No. _____

In The
Supreme Court of the United States

NORTHERN KENTUCKY
AREA DEVELOPMENT DISTRICT,

Petitioner,

v.

DANIELLE SNYDER,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

> Whether the Federal Arbitration Act (FAA) preempts Ky. Rev. Stat. § 336.700(2), which invalidates arbitration agreements between an employer and an employee, or whether the statute instead presents a "generally applicable contract defense" that can withstand preemption under the FAA. Ky. Rev. Stat. § 336.700(2) provides: "[N]o employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law." The Supreme Court of Kentucky refused to enforce the parties' arbitration agreement because it held that the statute – when applied to an arbitration agreement between an employer and its employee – provided a generally applicable contract defense.

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). It establishes a rule of equal-treatment: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud

QUESTION PRESENTED – Continued

or unconscionability, but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). Only two years ago, the *Kindred Nursing* Court unanimously reversed a decision of the Kentucky Supreme Court holding that the FAA did not preempt a state rule that singled out arbitration agreements for less favorable treatment than other types of contracts. The Kentucky Supreme Court has again misapprehended this Court's clear interpretation of the FAA, and again applied a state rule that disfavors arbitration agreements. Its decision is an untenable interpretation of the FAA, as a matter of law and logic.

PARTIES

Petitioner, Northern Kentucky Area Development District (NKADD), was the defendant-appellant below. Respondent, Danielle Snyder, was the plaintiff-appellee below.

STATEMENT OF RELATED CASES

The following cases are directly related to the Petition before the Court:

Snyder v. Northern Kentucky Area Development District, Kentucky Supreme Court, Case No. 2017-SC-000277-DG, Judgment entered on September 27, 2018, and Petition for Rehearing denied on April 18, 2019.

Snyder v. Northern Kentucky Area Development District, Kentucky Court of Appeals, Case No. 2015-CA-001167-MR, Judgment entered on May 12, 2017.

Snyder v. Northern Kentucky Area Development District, Boone Circuit Court, Case No. 14-CI-01622, Order denying NKADD's Motion to Stay the Proceedings and Compel Arbitration entered on March 23, 2015, and Order denying NKADD's Renewed Motion to Compel Arbitration entered on July 17, 2015.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Northern Kentucky Area Development District (NKADD) respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court.

OPINIONS BELOW

The opinion of the Kentucky Supreme Court (Pet. App. 1 – 15) is reported at 507 S.W.3d 531 (2018).

The following decisions are all unreported: (a) the May 12, 2017 opinion of the Kentucky Court of Appeals, affirming the denial of NKADD's motion, and its renewed motion, to compel arbitration (Pet. App. 16 – 29); (b) the July 17, 2015 Order of the Boone Circuit Court denying NKADD's renewed motion to compel arbitration (Pet. App. 30 – 44); and (c) the March 23, 2015, Order of the Boone County Circuit Court denying NKADD's motion to stay the proceedings and compel arbitration (Pet. App. 45 – 50).

JURISDICTION

The Kentucky Supreme Court entered its opinion on September 27, 2018. (Pet. App. 1 – 15) On October 17, 2018, NKADD filed a Petition for Rehearing which was denied on April 18, 2019. (Pet. App. 51) Pursuant to Supreme Court Rules 13.1 and 13.3, this Petition has been filed within ninety days of the date on which

the Kentucky Supreme Court denied NKADD's Petition for Rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Ky. Rev. Stat. § 336.700 provides:

> (1) As used in this section, "employer" means any person, either individual, corporation,

> partnership, agency, or firm, that employs an employee and includes any person, either individual, corporation, partnership, agency, or firm, acting directly or indirectly in the interest of an employer in relation to an employee; and "employee" means any person employed by or suffered or permitted to work for an employer.
>
> (2) Notwithstanding any provision of the Kentucky Revised Statutes to the contrary, no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law.

