No. 23-1051

In The

Supreme Court of the United States

GREAT AMERICAN INSURANCE COMPANY,

Petitioner,

v.

CRYSTAL SHORES OWNERS ASSOCIATION, INC.,

Respondent.

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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

Consistent with this Court's decisions upholding the federal policy favoring arbitration embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, ALF has a longstanding interest in judicial enforcement of agreements to resolve commercial, consumer, employment, and other types of private-

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[1] Petitioner's and Respondent's counsel were provided timely notice in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

party disputes through binding arbitration. As is the case here, ALF has participated as *amicus curiae* in many appeals that present important questions relating to the FAA's primacy over state law and the enforceability of arbitration agreements by both federal and state courts.[2]

The principal question presented here—whether federal law or state law governs the meaning of an agreement to arbitrate under § 2 of the Act—is fundamental to achieving the statute's objectives. The Court needs to grant review in this case and finally resolve the inter-circuit split on this seemingly straightforward issue. Without an unequivocal holding from this Court that federal law governs the meaning of arbitration under the FAA, individual States (such as Alabama and California) that are still hostile to arbitration will be able to obstruct the

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[2] Recent arbitration cases in which ALF has participated as *amicus curiae* include *Bissonnette v. LePage Bakeries Park St., LLC*, No. 23-51 (U.S. Apr. 12, 2024) (scope of FAA exemption for transportation workers' employment agreements); *Coinbase, Inc. v. Suski*, No. 23-3, cert. granted (U.S. Nov. 3, 2023) (enforcement of arbitration agreement provisions that delegate arbitrability questions to arbitrators); *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915 (2023) (mandatory stay following appeal of denial of motion to compel arbitration); *Viking River Cruises v. Moriana*, 142 S. Ct. 1906 (2022) (FAA preemption of California court-made rule that invalidated class-action waivers in employment contracts); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) (enforcement of arbitrator delegation provisions); and *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (enforcement of class-action waivers in arbitration agreements).

statute's goals by defining arbitration as narrowly as possible under state statutory and/or common law.

SUMMARY OF ARGUMENT

Nothing is more fundamental to the purpose and operation of the Federal Arbitration Act than the meaning of "arbitration," an obviously pivotal term that surprisingly, the statute nowhere defines. *See* App. 16a-17a. This Court repeatedly has explained that the FAA was enacted to quell the persistent tradition of judicial hostility to arbitration, and to promote national uniformity by mandating, in accordance with FAA § 2, that federal and state courts enforce agreements to arbitrate according to their own terms. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) ("[T]he basic purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate."). The FAA-related decisions issued by this Court for more than four decades not only reiterate the statute's anti-hostility objective, but also repeatedly reinforce the FAA's primacy over state law.

The Court's long line of FAA precedents highlights the many ways that some state courts and legislatures—increasingly fueled by legal scholars who oppose this Court's jurisprudence on individualized arbitration of consumer and employment disputes—have continued to resist broad application of the FAA and judicial enforcement of arbitration agreements.

Affording a State free rein to define what constitutes an FAA-enforceable arbitration agreement as sparingly as it chooses undermines the purposes and obstructs the operation of the Act, engenders uncertainty among contracting parties (especially if they are located in different States), and impedes the conduct of interstate commerce. But as the petition for a writ of certiorari explains, this is exactly what the current split of authority allows in the Fifth and Ninth Circuits, and presumably in other circuits that, unlike the First, Second, Sixth, and Tenth Circuits, have not squarely ruled that federal law governs the meaning of arbitration under the FAA.

The Court should grant certiorari in this case, which thanks to the Alabama Supreme Court's equivocation on whether federal or state law supplies the rule of decision, begs for this Court's resolution of the split of authority on the choice-of-law issue. Denial of certiorari only would embolden already arbitration–hostile state courts and legislatures to erect additional substantive and procedural barriers to what constitutes an enforceable arbitration agreement under the FAA.

ARGUMENT

The Court Should Grant Certiorari To Further Suppress State-Law Hostility To Arbitration By Holding That Federal Law Governs the Meaning of Arbitration Under the Federal Arbitration Act

A. This Court's decisions repeatedly affirm the FAA's primacy over state law

1. "The FAA was enacted in response to judicial hostility to arbitration." *Viking River Cruises v. Moriana*, 142 S. Ct. 1906, 1917 (2022); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984). "Its 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." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

"[I]n 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." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018). "So Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" *Id.* (quoting 9 U.S.C. § 2); *see also Concepcion*, 563 U.S. at 344 ("The overarching purpose of the FAA, evident in the text . . . is to ensure the enforcement of arbitration agreements according

to their terms so as to facilitate streamlined proceedings.").

