No. 15-406

IN THE

Supreme Court of the United States

THE RITZ-CARLTON DEVELOPMENT COMPANY, INC.,

Petitioner,

v.

KRISHNA NARAYAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF HOMEBUILDERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Cited Authorities

Page

Page

STATUTES AND OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch.

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amici curiae*'s intent to file and consented to the filing of this brief.

less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The National Association of Home Builders (NAHB) is a Washington, DC-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's missions is to provide and expand opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 140,000 members are home builders or remodelers and its builder members construct about 80 percent of the new homes each year in the United States. NAHB and its members work for the American dream of home ownership, as well as for the development of housing that creates vibrant and affordable communities. NAHB is a vigilant advocate in the Nation's courts, and frequently participates as a party or *amicus curiae* to safeguard the rights of its members. *See, e.g.*, *Horne v. USDA*, 135 S. Ct. 2419 (2015); *Sackett v. EPA*, 132 S. Ct. 1367 (2012).

The ability to operate effectively in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. Predictability is of paramount importance as it allows builders to accurately estimate and account for costs in building homes. Further, the more confidence a builder has in pre- and post-construction costs, the more cost-effective the home building process as well as the

builder's ability to pass those corresponding savings through to homeowners. Litigation, and its attendant costs in time and money, is anathema to predictability. Employing arbitration agreements allows builders and homebuyers to avoid litigation and conserve resources, which is beneficial to both sides. Uniform, consistent application of the FAA is essential to securing these benefits.

Amici thus have a strong interest in the faithful and consistent application of this Court's FAA jurisprudence, in particular, the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). And because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012), *amici* have a strong interest in ensuring the state courts' uniform, consistent, and accurate application of the FAA as interpreted by this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

In considering whether to enforce an arbitration clause, the Hawaii Supreme Court had before it a home purchase contract composed of multiple documents: an arbitration clause that was "unambiguous on its face" and contained in a "Declaration" that was undisputedly "binding on [Respondents]," App. 32a, a purchase agreement that contained a forum-selection clause, and a "public report" that explained that the various contract documents "are intended to be, and in most cases are, enforceable in a court of law," App. 14a-15a.

Consistent with one of the "cardinal principle[s] of contract construction," these contract terms easily could have been harmonized "to give effect to all provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). That is precisely what the intermediate appellate court did in concluding that the arbitration clause was enforceable. App. 34a-36a.

Moreover, even if a reviewing court were to have found the various contract terms ambiguous, then it should have resolved that ambiguity "in favor of arbitration," consistent with "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

But the Hawaii Supreme Court did neither. Without making any effort to harmonize these contractual terms, it simply declared them ambiguous as to arbitration and held the arbitration clause unenforceable, based upon a state-law rule that arbitration agreements "must be unambiguous" in order to be enforceable. App. 13a; *see also* App. 15a ("[W]e hold that the arbitration provision contained in the condominium declaration is unenforceable because the terms of the various condominium documents are ambiguous with respect to [parties'] intent to arbitrate.").

This holding contravenes two fundamental tenets of the Federal Arbitration Act ("FAA"). *First*, it "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996), in two different—but equally impermissible—ways. It does so by applying a special rule applicable only to arbitration—

that makes "ambiguous arbitration agreements *per se* unenforceable," Pet. 10; and it does so by departing from a rule of general applicability in such a way as to disfavor arbitration—the rule that courts should avoid "interpreting a contract such that any provision is rendered meaningless," *Stanford Carr Dev. Corp. v. Unity House, Inc.*, 141 P.3d 459, 470 (Haw. 2006). By disfavoring arbitration, the court below ran afoul of Section 2 of the FAA, which preempts any state-law rule that "places arbitration agreements in a class apart from 'any contract' and singularly limits their validity." *Doctor's Associates*, 517 U.S. at 688 (quoting 9 U.S.C. § 2).

Second, the ruling below runs directly counter to the "national policy favoring arbitration," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), by construing ambiguity *against*, rather than "in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24.

