No. 16-32

IN THE

Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, *et al.*,

Petitioners,

v.

JANIS E. CLARK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES

Page

Cited Authorities

Page

Page

Page

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration resolves disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration,

1. The parties have consented in writing to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Chamber's members have structured millions of contractual relationships around arbitration agreements. These members rely on the fair application of the FAA to ensure that they will not be deprived of the many benefits of arbitration. Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012), the Chamber has a strong interest in ensuring state courts' uniform, consistent, and accurate application of the FAA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The FAA makes arbitration agreements "valid, irrevocable, and enforceable," except on grounds that would invalidate "any contract." 9 U.S.C. § 2. Congress enacted the FAA "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Unfortunately, as the Chamber has written before, the hostility toward arbitration is alive and well in the state courts. Despite numerous adverse decisions from this Court (including a few summary reversals), the state courts continue to devise "a great variety of devices and formulas" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342 (citation omitted).

The decision below is the latest "clever contribution" to this "genre." Pet. App. 99a (Abramson, J., dissenting). The Supreme Court of Kentucky announced an "explicit-reference" rule for powers of attorney: an attorney-in-fact cannot bind a principal to an arbitration agreement unless

the power of attorney expressly grants him that authority. *Id.* at 44a (majority opinion). The court grounded this explicit-reference rule in the idea that waivers of the right to a civil jury must be "knowing and voluntary." *Id.* at 47a-48a. But its disdain for arbitration was palpable: the Kentucky Supreme Court described arbitration as a threat to the "divine God-given right" to a civil jury—the only "*sacred*" right recognized in the Kentucky Constitution. *Id.* at 43a.

The Chamber agrees with the petitioners that Kentucky's explicit-reference rule is preempted by the FAA. As Petitioners explain, the rule "stands in stark defiance of this Court's repeated holdings that the FAA preempts state-law rules that disfavor arbitration agreements." Br. for Pet'rs at 10. In particular, the decision below runs directly contrary to the Court's decision in *Doctor's Associates v. Casarotto*, 517 U.S. 681, 687-88 (1996), which held that the FAA preempted a Montana statute that mandated notice of an arbitration provision on the first page of a contract. *See* Br. for Pet'rs at 17-19. The Court had no difficulty concluding that the FAA preempted the Montana law because it imposed "a special notice requirement [upon arbitration] not applicable to contracts generally." 517 U.S. at 687. As the Court made clear, a "state [law] requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." *Id.* (quoting 2 I. Macneil, *et al.*, *Federal Arbitration Law* § 19.1.1 (1995)). Kentucky's explicit-reference rule does precisely that.

The Chamber writes separately to explain that the liberal federal policy favoring arbitration agreements is grounded in the congressional and judicial recognition that

arbitration is a fair, efficient, and inexpensive alternative to litigation. The decision below should be corrected because it runs afoul of that policy, reflects continued hostility to arbitration, upsets settled expectations, and undermines the proper operation of the Supremacy Clause.

ARGUMENT

I. The Liberal Federal Policy Favoring Arbitration Reflects the Fact that Arbitration is a Fair, Efficient, and Inexpensive Alternative to Litigation that Benefits Businesses and Individuals Alike.

The FAA "establishes 'a liberal federal policy favoring arbitration.'" *Concepcion*, 563 U.S. at 339 (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). This pro-arbitration policy reflects the fact that arbitration is a faster and cheaper alternative to litigation that is fair and beneficial to businesses and individuals. Indeed, both Congress and this Court have recognized the many benefits of arbitration. And the available data confirm that arbitration is cheaper and faster than litigation and produces fair outcomes.

Congress enacted the FAA nearly a century ago "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 intended goal 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)). Accordingly, the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687.

