likely to win in arbitration than in court.** Consumers initiated and prevailed in 44% of all consumer arbitrations that were terminated with awards during January 2014—June 2020. During the same period, consumers initiated and prevailed in 30% of all consumer litigation cases that were terminated with judgments. In an updated study by the same authors

[1] https://instituteforlegalreform.com/research/fairer-faster-better-ii-an-empirical-assessment-of-consumer-arbitration/

announced weeks before this filing, the win rate of consumer arbitration that terminated during January 2020 to June 2021 was slightly higher at 46.7%.[2]

2. **Consumers receive higher awards in arbitration than in litigation.** The median award in arbitration that consumers initiated and won was $20,019, compared to just $6,565 in litigation they initiated. The mean award to consumers was $68,198 in arbitration compared with $57,285 in litigation.
3. **Consumer arbitration is faster than litigation.** It took a mean time of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared with 429 days in litigation. The median number of days for consumers to initiate and complete a dispute with an award was 251 days in arbitration compared with 311 days in litigation.

Moreover, because arbitration involves far fewer procedures and complexities than court litigation, it is usually cheaper for both parties than going to court. The Consumer Financial Protection Bureau's 728-page empirical study of consumer arbitration, completed in March 2015, likewise found that arbitration is faster and less expensive than class action litigation and results in greater recoveries for consumers. *See Arbitration*

[2] *See* Nam. D. Pham & Mary Donovan, *Claimant Win Rates in Consumer and Employment Arbitration,* ndp analytics (Nov. 2021), *available at* https://instituteforlegalreform.com/claimant-win-rates-in-consumer-and-employment-arbitration-november-2021-update/

Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act 1028(a), Consumer Financial Protection Bureau (Mar. 2015).[3]

Second, arbitration enables financial lenders and other businesses to mitigate the ever-spiraling costs of litigation. Arbitration lowers businesses' dispute resolution costs because, *inter alia,* it uses a nationally uniform set of procedures, thus saving interstate businesses the costs of adapting to different procedural rules in different states; it reduces the amount of time and money that the parties spend on discovery; it typically takes place on an individual, bilateral basis; and there is only limited appellate review. *See* Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90-91 (2001). Businesses generally pass cost savings from arbitration to consumers and employees in the form of lower prices and higher wages. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) ("[I]t stands to reason that passengers who purchased tickets containing a forum clause . . . benefit in the form of reduced fares."). Lenders, such as Appellant, are able to charge lower interest rates when consumers agree to arbitrate claims.

Conversely, without arbitration, companies' litigation costs increase, and there is a corresponding need to increase revenue or reduce value, so that customers pay more or receive less for their money. *See, e.g., Unstable Foundation: Our Broken Class Action System and How to Fix It*, U.S. Chamber Inst. for Legal Reform (Oct. 2017), at 3

[3] https://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015/

(observing, for example, that class actions "impose[] substantial costs on the parties sued, including the fees of defense lawyers and the costs of discovery if the lawsuit survives a motion to dismiss. These costs are inevitably passed on to customers, shareholders, or other innocent parties."). In recent years, civil litigation has become much more expensive for the parties involved and much less responsive to consumers and employees. Agreeing ahead of time to avoid the high cost and inefficiencies of prolonged litigation, which often serves the lawyers more than the parties, is increasingly making sense for many types of claims.

Third, there are important intangibles associated with arbitration. For example, in arbitration, consumers can speak directly to an arbitrator sitting at a conference table, unencumbered by the intimidating formalities of a courtroom and the sometimes rigid constraints of court rules governing procedure and evidence. They can also choose arbitrators with expertise in the subject matter of the dispute. Unlike most court trials, scheduling of arbitration hearings is flexible and accommodates the needs and availabilities of the parties. Consumers can even participate by telephone or virtually, while thousands of miles away. Such conveniences and efficiencies do not exist in court, which can be daunting and frustrating to non-lawyers and fraught with unpleasantries and delays. They also have taken on increased importance during the Covid-19 pandemic, as many courts have suspended trials while private remote arbitrations have continued.

