No. 13-97

In The
Supreme Court of the United States

GENEVA-ROTH VENTURES, INC., d/b/a LOAN POINT USA,
Petitioner,

v.

TIFFANY KELKER

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts Montana's rule subjecting arbitration provisions in standard-form contracts to a heightened standard of consent that does not apply to other terms in form contracts.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The

[1] No party's counsel authored any part of this brief. Nor did any party, any party's counsel, or any other person other than *amicus curiae*, its members, and its counsel make any monetary contribution intended to fund this brief's preparation or submission. Counsel of record for all parties received timely notice of and consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than 3,000,000 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.

For that reason, the Chamber regularly files *amicus curiae* briefs in cases before this Court that raise issues of vital concern to the Nation's business community, including in particular cases involving the uniform and evenhanded enforcement 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). That issue is of signal importance because many members of the Chamber rely upon arbitration as a means of resolving business disputes promptly and efficiently, while avoiding the costs, burdens, and delays often associated with traditional litigation. Since questions of arbitration enforcement involving the Chamber's members arise in all 50 States, the uniformity, consistency, and predictability afforded by the Federal Arbitration Act, 9 U.S.C. §§ 1-16, are vital to ensuring the non-discriminatory enforcement of arbitration agreements.

SUMMARY OF ARGUMENT

Arbitration agreements are meaningless if they are not enforceable. That is why Congress passed the Federal Arbitration Act specifically to combat the

judicial hostility to arbitration that had long stunted the enforceability of arbitration agreements. In keeping with the FAA's plain text and Congress's purpose, this Court has repeatedly held that the FAA broadly preempts state laws that would bar the enforcement of arbitration agreements.

Yet hostility to arbitration remains. Time and again, this Court has been compelled to overturn efforts by state courts to subject arbitration agreements to disproportionate and targeted procedural burdens and substantive contract-law obstacles. This Court's recent decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), in particular, held with unflinching clarity that state courts cannot adopt rules that disfavor arbitration agreements under state law doctrines of unconscionability and unenforceability.

Notwithstanding the clarity and frequency of this Court's direction, the Montana Supreme Court has now interposed a distinct procedural gauntlet that arbitration agreements in standard-form contracts must run before Montana courts will respect the parties' contractual agreement to arbitrate. That holding is in the teeth of this Court's precedent, including not just *Concepcion* and *Marmet*, but also the Court's decision just two months ago in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

The Montana Supreme Court tried to navigate around those decisions by claiming a particularized

need to envelop the surrender of rights to judicial process with an added layer of protection. But that purported distinction confesses the problem: the decision to forgo those judicial processes *is* the very decision to arbitrate that the FAA protects. Thus the Montana Supreme Court's professed solicitude for rights enjoyed in the judicial process is nothing more than anti-arbitration hostility in sheep's clothing.

This Court's prompt review of that decision is imperative. As petitioner notes, the Montana Supreme Court's decision irreconcilably conflicts not only with this Court's precedent, but also with the law of the Ninth Circuit interpreting the *identical* Montana rule, and the arbitration enforcement decisions of other circuits. A central feature of the Federal Arbitration Act is to ensure the uniform, consistent, and predictable enforceability of arbitration agreements across the Nation, so that businesses and others can plan their activities in reliance on judicial respect for their dispute-resolution procedures. The Montana Supreme Court's decision now causes the FAA's protections to turn on and off as state borders are crossed, and even as state courthouses are exited and federal courthouses are entered.

This Court's review and reversal is also needed because, unfortunately, the Montana Supreme Court is not alone in its hostility to and distinctive burdening of arbitration agreements. Other courts are following suit, leaving this Court's intervention as the only remaining avenue for enforcing the stable and uniform protection of arbitration agreements that Congress intended in the FAA.

ARGUMENT

THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW DIRECTLY COUNTERMANDS THIS COURT'S PRECEDENT.

