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 Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The arbitration agreement at issue in this case states: "In the event of any claim or dispute . . . the claim or dispute shall be submitted to binding arbitration upon the request of either party upon the service of that request on the other party. . . . Any decision of the arbitrator shall be final and may be entered into any judgment in any court of competent jurisdiction."

In the decision below, the New Jersey Supreme Court held that this agreement is unenforceable because it "did not clearly and unambiguously signal to plaintiff that she was surrendering her right to pursue her statutory claims in court."

The question presented is:

Whether the Federal Arbitration Act preempts a state-law rule holding that an arbitration agreement is unenforceable unless it affirmatively explains that the contracting party is waiving the right to sue in court.

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, U.S. Legal Services Group, L.P.[1] Founded in 1973, Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF's Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as amicus curiae in many important cases in this Court and many state supreme courts involving the Federal Arbitration Act (FAA) and contractual arbitration in general. *See*, *e.g.*, *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); and *Preston v. Ferrer*, 552 U.S. 346 (2008). PLF participated as amicus curiae in this case in the New Jersey Supreme Court. *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430 (2014).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any 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, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Patricia Atalese contracted with a debt resolution service to help her manage her financial difficulties. The contract between Atalese and U.S. Legal Services Group (USLSG) contained this arbitration provision, in a separately numbered and bolded paragraph:

> In the event of any claim or dispute between [the client] and [defendant] USLSG related to this Agreement or related to any performance of any services related to this Agreement, the claim or dispute shall be submitted to binding arbitration upon the request of either party . . . [a]ny decision of the arbitrator shall be final and may be entered into judgment in any court of competent jurisdiction.

Atalese, 219 N.J. at 437. The provision further sets out the location for the arbitration, responsibility for the payment of costs, and the process under which the arbitration will be conducted. *Id.* Notwithstanding this provision, when Atalese became dissatisfied with the services provided by USLSG, she sued in court. The service successfully moved the trial court to compel arbitration and the Appellate Division affirmed, holding that "the consistency and clarity of the language employed allows the parties to reasonably understand the arbitration clause and to knowingly agree to be bound thereby." *Atalese v. U.S. Legal Svcs. Group, L.P.*, 2013 WL 645729 at *3 (App. Div. Feb. 22, 2013). The court found no reason to insist upon the inclusion of the specific word, "waiver" when the

language is otherwise clear that any disputes "shall" be resolved in arbitration. *Id.*

The New Jersey Supreme Court reversed, holding that although it would not dictate the particular words contracting parties must use, the contract must include language specifically stating that the parties understand that "arbitration" is a different dispute resolution forum than state or federal courts. *Atalese*, 219 N.J. at 444. The court takes a dim view of the state's consumers, as it explains that they cannot be expected to understand the meaning and import of the word "arbitration," and that the contractual language must include legal advice as to the benefits and trade-offs in choosing to resolve disputes in arbitration instead of in court. *Id.* at 446 ("The provision does not explain what arbitration is, nor does it indicate how arbitration is different from a proceeding in a court of law."). The *Atalese* court emphasized that "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 442.

Arbitration contracts may not be viewed with judicial suspicion, treated with hostility, or disfavored in any way when compared to other contracts. *Concepcion*, 131 S. Ct. at 1745-47. The decision below conflicts with decision of this Court and other courts that have held in a wide range of contexts that waivers need not adhere to a predetermined set of words to have a valid legal effect. This Court, and many other federal and state courts, have held that the FAA forbids heightened scrutiny of jury waivers where such scrutiny disproportionately, adversely affects arbitration contracts. By demanding that arbitration

contracts contain advisory provisions, intended to discourage consumers from agreeing to contracts that call for arbitration if a dispute should arise, the New Jersey Supreme Court runs afoul of the Federal Arbitration Act and the federal substantive common law of arbitration contracts. The petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I

THE DECISION BELOW CONFLICTS WITH CIRCUIT AND STATE COURTS THAT PERMIT COMPETENT ADULTS TO CHOOSE ARBITRATION FOR RESOLVING DISPUTES

A. The Court Below Conflicts with Others by Presuming Ignorance of Competent Adults

The New Jersey Supreme Court mandates that every arbitration contract contain specific language stating that the parties understand that arbitration constitutes a waiver of the right to sue in court. While the court declined to dictate the particular words, it says, "[t]he waiver-of-rights language, however, must be clear and unambiguous—that is, the parties must know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." *Atalese*, 219 N.J. at 445. At a minimum, therefore, the court below demands an explicit reference to courts or juries. The reason for this demand, the court explained, is that the public is too ignorant to understand the plain

language of a contract that provides for arbitration of disputes. *Id.* at 442.

