[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 REPLY BRIEF

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INTRODUCTION

This Court granted certiorari to address two questions: first, whether a party fails to "raise a specific challenge" to a delegation provision, "simply because [they] challenged the delegation provision on the same grounds as the arbitration clause as a whole"; and second, whether "both [UDC's] delegation provision and [its] arbitration clause are unenforceable." **[Pet. 4; Ord. Granting Pet.]**.

There is no longer any serious dispute about the first question. Abandoning the argument it made below, UDC now concedes that a "party *can* challenge a delegation clause and an arbitration clause as a whole for the same reasons." **[AB 5–6]** (emphasis added). The company purports to offer an alternative argument for why Ms. Sanchez's delegation-clause challenge was not specific enough: that the challenge did not "distinctly appl[y] to the delegation clause alone." **[AB 6]**. But that's just another way of saying that Ms. Sanchez had to challenge the delegation clause on different grounds than the arbitration clause. In other words, it's the very argument that UDC itself concedes can't be right.

That leaves the second issue: whether UDC's delegation clause and arbitration clause are unenforceable. Here, again, there's little left to dispute. UDC doesn't even attempt to argue that its arbitration clause is enforceable. Instead, it rests its entire argument on the validity of its delegation provision. And it defends that provision with a single argument, which it makes for the first time before this

Court. Although it never previously raised the issue, UDC now contends that the fees recoverable by plaintiffs who prevail on an Unfair Practices Act claim do not include fees for opposing an effort to compel the claim to arbitration. So the company's prohibition on Ms. Sanchez recovering such fees, it contends, can't render its delegation clause unconscionable.

UDC forfeited this argument by not raising it below. And, in any event, it's wrong. Like most prevailing-party statutes, the Unfair Practices Act entitles prevailing plaintiffs to recover "the full amount of fees fairly and reasonably incurred . . . in securing an award under the" statute. *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 25, 124 N.M. 606, 953 P.2d 1104; *see Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). That includes fees incurred for litigating threshold issues, like arbitrability.

Indeed, were it otherwise, it would defeat the purpose of awarding statutory fees in the first place. The Act provides fees to prevailing plaintiffs because, otherwise, many consumers with meritorious claims would be unable to secure counsel. If prevailing party fees did not include fees for work on threshold issues, defendants could easily make it too expensive for plaintiffs to bring Unfair Practices Act claims at all, simply by raising a host of unmeritorious gateway disputes—from arbitration to personal jurisdiction to standing. That's precisely what the fee statute is designed to prevent.

By its terms, the Act awards prevailing plaintiffs fees and costs for all work done to secure an award. If the legislature intended to create a massive loophole in its consumer-protection law, it would have said so. And nothing in the Act says so. UDC does not dispute that a delegation clause that waives a statutory right to fees and costs is unconscionable. Because that's precisely what UDC's delegation clause does, it is unenforceable. This Court should reverse.[1]

ARGUMENT

I. UDC concedes that its only argument that Ms. Sanchez did not specifically challenge its delegation clause is wrong.

UDC begins its argument by conceding the primary issue on which this Court granted certiorari: Despite having argued otherwise below, the company now admits that a "party *can* challenge a delegation clause and an arbitration agreement as a whole for the same reasons." **[AB 5–6]** (emphasis added); *compare* **[MIS 5]** (arguing otherwise before the Court of Appeals). That concession is all that's needed to resolve this appeal. The sole reason the lower courts refused to consider Ms. Sanchez's delegation-clause challenge is that she also challenged UDC's arbitration clause on the same ground—a justification UDC itself now agrees is wrong. *See* **[BIC 6–7]**.[2]

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[1] Unless otherwise noted, internal quotation marks, citations, and alterations are omitted from quotations throughout the brief.

[2] Although UDC briefly asserts (at 5) that the Court of Appeals did not require that a delegation-clause challenge be "unique," it does not cite any language from the court's decision to support this assertion. It can't. The decision says precisely the opposite: Challenges to a delegation clause "on the same grounds as" a challenge to

Unable to rely on the argument it pressed below, the company attempts to manufacture an alternative justification for its contention that Ms. Sanchez's delegation-clause challenge is insufficiently specific. But the best it can do is rephrase the uniqueness argument it claims to have disavowed. The problem with Ms. Sanchez's argument, UDC now contends, is not that she challenged the delegation clause and arbitration clause for the same reason; it's that she did not offer an unconscionability argument that "*distinctly* applies to the delegation clause *alone*." **[AB 6]** (emphasis added). But that's the same thing. An argument that "distinctly applies to the delegation clause alone" is, by definition, an argument that the delegation clause is unconscionable for a different reason than the arbitration provision as a whole.