STATEMENT

Just two terms ago, this Court reversed the Kentucky Supreme Court for "flout[ing] the FAA's command to place [arbitration agreements] on an equal footing with all other contracts." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429 (2017). In that case, the issue was whether a judicially-created state rule – the "clear statement" rule, which precluded a power of attorney from entering into an arbitration agreement unless the document creating his agency contained a clear statement that he was empowered to enter into an arbitration agreement – was preempted

by the FAA. After the Kentucky Supreme Court ruled it was not, this Court reversed that ruling. This Court emphatically held that the clear statement rule was preempted because it "did exactly what *Concepcion* barred: adopt a legal rule hinging upon the primary characteristic of an arbitration agreement – namely, a waiver of the right to go to court and receive a jury trial." *Id.* at 1427. This Court sharply criticized the Kentucky Supreme Court for trying to "cast the rule in broader terms" by "suggest[ing that it] could also apply when an agent endeavored to waive other 'fundamental constitutional rights' held by a principal." *Id.* And, the Court said: "We do not suggest that a state court is precluded from announcing a new, generally applicable rule of law in an arbitration case. We simply reiterate here what we have said many times before – that the rule must in fact apply generally, rather than single out arbitration." *Id.* at FN 2.

Despite these admonitions, the Kentucky Supreme Court has again disregarded the FAA's "equal footing" rule. It has applied a state statute – Ky. Rev. Stat. § 336.700(2) – that is *not* a generally applicable defense to a contract to invalidate an arbitration agreement. Ky. Rev. Stat. § 336.700(2) invalidates contracts between employers and employees in the Commonwealth of Kentucky under which an employee agrees, as a condition of employment, to "waive, arbitrate, or otherwise diminish" her claims against her employer.

The decision below defies *Kindred*. The Kentucky Supreme Court has either misunderstood or refused to follow this Court's repeated instruction that the FAA

"preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). See also *DirectTV, Inc. v. Imburgia*, 577 U.S. ___, 136 S. Ct. 463, 468-469 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). That approach cannot be squared with this Court's precedents, which hold that Section 2 of the FAA preempts state-law rules that are "restricted to [the] field" of arbitration and do not "place[ ] arbitration contracts on equal footing with all other contracts." *Imburigia*, 136 S. Ct. at 468-469 (quotation marks omitted).

Since Ky. Rev. Stat. § 336.700(2) applies to all employer-employee relationships, the Kentucky Supreme Court's decision invalidates all arbitration agreements between an employer and an employee that arise out of the employment relationship. This Court's review is therefore essential. Given the repeated failure of Kentucky courts to heed this Court's admonitions that the FAA requires arbitration agreements to be placed on equal footing with other contracts, the Court should either grant certiorari, summarily reverse, or vacate the decision below for reconsideration in light of *DirectTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).

A. STATEMENT OF THE CASE

The NKADD, a state agency that provides a variety of specialized services for local governments and for citizens in a nine-county region of Northern

Kentucky, employed Snyder as its Administrative Purchasing Agent. (Pet. App. 2 – 3, 5 – 6)

In conjunction with her employment at NKADD, Snyder entered into an agreement with NKADD on October 18, 2011 to arbitrate any disputes that might arise out of her employment. The Arbitration Agreement provides:

> This Agreement applies to legal claims or disputes which have not been or were not resolved by you and the District informally in the normal course of business. Accordingly, you and the District are required to use this Agreement to resolve employment related legal disputes. **By accepting employment with the District, you will have accepted this Agreement under the Federal Arbitration Act, and it will be binding on claims relating to your employment.** The "Claims Subject to Arbitration" list below identifies employment-related legal disputes covered by this Agreement and lists those which are excluded.

(Pet. App. 18)

The Arbitration Agreement further identifies the following as "Claims Subject to Arbitration":

> Any and all employment-related claims under . . . the Kentucky Wages and Hours Act, KRS 337.010 *et seq*.; . . . any statutory claims relating to public employment, and any claims of employment discrimination, retaliation, . . . wrongful termination . . . claims or demands

> arising under . . . public policy, the common law, or any federal, state or local statute, ordinance, regulation [sic] or constitutional provision . . . or other . . . controversies of every kind and description. . . .