Section 2 "is the primary substantive provision of the Act, declaring that a written agreement to arbitrate . . . 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (quoting 9 U.S.C. § 2). The Court often has reiterated that § 2 "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Id.*; *see, e.g.*, *Epic Sys.*, 138 S. Ct. at 1621; *Concepcion*, 563 U.S. at 339.

"The policy is to make arbitration agreements as enforceable as other contracts, but not more so." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022) (internal quotation marks omitted). Thus, "[c]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms." *Id.*; *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (FAA § 2's "text reflects the overarching principle that arbitration is a matter of contract").

Indeed, § 2 is "[a]n enforcement mandate, which renders agreements to arbitrate enforceable as a matter of federal law." *Viking*, 142 S. Ct. at 1917; *see also Moses H. Cone*, 460 U.S. at 27 n.34 (referring to "Congress' intent to mandate enforcement of all covered arbitration agreements"). "Section 2's

mandate protects a right to enforce arbitration agreements. That right would not be a right to *arbitrate* in any meaningful sense if generally applicable principles of state law could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace . . . .'" *Viking*, 142 S. Ct. at 1918 (quoting *Epic Sys.*, 138 S. Ct. at 1623).

> The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a law prohibit[ing] outright the arbitration of a particular type of claim. . . . The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) *have the defining features of arbitration agreements*.

Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017) (internal quotation marks omitted) (emphasis added); *see also Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019) ("[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA.") (quoting *Concepcion*, 563 U.S. at 352).

2. The Court repeatedly has applied these principles, including where preempted state law is in the form of court-made rules that discriminate against, or otherwise disfavor, arbitration.

Concepcion, for example, involved a class action alleging that AT&T's advertising was misleading because the company charged sales tax on the retail value of "free" cell phones provided to customers who signed a cell phone service contract. "The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" 563 U.S. at 336.

Affirming the district court's denial of AT&T's motion to compel arbitration, the Ninth Circuit relied on the California Supreme Court's "*Discover Bank* rule," which "classif[ied] most collective-arbitration waivers in consumer contracts as unconscionable." *Id.* at 338, 339 (discussing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)). The Court held in *Concepcion*, however, that FAA § 2 preempted California's court-made, state public policy-based, *Discover Bank* rule because it "stand[s] as an obstacle to the accomplishment of the FAA's objectives." 563 U.S. at 343.

In his concurring opinion in *Concepcion*, Justice Thomas added that "[i]f § 2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to 'any contract.'" 563 U.S. at 352-53 (Thomas, J., concurring).

Kindred Nursing Centers is another example of the FAA preempting a state-law rule that discriminated

against arbitration. The Kentucky Supreme Court had adopted a state-law "clear statement" principle under which "a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." 137 S. Ct. at 1426. This Court held in *Kindred* that the FAA preempted "[t]he Kentucky Supreme Court's clear statement rule [because it] fails to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426-27. "[T]he [state supreme] court did exactly what *Concepcion* barred: adopt 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." *Id.* at 1427. The Court further explained in *Kindred* that

> [a] rule selectively finding arbitration contracts invalid because [they are] improperly formed fares no better under the Act than a rule selectively refusing to enforce those agreements once [they are] properly made. . . . Adopting the respondents' view would make it *trivially easy for States to undermine the Act—indeed, to wholly defeat it*.

Id. at 1428 (emphasis added).

Most recently, the Supreme Court in *Viking River Cruises* reaffirmed the FAA's preemptive force by invalidating yet another California common-law rule as applied to arbitration agreements. *Viking* involved a former employee's allegations that the defendant

company had violated the California Labor Code. The employee had agreed to arbitrate any dispute arising out of her employment. *See* 142 S. Ct. at 1915-16. The arbitration agreement included a class-arbitration waiver clause, "providing that in any arbitral proceeding, the parties could not bring any dispute as a class, collective, or representative action" under the California Labor Code Private Attorneys General Act of 2004 ("PAGA"). *Id.* at 1916.

The Court considered whether the FAA "preempts a rule of California law that invalidates contractual waivers of the right to assert representative claims" under PAGA. *Id.* at 1913. The Court explained that according to the California Supreme Court's "*Iskanian* rule," "pre-dispute agreements to waive the right to bring 'representative' PAGA claims are invalid as a matter of public policy." *Id.* at 1916; *see Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014). California's *Iskanian* rule not only prohibited waivers of "representative" PAGA claims, but also agreements to separately arbitrate individual PAGA claims. *Viking*, 142 S. Ct. at 1916-17.