Fourth, arbitration is fair. Arbitrators and courts ensure that arbitration provisions will be enforced only if they meet basic guarantees of fairness and due process. The nation's two leading arbitration service providers, the AAA and JAMS, each have

standards to ensure that arbitrations are conducted fairly. The AAA's Consumer Due Process Protocol requires independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court.[4] The AAA will not administer a consumer arbitration unless the arbitration is consistent with the Due Process Protocol. Likewise, JAMS will not administer a pre-dispute arbitration clause between a company and consumer unless the clause complies with "minimum standards of fairness."[5] Both entities recognize that independence, due process, and low costs for consumers are vital elements of a fair and accessible arbitration system.

The courts provide an important layer of oversight to this process. State and federal courts have been empowered by Congress and the U.S. Supreme Court to invalidate arbitration clauses that run afoul of generally applicable principles of state contract law. *See* 9 U.S.C. § 2; *see Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530 (2012) (stating courts may invalidate arbitration provisions under standards "that are not specific to arbitration"). Courts have not hesitated to strike down arbitration provisions that subject consumers to unfair procedures. For example, courts routinely invalidate provisions that purport to limit a consumer's right to recover certain types of

[4] *See* Consumer Due Process Protocol, AAA, at https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf.

[5] Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, JAMS, at https://www.jamsadr.com/consumer-minimum-standards/.

damages,[6] impose excessive fees,[7] or unreasonably shorten statutes of limitations.[8] At the same time, the vast majority of arbitration agreements, including the one at bar, do not contain these defects, and the Associate Circuit Court made no findings otherwise.

Individuals who have arbitrated claims are generally satisfied with the experience and consistently favor arbitration as an alternative to litigation. In a 2005 survey, most individuals who had participated in arbitration reported that it was faster (74 percent), simpler (63 percent), and less expensive (51 percent) than litigation. *See Arbitration:*

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[6] *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003) (provision barring punitive damages); *Woebse v. Health Care & Retirement Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

[7] *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) (provision requiring employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Brunke v. Ohio State Home Servs., Inc.*, No. 08-9320, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008) (same); *Liebrand v. Brinker Rest. Corp.*, No. 07-3533, 2008 WL 2445544 (Cal. Ct. App. June 18, 2008) (same); *Murphy v. Mid-West Nat'l Life Ins. Co. of Tenn.*, 78 P.3d 766 (Idaho 2003) (same).

[8] *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, 936 F. Supp. 2d 1145 (N.D. Cal. 2013) (provision shortening the statute of limitations to 6 months), *aff'd*, 601 F. App'x 461 (9th Cir. 2014); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (30 days); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (1 year).

Simpler, Cheaper, and Faster Than Litigation, Harris Interactive (Apr. 2005), at 5 (conducted for U.S. Chamber Institute for Legal Reform). Two-thirds reported they would likely use arbitration again. *Id.* Likewise, nearly 70% of the consumers surveyed by Ernst & Young said they were "satisfied" or "very satisfied" with the arbitration process. *See Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases*, Ernst & Young (2005).[9] In its 2020 annual survey of the arbitration system for Kaiser Foundation Health Plan, the Office of the Independent Administrator reported that 46% of the parties who went through arbitrations that year said the arbitration system was better than going to court, another 44% said it was the same as going to court—and only 10% said it was worse. *See 2020 Annual Report of the Office of the Independent Administrator of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System for Disputes with Health Plan Members*, Kaiser Found. Health Plan, Inc. (2020), at 39.[10]

Also recently, a 2019 survey for the U.S. Chamber Institute for Legal Reform found that more than 6 in 10 people viewed arbitration as a favorable way to resolve disputes between consumers and businesses and employees and employers. *See Arbitration Survey*, Public Opinion Strategies (Mar. 2019).[11] The survey also found that

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[9] https://arbitrationlaw.com/library/ernst-young-study-outcomes-arbitration-empirical-study-consumer-lending-cases-wamr-2005-vol

[10] https://www.oia-kaiserarb.com/pdfs/2020-Annual-Report.pdf.

