No. 17-365

IN THE

Supreme Court of the United States

KINDRED HOSPITALS EAST, LLC
D.B.A. KINDRED HOSPITAL OCALA,

Petitioner,

v.

ESTATE OF MARIANNE KLEMISH
AND FRANK KLEMISH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FLORIDA FIFTH DISTRICT COURT OF APPEAL

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

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October 11, 2017

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IDENTITY & INTEREST OF *AMICUS CURIAE*[*]

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

To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases involving the enforceability of arbitration agreements. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *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*, 563 U.S. 333 (2011).

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* Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. The parties have consented to the filing of this brief.

Many of the Chamber's members regularly employ arbitration agreements in their contracts. Arbitration allows them to resolve disputes promptly and efficiently while avoiding the costs associated with traditional litigation. Arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Based on the legislative policies reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, the Chamber's members have structured millions of contractual relationships around arbitration agreements.

The Chamber thus has a strong interest in the faithful and consistent application of this Court's FAA jurisprudence, including the FAA's mandate requiring that arbitration agreements be "enforced according to their terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). And because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 17 (2012), the Chamber has a strong interest in ensuring the state courts' uniform, consistent, and correct application of the FAA as interpreted by this Court.

SUMMARY OF THE ARGUMENT

Congress enacted the Federal Arbitration Act to override judicial hostility toward arbitration and ensure that parties' agreements to arbitrate would be enforced according to their terms. Unfortunately, a significant number of courts have continued to devise creative rules that purport to be neutral on their face while clearly disfavoring arbitration in practice. However, this is the

unusual case in which a State has *expressly* prohibited the parties from enforcing an arbitration agreement according to its terms and instead purports to directly regulate the terms of parties' arbitration agreements.

In 2003, Florida enacted the Medical Malpractice Act ("MMA") to encourage the "prompt resolution of medical negligence claims." Fla. Stat. § 766.201(2). The MMA adopted a plan that "consist[s] of two separate components": (1) mandatory "presuit investigation" and (2) voluntary arbitration. *Id.* Under the presuit-investigation requirements, there must be "reasonable investigation" before a patient can initiate a malpractice claim. After this presuit investigation is completed, the parties can choose to engage in voluntary arbitration under the terms defined by the MMA. *Id.* § 766.207. Under the MMA's arbitral scheme, "liability is admitted" by the defendant, and "arbitration will be held only on the issue of damages," which cannot include punitive damages or noneconomic damages in excess of $250,000 per incident. *Id.* §§ 766.106(3), 766.207(7).

Here, Marianne Klemish and Kindred Hospital Ocala ("Kindred Hospital") voluntarily entered into an arbitration agreement shortly after Ms. Klemish was admitted to the hospital for therapy and post-surgical care. The parties' agreement states that "[a]ny and all claims or disputes arising out of or in any way relating to … the medical treatment or care of [Ms. Klemish] at Kindred Hospital Ocala … shall be submitted to alternative dispute resolution," which includes mediation and arbitration. Pet. App. 43a-44a. Under the agreement, Ms. Klemish and Kindred Hospital could arbitrate their claims under the MMA's requirements (*i.e.*, admitting

liability and capping damages) if at the close of the presuit investigation both parties agreed to the statute's format. *Id.* at 46a. If either party declined to follow this arbitral format, however, the parties would undertake traditional alternative dispute resolution (*i.e.*, without admitting liability or capping damages).

Under the Federal Arbitration Act and this Court's precedent, the parties' agreement was "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. By operation of the Supremacy Clause, "[t]he FAA … preempts any state rule discriminating on its face against arbitration" and "any rule that covertly accomplishes the same objective." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Thus, when a dispute arose and Kindred Hospital requested traditional arbitration, the courts below needed to enforce the agreement "according to [its] terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

The Florida Fifth District Court of Appeal, however, refused to uphold the arbitration agreement. The court instead found that the parties' arbitration agreement was "invalid" because it did not "incorporate all of the MMA's arbitration provisions." Pet. App. 6a. In other words, the agreement was unenforceable because the parties were trying to arbitrate under *their* terms, instead of under the *State*'s terms. *Id.* at 6a-7a.

The decision below directly conflicts with Supreme Court precedent. Just last year, the Court reaffirmed its longstanding rule that courts may not invalidate

an arbitration agreement "based on … legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1426 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 330 (2011)); *see, e.g., Perry v. Thomas*, 482 U.S. 483, 492, (1987) ("A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with … § 2 [of the FAA]."). But that is exactly what the court below did here: it invalidated an arbitration agreement based on reasoning that applies only to arbitration.

