No. ______

In the Supreme Court of the United States

SIENA AT OLD ORCHARD, L.L.C., *et al.*,
Petitioners,
v.

SIENA AT OLD ORCHARD CONDOMINIUM ASSOCIATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, First District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Condominium declarations are contracts under Illinois law, but they can be amended by a 2/3 vote of the condo-unit owners—even without consent from anyone else. In this case the parties' condominium declaration included an arbitration clause that applies to this dispute. But after this dispute arose, Respondents unilaterally deleted the arbitration provision, without Petitioners' consent. The Illinois appellate courts applied the deletion retroactively and held that it excused Respondents from arbitrating this case.

The question presented is whether a state may prohibit retroactive, unilateral *expansions* of arbitration agreements (as Illinois does) but enforce retroactive, unilateral *deletions* of arbitration agreements.

Consistent with this Court's approach in other arbitration cases, the Court may wish to consider summary reversal, or alternatively vacate the judgment below and remand in light of its decision in *Kindred Nursing Centers, LP v. Clark*, which was rendered after the opinion below in this case.

PARTIES TO THE PROCEEDING

Petitioners, Siena at Old Orchard L.L.C., Lennar Chicago, Inc., and Larry Keer were the defendants in the trial court and the appellees and cross-appellants in the Appellate Court of Illinois. The Supreme Court of Illinois denied Siena's and Lennar's petition for leave to appeal.

Respondents, the Siena at Old Orchard Condominium Association and its board of directors, were the plaintiffs in the trial court and the appellants and cross-appellees in the Appellate Court of Illinois.

CORPORATE DISCLOSURE STATEMENT

Petitioner Siena at Old Orchard, L.L.C. is wholly owned by Petitioner Lennar Chicago, Inc. Petitioner Lennar Chicago, Inc. is wholly owned by Lennar Corp., a publicly traded company.

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When Respondents' cause of action arose, the parties had a binding arbitration agreement. But Respondents did not want to arbitrate. The agreement was part of a condominium declaration—a contract that, under Illinois law, can be modified by 2/3 of the condo-unit owners, without anyone else's consent. So without Petitioners' consent, Respondents obtained a 2/3 vote that purported to delete the arbitration provision *ex post facto*, then filed this suit. The Illinois courts refused to enforce the arbitration clause, finding the deletion to have been effective retroactively.

Illinois does not treat other contractual amendments this way. In fact the Illinois Supreme Court has expressly held that, where a party is allowed to unilaterally amend a contract and does so to make arbitration *more likely*, the new arbitration terms may only be applied to disputes that arise after the amendment. But here, where Respondents unilaterally *deleted* an arbitration agreement, the Illinois courts applied it retroactively, refusing to require arbitration of an existing dispute that arose when the arbitration agreement was in place. That is the kind of anti-arbitration discrimination this Court has repeatedly held violates the Federal Arbitration Act.

Moreover, just last Term the Court reiterated that states may not disguise anti-arbitration hostility by adopting rules that bar only arbitration agreements and a "slim set" of other contractual provisions. *Kindred Nursing Centers LP v. Clark*, 137 S. Ct. 1421 (2017). At best, Illinois has done that here: as a general matter, a statutory or contractual right to make unilateral amendments cannot possibly allow retroactive revisions of contractual obligations. That would allow one party to impose *ex post facto* liability for actions the other party has already taken, or to create impossible procedural barriers to the other party's assertion of existing claims. No Illinois court has ever hinted that this is allowed. At best, then, Illinois has thrown arbitration deletions into a thin set of supposedly "innocuous" or "minor" unilateral contractual amendments that it will apply retroactively. *Kindred Nursing Centers* squarely prohibits that kind of hostility to arbitration.

As the decision below conflicts with this Court's settled precedents, the Court may wish to consider summary reversal. In the alternative, the Court may wish to grant the petition, vacate the judgment below, and remand for reconsideration in light of this Court's decision in *Kindred Nursing Centers*.

