No. 11-394

In the Supreme Court of the United States

CLARKSBURG NURSING HOME & REHABILITATION CENTER, LLC, D/B/A CLARKSBURG CONTINUOUS CARE CENTER, ET AL., PETITIONERS

v.

SHARON A. MARCHIO, EXECUTRIX OF THE ESTATE OF PAULINE VIRGINIA WILLETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR SEVENTEENTH STREET ASSOCIATES LLC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(b), Seventeenth Street Associates LLC, doing business as Huntington Health and Rehabilitation Center (HHRC), respectfully requests leave to submit the accompanying brief as *amicus curiae* in support of petitioners Clarksburg Nursing & Rehabilitation Center, Inc., Sheila Jones and Jennifer McWhorter (collectively, Clarksburg Nursing Center). Consent to file the accompanying brief was granted by counsel for Clarksburg Nursing Center and refused by counsel for respondent Sharon A. Marchio.

The petition for a writ of certiorari asks this Court to decide whether § 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, preempts a state-law rule prohibiting the enforcement of pre-dispute arbitration agreements when plaintiffs assert claims for personal injury or wrongful death. That question is of immense practical significance to all who wish to see their arbitration agreements honored like all other contracts.

Like Clarksburg Nursing Center, HHRC operates a skilled nursing facility in West Virginia that relies on pre-dispute arbitration agreements to resolve efficiently and fairly personal-injury and wrongful-death claims, which are the most common types of claims in the health care industry. As HHRC's standard arbitration agreement explains, arbitration "is valuable to all parties because it offers a streamlined process to settle disagreements. [Arbitration] increases the likelihood that disagreements can be resolved more quickly and less expensively than by litigation and that residents themselves will actually

benefit from faster resolution of disagreements. Participation in [arbitration] also helps to reduce the costs of health care for everyone."

In this case, however, the Supreme Court of Appeals of West Virginia held that the FAA does not protect from state interference pre-dispute arbitration agreements requiring the arbitration of claims for personal injury or wrongful death. Amazingly, the West Virginia court rendered its holding without addressing the plain language of the FAA or this Court's precedent rejecting the contention that the FAA only protects "commercial" agreements to arbitrate. If left undisturbed, the lower court's erroneous holding will further frustrate the exercise of federal arbitration rights in every segment of the United States economy, as claims for personal injury and wrongful death arise in all manner of contexts.

HHRC has a particular interest in making its views known in this case since it has personally experienced the fact that, in West Virginia (as in many other States), the ability to exercise federal arbitration rights now largely depends on two variables that have nothing to do with legal merit: (1) whether a case is before a state or federal court, and (2) whether a party wishing to enforce its federal arbitration rights is willing to invest the time and resources necessary to defeat the numerous ways in which parties (or their enterprising counsel) seek to avoid promises to arbitrate. As such, there now exists a two-tiered system of justice ostensibly subject to the same federal statute and the same decisions of this Court, which consistently produces inconsistent results.

For the foregoing reasons, the Court should grant HHRC leave to file the accompanying brief.

Respectfully submitted.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Seventeenth Street Associates LLC operates a 186-bed nursing facility known as Huntington Health and Rehabilitation Center (HHRC).[1] HHRC is located in Huntington, West Virginia, which is the State's second-largest city and home to Marshall University. HHRC provides a wide variety of services to a diverse patient population. For example, many of HHRC's residents come to HHRC from acute-care hospitals to receive rehabilitation services following major surgical procedures (e.g., cardiac surgeries or surgeries to repair torn ligaments and broken bones). Such residents may include the elderly, young adults and generally reflect the community at large. A significant number of HHRC's residents also receive long-term care ser-

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Petitioners have consented to the filing of this brief, and their written consent has been filed with the Clerk. Respondent has withheld her consent. Counsel of record for petitioners and respondent received notice of HHRC's intent to file this brief one day after the ten-day deadline provided by Supreme Court Rule 37.2(a); however, respondent suffered no prejudice because other *amici* had already noticed their intent to file briefs in support of petitioners. As a result, respondent had already requested and obtained a 30-day extension of time in which to respond to the petition and the briefs of *amici*. *See Revisions to Rules of the Supreme Court of the United States* 15 (July 17, 2007) (Clerk's comment explaining notice-of-intent requirement was added to "allow a respondent to seek an extension of time in order to respond to an *amicus curiae* brief in a brief in opposition").

vices, which are designed to help those who, because of medical condition, age or disability, require professional assistance.

