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 Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Under the Federal Arbitration Act (FAA), arbitration agreements are "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. In *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011), this Court reaffirmed the longstanding rule that "[t]his saving 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." Thus, "States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted," so long as those steps do not discriminate against arbitration or frustrate the Act's purposes. *Id.* at 1750 n.6.

The New Jersey Supreme Court's decision in this case fits that description to a tee. Because "mutual assent requires that the parties have an understanding of the terms to which they have agreed," New Jersey has long required that "any contractual waiver-of-rights provision must reflect that the party has agreed clearly and unambiguously to its terms." Pet. App. 11a. That rule, the decision below emphasized, applies evenhandedly and is fully consistent with the FAA and its policies. "Arbitration clauses are not singled out for more burdensome treatment than other waiver-of-rights clauses under state law." *Id.* at 12a. To the contrary, "[a]rbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is understandable to the reasonable consumer." *Id.*

The petition claims that the state court's preemption holding conflicts with "scores" of cases, but eight of the nine cases it cites involved no issue of federal preemption whatsoever. And the one cited case that involved a preemption question, *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013), rejected exactly the argument the petition makes here, reasoning that the Montana rule at issue, like New Jersey's, "does not invalidate only [arbitration] agreements. Many other types of agreement may be equally affected by the Montana rule." *Mortensen* held the state-law rule preempted not because it failed a test of general applicability but "because it 'disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.'" *Id.*

The petition asserts no such disparate-impact argument and, had it done so, it would have failed—as the only federal court to address the decision below has recognized. *See Guidotti v. Legal Helpers Debt Resolution, LLC*, 2014 WL 6863183, at *11 (D.N.J. Dec. 3, 2014) (holding that "the *Atalese* rule does not uniquely disfavor or disproportionately impact arbitration"). That court described the decision below as "sensible and binding" and fully consistent with this Court's decision in *Concepcion*. *Id.* at *10-11. Because that decision has been appealed, the Third Circuit will soon have the opportunity to decide whether the state-law rule applied here is preempted. If the Third Circuit affirms, it will be clear that the state and federal courts remain in harmony. But, either way, there is no need to speculate about whether a conflict will arise before the federal courts have even addressed the issue. Because the preemption holding of the decision below implicates no genuine conflict with the decisions of the state and federal courts or with this Court's cases, further review is unwarranted.

STATEMENT

1. U.S. Legal Services Group presents itself as "a law firm that specializes in providing services to clients in financial distress," Pet. 2, which it markets specifically to those "individuals who are in true financial hardship and cannot make minimum monthly payments to their creditors." U.S. Legal Services Group website, *available at* http://uslsgroup.com/. But its website does not list a single attorney associated with the firm. *Id.* Instead, when a potential client visits the firm's homepage and selects the "Attorneys" section, she is directed to click on her state from a list of states in which the firm ostensibly practices. *Id.* That list includes all 50 states, and clicking on any of them brings up a contact page listing a single address in California and an 800 number. *Id.*

California's State Bar, however, has no record of any attorney associated with U.S. Legal Services Group licensed to practice in the state. http://bit.ly/1DvoyRn. Different parts of the firm's website also list different addresses, and those addresses change often. The company—which also does business under multiple aliases, including "National Consumer Law Group"—has received a Better Business Bureau rating of "F" in light of numerous consumer complaints and the company's failure to respond to a request to "clarify the nature of [its] business, principals and other dba's that the company may have." http://go.bbb.org/1Dlv0dD. Complaints against the company bear a consistent theme: one consumer paid the company $3,800 "to negotiate debt settlement," but "found out they were not negotiating anything at all." *Id.* Another paid $9,872.16 before realizing the company was not attempting to settle his debts. *Id.*

U.S. Legal Services Group is part of the "rogue industry" of debt-settlement companies—companies that

use pressure tactics to get consumers to pay "tremendous" fees while "offering consumers false hope . . . and leaving them in a worse financial situation." *Id. New York Attorney General Andrew M. Cuomo Announces Nationwide Investigation into Debt Settlement Industry* (May 7, 2009), *available at* http://on.ny.gov/1DIaRPw. The federal Consumer Financial Protection Bureau—which has regulatory authority over the industry—has taken frequent action against these companies because they frequently do not "renegotiate, settle, reduce, or otherwise alter the terms of a single debt" for their "clients." *CFPB v. Amer. Debt Settlement Solutions*, Stipulated Final Judgment, No. 9:13-cv-80548-DMM (S.D. Fla. Jun. 7, 2013).