This holding conflicts with multiple decisions of this Court, Circuit Courts of Appeals, and state high courts. The liberal interpretation of arbitration contracts is based on the freedom of competent adults to make their own decisions as to how to resolve disputes. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (the Arbitration Act manifested "congressional desire to enforce agreements into which parties had entered"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("The 'liberal federal policy favoring arbitration agreements' . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements."). The FAA preempts state law that "conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

New Jersey's antipathy toward arbitration is not indicative of the state's general esteem for contractual freedom. In *Marcinczyk v. State Police Training Commission*, 203 N.J. 586, 592-93 (2010), the New Jersey Supreme Court described the importance of freedom of contract in New Jersey law:

> A basic tenet of our law is the doctrine of freedom of contract. Pursuant to that doctrine, parties bargaining at arms-length may generally contract as they wish, subject only to traditional defenses such as fraud, duress, illegality or mistake. In the absence of those defenses, such a contract is fully binding because the parties are "conclusively

> presumed" to understand and assent to its legal effect.

(Citations omitted). Consumers who enter into contracts, including those containing arbitration provisions, are presumed to be competent and to understand the provisions to which they express their consent by their signature. *Rudbart v. North Jersey District Water Supply Commission*, 127 N.J. 344, 353 (1992) ("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.") (citation omitted).[2] New Jersey law says that anyone aged 18 or older has reached the age of majority, N.J.S.A. 9:17B-3, and is therefore presumed competent to enter into contracts. *New Jersey State Policemen's Benev. Ass'n of N.J., Inc. v. Town of Morristown*, 65 N.J. 160, 162 (1974) (statute lowering age of majority to 18 extends to those individuals "the basic civil and contractual rights and obligations" formerly available only to those over the age of 21). Atalese signed an arbitration agreement that was written in standard form and simple language. This is compelling evidence that Atalese consented to arbitration of her disputes.[3]

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[2] *Rudbart* relied on *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 386 (1960) ("the basic tenet of freedom of competent parties to contract is a factor of importance"), and Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 630 (1943) (traditional contract principle is that "once the objective manifestations of assent are present, the author is bound").

[3] Analogously, New Jersey adults are also presumed competent to draft proposed legislation. N.J.S.A. 40:69A-184. Given the equal measure of competence designated to engage in political and

(continued...)

The decision below conflicts with the holding of the Ninth Circuit in *Operating Engineers Pension Trust v. Cecil Backhoe Service, Inc.*, 795 F.2d 1501, 1505 (9th Cir. 1986), which held that a party's "argument is that he was not aware of the legal consequences of signing the agreements" is "not a valid defense." The Ninth Circuit emphasized that, under general contract law principles, one party to a contract has no obligation to explain "the terms, conditions, or consequences" of the contract's provisions to the other party. *Id.* In short, "the fact that Cecil did not fully understand the consequences of signing the agreements does not lead to the conclusion that there was no mutual assent and hence no contract." *Id.* at 1504. *See also Smith v. BAC Home Loans Servicing, LP*, 552 Fed. Appx. 473, 476-77 (6th Cir. 2014) (applying Tennessee law) (rejecting plaintiff's claim that she did not understand the consequences of the contractual language by relying on the "bedrock principle of contract law that an individual who signs a contract is presumed to have read the contract and is bound by its contents") (citation omitted).

