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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NEW JERSEY CIVIL JUSTICE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI 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.[1]

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

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention to file this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

The New Jersey Civil Justice Institute ("NJCJI," or "The Institute") has a strong interest in the clear, predictable, and fair application of the law. NJCJI is a statewide, nonpartisan association of over 100 individuals, businesses, and trade and professional organizations dedicated to improving New Jersey's civil justice system. The Institute believes that a balanced civil justice system and the enforcement of agreements to engage in alternative dispute resolution fosters public trust and motivates professionals, sole proprietors, and businesses to provide safe and reliable products and services, while ensuring that injured people are compensated fairly for their losses. Such a system is critical to ensuring fair resolution of conflicts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

For these reasons, many of *amici*'s members and affiliates 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 policy reflected in the Federal Arbitration Act ("FAA") and this Court's consistent endorsement of arbitration, *amici*'s members have structured millions of contractual relationships around arbitration agreements.

The benefits of these agreements are threatened by state-law rules like the one announced below, which conditions the enforcement of arbitration agreements on disclosure requirements that do not apply uniformly to all contracts. Although this Court has consistently condemned discriminatory rules of

this sort, some state courts continue to resist. Accordingly, *amici* have a strong interest in advocating for summary reversal of rulings, like the one here, that represent outright defiance of this Court's FAA precedents.

INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court has observed, "the judicial hostility towards arbitration that prompted the FAA had manifested itself in 'a great variety' of 'devices and formulas.'" *Concepcion*, 131 S. Ct. at 1747 (citation omitted). The New Jersey Supreme Court's decision in this case represents one such device; indeed, it is one that this Court already has denounced.

Specifically, the court below held that a clear and unambiguous contract clause requiring that 'any dispute relating to the underlying agreement shall be submitted to arbitration and the resolution of that forum shall be binding and final" cannot be enforced unless it includes additional language warning that "consumers * * * are giving up their right to seek relief in a judicial forum." Pet. App. 1a, 5a (internal quotation marks and emphasis omitted). In the absence of this extra warning, the New Jersey court held, there cannot be "mutual assent" to arbitration, thus "render[ing] the arbitration [provision] unenforceable." *Id.* at 16a–17a.

The New Jersey rule requiring a warning of the consequences of one contract term (arbitration) in exhaustive detail is not a rule that applies to all other contract terms. Rather, the ordinary rules governing contracts in New Jersey provide that "[a] party who enters into a contract in writing, without any

fraud or imposition being practiced upon him, is *conclusively presumed* to understand and assent to its terms and legal effect." *Rudbart* v. *New Jersey Dist. Water Supply Comm'n*, 605 A.2d 681, 685 (N.J. 1992) (per curiam) (emphasis added; internal quotation marks omitted). This rule, moreover, is necessitated by common sense and practical experience. If special warnings were required regarding the implications of all aspects of a contract, the use of form contracts—a necessity in the modern economy—could grind to a halt. In fact, however, the sweep of the New Jersey court's ruling is limited almost entirely to arbitration provisions rather than other contract terms.

That court's insistence that the implications of a term requiring arbitration of disputes be explained to the post hoc satisfaction of the courts directly contradicts the FAA and this Court's precedents—most notably *Doctors' Associates, Inc.* v. *Casarotto*, 517 U.S. 681 (1996). Indeed, the New Jersey court's rule is just another version of the "special notice requirement[s]" for arbitration that the FAA held to be preempted in *Casarotto*. *Id.* at 687. Because the conflict between the New Jersey court's decision and *Casarotto* is so palpable, and because the New Jersey court's decision has already invited intermediate appellate courts to disregard the FAA, the Court should summarily reverse the decision below, as it has done in several other recent cases of state-court resistance to this Court's FAA precedents.

ARGUMENT

A. The Decision Below Conflicts With This Court's Precedents Interpreting The FAA.

1. Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also *American Express*, 133 S. Ct. at 2308-2309 ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *Concepcion*, 131 S. Ct. at 1745).

At the heart of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987) (emphasis added) (quoting 9 U.S.C. § 2; emphasis added by the Court). "By enacting § 2, * * * Congress precluded 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)).[2]

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[2] See also, *e.g.*, *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67-68 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye*

In other words, Section 2's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Casarotto,* 517 U.S. at 687). More broadly, Section 2 prohibits States from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008).

Applying these principles, this Court held in *Casarotto* that the FAA preempts any rule of state law that imposes on arbitration provisions notice requirements that do not apply to all other contract clauses. *Casarotto* involved an arbitration provision—virtually identical to the provision considered by the New Jersey court in this case—that required that "[a]ny controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration." 517 U.S. at 683 (internal quotation marks omitted).[3] The Montana Supreme

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Check Cashing, Inc. v. *Cardegna*, 546 U.S. 440, 443 (2006); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270-271 (1995); *Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp.* v. *Keating*, 465 U.S. 1, 10-11 & 16 n.11 (1984).

