No. 16-32

In The
Supreme Court of the United States

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP, et al.,

Petitioners,

v.

JANIS E. CLARK, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF OF ARBITRATION SCHOLAR IMRE S. SZALAI AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Imre S. Szalai is the Judge John D. Wessel Distinguished Professor of Social Justice at Loyola University New Orleans College of Law. He is a graduate of Yale University, and he received his law degree from Columbia University, where he was named a Harlan Fiske Stone Scholar. His teaching and scholarly passion focus on dispute resolution, arbitration, and arbitration law. For more than a decade, he has extensively studied the uses of arbitration and the development of arbitration law in America from the colonial period to the present. His scholarship has appeared in the top journals of dispute resolution, and he maintains a blog focusing on arbitration law. He has provided written testimony to Congress regarding arbitration law developments, and he has appeared in national media, such as Forbes and public radio, in connection with stories about arbitration. As a leading scholar in this field, he is regularly invited to speak at conferences and symposia about the evolution of arbitration law. Based on his extensive research of previously-untapped archival materials from the drafters of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, he wrote a comprehensive, leading book exploring the

[1] *Amicus* files this brief in his individual capacity, not as a representative of the institution with which he is affiliated. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus* through his professorship funds, made a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief, and their written consent has been filed with the Clerk.

development and enactment of the FAA and similar state statutes during the 1920s, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013). He also serves as a commercial arbitrator for the Financial Industry Regulatory Authority (FINRA). He has dedicated his professional life to the study and use of arbitration as an effective way to resolve disputes.

This case involves fundamental questions about the meaning and scope of the FAA. *Amicus* is concerned about the proper development of arbitration law, and he submits this brief to assist the Court in considering issues not addressed by Petitioners or their *amici*.

SUMMARY OF ARGUMENT

The text of the FAA, its legislative history, and the historical background of the FAA's enactment all demonstrate that the FAA was never intended to govern personal-injury claims. *Amicus* respectfully requests that the Court adopt a narrow, pragmatic exclusion from the FAA's coverage for personal-injury claims that can be asserted without reference to a contract. *See*, *e.g.*, *Arnold v. Burger King*, 48 N.E.3d 69, 77 (Ohio Ct. App. 2015) (employee's tort claims arising from her rape by a supervisor during work hours cannot be subject to arbitration where such tort claims "may be asserted independently, without reference to the contract" (citation omitted)).

Petitioners' core argument in favor of reversal focuses exclusively on the FAA's preemption of state law pursuant to *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). However, this case should not be framed or analyzed as a preemption case. Instead, this case involves a fundamental issue of the FAA's threshold coverage, and Petitioners' preemption argument overlooks the FAA's unambiguous text. As explained below, critical but often overlooked language in the FAA creates an exception for personal-injury claims that can be asserted without reference to a contract. The FAA was enacted to facilitate the arbitration of commercial disputes, not tort claims involving abuse and physical harms. Petitioners' flawed preemption argument cannot overcome the clarity of the FAA's text, legislative history, and the historical background of the FAA's enactment, all of which establish that the FAA does not cover personal-injury claims. As a result, the Court should affirm the decision below.

Furthermore, the Court should affirm the decision below because applying the FAA in this case results in an unconstitutional intrusion on state sovereignty. If the Court enforces Petitioners' arbitration clauses, such enforcement would strip away the sovereignty of a state to design and implement its own policies to protect personal-injury victims. *Johnson v. Fankell*, 520 U.S. 911, 922 & n.13 (1997) ("[R]espect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts," and it is "quite clear that it is a matter for each State to

decide how to structure its judicial system." (citations omitted)); *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) ("[T]he procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control.").[2]

ARGUMENT

I. The FAA's Text, Legislative History, And The Historical Background Of The FAA's Enactment Demonstrate That The FAA Does Not Govern Personal-Injury Claims

Since the enactment of the FAA in 1925, the Court has issued nearly sixty opinions discussing or applying the FAA. From this entire body of cases spanning almost a century, it was not until 2012 that the Court briefly discussed, for the first time, whether the FAA applies to personal-injury cases.[3] *See Marmet Health*

[2] This case does not involve the interpretation of an arbitration clause, or whether an existing agreement to arbitrate should be revoked. As demonstrated in the Respondents' brief, no contract was formed under Kentucky law. However, to the extent the Court is inclined to find an agreement exists under the FAA, *amicus* argues the FAA does not govern this case for the several reasons set forth in this brief.

