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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

C.S.,
Plaintiff Below, Petitioner

v.) No. 24-24 (ICA No. 22-ICA-141) (Berkeley Cnty. No. CC-02-2021-C-359)

S. Grow, D. Fishel, C. Jensen, S. Jensen,
M. Whitcomb, D. Wrye, A. Naegle, and C.M. Jensen,
Defendants Below, Respondents

MEMORANDUM DECISION

Petitioner C.S. appeals the memorandum decision of the Intermediate Court of Appeals ("ICA") affirming the Circuit Court of Berkeley County's order dismissing the petitioner's lawsuit. After considering the parties' briefs and oral arguments, the record on appeal, and the applicable law, we affirm the ICA's and circuit court's rulings, in part, finding that the circuit court correctly assessed that the claims in the petitioner's lawsuit below were within the scope of an enforceable arbitration agreement. However, we reverse the ICA's and the circuit court's rulings, in part, because the circuit court exceeded the dictates of the West Virginia Revised Uniform Arbitration Act and addressed the merits of the petitioner's claims when it outright dismissed the petitioner's lawsuit. As we discuss below, we remand the case for the circuit court to refer the merits of the parties' dispute to arbitration.[1]

This appeal involves the interpretation and application of a 2019 arbitration contract. However, the underlying case arises from one of the many allegations of child sexual abuse going back to 2004 committed by Christopher Michael Jensen ("Michael"). The case alleges that the respondents and defendants below (seven leaders within The Church of Jesus Christ of Latter-day Saints[2] ("the Church")) knew about and facilitated Michael's abuse. The petitioner and plaintiff

[1] Because no substantial question of law exists, we find this case appropriate for a memorandum decision under Rule of Appellate Procedure 21. Petitioner C.S. appears by counsel Christian J. Riddell. Respondents Steven Grow and Donald Fishel appear by counsel Kenneth J. Barton, Allen M. Gardner, and Sarah M. Gragert; respondents Christopher and Sandralee Jensen appear by John J. Polak; respondents Matthew Whitcomb, Don Wrye, and Anthony Naegle appear by counsel Thomas J. Hurney, Jr., and Blair E. Wessels; and respondent Christopher Michael Jensen appears by his guardian ad litem, T. Nicole Saunders-Meske.

[2] In earlier proceedings, two legal entities (each a Utah "corporation sole") handled the Church's secular affairs: Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("COPB") and Corporation of the President of the Church of Jesus Christ of Latter-day Saints ("COP"). These two entities were later combined into the current entity, "The

below, C.S., claims that decisions and acts by those Church leaders culminated in him being sexually abused by Michael.

This Court previously discussed the facts underlying the petitioner's claims in detail in *Jane Doe-1 v. Corporation of President of The Church of Jesus Christ of Latter-day Saints*, 239 W. Va. 428, 801 S.E.2d 443 (2017). Like the plaintiffs in *Jane Doe-1*, the petitioner asserted that Michael was arrested in Utah in 2004 when he was thirteen years old and charged with two felony counts of sexual abuse of a child relating to two of his female classmates. The petitioner and the *Jane Doe-1* plaintiffs asserted that the Church intervened with Utah prosecutors and Michael's charges were reduced to misdemeanors. Thereafter, Michael and his parents (respondents Christopher and Sandralee Jensen) moved to West Virginia. Three years later, in the summer of 2007, sixteen-year-old Michael appears to have sexually abused another female classmate. Contemporaneously, Michael apparently sexually abused one of his younger siblings, and Michael's parents banished him from their family home and made him sleep outside in the backyard.

According to the petitioner and the *Jane Doe-1* plaintiffs, Michael's parents were leaders in their local Church in West Virginia. Sometime in 2007, Michael's parents allegedly took part in a meeting with other regional Church leaders, a meeting that included many of the respondents, and in that meeting the Church leaders were put on notice about the sexual abuse allegations against Michael.[3] Thereafter, despite supposedly having knowledge of Michael's propensities, the petitioner and the *Jane Doe-1* plaintiffs contend that Church leaders did not report Michael to law enforcement; instead, parents in the Church received recommendations to use Michael as a babysitter.