Congress wanted to ensure that contractual arbitration rights are "on equal footing" with all other contracts, *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006), because it recognized the many advantages of arbitration. 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 likewise stated that the FAA was needed "to avoid the delay and expense of litigation." S. Rep. No. 68-536, at 3 (1924). Even then, Congress recognized that the expenses and delays associated with litigation tend to increase over time. *See id.* Arbitration thus benefits all disputants—"corporate interests, as well as … individuals." *Id.*

More than a half-century after the FAA was enacted, Congress had not changed its mind about the "many" benefits of arbitration. H.R. Rep. No. 97-542, at 13 (1982). Indeed, it expounded upon them, emphasizing 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 Federal courts." *Id.*

This Court likewise has acknowledged the "real benefits" of arbitration. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For more than three decades, the Court consistently has enforced the liberal

federal policy favoring arbitration, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *accord Moses H. Cone*, 460 U.S. at 24. And in doing so, the Court repeatedly has highlighted the "advantages" of arbitration. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see, e.g.*, *Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010) (arbitration provides "lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration"). Like Congress, the Court has explained that these advantages inure to the benefit of disputants—businesses and "individuals"—"who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

Data back up what Congress and this Court have recognized. Arbitration is faster than traditional litigation. *See* David Sherwyn *et al.*, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1572 (2005) ("[F]ew dispute the assertion that arbitration is faster than litigation."). In June 2016, the median civil lawsuit in federal court took 27.1 months to reach trial. *See* U.S. Courts, *U.S. District Courts—National Judicial Caseload Profile* (2016), goo.gl/Ogw9jB. State courts, which handle more cases than federal courts, have even worse workloads. *Compare* Nat'l Ctr. for State Courts, *Examining the Work of State Courts*

7 (2015), goo.gl/thJOxA (reporting 16.9 million new civil cases filed in state court in 2013), *with* U.S. Courts, *U.S. District Courts—Judicial Business 2013*, goo.gl/jxOAqG (reporting 284,604 new civil cases filed in federal court in 2013). Arbitration, by contrast, is estimated to take "less than half of the time required for civil litigation." Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 55 (1998). Arbitrations with the American Arbitration Association ("AAA")—the largest arbitration provider in the country—take an average of only four to six months. *See* AAA, *Analysis of the American Arbitration Association's Consumer Arbitration Caseload* (2007), goo.gl/Lqqmf7. Similarly, a study by the California Dispute Resolution Institute found that consumer and employment disputes were resolved in an average of 116 days in arbitration. *See* Calif. Disp. Resol. Inst., *Consumer and Employment Arbitration in California* 19 (2004), goo.gl/YXiWw7.

The increased speed of arbitration is due primarily to its decreased procedural complexity. But it is also attributable to the fact that the courts are clogged. Forty states had to cut funding to their courts in 2010, according to a report by the American Bar Association's Task Force on the Preservation of the Justice System, which was co-chaired by David Boies and Theodore B. Olson. *See* Am. Bar Ass'n, *The Growing Crisis of Underfunding State Courts* (2011), goo.gl/exBnPe. The effects of these funding cuts have been devastating: in California, "[a]t least 53 courthouses have closed," and "[c]ourts in 20 counties are closed for at least one day a month." Maura Dolan, *Budget Cuts Force California Courts to Delay Trials, Ax Services*, L.A. Times, Apr. 9, 2013, goo.gl/Rmmu44. These and other court closures "have forced some San

Bernardino residents to drive up to 175 miles one way to attend to a legal matter." *Id.* In New York City, the wait for a court date is four times longer than it was before the budget cuts. *See* William Glaberson, *Despite Cutbacks, Night Court's Small Dramas Go On*, N.Y. Times, June 2, 2011, goo.gl/UWXB0D.

Although the vast majority of civil claims are filed in state court, the federal courts also have extraordinarily high caseloads, especially at the trial level, where the backlogs are particularly severe. The Brennan Center for Justice has found that "the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007." Alicia Bannon, Brennan Ctr. for Justice, *Federal Judicial Vacancies: The Trial Courts* 5 (2013), goo.gl/WDcAO2. While "[a] judge in 1992 had an average of 388 pending cases on his or her docket," "[b]y 2012, the average caseload had jumped to 464 cases—a 20 percent increase." *Id.*

Arbitral forums do not have comparable backlogs and can resolve disputes rapidly. Moreover, the hundreds of thousands of arbitrations conducted each year reduce the caseloads of state and federal courts, improving their efficiency as well. *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, 108 Penn St. L. Rev. 165, 166-67 & n.11 (2003).