HHRC and its employees, which include dozens of registered nurses, licensed practical nurses, certified nursing assistants and social workers, serve a vital function in West Virginia's health care delivery system by bridging the gap between costly treatment in acute-care hospitals and treatment in the home. As with any human enterprise, however, HHRC and its employees are not perfect. Therefore, like petitioner Clarksburg Nursing & Rehabilitation Center, Inc., HHRC relies on pre-dispute arbitration agreements to resolve efficiently and fairly disputes that may arise with residents or their families. As in the health care industry generally, the most common type of dispute involves claims for personal injury or wrongful death.

HHRC does not condition admission or continued treatment on a resident executing an arbitration agreement. Instead, entering into such an agreement is completely voluntary. As HHRC's standard arbitration agreement explains, arbitration "is valuable to all parties because it offers a streamlined process to settle disagreements. [Arbitration] increases the likelihood that disagreements can be resolved more quickly and less expensively than by litigation and that residents themselves will actually benefit from faster resolution of disagreements. Participation in [arbitration] also helps to reduce the costs of health care for everyone."

In this case, however, the Supreme Court of Appeals of West Virginia held that § 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, does not preempt

a judge-made rule prohibiting the enforcement of pre-dispute arbitration agreements when plaintiffs assert claims for personal injury or wrongful death. Although the West Virginia court recognized that a "rule of state law disfavoring arbitration for a class of interstate commercial transactions is preempted by the FAA," it nonetheless concluded that "Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce . . . ." Pet. App. 84a.

Therefore, the state court felt free to craft a sweeping new rule whereby, as a matter of state "public policy," pre-dispute arbitration agreements cannot be enforced to compel arbitration of claims for personal injury or wrongful death. Pet. App. 85a-86a. In so holding, the state court expressed outright contempt for this Court's supposedly "expansive" FAA jurisprudence. Pet. App. 79a; *see also id.* 51a (claiming that, "[w]ith tendentious reasoning," this Court has "stretched the application of the FAA from being a *procedural* statutory scheme effective only in the federal courts, to being a *substantive* law that preempts state law in both the federal *and* state courts"). *But see Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984) (rejecting argument that FAA is only a procedural statute applicable in federal courts); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) (declining to reexamine *Southland*); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001) (same); *Preston v. Ferrer*, 552 U.S. 346, 353 n.2 (2008) (same); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative*

History of the Federal Arbitration Act, 78 Notre Dame L. Rev. 101, 166 (2002) (predicting danger that "state courts may misapply or misconstrue the FAA, influenced at least in part by their belief that *Southland* was wrongly decided").

The West Virginia court's radical holding threatens to invalidate all of HHRC's arbitration agreements. Therefore, HHRC has a significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari thoroughly explains why the West Virginia court's decision conflicts with several decisions of this Court and several decisions of various lower courts.[2] Therefore, HHRC

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[2] In addition to the authorities cited in the petition (at 22-25), HHRC directs the Court's attention to the following decisions in which a federal circuit court of appeals or state court of last resort compelled parties to arbitrate claims for personal injury or wrongful death pursuant to a pre-dispute arbitration agreement, in accordance with the FAA. *See Northport Health Servs. of Ark., LLC v. Rutherford*, 605 F.3d 483, 491-92 (8th Cir. 2010) (compelling arbitration of such claims asserted against nursing facilities); *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 645-46 (Tex. 2009) (compelling arbitration of such claims asserted against employer); *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (per curiam) (compelling arbitration of such claims asserted against nursing facility and finding FAA preempts state statute imposing special requirements on agreements providing for arbitration of personal-injury claims); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So. 2d 661, 664-68 (Ala. 2004) (per curiam) (compelling arbitration of such claims asserted against nursing facilities); *see also Jones v. Halliburton Co.*, 583 F.3d 228, 234 (5th Cir. 2009) (holding FAA preempts state statute imposing special requirements on agreements providing for arbitration of personal-

(continued)

wishes to emphasize three additional reasons why this Court's review is essential now and not years from now.