To "skirt" these enforcement efforts, debt-settlement companies have turned to the "attorney model," under which a purported attorney or law-firm presence provides "cover" for otherwise plainly illegal conduct. Becker and Harnick, *Debt Settlement Firms Adopt 'Attorney Model' to Evade State & Federal Rules*, Center for Responsible Lending (2013), *available at* http://bit.ly/1DvuJFg.

2. In 2011, Patricia Atalese, distressed by her mounting personal debt, responded to a marketing pitch from U.S. Legal Services Group. Compl., at 2. The company agreed to "negotiate and attempt to enter into settlements with creditors of [Patricia] in an effort to modify and/or restructure [her] current unsecured debt." Ex. A to Compl., at 5. Over the next year, Patricia paid U.S. Legal $4,083.55 in "legal fees," $940.00 in "supplemental legal fees," and $107.50 in "SPA fees" for this service. Compl., at 2. In return, the company—which did not inform her that "it was not a licensed debt adjuster in New Jersey"—provided Patricia with only the "preparation of

a single one-page answer for a collection action in which [she] represented herself." Pet. App. 3a.

Having paid over $5,000 for virtually nothing, Patricia brought an individual action against U.S. Legal in New Jersey state court in 2012, alleging various violations of New Jersey consumer law. Pet. App. 2a. The company responded by moving to dismiss her complaint and compel arbitration, pointing to an arbitration clause located on page nine of the company's twenty-three-page standard service contract. The clause provided that all claims between the parties would be "submitted to binding arbitration upon the request of either party." Pet. App. 3a. It did not define arbitration or explain that it entailed a waiver of the consumer's right to bring suit in court.

Patricia opposed arbitration by challenging the formation of this clause, as the FAA expressly permits. *See* 9 U.S.C. § 2. She asserted that the clause lacked mutual assent under New Jersey law, which requires any waiver of an important legal right—whether constitutional or statutory, substantive or procedural—to be clear and unequivocal. Pet. App. 6a. The arbitration clause in this contract, she argued, failed that generally applicable test. *Id.*

3. After the trial court compelled arbitration and the intermediate court affirmed, a unanimous New Jersey Supreme Court reversed. The Court began its analysis by emphasizing that the FAA, as this Court held in *Concepcion*, embodies a "'liberal federal policy favoring arbitration'" that "requires courts to 'place arbitration agreements on an equal footing with other contracts.'" Pet. App. 7a-8a (quoting *Concepcion*, 131 S. Ct. at 1745-46). In keeping with that requirement, the New Jersey Supreme Court stressed, "[a]n arbitration clause cannot

be invalidated by state-law 'defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Pet. App. 8a (quoting *Concepcion*, 131 S. Ct. at 1746). At the same time, the Court explained, the FAA does not demand enforcement of *every* arbitration clause. "Section 2 of the FAA 'permits agreement to arbitration to be invalidated by *generally* applicable contract defenses.'" Pet. App. 9a (quoting *Concepcion*, 131 S. Ct. at 1746) (some internal quotation marks omitted). The question before the Court was whether Patricia's contractual defense—that the arbitration agreement lacked the requisite assent—fit that description.

Turning to this question, the Court first explained that an arbitration agreement, "like any other contract, must be the product of mutual assent, as determined under customary principles of contract law," which "requires that the parties have an understanding of the terms to which they have agreed." Pet. App. 9a-10a (internal quotation marks omitted). To ensure that this general requirement is met, the Court continued, "[o]ur jurisprudence has stressed that when a contract contains a waiver of rights—whether in an arbitration or other clause—the waiver 'must be clearly and unmistakably established.'" Pet. App. 12a (quoting *Garfinkel v. Morristown Obstetrics & Gynecology Assocs.*, 168 N.J. 124, 132 (2001)). The Court cited nearly a dozen cases, from a wide range of different contexts—both in and out of arbitration—in support of that proposition. Pet. App. 11a.

