[Oral argument requested]

No. S-1-SC-39563

In the Supreme Court of New Mexico

MARLENE SANCHEZ,
Plaintiff-Petitioner,

v.

UNITED DEBT COUNSELORS, LLC, and LORRAINE S. ALIRES,
Defendants-Respondents.

PETITIONER'S BRIEF IN CHIEF

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June 5, 2023

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INTRODUCTION

Like many Americans, Marlene Sanchez was struggling to keep up with her credit card payments. She stayed up to date, but it was tough. So when she received an official-seeming letter instructing her to call United Debt Counselors—and warning that failure to do so would "likely result" in an "unreasonable" interest rate—she called. UDC promised to settle her debts within two years; all she needed to do was send her monthly payments to UDC, and it would take care of the rest.

But, it turned out, UDC didn't take care of anything. It just pocketed Ms. Sanchez's money, leaving her in default on the debt she'd worked so hard to keep up with—and without the money she'd depended on to pay it off. Ms. Sanchez, therefore, sued the company. But the district court compelled arbitration.

In doing so, the court made a fundamental mistake: It enforced an arbitration clause without first determining whether it was, in fact, enforceable. UDC's contract contains two arbitration clauses: (1) an agreement to arbitrate the merits of any dispute between the parties and (2) an agreement to arbitrate disputes about whether that merits arbitration clause is enforceable. (This latter arbitration provision is often called a delegation clause.) Here, both arbitration provisions—the merits arbitration clause and the delegation clause—are unconscionable for the same reason. They both prohibit Ms. Sanchez from exercising her statutory right to recover attorneys' fees and costs. Neither UDC nor the court denied that this is unconscionable. But

the court compelled arbitration anyway, holding that precisely *because* both provisions are unconscionable, it was *required* to enforce the delegation clause, regardless of whether it is actually enforceable.

That decision—and the Court of Appeals' summary decision affirming it—runs afoul of the U.S. Supreme Court's command that courts may not compel arbitration unless there is *some* enforceable arbitration agreement between the parties. The lower courts went astray because they misunderstood the rule that a party seeking to challenge a delegation clause must do so "specifically." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010). That rule requires only that a party explain why the delegation clause itself is unenforceable—rather than relying solely on the unenforceability of the merits arbitration clause or the contract as a whole. But it does not require that the delegation clause be unenforceable *for a different reason* than the merits arbitration provision (or, for that matter, the contract as a whole). If it did, it would mean that a company could require arbitration before a biased arbitrator or mandate that a consumer fly halfway around the world to resolve their dispute—so long as both the merits arbitration clause and the delegation clause contained the same unenforceable requirement, a court would have to enforce the delegation clause and send the parties to arbitration.

That is not the law. A challenge to a delegation clause must be specific; it need not be unique. This Court should reverse.

SUMMARY OF PROCEEDINGS

In April 2019, Marlene Sanchez was diligently paying off her credit card debt. **[RP 2 ¶ 10]**. Although it was difficult, she was keeping up with her payments. **[RP 2 ¶ 11]**. Then, she received a letter from United Debt Counselors. **[RP 2 ¶ 12]**. The letter directed her to contact the company "within 10 days . . . regarding the adjustment of [her] credit accounts." **[RP 2, 12]**. "Failure to call and make your minimum monthly payments," it warned, "will likely result in interest accruing on unsecured credit balances at an unreasonable rate." **[RP 12].**

As it was intended, the letter appeared to Ms. Sanchez to be from "an official source affiliated with [her] creditors." **[RP 2 ¶ 14]**. So she called as directed. **[RP 3 ¶ 18]**. During the phone call, UDC promised to settle her debts within 24 months. **[RP 3 ¶ 19]**. Instead of paying her monthly credit card bills, Ms. Sanchez would pay UDC. **[RP 3 ¶ 19]**. UDC would then negotiate with her creditors and handle her monthly payments. **[RP 3 ¶ 19]**.