[11] https://instituteforlegalreform.com/wp-content/uploads/media/Arbitration_Online_Survey.pdf

people prefer arbitration to both filing an individual lawsuit and being part of a class action. These individuals understand what the data reflect. Without arbitration, they would be "far worse off, for they would find it far harder to obtain a lawyer, find the cost of dispute resolution far more expensive, wait far longer to obtain relief and may well never see a day in court." Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 Cardozo J. Conflict Resol. 267, 267 (2008).

For many people who sustain injury, knowing that a path to resolve a dispute has been agreed to where he or she must be given a reasonable, fair path to redress, can be the deciding factor to pursue justice. Arbitration agreements have become common in business, consumer, and employment contracts because arbitration often achieves the goal of peaceful, quick, and conclusive dispute resolution better than the judicial system.

III. THE RULING BELOW VIOLATES THE FEDERAL ARBITRATION ACT BY IMPOSING REQUIREMENTS ON ARBITRATION AGREEMENTS THAT ARE NOT REQUIRED FOR OTHER TYPES OF CONTRACT PROVISIONS.

Despite the uniform rulings from this Court and the U.S. Supreme Court, as well as consistent policies from the General Assembly and Congress, some state courts continue to devise "a great variety of devices and formulas" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342. As explained in its Memorandum, the Court of Appeals invoked two of these techniques: refusing to incorporate an arbitration agreement into a larger contract, despite commonly used language expressly doing so, and not applying traditional consideration principles to the arbitration agreement. This Court should use this case to reiterate that it will not tolerate singling out arbitration agreements for negative treatment in any form.

First, the Court should clarify that severability of an arbitration agreement from contemporaneous related agreements under the FAA, *see Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 418 (Mo. banc 2016), does not mean an arbitration provision must have separate consideration, *see Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989). To the contrary, requiring independent consideration for an arbitration clause is the type of special requirement for arbitration provisions that the U.S. Supreme Court has repeatedly rejected. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1425 (2017). Severability is a concept limited to the notion that a party seeking to avoid enforceability of an arbitration provision must bring a discrete challenge to that arbitration provision—not to the underlying contract. *See Ellis*, 482 S.W.3d at 418. Similarly, a party seeking to void the underlying contract cannot avoid the arbitration clause. *See id.* Severability does not require separate proof of consideration.

Severing an arbitration agreement from an underlying contract has become a common ploy used as a pretense for invalidating arbitration agreements while upholding the underlying contract. As here, an arbitration agreement is often provided in a separate form so that its terms are conspicuous, separately acknowledged, and signed, so that it cannot be argued later that the agreement went unnoticed. As is often the situation when contract provisions are provided on separate forms, the arbitration agreement was expressly "incorporated by reference into and is a part of" the Retail Installment Contract. Under Missouri law, as in other states, "matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba." *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 45 (Mo. banc 2017). Yet

the Associate District Court treated the Retail Installment Contract and arbitration agreement as separate contracts. That violated the FAA and governing precedent: "[w]hat [courts] may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos., Inc.*, 513 U.S. at 281.

Second, the Court should make clear that the requirement of consideration does not require both sides to mutually agree to arbitrate all or even certain claims. This asserted justification for invalidating arbitration agreements, termed "mutuality of obligation," suggests that the contract must impose the requirements of arbitration equally on both parties. This doctrine has been manipulated to create an elusive and inconsistent level of mutuality to qualify as consideration -- here, that both sides must agree to arbitrate their "primary remedy." It is not and has never been the law in Missouri or elsewhere that all contract provisions must be mutual or that certain types of claims arising under a contract must be resolved in the same way. Indeed, "'mutuality of obligation' has been largely rejected as a general principle in contract law." *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 453 (2nd Cir. 1995) (citing Restatement (Second) of Contracts § 79 (1979)); *see also Vincent*, 194 S.W.3d at 859 (also citing Restatement).