(Pet. App. 18 – 19)

On August 11, 2014, after Snyder refused to report to a mandatory meeting intended to discuss performance-related issues, NKADD terminated Snyder's employment. (Pet. App. 19)

Ignoring the Arbitration Agreement she had previously signed, Snyder filed suit against NKADD in Boone Circuit Court ("the trial court"), asserting claims that NKADD violated the Kentucky Whistleblower Act and the Kentucky Wages and Hours Act. (Pet. App. 19)

B. PROCEEDINGS BELOW

After being served with the Complaint, NKADD filed a Motion to Stay Proceedings and Compel Arbitration, arguing that the Arbitration Agreement and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA) required arbitration of Snyder's claims, and that the FAA preempted any contrary state law. (Pet. App. 19, 45) The determinative issue with respect to preemption was whether or not the employment contract involved interstate commerce.

On March 23, 2015, the trial court issued an Order denying NKADD's motion, concluding that the FAA

did not preempt state law because the contract did not involve interstate commerce. (Pet. App. 45 – 50) On July 17, 2015, the trial court cited the same conclusion, as well as Tenth Amendment concerns, in denying NKADD's renewed motion to compel arbitration. (Pet. App. 30 – 44)

NKADD appealed these decisions. (Pet. App. 16)

On May 12, 2017, the Kentucky Court of Appeals affirmed the trial court's rulings but reached that conclusion using different reasoning. (Pet. App. 16 – 29) Instead of focusing on whether Snyder's employment with NKADD involved interstate commerce, the Court of Appeals considered whether the Arbitration Agreement had been validly formed. It concluded that "the threshold question of whether a valid arbitration agreement exists is *not* governed by the FAA." (Pet. App. 24) (emphasis added)

Working from the premise that the central question was whether the Arbitration Agreement was validly formed, the Court of Appeals referenced Ky. Rev. Stat. § 336.700(2), a state statute that forbids employers from conditioning an applicant's employment on her agreement to arbitrate employment disputes. The Court of Appeals held that the FAA preempted Ky. Rev. Stat. § 336.700(2) where the employer is a *private* entity. (Pet. App. 28)

However, the Court ruled that the FAA does *not* preempt Ky. Rev. Stat. § 336.700(2) when the employer is a public entity, reasoning that the Commonwealth has the authority to deny its political subdivisions the

power to enter into arbitration agreements with their employees. Convinced that NKADD lacked the authority to enter into an arbitration agreement with its employees, the Court of Appeals ruled that Snyder's Arbitration Agreement with NKADD was not valid. On that basis, the Court of Appeals affirmed the trial court's refusal to compel the arbitration of Snyder's employment claims. (Pet. App. 16 – 29)

NKADD moved the Kentucky Supreme Court to accept discretionary review, noting that the United States Supreme Court had decided *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421 (2017), a case arising out of Kentucky, just three days after the Kentucky Court of Appeals issued its decision. In *Kindred Nursing*, this Court reversed a Kentucky Supreme Court decision that depended on the assumption that state rules governing the formation of arbitration agreements are not preempted by the FAA. *Id.* In its Opinion, this Court clarified that such an assumption was erroneous, and specifically held that rules about the formation of arbitration agreements – including rules governing whether or not a party has the authority to enter into such an agreement – are subject to the FAA. *Id.* at 1428 ("By its terms, then, the FAA cares not only about the 'enforcement' of arbitration agreements, but also about their initial validity – that is, about what it takes to enter into them."). Moreover, this Court specified that such rules are preempted by the FAA if they fail to treat arbitration agreements the same as other kinds of contracts, a reference to the FAA's "equal footing" rule. *Id.* at 1424,

1428 ("A rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [FAA] than a rule selectively refusing to enforce those agreements once properly made.").