Following this phone call, UDC sent one of its agents, Lorraine Alires, to Ms. Sanchez's house with a contract for Ms. Sanchez to sign. **[RP 3 ¶¶ 21–22]**. The contract promised that UDC would help Ms. Sanchez "achieve debt freedom." **[RP 4 ¶ 27]**. And Ms. Alires reiterated that promise in person, telling Ms. Sanchez once again to "stop paying her credit card bills," and instead pay UDC to settle the debt for her. **[RP 3 ¶¶ 24–25]**. Ms. Sanchez signed the contract. **[RP 4 ¶ 34]**. And, on

UDC's advice, she stopped paying her credit card bills directly. **[RP 4 ¶ 34–35]** Instead, she gave UDC an initial payment of $572.48, as well as monthly payments of $273.47—expecting that UDC would negotiate settlements with the credit card companies and use the money to pay them. **[RP 5 ¶ 36]**.

But that never happened. **[RP 5 ¶ 36]**. Unbeknownst to Ms. Sanchez, UDC had a history of tricking consumers into paying it money, based on official-looking letters with false promises of rapid debt relief. *See* FTC, *FTC Returns Money to Consumers Harmed by Debt Relief Scheme*, (Feb. 13, 2018), https://perma.cc/87F5-WVNY (describing consent judgment entered in Federal Trade Commission action against UDC for sending "direct mail ads [that] looked like official documents from a bank or attorney" and made "misrepresentations about debt relief").

It took months—and thousands of dollars—before Ms. Sanchez realized UDC wasn't actually settling her debts. **[RP 5 ¶¶ 37–42]**. UDC was just taking her money. **[RP 5 ¶ 37]**. Eventually, Ms. Sanchez's creditors reported her nonpayment, damaging her credit report. **[RP 5 ¶ 38]**. And Wells Fargo sued her. **[RP 5 ¶ 39]**. Finally realizing that UDC had not done what it said it would, Ms. Sanchez took matters back into her own hands. She entered into a payment plan with Wells Fargo and contacted her other creditor, CBNA, to restart payments—all without UDC's assistance. **[RP 5 ¶¶ 40–41]**.

In April 2021, Ms. Sanchez sued UDC on behalf of herself and other New Mexicans harmed by its false promises.[1] Even if UDC had done what it said it would, the company's conduct would still have been illegal: New Mexico law prohibits companies from acting as debt adjusters at all, and federal law bars debt relief services from receiving payment before a debt is settled and from charging exorbitant fees. **[RP 2 ¶¶ 7–9]**. And UDC did not do what it said it would. So its conduct was also unfair, deceptive, and unconscionable in violation of the Unfair Practices Act. **[RP 7–8 ¶¶ 54–55, 61–63, 67–68]**.

Several months after Ms. Sanchez filed her complaint, UDC moved to compel arbitration. **[RP 76]**. Ms. Sanchez opposed the motion, arguing that UDC's arbitration provision is unconscionable because it prohibits her from seeking attorneys' fees and costs if she wins—a right protected by the Unfair Practices Act. **[RP 110–12]**. She also explicitly challenged UDC's delegation clause, a provision within the arbitration clause that requires the parties to arbitrate disputes about whether the arbitration clause is enforceable in the first place. **[RP 112–13]**. As Ms. Sanchez explained, the arbitration clause's fee-stripping provision "applies equally" to the delegation clause. **[RP 112]**. And so if the court enforced the delegation clause,

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[1] Ms. Sanchez also sued Lorraine Alires, the UDC agent who went to her home to ensure she signed a contract with the company. **[RP 1]**. Unless otherwise specified, this brief refers to both defendants together as UDC. In addition, unless otherwise noted, internal quotation marks, citations, and alterations are omitted from quotations throughout the brief.

Ms. Sanchez would be unable to recover the attorneys' fees and costs required to arbitrate the question of whether the arbitration clause is enforceable—even if she ultimately won her claims. **[RP 112]**. The point of this prohibition, Ms. Sanchez explained, is to discourage consumers from bringing statutory claims: Even just to determine whether the case would be heard in court or arbitration, a consumer would have to pay attorneys' fees and costs that—despite the Unfair Practices Act's fee-shifting provision—they'd never get back. **[RP 113]**. That, Ms. Sanchez argued, renders the delegation provision unconscionable. **[RP 112–13]**.