Arbitration is also far cheaper than litigation. The AAA charges consumers a $200 filing fee and requires businesses to shoulder the rest of the costs. *See* AAA, *Costs of Arbitration* 1 (2016), goo.gl/vltYGE. For many

employees, arbitration costs *nothing*—their filing fees and attorney's fees are shifted to the employer. *See* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 802 (2003).

In litigation, by contrast, unrepresented parties have little hope of navigating the complex procedures that apply in court. They must hire a lawyer, whose hourly billing rate far exceeds the cost of proceeding in arbitration and, in many cases, the entire value of their claim. If the plaintiff retains the lawyer on a contingency basis, the lawyer's compensation substantially reduces the amount of any award. Accordingly, the cost savings of arbitration allow individuals to bring small-value claims that would be priced out of court and larger claims that would be substantially reduced by contingency fees. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 791-92 (2008); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58-JUL Disp. Resol. J. 9, 10-11 (2003); Nat'l Workrights Inst., *Employment Arbitration: What Does the Data Show?* (2004), *available at* goo.gl/nAqVXe.

The streamlined procedures of arbitration make it cheaper for businesses too. Nursing homes, for example, have found that arbitration is 41% less expensive to administer than litigation. *See* Am. Health Care Ass'n, *Special Study on Arbitration in the Long Term Care Industry* 8 (2009), goo.gl/4A7ozo. Businesses often pass these savings on to consumers and employees in the form of lower prices and higher wages. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration*

Agreements—with Particular Consideration of Class Actions and Arbitration Fees, 5 J. Am. Arb. 251, 254-56 (2006).

Arbitration not only is faster and cheaper than litigation, but it also allows plaintiffs to vindicate their claims with at least as much success as litigation. Studies show that individuals are no less likely to prevail in arbitration than in court. For example, consumers who arbitrate "get decisions on the merits more frequently and more quickly than they would in court," and they "win at least as often, if not more often, than they do in court." U.S. Chamber of Commerce, *The CFPB's Flawed Arbitration "Study"* 10 (2016), goo.gl/p9JSzt [hereinafter Chamber, *CFPB's Flawed Study*]. A 2010 study by scholars Christopher Drahozal and Samantha Zyontz found that plaintiffs who file consumer claims with the AAA win relief 53.3% of the time. Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 897 (2010) [hereinafter Drahozal & Zyontz, *Empirical Study*]. This rate compares favorably with plaintiffs in state and federal court, who prevail roughly 50% of the time. *Id.* Another study by these authors found that consumers prevailed as or more often in debt-collection arbitration than in court, *see* Christopher R. Drahozal & Samantha Zyontz, *Credit Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011)—although, in 2010, the AAA imposed a moratorium on debt-collection arbitrations in part at the urging of so-called consumer advocates, *see* AAA, *Notice on Consumer Debt Collection Arbitrations* (2010), goo.gl/JlgOm8.

The Drahozal and Zyontz studies are consistent with

studies of arbitration in other contexts. For example, a 2005 study by Ernst & Young examined sample AAA casefiles of consumer cases. The study concluded that consumers prevailed more often than businesses—55% of the time—and received a favorable result almost 80% of the time. *See* Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005). Similarly, a study of employment-discrimination suits found that 46% of those who arbitrated won, compared to 34% of those who litigated; that only 4% of litigated cases ever reached trial; and that arbitrations were resolved 36% faster. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58-JAN Disp. Resol. J. 56, 56-58 (2003-04). In 2004, the National Workrights Institute compiled all available employment-arbitration studies and concluded that employees were 19% more likely to win in arbitration than in litigated cases. Nat'l Workrights Inst., *supra*. Median awards received by plaintiffs were the same as in court, although the distorting effect of occasional large jury awards resulted in higher average recoveries in litigation. *Id.*

And just as in court, plaintiffs who win in arbitration recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest." Drahozal & Zyontz, *Empirical Study*, *supra*, at 902. In particular, Drahozal and Zyontz found that 63.1% of prevailing consumer claimants who sought attorney's fees were awarded them. *Id.*

Arbitration is fair too. Arbitrators and courts ensure that arbitration provisions will be enforced only if they meet basic guarantees of fairness and due process. And companies increasingly have opted to make arbitration provisions even more favorable to consumers.

