No. 17-694

IN THE

Supreme Court of the United States

THE RITZ-CARLTON DEVELOPMENT COMPANY, INC., *et al.*,

Petitioners,

v.

KRISHNA NARAYAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF HOMEBUILDERS, AND THE AMERICAN RESORT DEVELOPMENT ASSOCIATION IN SUPPORT OF PETITIONERS

STEVEN P. LEHOTSKY
WARREN POSTMAN
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

JAMES G. RIZZO
DAVID S. JAFFE
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200

THOMAS R. MCCARTHY
Counsel of Record
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

ROBERT G. CLEMENTS
JUSTIN J. VERMUTH
AMERICAN RESORT DEVELOPMENT ASSOCIATION
1201 15th Street, NW
Washington, DC 20005
(202) 371-6700

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic 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 curiae* briefs in cases that raise issues of concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *American 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 (2011). Indeed, the Chamber filed an *amicus curiae* brief in this case when it was previously before the Court. *See The Ritz-Carlton Development Company v. Narayan*, No. 15-406.

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amici curiae*'s intent to file and consented to the filing of this brief.

allows them to resolve 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, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The National Association of Home Builders (NAHB) is a Washington, DC-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's missions is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers and its builder members construct about 80 percent of the new homes each year in the United States. NAHB and its members work for the American dream of home ownership, as well as for the development of housing that creates vibrant and affordable communities. NAHB is a vigilant advocate in the Nation's courts and frequently participates as a party or *amicus curiae* to safeguard the rights of its members. *See, e.g.*, *Murr v. State of Wisconsin,* 137 S. Ct. 1933 (2017); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Horne v. USDA*, 135 S. Ct. 2419 (2015); *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and

predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process as well as the builder's ability to pass those corresponding savings through to homeowners. Litigation, and its attendant costs in time and money, is anathema to predictability. Employing arbitration agreements allows builders and homebuyers to avoid litigation and conserve resources, which is beneficial to both sides. Uniform, consistent application of the FAA is essential to securing these benefits.

The American Resort Development Association ("ARDA") is the non-profit trade association representing the interests of the time-share and vacation ownership industries. Founded in 1969, ARDA represents more than 1,000 time-share development and related service corporations. It is the mission of ARDA to foster and promote the growth of the time-share and vacation ownership industry and to serve its members through education, public relations and communications, legislative advocacy, membership development, and ethics enforcement. Many ARDA members regularly employ arbitration agreements in their contracts.

Amici thus have a strong interest in the faithful and consistent application of this Court's FAA jurisprudence, in particular, the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). And 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), *amici* have a strong interest in ensuring the state courts' uniform, consistent, and accurate application of the FAA as interpreted by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the second time Petitioners have needed this Court to intervene in this matter because of the Hawaii Supreme Court's failure to adhere to binding and directly applicable FAA precedent.

The first time, the Hawaii Supreme Court refused to enforce the parties' contracted-for arbitration agreement by applying a special rule applicable only to arbitration—one that makes ambiguous arbitration agreements *per se* unenforceable. App. 57a-58a. Petitioners challenged that rule as violating two fundamental tenets of the FAA: (1) it "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996); and (2) it runs contrary to the "liberal federal policy favoring arbitration agreements," *Moses H. Cone*, 460 U.S. at 24, by construing ambiguity against, rather than "in favor of arbitration," *id*. By singling out arbitration for disfavored treatment and imposing a presumption against arbitrability, the Hawaii Supreme Court had exhibited the very "judicial hostility to arbitration" that the FAA was intended to defeat. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

This Court vacated that decision and remanded the case for reconsideration in light of *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015). That case similarly

overturned the refusal of the California Court of Appeal to enforce an agreement to arbitrate, holding that the ruling, in violation of the FAA, did not "place arbitration contracts on equal footing with all other contracts" and failed to "give due regard … to the federal policy favoring arbitration." *Id.* at 471 (internal quotations omitted).

On remand, the Hawaii Supreme Court yet again refused to enforce the parties' arbitration agreement. Undoubtedly aware that *Imburgia* barred it from imposing a rule making arbitration agreements uniquely unenforceable if they are ambiguous, the Hawaii court simply came up with a new reason to strike down the contract.