In its Motion for Discretionary Review, NKADD posited that the FAA and *Kindred Nursing* compelled reversal of the lower courts' decisions and required that the Arbitration Agreement between NKADD and Snyder be enforced. That position was based on the fact that Ky. Rev. Stat. § 336.700(2) establishes a rule that impinges a public entity's authority to enter into arbitration agreements without also impinging a public entity's authority to enter into other kinds of contracts, which violates the FAA's "equal footing" rule.

After accepting discretionary review, the Kentucky Supreme Court likewise ruled that the FAA does not preempt Ky. Rev. Stat. § 336.700(2). But, in reaching that conclusion, the Kentucky Supreme Court reasoned differently than the Court of Appeals. In an effort to make Ky. Rev. Stat. § 336.700(2) fit the description of a "generally applicable contract defense" referenced in *Kindred Nursing*, *supra* at 1426, the Kentucky Supreme Court called that statute a "law of general applicability" and erroneously concluded that it treats arbitration agreements between employers and employees no differently than it treats other contracts between employers and employees. Hence, the Kentucky Supreme Court concluded that the FAA did not preempt the state statute. (Pet. App. 1 – 15)

NKADD submitted a Petition for Rehearing, but the Kentucky Supreme Court denied it.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE KENTUCKY SUPREME COURT HAS AGAIN DECIDED AN IMPORTANT FAA ISSUE IN A MANNER THAT CONFLICTS WITH THIS COURT'S PRECEDENT

The FAA provides: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

That statutory provision establishes an "equal footing" rule or equal-treatment principle: A court may invalidate an arbitration agreement based on "generally applicable contract defenses" like fraud or unconscionability, but not based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). The FAA, therefore, preempts any state rule discriminating on its face against arbitration – for example, a "law prohibiting outright the arbitration of a particular

type of claim." *Id.* Moreover, the FAA also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that have the defining features of arbitration agreements, such as a state law declaring unenforceable any contract that disallowed an ultimate disposition of a dispute by a jury. *Id.*

These cases clearly and repeatedly hold that the FAA preempts state-law rules that discriminate against arbitration agreements, and the Kentucky Supreme Court's decision defies those holdings. The Kentucky Supreme Court ruled as follows: "We conclude that Kentucky state-created entities do not have the power to compel, as a condition of employment, any employee [to] agree to arbitrate any claim, right or benefit he or she may have against NKADD. Although NKADD appears to have broad power to enter into agreements and define the terms of those agreements, Ky. Rev. Stat. § 336.700(2) expressly prohibits [*sic*] NKADD from conditioning employment on an agreement to arbitrate." (Pet. App. 8) In other words, a public employer in Kentucky can enter into contracts, including contracts with its employees, so long as the contract is not an arbitration agreement with an employee. In so ruling, the Kentucky Supreme Court violated the FAA's mandate that courts must "place arbitration agreements on equal footing with all other contracts." *Imburgia*, 136 S. Ct. at 468; see also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Perry v. Thomas*, 482 U.S. 483 (1987).

The Kentucky Supreme Court defended its interpretation of Ky. Rev. Stat. § 336.700(2) as stating a rule

of general applicability, reasoning that "this not only means that an employer cannot force the employee to agree to arbitration on penalty of termination but also means that an employer cannot force an employee to, for example, waive all rights to file K[entucky] W[histleblower] A[ct] claims against the employer." (Pet. App. 11) Despite the Kentucky Supreme Court's effort to couch it as such, the prohibition on entering into a contract with an employee in which the employee agrees to "waive, arbitrate, or otherwise diminish" his claims against his employer is *not* a generally applicable contract defense. The prohibition is nothing more than an end-run around the "equal footing" rule.