Finally, the Court applied the general rule to the facts of this case. The Court noted that New Jersey courts have repeatedly "upheld arbitration clauses phrased in various ways when those clauses have explained that arbitration is a waiver of the right to bring

suit in a judicial forum." Pet. App. 13a. But the problem with this specific clause is that it does not contain "any explanation that [the consumer] is waiving her right to seek relief in court for a breach of her statutory rights." Pet. App. 15a. Nor would that be clear to the "average consumer" by reading the clause. *Id.* Because the clause did not explain, "at least in some general and sufficiently broad way," that Patricia was "giving up her right to bring her claims in court or have a jury resolve the dispute," it was unenforceable under New Jersey law. Pet. App. 15a-16a. The Court court concluded its opinion by reiterating 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.

REASONS FOR DENYING THE PETITION

I. There is No Split.

To support its theory that this Court's review is "urgently needed," Pet. 7, U.S. Legal claims that "[s]cores of courts—including the Third Circuit—have split with the New Jersey Supreme Court's conclusion that the FAA does not preempt the state-law contract rule applied here. Pet. 8. That is wrong. To the contrary, even courts within the Third Circuit have rejected U.S. Legal's preemption argument—a fatal blow to U.S. Legal's attempt to demonstrate any conflict, let alone an intractable one.

In *Guidotti v. Legal Helpers Debt Resolution, LLC*, 2014 WL 6863183, at *10 (D.N.J. Dec. 3, 2014), the federal district court in New Jersey specifically considered the decision below and "rejected" an argument that "the FAA preempts the application of the *Atalese* rule." Calling New Jersey's contract principles "sensible and bind-

ing," the court held them applicable—within the Third Circuit—to *any* contract containing "waiver-of-rights provisions." *Id.* This decision obliterates U.S. Legal's claim of an "extraordinary disparity between the Third Circuit and the New Jersey Supreme Court." Pet. 13.

The defendants in *Guidotti* have appealed the case to the Third Circuit, and their opening brief is currently due on June 1, 2015. Thus, the Third Circuit will soon have the opportunity to weigh in on whether the rule of New Jersey law announced in this case is preempted. If it affirms the district court's well-reasoned ruling, that holding will definitively lay to rest any contention that there is an "extraordinary disparity" between the law applied by the Third Circuit and that followed by the New Jersey Supreme Court. If the Third Circuit reverses, such a disparity may in fact become apparent. Until it does so, however, there is no need for this Court to speculate about whether an intolerable conflict will arise before the relevant federal court has even addressed the issue.

Meanwhile, U.S. Legal's reliance on cases decided before the New Jersey Supreme Court's ruling in this case to establish the existence of a conflict falls flat. Not a single case among U.S. Legal's "scores" has held, contrary to the New Jersey Supreme Court here, that a generally applicable rule of state contract law aimed at ensuring knowing, mutual assent to contractual provisions is preempted by the FAA. For starters, eight of the nine cases U.S. Legal cites in support of its claim that "the conflict between the New Jersey Supreme Court and other courts warrants this Court's immediate review," Pet. 26, involve no question of federal preemption *at all*. *See* Pet. 8-15. The lone case that found a state law preempted (*Mortensen*) did so because the state rule

"applied, in primary part, only to [arbitration] agreements"—not, as here, to a rule "that arose in contexts separate and distinct from arbitration." *Guidotti*, 2014 WL 6863183, at *11 n.9. This landscape alone warrants denying the petition.