[3] An old FAA case, *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935), involved personal injury. However, the Court's decision focused solely on the appealability of orders compelling arbitration and did not discuss the threshold issue of whether the FAA governs personal-injury claims. Furthermore, although personal injuries were involved in *Schoenamsgruber*, the asserted claims were contractual in nature. *Id.* at 455 ("The libels assert that the wrongful act constituted a breach of

Care Center, Inc. v. Brown, 132 S. Ct. 1201 (2012). In *Marmet*, the families of three patients filed personal-injury or wrongful-death actions against nursing homes. The state court in *Marmet* held that as a matter of state public policy, arbitration clauses in nursing home agreements are not enforceable in connection with personal-injury or wrongful-death claims. In a brief *per curiam* opinion, the Court in *Marmet* relied on the preemption doctrine set forth in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and summarily concluded that the FAA preempts a state's categorical rule prohibiting arbitration of particular claims. *Marmet*, 132 S. Ct. at 1203-04.

The Court in *Marmet* conducted only a cursory analysis of the FAA's text when discussing whether personal-injury claims can be arbitrated under the FAA. After quoting § 2 of the FAA, the heart of the statute, the Court succinctly stated that "[t]he statute's text includes no exception for personal-injury or wrongful-death claims." *Id.* at 1203. Although the FAA's text does not explicitly mention personal-injury or wrongful-death claims, a closer analysis of the FAA's text demonstrates the FAA was never intended to govern such claims. As explained below, § 2 of the FAA contains a significant, qualifying limitation overlooked by the Court in *Marmet*.

The relevant part of § 2, the core provision of the FAA, states the following:

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respondents' contract to carry the child safely from Hamburg, Germany, to San Francisco.").

> A written provision in any maritime transaction or 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. To paraphrase § 2, the FAA governs written arbitration provisions either in a maritime transaction or in a contract involving interstate commerce, and such arbitration provisions are binding with respect to certain defined controversies. More specifically, there are two types of controversies covered by this language of the FAA:

> (1) controversies arising out of a contract involving interstate commerce; and
>
> (2) controversies arising out of a maritime transaction.[4]

Thus, the text of the FAA unequivocally sets forth important, qualifying limitations to the FAA's coverage. The FAA's coverage is limited to written provisions in a contract "to settle by arbitration a controversy thereafter arising out of such contract." [hereinafter

[4] The FAA defines the phrase "maritime transaction" as covering different categories of maritime contracts: "charter parties"; "bills of lading of water carriers"; and "agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction." This case, of course, does not involve a maritime transaction.

Contract Limitation of § 2]. The Court in *Marmet* did not address this critical Contract Limitation of § 2.

It is axiomatic that tort liability may exist independent of a contract. *See*, *e.g.*, *Osei v. Univ. of Maryland Univ. Coll.*, 2016 WL 4269100, at *10 (D. Md. Aug. 15, 2016) (citing the classic elements of a negligence claim – duty, breach, causation, and damages – and explaining that "the duty giving rise to a tort action must have some independent basis [from a contractual obligation]" (citation omitted)); *see also Galeana Telecomm. Invs., Inc. v. Amerifone Corp.*, 2016 WL 4205997, at *7 (E.D. Mich. Aug. 10, 2016) ("an action in tort requires a breach of duty separate and distinct from a breach of contract" (citations omitted)). For example, one's right to be free from bodily harm in a car accident does not depend on or arise from any contract.

If a tort does not arise from a contract, then it is impossible for the FAA to cover such a tort claim because of the FAA's explicit Contract Limitation set forth in § 2. Consider a hypothetical situation in which an octogenarian resident of a nursing home is beaten by a staff member and files a tort suit, and a few days later, a visitor is also assaulted by the same staff member and files a tort suit. In both cases, the right to sue for bodily harm arises independently from a contract. Because their claims for personal injury can be stated without any reference to a contract, it is impossible for their claims to arise from a contract. As a result, their claims are not governed by the FAA due to the FAA's Contract Limitation, which the Court did not take into consideration in *Marmet*.