First, delaying review will further exacerbate the significant burden already imposed on businesses and individuals who seek to enforce their federal arbitration rights. HHRC knows this all too well from first-hand experience. Like countless businesses and individuals throughout the United States, HHRC has been forced to dedicate significant time and resources to enforce simple promises to arbitrate that the FAA was designed to protect from judicial and legislative interference. The ability to exercise federal arbitration rights now largely depends on two variables that have nothing to do with legal merit: (1) whether a case is before a state or federal court, and (2) whether a party wishing to enforce its federal arbitration rights is willing to invest the time and resources necessary to defeat the numerous ways in which parties (or their enterprising counsel) seek to avoid promises to arbitrate. As such, there now exists a two-tiered system of justice ostensibly subject to the same federal statute and the same decisions of this Court, which consistently produces inconsistent results.

Second, the West Virginia court's holding cannot be reconciled with the plain language of the FAA. There is no more fundamental canon of statutory construction that a court must begin with the language of the statute itself. In relevant part, § 2 of

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injury claims), *petition for cert. dismissed*, 130 S. Ct. 1756 (2010) (No. 09-864).

the FAA provides 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 (emphasis added). Although the West Virginia court agreed that the underlying contract evidenced a transaction involving interstate commerce, Pet. App. 58a, the West Virginia court never considered or applied the plain language of the remainder of § 2 in purporting to discern congressional intent. Instead, the West Virginia court relied upon a law review article published one year *after* the FAA's enactment, treating it as conclusive authority regarding Congress's "true" intent. The intent of Congress, however, is expressed in a statute's words, not in law review articles authored by individuals who did not vote on the legislation in question. Although ignored by the West Virginia court, the plain language of § 2 does not limit the FAA's protection to "commercial" controversies. The West Virginia court's reading of the word "commercial" into § 2 not only conflicts with this Court's decisions, it sets a dangerous precedent tending to revive the judicial hostility toward arbitration targeted by the FAA by encouraging other courts to read their views into the language of the FAA under the guise of enforcing "congressional intent."

Third, the West Virginia court's decision is so patently erroneous and openly contemptuous of this Court's FAA jurisprudence that it warrants summary reversal. When the decision under review con-

flicts with the unambiguous language of a controlling statute or a previous decision of this Court, or when the logic of the lower court's decision is patently incorrect, this Court has found it appropriate to grant the petition for a writ of certiorari and reverse the judgment of the lower court via a per curiam opinion. This Court recently granted such relief in reversing a state supreme court's narrow interpretation of the FAA's interstate-commerce requirement, which had the effect of artificially limiting the FAA's reach.

The West Virginia court's decision is exponentially less defensible, using language essentially daring this Court to take action. Moreover, the state court's decision invalidates a large class of arbitration agreements—those executed prior to a dispute and covering claims for personal injury or wrongful death—for which enforcement is sought in the courts of West Virginia. Therefore, the Court should use this opportunity to remind the bench and bar that this Court is the final arbiter of the meaning of federal law and that its decisions are to be respected.

Accordingly, the Court should grant the petition for a writ of certiorari and, as it has done under similar circumstances, summarily reverse the judgment below.

ARGUMENT

I. Delaying Review Will Further Exacerbate the Significant Burden Already Imposed on Parties Who Seek to Enforce Their Federal Arbitration Rights

Something very important often gets lost in the discussion of FAA preemption: the significant financial toll placed on businesses and individuals who,

like HHRC and petitioners here, have the temerity to insist that parties honor their promises to arbitrate and who ask courts to enforce those promises as they would any other contract. Seeking to enforce promises to arbitrate often results in years of costly litigation, something the FAA was designed to prevent. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983) (explaining that the FAA "calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses").