To begin, U.S. Legal's lead "split" case, *Morales v. Sun Contractors, Inc.*, 541 F.3d 218 (3d Cir. 2009), involved no question of "ordinary state-law principles," and so raised no FAA preemption issue *at all*. "In the absence of contrary Virgin Islands law," the court explained, "this case is governed by the rules of the common law." *Id.* at 221. Applying that common law, the court went on to hold that "the fact that an [employee] cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement . . . is enforceable." *Id.* at 222. Then, in passing (and only because it was "unclear" whether the district court had reached the issue), the Third Circuit added—in dicta—that, as *a matter of federal common law*, "applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA." *Id.* at 224. Nothing about the Third Circuit's reasoning, however, comes within even striking distance of the FAA-preemption question U.S. Legal has asked this Court to decide.[1]

The same is true for U.S. Legal's other cases. For instance, U.S. Legal says that, like *Morales*, *Awuah v. Coverall North America, Inc.*, 703 F.3d 36, 45 (1st Cir.

[1] Again, although *Morales* has nothing to say on the question presented here, the Third Circuit will soon have a chance to weigh in in *Guidotti*—yet another reason why this Court should stay its hand.

2012), shows that the First Circuit has "expressly held that a knowing-and-voluntary standard for arbitration agreements is *preempted by the FAA*." Pet. 10 (emphasis added). But *Awuah* is not a preemption case—the court of appeals went out of its way to explain that the district court, in adopting a "heightened notice" requirement, "did not purport to find this . . . requirement in state law, but rather in a series of cases from [the First Circuit]"—in other words, federal common law. *Id.* at 44. The court emphasized that "Massachusetts law is explicit that it does not impose a special notice requirement"—so there could be no preemption question. *Id.* at 45; *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1372 (11th Cir. 2005) (holding that an arbitration agreement is not subject to "a heightened 'knowing and voluntary' standard in evaluating the [agreement's] enforcement . . . under federal law"); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (same). Whether federal common law *imposes* a "heightened" standard is an entirely different question from whether the FAA *preempts* a state-law standard.

U.S. Legal's lone state case—which it claims "rejected the New Jersey Supreme Court's reasoning"—adds nothing to the mix. Pet. 11. In *Melena*, the Illinois Supreme Court merely held that *Illinois*' generally-applicable rules of contract law did not impose a "heightened 'knowing and voluntary' standard." *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 135, 150 (Ill. 2006). Instead, under Illinois contract law, "a party to an agreement is charged [only] with knowledge of and assent to the agreement signed." *Id.* (citing two Illinois contract-law cases, *Black v. Wabash, St. Louis & Pacific Ry. Co.*, 111 Ill. 351, 358 (Ill. 1884) and *Hints v. Lazarus*, 58 Ill. App. 3d 64, 66 (Ill. App. 1984)). The Illinois Supreme Court stated in dicta that had it nonetheless imposed a "height-

ened standard"—contrary to its own state law—that standard would have been "inconsistent with the FAA." *Id.* But the issue here is not whether the New Jersey Supreme Court misapplied its own state contract rules. Quite the opposite: it is "whether the FAA preempts a state-law rule." Pet. i.

Other cases forming U.S. Legal's alleged split likewise miss the boat. Not only did *Khan v. Dell*, 669 F.3d 350 (3d Cir. 2012), involve exclusively federal law without so much as a mention of state contract rules, but it involved an entirely different question: whether section 5 of the FAA "requires a court to address [the] unavailability [of an arbitrator] by appointing a substitute arbitrator." *Id.* at 357. So, too, with *Huffman v. Hilltop Companies, LLC*, 747 F.3d 391 (2014). There, the Sixth Circuit also decided an unrelated question: whether an "agreement's arbitration clause had post-expiration effect." *Id.* at 394. And the court looked only to federal law in reaching its answer. *See id.* at 396-98 (discussing the *contra preferentem* and *expressio unius* doctrines under federal common law).

That leaves *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160 (9th Cir. 2013)—the only case dealing even remotely with the question U.S. Legal has asked this Court to decide. But as even U.S. Legal admits, the Ninth Circuit there "held that Montana's state-law rule is preempted by the FAA because it 'disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions.'" Pet. 10 (quoting *Mortensen*, 722 F.3d at 1161). Here, though, U.S. Legal has not raised the "disproportionate impact" argument. And had that issue been raised, it would have failed on the facts. *See Guidotti*, 2014 WL 6863183, at *11 (explaining that "application of the

Atalese rule does not uniquely disfavor or disproportionately impact arbitration").