The New Jersey court's view of an ignorant public is unjustified given that anyone who has purchased a

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[3] (...continued)
economic activity, it makes little sense to treat economic freedom as a dangerous threat requiring judicial paternalism, while upholding the right to political participation as a fundamental right of all mature adults. *See* Timothy Sandefur, *The Right to Earn a Living* 281 (2010). "'[P]ublic policy requires * * * that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held sacred, and shall be enforced by the courts of justice, . . . we are not lightly to interfere with this freedom of contract.'" *Dufford v. Nowakoski*, 125 N.J. Eq. 262, 269 (1939) (citations omitted).

car, applied for a credit card or a job, has a cell phone, or rented an apartment has seen those black-boxed bolded arbitration provisions highlighted in their contracts. Multiple courts, in conflict with the court below, describe the fact that arbitration precludes a jury trial as "obvious." *Sydnor v. Conseco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) ("[T]he loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate."); *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 223 (3d Cir. 2007) (same); *State ex rel. Russo v. McDonnell*, 852 N.E.2d 145, 154 (Ohio 2006) (same); *Walther v. Sovereign Bank*, 386 Md. 412, 443 (2005) ("the loss of one's right to a jury trial is *generally implicit* in an agreement to arbitrate"); *BiotechPharma, LLC v. Ludwig & Robinson, PLLC*, 98 A.3d 986, 996 (D.C. Ct. App. 2014) ("[A]n arbitration agreement necessarily embodies a waiver of the right to trial by jury."); *Cooper v. MRM Investment Co.*, 367 F.3d 493, 506 (6th Cir. 2004) (entering into an arbitration agreement evidences a knowing and voluntary waiver of trial rights because the waiver of the right to a jury trial is an obvious and necessary consequence of entering into an arbitration agreement).[4]

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[4] Some arbitration contracts upheld by this Court lack specific reference to courts or juries, while containing language about "binding" or "mandatory" arbitration. *See e.g.*, Br. for Petitioners-Appellees, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 624 F.3d 157 (2d Cir. 2010), No. 06-3474-cv., 2006 WL 6837688, *4 (Oct. 13, 2006) (quoting language of arbitration agreement); Br. for Petitioners, *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009), No. 07-581, 2008 WL 1989715, *6 (May 5, 2008) (quoting arbitration contract); Personal Management Agreement, reprinted in the Joint Appendix, *Preston v. Ferrer*, 2007 (continued...)

For all these reasons, a plaintiff's claim to be unaware of the consequences of his or her arbitration agreement simply cannot have legal relevance. "Unless he requests the Court to imply something akin to incapacity, the Court presumes his competence and his ability to inform himself prior to signature of the ramifications stemming from his contract." *Bosinger v. Phillips Plastics Corp.*, 57 F. Supp. 2d. 986, 991 (S.D. Cal. 1999) (finding that no clear and unmistakable waiver of a right to a judicial forum was required to find an arbitration agreement valid).

B. The Decision Below Conflicts with the Majority of Courts That Determine Consent Objectively

Absent one party's fraud, misrepresentation or duress, the other party to a contract is legally bound by its terms whether he or she actually read or understood them. *See* 17A C.J.S. Contracts § 193 (2012). "Men, in their dealings with each other, cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance." *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 889 (Wis. Ct. App. 2004) (citation omitted). This is true regardless of whether the contract contains boilerplate language. *Id.* at 888; *cf. Sherman v. Lunsford*, 723 P.2d 1176, 1178 (Wash. Ct. App. 1986) ("Although the parties may not have fully understood the legal significance of each and every term, they knew they were signing a binding

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[4] (...continued)
WL 3276515, *17-*18 (Nov. 1, 2007) (quoting arbitration provision); *Nitro-Lift Tech. LLC v. Howard*, 133 S. Ct. 500, 502 (2012) (quoting arbitration clause).

contract."); *Ricci-Drain-Laying Co., Inc. v. Baskin*, 744 A.2d 406, 408 (R.I. 1999) (Rhode Island contract law presumes that someone who signs a contract knows and understands its contents; the party cannot complain that he or she did not read the contract or did not understand it.); *Janiga v. Questar Capital Corp.*, 615 F.3d 735, 743 (7th Cir. 2010) ("The problem for Janiga is that he signed a contract, and that the paper he signed refers to arbitration. Janiga's signature—which he admits was given voluntarily—objectively demonstrated his assent to the contract."); *see also* Margaret M. Smith, *Originalism and Precedent: Note: Adhesion Contracts Don't Stick in Michigan: Why* Rory *Got it Right*, 5 Ave Maria L. Rev. 237, 268 (2007) ("There are many examples of difficult reading material—state statutes, prescription drug pamphlets, federal tax forms—but no one can file a claim for relief from any of these based on the fact that 'no one ever reads them' or that the language is complicated.").