This Court's intervention is needed. The liberal federal policy favoring arbitration agreements is grounded in the congressional and judicial recognition that arbitration is a fair, efficient, and inexpensive alternative to litigation. As the Chamber has written before, many courts unfortunately continue to exhibit the "judicial hostility" toward arbitration that the FAA was designed to override. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Despite numerous adverse decisions from this Court (including summary reversals), some courts continue to devise "a great variety of devices and formulas" to avoid enforcing arbitration agreements. *Concepcion*, 563 U.S. at 342 (citation omitted). Summary reversal is warranted because the decision below thwarts important federal policy, upsets settled expectations, and undermines the proper operation of the Supremacy Clause.

ARGUMENT

I. The Decision Below Directly Conflicts with the Court's FAA Jurisprudence.

In 1925, Congress responded to "centuries of judicial hostility to arbitration agreements," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974), by enacting the Federal Arbitration Act, thereby codifying a "national policy favoring arbitration" and "plac[ing] arbitration agreements on an equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013) ("Congress enacted the FAA in response to widespread judicial hostility to arbitration") (citing *Concepcion*, 563 U.S. at 339); *Gilmer*, 500 U.S. at 24 ("[The FAA's] purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.").

The heart of the FAA is Section 2, *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), which makes written arbitration agreements "valid, irrevocable, and enforceable" as a matter of federal law, "save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2; *see also Perry v. Thomas*, 482 U.S. 483, 489 (1987). Section 2 "create[s] a body of federal substantive law of arbitrability," *Moses H. Cone*, 460 U.S. at 24, the central mandate of which requires arbitration agreements to be "enforced according to their terms," *Volt Info. Sciences, Inc.*, 489 U.S. at 479.

Importantly, Section 2 "establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). "The FAA thus preempts any state rule discriminating on its face against arbitration—for example, a law prohibiting outright the arbitration of a particular type of claim." *Id.* (citation omitted). "And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.*

The decision below flouts these fundamental principles in at least two ways. *First*, the court below invalidated the parties' arbitration agreement "under state laws applicable *only* to arbitration provisions." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). According to the state court, it is the "public policy" of the State of Florida that arbitration of medical claims should happen only under the precise provisions adopted by the MMA. Pet. App. 5a. These arbitration provisions, the court believed, were "necessary to lower the costs of medical care in this State," *id.* at 6a (quoting *Franks*, 116 So.3d at 1248), and so any arbitration agreement lacking the MMA's provisions is unenforceable.

But the MMA—by its explicit terms—applies *only* to arbitration. It creates an arbitration regime "in which liability is deemed admitted and arbitration will be held only on the issue of damages." Fla. Stat. 766.106(3)(b)(3).

The MMA thus is not a ground "'for the revocation of *any* contract' but merely a ground that exists for the revocation of arbitration provisions." *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (quoting 9 U.S.C. § 2).

Indeed, unlike prior cases before this Court, the court below did not even attempt to "cast the rule in broader terms." *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1427. The state court refused to enforce the parties' arbitration agreement simply because it conflicted with "the arbitration provisions under the [MMA's] statutory scheme." Pet. App. 5a (quoting *Crespo v. Hernandez*, 151 So.3d 495, 496 (Fla. 5th DCA 2014)). This type of arbitration-specific rule is flatly prohibited under the FAA. *See id.*

Second, the decision below disregards this Court's instructions that state courts may not mandate arbitration procedures that "interfere[] with the fundamental attributes of arbitration and thus create[] a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344. Petitioner puts it best: by endorsing the MMA, the state court "effectively transform[ed] arbitration from an alternative forum for the adjudication of disputes into a no-fault compensation scheme." Petitioner's Brief ("Pet. Br.") 21. That is "not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law." *Concepcion*, 563 U.S. at 351.

At bottom, arbitration under the FAA "is a matter of contract," *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 (2010), and "parties are 'generally free to structure their arbitration agreements as they see fit,'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010)

(quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995)); *see also Volt Info. Sciences, Inc.*, 489 U.S. at 479. That is what the parties did here—entering into a run-of-the-mill agreement to resolve disputes over medical care through arbitration. The FAA required the lower court to enforce the agreement.

II. Summary Reversal Is Warranted.

"When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established." *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012) (citing U.S. Const., Art. VI, cl. 2.). Because state supreme court decisions often represent the final say in the enforcement of arbitration agreements, such intervention is of utmost importance in the context of this Court's FAA jurisprudence. *See Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 17 (2012) ("State courts rather than federal courts are most frequently called upon to apply the [FAA]. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.").

