No. 14-882

IN THE
Supreme Court of the United States

U.S. LEGAL SERVICES GROUP, L.P.,
Petitioner,

v.

PATRICIA ATALESE,
Respondent.

On Petition for a Writ of Certiorari to the New Jersey Supreme Court

BRIEF OF THE CATO INSTITUTE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Does the Federal Arbitration Act permit a state court to invalidate a binding arbitration clause on the ground that it does not contain additional, redundant language warning that the contracting party is forgoing the right to a jury trial?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs, and produces the *Cato Supreme Court Review*.

NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and to be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business ("NFIB") is the nation's leading small-business association, representing members in Washington, D.C. and in all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole-proprietor enterprises to firms with hundreds of employees. While there is no standard

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[1] Pursuant to Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that no person other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.2(a), all parties were provided timely notice of *amici*'s intention to file this brief and have consented to its filing; written consents of the parties are being submitted contemporaneously with this brief.

definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

This case is of central concern to *amici* because it implicates the fundamental principle that contracts should be enforced without government interference.

INTRODUCTION AND SUMMARY

The New Jersey Supreme Court decided that an arbitration clause providing that all disputes "shall be submitted to binding arbitration" is unenforceable unless it also warns that the plaintiff is "giving up her right to bring her claims in court or have a jury resolve the dispute." Pet. App. 15a-16a. According to the court below, because an arbitration agreement waives the right to a jury, it "must reflect that the party has agreed 'clearly and unambiguously' to its terms." *Id.* at 11a (brackets omitted). This heightened requirement – which amounts to a belts-and-suspenders-and-drawstring standard – is not applicable to ordinary contracts and plainly contravenes the Federal Arbitration Act's ("FAA") national policy favoring arbitration. The decision below should therefore be reversed.

Review of the decision below is particularly important to small and medium-sized businesses. Such businesses rely on arbitration to limit their litigation costs, especially when they do business with out-of-state customers and suppliers that otherwise would be able to sue them in far-flung and unfamiliar jurisdictions. The decision below thus threatens to expose

any small business that has customers or suppliers in New Jersey to burdensome litigation in its courts, even when all parties expressly agreed to arbitrate their disputes instead. Moreover, small businesses may lack the resources continually to monitor the ever-changing law of arbitration in all of the states in which they may conduct business. As a result, they may be subject to the ongoing risk of costly litigation because they may be unable to adapt their contracts to New Jersey's anomalous and ill-defined rule.

This problem is not limited to New Jersey. Because both large and small businesses engage in commerce in various states, the rule adopted by the New Jersey Supreme Court will apply whenever a New Jersey resident sees fit to bring suit in New Jersey state court. Moreover, the decision below may become a model for other states to adopt similar arbitration-disfavoring requirements. The ruling thus threatens to impose enormous litigation costs on businesses nationwide.[2]

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[2] The decision below is so clearly erroneous that the Court should consider summary reversal, as it has done in similar cases. *See Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam); *KPMG LLP v. Cocchi*, 132 S. Ct. 23 (2011) (per curiam).

ARGUMENT

I. REVIEW OF THE DECISION BELOW IS CRITICAL TO VINDICATING THE FAA'S CORE POLICY OF PRESERVING PARTIES' CHOICE TO ARBITRATE

A. The Decision Below Flouts the FAA's Core Command To Enforce the Terms of Parties' Arbitration Agreements

The decision below warrants review because it contravenes the FAA's central mandate that courts enforce parties' choice to arbitrate disputes. As this Court has consistently recognized, "[t]he FAA reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "The liberal federal policy favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (internal quotation marks omitted).

The FAA's policy is embodied in its core substantive provision, which states that "[a] written provision in any . . . 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. "[C]onsistent with [the FAA's] text, courts must 'rigorously enforce' arbitration agreements according to their terms." *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *see* 9 U.S.C. § 4 (providing that courts must enforce arbitration agreements "in accordance with the terms of the agreement").

There can be no serious question that the decision below violates those well-settled principles. The parties here unambiguously agreed to arbitration. The contract says so in straightforward terms. Pet. App. 3a ("[T]he claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party."). The FAA's command in this case is simple: the courts below were bound to enforce the parties' agreement to arbitrate.