A. This Court Has Repeatedly Held That The FAA Preempts State Laws That Disfavor Or Distinctively Burden Arbitration.

The Montana Supreme Court's imposition of elaborate preconditions to the enforcement of arbitration agreements defies both the plain text of the Federal Arbitration Act and an array of on-point precedent from this Court.

The FAA makes an agreement to arbitrate "valid, irrevocable, and enforceable" as a matter of federal law, 9 U.S.C. § 2, and thereby "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution," *Preston v. Ferrer*, 552 U.S. 346, 349 (2008). Of most relevance here, Section 2 of the FAA specifically directs that arbitration agreements must be enforced unless they contravene "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That mandate requires that arbitration agreements be put on an even footing with all other contracts and explicitly prohibits the imposition of "prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

This Court has recognized that the Act's "principal purpose" is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). To that end, the Act has broad preemptive force, supplying "federal substantive law" of arbitration that "appl[ies] in state and federal courts." *Southland Corp.* v. *Keating*, 465 U.S. 1, 11 (1984). The FAA thus requires state courts to enforce arbitration agreements "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Indeed, Congress enacted the Act specifically to combat "judicial hostility to arbitration agreements" in the state and federal courts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

This Court has repeatedly held that the FAA's command of equal contractual treatment for arbitration agreements means exactly what it says, striking down a variety of state-law barriers designed to limit the enforceability of arbitration agreements. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011), the Court held that the FAA bars state laws that condition the enforcement of arbitration agreements on the availability of class-wide arbitration procedures. The Court explained that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

Concepcion also specifically rejected the argument that class procedures must remain available because some claims may be too small to be worth pursuing on an individual basis. 131 S. Ct. at 1753. Under the FAA, the Court explained, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Id.* The Court thus concluded that a state court's refusal to enforce an arbitration agreement on the ground that the agreement does not allow class actions is impermissible because that outcome "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" to eliminate preconditions to arbitration agreements that are not imposed on other contracts. *Id.* (internal quotation marks and citation omitted).

This Court reiterated that direction just last Term in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), holding that the FAA precludes courts from invalidating a contractual waiver of class arbitration on the ground that the cost of pursing single-plaintiff arbitration of a federal statutory claim exceeds the potential damages award, *id.* at 2309.

Similarly, in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), this Court summarily reversed West Virginia's "categorical rule prohibiting arbitration of a particular type of claim," *id.* at 1204. *Marmet* explained that such an absolute bar to the arbitration of certain types of claims was flatly "contrary to the terms and coverage of the FAA." *Id.*

In short, this Court's cases repeatedly and consistently have held that the FAA straightforwardly "preclude[s] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Casarotto*, 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). And that foundational principle is what the Montana Supreme Court's decision upends.

B. Review Is Necessary Because The Montana Supreme Court's Decision Is In Irreconcilable Conflict With This Court's And Circuit Precedent.

As the petition explains (Pet. 16-27), the Montana Supreme Court's rule that a decision to forgo the litigation process in favor of arbitration is subject to special scrutiny and heightened notice requirements defies the FAA's plain-text command that arbitration agreements must be enforced unless they run afoul of already existing rules applied evenhandedly to the revocation of "any contract." 9 U.S.C. § 2. The labyrinth of specialized showings that the state supreme court crafted as a precondition to arbitration targets, by its very terms, not "any contract" but only those contracts agreeing to forgo judicial resolution of a dispute—which is the very essence of an arbitration agreement.

Because the Montana Supreme Court formulated a special obstacle course just for agreements to eschew litigation, the rule transgresses this Court's extensive precedent

enforcing Section 2's command of equal treatment and respect for arbitration agreements. *Concepcion* was explicit that courts may not interpose defenses that "derive their meaning from the fact that an agreement to arbitrate" rather than some other type of agreement "is at issue." 131 S. Ct. at 1746; *see also, e.g., Marmet*, 132 S. Ct. at 1204 (courts may not enforce a "categorical rule prohibiting arbitration of a particular type of claim"); *Casarotto*, 517 U.S. at 687 (Montana rule struck down because it "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally").