Instead, U.S. Legal argued below (as it does now) that New Jersey's contract rule is "*not* generally applicable to all contracts" because it applies only to "contractual provisions involving waiver-of-rights provisions" and so cannot survive under section 2. Pet. 17-18. The Ninth Circuit in *Mortensen* specifically rejected exactly this argument. There, the company argued that the Montana rule "is not preserved by the FAA's savings clause because it is not generally applicable given that it depends on the unique nature of arbitration agreements." 722 F.3d at 1160. The court disagreed, reasoning that (as here), "the rule does not invalidate only [arbitration] agreements. Many other types of agreement may be equally affected by the Montana rule." *Id.* at 1161; *compare* Pet. App. 12a (explaining that New Jersey's rule applies equally "whether in an arbitration or other clause"). *Mortensen* thus poses no conflict with the New Jersey Supreme Court. *See Guidotti*, 2014 WL 6863183, at *11 n.9 (rejecting argument that *Atalese* conflicts with *Moretensen*).

II. There Is No Conflict with the FAA or this Court's Precedents.

On the merits, U.S. Legal contends that the decision below "contradicts the plain text of the FAA and decades of this Court's precedents." Pet. 16. But the FAA's text expressly saves generally applicable contract-law defenses from preemption. And the very cases that U.S. Legal cites demonstrate why its preemption theory fails.

1. In an attempt to substantiate its preemption argument, U.S. Legal principally relies (at 16-18) on two of this Court's cases—*Doctors' Assocs., Inc. v. Casarotto*,

517 U.S. 681 (1996), and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). The petition contends that the decision below does "precisely" what this Court condemned in *Doctor's Associates*. But *Doctors' Associates* did not remotely involve the application of general contract law. Rather, that case concerned a Montana statute that openly singled out arbitration for special treatment, imposing a heightened burden on arbitration agreements and arbitration agreements alone. *Doctors' Associates* was thus an easy case for preemption. As the Court explained, the Montana arbitration-specific statute failed because courts may not "invalidate arbitration agreements under state laws applicable *only* to arbitration agreements" but must instead place such agreements "on the same footing as other contracts." 517 U.S. at 687. Because New Jersey is applying a rule of general contract law, not an arbitration-specific statute, the holding of *Doctors' Associates* is relevant here only by way of contrast.

At the same time, *Doctors' Associates* made clear that "generally applicable contract defenses, such as fraud, duress, or unconscionability, *may* be applied to invalidate arbitration agreements without contravening § 2." *Id.* (emphasis added). And the Court went out of its way to distinguish such common-law defenses from Montana's statute, explaining that the state court "did not assert as a basis for its decision a generally applicable principle of 'reasonable expectations'"; instead, the court had upheld only a "particular statute… setting out a precise, arbitration-specific limitation." *Id.* at 687 n.3. That is a far cry from New Jersey's efforts to ensure a basic meeting of the minds through the application of a contract-law doctrine that is expressly "not specific to arbitration provisions" and under which "[a]rbitration clauses are not singled out for more burdensome treatment

than other waiver-of-rights clauses under state law." Pet. App. 11a-12a. Indeed, if anything, the Court's discussion in *Doctor's Associates* suggests that the application of "general, informed consent principles" to ensure that "[u]nexpected provisions in adhesion contracts must be conspicuous." 517 U.S. at 687 n.3.