Mutual assent and freedom of contract are closely aligned because freedom of contract cannot exist without mutual assent. *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 258 (Mich. 2003). The majority rule, by far, is that "mutual assent is judged by an objective standard, looking to the express words the parties used in the contract." *Management Computer Svcs., Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 76-77 (1996). A party's signature is evidence of "an objective meeting of the minds." *In re Fillion*, 181 F.3d 859, 864 (7th Cir. 1999). *See also Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla. 1957) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897)) ("The making of a contract depends not on the

agreement of two minds in one intention, but on the agreement of two sets of external signs—not the parties' having *meant* the same thing but on their having *said* the same thing.").

The decision below, by permitting "litigation-motivated, post hoc descriptions" of one contracting party's state of mind, severely undermines the fundamental policies underlying the objective approach to determining consent. *See* Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law*, 62 Clev. St. L. Rev. 373, 390 (2014). Namely, the objective test increases the reliability of judicial decision-making, Lawrence M. Solan, *Contract As Agreement*, 83 Notre Dame L. Rev. 353, 380 (2007), and gives each party little or no reason to fear that the other party may void the contract by claiming either a failure to read or a subjective misunderstanding of the agreement. *See Ursini v. Goldman*, 118 Conn. 554, 562 (1934); *Universal Studios, Inc. v. Viacom, Inc.*, 705 A.2d 579, 589 (Del. Ch. 1997) ("The necessity of preserving predictability and stability in commercial transactions is fostered by this objective view of contracts."); *McCall v. Carlson*, 172 P.2d 171, 187-88 (Nev. 1946) (freedom of contract promotes "[t]he necessary certainty, stability and integrity of contractual rights and obligations.").

The requirement that intent be objective also enhances the freedom of contract because it allows parties an increased ability to manage their business relationships "[b]y limiting operative manifestations to those that are received and known by the parties to the negotiation." Wayne Barnes, *The Objective Theory of*

Contracts, 76 U. Cin. L. Rev. 1119, 1131 (2008). Moreover, "a party's ability to enter and enforce contracts both reflects and promotes liberty, but also increases the production of wealth to the benefit of the general welfare." Feldman, *supra*, 62 Clev. St. L. Rev. at 429, citing *Ryan v. Weiner*, 610 A.2d 1377, 1380 (Del. 1992); Restatement (Second) of Contracts § 72 cmt. b (1981) ("bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action"); *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 31 (Mich. 2005) ("One does not have 'liberty of contract' unless organized society both forbears and enforces, forbears to penalize him for making his bargain and enforces it for him after it is made.").

And, as a practical matter, courts are ill-suited to delve into party's subjective expectations and understandings of otherwise clear language. *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987) ("Yet [contract] 'intent' does not invite a tour through [a party's] cranium, with [that party] as the guide."). As Professor Feldman summarizes,

> All told, the duty to read and understand properly shifts the risk of misunderstanding the contract from the merchant as the drafter to the consumer where the latter fails to take proper measures to protect his own interests—which includes the need for a party (even an illiterate person) to seek assistance if he does not understand the contract terms.

Feldman, *supra*, 62 Clev. St. L. Rev. at 410 (citing cases).

C. The Court's Presumptions Lead It to Treat Arbitration Contracts Adversely, Compared to Other Types of Contracts

The court below created a rule that no arbitration contract can be valid absent particular phrasing that reflects the parties' agreement to resolve disputes in arbitration rather than in court, and describes the differences between the two methods of dispute resolution. In doing so, it treats arbitration contracts differently—adversely—than other contracts containing waivers, a result prohibited by the federal substantive common law of arbitration as well as the FAA. *See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (under the FAA, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

This is in contrast to many courts that refuse to invalidate an arbitration contract that implicitly—rather than explicitly—contains a jury waiver. *See e.g.*, *Harrington v. Atlantic Sounding Co., Inc.*, 602 F.3d 113, 126 (2d Cir. 2010), *cert. denied* 131 S. Ct. 1054 (2011) (rejecting the plaintiff's argument that an arbitration agreement is unconscionable and invalid because it eliminates his right to a trial by jury "because courts may not 'rely on the uniqueness of an agreement to arbitrate', which necessarily waives jury trial, 'as a basis for a state-law holding that enforcement would be unconscionable.' . . . It is well-settled that waivers of jury trial are fully enforceable under the FAA.") (citations omitted);

Credit Acceptance Corp. v. Front, 231 W. Va. 518, 532 (2013) ("insofar as an arbitration agreement, by its very nature, requires a party to surrender his or her right to litigate, it may not be invalidated solely upon that ground.").