The Montana Supreme Court's explanation that it was applying a special rule protecting the right to judicial process confirms, rather than redeems, the error. Adopting rules to enforce special solicitude for the judicial form of dispute resolution is simply hostility to arbitration by another name. A rule that serves no purpose other than to make it harder for individuals to forgo litigation strikes at the very heart of the arbitral choice and isolates that one particular category of contracts for suspect treatment. It is precisely because the rule "requir[es] greater information or choice in the making of agreements to arbitrate than in other contracts" that it "is preempted." *Casarotto*, 517 U.S. at 687 (quoting 2 I. Macneil, R. Speidel, T. Stipanowich, & G. Shell, FEDERAL ARBITRATION LAW § 19.1.1, pp. 19:4-19:5 (1995) (quotation marks omitted)).

Accordingly, this Court's intervention is imperative. The Montana Supreme Court's decision conflicts directly with the Ninth Circuit's decision in

Mortensen v. Bresnan Communications, LLC, No. 11–35823, 2013 WL 3491415 (9th Cir. July 15, 2013), holding that Montana's exact same heightened consent requirements violate the FAA. The enforceability of arbitration agreements should not turn entirely on the happenstance of which courthouse—federal or state—a case arises in.

C. This Court's Review Is Critical To Stanch A Continuing Pattern Of Resistance To The FAA And This Court's Precedents In The Guise Of Unconscionability Rules.

The FAA is meant to establish a single, uniform, national rule of evenhanded enforcement for arbitration agreements, and this Court's decisions have consistently given effect to that legislative judgment. In reliance on the FAA's promise, Chamber members have structured millions of contractual relationships with customers, employees, vendors, and others around the enforceability of arbitration agreements. Those agreements are intended to avoid costly, time-consuming, and potentially procedurally exhausting litigation. But the effectiveness and efficiency of such agreements are directly tied to the consistency and predictability of their enforcement.

Decisions like that of the Montana Supreme Court selectively burdening contractual decisions to arbitrate drastically impair the enforceability of arbitration agreements used by Chamber members and strip arbitral agreements of the stability, predictability, and uniformity in operation that are

critical to contractual and business decisionmaking. Furthermore, when courts treat arbitration agreements as suspect, then parties inevitably become embroiled in "preliminary litigat[ion]" over enforceability that undermines the central objective of arbitration: the "speedy resolution" of disputes. *American Express*, 133 S. Ct. at 2312.

The starkness of the Montana Supreme Court's transgression of precedent and the irreconcilable conflicts in the law it has created (*see* Pet. 28-30), by themselves, warrant this Court's grant of certiorari. But, unfortunately the Montana decision does not stand alone. Too many courts still continue to contravene the commands of the FAA and this Court's precedent by adopting arbitration-hostile contracting rules in the guise of unconscionability principles. Accordingly, this Court's prompt intervention is necessary to quell a pattern of decisions that once again threatens to turn the FAA into a patchwork quilt of disparate enforceability rules.

As one commentator found based on an extensive survey of unconscionability litigation from 1990 to 2008, the annual number of *non-arbitration* unconscionability cases remained stable, while the annual number of *arbitration* cases "expanded rather dramatically—from 1 or 2 at most through 1996, up to an average of 38 from the years 2003 through 2007, and up to 115 in 2008." Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622 (2009). Similarly, the number of non-arbitration cases in which an

unconscionability claim was sustained during that period "remained remarkably constant at *** never more than half a dozen per year." *Id.* at 622-623. In telling contrast, the number of unconscionability cases striking down arbitration clauses skyrocketed to 40% in 2007—"81 out of a total of 191" cases. *Id.* at 623 n.70. Worse, the number of unconscionability cases involving arbitration provisions tripled in 2008, "from 41 in 2007 to 115 in 2008," and in 19 of those cases, the court struck the arbitration clause. *Id.*

This Court's intervening decisions in *Concepcion*, *Marmet*, and *American Express* have now limited the ability of courts to invalidate arbitration agreements through the invocation of unconscionability doctrines, particularly when hostility to class-action waivers is at issue. And in the Chamber's experience, many state courts have heeded this Court's precedents supporting the enforceability of arbitration agreements. But, as the Montana decision here and its predecessors (*see* Pet. 30-35) attest and a survey of recent decisional law confirms, not all state courts are hewing to this Court's precedent. That is why it is vital that this Court again step in.