By singling out arbitration agreements for disfavored treatment and applying a presumption *against* arbitrability, the Hawaii Supreme Court exhibited the very "judicial hostility to arbitration" that the FAA was intended to defeat. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Indeed, the hostility directed toward arbitration in this case is even less disguised than in *DirecTV v. Imburgia* (No. 14-462). In that case, a state appellate court flatly ignored the plain terms of a contract requiring arbitration and then purported to apply the doctrine of *contra proferentem* to resolve that ambiguity. As the Chamber of Commerce and other *amici* explained, while that decision purported to apply general contract principles, it so disregarded the plain terms of the arbitration agreement that it could only be explained

by hostility toward arbitration. *See* Brief of Chamber of Commerce of the United States of America et al., *DirecTV, Inc. v. Imburgia*, No. 14-462, at 4, 14 (filed June 5, 2015). In this case, the Hawaii Supreme Court also ignored the plain terms of a contract requiring arbitration, but then refused to enforce the agreement based on rule that *facially* disfavored arbitration. Thus, the decision did not even adopt the pretense of complying with the FAA. Because "state supreme courts['] adhere[nce] to a correct interpretation of the [FAA]" is "a matter of great importance," *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012), this judicial hostility to arbitration warrants summary reversal, *see, e.g.*, *id.* at 501, 503; *Marmet Health Care Ctr. Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam). At a minimum, this petition should be held pending the Court's decision in *DirecTV*.

ARGUMENT

I. The Decision Below Contravenes Two Fundamental Principles Of The Court's FAA Jurisprudence.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974), by enacting the FAA, thereby codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on an equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the

FAA in response to widespread judicial hostility to arbitration.") (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) ("[The FAA's] 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.").

The heart of the FAA is Section 2, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), which makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry v. Thomas*, 482 U.S. 483, 489 (1987). "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24; *see also AT&T Mobility LLC*, 131 S. Ct. at 1749 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration."). It "create[s] a body of federal substantive law of arbitrability," *id.*, the central mandate of which requires arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). In particular, that substantive body of federal arbitration law (1) bars courts from applying rules that single out arbitration agreements for disfavored treatment and (2) requires that courts construe ambiguities in arbitration agreements in favor of arbitration. The decision below conflicts with both of these requirements.

A. The Decision Below Singles Out Arbitration Agreements For Disfavored Treatment In Contravention Of The FAA.

Section 2 of the FAA preempts contrary state law, *see Preston v. Ferrer,* 552 U.S. 346, 353 (2008), except to the extent preserved by its savings clause. The savings clause preserves state law only if it serves as a ground "for the revocation of *any contract*." 9 U.S.C. § 2. The "any contract" limitation is a reference to state laws of general applicability. In other words, any state-law rule that "singl[es] out arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996), is preempted by the FAA.

This limitation on Section 2's savings clause operates in two ways. First, it prevents states from adopting novel laws or rules that apply only to arbitration agreements. "A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with [the text of Section 2]." *Perry v. Thomas,* 482 U.S. 483, 492 n.9 (1987); *see also Doctor's Assocs.,* 517 U.S. at 687 ("Courts may not … invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.") (emphasis in original); *Oblix, Inc. v. Winiecki,* 374 F.3d 488, 492 (7th Cir. 2004) ("[N]o state can apply to arbitration (when governed by the Federal Arbitration Act) any novel rule.").

Second, it bars the manipulation of generally applicable contract defenses in a "fashion that disfavors arbitration." *AT&T Mobility v Concepcion LLC*, 131 S. Ct. 1740, 1747 (2012); *see also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC,* 379 F.3d 159, 167 (5th Cir.

2004) ("[S]tate courts are not permitted to employ those general doctrines in ways that subject arbitration clauses to special scrutiny."). Section 2 thus embodies a "principle of rigorous equality"—"antagonism toward arbitration … howsoever manifested in state law, is preempted." *Secs. Indus. Ass'n v. Connolly,* 883 F.2d 1114, 1119-20 (1st Cir. 1989).