The adverse effects of *Atalese*'s hostility to arbitration contracts are already apparent, as post-*Atalese* courts impose the bright-line rule requiring special language to invalidate arbitration contracts. In *Dispenziere v. Kushner Companies*, 101 A.3d 1126, 1127 (N.J. Super. App. Div. 2014), a New Jersey appellate division recounts *Atalese*'s insistence that the arbitration provision include specific language stating that agreement to resolve disputes by binding arbitration means a waiver of the right to seek relief in a court of law. With the *Atalese* mandate, the court's analysis was simple: No specific language about waiver means an invalid arbitration clause. *Id.* at 1131. Moreover, the court explained that *Atalese* was not restricted to plaintiffs alleging statutory violations; it applies to common law causes of action as well. *Id.* The court was unmoved by the fact that many of the plaintiffs were represented by counsel in the course of executing the purchase agreements. *Id.* at 1132. Similarly, in *Kelly v. Beverage Works NY Inc.*, 2014 WL 6675261 *3 (N.J. Super. App. Div. Nov. 26, 2014), another appellate panel followed *Atalese* to hold that lack of "waiver" language invalidated the arbitration contract and extended *Atalese* beyond consumer contracts to arbitration agreements in the employment context.

The decision below, by requiring language describing the differences, including the costs and benefits, of various fora for resolving disputes as a

requisite to a jury waiver, impermissibly presumes that competent adults lack the capacity to read and understand their own contracts. In doing so, it undermines the freedom of contract that underpins this Court's, and the FAA's, protection of arbitration agreements.

II

THE DECISION BELOW EXACERBATES A CONFLICT AMONG LOWER COURTS AS TO WHETHER A KNOWING WAIVER OF THE RIGHT TO A JURY REQUIRES HEIGHTENED NOTICE IN AN ARBITRATION CONTRACT

The *Atalese* decision below joins the Montana Supreme Court as outlying decisions that hold waiver of a jury trial to a higher standard, disproportionately affecting arbitration contracts. The Montana Supreme Court held in *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 699 (Mont. 2009), that an arbitration provision falls outside a consumer's "reasonable expectations"—and thus need not be enforced—unless the waiver of the "consumer's fundamental constitutional rights to trial by jury, access to the courts, due process of law and equal protection of the laws" was done "voluntarily, knowingly, and intelligently." Under *Kortum-Managhan*, the proponent of arbitration must "prove" that the consumer "deliberately and understandingly made" the waiver and was "informed of the consequences before personally consenting to the waiver." *Id.* This rule was reaffirmed in *Kelker v. Geneva-Roth Ventures, Inc.*, 369 Mont. 254 (2013), over the dissent of Justice Baker, who opined

> It is not unreasonable that a State should impose more stringent standards for evaluating the waiver of fundamental constitutional rights. In doing so, however, we have created a state-law rule with "disproportionate impact on arbitration agreements," *Concepcion*, 131 S. Ct. at 1747, which the U.S. Supreme Court has viewed as the "type of 'judicial hostility towards arbitration'" that is expressly foreclosed by the FAA, *Nitro-Lift*, 133 S. Ct. at 503. Like it or not, we are bound by those rulings. U.S. Const. Art. VI, cl. 2.

Kelker, 369 Mont. at 268 (Baker, J., dissenting).

The Ninth Circuit agreed with Justice Baker in *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013), holding that the FAA preempts the *Kortum-Managhan* test. The court explained that the test "runs contrary to the FAA . . . because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Id.* *See also* Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am. Rev. 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.").