B. The New Jersey Supreme Court's Heightened Standard for Enforcing Jury Waivers Reflects Judicial Hostility Toward Arbitration

In invalidating the parties' arbitration agreement, the New Jersey Supreme Court imposed a heightened requirement for enforcement of jury waivers. *See* Pet. App. 11a-12a. That requirement rests expressly on an impermissible judicial policy preference for litigation over arbitration. As the court below stated, "because arbitration involves a waiver of the right to pursue a case in a judicial forum, courts take particular care in assuring the knowing assent of both parties to arbitrate." *Id.* at 10a (internal quotation marks omitted). Indeed, the New Jersey Supreme Court went as far as to analogize arbitration to the waiver of *substantive* rights in other contexts. *Id.* at 11a-12a. Equating arbitration with the waiver of substantive rights reflects precisely the old "judicial hostility" toward arbitration that the FAA sought to extinguish. *See*, *e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

The rule adopted by the court below targets the very essence of arbitration. As the court acknowledged, *every* arbitration agreement can be character-

ized as a waiver of the right to a judicial forum. "By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court." Pet. App. 10a (internal quotation marks omitted); *Concepcion*, 131 S. Ct. at 1748 (explaining that requiring that arbitration take place before a jury would eviscerate the core character of arbitration). The New Jersey Supreme Court's holding that this feature of arbitration warrants a rule of heightened scrutiny disfavors arbitration and thus strikes at the heart of the FAA.

Nothing in the "saving clause" of § 2 of the FAA countenances such a rule. First, a heightened standard for enforcement of jury waivers is not based on a general contract defense. Although the court below invoked the contract-law requirement of mutual assent, the court did not make a case-specific finding that the parties lacked an understanding that arbitration entails forgoing litigation in court. Nor was the court justified in assuming that the parties lacked such understanding, because the "loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate." *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) (refusing to find a contract unconscionable). The decision below thus does not reflect an application of the mutual-assent requirement; it reflects the imposition of a heightened requirement applicable to all arbitration agreements, regardless of the sophistication of the parties or their understanding of the agreement.[3]

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[3] The consequences of the rule are far reaching: even sophisticated commercial parties may now try to escape their bargain by scouring their agreements for unambiguous arbitration clauses that do not contain the requisite redundancies.

Moreover, as petitioner has explained (at 16-20), the court below specifically targeted jury waivers for special disfavor and, in doing so, created an arbitration-specific rule that is not preserved by FAA § 2. The New Jersey Supreme Court does not apply a heightened requirement to all waivers of statutory or constitutional rights. For example, it does not impose a heightened standard for the enforcement of choice-of-law provisions, even though the party may thereby be waiving the application of certain statutory protections. *See Pfizer, Inc. v. Employers Ins. of Wausau*, 712 A.2d 634, 642 (N.J. 1998). The New Jersey Supreme Court treats arbitration agreements differently as compared to other waivers, in direct contradiction of the FAA and this Court's precedents. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

Finally, even assuming the New Jersey rule were somehow construed as a generally applicable contract defense, "nothing in [FAA § 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." *Concepcion*, 131 S. Ct. at 1748. The ruling below stands as an obstacle to the FAA's core objectives by requiring that arbitration agreements one-sidedly highlight what New Jersey perceives to be the disadvantages of arbitration (waiver of the jury right) without any mention of arbitration's concomitant advantages (namely, "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)).

The FAA does not permit state courts to put the thumb of state law on the scale against arbitration and in favor of litigation. *See Concepcion*, 131 S. Ct. at 1747 (holding that a state may not apply even "a

doctrine normally thought to be generally applicable . . . in a fashion that disfavors arbitration" or "ha[s] a disproportionate impact on arbitration agreements"). Such back-door efforts to undermine arbitration, just like explicit anti-arbitration rules, contravene federal policy "guaranteeing the enforcement of private contractual arrangements," *Mitsubishi Motors*, 473 U.S. at 625, and impair parties' freedom to contract for the dispute-resolution procedures that suit their needs and circumstances. Creative new contract doctrines cannot be wielded as tools to curtail this basic freedom and frustrate Congress's intent. The FAA was designed to stop this sort of judicial mischief in its tracks. This Court should grant review (or summarily reverse) to ensure that the FAA's mandate is enforced.

II. THE DECISION BELOW HARMS SMALL AND MEDIUM-SIZED BUSINESSES THAT HAVE LONG RELIED ON STRAIGHTFORWARD ARBITRATION CLAUSES IN THEIR COMMERCIAL CONTRACTS

The New Jersey Supreme Court's heightened standard for enforcement of arbitration agreements is especially harmful to small and medium-sized businesses that rely on arbitration to avoid the high costs of litigation. Many such businesses rely on arbitration clauses to reduce their costs and remain competitive. While the arbitration agreements of some large corporations already contain belt-and-suspenders-and-drawstring language that would satisfy New Jersey's test, smaller businesses often rely on model arbitration clauses promulgated by major arbitration service providers, none of which contains such language.

The leading such provider, the American Arbitration Association ("AAA"), publishes a "practical guide" that includes more than a dozen sample clauses for various industries and types of disputes.[4] Not one of those sample arbitration clauses includes the cautionary jury-waiver language now required by the New Jersey Supreme Court. Instead, all of them simply provide, as did the arbitration clause at issue, that all claims will be resolved through binding arbitration. For example, the AAA's model arbitration clause for commercial disputes provides:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[5]

Similarly, JAMS Alternative Dispute Resolution publishes two standard arbitration clauses, neither of which includes the express cautionary language required by the New Jersey Supreme Court. Its "Standard Arbitration Clause for Domestic Commercial Contracts" provides:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement

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[4] American Arbitration Ass'n, *Drafting Dispute Resolution Clauses: A Practical Guide* 10-21 (2013), *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540.