[3] The full text of the arbitration provision in *Casarotto* states:

> Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association at a hearing to be held in Bridgeport, Connecticut and judgment upon an award rendered by the Arbitra-

Court refused to enforce this agreement based on a Montana statute that required contracts containing arbitration clauses to declare that fact in "underlined capital letters on the first page of the contract." *Ibid.* (internal quotation marks omitted). That requirement, the Court held, "directly conflict[ed] with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a *special notice requirement not applicable to contracts generally*." *Id.* at 687 (emphasis added).

2. The New Jersey Supreme Court's holding in this case similarly conditions the enforceability of arbitration agreements on compliance with special notice requirements—and is therefore every bit as preempted as the Montana statute at issue in *Casarotto*. The court below ruled that, to be enforceable, the arbitration "clause, at least in some general and sufficiently broad way, *must explain* 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 (emphasis added). The contract in this case, as the intermediate appellate court concluded and the New Jersey Supreme Court acknowledged, "'clearly and unambiguously stated that any dispute relating to the underlying agreement shall be submitted to arbitration and the resolution of that forum

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> tor(s) may be entered in any court having jurisdiction thereof. The commencement of arbitration proceedings by an aggrieved party to settle disputes arising out of or relating to this contract is a condition precedent to the commencement of legal action by either party. The cost of such a proceeding will be borne equally by the parties.

J.A. 75, *Doctor's Associates.* v. *Casarotto*, 517 U.S. 681 (1996) (No. 95-559), *available at* 1996 WL 33414128.

shall be binding and final.'" *Id.* at 5a (emphasis and ellipsis omitted). Indeed, this contractual language is materially indistinguishable from the language of the arbitration provision involved in *Casarotto*. But the New Jersey Supreme Court nonetheless declared that "clear[]" and "unambiguous[]" statement insufficient, because "an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's claim adjudicated in a court of law." *Id.* at 10a.

The court denied that it had "prescribed [a] set of words" needed to form an arbitration agreement. Pet. App. 16a. But it nonetheless declared that "[w]hatever words compose an arbitration agreement, they must be clear and unambiguous that a consumer is choosing to arbitrate disputes rather than have them resolved in a court of law." *Ibid.* The court concluded that the absence of "wording" that "clearly and unambiguously signal[s] to [a] plaintiff that she was surrendering her right to pursue her statutory claims in court * * * renders the arbitration agreement unenforceable." *Id.* at 17a; see also *id.* at 2a.

Not surprisingly, the New Jersey Appellate Division has taken the New Jersey Supreme Court's decision at face value and has begun imposing a special notice requirement on arbitration agreements. Indeed, in the several months since the decision below, the Appellate Division has already issued three decisions refusing to enforce clear and unambiguous arbitration agreements because they failed to include a special warning regarding the waiver of rights associated with litigation in court. See *Dispenziere* v. *Kushner Cos.*, 101 A.3d 1126, 1128, 1131 (N.J. Super.

Ct. App. Div. 2014) (relying on lack of special warning to refuse to enforce contract stating that "[a]ny disputes arising in connection with this Agreement [with certain exceptions] * * * shall be heard and determined by arbitration before a single arbitrator * * * [and] [t]he decision of the arbitrator shall be final and binding") (internal quotation marks omitted); *Rosenthal* v. *Rosenblatt*, 2014 WL 5393243, at *5, *6 (N.J. Super Ct. App. Div. Oct. 24, 2014) (refusing to enforce arbitration agreement providing that "all disputes, claims and controversies between the parties hereto * * * shall be exclusively resolved as provided herein through mediation and arbitration" because, among other reasons, the agreement "fails to include the language our Supreme Court has deemed crucial to an effective waiver of the right to litigate in court") (internal quotation marks omitted); *Kelly* v. *Beverage Works NY Inc.*, 2014 WL 6675261, at *2-3 (N.J. Super. Ct. App. Div. Nov. 26, 2014) (denying enforcement of arbitration provision in collective bargaining agreement that does not contain special warning required by decision below).

This rule of New Jersey law—that arbitration provisions cannot be enforced unless they expressly state that their consequence is to waive litigation in court—runs directly afoul of *Casarotto*, which held that "'state legislation requiring *greater information or choice* in the making of agreements to arbitrate than in other contracts is preempted.'" 517 U.S. at 687 (emphasis added) (quoting 2 Ian R. Macneil *et*

al., FEDERAL ARBITRATION LAW § 19.1.1, pp. 19:4-19:5 (1995)).[4]

There can be no doubting that the New Jersey Supreme Court has demanded "greater information or choice" for arbitration agreements than for other contractual terms. The ordinary rules governing contracts in New Jersey, as elsewhere, provide that "[a] party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is *conclusively presumed* to understand and assent to its terms and legal effect." *Rudbart*, 605 A.2d at 685 (emphasis added; internal quotation marks omitted). If the rule were otherwise, the continued vitality of form contracts would be threatened because parties intent on avoiding their contractual obligations would predictably argue (and some courts predictably will accept) that the full implications of a wide variety of any number of contract terms—such as methods of calculating prices, taxes, and fees; extensions of credit; the extent of and limits on the availability of service; warranty provisions; choice-of-law and venue provisions; and the like—are not readily understandable by "an average member of the public" Pet. App. 10a.