UDC had good reason to concede that parties need not make such an argument. As explained in the opening brief, allowing companies to enforce an unconscionable delegation clause simply because the arbitration clause is unconscionable for the same reason conflicts with the Federal Arbitration Act, U.S. Supreme Court precedent, caselaw from throughout the country, and common sense. **[BIC 7–16]**. Therefore, while courts may not invalidate a delegation clause

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the arbitration clause as a whole, the court held, "do not constitute a specific challenge to the delegation clause." **[Mem. Op. 2]**; *see also* **[RP 164]** (district court order refusing to consider Ms. Sanchez's challenge to the delegation clause because it is "the same challenge she asserts against the arbitration agreement").

solely because it is located within an unenforceable arbitration clause, they also may not refuse to consider an unconscionability challenge to the delegation clause itself just because a party challenges the arbitration clause on the same grounds. *See id.*; *see also, e.g.*, *Felts v. CLK Mgmt., Inc.*, 2011-NMCA-062, ¶ 31, 149 N.M. 681, 254 P.3d 124, *aff'd on other grounds*, No. 33,011, 2012 WL 12371462 (N.M. Aug. 23, 2012) (considering challenge to delegation clause even though arbitration clause was unenforceable for the same reason); *Sanderson by Pearson v. Genesis Healthcare, Inc.*, No. A-1-CA-39586, mem. op. ¶ 7, 2023 WL 4122115, at *2 (N.M. Ct. App. June 22, 2023) (nonprecedential) ("Even where the arbitration provision is challenged on the same basis as the contract as a whole, so long as the challenge is specifically directed to the agreement to arbitrate, the court will consider it."); *MacDonald v. CashCall, Inc.*, 883 F.3d 220, 227 (3d Cir. 2018) (challenging the delegation clause because it "suffers from the same defect as the arbitration provision" is "sufficient to contest it"); *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 338 (4th Cir. 2020) (argument that delegation clauses were "unenforceable for the same reason as the underlying arbitration agreement—the wholesale waiver of the application of federal and state law" was "all that is required to dispute the viability of the delegation provisions").

UDC can't dispute that Ms. Sanchez challenged the delegation clause itself. The company admits (at 10–11) that under the U.S. Supreme Court's decision in *Rent-A-Center*, a party "effectively challenge[s] a delegation clause" if they explain how an

"objectionable" contractual requirement "as applied to the delegation provision render[s] that provision unconscionable." That's precisely what Ms. Sanchez did. She explained that UDC's fee-stripping provision, as applied to its delegation clause, prohibits Ms. Sanchez from recovering attorneys' fees and costs for arbitrating the threshold issue of whether the company's arbitration clause is unenforceable—fees that she would otherwise be entitled to recover under the Unfair Practices Act if she ultimately prevails on her claims. **[RP 112–13]**. Therefore, she argued, the delegation clause itself is unconscionable because it bars her from pursuing statutory remedies. *See id.*[3]

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[3] In a footnote, UDC halfheartedly complains that Ms. Sanchez did not sufficiently explain her delegation-clause argument. *See* **[AB 11 n.2]**. But Ms. Sanchez made her argument very clear. She explained:

> Here, the delegation provision is unenforceable for precisely the same reasons as the entire arbitration agreement is unconscionable: it strips consumers of the right to attorney' s fees and costs pursuant to the Unfair Practices Act ("UPA") and other statutes. The arbitration agreement's denial of attorney's fees and costs applies equally to the delegation provision and the threshold issues it purports to send to the arbitrator. *See Felts*, 2011-NMCA-062, ¶ 32 ("we have concluded that Felts' argument . . . [that] the arbitration provision was substantively unconscionable was directed to the delegation clause as well"). Put another way, it is just as unconscionable to force Ms. Sanchez to arbitrate the threshold issue of unconscionability pursuant to a fee and cost-stripping clause as it is to force her to arbitrate her claims for relief under such an agreement. *See Hunt*, 2019 WL 2107086, at *2.

[RP 112–13]. There is nothing more Ms. Sanchez could have said—or needed to say—to explain the basis of her challenge.