As the U.S. Court of Appeals for the Eighth Circuit has explained, state contract law, "for good reason, does not require on 'mutuality of obligation' grounds or any other, that a party's promise, say, to build a house is not enforceable unless the other party also promises to do so." *Plummer v. McSweeney*, 941 F.3d 341, 347 n.1 (8th Cir. 2019). Thus, no such rule may be applied only to arbitration agreements. *See id.* at 346. As discussed

above and in Appellant's brief, this Court already adopted this rule of law in *Vincent* and *Eaton*. Parties to a contract are fully permitted to limit the issues subject to arbitration. In *Concepcion*, for example, the agreement to arbitrate class actions would not apply to claims that AT&T might bring, but the Court found value in AT&T's obligations in the arbitration agreement. *See* 563 U.S. at 352 (noting the lower court conclusion that "the Concepcions were *better off* under their arbitration agreement"). Here, consideration can be found in Appellant's agreement to finance Respondent's car purchase in the broader contract or to pay costs associated with arbitrating claims in the arbitration agreement.

The Eighth Circuit's decision in *Plummer* has parallels to the case at bar, as the lower court there also expressed reservations that the arbitration clause "in effect allowed only [one party] to obtain redress of claims" in the courts, while the others had to arbitrate their claims. *Plummer*, 941 F.3d at 346. The Eighth Circuit explained that this rationale for invalidating the arbitration clause "contravene[s] the FAA's directive that courts place arbitration contracts on an equal footing with other contracts." *Id*. at 347. It noted that this entire theory relies on "a resistant strain" of cases that had reasoned "that a party's promise to arbitrate disputes is not enforceable unless the other party promises to arbitrate as well." *Id*. at 346. Other federal circuits have similarly precluded states from imposing "mutuality of obligation" requirements on arbitration agreements. *See, e.g.*, *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76 (1st Cir. 2011) ("[T]he FAA preempts Puerto Rico from imposing [a mutuality of obligation] requirement applicable only to arbitration provisions."); *Distajo*, 66 F.3d at 453 (requiring "separate consideration for

arbitration clauses" runs afoul of the FAA).[12] Seeking to re-characterize mutuality of obligation as a contract formation rather than an unconscionability issue does not allow the lower courts to escape this well-considered and consistent case law.

The U.S. Supreme Court has cautioned that courts of last resort, including this one, should "be alert to new devices and formulas" that local courts may use for "declaring arbitration agreements against public policy." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018). As this case demonstrates, combating devices that some courts create to defeat arbitration agreements has sometimes resembled a game of Whack-a-Mole. Courts must be diligent in knocking down each new device. The uncertainty that the rulings below raises over whether Missouri courts will enforce lawful arbitration agreements threatens regular business practices -- especially in the financial sector, where lenders are left in a state of flux as to whether they may mitigate losses through self-help without waiving other contractual rights to arbitrate.

[12] For federal district court rulings involving adjacent jurisdictions, see *Higgins v. Ally Fin. Inc.*, No. 4:18-CV-0417-SRB, 2018 WL 5726213, at *3 (W.D. Mo. Nov. 1, 2018) ("Any Kansas mutuality-of-obligation requirement applying specifically to arbitration provisions would be preempted by the FAA.") and *Diversicare Leasing Corp., v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208, at *4 (W.D. Ark. Nov. 18, 2011) (applying Arkansas law and holding that mutuality of obligation did not invalidate an arbitration agreement with a fifteen thousand dollar ($15,000) threshold).

Missouri businesses and consumers need to know that their arbitration agreements will be enforced so they can anticipate the costs of dispute resolution and plan their affairs accordingly. Also, for many individuals and businesses, arbitration may be the only path for achieving justice. The Court should restore order by reversing the Associate Circuit Court's order, remanding with the instruction that the Associate Circuit Court should compel arbitration, and issuing an opinion that clearly emphasizes the validity of arbitration agreements in Missouri and cautions courts against creating improper rationales for invalidating arbitration provisions.

CONCLUSION

For these reasons, this Court should reverse the Associate Circuit Court's order denying Bridgecrest's Motion to Compel Arbitration.

Respectfully submitted,

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Dated: December 3, 2021

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) complies with the requirements contained in Mo. R. Civ. P. 81.18 and 84.06; and (3) contains 5,034 words.

Respectfully Submitted,

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Dated: December 3, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served through the Missouri Supreme Court's electronic filing system on December 3, 2021 to the following counsel:

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