As relevant here, the Hawaii Supreme Court found a way to rule that three provisions of the arbitration agreement were unconscionable: its prohibition on punitive damages, discovery limitations, and confidentiality requirement. App. 20a-27a. Further, the Hawaii court invalidated the entire arbitration agreement, despite a severability clause expressly requiring that any part of the arbitration agreement held to be unenforceable "shall be severed and shall not affect either the duties to mediate and arbitrate hereunder or any other part of this Article." App. 9a. These shifting rationales should not save the Hawaii Supreme Court's hostility to arbitration from invalidation.

First, the court once again singled out arbitration for disfavored treatment—this time by refusing to enforce the severability clause. The court recognized that Hawaii's "'general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the

agreement is enforceable when the illegal provision is not central to the parties' agreement." App. 28a. Here, though, it disregarded the "general rule." Instead, "without further explanation, and without citing any Hawaii decisions that disregarded a severance clause in such circumstances," Pet. 13, the court conclusorily asserted that unconscionability "pervade[d]" the entirety of the parties' arbitration agreement and held that this was sufficient reason to refuse to enforce an arbitration agreement, App. 29a, notwithstanding that the agreement could be sensibly applied without the three purportedly unconscionable provisions. When a state-law rule singles out arbitration agreements this way, "the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

The lower court's unconscionability holdings singled out arbitration for disfavored treatment by other means as well. Specifically, the court held the agreement's limits on discovery and requirement of confidentiality unconscionable because they would give respondents comparatively less access to information about their claims than would full-blown discovery through litigation in court. App. 23a, 25a. To be sure, "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. But "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* (quoting *Perry v. Thomas,* 482 U.S. 483, 493 n.9 (1987)). That is precisely what the Hawaii Supreme Court did here.

Second, the Hawaii ruling continues to frustrate the "liberal federal policy favoring arbitration agreements." *Id.* at 346 (quotation omitted). By refusing to enforce the arbitration agreement's severance clause, the court ran afoul of the FAA's "principal purpose"—to "'ensure that private arbitration agreements are enforced according to their terms.'" *Id.* at 344 (quoting *Volt,* 489 U.S., at 478); *see Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 85 (D.C. Cir. 2005) (enforcing arbitral severance clause is "faithful to the federal policy which requires that we rigorously enforce agreements to arbitrate") (quotation omitted). And, the court exhibited hostility to arbitration itself by refusing to enforce the agreement's procedural limitations on discovery and confidentiality requirement—rules that are hallmarks of arbitration.

As Petitioners aptly put it, "[t]he decision below, like the Hawaii Supreme Court's initial decision in this case, manifests the persistent and longstanding judicial hostility to arbitration agreements that the FAA was meant to reverse and that this Court has long condemned." Pet. 4 (internal quotation and citation omitted). In other words, rather than correct its errors on remand, the Hawaii Supreme Court instead doubled down on its hostility to arbitration.

As this Court has recognized, "state supreme courts[']adhere[nce] to a correct interpretation of the [FAA]" is "a matter of great importance," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012). That is because state courts' refusal to enforce arbitration agreements undermines the FAA's purpose of providing efficient and effective dispute resolution according to the parties' negotiated terms. This Court thus regularly intervenes

when state courts fail to faithfully apply the FAA and this Court's precedents; indeed, the Court has summarily reversed state court decisions running afoul of the FAA several times in recent years. *See, e.g., id.* at 501, 503; *Marmet Health Care Ctr. Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam). Summary reversal is warranted here too.

ARGUMENT

I. The Hawaii Supreme Court's Decision Patently Violates The FAA.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974), by enacting the FAA, thereby codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on an equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration") (citing *Concepcion*, 563 U.S. at 339); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

Section 2 is the FAA's centerpiece. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry*, 482 U.S. at 489. Section 2 thus "create[s] a body of federal substantive law of arbitrability," *id.*, the central mandate of which requires arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

In particular, this substantive body of federal arbitration law includes: (1) an "equal footing" principle that prohibits courts from imposing rules that single out arbitration for disfavored treatment, *Concepcion*, 563 U.S. at 339; and (2) a "declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," *Moses H. Cone*, 460 U.S. at 24; *see also Concepcion*, 563 U.S. at 345-46 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration."). The Hawaii Supreme Court's ruling patently violates both of these rules.