Unable to seriously contest that Ms. Sanchez made a specific delegation-clause challenge, UDC instead criticizes her briefing before this Court—chastising her for citing federal cases in her brief in chief. But the requirement that a party specifically challenge a delegation clause is imposed by the *Federal* Arbitration Act, as interpreted by the U.S. Supreme Court. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010). That is, it's a federal, not state, law requirement. *Id.* And, in any event, Ms. Sanchez cited *both* New Mexico and federal case law holding that an unconscionable delegation clause does not escape scrutiny simply because the arbitration clause is also unconscionable for the same reason—a principle that, again, UDC says it no longer disputes. *See* **[BIC 14]**.[4]

The company's plea that this Court look to New Mexico decisions is really a plea that the Court follow one New Mexico Court of Appeals case in particular: *Juarez v. THI of New Mexico at Sunset Villa, LLC*, 2022-NMCA-056, 517 P.3d 918. **[AB 7–9]**. In *Juarez*, a patient injured by a medical care facility argued that both the arbitration clause and the delegation clause in her admission paperwork were procedurally unconscionable for the same reasons: Among other things, she was on judgment-impairing medication when the facility made her sign the paperwork.

[4] In addition, not long after Ms. Sanchez's brief in chief was filed, yet another New Mexico Court of Appeals decision rejected the contention that a party must challenge a delegation clause on different grounds than the arbitration provision as a whole. *See Sanderson*, 2023 WL 4122115, at *2.

Juarez, 2022-NMCA-056, ¶ 7. Although the patient explicitly argued that the delegation clause itself was procedurally unconscionable, the court refused to even consider the argument solely because she argued that the arbitration clause as a whole was also unconscionable for the same reasons. *See id.*

In other words, *Juarez* made the same mistake the Court of Appeals made here: requiring that a delegation-clause challenge be not only specific, but also unique. In fact, the court here relied on *Juarez* in imposing this requirement. **[Mem. Op. 2]**. UDC does not explain how this Court could possibly follow *Juarez* without imposing the uniqueness requirement the company properly concedes may not be imposed.

The vast majority of state and federal decisions—including multiple New Mexico cases UDC itself cites—have made clear that a party may challenge a delegation clause and an arbitration clause on the same grounds. *See* **[BIC 14]** (citing numerous state and federal decisions); **[AB 6–7]** (discussing *Felts*, 2011-NMCA-062, ¶ 30, and *Clay v. NM Title Loans, Inc.*, 2012-NMCA-102, ¶ 13, 288 P.3d 888, both cases in which the court invalidated a delegation clause that was unenforceable for the same reason as the arbitration clause as a whole). As UDC itself concedes, this Court should do the same.

II. UDC's fee-stripping provision renders both its delegation clause and its arbitration provision unconscionable.

Ultimately, though couched in the language of specificity, UDC's real argument is that Ms. Sanchez's delegation-clause challenge fails on the merits. *See, e.g.*, **[AB 9]** (arguing that Ms. Sanchez's challenge is "not clearly directed against the validity of the delegation clause alone" because it rests on a statutory right that, according to UDC, "does not exist"). The company does not dispute that barring consumers from recovering statutory fees and costs is unconscionable. Nor does it dispute that, as applied to the delegation clause, its fee-stripping provision would prohibit Ms. Sanchez from recovering attorneys' fees and costs for arbitrating threshold disputes about whether she can bring her claims in court. Instead, the company argues (at 12) that the Unfair Practices Act does not entitle prevailing parties to recover these fees and costs. And so, the company contends, it's not unconscionable to prohibit Ms. Sanchez from doing so. This argument fails twice over.

First, it's forfeited. This Court does not ordinarily "consider an issue raised for the first time on appeal." *Rainaldi v. Pub. Emps. Ret. Bd.*, 1993-NMSC-028, ¶ 23, 115 N.M. 650, 857 P.2d 761. And in the courts below, UDC never disputed that the attorneys' fees and costs recoverable by a consumer who prevails on an Unfair Practices Act claim include fees incurred in opposing the defendant's effort to use an

unconscionable arbitration clause to force the claim out of court. UDC does not even attempt to explain why it should be permitted to raise the issue for the first time now.[5]

Second, even if it had preserved the issue, UDC is wrong on the law. The Unfair Practices Act provides that the "court shall award attorney fees and costs to the party complaining of an unfair or deceptive trade practice or unconscionable trade practice if the party prevails." NMSA § 57-12-10(C). Beyond requiring a consumer to prevail on the merits of an Unfair Practices Act claim, this provision does not contain any limitations or exclusions. *Atherton v. Gopin*, 2012-NMCA-023, ¶ 9, 272 P.3d 700. There is no caveat that says a prevailing plaintiff may recover their attorneys' fees, except for those incurred opposing an unmeritorious effort to compel arbitration. By its terms, the Act entitles prevailing plaintiffs to recover "the full amount of fees fairly and reasonably incurred . . . in securing an award under the" statute. *Jones v. Gen. Motors Corp.*, 1998-NMCA-020, ¶ 25, 124 N.M. 606, 953 P.2d 1104; *accord Atherton,* 2012-NMCA-023, ¶ 8.