Amicus respectfully requests that, based on the Contract Limitation in § 2, the Court adopt a narrow, reasonable exclusion from the FAA's coverage for personal-injury claims that can be asserted without reference to a contract. Lower courts are, in effect, already applying the proposed exclusion by holding that tort claims should not be arbitrated. For example, in *Arnold v. Burger King*, a plaintiff employee alleged that her supervisor raped her in the bathroom of Burger King during work hours. 48 N.E.3d 69 (Ohio Ct. App. 2015). The plaintiff had signed a mandatory arbitration clause as part of her employment, and the defendants tried to dismiss the plaintiff's tort claims from court by asking the court to enforce the arbitration agreement. *Id.* at 72. The Ohio appellate court in *Burger King* held that the employee's tort claims arising from the rape could not be arbitrated on the grounds that such tort claims "may be asserted independently, without reference to the contract." *Id.* at 77 (citation omitted). *See also Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. 2009) (tort claims arising from alleged gang-rape are not arbitrable); *but see id.* at 242-43 (dissenting opinion) (tort claims arising from alleged gang-rape are arbitrable because these claims were related to the plaintiff's employment).

In *Johnson v. Rent-A-Center*, a Missouri appellate court compelled arbitration in a case involving an elderly man who had rented a television and refrigerator from Rent-A-Center and was later robbed and beaten to death by Rent-A-Center's repairman. 2014 Mo. App. LEXIS 1227 (Mo. Ct. App. Nov. 4, 2014). Although the

trial court properly refused to compel arbitration because the victim's claims did not require reference to the rental agreement containing the arbitration clause, the Missouri appellate court reversed and enforced the arbitration agreement. *Id.* at *4, *1. Fortunately, about one month later, the Missouri appellate court withdrew its erroneous opinion compelling arbitration. *Johnson v. Rent-A-Center*, 2014 Mo. App. LEXIS 1385 (Mo. Ct. App. Dec. 9, 2014). The trial court was correct in its initial decision not to enforce the arbitration clause in the decedent's rental agreement.

This *Rent-A-Center* wrongful death case, *Burger King* rape case, *Halliburton* gang-rape case, as well as the present case involving nursing home abuse and wrongful death, all demonstrate grounds for this Court to recognize a narrow exclusion from the FAA, based on the explicit Contract Limitation in § 2, for personal-injury claims that can be asserted without reference to a contract. As a statute designed for the resolution of commercial disputes, the FAA was never intended to cover such personal-injury claims. The FAA's text explicitly supports such an exclusion.

The legislative history and historical background of the FAA's enactment confirm that the FAA was designed for the arbitration of commercial disputes, not personal-injury claims. Testimony from the FAA's drafters and supporters demonstrates that the legislation was designed for "ordinary, everyday trade disputes," rather than personal-injury claims. *Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising Out*

of Contracts, Maritime Transactions, or Commerce Among the States or Territories or With Foreign Nations: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 7 (1924) (the FAA covers "ordinary, everyday trade disputes," and "it is for them that this legislation is proposed"); *id.* (FAA covers commercial disputes arising in interstate commerce, such as a "farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey"); *id.* at 30-31 (arbitration reduces "business litigation" and encourages "business men" to settle their "business differences"); *id.* at 31 (adoption of the FAA is necessary to facilitate the resolution of disputes "arising in [merchants'] daily business transactions"). As evidenced above, the FAA was developed for business interests desiring a quick, efficient way to resolve "everyday trade disputes" and "business differences" arising from the interstate shipment of goods in the growing national economy of the early 1900s, not personal-injury claims. *See generally* Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013).