OPINIONS BELOW

The Illinois Supreme Court's denial of review is not reported but is available at 2017 WL 4386603 and is reproduced in the Appendix at App.1. The opinion of the Appellate Court of Illinois is reported at 75 N.E.3d 420, and is reproduced in the Appendix at App.2. The initial opinion of the Circuit Court of Illinois dismissing Plaintiffs' claims is not reported but is reproduced in the Appendix at App.57. The Circuit Court's opinion denying reconsideration of that order is available at 2014 WL 12709901 and is reproduced in the Appendix at App.68. The Circuit Court's opinions dismissing Plaintiffs' amended complaint and subsequently denying reconsideration are not reported but are reproduced in the Appendix at App.77 and App.85, respectively.

JURISDICTION

The Supreme Court of Illinois issued its order denying Petitioners' timely petition for appeal on September 27, 2017. The Illinois Appellate Court issued a disposition by written opinion on March 27, 2017; corrected the opinion on April 6, 2017; and denied Petitioners' timely petition for rehearing on April 24, 2017.

This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act provides, in relevant part, that "[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." 9 U.S.C. § 2.

The Illinois Condominium Act provides, in relevant part, that "[i]f there is any unit owner other than the developer ..., the condominium instruments shall be amended only ... upon the affirmative vote of 2/3 of those voting." 765 Ill. Cons. Stat. 605/27(a).

STATEMENT OF THE CASE

A. The FAA Requires That Arbitration Agreements Be Enforced Like Any Other Contract Provision.

"The Federal Arbitration Act reflects an emphatic federal policy in favor of arbitral dispute resolution" and "requires courts to enforce the bargain of the parties to arbitrate." *KPMG LLP v. Cocchi,* 565 U.S. 18, 21 (2011) (citations omitted). The Act "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud 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.*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). As a result, the Act preempts any rule of state law that "fails to put arbitration agreements on an equal plane with other contracts," either facially or by disfavoring procedures that are proper to arbitration. *Kindred Nursing Ctrs.*, 137 S. Ct. at 1426-27.

Last Term—after the decision below in this case—this Court clarified that a state may not disguise anti-arbitration rules by applying them only to arbitration agreements and "a slim set of utterly fanciful contracts" but not to other more common contracts. *Id.* at 1427. In *Kindred Nursing Centers* the Kentucky Supreme Court purported to create a clear-statement rule for a power of attorney to allow a representative to sign away the principal's "fundamental constitutional rights." *Id.* at 1426, 1427. The Kentucky court listed contracts that would be invalid if a representative made them without such a clear statement: waivers of the "right to worship freely," contracts for "an arranged marriage" or "personal servitude"—and arbitration agreements. *Id.* at 1427-28.

This Court didn't buy it, finding the Kentucky rule a subterfuge for anti-arbitration discrimination. The Court noted that the Kentucky Constitution also protects basic rights to property and to free speech—but that the Kentucky courts had not suggested that similar "specific authorization" was required before a representative could, "say, sell her principal's furniture or commit her principal to a non-disclosure agreement." *Id.* at 1427. The Court held that treating arbitration agreements so differently from other similar contracts "reveals the kind of 'hostility to arbitration'" that the FAA forbids. *Id.* at 1428 (quoting *AT&T Mobility*, 563 U.S. at 339).

B. Illinois Condominium Declarations.

In Illinois, "[a] condominium is an interest in real estate ... that gives each owner an interest in an individual unit as well as an undivided interest in common elements." *Bd. of Dirs. of 175 E. Del. Pl. Homeowners Ass'n v. Hinojosa*, 679 N.E.2d 407, 409 (Ill. App. 1997); *see generally* 765 Ill. Cons. Stat. 605. "A condominium comes into being by the recording of a declaration" by the property's owner, *Hinojosa*, 679 N.E.2d at 409, which usually then sells individual condominium units to others. "A condominium declaration is a contract," *McCarter v. Kovitz Shifrin Nesbit*, 6 F. Supp. 3d 797, 804 (N.D. Ill. 2013) (citing *Streams Sports Club, LTD v. Richmond*, 457 N.E.2d 1226, 1230-32 (Ill. 1983)), *see* App.33-34, and its provisions "are covenants that run with the land and bind each subsequent owner" of any unit. *Hinojosa*, 679 N.E.2d at 409.