HHRC has experienced this first-hand. For example, in early 2010, a former resident of HHRC sued the facility's owners and its administrator in the Circuit Court of Cabell County, West Virginia, asserting claims for personal injury. That former resident had agreed to arbitrate all disputes with HHRC arising out of her treatment. Given West Virginia precedent's general hostility toward arbitration, HHRC's owners filed an independent action in the United States District Court for the Southern District of West Virginia seeking to compel the former resident to arbitrate her claims. *See Canyon Sudar Partners, LLC v. Cole ex rel. Haynie*, No. 3:10-cv-1001, 2011 WL 1233320, at *1 (S.D. W. Va. Mar. 29, 2011).

Represented by the same counsel that represents respondent here, the former resident opposed the motion to compel arbitration and sought to join HHRC's administrator as a necessary party in order to deprive the federal district court of diversity jurisdiction. That effort failed, and the federal district court ordered the former resident to arbitrate her claims after finding that the FAA protected the arbi-

tration agreement from state interference. *Canyon Sudar*, 2011 WL 1233320, at *10.

However, instead of complying with the district court's decision or appealing, the former resident waited several months. Once the West Virginia court issued its decision in this case, the former resident sought leave to name HHRC as a defendant in her state-court suit even though HHRC was a party to the exact same arbitration agreement enforced in *Canyon Sudar*. As a result, HHRC was forced to file its own federal action seeking to compel arbitration. *See 17th St. Assocs. LLC v. Cole ex rel. Haynie*, No. 3:11-cv-478 (S.D. W. Va. filed July 12, 2011). Three days later, the former resident filed a motion in state court citing the decision in this case and seeking a declaratory ruling that the arbitration agreement upheld in *Canyon Sudar* was unenforceable as a matter of law. To its credit, the state court declined to rule on the former resident's motion pending the outcome of HHRC's federal action.[3]

HHRC's experience is typical of the lengths to which those wishing to protect their federal arbitration rights must go to see that their arbitration agreements are enforced according to the standards applicable to all contracts generally. *See, e.g.*, *Moses H. Cone*, 460 U.S. at 27 n.36 (addressing similar in-

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[3] Given that the former resident chose not to appeal in *Canyon Sudar*, HHRC's action against the former resident is unlikely to produce a decision on the question presented in this case since *Canyon Sudar* will be given preclusive effect. *See, e.g.*, *Walker v. W. Va. Gas Corp.*, 3 S.E.2d 55, 57-58 (W. Va. 1939) (explaining a ruling conflicting with state precedent is still given preclusive effect).

stance in which party seeking to enforce arbitration agreement was forced to file independent federal action because state trial court in which first action was filed was bound by state precedent narrowly interpreting the FAA); *Northport Health Servs. of Ark., LLC v. Rutherford*, 605 F.3d 483, 485 (8th Cir. 2010) (addressing similar instance in which nursing facilities seeking to enforce arbitration agreements were forced to file independent federal actions to compel arbitration of personal-injury and wrongful-death claims asserted in state-court actions); *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 90-91 (4th Cir. 2005) (addressing similar instance where state trial court was bound by state precedent narrowly interpreting the FAA); *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 839-40 (7th Cir. 1999) (addressing same where state trial court was hostile to federal arbitration rights); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (addressing same where state trial court was bound by state precedent hostile to the FAA); *Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 4:07-cv-194, 2008 WL 268321, at *6 (N.D. Okla. Jan. 29, 2008) (same); *Sooner Geriatrics, L.L.C. v. Crutcher*, No. 5:07-cv-244, 2007 WL 2900535, at *5 (W.D. Okla. Oct. 3, 2007) (same).

Those who remain in state court often face years of costly litigation seeking to enforce their federal arbitration rights. For example, Odin Healthcare Center is an Illinois nursing facility affiliated with HHRC. Five years ago, Odin Healthcare Center was sued in the Circuit Court for Madison County, Illinois, by the estate administrator of a former resident who asserted personal-injury and wrongful-death

claims. *See Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1211 (Ill. 2010). Odin Healthcare Center moved to compel arbitration based on agreements signed by the resident and the estate administrator. *See id.* at 1211-12. The estate administrator responded by arguing that the agreements were unenforceable because they conflicted with state "public policy" and because the FAA did not protect the agreements, which the estate administrator claimed did not satisfy the FAA's interstate-commerce requirement. *See id.* at 1212. The estate administrator also argued that the agreements were void for lack of mutuality because the agreements did not impose equal obligations to arbitrate. *See id.*

