No. 22-968

IN THE

Supreme Court of the United States

GINGER ATHERTON,

Petitioner,

v.

KEY BANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

The Washington State Court of Appeals is in disarray. Three days after Petitioner Ginger Atherton submitted her Reply Brief Supporting her Petition for Writ of Certiorari, a different division within Washington's only Court of Appeals issued and published *Biochron, Inc. v. Blue Roots, LLC*, Case No, No. 38834-4-III, ___ Wn.App.2d ___, ___ P.3d ___., 2023 WL 3638293, (Wash. Ct. App. May 25, 2023). It concludes that arbitrators—not courts—must decide any defense asserting a right within a broader contract that contains a severable arbitration agreement is unenforceable. In contrast, the Division that issued the opinion below affirms a trial judge who accepted KeyBank's invitation to look through Atherton's arbitrable breach of contract claim and decide whether her contract right was currently enforceable. *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059, 2022 WL 2915540, *4, fn 17 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash. 2d 1024, 522 P.3d 48 (2023). These two opinions diametrically oppose one another.

The conflict should be resolved to maintain uniformity amongst all courts in this nation that are required to apply the Federal Arbitration Act ("FAA") when deciding whether to compel arbitration. Only then will contracting businesses and individuals confidently contract with reasonable certainty that their contract dispute will be decided by the person(s) they choose to make the decision and not by a judge harboring arbitration enforcement animus.

SUPPLEMENTAL ARGUMENTS

I. A Different Division Within Washington's Court of Appeals has Issued a Published Opinion that Constitutes new Matter this Court Should Consider Before Determining Whether to Grant Petitioner's Petition for Writ of Certiorari.

A. This Court Should Consider the *Biochron* Opinion Because its Analysis is Correct and Differs from the Opinion Below.

On May 25, 2023, Division Three of the Washington Court of Appeals issued and published the *Biochron* decision concluding:

> [T]he trial court erred in denying Blue Roots's renewed motion to compel arbitration because the enforceability of a contract containing an agreement to arbitrate is a question for the arbitrator, not the court. In general, a court may only decide whether the agreement to arbitrate exists in a record and whether the arbitration clause can be fairly read to encompass the scope of the dispute.

Biochron, 2023 WL 3638293, at *1 (Wash. Ct. App. May 25, 2023).

This stands in stark contrast to the opinion below to which Atherton petitions this Court to grant a Writ of Certiorari. In the opinion below, Division One of the same Washington Court of Appeals affirmed a trial court looking through Atherton's arbitrable dispute and

considering the merits to decide whether it was ripe and justiciable. Based on that "look through" the trial court determined whether Atherton's breach of contract claim was enforceable before requiring arbitration even though the purported condition precedent was outside the severable agreement to arbitrate. *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059, 2022 WL 2915540, *4, fn 17 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash. 2d 1024, 522 P.3d 48 (2023) ("It appears that the trial court in rendering its decision here 'looked through' Atherton's motion to compel arbitration in determining that a condition precedent, the foreclosure sale, must be met before either a trial court or an arbitrator could reach the merits of her claims).

B. A Dilemma will Inevitably Result if this Court does not Resolve the Differing Judicial Treatment Between *Atherton* and *Biochron*.

If this Court does not grant Atherton's Petition, then the consequences will affect Interstate Commerce and thwart the FAA's Policies. That the two motions to compel arbitration were decided by two divisions of Washington's Court of Appeals does not confine these decisions' effects to Washington State. Instead, they will affect every person who seeks to enforce a valid agreement to arbitrate in Washington's State courts, and that will affect Interstate Commerce.

For example: Could a potato processing facility in Idaho confidently expect an agricultural specialist arbitrator determine any disputes arising out of its standard procurement contract that contains the identical agreement to arbitrate when it obtains potatoes from an

Eastern Washington farmer and supplies from a Seattle distributor who imports the supplies from overseas? It could not. It should not have to depend, but it would depend, on where the potato processor tries to enforce its contract right and whether the judicial officer who determines whether to compel arbitration has arbitration enforcement animus.

This situation controverts the FAA's policy and purpose and calls for this Court's resolution.

C. *Biochron S*hould be Considered Because the Differences Within the Same Court Demonstrate the FAA's Purposes of Uniformity and Ending Judicial Hostility are not Being Fulfilled.

1. Maintain Uniformity

This Court should consider *Biochron* because it demonstrates why this Court should grant Atherton's Petition. It should grant Atherton's Petition to maintain uniformity as to who decides the merits of arbitrable disputes. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 282, 115 S. Ct. 834, 844, 130 L. Ed. 2d 753 (1995) (O'CONNER, J., concurring) ("if we are to apply the [FAA] in state courts, it makes little sense to read § 2 differently in that context. In the end, my agreement with the Court's construction of § 2 rests largely on the *wisdom of maintaining a uniform standard*.")(emphasis added).