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[5] In the courts below, UDC relied on two arguments. First, it argued that the delegation clause is not unconscionable because the fee-stripping language is not included in the delegation clause itself. **[RP 137]**. But as UDC now recognizes, a plaintiff may challenge a delegation clause by explaining that a contractual term—here, the fee-stripping provision—"as applied to" the delegation clause renders the delegation clause unconscionable. **[AB 10–11]** (quoting *Rent-A-Ctr.*, 561 U.S. at 74). So the company has sensibly abandoned that argument. Second, UDC argued before the Court of Appeals that Ms. Sanchez's delegation-clause challenge was not sufficiently specific because she also challenged the arbitration clause on the same grounds. **[MIS 5]**. The company has now conceded that this argument, too, is incorrect.

As the Court of Appeals has recognized, those fees include fees incurred for litigating threshold issues—including arbitrability. *See, e.g.*, *Lisanti v. Alamo Title Ins. of Tex.*, 2001-NMCA-100, ¶ 12, 131 N.M. 334, 35 P.3d 989, *aff'd in part, rev'd in part on other grounds and remanded*, 2002-NMSC-032, ¶ 12, 132 N.M. 750, 55 P.3d 962 (instructing the plaintiff to "apply to the trial court for an award" of attorney's fees for defeating a motion to compel arbitration "should the [plaintiff] prevail on a cause of action as to which there is a right to attorney's fees"); *Chavarria v. Fleetwood Retail Corp. of N.M.*, 2005-NMCA-082, ¶¶ 42–43, 137 N.M. 783, 115 P.3d 799, *aff'd in part, rev'd in part on other grounds sub nom. Chavarria v. Fleetwood Retail Corp. of N.M.*, 2006-NMSC-046, ¶¶ 42–43, 140 N.M. 478, 143 P.3d 717, as revised (Oct. 11, 2006) (fee award included "[t]he time and work Plaintiffs' counsel spent litigating the arbitration issue"); *San Juan Agric. Water Users Ass'n v. KNME-TV*, No. A-1-CA-35839, mem. op. ¶ 53, 2019 WL 2089540, at *11 (N.M. Ct. App. Apr. 16, 2019) (nonprecedential) (fees permissible for defending standing); *see also Hale v. Basin Motor Co.*, 1990-NMSC-068, ¶¶ 2–3, 110 N.M. 314, 795 P.2d 1006 (Unfair Practices Act provides prevailing plaintiff attorneys' fees for successfully defending appeal).

Indeed, this is how prevailing party fee statutes ordinarily work. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (attorneys' fees awarded to prevailing party "[n]ormally . . . will encompass all hours reasonably expended on the litigation"); 1 Attorney Fee Awards §§ 4:18–21 (3d ed.) (explaining that all hours reasonably spent

should be compensated, including those in related judicial, administrative, or arbitration proceedings and on non-merits issues, such as disputes about statutory fees); *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 25, 136 N.M. 647, 103 P.3d 571 (including fees for preparation of fee motion); *Vargoshe v. Advanced Cap. Sols., Inc.*, No. 19-80880-CIV, 2020 WL 9549666, at *3 (S.D. Fla. Apr. 15, 2020), *report and recommendation adopted*, No. 19-CV-80880, 2020 WL 9549536 (S.D. Fla. May 4, 2020) (including fees for work opposing effort to compel arbitration in statutory prevailing party fee award); *Murray v. UBS Sec., LLC*, No. 14 Civ. 927, 2020 WL 7384722, at *19 (S.D.N.Y. Dec. 16, 2020) (same); *Ricksecker v. Ford Motor Co.*, No. 21-CV-04681, 2023 WL 1542199, at *1 (N.D. Cal. Feb. 3, 2023), *report and recommendation adopted*, No. 21-CV-04681, 2023 WL 2189497 (N.D. Cal. Feb. 22, 2023) (same).