Under *Casarotto*, courts may not adopt a general rule that parties are "conclusively presumed to understand and assent to" contractual terms, while at the same time requiring special warnings before parties will be deemed to have understood and assented

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[4] The fact that New Jersey's rule is judge-made rather than statutory makes no difference; the FAA preempts any "state law, whether of legislative or judicial origin," that disfavors arbitration. *Perry*, 482 U.S. at 492 n.9.

to an arbitration provision. As the Court has said in a related context, "[w]hat States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. * * * [T]hat kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 281 (1995).

The New Jersey Supreme Court asserted that "under our state contract law, we impose no greater burden on an arbitration agreement than on any other agreement waiving constitutional or statutory rights." Pet. App. 17a. Yet a rule that is limited to provisions that waive statutory or constitutional rights—especially ones that by their nature cannot coexist with arbitration (such as jury trials or litigation in court)—is not a rule of general applicability. See Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. OF INT'L ARB. 435, 537 n.340 (2011) ("[I]t would be sensible to recognize that any heightened standard for 'jury waiver,' as it would disproportionately affect agreements to arbitrate, should be preempted on that ground alone.").

To the contrary, the New Jersey Supreme Court's rule that special warning must be given that arbitration displaces jury trials necessarily rests on "the tired assertion that arbitration should be disparaged as second-class adjudication." *Carbajal* v. *H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004). But as this Court explained nearly three decades ago, "we are well past the time when judicial suspicion of the desirability of arbitration and of the

competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985). The "mistrust of the arbitral process" reflected in the conditions imposed by the court below on the enforceability of arbitration agreements long "has been undermined by" this Court's "arbitration decisions." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 34 n.5 (1991).

3. If the decision below were allowed to stand, the injury to the federal policy favoring the enforcement of arbitration agreements would be significant. As noted above (at 8-9), New Jersey courts already are refusing to uphold arbitration agreements that "fail[] to include the language [that the New Jersey] Supreme Court has deemed crucial." *Rosenthal*, 2014 WL 5393243, at *6. Courts in other States have imposed similarly impermissible special notice requirements. *E.g.*, *Harris* v. *Bingham McCutchen LLP*, 154 Cal. Rptr. 3d 843, 844, 847, 849 (Ct. App. 2013) (holding under Massachusetts law that "plaintiff was not required to arbitrate her antidiscrimination claims" because agreement to arbitrate "'any legal disputes'" did "not state in clear and unmistakable terms that plaintiff was waiving or limiting any statutory antidiscrimination rights"), cert. denied, 134 S. Ct. 903 (2014).

Reversal of the decision below is therefore necessary to ensure that other States do not follow New Jersey's lead by erecting one set of rules governing the formation of arbitration agreements while maintaining a different set of rules for all other contracts. At the same time, however, courts will remain free to

police arbitration agreements for substantive fairness by applying established contract-law principles, including unconscionability, so long as those principles apply evenhandedly to all contracts. See *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam) ("On remand, the West Virginia court must consider whether, absent that general public policy, the arbitration clauses * * * are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.").

B. Summary Reversal Is Warranted.

For the reasons discussed above, the New Jersey court's decision flouts this Court's precedents—especially *Casarotto*. Under such circumstances, this Court has not hesitated to summarily reverse, doing so on at least four occasions. See *Nitro-Lift Techs., LLC* v. *Howard*, 133 S. Ct. 500, 501, 503 (2012) (per curiam) (reversing Oklahoma Supreme Court's decision that "disregard[ed] this Court's precedents on the FAA" and severability); *Marmet*, 132 S. Ct. at 1204 (reversing West Virginia Supreme Court of Appeals' holding that personal injury and wrongful death claims were not subject to arbitration); *KPMG LLP* v. *Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) (reversing Florida appellate court ruling that "failed to give effect to the plain meaning of the [FAA] and to [this Court's] holding in" *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985)); *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*).

As this Court has explained, "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Techs.*, 133 S. Ct. at 501. Unfortunately, however, the history of the FAA shows that this Court's continued vigilance is necessary to prevent state courts from reincarnating "a great variety" of purportedly neutral "devices and formulas" for undermining arbitration agreements. *Concepcion*, 131 S. Ct. at 1747 (internal quotation marks omitted).

The Supremacy Clause demands as much: "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. See U.S. Const., Art. VI, cl. 2." *Marmet*, 132 S. Ct. at 1202.

In this case, the New Jersey Supreme Court fashioned a rule that cannot be reconciled with this Court's holding in *Casarotto*. Because the decision below so clearly conflicts with this Court's precedents and, if left unchecked, would serve as an invitation for state courts to circumvent the FAA, the Court should summarily reverse that decision.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the New Jersey Supreme Court should be reversed.

Respectfully submitted.

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