The plain (but misbegotten) intent of Ky. Rev. Stat. § 336.700(2) is to protect an employee's right to a jury trial. The statute prohibits an employer from contractually requiring an employee to "waive, arbitrate or diminish" any claims the employee may wish to assert against the employer. The only point of foreclosing the waiver of claims, the arbitration of claims, and the diminution of claims is to ensure that an aggrieved employee has the right to a file a claim in court so that a jury may decide it. Ergo, Ky. Rev. Stat. § 336.700(2) forbids contracts in which employees waive their right to a jury trial. In so doing, the statute does exactly what *Kindred Nursing* – and *Concepcion* before that – prohibited in no uncertain terms: It "adopt[s] a legal rule hinging on the primary characteristic of an arbitration agreement – namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing*, 137 S. Ct. at 1427-1428 (citing *Concepcion*, 563 U.S. at 339).

Because Ky. Rev. Stat. § 336.700(2) is a legal rule that hinges on the primary characteristic of an arbitration agreement, it is not a "generally applicable contract defense." Instead, it specifically targets arbitration agreements.

Moreover, the prohibition on entering into a contract with an employee in which the employee agrees to "waive, arbitrate, or otherwise diminish" his claims against his employer is *not* a "generally applicable contract defense" like fraud, unconscionability, duress, or illegality. Fraud, unconscionability, duress, and illegality are generally applicable because they could apply to literally any type of contract made by parties of any relationship in any factual context. Ky. Rev. Stat. § 336.700(2) is not nearly so broad. It only applies to two types of contracts – arbitration agreements and agreements to waive or diminish a claim – made by parties bearing one specific relation to each other (employer-employee) and relating to a single factual context – when an employer wishes to condition or precondition employment on such an agreement. Like the "clear statement" rule in *Kindred Nursing*, Ky. Rev. Stat. § 336.700(2) is not a "generally applicable contract defense" because only "a slim set of . . . contracts . . . would be subject to" it. *Kindred Nursing*, 137 S. Ct. at 1427-1428. As this Court concluded in *Kindred Nursing*, placing arbitration agreements within such a narrow class of contracts reveals the kind of "hostility to arbitration" that led Congress to enact the FAA in the first place. *Id.* (citing *Concepcion*, 563 U.S. at 339).

II. *SNYDER* DEPARTS FROM THE LAW APPLIED IN KENTUCKY FEDERAL COURTS, THEREBY CREATING A SPLIT OF AUTHORITY ON A QUESTION OF FEDERAL LAW THAT GIVES RISE TO FORUM SHOPPING AND OUTCOME-DETERMINATIVE DECISIONS BASED ONLY ON JURISDICTION

The Kentucky Supreme Court's decision in *Snyder* creates a split between the federal and state courts in Kentucky on an issue of federal law – whether the FAA preempts Ky. Rev. Stat. § 336.700. That split will give rise to forum shopping and outcome-determinative decisions based only on jurisdiction.

A federal district court sitting in Kentucky ruled that the FAA preempted Ky. Rev. Stat. § 336.700(2) in *Johnson v. Career Sys. Devs./DJI J.V.*, 2010 U.S. Dist. LEXIS 4052 (W.D.Ky.). There, an employer required its existing employees, under threat of termination, to sign arbitration agreements. A long-time employee signed such an agreement. After her employer terminated her, she sued her employer for race and age discrimination. The employer moved the federal district court to compel arbitration, and the employee opposed that motion on the grounds that Ky. Rev. Stat. § 336.700(2) prohibited the employer from conditioning her continued employment on her willingness to enter into the arbitration agreement. The federal district court rejected that argument, explaining: "To be sure, the FAA explicitly permits a party 'to assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement.' . . . However, the

ground asserted by the party must 'exist at law or in equity for the revocation of *any* contract. . . . Here, the plaintiff's contention that [Ky. Rev. Stat. § 336.700(2) and Ky. Rev. Stat. § 417.050] are rules applicable to contracts generally simply defies the plain language of the provisions. Ky. Rev. Stat. § 417.050 recognizes the validity of arbitration agreements except *arbitration* agreements between employees and their employers. Ky. Rev. Stat. § 336.700(2) makes it improper for employers to require employees to *arbitrate* existing or future claims." *Id.* at *8-*9 (emphasis in original).