In November 2007, after the alleged meeting, a Church member identified as "Jane Doe-1" allowed Michael to babysit her two sons, who were then ages three and four. In January 2012, the two boys revealed that Michael had sexually abused them during the November 2007 babysitting session.[4] Law enforcement officers initiated an investigation but, allegedly because Church leaders moved Michael to different locations, officers could not find or question Michael.

Church of Jesus Christ of Latter-day Saints" ("CHC") which is also a "corporation sole" organized under the laws of Utah. For simplicity, we refer to the entity as "the Church."

[3] Additionally, the record indicates that Michael babysat several young children for a weekend in April 2007. When the parents returned, they discovered their young daughter had physical injuries they believed were caused by Michael. The parents reported the girl's injuries to Church leaders in April 2007. In September 2012, the young girl revealed to her parents that Michael had sexually abused her.

[4] The record contains allegations that, between 2007 and 2012, other parents suspected Michael had sexually or physically abused their children. The record suggests that these parents discussed their suspicions with Church leaders but were told that "the Jensens were a good family, that Michael Jensen was a good kid," and that whatever the child said to the parent was confusion or a mistake on the child's part.

By May of 2012, Church leaders had urged the petitioner's parents to take Michael into their home. Church leaders seemingly suggested that Michael would be a good influence on the children in the home. The petitioner was twelve years old between May and August 2012, and he contends that Michael sexually abused him and his minor siblings during that period.

In October 2012, Michael was indicted for the 2007 sexual abuse of Jane Doe-1's two sons. He was subsequently convicted of one count of sexual assault in the first degree, and two felony counts of sexual abuse by a parent, guardian, custodian, or person in a position of trust. This Court later affirmed the conviction. *State v. Jensen*, No. 13-1088, 2014 WL 2681229 (W. Va. June 13, 2014) (memorandum decision). Michael is currently incarcerated serving a 35-to-75-year sentence.

The *Jane Doe-1* litigation began in September 2013 when five families filed a lawsuit on behalf of their minor children seeking damages from the Church, four Church leaders, and Michael. Petitioner C.S. was one of the many minor children who were part of the 2013 *Jane Doe-1* lawsuit. The lawsuit generally alleged that Church leaders were repeatedly put on notice of Michael's sexually abusive conduct; failed to protect the children from Michael; and actively covered up the abuse. *See generally Jane Doe-1, et al. v. The Corporation of the President of the Church of Jesus Christ of Latter-day Saints, et al.*, Berkeley Co. Civil Action No. 13-C-656.[5]

In January 2015, the petitioner was still a minor. Through his mother, acting as his guardian and next friend, the petitioner moved to voluntarily dismiss his claims from the *Jane Doe-1* lawsuit. The circuit court granted that motion and dismissed the petitioner's claims without prejudice. Thereafter, the remaining claims in the *Jane Doe-1* lawsuit proceeded to trial; however, after a mistrial, the case was resolved in 2018 by a settlement.

By 2019, petitioner C.S. had reached the age of majority, and he threatened to renew his claims against the Church.[6] However, after negotiations by the petitioner's lawyer, the petitioner and the Church entered into a written agreement to arbitrate their dispute. In the agreement, the petitioner "indicated that he plans to re-assert various previously dismissed without prejudice tort claims against" the Church. Importantly, petitioner and the Church then agreed to the following term (with emphasis added):

> [T]he Parties mutually consent to the resolution by arbitration of all [the petitioner's] claims or controversies that *were or could have been asserted* in Jane

[5] The *Jane Doe-1* case asserted claims against the following four respondents who were Church leaders: Christopher and Sandralee Jensen (who are also Michael's parents); Donald Fishel; and Steven Grow.

[6] State law provides that an individual like the petitioner has until the age of 36 to bring an action. West Virginia Code § 55-2-15(a) provides, in pertinent part, that "[a] personal action for damages resulting from sexual assault or sexual abuse of a person who was an infant at the time of the act or acts alleged shall be brought against a person or entity which aided, abetted, or concealed the sexual assault or sexual abuse within 18 years after reaching the age of majority."