Any doubt on this score should be dispelled by *Concepcion*. Although *Concepcion* held the California rule at issue in that case was preempted on obstacle-preemption grounds, it nevertheless reaffirmed that the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses." 131 S. Ct. at 1746. And *Concepcion* went further, pointing out that "States remain free to take steps addressing concerns that attend contracts of adhesion—for example, requiring class-action waiver provisions in adhesive arbitration agreements to be highlighted"—so long as those steps are not carried out in a way that discriminates against arbitration. 131 S. Ct. at 1750 n.6. The New Jersey rule applied here falls comfortably within this description; it ensures meaningful consent to adhesive contract terms that waive important rights, ensuring that such terms are "highlighted," but without disfavoring arbitration. *See Harris v. Bingham McCutchen LLP*, 154 Cal. Rptr. 3d 843, 849 (Cal. Ct. App. 2013) (noting that footnote 6 of Concepcion "suggests the Supreme Court would approve of the requirement at issue here, that contractual waivers of statutory antidiscrimination litigation rights must be expressly stated to be enforceable"). The New Jersey rule is straightforward: "when a contract contains a waiver of rights—whether in an arbitration or other clause—the waiver 'must be clearly and unmistakably established.'" Pet. App. 12a. This Court has never suggested that the FAA precludes States from protecting

consumers and ensuring consent through the application of such a general rule.

Moreover, New Jersey's contract rule does not seek to achieve its objectives in ways that alter fundamental attributes of arbitration or otherwise frustrate the FAA's aim of rendering arbitration agreements enforceable. The requirements an agreement must meet to demonstrate that the parties entered into a knowing, mutual agreement to arbitrate are not onerous. The petition's question presented wrongly presumes that New Jersey holds arbitration agreements unenforceable unless they "affirmatively" provide certain statements. Pet. i. In fact, "[n]o particular form of words" is required (Pet. App. 12a), and the New Jersey Supreme Court made clear that it was not holding that the many agreements that New Jersey courts had regularly enforced before this case were inadequate. Indeed, standard language that is in widespread use in many arbitration agreements—including those this Court has reviewed—provides exactly the kind of clarity that would easily satisfy the standard articulated below.

For example, the arbitration agreement in *Concepcion* told consumers that they were agreeing to resolve disputes through arbitration "**instead of in courts of general jurisdiction**," stated that arbitration "uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts," and stated expressly that the parties "**are each waiving the right to a trial by jury**." *AT&T Mobility LLC v. Concepcion*, No. 09-893, Pet. App. 56a–58a (bold type in original). Similarly, the agreement considered by this Court in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), provided in bold-faced type that if one of the party's elected to arbi-

trate a dispute, "**neither you nor we will have the right to litigate in court the claim being arbitrated, including in a jury trial, or to engage in pre-arbitration discovery except as provided under NAF Rules. In addition, you will not have the right to participate as representative or member of any class of claimants relating to any claim subject to arbitration**." *CompuCredit Corp. v. Greenwood*, No. 10-948. Jt. App. 63.

Thus, as the federal district court in New Jersey recently concluded, the decision below is fully consistent with the preemption principles articulated in *Concepcion*. "Indeed, the *Atalese* court specifically noted that New Jersey contract law 'repeatedly' recognizes that a waiver of rights, in whatever contractual context, requires a clear and unmistakable expression." *Guidotti v. Legal Helpers Debt Resolution*, 2014 WL 6863183, at *11. And "application of the *Atalese* rule does not uniquely disfavor or disproportionately impact arbitration" because it merely "requires that a consumer contract's provision waiving rights, including an agreement to arbitrate, be stated in sufficiently clear terms and, if so stated, permits courts to compel arbitration." *Id.* The petition (at 26 n.2) acknowledges the existence of this recent decision but fails to grapple with its logic. Because the state and federal courts are now in harmony, and because the Third Circuit will have an opportunity to address this issue soon in *Guidotti*, this Court should stay its hand.

2. U.S. Legal next advances an incoherent theory of FAA preemption that no court has adopted. Because the FAA saves only contract defenses that apply to "the revocation of *any* contract," U.S. Legal argues, the statute "does not permit invalidation of an arbitration agreement on grounds that exist for *some* contracts," such as

those containing waivers of rights. Pet. 18. U.S. Legal's position seems to be that general principles of contract law, like New Jersey's rule requiring sufficient clarity in waiver-of-rights provisions, are no longer general principles when they are applied to an arbitration agreement or to some broader subset of contracts that includes arbitration agreements. But the same could be said of any application of unconscionability, duress, or any other general contract-law doctrine to specific facts or circumstances. That logic would quickly render the FAA's savings clause a nullity.