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. *See* AAA, *Consumer Due Process Protocol*, goo.gl/fWwHQ1. 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 a consumer unless the clause complies with "minimum standards of fairness." JAMS, *Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, goo.gl/tpXOOb. Both entities recognize that independence, due process, and low costs for the consumer are vital elements of a fair and accessible arbitration system.

The courts provide another layer of oversight. State and federal courts are empowered by Congress to invalidate arbitration clauses that run afoul of generally-applicable principles of state contract law, such as unconscionability. 15 U.S.C. § 2; *see Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (stating that 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 arbitration provisions that purport to limit a consumer's right to recover certain types of damages;[2] provisions that impose excessive fees;[3] and provisions that unreasonably shorten statutes of limitation.[4]

At the same time, the vast majority of arbitration agreements do not contain these defects. As companies have gained more experience with arbitration, they have sought to make arbitration even *more* favorable for

2. *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).

3. *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); *see also Am. Express*, 133 S. Ct. at 2310-11 (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration ... are so high as to make access to the forum impracticable").

4. *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); *Alexander*, 341 F.3d at 256 (same); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Ct. App. 1997) (1 year).

consumers, not less. As the Solicitor General of the United States has recognized, "many companies have modified their agreements to include streamlined procedures and premiums designed to encourage customers to bring claims." Br. for the United States as *Amicus Curiae* Supporting Resp'ts at 28, *Am. Express*, 133 S. Ct. 2304 (No. 12-133), 2013 WL 367051.

Unsurprisingly then, individuals who arbitrate are generally pleased with the experience. 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* Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* 5 (conducted for U.S. Chamber Institute for Legal Reform, April 2005). Two-thirds reported that they would likely use arbitration again. *Id.* Similarly, a 2013 survey of the arbitration system for Kaiser Foundation Health Plan revealed that "almost 50% of the parties and attorneys who went through arbitrations that year reported that the arbitration system was better than going to court, another 38% reported that it was the same as going to court—and only 14% reported it was worse." Chamber, *CFPB's Flawed Study*, *supra*, at 12. Nearly 70% of the consumers surveyed by Ernst & Young likewise said they were "satisfied" or "very satisfied" with the arbitration process. *See* Ernst & Young, *supra*.

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).

II. The Approach of the Court Below Flouts the Federal Policy in Favor of Arbitration, Undermines Predictability, and Ignores the Supremacy Clause.

In the cases below, Respondents had the authority to enter into contracts on behalf of their principals. And Respondents each elected to exercise that authority by signing arbitration agreements that indisputably encompass the underlying disputes. The Kentucky trial court rightly enforced those arbitration agreements, concluding that the disputes could be adjudicated only through arbitration pursuant to the terms of those agreements. Nearly five years later, however, those disputes remain unresolved, even though the parties contracted for the "simplicity, informality, and expedition of arbitration," *Mitsubishi Motors*, 473 U.S. at 628. This is because the Kentucky Supreme Court announced an "explicit reference" rule for powers of attorney: that an attorney-in-fact cannot bind a principal to an arbitration agreement unless the power of attorney explicitly grants her that authority. Pet. App. 44a.