A condominium declaration thus creates a variety of contractual rights and obligations. Illinois requires a declaration to specify the percentage interest each unit owner has in the common areas. 765 Ill. Cons. Stat. 605/4. The declaration may also include any "other lawful provisions" governing how the complex is used and shared. *Id.* § 605/4(i). So, for example, declarations often restrict occupancy of a unit to the owner's family, or prohibit pets of certain types or sizes, or restrict leasing of units, or create a right of first refusal for the condominium association to buy any unit. Kim, *Illinois Condominium Law: Representing the Unit Purchaser / Seller* (Ill. Inst. on Continuing Legal Educ'n 2016), at pp. 6, 8-10, 16-17. And Illinois expressly permits a developer to "reserve the right to add additional property" to the condominium by stating as much in the declaration. 765 ILCS 605/25.

When an owner sells all its condo units, of course that ends its contractual relationship with the other owners. But just as other kinds of contract litigation may continue after the contract expires, a former condo unit owner may still become involved in disputes over its own or others' past rights and duties under the declaration.

With exceptions not relevant here, Illinois permits a condominium declaration to be amended only "upon the affirmative vote of 2/3 of [unit owners] voting." 765 ILCS 605/27(a)(1). This means that minority owners, former owners, and non-owners who have rights under the declaration may find that its terms change without their consent.

"Administration and operation" of an Illinois condominium "are vested in the condominium association, which is comprised of all unit owners." *Hinojosa*, 679 N.E.2d at 409. "The administration is exercised through the board of directors, which is elected by the owners." *Ibid.*; *see* 765 ILCS 605/18.3-4.

C. The Illinois Courts Allow Respondents To Retroactively Delete Their Condominium Declaration's Arbitration Provision.

Petitioner Siena at Old Orchard L.L.C. (Siena) built and developed a condominium complex in Skokie, Illinois. App.4. (Petitioner Lennar is Siena's managing member. *Ibid.*) Pursuant to Illinois law, in 2006 Siena recorded a declaration of condominium, established the respondent Condominium Association, and appointed the Association's initial board of directors. App.4, 7-8. The condo declaration included an alternative-dispute-resolution provision, stating that the parties "agree to encourage the amicable resolution of disputes, without the emotional and financial costs of litigation." App.94. They accordingly agreed that "[a]ny dispute" involving the Association or its directors, or Siena or its "affiliates, directors, officers, employees, and agents," "shall first be submitted to mediation and, if not settled ... to binding arbitration." App.98, 100.

This dispute is about alleged construction defects in the complex. By 2007 Siena had sold most of the condo units, and the new unit owners elected new directors for the Association's board. *See* App.4; 765 ILCS 605/18.2(b)(i). In August 2010, the Association's lawyers sent a letter to Lennar asserting a "claim against the developer for certain [alleged] construction defects." App.32-33. Eleven days later, Lennar wrote back denying liability.

The condominium declaration required mediating and arbitrating this construction-defect dispute against Petitioners. Not wanting to do that, Respondents tried to amend the declaration to avoid those obligations. By this time Siena had sold all the condo units it originally owned, and so no longer had a vote on declaration amendments. So in August 2011—a year after the Association informed Petitioners of its claim and more than two years after the cause of action accrued—the Association purported to delete the arbitration provision from the condominium declaration by obtaining a 2/3 vote of unit owners. App.14. After deleting the arbitration provision, the Association filed this suit in 2013—three years after the claim accrued and two years after asserting it—against Siena, Lennar, and Petitioner Larry Keer in Illinois state court, alleging a variety of contract, warranty, fraud, and fiduciary-duty claims. App.4-7.[1]

[1] Keer had been president of the Association at a time before it asserted the claims here. App.4. During his presidency the Association asserted other claims against Lennar, and Keer executed a global settlement and release. App.7. Respondents recognized that the release barred their claims in this suit, so they joined Keer as a defendant in an attempt to void the release. Those issues are not before this Court, and there is no dispute that if Respondents are required to arbitrate their claims against Siena and Lennar, they must arbitrate against Keer as well.