A. The Decision Below Singles Out Arbitration Agreements For Disfavored Treatment In Contravention Of The FAA's Equal-Footing Principle.

Section 2 of the FAA preempts contrary state law, *see Preston v. Ferrer*, 552 U.S. 346, 353 (2008), except to the extent preserved by its savings clause. The savings

clause preserves state law only if it serves as a ground "for the revocation of *any contract*." 9 U.S.C. § 2 (emphasis added). The "any contract" limitation is a reference to state laws of general applicability. Accordingly, the FAA preempts any state-law rule that "singl[es] out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). For good reason, this rule is sometimes called the "equal-footing principle." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017).

It operates in two ways. First, the rule prevents states from adopting novel laws or rules that apply only to arbitration. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of Section 2]." *Perry,* 482 U.S. at 492 n.9; *see Doctor's Assocs.,* 517 U.S. at 687 ("Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.") (emphasis in original); *Oblix, Inc. v. Winiecki,* 374 F.3d 488, 492 (7th Cir. 2004) ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

Second, it bars the manipulation of generally applicable contract defenses in a "fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341; *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159, 167 (5th Cir. 2004) ("[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."). Section 2 thus embodies a "principle of rigorous equality"—"antagonism toward arbitration … howsoever manifested in state law, is preempted." *Secs. Indus. Ass'n v. Connolly,* 883 F.2d 1114, 1119-20 (1st Cir. 1989).

This decision violates the equal-footing principle in both respects. In refusing to enforce the agreement's severance clause, the Hawaii Supreme Court adopted a novel approach that applies only to arbitration. Pet. 31 ("Simply put, this is not an approach the Hawaii Supreme Court applies outside of the arbitration context."). Under longstanding Hawaii law, when deciding whether to sever unlawful provisions from an otherwise lawful contract, a Hawaii court asks whether the unlawful provisions "may be excised from the [contract] without doing violence to the [contract's] essential objects." *Ai v. Frank Huff Agency*, 607 P.2d 1304, 1313 (Haw. 1980). Naturally, then, that inquiry calls for a determination of whether the contract could still be enforced in a manner consistent with its "essential object." *Id.*

Here, that inquiry should have been easy. The essential object of the arbitration agreement is to resolve covered disputes via mediation and arbitration. The three provisions held unenforceable by the Hawaii Supreme Court are merely rules to be applied once the arbitration has commenced. The agreement remains effective and enforceable even without them. As Petitioners explain, this point "is proved by petitioners' offer, on the initial remand from this Court, to proceed to arbitration without invoking those provisions of the contract that were challenged as unconscionable—an offer that the court below failed to mention in its decision." Pet. 29.

The Hawaii Supreme Court's inclusion of the entire arbitration agreement in its opinion helps illustrate that it could be enforced consistent with its essential object without the three purportedly unconscionable provisions. They comprise a few scattered sentences of an agreement that covers three-and-a-half pages. App. 6a-9a. Viewing

the agreement as a whole, it is easy to see that removing those three provisions would leave an agreement that could still function in the same basic manner. It would have fewer procedural rules. But there is no doubt that it could be sensibly interpreted and applied "without doing violence to the [agreement's] essential object[]." *Ai*, 607 P.2d at 1313. *Compare Gabriel v. Island Pac. Acad., Inc.*, 140 Haw. 325, 342 (2017) (holding arbitration agreement unenforceable where three sentences of a four-sentence arbitration agreement were unlawful and the remaining sentence did not even mention arbitration).

Instead of engaging in the normal severance analysis called for by Hawaii law, the Hawaii Supreme Court simply concluded—without explanation or citation—that unconscionability "pervades" the entire arbitration agreement. App. 29a; Pet. 31 ("[T]he court below pointed to no Hawaii decisions in support of its severance ruling."). But this is not how Hawaii treats severance clauses outside the context of arbitration. There does not appear to be "any Hawaii case other than this one in which the court invalidated an entire agreement or contract in the face of a severance clause where the remaining contractual language was easily enforced." *Id.* This "makes clear the arbitration-specific character" of the court's novel approach to severance. *Kindred Nursing Ctrs. v. Clark*, 137 S. Ct. 1421, 1428 (2017); *id.* at 1427 ("No Kentucky court, so far as we know, has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees.").