The district court granted the motion to compel arbitration anyway. **[RP 164]**. The court "decline[d] to determine" whether the arbitration clause is unconscionable because UDC "delegated" that issue "to the arbitrator." **[RP 164]**. The court acknowledged that Ms. Sanchez had explicitly challenged the enforceability of that delegation clause itself. **[RP 164]**. But the court rejected that challenge solely because it rested on the "same" grounds as the challenge to the arbitration clause as a whole: the fee- and cost-stripping provision. **[RP 164]**. The court did not cite any authority for the proposition that a court must reject a plaintiff's specific challenge to an unenforceable delegation clause simply because the rest of the arbitration clause is also unenforceable for the same reason.

The court of appeals affirmed on the same ground: that Ms. Sanchez's challenge to the delegation clause necessarily failed because she asserted that the

arbitration clause as a whole was also unconscionable for the same reason. Memorandum Opinion, *Sanchez v. United Debt Counselors, LLC*, A-1-CA-40164 (N.M. Ct. App. Aug. 17, 2022) (hereinafter "Mem. Op.").

ARGUMENT

I. Standard of review

This Court reviews a lower court's decision on a motion to compel arbitration de novo. *Cordova v. World Fin. Corp. of NM*, 2009-NMSC-021, ¶ 11, 146 N.M. 256, 208 P.3d 901. "Whether a contract provision"—including an arbitration clause—"is unconscionable and unenforceable is" also "a question of law that" this Court "review[s] de novo." *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 42, 150 N.M. 398, 259 P.3d 803.

II. An unenforceable delegation clause is not immunized from review just because the arbitration clause is unenforceable for the same reason.

1. As both this Court and the U.S. Supreme Court have "emphasized," arbitration is "a matter of contract." *Rivera*, 2011-NMSC-033, ¶ 16; *accord Peavy by Peavy v. Skilled Healthcare Grp., Inc.*, 2020-NMSC-010, ¶ 12, 470 P.3d 218; *Rent-A-Ctr.*, 561 U.S. at 67. A court, therefore, may only compel parties to arbitrate a dispute if they have validly agreed to do so—that is, if there is an enforceable contractual provision requiring that the dispute be arbitrated. *See Rent-A-Ctr.*, 561 U.S. at 68–70; *Granite Rock, Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. 287, 297 (2010). And like any other

contract, an arbitration clause may be "invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rivera*, 2011-NMSC-033, ¶ 17; *accord Rent-A-Ctr.*, 561 U.S. at 68.

These principles apply with equal force to delegation clauses. A delegation clause is "simply an additional, antecedent" arbitration provision that requires the parties to arbitrate disputes about arbitrability—that is, gateway disputes about whether a company's arbitration clause is enforceable. *Rent-A-Ctr.*, 561 U.S. at 70. This "additional, antecedent" arbitration provision is called a delegation clause because it delegates these gateway arbitrability disputes to the arbitrator. *See id.* But it is nothing more than a specific kind of arbitration clause. *Id.* And so the Federal Arbitration Act—and its fundamental rule that arbitration is a matter of contract—"operates on this additional arbitration agreement just as it does on any other." *Id.*

As with any other arbitration clause, before requiring that the parties arbitrate gateway arbitrability disputes, the court must conclude that there is an enforceable delegation provision. *See Rent-A-Ctr.*, 561 U.S. at 68–70; *Granite Rock*, 561 U.S. at 297. And as with any other arbitration clause, a delegation clause may be invalidated by generally-applicable contract defenses. *Rent-A-Ctr.*, 561 U.S. at 70.

These principles are all that's needed to resolve this appeal. There is no dispute that unconscionability is a generally-applicable contract defense. Nor is there any dispute that an arbitration clause that waives a party's statutory rights, including

the right of the prevailing party to recover attorneys' fees and costs, is unconscionable. The delegation clause here does exactly that: Even if Ms. Sanchez ultimately wins her claims, UDC's contract prohibits her from recovering any attorneys' fees or costs for arbitrating the dispute about whether the company's arbitration clause is enforceable in the first place—fees and costs she would be entitled to under the Unfair Practices Act. That's unconscionable. *See infra* pages 16–17.