Petitioners' sole argument in favor of reversal is based on the FAA's preemption of state law. However, this case should not be framed or analyzed as one involving the preemption of state law under *Concepcion*. Instead, this case involves a threshold question of the FAA's coverage and the often overlooked, yet explicit, Contract Limitation of § 2 of the FAA, which this Court ought not and constitutionally cannot alter. The FAA's text, legislative history, and historical background

overwhelmingly support the recognition of a narrow, reasonable exception to the FAA for personal-injury claims that can be asserted without reference to a contract. Relying solely on the explicit limitations of the FAA, defined by the text of the statute, the Court should affirm the decision below.

II. The Court Should Also Affirm The Decision Below Because Applying The FAA In This Case Results In An Unconstitutional Intrusion On State Sovereignty

In a series of FAA cases spanning the last several decades, the Court has repeatedly confirmed that the enforcement of arbitration agreements is purely procedural. For example, the Court has explained that by agreeing to arbitrate, "a party does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In several cases, the Court has conceptualized the enforcement of arbitration agreements as nothing more than a procedural tool to define or determine substantive rights. *See*, *e.g.*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002) ("[an arbitration] agreement *only* determines the choice of forum" (emphasis added)); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."). In *Preston v.*

Ferrer, 552 U.S. 346 (2008), the Court highlighted the procedural nature of arbitration and emphasized that arbitration does not impact substantive rights: "[The enforceability of an arbitration agreement] presents *precisely* and *only* a question concerning the forum in which the parties' dispute will be heard. . . . So here, [the plaintiff, who must arbitrate,] relinquishes no substantive rights the [California Talent Agencies Act] or other California law may accord him." *Id.* at 359 (emphasis added and citation omitted). As explained by the Court in *Mitsubishi Motors*, when parties agree to arbitrate, the parties are merely "trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." 473 U.S. at 628. The enforcement of an arbitration agreement is procedural because an arbitration agreement does not set forth any rules of decision; instead, an arbitration agreement simply identifies the method and forum for resolving substantive disputes. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting, joined by Scalia, J.) ("An arbitration agreement is a species of forum-selection clause: Without laying down any rules of decision, it identifies the adjudicator of disputes."). In sum, the Court in several cases has declared that the enforcement of an arbitration agreement is fundamentally a matter of pure procedure.

Unfortunately, the Court has injected significant discord into arbitration law through its decision in *Southland Corp. v. Keating*, 465 U.S. 1 (1984). In *Southland*, the Court held that the enforcement of

arbitration agreements under the FAA should be treated as "a *substantive* rule applicable in state as well as federal courts." *Id.* at 16 (emphasis added). *Southland* is considered one of the most deeply flawed Supreme Court decisions ever issued regarding federalism, due to the broad, unconstitutional intrusion on state sovereignty arising from *Southland*. As thoroughly proven by the late Professor Ian Macneil in his groundbreaking book regarding the FAA, and consistent with the procedural conceptualization of arbitration in several cases like *Mitsubishi Motors* and *Preston*, Congress intended the FAA to be a procedural statute applicable solely in the federal courts, not the state courts. *See generally* Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* (1992).

In addition to the serious constitutional concerns arising from *Southland*, *Southland* is also wrongly decided as a matter of statutory construction. The FAA is a fully-integrated, unitary statute designed to facilitate the different stages of arbitration – the commencement of an arbitration proceeding, the proceeding itself, and the end of the proceeding. For example, the FAA contains provisions governing the enforcement of an arbitration clause to commence an arbitration proceeding, 9 U.S.C. §§ 3-4; provisions governing subpoena powers to compel attendance of arbitral witnesses for the middle of an ongoing proceeding, 9 U.S.C. § 7; and judicial confirmation and vacatur provisions for the end of an arbitration proceeding, 9 U.S.C. §§ 9-10. When one properly examines the entire statute as a