> Doe-1, et al, v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, et al. . . .

The parties also agreed that their arbitration agreement would be interpreted under the West Virginia Revised Uniform Arbitration Act. *See* W. Va. Code § 55-10-1 to -33. Further, the agreement outlined that discovery and testimony from the *Jane Doe-1* litigation could be used but required any arbitration proceeding include "live and in person" testimony from three Church leaders who are respondents herein.[7] In the subsequent arbitration proceeding, the petitioner raised nearly identical claims against the Church to those raised in the *Jane Doe-1* lawsuit. The one difference from *Jane Doe-1* is that the petitioner asserted his arbitration claims solely against the Church.

The parties' arbitrator conducted an evidentiary hearing and received pre- and post-hearing briefs from the parties. On February 4, 2020, the arbitrator issued a ruling in favor of the Church, finding that the petitioner "has not carried his burden of proving, by a preponderance of the evidence, all the required elements of his claims. Accordingly, [the petitioner] has not established entitlement to any recovery against [the Church]."[8]

In November 2021, with a new lawyer, the petitioner filed a new lawsuit that is the focus of this appeal. The petitioner's lawsuit asserted claims against the Church; Michael; and the respondents herein, seven Church leaders (four of whom had been sued in 2013).[9] Some of the petitioner's claims mirrored the 2013 *Jane Doe-1* complaint, while others were new.

The Church and the respondents (the seven Church leaders) filed motions to compel arbitration or, in the alternative, to dismiss the petitioner's lawsuit arguing that the 2019 arbitration agreement between the petitioner and the Church applied to all claims that "were or could have been asserted" in the *Jane Doe-1* litigation. Moreover, because the arbitration proceeding resulted in a ruling favorable to the Church, the Church and the respondents argued that the petitioner's claims against it were barred by res judicata or otherwise should be dismissed.

In an order dated June 7, 2022, the circuit court granted the Church's and the respondents' motions to dismiss the petitioner's lawsuit. The court found the arbitration agreement between the petitioner and the Church was clear; found that all of the petitioner's 2021 claims were or could have been brought in the 2013 *Jane Doe-1* litigation; and it found that the petitioner's dispute with

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[7] The arbitration agreement provides that "The Parties agree that the following individuals shall appear to testify at the arbitration hearing live and in person: . . . [respondents] Don Fishel, . . . Steve Grow and Matt Whitcomb."

[8] The arbitrator's ruling notes that "[t]he parties agreed that I would issue a simple rather than a reasoned award in this matter."

[9] The petitioner's 2021 lawsuit asserted claims against four Church-leader respondents who had been part of the *Jane Doe-1* action: Steven Grow; Donald Fishel; Christopher and Sandralee Jensen; and against three other respondent leaders: Matthew Whitcomb; Donald Wrye; and Anthony Naegle.

the Church and the respondents was encompassed by the 2019 arbitration agreement. Moreover, the court concluded that "a final disposition of [the petitioner's] claims through arbitration was the intent of the parties" to the arbitration agreement, and it therefore dismissed the petitioner's lawsuit against the Church and the respondents.

The petitioner appealed the dismissal of his case against the respondents (the seven Church leaders) to the ICA; he did not appeal the ruling as it pertained to the Church. However, in a memorandum decision, the ICA agreed with the circuit court that all of the petitioner's claims were subject to the arbitration agreement and affirmed the circuit court's dismissal of the petitioner's claims against all of the respondents. *C.S. v. Grow*, No. 22-ICA-141, 2023 WL 7410618 (W. Va. Ct. App. Nov. 8, 2023) (memorandum opinion).

Petitioner C.S. now appeals the ICA's decision affirming the circuit court's dismissal of his complaint. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). *See also*, *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005) ("[O]ur review of whether Petitioner's [Arbitration] Agreement represents a valid and enforceable contract is de novo.").