1. In three decisions handed down since *Concepcion*, intermediate California appellate courts have continued to enforce rules hostile to arbitration that are foreclosed by the FAA and precedent. The history of this Court's superintendence of California anti-arbitration rules dates back at least to the California state legislature's effort to exempt claims under the State's Franchise Investment Law from arbitration. The California state courts sustained

those laws, *Keating v. Superior Court*, 645 P.2d 1192, 1210 (Cal. 1982), but this Court reversed in *Southland*, 465 U.S. at 10.

When the California legislature later exempted certain wage-collection claims under the California Labor Code from arbitration, the California state courts again upheld the law, necessitating this Court's intervention and reversal in *Perry v. Thomas*, 482 U.S. 483, 491 (1987). And yet again in *Preston*, 552 U.S. at 359, this Court stepped in to overrule another California state court decision and to make clear that the State could not preclude arbitration by vesting exclusive jurisdiction over certain claims in an administrative agency.

Most recently, in *Concepcion*, this Court overturned a California Supreme Court decision holding that the FAA did not preempt California's rule disallowing class-action waivers in arbitration agreements. *Concepcion*, 131 S. Ct. at 1753 (overturning *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

Despite this Court's line of decisions reversing California state court decisions that were incompatible with the FAA, California courts today continue to issue rulings that perpetuate that pattern of selective hostility to arbitration agreements.

Earlier this year, for example, a California appellate court in *Brown v. Superior Court*, 157 Cal. Rptr. 3d 779 (Ct. App. 2013), adopted a reading of the FAA that flies in the face of *Concepcion*. The court there addressed whether the FAA "permits arbitration agreements to override" an employee's

right, under the California Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.*, to bring a representative action against an employer on behalf of other employees, *id.* at 781. Such Private Attorney General Act claims share with class actions the essential feature that they are litigated by a representative employee on behalf of others. *See Arias v. Superior Court*, 209 P.3d 923, 930 (Cal. 2009) (claims under the Act allow "an 'aggrieved employee' [to] bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations") (citation omitted).

The plaintiff employees in *Brown* signed their employer's dispute resolution plan, in which they "waive[d] any right they may otherwise have to pursue, file, participate in, or be represented in Disputes brought in any court on a class basis or as a collective action or representative action," and instead contracted to submit "'[a]ll Disputes'" to "'mediat[ion] and arbitrat[ion] as individual claims.'" *Brown*, 157 Cal. Rptr. 3d at 782 (quoting Plan). Under this Court's precedents, that class action waiver should have been enforced. There is no viable basis for distinguishing *Concepcion*.

The California Court of Appeal nevertheless invalidated the class action waiver. *Brown*, 157 Cal. Rptr. 3d at 791. The court ruled that, even if a Private Attorney General Act "claim may be effectively prosecuted in the arbitral forum, it must proceed as a representative action, if at all, because the representative aspect is intrinsic to the claim." *Id.* Declaring that the "[w]aiver of the right to

pursue a representative [Private Attorney General Act] action (in court or in arbitration) *** amounts to the waiver of a right established for a public reason and effectively exempts the employer from responsibility for its violation of the law[,]" the court concluded that the class action waiver was unenforceable. *Id.* at 792.