comprehensive framework designed to facilitate commercial arbitration, one readily sees that the FAA is a statute applicable solely in federal courts because the FAA is filled with constant and exclusive references to the federal courts. For example, § 4 provides procedures for judicial enforcement of an arbitration clause in order to commence an arbitration proceeding. 9 U.S.C. § 4. More specifically, § 4 refers exclusively to the powers of a "United States district court" to enforce an arbitration clause, and § 4 expressly incorporates the Federal Rules of Civil Procedure. *Id.* If the FAA, as a comprehensive arbitration statute, were truly intended to apply in state courts as *Southland* incorrectly held, § 4 of the FAA would not refer exclusively to federal courts and the Federal Rules of Civil Procedure. Similarly, for the middle of an arbitration proceeding, if a party needs assistance to compel the attendance of witnesses at the arbitration hearing, the FAA provides for a petition to the "United States district court" in whose district the arbitrators are sitting. 9 U.S.C. § 7. Again, if the comprehensive statute were intended to apply in state courts, the statute would not refer exclusively to federal courts. Likewise, at the back-end of an arbitration proceeding, if a party wants to seek judicial vacatur of an arbitral award, § 10 permits a party to file an application for vacatur in the "United States court in and for the district wherein the award was made." 9 U.S.C. § 10. The comprehensive, fully-integrated nature of the FAA and the FAA's explicit and exclusive references to federal courts and the Federal Rules of Civil Procedure make clear, as a textual matter, that the FAA was not intended to be a

substantive law applicable in state courts. *See* Macneil, *supra*, at 105-07.[5]

Furthermore, historical understandings of arbitration help confirm the flaws of *Southland*. Consistent with the Court's modern treatment of arbitration as a procedural vehicle for enforcing substantive rights in several cases like *Preston*, *Waffle House*, and *Mitsubishi Motors*, the governing, universal understanding of arbitration law when the FAA was enacted in 1925 was that arbitration law is procedural law. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-89 (1995) (Thomas, J., dissenting, joined by Scalia, J.). *See also* H.R. Rep. No. 68-96, at 1 (1924) ("Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law

[5] The *Southland* majority did not evaluate the FAA within its proper context as an integrated, complete framework supporting the different stages of arbitration. Instead, to support its flawed result that the FAA applies in state court, the *Southland* majority selectively plucked out and focused solely on language from § 2 of the FAA, which generally provides that an arbitration agreement is binding. By focusing solely on this isolated language from § 2 and ignoring the fully-integrated nature of the statute, the *Southland* majority concluded that the selected language contained no restrictions limiting the FAA to federal courts. *Southland*, 465 U.S. at 10-11 (finding "only two limitations" in the language of § 2 of the FAA, namely, a written contract involving interstate commerce and issues of revocability under contract law). As a result of this narrow observation focusing solely on one part of the broader statute, the Court saw no limits regarding state courts and easily reached the erroneous conclusion that the FAA therefore applies in state courts. *Id.* at 16. However, as explained above, the FAA's explicit and exclusive references to federal courts and the Federal Rules of Civil Procedure demonstrate that the statute applies only in federal court.

court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential.").

As a result of the deeply problematic *Southland* ruling, there is an ongoing, unconstitutional, "permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting). To illustrate this unconstitutional displacement of state law, consider the result and ramifications of *Preston v. Ferrer*, where the Court relied on the FAA, a purely procedural federal statute, to override state sovereignty in connection with proceedings in both state court and a state administrative agency charged with the enforcement of state-created rights. 552 U.S. 346 (2008). In *Preston*, the California legislature had designed an administrative tribunal, with its own expertise and unique procedures, to handle a special type of dispute under California law regarding talent agents in California's entertainment industry. *Id.* at 354-56. Under California law, this carefully-designed tribunal had exclusive jurisdiction to resolve these state-law disputes. *Id.* at 356. The Court in *Preston* held that "the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. *Preston*'s holding is tenuous because states have sovereign authority to control the procedures by which state-created rights are enforced, and federal attempts to control such

procedures raise serious federalism concerns. As recognized by this Court, "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control," and states have broad, exclusive powers to adopt any procedure for the enforcement of rights, as long as the procedure "satisfies the constitutional requirements of reasonable notice and opportunity to be heard." *Hardware Dealers' Mut. Fire Ins. Co v. Glidden Co.*, 284 U.S. 151, 158 (1931).