The court's refusal to enforce the severance clause is sufficient grounds for summary reversal. But the unconscionability holdings that preceded that decision violated the "equal footing" principle too. The Hawaii

Supreme Court claimed to apply generally applicable state unconscionability principles in holding that the arbitration agreement's limitations on discovery and confidentiality requirement were unenforceable. But a closer look reveals that the court impermissibly "rel[ied] on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Concepcion*, 563 U.S. at 341.

Specifically, the Hawaii Supreme Court held that these provisions were oppressive and thus substantively unconscionable because, as compared with litigants in court, Respondents would be "hindered in their ability from discovering potentially relevant information for their claims against the Defendants." App. 23a; *id.* ("This restriction runs in direct contravention to Hawaii's 'basic philosophy' that a party is entitled to all relevant, unprivileged information pertaining to the subject matter of the action."); *id.* at 25a ("[W]here an agreement contains severe limitations on discovery alongside a confidentiality provision, the plaintiff may be deprived of the ability to adequately discover material information about his or her claim."). This may be a slightly subtler means of singling out arbitration agreements in that there is no special rule targeting arbitration, but it violates the "equal footing" doctrine just the same "by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Kindred Nursing*, 137 S. Ct. at 1426. Indeed, in *Concepcion*, the Court pointed to a state law invalidating arbitration agreements that do not provide for "full discovery" as an "obvious" example of one that is barred by the FAA. 563 U.S. at 341-42.[2]

2. In declaring the agreement's discovery limitations unconscionable, the Hawaii Supreme Court added that its conclusion was supported by the Hawaii Arbitration Act,

B. The Decision Below Runs Afoul Of The Liberal Federal Policies In Favor Of Arbitration And Arbitration Agreements.

As explained above, the Hawaii Supreme Court violated the equal footing doctrine by refusing to enforce the arbitral severance clause and by concluding that certain contracted-for arbitral procedures were unconscionable. Those same rulings run afoul of the broad federal policies in favor of arbitration and arbitration agreements, *see Moses H. Cone*, 460 U.S. at 24, which apply the same in Hawaii courts as they do in any federal court.

By refusing to enforce the arbitration agreement's severance clause, the Hawaii Supreme Court ran afoul of the "liberal federal policy favoring arbitration agreements." *Id.* That policy is reflected in the "principal purpose" of the FAA—to "'ensure that private arbitration agreements are enforced according to their terms.'" *Concepcion*, 563 U.S. at 344 (citation omitted). As then-Judge Roberts explained in *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005), applying a severance clause in a contract to enforce the contract's arbitration clause honors both "the intent of the parties reflected in the [contract]" and "the federal policy which 'requires that we rigorously enforce agreements to arbitrate.'" *Id.* at 85-86 (quoting *Mitsubishi Motors Corp. v. Soler*

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which makes nonwaivable a statutory provision that authorizes arbitrators to subpoena witnesses and other evidence and order the depositions of witnesses. App. 23a-25a. But the presence of a statute setting out the same rule makes no difference. Whether accomplished by a court or a legislature, a state-law rule conflicting with the FAA "must give way." *Perry*, 482 U.S. at 491.

Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)). This is particularly so where the severance clause is part of the arbitration agreement itself, App. 9a, as the FAA requires arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences*, 489 U.S. at 479.

Similarly, the Hawaii Supreme Court ran afoul of the federal policy in favor of arbitration in holding the discovery limitations and the confidentiality requirement unconscionable. Attacking arbitration for being less formal than litigation is nonsensical given that the "prime objective" of arbitration is to "achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Mitsubishi Motors,* 473 U.S. at 633). Indeed, limited discovery and confidentiality are hallmarks of arbitration. *See, e.g.*, *McDonald v. City of West Branch, Mich.,* 466 U.S. 284, 291 (1984) ("[A]rbitral factfinding is generally not equivalent to judicial factfinding …. [T]he usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery … are often severely limited or unavailable."); *COMSAT Corp. v. National Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("A hallmark of arbitration—and a necessary precursor to its efficient operation—is a limited discovery process."); 3 Ian R. MacNeil *et al., Federal Arbitration Law* § 34.1 at 34:2 (1997) ("Limitations on discovery, particularly judicially initiated discovery, remain one of the hallmarks of American commercial arbitration, including arbitration under the FAA."); 1 Thomas H. Oehmke & Joan M. Brovins, Commercial Arbitration § 10:55 (Supp. 2015) ("One hallmark of arbitration is the confidentiality of the process and the award, unless all parties stipulate otherwise."); 4 Hon. Paul A. Crotty & Robert E.