This appeal pertains to the circuit court's order granting the respondents' motions to enforce the arbitration agreement and dismiss the petitioners' claims on the ground that the parties were bound by the arbitrator's final ruling in favor of the Church. By its own terms, the subject arbitration agreement is to be interpreted pursuant to the Revised Uniform Arbitration Act.

In general, when a party moves for a court to enforce an arbitration agreement, the court's authority is constrained to answering only two questions: is there a valid, enforceable arbitration agreement, and does the parties' dispute fall within the substantive scope of the agreement? If the court answers "yes" to both questions, then the court's authority over the merits of the dispute ends and the dispute must be referred to arbitration. For arbitration contracts governed by the Revised Uniform Arbitration Act, we have stated that the Act dictates the following process:

> When a trial court is required to rule upon a motion to compel or stay arbitration, the West Virginia Revised Uniform Arbitration Act, West Virginia Code § 55-10-8(b) (2015), limits the authority of the trial court to determining whether a litigant has established: (1) the existence of a valid, enforceable agreement to arbitrate between the parties; and (2) that the parties' controversy falls within the substantive scope of that agreement to arbitrate.

Syl. Pt. 4, *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 242 W. Va. 372, 836 S.E.2d 23 (2019).[10] Since we are reviewing the circuit court's order anew, we apply this two-part rubric to the parties' arguments.

[10] The same judicial constraint applies to those arbitration contracts governed by the Federal Arbitration Act. *See* Syl. Pt. 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010) ("When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the

On the first *Golden Eagle* question, the petitioner asserts that there is no valid, enforceable agreement to arbitrate between the parties because the respondents were not signatories to the 2019 arbitration agreement. The arbitration agreement was between the petitioner and the Church. The petitioner also argues that the respondents were not identified in the agreement as beneficiaries.[11] The respondents, however, contend that the Church (a defendant below) raised the arbitration agreement in the circuit court to bar claims against itself and all of the individual respondents, and therefore, the respondents are beneficiaries of the agreement.

With regard to whether a party is a third-party beneficiary of a particular contract, we have said that:

> In the absence of a provision in a contract specifically stating that such contract shall inure to the benefit of a third person, there is a presumption that the contracting parties did not so intend and in order to overcome such presumption the implication from the contract as a whole and the surrounding circumstances must be so strong as to be tantamount to an express declaration.

Syl. Pt. 2, *Ison v. Daniel Crisp Corp*., 146 W. Va. 786, 122 S.E.2d 553 (1961). Examining the arbitration agreement as a whole and the surrounding circumstances, it is clear that the petitioner and the Church perceived that any liability by the Church would arise from the actions of the respondent Church leaders. The arbitration agreement extended to all claims or controversies "that were or could have been asserted" in *Jane Doe-1*. The 2013 *Jane Doe-1* litigation named four Church leaders; three Church leaders are identified in the arbitration agreement as being required

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trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.").

[11] The petitioner also argues that the arbitration agreement is unconscionable if a court interprets it to apply to the respondents. We decline to address this argument, largely because the doctrine of unconscionability applies to the formation of an agreement and not its interpretation. Stated differently, where grossly unfair circumstances exist in the terms and process of making a contract, courts may invoke the doctrine of unconscionability to refuse enforcement of the agreement because, in effect, there was no true, fair meeting of the minds. Our current law makes clear that there must be some element of *both* substantive unfairness combined with procedural unfairness. *See* Syl. Pt. 20, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *cert. granted, judgment vacated on other grounds sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012) ("A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa."). *But see Horizon Ventures of W. Va., Inc. v. Am. Bituminous Power Partners, L.P.*, 245 W. Va. 1, 13, 857 S.E.2d 33, 45 (2021) (Hutchison, J., concurring) (arguing this Court should abandon the requirement "a litigant must prove some measure of *both* procedural *and* substantive unconscionability" because either form of unfairness alone should be sufficient to void a contract).

to appear as live witnesses; and testimony from Church leaders was clearly anticipated to be used in the arbitration proceeding to hold the Church liable. In sum, we find no doubt that the 2019 arbitration agreement was intended to encompass and benefit the respondents. Under these novel circumstances, the respondents are entitled to enforce the valid contractual right to arbitration against the petitioner.