As a result of *Southland*'s unconstitutional holding, states can no longer design and require specialized administrative tribunals to implement fundamental policies that are traditionally within the sphere of state authority, as illustrated by the severe displacement of state law in *Preston*. If the FAA controls the present case, which arises from the Kentucky state court system and involves state-created rights, the FAA would interfere with and displace the sovereignty of a state to design, implement, and enforce its own particular policies regarding tort law, consumer protection law, agency law, and the delivery of healthcare services to its elderly citizens. As a result of the Court's erroneous decision in *Southland*, the Court is stripping away the power of a state to enforce its own state-created substantive rights, and such an intrusion on state sovereignty is diametrically opposed to principles of federalism. "[R]espect [for federalism] is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts." *Johnson v.*

Fankell, 520 U.S. 911, 922 (1997); *see also* Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. Cal. L. Rev. 103 (2015) (FAA's preemptive impact on state administrative and regulatory schemes violates constitutional guarantees of federalism).

Consider the following hypothetical involving the federal transfer statute, 28 U.S.C. § 1404, which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." The federal transfer statute is a procedural statute, intended to apply solely to transfers within the federal court system. Suppose that just like the *Southland* majority, the Court ignores the references to federal district courts and expansively misconstrues the federal transfer statute to say that "for the convenience of parties and witnesses, in the interest of justice, a . . . court may transfer any civil action to any other [court]." By ignoring the explicit reference to federal district courts and turning a blind eye to constitutional concerns, one could easily conclude that the federal transfer statute is applicable in state courts. As a result of this erroneous interpretation, a California state court could be forced to accept the transfer of a case from a New York state court "for the convenience of the parties and witnesses." Such an interpretation of the federal transfer statute as a procedural statute binding on the states would raise serious federalism concerns because

the Court "ha[s] made it quite clear that it is a matter for each State to decide how to structure its judicial system." *Johnson v. Fankell*, 520 U.S. 911, 922 n.13 (1997). The Court's ruling in *Southland*, which interpreted the FAA to govern in state courts, is just as statutorily and constitutionally flawed as this hypothetical interpretation of the federal transfer statute.

Instead of permitting federal law to unconstitutionally trump the sovereignty of states, this Court as guardian of our system of federalism must preserve the critical role of the states as "laboratories for experimentation." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring, joined by O'Connor, J.) (citation omitted). Giving each state the freedom to experiment with the development of its own arbitration laws would help promote the values of federalism and spur innovation among the states to regulate arbitration in different, creative ways. Peter B. Rutledge, *Arbitration and the Constitution* 121 (2013) (sacrificing the uniformity values of *Southland* would promote federalism values in connection with dispute resolution). For example, the European Union has developed an online dispute resolution platform for the resolution of consumer disputes arising from e-commerce sales, and consumers must affirmatively consent to such proceedings. *See* Regulation (EU) 524/2013 of the European Parliament and of the Council of 21 May 2013, 2013 O.J. (L 165) 1. This development in the European Union has the potential to increase the efficiency of dispute resolution, promote e-commerce, reduce judicial workloads, and protect the interests of both consumers

and businesses in a fair manner where the consumer provides meaningful consent. If states were not restrained by the unconstitutional holding of *Southland*, states could innovate by developing similar, creative solutions for resolving disputes through arbitration. Furthermore, vibrant and diverse systems of arbitration could in turn spur innovations in judicial procedures and improve the administration of justice. The New York judiciary, for example, recently updated its procedures for resolving commercial disputes in order to make New York courts more competitive with arbitration. *See* Lia Iannetti, *New Rule on Accelerated Adjudication Procedures in New York State Courts* (May 2014), https://www.cpradr.org/news-publications/articles/2014-05-23-new-rule-on-accelerated-adjudication-procedures-in-new-york-state-courts. *Southland*'s erroneous holding undermines important values of federalism and cripples the ability of states to innovate and develop alternative methods of dispute resolution.