[5] *Id.* at 10 (brackets in original).

> to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.[6]

Likewise, JAMS's standard arbitration clause for international commercial disputes simply states:

> Any dispute, controversy or claim arising out of or relating to this contract, including the formation, interpretation, breach or termination thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration in accordance with the JAMS International Arbitration Rules. The Tribunal will consist of [three arbitrators/one arbitrator]. The place of arbitration will be [location]. The language to be used in the arbitral proceedings will be [language]. Judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.[7]

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[6] JAMS Alternative Dispute Resolution, *JAMS Clause Workbook: A Guide to Drafting Dispute Resolution Clauses for Commercial Contracts* 2 (2011), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf (brackets in original).

[7] *Id.* (brackets in original).

Similar model arbitration clauses promulgated by other organizations abound.[8] These model arbitration agreements have been used in commercial contracts for decades. *See* G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. Rev. 623, 630 n.24 (1988) (quoting AAA model arbitration clause); *see also* Robert Coulson, *Business Arbitration – What You Need to Know* 9 (3d ed. 1986). According to one estimate, they have been used in more than one million disputes. *See* Howard J. Aibel & George H. Friedman, *Drafting Dispute Resolution Clauses in Complex Business Transactions*, 51-MAR Disp. Resol. J. 17, 18 (1996). During that time, they "have consistently received judicial support." *Id.* As a result of the decision below, however, myriad contracts that incorporate these long-accepted clauses are now at risk of invalidation. That result will have a disproportionate adverse impact on smaller businesses that have relied on such clauses to reduce their costs and remain competitive.

It is no answer that businesses may be able to change their arbitration clauses to satisfy the New Jersey test going forward. The court below fastidiously avoided providing clear guidance as to what language would satisfy its requirement of a "clear and unambiguous" warning that the parties are waiving their jury right. Its ruling is thus likely to spawn extensive litigation over the rule's precise contours. Such uncertainty will inflict especially

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[8] *See*, *e.g.*, National Arbitration Forum, *Drafting Mediation and Arbitration Clauses*, *available at* http://www.adrforum.com/users/naf/resources/Sample%20Dispute%20Resolution%20Clauses.pdf; United States Arbitration & Mediation, *Arbitration*, *Sample Arbitration Clauses*, http://www.usam.com/arbsac.shtml.

severe harm on smaller businesses, which are far less likely to have the resources to monitor constant shifts in the law of arbitration. This Court's intervention is warranted to ensure that existing arbitration agreements are enforced, as the FAA guarantees.

III. THE DECISION BELOW CREATES A NATIONWIDE PROBLEM WARRANTING THIS COURT'S PROMPT REVIEW

This Court's intervention also is necessary because the decision below will have deleterious effects well beyond New Jersey's borders. First, the New Jersey Supreme Court's heightened standard is not, by its terms, limited to intrastate disputes. As long as a plaintiff brings suit in a New Jersey court, the decision below will jeopardize the enforceability of the parties' arbitration agreement. The rule will thus incentivize forum shopping, as plaintiffs will attempt to sue out-of-state businesses that engage in commerce in New Jersey in that state's courts, regardless of where that business is domiciled.

Second, the decision below will effectively become a nationwide rule for businesses that operate in New Jersey and other states. As a practical matter, adopting different arbitration agreements based on the laws of different states is tremendously costly and burdensome, especially for smaller businesses. *See*, *e.g.*, *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (noting that form contracts and standard clauses reduce transaction costs). To avoid those additional costs, businesses likely will be compelled to change their standard arbitration clause across the board. Thus, the decision below is not limited to New Jersey; it will effectively govern any business with operations there.

Finally, absent this Court's review, the decision below will metastasize and become a model for other states to enact their own heightened requirements for the enforcement of jury waivers. As petitioner explains (at 9-10), Montana already has enacted similar requirements. California, which has been at the vanguard in the assault on arbitration agreements, can be expected to follow suit. *See*, *e.g.*, *Concepcion*, 131 S. Ct. at 1746 (noting California courts' pattern of hostility toward arbitration contracts). The result will be an unworkable patchwork of inconsistent state laws and a further erosion of the FAA's command that arbitration agreements be given effect no matter where enforcement is sought.

CONCLUSION

For all these reasons – and generally because courts should enforce the unambiguous agreement of uncoerced parties – this Court should summarily reverse the decision below or, at the very least, grant the petition for a writ of certiorari.

Respectfully submitted,

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