The Illinois appellate courts refused to enforce the arbitration provision. After the trial court dismissed the claims on waiver grounds not pertinent here, App.25, the Illinois Appellate Court reversed in an opinion issued before this Court decided *Kindred Nursing Centers*. The appellate court disagreed with the trial court's waiver ruling but noted that "the Association would still be required to submit its claims to mediation and arbitration ... if not for the fact that, in 2011, the Association amended the declaration to remove [the arbitration agreement] in its entirety." App.39. The court held that the arbitration deletion applied retroactively without discussing the FAA. App.39-47.[2]

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[2] Siena did argue in the Appellate Court that the FAA favors the arbitration clause. While this case was pending, Illinois purported to enact a statute invalidating arbitration agreements for suits by a condo's board of managers against the condo declarant or any non-unit-owner. *See* 765 Ill. Cons. Stat. 605/18.9. Respondents tried to invoke this statute to invalidate the arbitration agreement, and Siena countered that the statute does not apply retroactively and in any event is preempted by the FAA. The Appellate Court did not apply the new §18.9 retroactively and did not consider whether the FAA governs in any other respect. Siena's petition for leave to appeal to the Illinois Supreme Court explained at length why, under the FAA, the Appellate Court should not have permitted such a unilateral *post facto* arbitration deletion as this one.

The Appellate Court also invalidated the Declaration's requirement that Siena consent to any amendment of the dispute-resolution provisions. App.39-47. The court held that this conflicted with Illinois's rule that 2/3 of unit owners may amend the declaration. *Ibid.* That holding is not at issue here.

The Supreme Court of Illinois denied Siena's and Lennar's petition for leave to appeal, without comment. App.1.

REASONS FOR GRANTING CERTIORARI

After the ruling below, Illinois law directly discriminates against arbitration. When a party has the right to unilaterally amend a contract and does so in a way that *favors* arbitration, the Illinois Supreme Court has expressly held that the amendment does not apply to already-existing disputes—especially after the parties' contractual relationship has ended, as was the situation here. More generally, Illinois has never suggested that it allows unilateral, retroactive, after-the-fact contract amendments, nor could it possibly do so in anything other than *de minimis* situations. But the ruling below gives retroactive force to a unilateral attempt by one party to retract its agreement to arbitrate. The FAA does not allow that. Even if Illinois were to create a "slim set" of other supposedly minor unilateral contract amendments that it will apply retroactively, placing arbitration deletions into that narrow category is exactly what this Court prohibited in *Kindred Nursing Centers*.

I. Illinois Has Singled Out An Arbitration Provision For Hostile Treatment.

A. Illinois Refuses to Enforce Nearly Identical Amendments when they Favor Arbitration.

Normally, of course, amending a contract requires the consent of all the parties. But sometimes a statute allows amendment with less than unanimous consent, as Illinois does here. Other times the contract itself allows unilateral amendment.

Illinois has already clarified that such unilateral amendments cannot retroactively *expand* arbitration rights. *Kinkel v. Cingular Wireless LLC* involved a standard cell-phone service contract, under which "Cingular expressly reserved the right to unilaterally modify the terms and conditions of the agreement, at any time, without notice. Plaintiff accepted this condition." 857 N.E.2d 250, 259 (Ill. 2006). The contract also included an arbitration provision with a class waiver. *Id.* at 256-257. Kinkel paid an early termination fee to cancel her service under the contract, then filed a class action "alleging that the ... early termination fee is an illegal penalty" and the class waiver was unconscionable. *Id.* at 255. Because this Court had not yet decided *AT&T Mobility*, many states were still invalidating class waivers as unconscionable. So Cingular, trying to avoid that outcome for its standard arbitration agreement, unilaterally modified it (for all customers) to expand the arbitrable issues and make it more favorable to consumers. *Id.* at 257. For example, Cingular agreed that punitive-damages claims could be arbitrated and also that a successful claimant's attorney's fees would be reimbursed. *Ibid.*

But in Kinkel's case the Supreme Court of Illinois refused to consider the newer, more arbitration-friendly terms. Instead it agreed with the plaintiff "that Cingular should not be allowed to make unilateral *post facto* amendments to its contract to improve its litigation position in this case." *Id.* at 259. The court held that Cingular was "saddled with the consequences of the provision *as drafted*" and could not "compel" the plaintiff to accept different arbitration terms under "a contract that had been terminated many months prior." *Ibid.* The court disclaimed any intent to target arbitration agreements: "the analysis," it claimed, "does not depend on the nature of the contractual provision at issue. One party to a contract may not unilaterally modify a contract term—whether it is an arbitration clause ... or any other term—after the contractual relationship between the parties has ended and the original contract is the subject of a dispute." *Id.* at 260.[3]