In the same vein, another California intermediate court recently held post-*Concepcion* that the Private Attorney General Act rendered a class-action waiver in an arbitration clause unenforceable. *Franco v. Arakelian Enters., Inc.*, 149 Cal. Rptr. 3d 530, 570 (Ct. App. 2012). The court there held that *Concepcion* did not apply because the plaintiff "lack[ed] the means" to pursue his claim individually. *Id.* And since the plaintiff could not afford to litigate the action as an individual claim, the court deemed his case to be "not viable in either [a litigation or arbitration] forum unless it can be brought as a class action." *Id.* (emphasis omitted). On that basis, the court held that the collective action waiver could not be enforced. *Id.* at 574.

Brown and *Franco* defy *Concepcion*, which flatly rejected the notion that States may prohibit the individual arbitration "envisioned" and protected "by the FAA" just because claims "might otherwise slip through the legal system" without class-action procedures. 131 S. Ct. at 1753. They also run directly counter to *American Express*, which emphasized that "the individual suit that was considered adequate to assure 'effective vindication' of a [] right before adoption of" alternative procedures "[does] not suddenly become 'ineffective vindication'

upon their adoption." *American Express*, 133 S. Ct. at 2311.

Thus, taken together, *American Express* and *Concepcion* expose the anti-arbitration faults in *Brown* and *Franco*. In both decisions, California courts refused to enforce an arbitration agreement solely on the ground that what was deemed to be a non-arbitral mechanism—a judicial collective action—was the only way to enforce the law. The FAA and this Court's precedent foreclose reliance on such a rationale.

Brown and *Franco* highlight the persisting and recurring problem of state courts adopting discriminatory rules against arbitration agreements.[2] But this anti-arbitration strain continues in California outside the context of the Private Attorney

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[2] *Franco* is on review by the California Supreme Court, *Franco v. Arakelian Enters., Inc.*, 294 P.3d 74, 74 (Cal. 2013) (granting review), and a petition for review in *Brown* is pending, *see* Docket, *Brown v. Superior Court* (*Morgan Tire & Auto*), No. S211962 (Cal.) (petition for review filed July 11, 2013). Notably, the California Supreme Court is also reviewing an appellate court decision that applied *Concepcion* faithfully in a Private Attorney General Act case. *See Iskanian v. CLS Transp. L.A., LLC*, 142 Cal. Rptr. 3d 372, 381, 385 (Ct. App. 2012) ("Following *Concepcion*, the public policy reasons underpinning the PAGA do not allow a court to disregard a binding arbitration agreement[,]" and *Concepcion* required "enforcing the arbitration agreement according to its terms."), *review granted*, No. S204032 (Sept. 19, 2012). Summary reversal of the Montana decision here would strongly confirm for lower courts the need to respect arbitration agreements as the FAA and this Court's precedent require.

General Act, as well. In a recent employment discrimination decision, *Harris v. Bingham McCutchen*, 154 Cal. Rptr. 3d 843 (Ct. App. 2013), a California court of appeal refused to enforce a clause that required arbitration of "'any legal disputes'" between the employee and the employer, *id.* at 844 (applying Massachusetts law). The asserted basis of the court's decision was a Massachusetts doctrine requiring that "agreements to arbitrate statutory discrimination [claims] be in clear and unmistakable terms." *Id.* at 846. The problem is that giving the benefit of doubt to litigation over arbitration when construing an arbitration clause violates the holding of *Moses H. Cone* that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24–25 (1983).

2. Of like kind to those California decisions is the ruling of the West Virginia Supreme Court of Appeal last year in *Brown v. Genesis Healthcare Corporation*, 729 S.E.2d 217 (W. Va. 2012) ("*Brown II*").