Crotty, Business and Commercial Litigation in Federal Courts § 48:32 (3d ed. Supp. 2014) ("Arbitration is generally considered to be confidential."). An attack on the agreement's limited discovery and confidentiality provisions is thus an attack on arbitration itself. The decision below therefore contravenes the FAA and its "federal policy favoring arbitration." *Buckeye Check Cashing*, 546 U.S. at 443.

II. Because State-Court Fidelity To Federal Arbitration Law Is Of Paramount Importance, Summary Reversal Is Warranted.

When state courts fail to apply this Court's precedents, the Court has not hesitated to intervene. *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.)). Unlike other areas of federal law, the FAA is unique in its reliance on state-court enforcement. Because of the FAA's "nonjurisdictional cast," *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009), "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration," *Nitro-Lift*, 133 S. Ct. at 501. Because state supreme court decisions often represent the final say in the enforcement of arbitration agreements, this Court's superintendence of the state courts is of utmost importance in the context of this Court's FAA jurisprudence. *See id.* ("State courts rather than federal courts are most frequently called upon to apply the [FAA]. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.").

Indeed, the Court has ordered summary reversal of several recent state court decisions that failed to heed its FAA precedents. *See, e.g.*, *id.* at 501, 503 (reversing Oklahoma Supreme Court's decision that "disregard[ed] this Court's precedents on the FAA" and severability); *Marmet Health Care*, 132 S. Ct. at 1202 (reversing a decision of the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG*, 132 S. Ct. at 26 (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds*); *Citizens Bank*, 539 U.S. at 56-58 (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*); *see also DirecTV, Inc. v. Imburgia*, No. 14-462, Tr. of Oral Arg. at 50:8-17 (Oct. 6, 2015) (Breyer, J.) (discussing risk of state court noncompliance with this Court's decisions).

This is one of those cases in which the Court's intervention is needed. The relevant law "is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 352 ("[T]he Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous.").

Moreover, summary reversal is especially warranted given the judicial hostility to arbitration exhibited by the court below. As explained above, the Hawaii Supreme Court singled out arbitration agreements for disfavored

treatment, thus contravening the FAA's "principle of rigorous equality," *Secs. Indus. Ass'n,* 883 F.2d at 1119-20, and ran afoul of the national policy in favor of arbitration agreements. On top of that, the lower court did this after the Court afforded it the opportunity to correct its original errors on remand. The lower court's hostility to arbitration thus is not an isolated incident.

This judicial hostility to arbitration directly undermines the goals of the FAA. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results,'" *Preston* v. *Ferrer*, 552 U.S. 346, 357 (2008), Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Yet despite a binding arbitration agreement in this case, the parties' dispute has stalled in the courts for more than five years, with no end in sight.

Moreover, if left uncorrected, the decision below would threaten to undermine the enforcement of arbitration agreements throughout the State of Hawaii. Indeed, the Hawaii Supreme Court's recalcitrance may send a message to the lower courts in the State that the State's highest court is unlikely to enforce arbitration agreements; this would put every arbitration agreement in a Hawaii contract at risk of nonenforcement.

Worse still, decisions like the one below, if left unchecked, allow judicial hostility to arbitration to persist elsewhere and may green-light other state courts to engage in similar hostility against the FAA. This would upset the uniform, faithful application of the FAA that is critical to *amici* and their members.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for certiorari and summarily reverse the judgment of the Supreme Court of Hawaii.

Respectfully submitted,

Steven P. Lehotsky
Warren Postman
U.S. Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

James G. Rizzo
David S. Jaffe
National Association of Home Builders
1201 15th Street, NW
Washington, DC 20005
(202) 266-8200

Thomas R. McCarthy
Counsel of Record
J. Michael Connolly
Consovoy McCarthy Park PLLC
3033 Wilson Boulevard, Suite 700
Arlington, VA 22201
(703) 243-9423
tom@consovoymccarthy.com

Robert G. Clements
Justin J. Vermuth
American Resort Development Association
1201 15th Street, NW
Washington, DC 20005
(202) 371-6700

Counsel for Amici Curiae

December 11, 2017