The Court held in *Viking* that "the FAA preempts the rule of *Iskanian* insofar as it precludes division of PAGA actions into individual and non-individual claims through an agreement to arbitrate." *Id.* at 1924. As a result, Viking was entitled to compel arbitration of the plaintiff's individual PAGA claim. *Id.* at 1925.

B. Despite the Court's FAA jurisprudence, state-law hostility to arbitration persists

1. The certiorari petition in this case discusses in detail the mature and well-defined split of authority on the question of whether federal law or state law governs the meaning of arbitration under FAA § 2. *See* Pet. at 11-14; *see also Bakoss v. Certain Underwriters at Lloyds of London Issuing Certificate No. 0510135*, 707 F.3d 140, 143-44 (2d Cir. 2013) (discussing the circuit split). Each of the four circuits holding that federal law governs the meaning of arbitration has based its decision on the FAA's primacy over state law. *Bakoss*, for example, involved an insurance contract that provided for a third-party physician examination in the event of a disagreement about whether the insured was totally disabled. *See id.* at 142. Holding that "federal common law provides the definition of 'arbitration' under the FAA," the Second Circuit explained that "[t]he circuits that apply federal common law have relied on congressional intent to create a uniform national arbitration policy." *Id.* at 143-44. "Applying state law would create a patchwork in which the FAA will mean one thing in one state and something else in another." *Id.* at 144 (internal quotation marks omitted).

Similarly, in *Evanston Insurance Co. v. Cogswell Properties, LLC*, 683 F.3d 684, 693 (6th Cir. 2012), involving an insurance contract appraisal provision analogous to the one at issue here, the court of appeals explained that "[i]t seems counter-intuitive to look to state law to define a term in a federal statute on a

subject as to which Congress has declared the need for national uniformity" (internal quotation marks omitted); *see also Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004). ("That a uniform federal definition is required is obvious to us."); *Salt Lake Trib. Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004) ("Congress did not plainly intend arbitration to mean different things in different states."). The Tenth Circuit further explained that "[w]ere we to hold that state law guides our determination, we would empower states to define arbitration as they choose, thus limiting the FAA's utility." *Id.*

2. Here, the Alabama Supreme Court attempted to take the easy way out by analyzing under *both* federal and state law whether a commercial property insurance contract's appraisal provision is an arbitration agreement enforceable under the FAA. In reality, however, the court's conclusion that "regardless of whether federal or Alabama law controls" the provision "does not qualify as a clause calling for 'arbitration' under the FAA," App. 38a, exacerbates, rather than avoids, the unresolved issue of what law governs.

What if the state supreme court had concluded that the appraisal provision *is* an arbitration provision under federal law? Would the court have stopped there? Or would it have proceeded to analyze the appraisal provision under Alabama law too? And assuming the latter, what if, as the court actually concluded, under Alabama law the appraisal provision

"does not qualify as a clause calling for 'arbitration' under the FAA"? *Id.* 37a. Would the Alabama Supreme Court—in view of its "longstanding hostility towards arbitration," Pet. at 17—have held that its state-law analysis governs even though application of federal law would produce a different result? The court's opinion suggests exactly that: "[I]nsurance-appraisal clauses such as the one at issue in this case have been adjudicated by our courts for a long time." App. 34a; *see also id.* 39a (Mitchell, J., concurring in the result) ("I would dismiss this appeal on State-law grounds only.").

Thus, the state supreme court's equivocal, unhelpful, and unconvincing analytical approach only deepens the entrenched split of authority among the six circuits that have addressed the issue, and prolongs the uncertainty expressed by the circuits that have not. *See* Pet. at 11. The court's opinion also signals to lower Alabama courts, and to courts in other States still hostile to arbitration, that they can exploit the existing split of authority by devising a cramped, state-law definition of arbitration that limits the reach of the FAA, and thus defeats the statute's objectives.

3. The certiorari petition correctly predicts that unless this Court intercedes and holds that federal law governs the meaning of arbitration under the FAA, the "continued conflict will only bolster the already-existing hostility to arbitration agreements." *Id.* at 9. Absent review, the "antiarbitration rule" that the FAA was enacted more than 75 years ago to supplant, *Allied-Bruce*, 513 U.S. at 271, would be

revitalized "by allowing state courts to define arbitration as narrowly as they wish under state law." Pet. at 8-9. Without a decision by this Court, the 12 States encompassed by the Fifth and Ninth Circuits, as well as other States outside of the First, Second, Sixth, and Tenth Circuits, are free to do exactly that.