By way of background, the West Virginia court first ruled in *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011) ("*Brown I*"), that arbitration clauses "adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning negligence" as "a matter of public policy under West Virginia law," *id.* at 292. "Alternatively," the court found the arbitration clauses at issue "unconscionable and unenforceable against the

plaintiffs" "as a matter of law," stating that they were "beyond the reasonable expectations of an ordinary person *** being admitted, or admitting a loved one, to a nursing home." *Id.* at 292-294. In holding that the FAA did not preempt West Virginia law, the court said that the West Virginia "Constitution recognizes that factual disputes should be decided by juries of lay citizens rather than paid, professional fact-finders (arbitrators) who may be more interested in their fees than the disputes at hand." *Id.* at 271 (emphasis omitted). The court relied on state precedent requiring that the waiver of a constitutional right must be "'based on an informed and knowing decision.'" *Id.* at 271 n.31 (citation omitted). As for this Court's FAA precedents, *Brown I* described them as "tendentious" and "created from whole cloth." *Id.* at 278-279.

In *Marmet*, this Court summarily reversed *Brown I*, holding that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes [was] a categorical rule prohibiting arbitration of a particular type of claim" that ran directly "contrary" to the FAA. *Marmet*, 132 S. Ct. at 1203-1204 (citing *Concepcion*, 131 S. Ct. at 1747). Finding it "unclear" whether *Brown I*'s "alternative" holding on unconscionability was "influenced by" that facially invalid, categorical rule, this Court remanded for the West Virginia court to consider whether the arbitration clauses were "unenforceable under state common law principles that," the Court stressed, "are not specific to arbitration and pre-empted by the FAA." *Id.* at 1204.

On remand, the West Virginia court adopted a crabbed reading of *Marmet*. The court declared that all *Marmet* did was overrule that part of *Brown I* that "questioned whether the FAA applies to personal injury or wrongful death actions." 729 S.E.2d at 222. Because *Marmet* purportedly "did not discuss any other portion of *Brown I*," the court said it had no need to change anything in *Brown I*'s explication of West Virginia's doctrine of unconscionability. *Id*. at 222-223.[3]

Applying the *Brown I* unconscionability doctrine, the court in *Brown II* once again singled out "arbitration of a particular type of claim" for special restrictions, just as it had in *Brown I* and just as this Court prohibited in *Marmet*, 132 S. Ct. at 1203. In particular, the court repeated its *Brown I* determination that "'[t]he process of signing paperwork for medical care—specifically, a contract for admission to a nursing home—is often fraught with urgency, confusion, and stress.'" *Brown II*, 729 S.E.2d at 226 (alteration in original; citation omitted). Quoting liberally from *Brown I*, the court then reasserted that "[m]ost patients do not view 'the admission process as an interstate commercial

[3] The court also complained that this Court had not "elucidate[d] how and why the FAA applies to negligence actions that arise subsequently and only incidentally to a contract containing an arbitration clause." 729 S.E.2d at 225. As *Marmet* explained, however, that conclusion flowed so inexorably from *Concepcion* that summary reversal of *Brown I* was warranted. 132 S. Ct. at 1204.

transaction with far-reaching legal consequences.'" *Id.*

Based on that premise, the court opined, just as it had in *Brown I,* that under West Virginia's unconscionability doctrine, "[i]t may be disingenuous for a nursing home to later assert that the patient or family member consciously, knowingly and deliberately accepted an arbitration clause in the contract[.]" *Brown II*, 729 S.E.2d at 226.

The West Virginia Supreme Court's requirement of conscious, knowing, and deliberate acceptance of a contractual term is nowhere to be found in the West Virginia common law of contracts that this Court directed the court to apply on remand. Rather, the rule for all other contracts in West Virginia calls for the enforcement of a contract even if the signatory has not read it. *See*, *e.g.*, *Reddy v. Community Health Found. of Man*, 298 S.E.2d 906, 910 (W. Va. 1982) ("[I]n the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms. *** A person who fails to read a document to which he places his signature does so at his peril.").

Brown II's insistence on an extra layer of proof of contractual understanding before an arbitration clause will survive West Virginia's unconscionability doctrine thus repeated on remand the same type of arbitration-specific contract nullification that this Court had forbidden in *Marmet*, 132 S. Ct. at 1204. And on that basis, the West Virginia Supreme Court reversed the lower court ruling enforcing the arbitration clause and remanded for factual

development of unconscionability under the "guidelines" of the *Brown I* decision this Court vacated, including the FAA-proscribed requirement of conscious, knowing, and deliberate acceptance of a contractual term. *See Brown II*, 729 S.E.2d at 227, 230. That heightened anti-arbitration standard for waiver of judicial proceedings closely parallels the waiver standard that the Montana court adopted in this case. Neither can be reconciled with *Concepcion*. *See* Pet. 20-21.

