No. 17-694

In the Supreme Court of the United States

THE RITZ-CARLTON DEVELOPMENT CO., INC., *ET AL.*,
Petitioners,

v.

KRISHNA NARAYAN, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1]

Although respondents' opposition brief says many distracting things, it fails to engage the central points of the petition. Respondents evidently recognize that the decision below invalidating the arbitration agreement's limits on discovery invoked a state statute that *expressly* singles out arbitration contracts for unfavorable treatment. Respondents have not identified any Hawaii decision—or element of Hawaii law—that justifies disregarding a contract's severance clause in circumstances like those here. And respondents have no persuasive response to the petition's showing—underscored by the brief in support by three *amici*—that state-law rules dictating the terms of arbitration agreements and invalidating such agreements based on biased severance standards pose a significant threat to the congressional policy embodied in the FAA, requiring this Court's intervention.

The reality is that the Hawaii Supreme Court's decision on remand from this Court singles out arbitration agreements for disfavored treatment, disregards the federal policy favoring arbitration, and refuses to enforce an arbitration agreement according to its terms. This Court should not countenance such state-court hostility to the federal principles codified in the FAA.

[1] The Rule 29.6 Statement in the petition remains accurate.

A. This Case Involves No Threshold Considerations That Make It Unsuitable For Review.

Initially, respondents assert that "several aspects of this particular case make it unworthy of review." Opp. 10. These contentions, transparently designed to obscure the central issues in the case, are unconvincing.

First, respondents maintain that "[p]etitioners' failure to challenge the Hawaii Supreme Court's procedural-unconscionability ruling makes this case unsuitable for review" because that ruling "was central to [the Hawaii court's] conclusion that the [arbitration] clause is so one-sided as to be unenforceable." Opp. 12. But that contention is nonsensical. All agree that findings of *both* procedural *and* substantive unconscionability are necessary before a contract (or contract provision) may be invalidated as unconscionable. Accordingly, notwithstanding the Hawaii court's finding of procedural unconscionability, if this Court holds *either* that the finding below of substantive unconscionability runs afoul of the FAA *or* that the FAA mandates enforcement of the arbitration agreement's severance clause, the decision below will be set aside. Petitioners had no obligation also to challenge the Hawaii court's ruling regarding procedural unconscionability, which was necessary *but not sufficient* to require invalidation of particular contract provisions.

Second, it is equally beside the point that "it remains unresolved whether the parties entered into any arbitration agreement." Opp. 13. After this Court vacated the Hawaii Supreme Court's initial decision that the parties never entered into an enforceable agreement to arbitrate, the Hawaii court

assumed the existence of such an agreement and proceeded to decide whether that agreement is unconscionable. See Pet. App. 27a n.9. Respondents cannot now preclude review of this latest holding by contending, in whack-a-mole fashion, that their prior argument regarding the existence of an arbitration agreement might later resurface. If an argument that no enforceable arbitration agreements exists as a matter of generally applicable Hawaii law plausibly can be made, respondents will be free to make it on remand from this Court. See, *e.g.*, *Fitzgerald* v. *Barnstable School Committee*, 555 U.S. 246, 259-60 (2009) (resolving question presented and remanding for resolution of open threshold issues).[2]

B. Hawaii's Invalidation Of The Arbitration Agreement's Limits On Discovery And Confidentiality Requirement Is Inconsistent With The FAA.

When it comes to defending the actual holding below, respondents cannot reconcile the Hawaii Supreme Court's decision with the FAA and this Court's decisions interpreting it.

1. We showed in the petition (at 16-18) that, in holding the arbitration contract's limits on discovery to be unenforceable, the court below relied on a Ha-

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[2] Respondents get no further in their misleading assertion "that *no* petitioner signed *any* contract with respondents." Opp. 13. As we showed in the reply brief supporting the initial petition for certiorari in this case, respondents did not raise this argument below and, in any event, in the circumstances of this case Hawaii law permits a nonsignatory to an arbitration agreement to compel arbitration with a signatory. No. 15-378, *The Ritz-Carlton Development Co., Inc.* v. *Narayan*, Cert. Reply Br. 2-3. Respondents' observation therefore is wholly irrelevant.

waii statute that uniquely disfavors arbitration by making it impermissible for arbitration contracts—but not any other type of contract—to impose specified limits on discovery.