The chronic concern that despite the FAA's indisputable primacy over state law, some States, through their courts and/or legislatures, continue to exhibit hostility toward arbitration is reflected in this Court's long line of FAA precedents. For example:

• *Viking River Cruises*, 142 S. Ct. at 1924—The Court held that the FAA preempted a California Supreme Court rule that invalidated, on state public policy grounds, contractual waivers of an employee's right to bring representative claims under the state PAGA statute.

• *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015)—The Court held that the FAA preempted a California Court of Appeal consumer arbitration agreement interpretation that would have disregarded *Concepcion*'s holding, 563 U.S. at 343, that the FAA invalidates state laws purporting to render class-arbitration waivers unenforceable.

• *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012)—The Court rejected a West Virginia Supreme Court ruling that prohibited, as a matter of state public policy, pre-dispute agreements to arbitrate wrongful death and personal injury claims against nursing homes.

• *Preston v. Ferrer*, 552 U.S. 346, 350-51 (2008)—The Court held that "when parties agree to arbitrate all questions arising under a contract, [California] state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA."

• *Doctors' Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996)—The Court held that the FAA displaced a Montana statute that rendered unenforceable any arbitration agreement included in a contract whose first page does not declare, in underlined capital letters, that the contract is subject to arbitration.

• *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53 (1995)—The Court held that the FAA invalidated a "New York law [that] allow[ed] courts, but not arbitrators, to award punitive damages."

• *Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. at 269—The Court reversed an Alabama Supreme Court ruling that declined to enforce a consumer arbitration agreement subject to a state statute "making written, predispute arbitration agreements invalid and 'unenforceable.'"

• *Southland Corp. v. Keating*, 465 U.S. at 16—The Court held that the FAA preempted a California franchise investment statute from prohibiting arbitration of claims brought under the statute because "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."

As if arbitration-averse States' persistent efforts to circumvent the FAA and this Court's FAA precedents were not enough, legal scholars have been doing their best to trigger a resurgence of state hostility to arbitration, especially in connection with arbitration of consumer and other mass disputes. *See, e.g.*, Cameron Molis, *Curbing Concepcion: How States Can Ease the Strain of Predispute Arbitration to Counter Corporate Abusers*, 24 U. Pa. J.L. & Soc. Change 411, 441 (2021) ("[L]egislative protections can and must be implemented at the state level to counter [arbitration agreements'] worst abuses. . . . States have already shown that they are eager to intervene to combat excessive arbitration, but they must draft careful and precise legislation to ensure a lasting impact."); David Horton, *All Alone In Arbitration*, 72 Fla. L. Rev. Forum 75, 82 (2021) (arguing that despite Supreme Court precedents that "have made class arbitration waivers bulletproof . . . states should step in and try to facilitate mass arbitrations"); Victor D. Lopez, *Mandatory Arbitration Clauses In Consumer Contracts: A Legally Permissible Means of Denying Consumers the Constitutional Right To Litigate Contract Disputes In Court and the Right To Trial By Jury*, 40 N.E. J. Legal Stud. 1 (2020) (arguing that the FAA was intended to apply only to disputes between merchants, not to disputes with consumers); Alyssa S. King, *Arbitration and the Federal Balance*, 94 Ind. L.J. 1447, 1448 (2019) ("[T]he Supreme Court now treats the [FAA] as preempting nearly any limits state courts can impose before granting a motion to compel arbitration. . . . This expansion in arbitral

power has been subject to fierce critique.") (collecting articles); Matthew J. Stanford & David A. Carrillo, *Judicial Resistance To Mandatory Arbitration As Federal Commandeering*, 71 Fla. L. Rev. 1397 (2019) (arguing that "the current doctrine of preempting state substantive law in favor of the [FAA] contravenes core federalism principles generally"); *see also* Salvator U. Bonaccorso, Note, *State Court Resistance To Federal Arbitration Law*, 67 Stan. L. Rev. 1145, 1147-48 (2015) ("What ensued in the four years following *Concepcion* can best be described as a power struggle of Shakespearean magnitude between the Supreme Court, which attempted to enforce its own interpretation of the FAA, and state courts that tried to preserve their own laws and public policy. . . . After open rebellion failed, state courts across the country, especially in California, developed novel strategies to limit the FAA's preemptive effect.").

This Court needs to extinguish the still-smoldering embers of judicial and legislative resistance to arbitration and this Court's FAA precedents before they flare into a new broad wave of overt anti-arbitration hostility. To accomplish this important statutory imperative, the Court should grant review here and hold that federal law—not state law—governs the meaning of arbitration under the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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