It is hard to see how the explicit-reference rule could do anything other than "singl[e] out arbitration provisions" for disfavored treatment. *Casarotto*, 517 U.S. at 687. Yet the Kentucky Supreme Court claimed that its rule is "consistent" with the FAA, framing it not as an arbitration-specific rule, but as a rule respecting jury-trial rights. Pet. App. 46a. This sleight of hand does not work. As the dissent explained, "arbitration agreements are distinguished [from other contracts] by their effect

on trial rights." *Id.* at 89a (Abramson, J., dissenting); *accord Concepcion*, 563 U.S. at 342 (explaining that a rule prohibiting contracts that permit non-jury trials would have a "disproportionate impact on arbitration agreements"); *id.* at 362 (Breyer, J., dissenting) (agreeing). If framing a rule in terms of the right to a jury trial was enough, States would have carte blanche to discriminate against arbitration. Indeed, as Petitioners point out, to uphold the decision below would mean that Montana could revive the very statute invalidated in *Casarotto* if it "replace[d] the word 'arbitration' with the term 'waiver of a jury trial.'" Br. for Pet'rs at 29-30.

It would be bad enough if this was an isolated case of a state court flouting the federal policy favoring arbitration. Sadly, the decision below continues the unfortunate trend of state courts inventing new "devices and formulas" to circumvent the FAA. *Concepcion*, 563 U.S. at 342; *see Imburgia*, 136 S. Ct. 463; *Nitro-Lift*, 133 S. Ct. 500 (per curiam); *Marmet Health*, 132 S. Ct. 1201 (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam). For the Chamber and its members, combatting these efforts has become a never-ending game of Whack-a-Mole: as soon as one method of circumventing the FAA is defeated, another one pops up.

This relentless creativity from the states is bad for American businesses. Many of the Chamber's members have "written contracts relying on [this Court's FAA precedents] as authority." *Allied-Bruce*, 513 U.S. at 272. They need to know that their arbitration agreements will be enforced so they can anticipate the costs of dispute resolution and plan their affairs accordingly. But the states' ongoing efforts to avoid the FAA cast a pall

over every arbitration agreement, creating widespread uncertainty for businesses. American businesses are left wondering, "What will the states think of next?"

Even when the states' efforts fail, they require years of litigation to undo—eliminating the very efficiencies that arbitration is supposed to provide. And the state courts' receptivity to new ways of limiting the enforceability of arbitration agreements means that litigants are encouraged to keep raising them. The resulting satellite litigation is wasteful, time-consuming, and does nothing to resolve the underlying merits of disputes. The irony, of course, is that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7. And it contravenes "Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone*, 460 U.S. at 22).

On top of that, the decision below reads like a throwback to "the old judicial hostility to arbitration." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (citation omitted). The Kentucky Supreme Court described arbitration as an affront to the "divine God-given right" to a civil jury. Pet. App. 43a. To allow an attorney-in-fact to sign an arbitration agreement, the court reasoned, would be as "absurd" as allowing him to "bind the principal to personal servitude." *Id.* at 42a.

Perhaps worse, the decision below exhibits hostility not only to arbitration, but to the proper operation of the Supremacy Clause. The Federal Arbitration Act is one of the "Laws of the United States." U.S. Const., Art. VI,

cl. 2. This Court's long line of precedent enforcing the liberal federal policy in favor of arbitration represents the "authoritative interpretation of that Act. Consequently, the judges of every State must follow it." *Imburgia*, 136 S. Ct. at 468.

When state courts refuse to apply this Courts' precedents on arbitration, this Court has not hesitated to intervene to remind them that they are bound by its interpretations of federal statutes. *See, e.g.*, *Marmet Health*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art. VI, cl. 2.)). Because state supreme-court decisions often represent the final say on the enforcement of arbitration agreements, such intervention is "a matter of great importance" so that "state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift*, 133 S. Ct. at 501. And it is particularly important now—at a time when the state courts continue to disregard this Court's admonitions.

Enough is enough. The "old judicial hostility to arbitration" has gotten, in a word, old. The FAA is "the supreme Law of the Land" and has been for nearly 100 years. *Nitro-Lift*, 133 S. Ct. at 503 (quoting U.S. Const., Art. VI, cl. 2). This case presents an opportunity to reaffirm that courts must stop inventing new ways to circumvent the FAA, this Court's precedents, and the liberal federal policy favoring arbitration.

CONCLUSION

The judgment of the Supreme Court of Kentucky should be reversed.

Respectfully submitted,

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