The disproportionate impact on arbitration clauses wrought by the unconscionability doctrine in West Virginia is confirmed by a review of other recent decisions of the West Virginia Supreme Court of Appeals. In just the two years since *Concepcion* was decided, that court has considered unconscionability challenges to contracts in ten cases, including *Brown*. Seven of those involved arbitration clauses, while only three involved other contractual provisions. With respect to the arbitration-clause cases, the court found four of the seven contracts void as unconscionable or left open that possibility on remand. In the non-arbitration cases, by contrast, the court rejected every single unconscionability challenge.[4]

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[4] *Compare Brown II, supra*; *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 560 (W. Va. 2012) (although "[a] single clause within a multi-clause contract does not require separate consideration or mutuality of obligation[,] *** under the doctrine of unconscionability, a trial court may decline to enforce a contract clause—such as an arbitration provision—if the obligations or rights created by the clause unfairly lack

* * * * *

In sum, the Montana Supreme Court's decision so unblinkingly defies the FAA's text and this Court's precedent and instigates such disuniformity in the law that this Court's prompt review and reversal is necessary. That need for this Court to exercise its certiorari jurisdiction only increases when the spectrum of similar court rulings adopting contract rules that overtly discriminate against arbitration agreements is considered. *Brown II* and the

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mutuality"); *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91, 103-104 (W. Va. 2012) (remanding as to the enforceability of an arbitration clause under the unconscionability rules set forth in *Brown I*); *Credit Acceptance Corp. v. Front*, 745 S.E.2d 556, 568 (W. Va. 2013) (holding, on certified question from the Fourth Circuit, that "[w]here the choice of forum is an integral part of the agreement to arbitrate, the failure of the chosen forum will render the arbitration agreement unenforceable"); *State ex rel. Richmond American Homes of W. Va., Inc. v. Sanders*, 717 S.E.2d 909, 924 (W. Va. 2011) (voiding arbitration agreement because of an "overall imbalance and unfairness of the arbitration process created by Richmond's Purchase Agreement, such that the arbitration provision is unconscionable and unenforceable"), *with Teed v. Teed*, No. 12-0421, 2013 WL 2149857 (W. Va. May 17, 2013) (upholding prenuptial agreement against unconscionability challenge); *Pingley v. Perfection Plus Turbo-Dry, LLC*, No. 11-1605, -- S.E.2d --, 2013 WL 1788224 (W. Va. Apr. 26, 2013) (same as to liability waiver); *Vance v. Smallridge*, No. 11-0689, 2012 WL 3055439 (W. Va. June 22, 2012) (same as to attorney fee provision); *see also Price v. Morgan Fin. Grp.*, No. 12-1026, 2013 WL 3184671 (W. Va. June 24, 2013) (upholding arbitration agreement); *Shorts v. AT&T Mobility*, No. 11-1649, 2013 WL 2995944 (W. Va. June 17, 2013) (same); *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808 (W. Va. 2012) (same).

California appellate cases, like the Montana Supreme Court decision here, breathe continued life into that "'great variety' of 'devices and formulas' declaring arbitration against public policy" that Congress adopted the FAA to stop. *Concepcion*, 131 S. Ct. at 1747 (citation omitted). Continued oversight by this Court through the reversal of the Montana Supreme Court decision in this case is the only path forward for nationwide adherence to the FAA. Moreover, this Court's grant of review could most efficiently and comprehensively redress the broader multi-state problem of non-adherence to the FAA and this Court's direction, thereby affording the Chamber's members the confidence and stability needed to structure their business relationships.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted.

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