On the second question required by *Golden Eagle*, whether the parties' dispute is within the scope of the arbitration agreement, we again find no doubt. By its terms, the arbitration agreement extends to all claims and all controversies that either were, or which could have been, brought in the *Jane Doe-1* litigation. The petitioner does not seriously dispute that all of the claims encompassed within his 2021 complaint were or could have been brought when the 2013 *Jane Doe-1* lawsuit was filed.

Interpreting the 2019 arbitration agreement under *Golden Eagle* and the Revised Uniform Arbitration Act, we find no error with the circuit court's, and later the ICA's, conclusion that there was a valid and enforceable arbitration agreement between the parties, and that the parties' controversy falls within the substantive scope of that agreement to arbitrate. On this point, we affirm the circuit court and the ICA.

However, the circuit court erred in its next steps: upon answering both of the *Golden Eagle* questions in the affirmative, the court should have referred the parties' dispute to an arbitrator. The circuit court went beyond finding that the respondents could invoke their right to arbitration and accepted the respondents' claim that the arbitration agreement disposed of, or somehow resolved, the merits of the petitioners' claims against the respondents. The respondents do not seek to invoke the arbitration *agreement*; instead, the respondents seek to invoke the arbitration *ruling* that was favorable to the Church, contending that they should be beneficiaries of the arbitrator's ruling. The respondents claim that the 2019 arbitration agreement provides that the arbitrator's February 2020 ruling in favor of the Church is "final and binding," but that is a loose reading of the agreement. The agreement actually states (with emphasis added) that "the Parties recognize and desire the benefits of a speedy, impartial, final and binding dispute resolution *procedure*" and therefore "mutually consent to the resolution by arbitration" of all of the petitioner's claims or controversies.

The Revised Uniform Arbitration Act limited the circuit court's power to assessing only whether there was an enforceable arbitration agreement covering the parties' controversy; the court had no authority to assess the merits of any of the parties' claims or defenses.[12] The respondents are merely beneficiaries of the petitioner-Church contract to arbitrate any claims or controversies that were or could have been asserted in the *Jane Doe-1* litigation. Hence, it was error for the circuit court, and on appeal the ICA, to conclude that the merits of the petitioner's claims were barred by the arbitration agreement.

[12] To the extent that the respondents claim res judicata bars the petitioner's claims, we note that res judicata is an affirmative defense to the merits of the controversy. *See*, *e.g.* W. Va. R. Civ. Pro. 8(c)(1) ("[A] party shall affirmatively state any . . . affirmative defense, including . . . res judicata[.]"); Syl. Pt. 3, *Mountain State Motor Car Co. v. Solof*, 97 W. Va. 196, 124 S.E. 824 (1924) ("Res judicata must be properly pleaded as well as proven.").

Accordingly, we affirm the circuit court's and ICA's finding that there was a valid arbitration agreement between the petitioner and the respondents, and that their dispute was within the scope of that agreement. We reverse the circuit court's and ICA's finding that the agreement precluded the petitioner's claims, set aside the court's dismissal order, and remand the case with an order that the circuit court refer the parties' dispute to arbitration.

Affirmed, in part, reversed, in part, and remanded.

ISSUED: November 13, 2026

CONCURRED IN BY:

Justice William R. Wooton
Justice H. L. Kirkpatrick
Justice James W. Flanigan

CONCURRING, IN PART, AND DISSENTING, IN PART:

Chief Justice C. Haley Bunn
Judge W. E. Sam Fox, II, sitting by temporary assignment.

DISQUALIFIED:

Justice Charles S. Trump IV, deeming himself disqualified, did not participate.

Bunn, Chief Justice, concurring, in part, and dissenting, in part, and joined by Judge W. E. Sam Fox, II:

I concur with the majority's conclusion that respondents were third party beneficiaries to the arbitration agreement and that petitioner C.S.'s underlying claims against respondents were included in what the parties agreed to arbitrate—and did. As a result, I dissent to the majority's unsupported conclusion that, despite these findings, the circuit court was nevertheless required to submit an already arbitrated claim *back* to the arbitrator to presumably determine whether C.S. gets a second attempt at arbitration of the same claims.