The state trial court denied Odin Healthcare Center's motion to compel arbitration in 2007. *See id.* at 1212. One year later and after additional briefing and oral argument, the Illinois Court of Appeals unanimously affirmed the trial court's decision on the basis that Illinois's "emphatically stated public policy" invalidated the arbitration agreements. *Id.* at 1212. Odin Healthcare Center asked the Supreme Court of Illinois to review that decision because it conflicted with the plain language of § 2 and several decisions of this Court. *See id.* After the Supreme Court of Illinois declined to review the Illinois Court of Appeals decision, Odin Healthcare Center asked this Court to do so. *See id.* This Court declined review after the estate administrator argued that the Supreme Court of Illinois could reject the lower court's ruling if Illinois's intermediate appellate courts reached conflicting conclusions. *See id.*

By mere happenstance, shortly before this Court declined review, another intermediate appellate

court in Illinois expressly rejected the lower court's decision in Odin Healthcare Center's case. Citing that split of authority, Odin Healthcare Center successfully petitioned the Supreme Court of Illinois to reconsider its denial of review. *See id.* at 1214. After yet another round of briefing and oral argument, the Supreme Court of Illinois issued an opinion in early 2010 unanimously rejecting the lower courts' "public policy" logic, finding that it conflicted with the plain language of § 2 and several decisions of this Court. *See id.* at 1215-19. The Supreme Court of Illinois remanded the case for consideration of the estate administrator's remaining arguments. *Id.* at 1220.

After yet another round of briefing and oral argument, the Illinois Court of Appeals recently rejected the trial court's interstate-commerce analysis. *See Carter v. SSC Odin Operating Co.*, 2011 IL App (5th) 070392-B, ¶¶ 17-21, --- N.E.2d ---. However, the Illinois Court of Appeals once again affirmed the denial of Odin Healthcare Center's motion to compel arbitration, based primarily on a state-law standard applicable only to arbitration agreements that essentially requires equivalency of arbitral obligation. *See id.* ¶ 29. Accordingly, Odin Healthcare Center has once again been forced to ask the Supreme Court of Illinois to grant discretionary review.

Thus, Odin Healthcare Center has spent over five years and hundreds of thousands of dollars seeking to do one thing: enforce its federal rights under the FAA. It has done so because the principles involved in the case affect the enforceability of all of Odin Healthcare Center's arbitration agreements and those of hundreds of other nursing facilities.

There can be no doubt that the West Virginia court's interpretation of the FAA is an extreme outlier. Indeed, it is telling that none of the briefs filed by the parties or their *amici* in the West Virginia court advocated the radical conclusion reached by that court. The West Virginia court's decision should be immediately removed from the body of FAA jurisprudence lest it spread to other jurisdictions.

II. The State Court's Decision Cannot Be Reconciled with the Plain Language of the FAA

It is axiomatic that when determining the meaning of a federal statute, a court must begin with the language of the statute itself, on the assumption that the ordinary meaning of the statutory language accurately expresses its legislative purpose. *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2156 (2010). A court must then enforce the plain and unambiguous statutory language according to its terms. *Id.*; *see also Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1980 (2011) (explaining that "Congress's authoritative statement is the statutory text, not the legislative history") (internal quotations and citation omitted).

Section 2 of the FAA instructs 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 (emphasis added). The FAA does not define the word "controversy." When left undefined, this Court gives statutory terms their ordinary meaning. *Hamilton v. Lanning*, 130 S. Ct. 2464,

2471 (2010). In doing so, this Court often looks to dictionary definitions. *See, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009).

The ordinary meaning of the word "controversy" is extremely broad. *See, e.g.*, *Black's Law Dictionary* 379 (9th ed. 2009) (defining "controversy" as a "disagreement or a dispute"); *American Heritage Dictionary* 319 (2d ed. 1991) (defining "controversy" as a dispute "between sides holding opposing views"). The same was true when Congress enacted the FAA in 1925. *See, e.g.*, *New Graphic Dictionary of the English Language* 231 (1925) (defining "controversy" as an "agitation of contrary opinions; debate; disputation"); *Webster's New International Dictionary of the English Language* 316 (1922) (defining "controversy" as a "[c]ontention; dispute; debate; discussion; agitation of contrary opinions"); *Cyclopedic Law Dictionary* 227 (2d ed. 1922) (defining "controversy" as a "dispute arising between two or more persons"); *Black's Law Dictionary* 265 (2d ed. 1910) (defining "controversy" as a "litigated question; adversary proceeding in a court of law; a civil action or suit, either at law or in equity").