In rendering that explanation, the *Johnson* Court relied on this Court's decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a case that involved a challenge to a state rule similar to Ky. Rev. Stat. § 336.700(2). At issue in *Southland Corp.* was a California law regulating franchise agreements which provided that "any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." *Id.* at 10 (quoting Cal. Corp. Code § 31512). The California Supreme Court had interpreted this provision as invalidating any contract that purported to deny a party her right to judicial consideration of claims brought under the statute, which essentially rendered all arbitration provisions in franchise agreements invalid. Based upon this interpretation, this Court held that the statute directly conflicted with the FAA's equal footing doctrine. The Court found that the statute was a "legislative attempt to under-cut the enforceability of arbitration

agreements." The Court concluded that the FAA prohibited states from enacting such a law that provided franchisees with "special protection" from arbitration agreements. *Id.* at FN 11.

Relying on *Southland Corp.*, the *Johnson* Court noted that Ky. Rev. Stat. § 336.700(2) evinced a policy on Kentucky's part to provide "special protection" to employees against the enforcement of arbitration agreements by their employers. The Court concluded: "The provisions of [Ky. Rev. Stat. § 336.700(2)] expressly make it unlawful for employers to require employees to enter into arbitration agreements and make such agreements unenforceable. These provisions unmistakably conflict with §2 of the FAA and violate the Supremacy Clause." *Johnson*, *supra* at *10.

Moreover, the *Johnson* Court went on to say:

> "The plaintiff's argument that the arbitration agreement is invalid under general contract principles because it 'diminishes an existing or future claim, right, or benefit,' i.e., her right to a jury trial, fares no better. If a state could invalidate all employment contracts that purport to deny an employee her right to a jury trial, then 'states could wholly eviscerate Congressional intent to place arbitration agreements upon the same footing as other contracts' simply by enacting a statute similar to Ky. Rev. Stat. § 336.700(2). . . . All arbitration agreements in employment contracts would be invalid under state law which 'is in conflict with the Arbitration Act and would permit states to override the declared policy

> requiring enforcement of arbitration agreements.' "

Johnson, *supra* at *10-*11.

At bar, the Kentucky Supreme Court ignored not only this Court's ruling in *Southland Corp.*, but also the federal district court's ruling in *Johnson* relating to the impact of the FAA on Ky. Rev. Stat. § 336.700(2).

Because the decision below flouts the FAA and creates disuniformity among the lower state and federal courts, this Court should review and reverse the decision of the Kentucky Supreme Court.

III. EFFORTS TO UNDERMINE THE FAA CANNOT BE TOLERATED

This Court has on many occasions recognized the importance of reversing state court decisions that have ignored or refused to apply controlling precedents interpreting the FAA. As the Court has explained, because "[s]tate courts rather than federal courts are most frequently called upon to apply the . . . FAA," "[i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500 (2012) (per curiam).

Thus, for example, in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), this Court summarily vacated and remanded a decision of the "Supreme Court of Appeals of West Virginia," which, "by misreading and disregarding the precedents of this

Court interpreting the FAA, did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." *Id.* at 1202; see also *id.* at 1203 ("The West Virginia court's interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court.").

In *Nitro-Lift*, this Court summarily vacated the Oklahoma Supreme Court's decision refusing to apply this Court's severability doctrine and instead declaring the underlying contract containing the arbitration provision null and void – a decision which blatantly "disregard[ed] this Court's precedents on the FAA." 133 S. Ct. at 503. The Court further reminded lower courts that "'[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Ibid*. (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)).

In *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam), this Court summarily vacated the Florida District Court of Appeal's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter* [*Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)]."

And, in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam), this Court summarily reversed the Alabama Supreme Court's refusal to apply

the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

In addition, this Court recently reversed a decision of the California Court of Appeal adopting a dubious interpretation of an arbitration agreement in an effort to find the agreement unenforceable. *Imburgia*, 136 S. Ct. at 468.