This Court has tried to maintain uniformity by developing a substantive body of federal law that

constructively preempts state law obstacles to enforcing agreements to arbitrate. This Court has determined the FAA, §2, "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984); *see also Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525, 96 L. Ed. 2d 426 (1987). In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), this Court stated the FAA's "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act.' " (emphasis added).

This Court has also maintained uniformity by making the FAA, §2, equally enforceable in both state and federal courts. *Southland,* 465 U.S. at 12, 104 S.Ct. 852 (quoting *Moses H. Cone,* 460 U.S. at 25, n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); accord *Dobson,* 513 U.S. at 271–272, 115 S.Ct. 834; and *Vaden v. Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 1272, 173 L. Ed. 2d 206 (2009). In *Keating*, FAA §2 constructively preempted the California Franchise Investment Law that was interpreted by its courts to permit them to consider claims arising under that law. *Keating,* 465 U.S. at 11–12, 104 S.Ct. at 858.

It is essential to the FAA's purpose that State courts are not permitted to deviate from this Court's pronouncements regarding the FAA, §2. Federal courts

are courts of limited jurisdiction, and they may only be called upon to decide motions to compel arbitration if they have subject matter jurisdiction to decide the arbitrable dispute. *Vaden*, 556 U.S. at 59, 129 S.Ct. at 1272. This makes uniformity amongst State courts imperative because they are the courts that are most often called upon to determine motions to compel arbitration. This Court has made clear that the FAA, Section 2, "carries with it" a *duty* for States to provide certain enforcement mechanisms equivalent to the FAA's.´" *Badgerow v. Walters*, 212 L. Ed. 2d 355, 142 S. Ct. 1310, 1316 (2022). *Badgerow* specifically observed that "most, if not all, States" satisfy their FAA, §2, duty because they "provide procedural vehicles, similar to those in the FAA, to enforce arbitration agreements." *Badgerow*, 556 U.S. at 58, 142 S.Ct. at 1316, *citing* Revised Uniform Arbitration Act of 2000 §§ 22–24, 7 U. L. A. 26 (2009) (then adopted in 21 States and the District of Columbia). The opinion below does not meet Washington's duty because it stands alone amongst any case in any State (and even within its own State) when it interpreted Washington's Revised Uniform Arbitration Act to bestow it with primary subject jurisdiction to decide conditions precedent not involving arbitrability.

Comparing *Biochron* to the opinion below in *Atherton* epitomizes the lack of uniformity within Washington's Court of Appeals, but that lack of uniformity has been occurring nationwide. These differences affect any party who contracts with businesses in Washington State.

The effect is demonstrated by using the potato processor example. The hypothetical Idaho processor who procures potatoes from the Eastern Washington farmer

could confidently expect the agreed-upon arbitrator/specialist would determine the present enforceability of an asserted contract right in the procurement contract that did not involve arbitrability. That same potato processor, however, could have no such confidence if it sought to compel the Seattle supplier to arbitrate even though the procurement contract is the same standard contract and contains the identical agreement to arbitrate.

2. Overcoming Judicial Hostility

This Court should also grant Atherton's Petition to fulfill FAA §2's purpose to overcome judicial hostility to enforcing agreements to arbitrate. In 1925, Congress enacted the FAA "[t]o overcome judicial resistance to arbitration," *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), and to declare " 'a national policy favoring arbitration' of claims that parties contract to settle in that manner," *Preston v. Ferrer,* 552 U.S. 346, 353, 128 S.Ct. 978, 983, 169 L.Ed.2d 917 (2008) (quoting *Southland Corp. v. Keating,* 465 U.S. 1, 10, 104 S.Ct. 852, 859, 79 L.Ed.2d 1 (1984)).

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.,* 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), this Court stated the FAA's "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to *any* arbitration agreement within the coverage of the Act.' " (emphasis supplied).

The FAA §2 is enforceable in both state and federal courts. In *Southland Corp. v. Keating,* 465 U.S. 1, 11–12, 104 S.Ct. 852, 858–859, 79 L.Ed.2d 1 (1984), this Court held FAA § 2 constructively preempted the California Franchise Investment Law that was interpreted by its courts to permit them to consider claims arising under that Law. This Court then determined § 2 "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Keating,* 465 U.S. at 10, 104 S.Ct. at 859; *see also Perry v. Thomas*, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525, 96 L. Ed. 2d 426 (1987).

The "body of federal substantive law" generated by elaboration of FAA § 2 is equally binding on state and federal courts. *Southland,* 465 U.S. at 12, 104 S.Ct. 852 (quoting *Moses H. Cone,* 460 U.S. at 25, n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); accord *Dobson,* 513 U.S. at 271–272, 115 S.Ct. 834; and *Vaden v. Discover Bank*, 556 U.S. 49, 59, 129 S. Ct. 1262, 1272, 173 L. Ed. 2d 206 (2009).

Due to the differences between the language used in FAA § 2 and the language used in §§ 3 and 4, for a federal court to decide whether to compel arbitration it must have independent subject matter jurisdiction basis under Article III. *Vaden,* 556 U.S. at 59, 129 S.Ct. at 1272.