Respondents appear to recognize that this statute *does* discriminate against arbitration, acknowledging that "the Hawaii Rules of Civil Procedure do not have a provision analogous to the Hawaii Arbitration Act precluding the parties from waiving the factfinder's discretion to order depositions and written discovery." Opp. 19. That makes this statute, and the decision below applying it, the very model of a state law that impermissibly is "applicable *only* to arbitration provisions." *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996).

In opposing review, respondents nevertheless maintain that the court below did not actually rely on Hawaii's arbitration statute. Opp. 18. But that is not so. Although the Hawaii Supreme Court also identified an additional basis for finding the discovery provision as unenforceable (see Pet. App. 23a), the court quoted the Hawaii arbitration statute at length while holding unequivocally that the arbitration contract's "discovery provision violates parts of Hawai'i Revised Statutes (HRS) § 658A." Pet. App. 23a. See *id.* at 24a ("the discovery provision * * * violates HRS § 658A-4(b)(1)"). This qualifies as an express holding and an authoritative interpretation of state law. Moreover, as we showed in the petition and further explain below, the Hawaii court's other rationale for invalidating the contract's discovery limitation *also* is inconsistent with the FAA—and respondents cannot avoid review of two invalid holdings by contending that either one would have been sufficient to support the decision.

Respondents also assert that the discriminatory features of Hawaii's arbitration statute should be disregarded because Hawaii courts might refuse to "uphold a contractual provision on discovery as severe as this one in a case pending before the Hawaii courts rather than an arbitrator." Opp. 19. That proposition may or may not be true—respondents offer no Hawaii authority to support it—but it is, in any event, beside the point. Any limited opportunities that state-law doctrines might offer to challenge non-arbitral restrictions on discovery cannot, under the FAA, validate a *blanket* statutory ban on specified discovery limits that applies *only* to arbitration contracts.

2. The Hawaii court's other basis for invalidating the arbitration agreement's discovery limit was the court's view that "[i]n Hawai'i, discovery rules 'reflect a basic philosophy that a party to a civil action should be entitled to the disclosure of all relevant information in the possession of another person prior to trial, unless the information is privileged.'" Pet. App. 22a (citation omitted). But that "philosophy" of discovery offers no support for the holding below, which allowed the State to effectuate its policy by imposing a statutory restriction on discovery limits in arbitration that, respondents acknowledge, has no parallel in litigation. This approach improperly "singl[es] out" arbitration contracts "for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'Ship* v. *Clark*, 137 S. Ct. 1421, 1427 (2017).

In addition, as we showed in the petition (at 18-20), respondents cannot prevail by contending that Hawaii's "basic philosophy" favors broad discovery *in litigation*. It is a central goal of the FAA to allow the parties, by agreement, to substitute less burdensome

arbitral procedures for the unfettered discovery ordinarily available in a judicial action. The Hawaii court's analysis takes no account of this FAA principle, stating a rule that "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 344 (2011). Indeed, as this Court pointed out in *Concepcion*, requiring "a discovery process rivaling that in litigation" is incompatible with "arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Id.* at 351.

Rather than address the Hawaii court's criticism of the arbitration contract for its failure to satisfy litigation discovery standards, respondents insist that the Hawaii court premised its holding on a finding that the contract's discovery limitation "would preclude respondents from making their case." Opp. 17. But that assertion misreads the decision. Although the court observed in passing that the discovery limit "hinders the [respondents'] ability to prove their claims" (Pet. App. 23a), it *premised* its holding on the belief that the discovery "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." *Ibid.* And it is fundamental that such a state-law policy, which purports to apply a "legal rule hinging on the primary characteristic of an arbitration agreement" (*Kindred Nursing*, 137 S. Ct. at 1427), may not supersede FAA principles.

3. As we explained in the petition (at 20-22), the Hawaii Supreme Court's invalidation of the arbitration contract's confidentiality provision made similar errors.