Placing *Kinkel* next to the decision below shows that Illinois is not treating arbitration even-handedly. The facts of this case parallel *Kinkel*—except the amendment here suppressed arbitration rather than promoted it. There is no dispute here that the parties' arbitration provision as drafted applies to this case. And there is no dispute that, after Siena ceased being a party to the contract (when it sold its last condo unit) and after this dispute arose, the Association tried "to make unilateral *post facto* amendments to [the] contract to improve its litigation position in this case." *See Kinkel*, 857 N.E.2d at 259. Only one difference between this case and *Kinkel* can explain the difference in outcome: *Kinkel* refused to enforce a pro-arbitration amendment, while the decision below agreed to enforce an anti-arbitration amendment. The FAA does not permit that discriminatory treatment.

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[3] The *Kinkel* court went on to hold that the class waiver was unconscionable and that the FAA allowed that outcome. *Id.* at 260-278. Those holdings likely have been abrogated by this Court's ruling in *AT&T Mobility*. But that does not impair the *Kinkel* holding as to what the terms of the arbitration agreement were, nor have the Illinois courts repudiated that portion of *Kinkel*.

B. Illinois Cannot Plausibly Permit Unilateral *Ex Post* Contract Amendments in Other Contexts.

Nor is there any plausible way to argue that condominium declarations are uniquely amenable to retroactive, unilateral amendment under Illinois law. No state (Illinois included) could allow such amendments—as to condos or any other subject matter—in more than the narrowest set of circumstances. Amendments may be either retroactive or unilateral, but not both.

A contractual amendment may certainly be retroactive if all parties agree to it. For instance, the FAA itself recognizes that parties may agree "to submit to arbitration an existing controversy." 9 U.S.C. § 2. Similarly, there is no problem if parties mutually amend their arbitration agreement (or agree not to enforce it) to allow litigation of a specific, identified controversy.

On the other hand, contract amendments may sometimes be made unilaterally if the law allows it. In such cases the non-consenting party must conform its future conduct to the new terms or else exit the contractual relationship. Here, for instance, if Siena had retained any condo units after the other owners deleted the arbitration provision, it would have no arbitration rights for disputes about its *future* conduct related to those units. Similarly, if the cell-phone customer in *Kinkel* had continued her Cingular service, she would have had to comply prospectively with any changes to the contract that Cingular made.[4]

But no state could possibly allow contractual alterations that are both unilateral *and* retroactive. A party with that power could impose *ex post facto* liability for things the other party had already done; or it could retroactively eliminate a contractual duty it was alleged to have violated; or it could create procedural requirements that would guarantee it victory in existing disputes. Both in Illinois and nationwide, when a contract appears to allow changes that are both unilateral and retroactive, courts either hold that there was no contract at all, since one side could simply undo its obligations,[5] or (more frequently) hold that retroactive changes simply are not allowed.[6]

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[4] In some circumstances, continuing the contractual relationship might even constitute consent to a retroactive change in terms. But that is no longer possible once the contractual relationship has already ended, as it had in *Kinkel* and here.

[5] *E.g., Baker v. Bristol Care, Inc.,* 450 S.W.3d 770, 777 (Mo. 2014).

[6] *E.g., Anthony Marano Co. v. Passoff*, 2012 IL App (1st) 112853-U, 2012 WL 6861752, at *4 ("Illinois cases do not provide for the unilateral modification of compensation terms *retroactively*."); *Avery v. Integrated Healthcare Hldgs., Inc.,* 218 Cal. App. 4th 50, 61 (2013) (if contract allows unilateral changes, covenant of good faith and fair dealing requires they not be retroactive); *Lipson v. Jackson Nat'l Life Ins. Co.,* 2004 WL 163681, at *5 (E.D. Pa. Jan. 8, 2004) ("The Court cannot conclude, as a matter of law, that Jackson National can unilaterally modify the commission percentages on policies that were [already] sold"); *WRB Corp. v. United States*, 183 Ct. Cl. 409, 455 (1968) ("It would obviously be unfair to permit the defendant retroactively and unilaterally to change the provisions of the contract at a later date by amending Federal Specification WW-P-541b.").