The decision below runs afoul of the "any contract" limitation in both respects. On its face, it imposes a "special rule that disadvantages arbitration," Pet. 11, rendering arbitration agreements unenforceable unless they are "unambiguous as to the intent to submit disputes or controversies to arbitration," App. 13a. As Petitioners explain, by virtue of this rule, "Hawaii law makes ambiguous arbitration agreements *per se* unenforceable." Pet. 10. This is certainly not how Hawaii treats ambiguities in contracts outside of the arbitration agreements. Normally, "[w]hen an ambiguity exists so that there is some doubt as to the intent of the parties, intent is a question for the trier of fact." *Found. Int'l, Inc. v. E.T. Ige Constr., Inc.*, 78 P.3d 23, 33 (Haw. 2003). Because this "special rule" "takes its meaning precisely from the fact that a contract to arbitrate is at issue," it "does not comport with [the text of Section 2]." *Perry,* 482 U.S. at 492 n.9.

Adding insult to injury, the decision below departed from a rule of general applicability in such a way as to disfavor arbitration. Typically, Hawaii courts will avoid "interpreting a contract such that any provision is rendered meaningless." *Stanford Carr Dev. Corp. v. Unity House, Inc.*, 141 P.3d 459, 470 (Haw. 2006). More particularly, Hawaii courts will not construe a forum selection clause to destroy arbitral rights. Indeed, as

Petitioners note, in recognition of the judicial role in administering arbitration proceedings, courts often harmonize arbitration agreements and forum-selection clauses such that the forum-selection clause will determine the forum for seeking vacatur or confirmation of an arbitral award. Pet. 13.[2]

Yet here, when faced with what it considered competing language in three contract clauses, the Hawaii Supreme Court simply threw up its hands and refused to give effect to the arbitration agreement. Instead of "giv[ing] effect to all of the [contractual] provisions and render[ing] them consistent with each other," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995), the court "simply read the arbitration clause out of the contract altogether," Pet. 14.

As Petitioners put it, the Hawaii Supreme Court "both announced a rule that by its terms applies only to arbitration agreements" and "disregard[ed] [a] generally applicable" state-law rule. Pet. 16. This "singl[ing] out [of] arbitration provisions for suspect status," *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996), is precisely the sort of "judicial hostility to arbitration agreements" that the FAA was intended to eliminate, *Scherk*, 417 U.S. at 510; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985). This "antagonism toward arbitration … is preempted." *Secs. Indus. Ass'n,* 883 F.2d at 1119-20.

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2. Importantly, the FAA is designed so that the courts have an important role in the administration of arbitration proceedings. Under the FAA, courts assist with the appointment of arbitrators at the outset, 9 U.S.C. § 5, compel attendance of parties during arbitration proceedings, *id.* § 7, and handle requests to confirm or vacate arbitral awards at the conclusion thereof, *id.* §§ 9, 10.

B. The Decision Below Runs Afoul Of The Liberal Federal Policy In Favor Of Arbitration.

The "federal substantive law of arbitrability," *Moses H. Cone*, 460 U.S. at 24, applies equally in federal and state courts, *see Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), as does the "liberal federal policy favoring arbitration agreements," *Perry*, 482 U.S. at 489. In the Hawaii Supreme Court just as much as any federal court, "any doubts concerning the scope of arbitrable issues [are] resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25.

The court below ran afoul of this "presumption of arbitrability." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 298 (2010). Before the court was an arbitration agreement that was unambiguous in isolation, but that the court found ambiguous in light of related contract documents that included a forum-selection clause and a provision stating that all the documents "are intended to be, and in most cases are, enforceable in a court of law." App. 15a. Setting aside the fact that the various parts of the contract could have been harmonized, App. 32a-34a, after concluding that the agreement was ambiguous with regard to arbitration, the court should have resolved this ambiguity in favor of arbitration, consistent with the federal presumption of arbitrability. But the Hawaii Supreme Court did the opposite. It held that this ambiguity rendered the arbitration agreement unenforceable. App. 14a ("The purported agreement to arbitrate is unenforceable because it is ambiguous when taken together with the terms of the purchase agreements and the public report.").