Respondents attempt to defend that holding on the theory that the confidentiality provision would prevent them from preparing their case. Opp. 20. But here, too, the court below disfavored arbitration while condemning one of its characteristic features. Thus, the court relied for its holding on decisions that presumptively disapprove of confidentiality provisions in arbitration on the theory that such provisions "usually favor companies over individuals." *Ting* v. *AT&T*, 319 F.3d 1126, 1151 (9th Cir. 2003); *Zuver* v. *Airtouch Commcn's, Inc.*, 103 P.3d 753, 765 (Wash. 2004); see Pet. App. 25a-26a (citing those decisions). Such a rule, however, is inconsistent with both the general FAA requirement "'that private arbitration agreements [be] enforced according to their terms'" (*Concepcion*, 563 U.S. at 344 (alterations and citation omitted)) and the Court's implicit recognition that confidentiality is one of the defining features of arbitration. *Id.* at 348 (noting among the reasons why classwide arbitration is fundamentally different from bilateral arbitration that "[c]onfidentiality becomes more difficult."); *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010) (identifying as a "fundamental change[]" that under class-arbitration rules, "'the presumption of privacy and confidentiality' that applies in many bilateral arbitrations '[does] not apply in class arbitrations'").

C. The Court Below Departed From The FAA When It Disregarded The Arbitration Agreement's Severance Provision.

We also showed in the petition that the Hawaii Supreme Court's refusal to sever the portions of the arbitration agreement that it found to be unconscionable cannot be reconciled with FAA principles, which favor arbitration and mandate that arbitration

agreements be enforced as written. Pet. 23-32. Respondents' contrary argument insists that the holding below—which ruled that unconscionability "pervades" the arbitration agreement (Pet. App. 29)—is simply a fact-bound application of unexceptional state-law severance rules that have no importance beyond this case. Opp. 22-23. For several reasons, this contention is wrong.

First, respondents maintain that the arbitration agreement is "'infected by illegality' because it was inserted into the parties' contract through unfair surprise" (Opp. 24) and therefore is procedurally unconscionable. Although petitioners strongly disagree with this characterization, the assertion nonetheless proves *our* point. As we have noted, under the law of Hawaii (as in most States), a contract provision will not be invalidated as unconscionable absent a finding of procedural unconscionability that rests on flaws in "the 'process by which the allegedly offensive terms found their way into the agreement.'" Pet. App. 16a (citation omitted). As a consequence, literally *every* arbitration agreement that is held to contain an unconscionable feature will have been found to be affected by "overreaching" in the manner by which "the arbitration clause [was inserted] into the contract." Opp. 25. If this is what makes unconscionability pervasive and severance inappropriate, the holding below makes *all* severance clauses in arbitration contracts unenforceable. Needless to say, there is no generally applicable rule of Hawaii law (or the law of any other State) that declares severance clauses categorically unenforceable when the provision to be severed is deemed unconscionable.

Second, we do not suggest, as respondents would have it, that arbitral severance clauses must be en-

forced in all circumstances. Opp. 22. But we do maintain that, under the FAA, there is "a presumption in favor of severance when an arbitration agreement contains a relatively small number of unconscionable provisions that can be meaningfully severed and after severing the unconscionable provisions, the arbitration agreement can still be enforced." *Zaborowski* v. *MHN Gov't Servs., Inc.*, 601 F. App'x 461, 464-65 (9th Cir. 2014) (Gould, J., concurring in part and dissenting in part). Under this principle, it generally is appropriate to disregard an arbitration agreement's severance clause only in those circumstances where "a disintegrated fragment [of the arbitration agreement is all that] would remain after hacking away the unenforceable parts." *Booker* v. *Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005).[3]

And as we showed in the petition (at 25-26), that manifestly is not the case here. Once the ancillary provisions held to be unconscionable are removed

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[3] Respondents are incorrect in asserting that this principle of *Booker* applies only when the challenged arbitration clause "involve[s] 'only one discrete illegal provision.'" Opp. 24 (quoting *Booker*, 413 F.3d at 85). Although that was the factual situation in *Booker* itself, *Booker*'s holding hinges severance not on the number of illegal provisions, but on the ease with which those provisions could be deleted from the contract: "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, * * * the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 413 F.3d at 84-85. *Booker* also emphasized that "the 'preeminent concern of Congress in passing the [FAA] was 'to enforce private agreements into which parties had entered'" and that it is important to be "faithful to the federal policy which 'requires that we rigorously enforce agreements to arbitrate.'" *Id.* at 85-86 (citations omitted).