Using principles of arbitrability, the majority finds that 1) there is an enforceable agreement to arbitrate between C.S. and the respondents, who are third party beneficiaries of the agreement entered into by C.S. and the Church; and 2) the case falls within the "substantive scope" of that agreement by virtue of its language providing that "all claims and controversies that could have been" raised in the prior *Jane Doe*-1 case were included. The memo decision finds "no doubt" on each of these questions. The memorandum decision specifically declares that the "arbitration

agreement extends to all claims and all controversies that either were, or which could have been, brought in the *Jane Doe*-1 litigation[]" and that petitioner does not "seriously dispute" that the underlying claim fits that description.

The majority then reasons—without citing supporting authority—that while the circuit court had authority to conclude that the underlying claims were encompassed within the arbitrated claim, it could go no further. It finds that the case must return to the arbitrator to essentially decide what it just decided: that these claims were included in the arbitration that already occurred. The precise issue hinted at by the majority, but never identified, analyzed, or discussed, is whether the preclusive effect of an arbitration on subsequent litigation must be decided by the court or the arbitrator. This is, at a minimum, an issue of first impression that the majority presumptively determines without benefit of briefing, argument, or analysis.

In the context of the Federal Arbitration Act, the United States Supreme Court has stated that "courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223, 105 S. Ct. 1238, 1243, 84 L. Ed. 2d 158 (1985). The Supreme Court of Georgia held that the trial court is not prohibited from "considering certain procedural mechanisms that may eliminate substantive claims from consideration by an arbitrator[.]" *Bryan Cnty. v. Yates Paving & Grading Co*., 638 S.E.2d 302, 304 (Ga. 2006). More specifically, the *Bryan County* court found that "[r]es judicata is not a claim 'arising out of or relating to' the parties' contractual arrangement, but a procedural bar to claims that have already arisen and been resolved by prior arbitration[.]" *Id*. It explained further:

> [W]hen res judicata applies to procedurally bar a claim, the trial court does not even reach the merits or lack thereof of the substantive claim that a party has attempted to raise. Because arbitration has already taken place on the issues that were previously raised, there is nothing left for an arbitrator to resolve relating to those same issues[.]

Id. The court also succinctly allayed any concern that the "swift and inexpensive" resolution gained through arbitration is undermined with this procedure: "That goal was accomplished once the parties took their claims to arbitration the *first* time." *Id*.

Similarly, in *Waterfront Marine Const., Inc. v. N. End 49ers Sandbridge Bulkhead Groups A, B & C*, 468 S.E.2d 894, 902 (Va. 1996) the Virginia Supreme Court also addressed the presumptive conclusion made by the majority, i.e., whether the "res judicata effect [of a prior award] on a subsequent request for arbitration is itself arbitrable[.]" The *Waterfront* Court found that "a plea of res judicata is not subject to arbitration and the court, not the arbitration panel, determines whether a previous arbitration award operates as *res judicata* or collateral estoppel on a subsequent action or demand for arbitration."[13]

[13] *See also Hansen v. Musk,* 122 F.4th 1162, 1173 (9th Cir. 2024)*, cert. denied sub nom. Hansen v. Tesla, Inc.,* 145 S. Ct. 2850, 222 L. Ed. 2d 1132 (2025) (affirming district court's application of claim preclusion to litigation following arbitration); *FleetBoston Fin. Corp. v. Alt,* 638 F.3d 70, 81 (1st Cir. 2011) (affirming district court's determination that prior arbitration

Despite ruling that any further disposition by a court improperly intrudes into the "merits and defenses" reserved to the arbitrator, the majority then immediately discards its own ruling and does what it forbids any other court to do: speaks to the preclusive effect of the completed arbitration. The majority frames an argument about whether the arbitration ruling is "final and binding"—an issue C.S. does not even dispute. The only alternative argument C.S. made is that, if the underlying claims were encompassed within the arbitration agreement, the agreement was unconscionable. At no point did C.S. make any argument that the arbitration had no preclusive effect and he is still somehow entitled to arbitrate those claims *again*.[14]