Like the New Jersey rule, which the *Atalese* court described as generally applicable to all contracts, the *Kortum-Managhan* test also is facially neutral. However, the Ninth Circuit held that

> This is not an easy case as it requires us to interpret *Concepcion* and apply that law to an established Montana rule that governs the validity of contracts generally but has a disproportionate impact on arbitration agreements. Montana has an interest in protecting its consumers from unfair agreements, particularly those that force waiver of fundamental rights without notice. But the Supreme Court in *Concepcion* told us to hold that the FAA preempts all laws that have a disproportionate impact on arbitration agreements. Given this directive, we hold that the Montana reasonable expectations/fundamental rights rule is preempted by the FAA.

Id. at 1162. The contract in *Mortensen*, like the one in *Atalese*, did not contain specific language explaining that the phrase "binding arbitration" precluded a jury trial in a court of law. *Id.* at 1154. After the Ninth Circuit held the *Kortum-Managhan* rule preempted by the FAA and remanded the case, the district court held that the contract was unambiguous, "clear and direct," and does "not depend upon implication, inveiglement or subtlety." 2014 WL 2694220 *5 (D. Mont. June 11, 2014) (citation omitted). The plaintiff's claims were therefore sent to be resolved in an arbitral forum.

Atalese and *Kortum-Managhan* stand in conflict with multiple Circuit courts that agree that federal law and general contract principles prohibit a heightened standard for jury waivers in arbitration contracts. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1372 (11th Cir. 2005) ("[G]eneral contract principles govern the enforceability of arbitration agreements and

that no heightened 'knowing and voluntary' standard applies, even where the covered claims include federal statutory claims generally involving a jury trial right."); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 711 (5th Cir. 2002) (holding that an arbitration agreement that stated that the right to a trial and to a jury were waived, validly waived those trial rights, and rejecting arguments that a heightened "clear and unmistakable" or "voluntary, knowing, and intelligent" standard applied to the waiver); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) ("common sense" demands rejection of plaintiff's argument that she could not have knowingly and voluntarily waived her right to a jury trial without an express jury waiver provision); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 368 (7th Cir. 1999) (evaluating arbitration agreement under general contract principles and rejecting Seventh- and Fifth-Amendment waiver arguments because there was no constitutional right to a jury trial for claims subject to the arbitration clause and the arbitral forum adequately protects an employee's substantive and procedural statutory rights); *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 224 (3d Cir. 2008) ("applying a heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA"); *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36, 44 (1st Cir. 2012) (no heightened notice requirement to enforce agreement to arbitrate).

This Court has never addressed this question directly, although it stated in dicta that a heightened waiver standard is not applicable when an individual waives his or her own constitutional rights. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80-81

(1998). *Wright* construed a general arbitration clause contained in a collective bargaining agreement (CBA), and held that any union-negotiated waiver of employees' statutory rights to a judicial forum must be "clear and unmistakable." 525 U.S. at 80. This Court differentiated CBAs from agreements entered into by individual employees because CBAs involve "a union's waiver of the rights of represented employees," whereas individual agreements involve "an individual's waiver of his own rights." *Id.* at 81. This dicta informed the Tenth Circuit's decision in *Williams v. Imhoff*, 203 F.3d 758 (10th Cir. 2000). As *Williams* explains, although this Court "did not discuss in detail the standard applicable to agreements entered into by individual employees, it left little doubt that the 'clear and unmistakable' standard was inapplicable to such agreements." *Id.* citing *Wright*, 525 U.S. at 80-81 ("the 'clear and unmistakable' standard was not applicable" in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991), which involved an individual's waiver of his own statutory rights). This Court further distinguished individual arbitration agreements, which could "embrace federal statutory claims," while the identical clause in a CBA would be construed in a more narrow fashion. *Id.* at 763-64, citing *Wright*, 525 U.S. at 80.

The decision below cites *Wright* as a "cf.", noting only the holding with regard to waivers in CBAs, *Atalese*, 219 N.J. at 444, and ignoring the more relevant dicta that applies to individual arbitration agreements. This Court should take this opportunity to address directly the question of whether the federal law of arbitration, and the FAA, prohibit heightened scrutiny of jury waivers in individual contracts calling for arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: February, 2015.

Respectfully submitted,

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