Accordingly, when state courts refuse to apply this Court's FAA precedents, the Court has not hesitated to intervene. Indeed, the Court has ordered summary reversal of several recent state court decisions that failed to heed its FAA precedents. *See, e.g.*, *Marmet*, 565 U.S. at 532 (vacating and remanding a decision of the Supreme Court of Appeals of West Virginia because its "interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of this Court"); *Nitro-Lift*, 568 U.S. at 501, 503 (reversing Oklahoma Supreme Court's

decision that "disregard[ed] this Court's precedents on the FAA" and severability); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-58 (2003) (per curiam) (reversing Alabama Supreme Court's "misguided" approach to FAA's "involving commerce" requirement in light of this Court's decision in *Allied-Bruce*); *see also DIRECTV, Inc. v. Imburgia*, No. 14-462, Tr. of Oral Arg. at 50:8-17 (Oct. 6, 2015) (Breyer, J.) (discussing risk of state court noncompliance with this Court's decisions). Indeed, this is not the first time a Florida court has demonstrated hostility to arbitration agreements by failing to heed basic principles of federal arbitration law. *See KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam) (summarily vacating the Florida Fourth District Court of Appeal's decision refusing to compel arbitration, because the court "failed to give effect to the plain meaning of the Act and to the holding of *Dean Witter*").

This continued resistance from the state courts not only undermines this Court's authority, but it also is bad for American businesses and consumers. This Court has acknowledged the "real benefits" of arbitration. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001). For more than three decades, the Court consistently has enforced the liberal federal policy favoring arbitration, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp.*, 465 U.S. at 15 n.9; *accord Moses H. Cone*, 460 U.S. at 24. And in doing so, the Court repeatedly has highlighted the "advantages" of arbitration. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995); *see, e.g.*, *Concepcion*, 563 U.S. at 345 (arbitration "reduc[es] the cost and increas[es] the speed of dispute resolution"); *Stolt-Nielsen S.A.*, 559 U.S. at 685 (arbitration provides

"lower costs" and "greater efficiency and speed"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985) (emphasizing the relative "simplicity, informality, and expedition of arbitration"). Like Congress, the Court has explained that these advantages inure to the benefit of disputants—businesses and "individuals"—"who need a less expensive alternative to litigation." *Allied-Bruce*, 513 U.S. at 280.

Many of the Chamber's members have "written contracts relying on [this Court's FAA precedents] as authority." *Allied-Bruce*, 513 U.S. at 272. They need to know that their arbitration agreements will be enforced so they can anticipate the costs of dispute resolution and plan their affairs accordingly. But the state courts' ongoing efforts to avoid the FAA cast a pall over every arbitration agreement, creating widespread uncertainty for businesses.

Even when the state courts' efforts fail, they require years of litigation to undo—eliminating the efficiencies that arbitration is supposed to provide. And the state courts' receptivity to new ways of limiting the enforceability of arbitration agreements means that litigants are encouraged to keep raising them. The resulting satellite litigation is wasteful, time-consuming, and does nothing to resolve the underlying merits of disputes. The irony, of course, is that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.*, 465 U.S. at 7. And it contravenes "Congress' intent 'to move

the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone*, 460 U.S. at 22).

If left unchecked, the decision below may serve as an invitation for other States to circumvent the FAA. As Petitioner has recognized, "a rule that allowed States to render certain provisions in arbitration agreements unenforceable merely by prescribing a mandatory list of terms for arbitration agreements 'would make it trivially easy for States to undermine the Act.'" Pet. Br. 17 (quoting *Kindred Nursing Ctrs.*, 137 S. Ct. at 1428). State legislatures could create new statutory arbitral formats in a whole host of industries and fields solely in order to override the freedom to arbitrate guaranteed by the FAA.

More broadly, leaving on the books decisions like the one below threatens to thwart the uniform "national policy favoring arbitration," *Nitro-Lift*, 568 U.S. at 17 (quotation omitted), and to embolden parties that wish to evade contractual obligations to arbitrate disputes in the hopes that unchecked judicial hostility to arbitration will relieve them of those obligations. The decision below thus also hinders the FAA's important goals of "achiev[ing] streamlined proceedings and expeditious results." *Preston*, 552 U.S. at 357. It should not stand.

CONCLUSION

For all these reasons, the Court should grant the petition for certiorari and summarily reverse the judgment of the Florida Fifth District Court of Appeal.

Respectfully submitted,

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