This only increases the importance of maintaining uniformity in the way the FAA is applied in State courts. This Court has made clear that the FAA, § 2, "carries with it" a *duty* for States to provide certain enforcement mechanisms equivalent to the FAA's. *Badgerow v. Walters*, 212 L. Ed. 2d 355, 142 S. Ct. 1310, 1316 (2022). *Badgerow*

specifically observed that "most, if not all, States" satisfy their FAA, § 2, duty because they "provide procedural vehicles, similar to those in the FAA, to enforce arbitration agreements." *Badgerow*, 556 U.S. at 58, 142 S.Ct. at 1316, *citing* Revised Uniform Arbitration Act of 2000 §§ 22–24, 7 U. L. A. 26 (2009) (then adopted in 21 States and the District of Columbia).

Comparing *Biochron* to the opinion below in *Atherton* epitomizes the lack of uniformity that is occurring nationwide, and it will affect any contracting party who contracts with businesses in Washington State. In Washington Court of Appeals Division III, which is east of the Cascade Mountains, Division Three's opinion in *Biochron* controls. The hypothetical Idaho processor could be reasonably convinced the agreed-upon arbitrator/specialist would determine the present enforceability of an asserted contract right not involving the agreement to arbitrate when it procured potatoes from the Eastern Washington farmer. Across the State, however, in Seattle, the same potato processor who uses the same procurement contract containing the same agreement to arbitrate could not confidently have the same expectation if a dispute arose out of the broader contract but did not involve the much narrower agreement to arbitrate. Division One's *Atherton* opinion permits a judge that is hostile to arbitration to look through the claimed dispute and weed out any dispute it decides is presently unenforceable.

The Washington State Supreme Court has demonstrable hostility toward enforcing arbitration agreements. In her Petition, Atherton provided this Court with the Chief Justice stating he considers the inability for Washington's courts to develop a rich body of common

law when he determines whether arbitration should be compelled. An Associate Justice admitted she considers the fact arbitrations are conducted behind closed doors and not in a public forum when she decides whether to compel arbitration. These considerations do not exist when determining whether to compel performance of other agreements; rather they exist only when considering agreements to arbitrate. These extraneous considerations, therefore, do not place agreements to arbitrate on equal footing with other contracts and violate not only the spirit, but also the letter, of the FAA, §2.

Arbitration enforcement animus may explain why the Washington State Supreme Court does not accept review of arbitration denial cases and when it has, it consistently refuses to compel arbitration. The Washington Supreme Court has not accepted review of an arbitration case in 2021, 2022, or so far this year in 2023, although it has had at least three opportunities from Division One, alone, all of which were novel issues that were decided in unpublished opinions.[1]

The most recent arbitration denial cases the Washington Supreme Court reviewed were in 2020 and

1. *In re Apogee Cap. LLC*, 22 Wash. App. 2d 1053, 2022 WL 2818667 (2022), *as amended on reconsideration* (Nov. 15, 2022), *review denied sub nom. Matter of Dissolution of Apogee Cap., LLC*, 526 P.3d 845 (Wash. 2023); *Key Bank, N.A. v. Atherton*, 22 Wash. App. 2d 1059 (2022), *review denied sub nom. Key Bank v. Atherton*, 200 Wash. 2d 1024, 522 P.3d 48 (2023); and *JC Aviation Invs., LLC v. Hytech Power, LLC*, 16 Wash. App. 2d 1051, *review denied sub nom. JC Aviation Invs., LLC v. HTP, Inc*, 198 Wash. 2d 1010, 495 P.3d 831 (2021).

it denied compelling arbitration in both cases.[2] It did not review any arbitration denial case in the six preceding years (2019, 2018, 2017, 2016, 2015, or 2014). In 2013 it denied compelling arbitration in the three arbitration denial cases it reviewed.[3]

II. *Biochron* is new Matter that is Properly Asserted in this Supplemental Brief.

Biochron is "new matter" as described in United States Supreme Court Rule 15.8. That Rule allows a party to "file a supplemental brief at any time while a petition for a writ of certiorari is pending." Here, Petitioner Atherton's last filing was her Reply Brief Supporting her Petition for Writ of Certiorari, filed May 22, 2023. *Biochron* was issued and published three days later on May 25, 2023. It is, therefore, new matter and is properly presented in this Supplemental Brief.

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2. *Burnett v. Pagliacci Pizza, Inc.*, 196 Wash. 2d 38, 470 P.3d 485 (2020); and *Jeoung Lee v. Evergreen Hospital Medical Center*, 196 Wash.2d 699, 464 P.3d 209 (2020).

3. *Hill v. Garda CL Northwest, Inc.*, 179 Wash.2d 47, 308 P.3d 635 (2013); *Brown v. MHN Government Services, Inc.*, 178 Wash.2d 258, 306 P.3d 948 (2013); and *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash. 2d 598, 2993 P.3d 1197 (2013).

Respectfully submitted,

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June 5, 2023