The Hawaii court effectively applied a presumption *against* arbitration that cannot be squared with the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985). In so doing, the court exhibited precisely the "judicial hostility to arbitration agreements" that the FAA was intended to eliminate, *Scherk*, 417 U.S. at 510; *Dean Witter Reynolds,* 470 U.S. at 219-20.

II. Because State-Court Fidelity To Federal Arbitration Law Is Of Paramount Importance, Summary Reversal Is Warranted.

When state courts fail to apply this Courts' precedents, the Court has not hesitated to intervene. *See, e.g.*, *Marmet Health*, 132 S. Ct. at 1202 ("When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." (citing U.S. Const., Art. VI, cl. 2.)). Unlike other areas of federal law, the FAA is unique in its reliance on state-court enforcement. Because of the FAA's "nonjurisdictional cast," *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009), "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration." *Nitro-Lift*, 133 S. Ct. at 501. Because state supreme court decisions often represent the final say in the enforcement of arbitration agreements, this Court's superintendence of the state courts is of utmost importance in the context of this Court's FAA jurisprudence. *See Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501 (2012) ("State courts rather than federal courts are most frequently called upon to apply the [FAA]. It is a matter of great importance,

therefore, that state supreme courts adhere to a correct interpretation of the legislation.").

Indeed, the Court has ordered summary reversal of several recent state court decisions that failed to heed its FAA precedents. *See, e.g.*, *id.* at 501, 503 (reversing Oklahoma Supreme Court's decision that "disregard[ed] this Court's precedents on the FAA" and severability); *Marmet Health Care*, 132 S. Ct. at 1202 (reversing a decision of the West Virginia Supreme Court of Appeals for "misreading and disregarding the precedents of this Court interpreting the FAA"); *KPMG*, 132 S. Ct. at 26 (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds*, 470 U.S. at 213); *Citizens Bank*, 539 U.S. at 56-58 (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*); *see also DirecTV, Inc. v. Imburgia*, No. 14-462, Tr. of Oral Arg. at 50:8-17 (Oct. 6, 2015) (Breyer, J.) (discussing risk of state court noncompliance with this Court's decisions).

This is one of those cases in which the Court's intervention is needed. The relevant law "is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman et al., Supreme Court Practice 350 (9th ed. 2007) (quoting *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting)); *see also id.* at 352 ("[T]he Court has shown no reluctance to reverse summarily a state court decision found to be clearly erroneous.").

Moreover, summary reversal is especially warranted given the judicial hostility to arbitration exhibited by the court below. As explained above, the Hawaii Supreme Court singled out arbitration agreements for disfavored treatment and applied a presumption *against* arbitrability. The decision below thus flies in the face of the FAA's "principle of rigorous equality," *Secs. Indus. Ass'n,* 883 F.2d at 1119-20, and its presumption in favor of arbitrability, *Granite Rock*, 561 U.S. at 298.

This judicial hostility to arbitration has a discernible negative impact on the FAA's goals. Because a "prime objective [of arbitration] is to achieve 'streamlined proceedings and expeditious results,'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008), Congress instructed the courts "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Yet despite a binding arbitration agreement in this case, the parties' dispute has stalled in the courts for more than three years, with no end in sight.

Moreover, if left uncorrected, the decision below threatens to undermine the enforcement of arbitration agreements throughout the State of Hawaii. Indeed, the Hawaii courts' presumption against arbitrability puts every arbitration clause in a Hawaii contract at risk of nonenforcement. And, as Petitioner notes, it "open[s] the door to conflicting interpretations of similar (or identical) contracts, in a manner that undermines the national policy favoring arbitration." Pet. 23.

Worse still, decisions like the one below, if left unchecked, allow judicial hostility to arbitration to persist

elsewhere and may green-light other state courts to engage in similar hostility against the FAA. This would upset the uniform, faithful application of the FAA that *amici* and their members have come to depend on.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for certiorari and summarily reverse the judgment of the Supreme Court of Hawaii. At a minimum, this petition should be held pending the Court's decision in *DirecTV*.

Respectfully submitted,

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