A similar disregard of this Court's precedents is apparent in Kentucky. This Court recently admonished the Kentucky Supreme Court for its refusal to follow precedent concerning the FAA's "equal footing" rule in *Kindred Nursing*. And, despite that admonition, the Kentucky Supreme Court has again refused to follow precedent concerning the FAA's "equal footing" rule, as demonstrated by its ruling in this case.

The decision below is demonstrative. It indicates that in some state courts, this Court's admonitions have fallen on deaf ears. Left to stand, the decision below could prompt other states' courts to manufacture interpretations of state contract law that single out arbitration for disfavored treatment in an effort to circumvent the FAA and this Court's precedents. This Court has long recognized that "private parties have likely written contracts relying on [its FAA precedent] as authority." *Allied-Bruce Terminix*, 513 U.S. at 272. That reliance on a uniform national policy favoring arbitration (one embodied by the FAA) would be replaced

with an uneven patchwork of "one-off," unprincipled carve-outs from the FAA that differ from state to state.

Given the clear conflict between the decision below and this Court's precedents, the Court should consider summarily reversing the decision below.

The Court may also wish to consider granting, vacating, and remanding the decision below. This Court has already taken that course in other cases presenting state courts' refusal to adhere to this Court's precedents interpreting the FAA. See *Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Development Co. v. Narayan*, 136 S. Ct. 799 (2016). Doing the same here would emphasize to the Kentucky Supreme Court and other state courts that Congress has preempted rules of contract interpretation that disfavor arbitration.

IV. THE DECISION BELOW UNDERMINES THE LIBERAL FEDERAL POLICY FAVORING ARBITRATION AND OPENS THE DOOR FOR OTHER STATES TO FOLLOW SUIT

The decision below affects an important public policy issue in Kentucky and throughout the country.

As this Court has previously recognized, there is a "liberal federal policy favoring arbitration agreements." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927 (1983)). That policy exists because "in Congress's judgment

arbitration had more to offer than courts recognized – not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

Consistent with that policy, employers in the private and public sectors are increasingly including arbitration agreements in their employment contracts because arbitration provides a less formal, less expensive and quicker means of resolving disputes with their employees than does litigation. See *Article: A Comparative Analysis Of The Law Regulating Employment Arbitration Agreements In The United States And Canada*, 23 Comp. Lab. L. & Pol'y J. 1007 (discussing the prevalence of arbitration agreements amongst American employers); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 562-64 (2001) (examining the potential benefits of arbitration in employment cases in the United States); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1579 (2005) (asserting that many "employers facing a high volume of low-value claims . . . opt for employment arbitration"). The advantages of arbitration can be especially attractive to public agencies, given that they typically have particularly limited resources to devote to the resolution of employee disputes and given that protracted employment disputes often detract from the public agency's mission. Therefore, public agencies that operate in the

Commonwealth of Kentucky have a profound interest in ensuring their employment agreements and the arbitration clauses therein are enforced on equal footing with those of private employers and employees.

Below, the Kentucky Supreme Court ruled that employers in the Commonwealth of Kentucky are forbidden under Ky. Rev. Stat. § 336.700(2) from entering into arbitration agreements in the context of employment contracts. (Pet. App. 1 – 15) That ruling flies in the face of the United States Supreme Court's decision in *Kindred Nursing*, and wholly undermines the liberal federal policy favoring arbitration agreements. But, unless this Court intervenes by granting certiorari, arbitration agreements between employers and their employees will be placed on unequal footing with other types of agreements between those parties.

Moreover, if the decision below is allowed to stand, it would also undermine the liberal federal policy favoring arbitration agreements by paving the way for other states to adopt statutes similar to Ky. Rev. Stat. § 336.700(2). Certiorari is necessary to protect this important federal policy in Kentucky and in other states.

CONCLUSION

The petition for a writ of certiorari should be granted, or, in the alternative, the Court should consider summarily reversing or vacating the decision below.

Respectfully submitted,

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