U.S. Legal's proposed interpretation of the FAA's savings clause effectively insulate many otherwise unenforceable procedural limitations in arbitration clauses from challenge under state law, no matter how one-sided, thus threatening Section's 2 function of "giv[ing] States a method of protecting consumers" against unfair terms. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). Courts frequently apply general principles to preclude enforcement of clauses that, for example, give the drafter the right select the arbitrator or pool of arbitrators, *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006); *McMullen v. Meijer*, 355 F.3d 485, 493-94 (6th Cir. 2004), or that require arbitration in an unreasonably distant forum, *Nagrampa v. MailCoups*, Inc., 469 F.3d 1257, 1287-92 (9th Cir.) (en banc). But even these applications of general principles would fail U.S. Legal's proposed test, under which even general contract defenses may not be applied in a manner that "turns on the characteristics of arbitration agreements," even where "non-arbitration agreements … are similarly disfavored." Pet. 19.

3. U.S. Legal also tries to get some mileage out of the settled principle that "ambiguities as to *the scope of the*

arbitration clause" should be "resolved in favor of arbitration." Pet. 20 (quoting *Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989)). But this is not a case about the interpretation of an arbitration agreement or a disagreement about its scope. It is instead a case about the application of a rule of contract law that is designed to determine whether there has been a consensual agreement to arbitrate in the first place. The interpretive principle discussed in *Volt* has nothing to do with that concern, and this Court's cases have never suggested what U.S. Legal seems to suggest here—namely, that when there is doubt about whether a consumer has given meaningful consent to arbitrate, all doubts must be resolved against the consumer. Again, such an approach cannot be reconciled with *Concepcion*'s recognition that "States remain free to take steps addressing the concerns that attend contracts of adhesion"—including "requiring" that certain important provisions be "highlighted." 131 S. Ct. at 1750 n.6.

Those concerns are well founded, and are backed up by the most comprehensive recent study on the matter. Congress required the Consumer Financial Protection Bureau—the federal agency with jurisdiction over debt-adjustment firms like U.S. Legal, 12 U.S.C. §§ 5491(a), 5511(b)—to conduct a study of mandatory pre-dispute arbitration clauses in contracts for such services, and authorized the agency to "prohibit or impose conditions or limitations on the use of [such clauses]" if it finds that doing so is "in the public interest and for the protection of consumers," and is "consistent with the study." 12 U.S.C. § 5518(a). As required by the Act, the CFPB recently released the results of its study. Among its many findings is this one: "Less than 7% of consumers whose credit card agreements included pre-dispute arbitration

clauses" actually understood that this meant "that they could not sue their credit card issuers in court." *See* CFPB Arbitration Study, § 3.1, *available at* http://1.usa.gov/19cVrvE.

4. Finally, U.S. Legal (at 22-23) takes issue with the notion that an arbitration clause may be regarded as a waiver-of-rights provision for purposes of generally applicable contract law. But the petition does not actually cite any case rejecting this proposition. Instead, U.S. Legal substantially overreads language in this Court's cases, such as *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 90 (1998) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, Inc., 473 U.S. 614 (1985), having nothing to with preemption of general contract law. U.S. Legal cites these cases for the correct and unremarkable proposition that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." *Id.* at 628. True enough, but the decision below does not rest on the premise that arbitration agreements waive *substantive* rights. To the contrary, the decision below applies a general rule that applies to contractual provisions waiving important rights, regardless of whether the rights at issue are characterized as substantive or procedural.[2]

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[2] Indeed, *Wright* itself imposes a requirement of clarity to ensure that particular types of arbitration agreements do not involve unknowing waivers of *procedural* rights. 525 U.S. at 80. That holding is at odds with the contention that similar requirements imposed by general state contract law principles conflict with the objectives of the FAA so directly that they may be found to be impliedly preempted.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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