UDC asks this Court to graft onto the Unfair Practices Act a unique, unwritten limitation. According to the company (at 12), the fees and costs recoverable under the Unfair Practices Act should be limited to those incurred in proceedings that actually "resolve" a plaintiff's "underlying statutory claim." But, like any other claim, prosecuting an Unfair Practices Act claim involves many proceedings that don't themselves resolve the claim. For example, a plaintiff may need to fend off efforts to compel arbitration or oppose challenges to standing or venue or personal

jurisdiction. In none of these proceedings does a plaintiff actually "prevail[] on any UPA claims." **[AB 12]**.[6]

Limiting attorneys' fees to just those proceedings would defeat the purpose of awarding statutory fees in the first place. The whole point of the attorneys' fees provision is to ensure that it's feasible for lawyers to represent consumers seeking to "redress wrongs resulting from unfair or deceptive trade practices." *Hale*, 1990-NMSC-068, ¶ 27; *Jones*, 1998-NMCA-020, ¶ 24. Effective enforcement of the Unfair Practices Act is essential to vindicate the rights of those who have been harmed and deter future violations. *See id.* But because the damages awards—while meaningful to the consumers—are often small in absolute terms, many consumers simply could not afford to hire an attorney to bring a case without a fee-shifting provision. *See id.*; *cf. Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 9, 144 N.M. 464, 188 P.3d 1215 (explaining that the UPA supports "the resolution of consumer claims, regardless of the amount of damages alleged"). Thus, the prevailing party fee provision makes it possible for attorneys to represent consumers with meritorious claims.

If, as UDC contends (at 12), the fee provision exempted proceedings that do not "resolve [the] underlying statutory claims," it would be practically meaningless. Defendants could make it impossible for plaintiffs to bring Unfair Practices Act

[6] Indeed, typically, the only proceedings in which a plaintiff can prevail on the underlying statutory claim are trial and summary judgment.

claims, simply by raising a host of gateway disputes—from arbitration to personal jurisdiction to standing—solely to make it too expensive for the plaintiff to litigate their claim.

This case proves the point. Conspicuously absent from UDC's answer brief is any attempt to argue that its arbitration clause (as opposed to its delegation provision) is actually enforceable. Presumably the company chose to forfeit the issue because it cannot dispute that its prohibition on recovering attorneys' fees and costs renders the arbitration clause unconscionable. Nevertheless, the company still seeks to force Ms. Sanchez to arbitrate the question of whether its arbitration clause is enforceable—a question on which the company cannot even muster an argument before this Court. It's hard to explain this gambit as anything other than an attempt to increase the costs to Ms. Sanchez for pursuing her claims. If the Unfair Practices Act does not enable consumers like Ms. Sanchez to recover those costs if they prevail on the merits, it would be economically infeasible for most consumers to bring their claims in the first place. That's precisely the outcome the statute's prevailing party fee provision is designed to prevent. The company offers no convincing explanation for why this Court should read an atextual limitation into the statute that ensures it cannot fulfill its purpose. *Cf., e.g.*, *Hale*, 1990-NMSC-068, ¶ 27 (rejecting argument that fees should be limited to those incurred at the trial level); *Atherton*, 2012-NMCA-023,

¶ 9 ("[T]he UPA contains no limitation on the award of attorney fees."); *Jones*, 1998-NMCA-020, ¶ 25 (similar).[7]

Under the Unfair Practices Act, if Ms. Sanchez prevails on the merits of her statutory claim, she would be entitled to recover her attorneys' fees and costs for litigating the enforceability of UDC's arbitration clause. UDC's delegation clause indisputably bars her from doing so. It is, therefore, unconscionable. And because the company's arbitration clause as a whole prohibits Ms. Sanchez from recovering statutory fees and costs, it, too, is unconscionable. *See* **[BIC 17–18]**. UDC does not even attempt to argue otherwise. This Court, therefore, should reverse.

CONCLUSION

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

Respectfully submitted,

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[7] UDC repeatedly complains that because the Unfair Practices Act does not provide prevailing plaintiffs fees and costs for litigating arbitration issues, Ms. Sanchez has not cited any authority that demonstrates that she would be statutorily entitled to those fees should she prevail on the merits. But because the company's Unfair Practices Act argument fails, so too does its lack of authority argument.

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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 9th day of August 2023, I arranged for service of the foregoing brief via electronic service to the parties to this action as follows:

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