from the arbitration contract, the substantial bulk of the agreement to arbitrate remains intact, coherent, and easily enforceable according to its terms. Respondents do not deny that is so—or, indeed, make any real response at all to this dispositive point.[4]

Third, we also showed in the petition that the court below applied an unusually strict severance standard that is unique to the arbitration context. Pet. 29-31. Here, too, respondents offer no real response. Notably, they make no defense of the Hawaii

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[4] Respondents likewise are wrong when they contend that severing the portions of the arbitration agreement held to be unconscionable would "require the court to rewrite the Purchase Agreement and the Public Report to eliminate the parties' agreement that disputes be resolved in court." Opp. 25. Arbitration will be required only if it is determined that the parties' arbitration contract—which constitutes those two documents *and* the Condominium Declaration—is enforceable, which necessarily will be premised on a determination that these documents do not allow for litigation in court. No rewriting will be required.

Although it is not material for present purposes, respondents get no further in their repeated suggestion that the Condominium Declaration, which contains the arbitration provision, is an "ancillary" or "obscure" document that should not be taken seriously. Opp. 9, 24. It is undisputed that the Condominium Declaration, required by Hawaii law, is the document that creates the ownership structure agreed to by respondents; that the Declaration therefore is an essential part of the contract between the parties; and accordingly is binding on respondents. See Pet. App. 77a. And as we showed in the initial petition in this case (at 12-14), arbitration provisions like the one in the Condominium Declaration *are* consistent with venue selection and related clauses such as those contained in the Purchase Agreement and Public Report. Indeed, Hawaii's Intermediate Appellate Court held in this case that the three documents, read together, *do* constitute an agreement to arbitrate. Pet. App. 77a-80a.

Supreme Court's severance holding under Hawaii law and do not identify any decision involving a non-arbitration contract where a Hawaii court refused to sever unconscionable contract provisions in circumstances even remotely like those here; the only Hawaii severance decisions respondents cite are ones where the court *did* sever the challenged provision. Opp. 23 n.9. Accordingly, the Hawaii Supreme Court in this case gave arbitration special, and impermissibly unfavorable, treatment.

D. The Decision Below Is Inconsistent With This Court's Holdings.

Finally, respondents are wrong in insisting that the holding below is consistent with *Imburgia* and *Kindred Nursing*. Opp. 26-33. Of course, the factual circumstances in those cases were not identical to those in this one. But those decisions forcefully reaffirmed the understanding that state law may not "singl[e] out" arbitration contracts "for disfavored treatment" (*Kindred Nursing*, 137 S. Ct. at 1427) and must "give 'due regard … to the federal policy favoring arbitration.'" *DIRECTV, Inc.* v. *Imburgia*, 136 S. Ct. 463, 471 (2015) (citations omitted; ellipses added by the Court). The Hawaii Supreme Court's decision cannot be squared with those principles.[5] That decision—the latest in a long line of state-court rulings

[5] Respondents' assertion that "the Hawaii court explained * * * [that] this case does not involve any rule fashioned specifically for arbitration cases" (Opp. 27) is wrong on its face; the Hawaii Arbitration Act, invoked by the court below, applies *only* to arbitration cases.

that misapply this Court's FAA precedents and disregard FAA principles—should not stand.[6]

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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[6] Respondents note that the Court denied certiorari in No. 17-365, *Kindred Hospitals East* v. *Klemish*. As we noted in the petition (at 5, 34), the state law at issue in that case also improperly singled out arbitration. But the procedural posture of *Klemish* differed materially from that of this case. In *Klemish*, the state supreme court denied review without opinion; in this case, the Hawaii Supreme Court wrote a lengthy opinion that misapplied the FAA in significant ways—and did so even after its prior decision in the case, which also singled out arbitration agreements for unfavorable treatment, had been vacated by this Court.