These concerns apply just as strongly in the condominium context. Because 2/3 of a condo's unit owners can alter the rights of others under the declaration without the others' consent, it would be nonsensical to allow such alterations to apply retroactively. For instance, although the directors of a condominium association ordinarily owe a fiduciary duty to unit owners, 765 Ill. Cons. Stat. 605/18.4, the declaration may limit that duty to avoiding "willful misconduct." *Kelley v. Astor Investors, Inc.*, 478 N.E.2d 1346, 1348 (Ill. 1985); *see Glickman v. Teglia*, 902 N.E.2d 1256, 1264 (Ill. App. Ct. 2009). But if unit owners vote to delete such an exculpatory clause, surely it can only apply prospectively: unit owners could not wait until a dispute arises with their board, and only *then* delete the clause and sue for non-willful breaches of duty that occurred before the deletion. To give another example, Illinois permits a condo developer to reserve the right in the declaration to add units. 765 ILCS 605/25. If unit owners later vote to delete that right from the declaration, this again could only apply prospectively: unit owners could not delete the reservation *after* the developer had added units, then sue claiming the additions had violated the declaration.

Illinois courts have never suggested that they would allow such strange outcomes. They have allowed condo-declaration amendments to be "retroactive" only in the sense that the declaration may, in the future, prevent an owner from *continuing* a preexisting use of a condo unit. *See Apple II Condo. Ass'n v. Worth Bank & Trust Co.*, 659 N.E.2d 93, 95-97 (Ill. App. Ct. 1995) (amendment could require unit owner to stop leasing unit); *1751 W. Div. Condo. Ass'n v. CB Hldgs.*, 2014 WL

3360116 (Ill. Cir. Ct. May 15, 2014) (amendment could require owner to stop construction of restaurant). In these decisions, the Illinois courts directly considered the timing of when condo-declaration amendments can take effect—and they did not suggest that an amendment could change the rules that governed *past* conduct.

These principles are so obvious that it appears no one has ever questioned them in the context of condominium declarations, and so the Illinois courts have never had to spell them out specifically. But that does not allow Illinois to apply different rules to arbitration agreements. In *Kindred Nursing Centers*, the Kentucky courts applied a clear-statement rule to arbitration, and this Court did not hesitate to conclude that the same rule would not apply to furniture sales or nondisclosure agreements, even though Kentucky had not expressly spelled that out. 137 S. Ct. at 1427 ("[W]ere we in the business of giving legal advice, we would tell the agent not to worry" about entering such transactions). The same is true here: Illinois cannot evade the FAA by treating arbitration agreements so badly that no one has ever proposed any similar treatment for other condo-declaration amendments.

Nor can the arbitration deletion here be justified as a change in the procedures to be "prospectively" used to resolve a preexisting dispute. That would lead to more untenable mischief. For instance, would Illinois allow a condo association to wait until a minority of owners complained about an issue, then amend their declaration to allow only one additional day to file suit about that issue? Or to require that the issue be litigated in some distant forum? Or to require that a losing plaintiff pay the defense's attorneys' fees? Worse yet, would Illinois let a majority of unit owners wait to win a judgment under the declaration, then amend it to prohibit an appeal from that judgment? Surely not.

At the very most, Illinois might allow condo-declaration amendments to alter dispute-resolution procedures for existing controversies in ways that (in Illinois' judgment) would not unduly prejudice one side or the other.[7] For instance, perhaps Illinois would allow an inconsequential change in the contractual limitations period for an existing dispute. Or perhaps Illinois would think it harmless for a declaration amendment to require that existing disputes be litigated in the county where the condominium is located, even if venue otherwise would be proper elsewhere. But categorizing arbitration deletions as this kind of "innocuous" procedural amendment is precisely the problem. If Illinois is distinguishing between supposedly "prejudicial" and "non-prejudicial" procedural changes and placing the loss of arbitration rights in the narrow "non-prejudicial" category, that is exactly what the FAA prohibits—and what this Court warned against in *Kindred Nursing Centers*.