Southland's holding that the FAA is substantive law is strongly refuted by the Court's fundamental conceptualization of arbitration as procedural in several cases such as *Waffle House* and *Mitsubishi Motors*. Interestingly, the Court's view of arbitration as a neutral procedure represents a whiplashing, 180-degree reversal of the Court's earlier FAA jurisprudence. *Compare Wilko v. Swan*, 346 U.S. 427 (1953) (arbitration undermines the effective application of substantive laws), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), *with*

Mitsubishi Motors, 473 U.S. at 628 (by agreeing to arbitrate, "a party does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum."). In the overruled *Wilko* decision, the Court viewed arbitration as impacting substantive rights, which is an erroneous, outdated view of arbitration. *Southland*'s treatment of the FAA as substantive law appears to be a vestige of this outdated, overruled misunderstanding of arbitration from *Wilko*, which misconstrued arbitration as impacting substantive rights. *Stare decisis* did not prevent this Court from dramatically changing its outdated view of the FAA in *Wilko* and re-conceptualizing arbitration as purely procedural. Similarly, *stare decisis* should not prevent the Court from overruling its unconstitutional holding in *Southland* that the enforcement of an arbitration clause is substantive law binding on the states.

Justice O'Connor, a dissenter in *Southland*, mentioned a desire to protect commercial expectations as a reason for keeping the flawed *Southland* decision alive under *stare decisis*. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283-84 (1995) (O'Connor, J., concurring). However, *stare decisis* is not a valid reason to retain the unconstitutional *Southland* decision. First, as explained above, *stare decisis* did not stop the Court from radically reinterpreting the FAA when overruling *Wilko v. Swan*. Second, to the extent the Court is concerned about interfering with commercial expectations by overruling *Southland*, such a concern is overstated.

Many states will continue to enforce arbitration agreements as they have arbitration laws patterned after the FAA. *See*, *e.g.*, *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 303 (6th Cir. 2008) ("Michigan's arbitration law is almost identical to the FAA in all relevant respects."); *Peters v. Pillsbury Winthrop Shaw Pitman, LLP*, 2011 WL 5304627, at *1 (Conn. Super. Ct. Oct. 17, 2011) ("federal and Connecticut state law on arbitration are similarly in concert"); *Marsh Farms v. Olvey*, 974 So. 2d 194, 196 (La. Ct. App. 2008) ("Louisiana courts look to federal law in interpreting the [state arbitration] act because it is virtually identical to the Federal Arbitration Act."). And if a state determines that arbitration agreements should not be enforceable, such is the nature of our system of federalism. Because the FAA is a procedural statute applicable solely in federal court, each state should have the right to decide on its own how it will regulate arbitration agreements. For example, a particular state may have a severe problem with nursing home abuse or a severe problem with certain types of employers failing to comply with critical state regulations. Under our system of federalism, a state should be able to decide it is in the public interest for such disputes to be resolved publicly in court or in an administrative agency proceeding. Third, even under the existing law of *Southland*, business interests should already be accustomed to uncertainty regarding the enforcement of an arbitration clause. *Compare Figueroa v. THI of New Mexico*, 306 P.3d 480 (N.M. Ct. App. 2012) (invalidating arbitration clause in nursing home agreement), *with THI of New Mexico v. Patton*, 741 F.3d 1162 (10th Cir. 2014) (enforcing the identical

arbitration clause). Overruling *Southland* will not harm commercial expectations. Fourth, if *Southland* is overruled so that states are not bound by the FAA, then a federal court may compel arbitration while a state court may allow the same dispute to proceed in court. Whether a case is resolved in an arbitral forum or judicial forum should not make a difference. As repeatedly stressed by the Court in several cases, "a party [in arbitration] does not forgo the substantive rights afforded by [a statute]; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628. Finally, *stare decisis* should not prevent the Court from overruling a flawed holding that unconstitutionally and expansively overrides state sovereignty. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling the infamous *Swift* doctrine that unconstitutionally permitted federal intrusion on state sovereignty for almost a century).

In sum, the Court should affirm the decision below because imposing the FAA, a purely procedural statute, on the courts of Kentucky represents an unconstitutional intrusion on state sovereignty.

CONCLUSION

The text of the FAA, its legislative history, and the historical background of the FAA's enactment demonstrate that the FAA was never intended to govern personal-injury claims. *Amicus* respectfully requests that the Court adopt a narrow, reasonable exclusion from the FAA's coverage for personal-injury claims that can

be asserted without reference to a contract. Furthermore, to respect federalism and prevent the unconstitutional overriding of state sovereignty, the Court should affirm the decision of the Kentucky Supreme Court.

Respectfully submitted,

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