The plain language of § 2 contains no evidence that Congress intended to limit the types of "controvers[ies]" parties could agree to arbitrate. However, the lower court effectively inserted the word "commercial" before § 2's use of the word "controversy," artificially limiting the FAA's reach to "contracts between merchants with relatively equal bargaining power." Pet. App. 51a. In doing so, the West Virginia court failed to acknowledge that this Court has previously rejected efforts to read "missing" words into § 2.

For example, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court was asked to decide whether § 1 of the FAA, which excludes from the FAA's protection "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," excludes all employment contracts or only employment contracts with transportation workers. The retail employee seeking to avoid arbitration in *Circuit City* argued that § 2 of the FAA applies only to "commercial" contracts, such that, even if the § 1 exemption did not apply, the employment agreement in question was not a "contract evidencing a transaction involving commerce" protected by § 2. This Court expressly rejected the employee's argument and refused to limit § 2 to "commercial" contracts. *Circuit City*, 532 U.S. at 113.

Nor can the West Virginia court's purported reliance on the intent of the 1925 Congress withstand scrutiny. In particular, the lower court discerned Congress's intent in enacting the FAA in a law review article published one year *after* the FAA's enactment by two individuals who were *not* members of Congress. *See* Pet. App. 42a, 43a, 50a, 87a (citing Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265 (1926)). Needless to say, it is one thing to contend that the intent of Congress can be discerned by examining the words of a committee report or words inserted into the *Congressional Record* prior to (and sometimes after) a statute's enactment. It is quite another to say that legislative intent can be discerned from a law review article published one year after the en-

actment of legislation and authored by individuals who did not vote on the legislation in question.

In fact, the 1926 law review article cited by the West Virginia court did not purport to be a thorough explanation of the FAA's meaning or congressional intent. Instead, given the history of deep-seated judicial hostility toward arbitration agreements inherited from English law, the article was designed to apprise the American bench and bar of the new statute's enactment and provide advice for its usage, the type of practical scholarship lamentably absent from many of today's legal journals. *See* Cohen & Dayton, *supra*, at 265 ("By this Act there is reversed the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable, and in the language of the statute itself, they are made 'valid, enforceable and irrevocable' within the limits of Federal jurisdiction.").

The West Virginia court's *sui generis* reasoning also leads to absurd results. For example, consistent with its reasoning in the case below, the West Virginia court would have to find that the FAA does not protect arbitration agreements between distillers and their distributors, for at the time of the FAA's enactment in 1925, the United States Constitution prohibited the "manufacture, sale, or transportation of intoxicating liquors." U.S. Const. amend. XVIII, § 1 (1919), *repealed by* U.S. Const. amend. XXI, § 1 (1933). Certainly the 1925 Congress did not intend to protect the arbitration rights of criminals. Fortunately for American distillers, beer brewers and those with whom they do business, the FAA is a statute of general applicability written in broad language whose meaning cannot be cabined by the par-

ticular economic conditions that existed in 1925 (or those economic conditions that the West Virginia court mistakenly assumed existed). *See, e.g.*, *Stawski Distrib. Co. v. Browary Zywiec S.A.*, 349 F.3d 1023, 1024-25 (7th Cir. 2003) (finding FAA preempts state statute imposing special requirements on arbitration agreements between beer brewers and distributors).[4]

Allowing the meaning of the FAA to be limited by a court's views regarding the particular economic conditions that existed in 1925 is also problematic because such a rule invites courts that are hostile to the FAA to inject their subjective views through the often-pliable lens of "congressional intent." For example, a court hostile to the FAA could parse the historical record and say that Congress could not have intended to protect the arbitration rights of married women, who at the time of the FAA's enactment still could not enter into binding contracts without their husbands' consent in some States. *See* 2 Samuel Williston, *The Law of Contracts* § 269 at 512 (1st ed. 1920) (surveying jurisdictions); 3 William Herbert Page, *The Law of Contracts* § 1658 at 2854 (2d ed.