But the majority goes even further. After framing the preclusion issue, the majority offers its advisory thoughts on possible defenses for C.S. to advance to avoid the preclusive effect of the

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resolved all claims of parties and rejecting claim that issue should have been remanded to arbitrator); *Lewis v. Cir. City Stores, Inc*., 500 F.3d 1140, 1147 (10th Cir. 2007) (affirming district court's application of claim preclusion to litigation subsequent to final and valid arbitration award); *Premium Plastics Supply, Inc. v. Howell*, 537 S.W.3d 201, 207 (Tex. App. 2017) (finding claims subject to arbitration agreement were res judicata as to subsequent attempt to "relitigate" them); *Palmetto Homes, Inc. v. Bradley*, 593 S.E.2d 480, 485 (S.C. Ct. App. 2004) (finding prior arbitration award final, binding, and res judicata as to all claims within scope of arbitration agreement); *Chattin v. Cape May Greene, Inc.*, 524 A.2d 841, 848 (N. J. App. Div. 1987) (applying res judicata to preclude party's attempt to "secure an additional recovery against a party to the arbitration proceedings" and finding that "the court must determine what was submitted to arbitration[.]"); *Rodgers Builders, Inc. v. McQueen*, 331 S.E.2d 726, 730 (N.C. App. 1985) ("The scope of an arbitration award and its res judicata effect are matters for judicial determination; therefore, whether plaintiff's claims are barred was for the superior court to determine."); *Monmouth Pub. Schs., Dist. No. 38 v. Pullen*, 489 N.E.2d 1100, 1105 (Ill. Ct. App. 1985) ("It is for the courts to decide the res judicata or collateral estoppel effect to be given a prior arbitration award."); *C & O Dev. Co. v. Am. Arb. Ass'n*, 269 S.E.2d 685, 687 (N.C. Ct. App. 1980) ("[T]he extent of a judgment's binding effect is a matter for judicial determination.").

But see Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002) (holding "in the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether *prerequisites* such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." (emphasis added)); *Constellium Rolled Prods. Ravenswood, LLC v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union AFL-CIO/CLC*, 18 F.4th 736, 740 (4th Cir. 2021) (finding that "preclusive effect of a prior judgment is a procedural question for the arbitrator[,]" relying on *Howsam*); *Nat'l Cas. Co. v. Cont'l Ins. Co*., 121 F.4th 1151, 1153 (7th Cir. 2024) ("[T]he preclusive effect of an arbitral award is an issue for the arbitrator to decide, not a federal court." citing *Howsam*).

[14] C.S.'s brief before this Court contains no arguments in defense of preclusion. Respondents Grow and Fishel represent that the only defense made to res judicata below by C.S. was the lack of privity between respondents and the church—an issue more properly characterized as whether respondents were third party beneficiaries to the arbitration agreement.

arbitration. The majority evaluates what it deems a "loose reading" of the agreement's finality language and suggests an alternate interpretation wherein the parties agreed only to procedural finality. If it is the majority's position that the circuit court could not delve into the preclusive effect of the decision, it cannot then issue an advisory opinion about that precise issue, gratuitously offering C.S. an argument to escape the impact of the ruling it just made.

The majority presumes without analysis or citing authority that once a claim is determined to be within the scope of an arbitration agreement, the preclusive effect of a prior arbitration must be determined by the arbitrator. Here, the majority did more than determine that the underlying claims were within the "scope" of the arbitration agreement; because the "scope" of the arbitration agreement is coextensive with these precise claims and these exact defendants, the majority effectively decided—correctly—that these claims were in fact arbitrated. Rather than affirming dismissal of the case, the majority gifts C.S. an argument to make on remand to blunt the effect of its own decision.

Accordingly, I respectfully concur, in part, and dissent, in part. I am authorized to state that Judge Fox joins in this concurrence and dissent.