But the Court of Appeals refused to even consider this argument solely because UDC's arbitration clause *also* impermissibly waives Ms. Sanchez's right to recover attorneys' fees and costs for arbitrating the merits of her dispute. Mem. Op. 2. The court believed that even if a party explicitly challenges a delegation clause, if they also challenge the arbitration clause as a whole on the same grounds—here, that they both waive Ms. Sanchez's statutory rights—the party has not specifically challenged the delegation clause *at all*. *Id.* In other words, according to the Court of Appeals, courts are required to enforce an otherwise-unenforceable delegation clause if the arbitration clause as a whole is also unenforceable for the same reason. *See id.*

On this view, if a company's arbitration clause required that all disputes be arbitrated before its CEO, including gateway disputes about whether its arbitration clause is enforceable in the first place, a court would have no choice but to require an employee challenging the enforceability of the arbitration clause to arbitrate that

challenge before the company's CEO. After all, the delegation clause and the arbitration clause in that case would be unconscionable for the same reason: They both require a biased arbitrator. Or if a payday lender required that consumers arbitrate any dispute, including disputes about whether the arbitration clause is enforceable, before an arbitrator who is prohibited from applying state or federal law, a consumer would have to challenge that requirement before an arbitrator prohibited from applying state or federal law. That's because, again, the challenge to the delegation clause and the arbitration clause as a whole would be the same. And according to the Court of Appeals, that automatically invalidates the challenge to the delegation clause. But the Court of Appeals was mistaken. That is not, in fact, the law. *See, e.g. Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 338 (4th Cir. 2020) (refusing to enforce a delegation clause that prohibited the arbitrator from applying state or federal law, even though the arbitration clause was unenforceable for the same reason).

In holding otherwise, the Court of Appeals confused the requirement that a challenge to a delegation clause be "*specific*" with a (non-existent) mandate that the challenge be *unique*. *See Rent-A-Ctr.*, 561 U.S. at 72 (emphasis added); *Felts v. CLK Mgmt., Inc.*, S-1-SC-33011, mem. op. ¶ 6 (N.M. Aug. 23, 2012) (nonprecedential). The requirement that a challenge to a delegation clause be specific comes from the United States Supreme Court's decision in *Rent-A-Center*. *See Rent-A-Ctr.*, 561 U.S. at

72; *Felts*, S-1-SC-33011, mem. op. ¶ 6. There, the Court held that parties may not defeat an arbitration clause merely by arguing that the contract containing the arbitration clause is invalid. *Rent-A-Ctr.*, 561 U.S. at 70. Instead, they must "challenge[] specifically the validity of the" arbitration clause itself. *Id.* at 70–71. That's because the Federal Arbitration Act provides that an arbitration provision is only unenforceable if a generally-applicable contract-law doctrine invalidates it—not simply because it happens to be contained within a broader contract (or contractual provision) that is invalid. *See id.* The same rule, the Court explained, applies to delegation clauses; like all arbitration clauses, they must be challenged "specifically." *See id.*

But the Court has never required that this challenge be unique. To the contrary, *Rent-A-Center* made clear that an unconscionable delegation clause is *not* "unassailable" just because the arbitration clause as a whole is also unconscionable for the same reason. *Id.* at 71, 74. The court explained that "[i]n some cases the claimed basis of invalidity" of the contract or arbitration clause "as a whole will be much easier to establish than the same basis as applied only to the" delegation clause. *Id.* at 71. But in doing so, it explicitly recognized that parties *could* challenge the delegation clause on the same grounds as the arbitration clause as a whole. *See id.* They simply had to explain how those grounds rendered the delegation clause "specifically" unenforceable. *Id.*

The Court even demonstrated how a party would do so. The plaintiff in *Rent-A-Center* had sought to avoid arbitration solely by arguing that the agreement to arbitrate disputes on the merits was unconscionable due to a fee-splitting provision and discovery limitation. *Id.* at 74. But the contract also contained a delegation clause that the plaintiff never even mentioned. *Id.* The Court, therefore, held that he had not specifically challenged the delegation clause. *Id.* But, the Court made clear, if the plaintiff had argued that the fee-splitting and discovery limitations "*as applied* to the delegation provision rendered *that provision* unconscionable," that *would* have been a "specific" challenge to the delegation clause. *Id.*