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[4] For example, the West Virginia court concluded that Congress intended the FAA to "govern only contracts between merchants with relatively equal bargaining power," citing as an example Wyoming farmers wishing to sell their potatoes to dealers in New Jersey. Pet. App. 51a. To assume that the parties to such contracts had "relatively equal bargaining power" in 1925 is problematic, to say the least. *See, e.g.*, *United States v. Borden Co.*, 308 U.S. 188, 204-05 (1939) (discussing the Capper-Volstead Act of 1922, ch. 57, 42 Stat. 388, which gave agricultural cooperatives additional bargaining power by exempting more of their number from federal antitrust laws).

1920) (same). Indeed, Congress did not fully acknowledge a married woman's right to contract in the District of Columbia until one year *after* the FAA was enacted. *See Jett v. Montague Mfg. Co.*, 61 F.2d 918, 919-20 (D.C. Cir. 1932) (describing 1926 legislative change).

Accordingly, the West Virginia court's decision is not only a cautionary tale in how not to interpret a federal statute, the reasoning used by the lower court invites all sorts of mischief to frustrate federal arbitration rights.

III. The State Court's Clear Error and Outright Contempt for this Court's FAA Jurisprudence Warrants Summary Reversal

Full-blown briefing on the merits and oral argument impose a substantial burden on the Court and several months of delay. Such treatment is unnecessary, however, when the decision under review conflicts with the unambiguous language of a controlling federal statute or a previous decision of this Court, or when the logic of the lower court's decision is patently incorrect. Under such circumstances, this Court has found it appropriate to grant the petition for a writ of certiorari and reverse the judgment of the lower court via a per curiam opinion. *See, e.g.*, *Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (per curiam) (reversing summarily lower court's ruling because it conflicted with unambiguous language of controlling federal statute); *Spears v. United State*s, 129 S. Ct. 840, 842 (2009) (per curiam) (reversing summarily lower court's ruling because controlling precedent "considered and rejected the position taken by the [court] below"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (reversing

summarily lower court's ruling because its error was "obvious in light of" controlling precedent); *Smith v. Texas*, 543 U.S. 37, 48 (2004) (per curiam) (reversing summarily state appellate court's ruling because there was "no principled distinction" between the jury instruction found to be unconstitutional by a previous decision of this Court and the jury instruction about which the petitioner complained).

This Court's decision in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam), is particularly instructive for how the Court should dispose of this case. There, the Supreme Court of Alabama adopted what this Court characterized as a "stringent test" for satisfying the FAA's interstate-commerce requirement, artificially limiting those types of agreements protected by the FAA. *Id.* at 55. In summarily reversing the Supreme Court of Alabama, this Court explained that its decision was "well within [its] previous pronouncements on the extent of Congress' Commerce Clause power." *Id.* at 57. Therefore, the Court found full merits briefing and oral argument unnecessary.

The same is true here. Apart from the fact that the West Virginia court's decision cannot be reconciled with the plain language of the FAA, just last Term, this Court explained that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). Here, so long as the arbitration agreement was executed prior to a dispute (as most of them are), the West Virginia court's decision purports to prohibit outright the arbitration of *two* types of claims in any

context in which they may arise. As such, the West Virginia court's holding is clearly preempted by the FAA.

Summary reversal is especially appropriate in this case given the outright contempt expressed by the West Virginia court toward this Court's FAA jurisprudence. Summary reversal would send a clear message akin to that sent by *Citizens Bank*: this Court's FAA jurisprudence is not to be disregarded so that courts can exercise their ancient jealously in favor of retaining jurisdiction over disputes, the parties to which have previously agreed to binding arbitration. One can only read the West Virginia court's decision and come away with the distinct impression that the West Virginia court has lost sight of the well-established principle that this Court is the final arbiter of the meaning of federal law and this Court's decisions on questions of federal law bind the West Virginia court. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 415 (1821) (Marshall, C.J.).

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

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