* * *

[7] Illinois applies a similar analysis to determining whether *statutory* amendments apply retroactively. *E.g., Chicago v. Collin,* 302 Ill. 270, 274 (1922) ("[I]t is not competent for the Legislature to give [retroactive] operation to an act where it will affect existing or vested rights.").

In short: Respondents waited until they had a claim against Petitioners and only *then* deleted the arbitration agreement. Because Illinois does not and could not give retroactive force to other contractual amendments of this sort, the FAA does not allow it to enforce Respondents' arbitration deletion, either.

II. The Court Should Consider Summary Reversal Or A GVR In Light Of *Kindred Nursing Centers.*

The decision below misapplies settled FAA principles. Consistent with its approach in similar cases, the Court here may wish to summarily reverse. Alternatively, the Court may wish to grant the petition, vacate the judgment below, and remand for further consideration in light of this Court's more-recent *Kindred Nursing Centers* decision.

This Court takes an active role in supervising state courts' enforcement of the FAA. That is because the Act "is something of an anomaly in the realm of federal legislation: It bestows no federal jurisdiction." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) (citation and editing marks omitted). As a result, "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act, including the Act's national policy favoring arbitration." *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 17 (2012) (per curiam). When a state court decision improperly reflects the old "judicial hostility to arbitration," *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013), only this Court can ensure that the FAA is given its proper priority.

Accordingly, this Court has not hesitated to correct matters when state courts have failed to enforce the FAA, including when a state's anti-arbitration decision contradicts "present well-established law." *Kindred Nursing Ctrs.*, 137 S. Ct. at 1429 (quoting *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015); *see Preston v. Ferrer*, 552 U.S. 346, 354 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687-88 (1996). On several such occasions, this Court has summarily reversed a state court's denial of arbitration. *See Nitro-Lift Techs.*, 568 U.S. 17; *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530 (2012) (per curiam); *KPMG LLP v. Cocchi*, 565 U.S. 18 (2011) (per curiam); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam).

That outcome would be appropriate here. The court below did not engage in any novel application of this Court's FAA precedents, nor did it purport to find a loophole in them. It simply failed to apply them. As a result, this Court should consider summary reversal.

Alternatively, the Court could GVR in light of its *Kindred Nursing Centers* decision, which was released after the Illinois Appellate Court's opinion. In recent years this Court's arbitration-related decisions have routinely been followed by GVRs in other arbitration cases.[8] There is no reason *Kindred Nursing Centers*

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[8] Following its decision in *DIRECTV v. Imburgia*, this Court GVR'ed in *Schumacher Homes of Circleville, Inc. v. Spencer*, 136 S. Ct. 1157 (2016); *Ritz-Carlton Development Co. v. Narayan*, 136 S. Ct. 800 (2016); and *Ritz-Carlton Development Co. v. Nath*, 136 S. Ct. 799 (2016). Following its decision in *Italian Colors*

should be different. That decision focuses the inquiry on the number and nature of other kinds of unilateral contract amendments that Illinois would apply retroactively. As described above, the Illinois courts have not directly engaged in that analysis. Doing so might well affect the decision below. So a GVR also would be appropriate here.

CONCLUSION

The Court should grant a writ of certiorari. It may wish to consider summary reversal, or alternatively vacatur and remand for reconsideration in light of *Kindred Nursing Centers*.

Restaurant, this Court GVR'ed in *CarMax Auto Superstores v. Fowler*, 134 S. Ct. 1277 (2014). And following *AT&T Mobility*, this Court GVR'ed in *Branch Banking & Trust v. Gordon*, 565 U.S. 1031 (2011); *Sonic-Calabasas A, Inc. v. Moreno*, 565 U.S. 973 (2011); *Affiliated Computer Services v. Fensterstock*, 564 U.S. 1001 (2011); *Litman v. Cellco Partnership*, 563 U.S. 971 (2011); *Missouri Title Loans, Inc. v. Brewer*, 563 U.S. 971 (2011); and *Sonic Automotive*, *Inc. v. Watts*, 563 U.S. 971 (2011).

Respectfully submitted,

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