The Court explained that as long as "a party challenges the validity . . . of the precise agreement to arbitrate at issue"—whether it be a delegation clause or an agreement to arbitrate disputes on the merits—a court "*must* consider the challenge before ordering compliance with that agreement." *Id.* at 71 (emphasis added). In other words, if a party challenges the validity of a delegation clause, the court is *required* to determine whether that clause is enforceable before enforcing it. *See id.* There's no exception for cases in which the delegation clause and the arbitration clause in which it is contained are invalid for the same reason. *See id.* at 74. There couldn't be: If there were, courts would have to compel parties to arbitrate gateway disputes about arbitrability, even though they have no enforceable agreement to do so. That would violate the fundamental principle that arbitration is a matter of contract.

The Court of Appeals decision here violates that fundamental principle—and conflicts with *Rent-A-Center*. Indeed, courts across the country, following *Rent-A-Center*'s guidance, have rejected the reasoning the Court of Appeals relied on. "In specifically challenging a delegation clause," these courts have emphasized, "a party *may* rely on the same arguments that it employs to contest the enforceability of other arbitration agreement provisions." *MacDonald v. CashCall, Inc*, 883 F.3d 220, 226–27 (3d Cir. 2018) (emphasis added); *accord, e.g.*, *Gibbs*, 967 F.3d at 338. That's because the law requires that a challenge to a delegation clause be specific, not that it be unique. *See MacDonald*, 883 F.3d at 227 ("[E]xplicit references to the delegation clause are sufficient to contest it.").

Thus, the Fourth Circuit Court of Appeals has refused to enforce a delegation clause that was rendered void by a state statute, even though the same statute also rendered the arbitration clause as a whole void. *See, e.g.*, *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc.*, 867 F.3d 449, 455–56 (4th Cir. 2017). The Third Circuit declined to require that parties arbitrate arbitrability in an illusory forum, even though the arbitration clause as a whole required the same forum. *See, e.g.*, *MacDonald*, 883 F.3d at 227. And the Ninth Circuit held that a fee-splitting provision rendered a delegation clause unconscionable, even though the same provision also applied to the arbitration clause as a whole. *See, e.g.*, *Lim v. TForce Logistics, LLC*, 8 F.4th 992, 1003 (9th Cir. 2021).

These are just a few of the many examples in which courts—including other decisions from our Court of Appeals—have considered challenges to a delegation clause, even though, as here, the arbitration clause was also unenforceable for the same reason. *See, e.g.*, *Clay v. NM Title Loans, Inc.*, 2012-NMCA-102, ¶ 13, 288 P.3d 888; *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶ 30, 149 N.M. 681, 254 P.3d 124, *aff'd on other grounds, Felts v. CLK Mgmt., Inc.*, S-1-SC-33011 (N.M. Aug. 23, 2012) (nonprecedential); *Hunt v. St. John Healthcare & Rehab. Ctr., LLC*, A-1-CA-36874, mem. op. ¶ 4 (N.M. Ct. App. Apr. 2, 2019) (nonprecedential); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 125–26 (2d Cir. 2019); *Shockley v. PrimeLending*, 929 F.3d 1012, 1018 (8th Cir. 2019); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1338 (11th Cir. 2016); *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.*, 232 Cal. Rptr. 3d 282, 291 (2018); *Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 242 Cal. Rptr. 3d 87, 95–96 (2018).

And with good reason. Were it otherwise, companies could insulate unconscionable delegation clauses simply by ensuring that the arbitration clause as a whole was also unconscionable—and vice versa. Courts could only decline to enforce delegation provisions that mandated a biased arbitrator or forced a worker to travel to a far-flung venue or imposed exorbitant costs if the arbitration clause as a whole did not do the same. So courts would routinely have to enforce unconscionable delegation clauses, and the more unconscionability permeated a company's contract, the less likely it would be that a court could do anything about

it. Courts would also be required to enforce delegation provisions the parties never agreed to in the first place: If a plaintiff argued that they never agreed to a contract at all, the basis for challenging the delegation clause in that contract would be precisely the same as the basis for challenging the arbitration clause as a whole—lack of consent.

Forcing the parties in these circumstances to arbitrate anyway would not only conflict with *Rent-A-Center* but with the Federal Arbitration Act itself. The Act requires that courts ensure that the parties have agreed to arbitrate before compelling arbitration. *See, e.g.*, *Granite Rock*, 561 U.S. at 297; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010). And it requires that arbitration clauses—including delegation provisions—be treated no differently than any other contract. *See, e.g.*, *Rent-A-Ctr.*, 561 U.S. at 67, 71; *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). There is no generally applicable contract law doctrine that immunizes a contractual provision merely because another provision in the same contract is unenforceable for the same reason. And so "[t]o immunize" an unconscionable delegation clause "from judicial challenge" simply because the agreement to arbitrate the merits of a dispute is also unconscionable "would be to elevate [arbitration clauses] over other forms of contract." *Rent-A-Ctr.*, 561 U.S. at 71. That the Federal Arbitration Act does not allow. *See id.*

The Federal Arbitration Act, U.S. Supreme Court precedent, case law from around the country, and common sense all point to the same conclusion: An unconscionable delegation clause is not immunized from judicial scrutiny merely because the arbitration clause as a whole is unconscionable for the same reason. This Court should reverse the Court of Appeals contrary conclusion.

2. Once the Court of Appeals' misunderstanding is corrected, there can be no dispute that Ms. Sanchez specifically challenged the delegation clause. Both before the district court and the Court of Appeals, Ms. Sanchez did exactly what the U.S. Supreme Court instructed in *Rent-A-Center*: She argued that the contract's prohibition on recovering attorneys' fees and costs rendered the delegation clause itself unconscionable. That's because it would prevent her from recovering the fees and costs required to arbitrate her challenge to the enforceability of the arbitration clause—fees and costs to which she would otherwise be entitled under the Unfair Practices Act if she won her claims. *See* NMSA § 57-12-10(C).

UDC has never disputed that arbitration clauses—including delegation provisions—may not strip consumers of their statutory right to attorneys' fees and costs. Nor could it. "[A] fundamental principle of justice in New Mexico [is] that corporations may not tailor the laws that our legislature has enacted in order to shield themselves from the potential claims of consumers." *Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 21, 144 N.M. 464, 188 P.3d 1215; *see also Viking River Cruises, Inc. v. Moriana*,

142 S. Ct. 1906, 1919 & n.5 (2022) (explaining that an arbitration clause may alter the forum in which a plaintiff's claims are heard, but it may not be used to force a plaintiff to forego a statutory right); *Mitsubishi Motors Corp. v. Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) ("[I]n the event the [arbitration agreement] operated . . . as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation in condemning the agreement as against public policy.").

And it's well-established that an arbitration clause that waives a statutory right to attorneys' fees and costs is unenforceable. *See, e.g.*, *Nesbitt v. FCNH, Inc.*, 811 F.3d 371, 380 (10th Cir. 2016); *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 203 (3d Cir. 2010) ("Provisions in arbitration clauses requiring parties to bear their own attorney's fees, costs, and expenses . . . undermine the legislative intent behind fee-shifting statutes."). That's because not only is it impermissible to waive statutory rights at all, but also prohibiting plaintiffs from recovering their fees and costs unconscionably deters them from bringing claims in the first place. *See Nesbitt*, 811 F.3d at 380. That deterrence is equally, if not more, problematic in the context of a delegation clause: It requires plaintiffs to advance fees and costs just to determine whether they can bring their case in court, with no hope of ever recovering them—and it deters parties from challenging unenforceable arbitration clauses.

Again, UDC did not dispute any of this below. These longstanding principles render both its delegation clause and its arbitration clause unenforceable. Both

provisions impermissibly waive Ms. Sanchez's statutory right to recover attorneys' fees and costs. This Court, therefore, should reverse the decision below and hold that UDC's motion to compel arbitration should be denied.

CONCLUSION

This Court should reverse and remand with instructions to deny UDC's motion to compel arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of New Mexico, that the following is true and correct:

That on the 5th day of June 2023, I arranged for service of the foregoing brief via electronic service to the parties to this action as follows:

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