NO. 13-97

IN THE

Supreme Court of the United States

GENEVA-ROTH VENTURES, INC. D/B/A LOAN POINT USA,
Petitioner,

v.

TIFFANY KELKER,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Arbitration Act preempt a state court's case-specific determination that a concededly "misprint[ed]" arbitration clause is unenforceable, as a matter of generally applicable state contract law, due to its ambiguity?

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INTRODUCTION

Petitioner Geneva-Roth asks this Court to grant certiorari to decide whether Montana contract law subjects arbitration agreements to a "heightened standard of consent," in violation of the Federal Arbitration Act (FAA). If the Montana Supreme Court did in fact apply a "heightened standard" in this case, it would indeed have run afoul of the FAA, which permits only state-law defenses that apply to "any contract." 9 U.S.C. § 2. But that is not what happened, and the question on which Geneva-Roth petitions this Court is not presented here. Geneva-Roth's complaints about hostility to arbitration are based on *other* Montana opinions—not this one. A "heightened standard of consent" can be found nowhere in the holding or reasoning of the decision below.

To the contrary, the decision in this case rests on a factbound, case-specific conclusion that Geneva-Roth's online payday lending agreement was "plague[d]" by "ambiguities." Pet. App. 13a. As Geneva-Roth concedes, those dispositive ambiguities are "the result of what appears to be a misprint" in the agreement, Pet. 6, which created two conflicting provisions. The first—an anti-waiver clause, presumably a holdover from an earlier version of the contract lacking any arbitration clause—states unequivocally that "this agreement does not constitute a waiver of any of Customer's rights to pursue a claim individually." Pet. App. 45a. But the arbitration language following that provision suggests the opposite: that the parties agreed to give up their right to "litigate disputes through the law courts." *Id.* at 46a. These two clauses, the state court held, "cannot easily be reconciled." *Id.* at 14a.

Geneva-Roth's petition argues that the decision below disfavors arbitration by applying a multi-factor un-

conscionability test containing several factors that would always be satisfied by a standard-form arbitration agreement. But ambiguity itself is a factor in that test—as well as an independent contract defense under Montana law—and it is certainly *not* met by the run-of-the-mill arbitration agreement. Indeed, this Court has recognized that the common-law rule applied below is fully consistent with the FAA: Geneva-Roth "drafted an ambiguous document" and "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995). Under Montana law, that common-law rule is an independent—and generally applicable—basis for the decision below. Pet. App. 10a-11a.

Thus, whether the decision's ambiguity conclusion is characterized as a freestanding holding or the dispositive factor in its unconscionability analysis, the upshot is the same: The decision hinges on the internal contradiction in Geneva-Roth's contract, exacerbated by an acknowledged "misprint" that does not appear to have occurred before. That dispositive factor is highly unlikely to recur in other cases and makes this case unworthy of review. Geneva-Roth does not point to any case involving a misprinted agreement similarly plagued by internal contradiction—let alone one in which a court enforced such an agreement.

Accordingly, this case is an unsuitable vehicle to decide the question presented by the petition. If Montana has truly erected a "heightened standard of consent" for arbitration agreements, then a decision invalidating an arbitration agreement for reasons other than a case-specific drafting error should emerge soon enough.

STATEMENT

1. Geneva-Roth's online lending practices. Geneva-Roth is in the business of making "payday" loans to consumers at an effective annual interest rate as high as 1,365%. *Id.* at 38a. Under a typical payday loan, a consumer who cannot afford to wait until his or her payday receives a cash advance. In exchange, the lender subtracts a larger amount from the consumer's next paycheck. Consumers typically renew the loan for an additional fee when they are unable to pay it off.

Geneva-Roth's payday lending practices, however, are anything but typical. Indeed, they have attracted the scrutiny of regulators and law enforcement officials nationwide and have caused the company to be barred from doing business in five states.[1]

Two features distinguish Geneva-Roth's loans. First, the terms on the company's website give Geneva-Roth the authority to take withdrawals directly from "any of Customer's bank accounts at any financial institution, from time to time, for fixed and variable amounts, including recurring transactions." *Id.* at 41a. Geneva-Roth is not "required to notify Customer prior to any recurring debit entry." *Id.* Geneva-Roth's agreement assures con-

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[1] These states are Arkansas, California, Connecticut, Oregon, and Washington. *See* Arkansas Consent Judgment (May 4, 2011), *available at* http://bit.ly/Hou2IV; California Desist and Refrain Order (Aug. 31, 2009), *available at* http://bit.ly/1is88zL; Connecticut Cease and Desist Order (Aug. 22, 2012), *available at* http://1.usa.gov/18zHIX6; Oregon Order to Cease and Desist, Suspending Collection Activities, and Assessing Civil Penalty (Mar. 15, 2012), *available at* http://bit.ly/16Iblv6; Washington Consent Order (Aug. 18. 2011), *available at* http://1.usa.gov/17Wx39D.

sumers that it "Does Not Charge Interest" and "only charges a fee." *Id.* at 38a.

Second, these terms allow Geneva-Roth to withdraw "partial payments" from consumers' accounts on paydays—payments that Geneva-Roth sets just high enough to cover its recurring fees without paying down the principal. *Id.* at 42a. As a result, Geneva-Roth can extract continual payments from consumers and ensure that they will remain indebted long after repaying the value of the initial loan. *Id.*

2. Ms. Kelker's loan and "misprinted" contract. In this case, Geneva-Roth made a $600 loan to Tiffany Kelker at an annual interest rate of 780%—twenty-one times greater than the maximum legal rate in Montana, where Kelker resides. *Id.* at 1a. By the time she filed this action, Geneva-Roth had withdrawn over $1,800 in fees from her bank account—three times the amount of her payday loan, *id.* at 2a—even though the fee stated in her contract was only $180. *Id.* at 38a.

Ms. Kelker's relationship with Geneva-Roth began on January 14, 2011. *Id.* On that day, "as a result of what appears to be a misprint," Pet. 6, two sentences were misplaced in a section of Geneva-Roth's online agreement that described litigation rights and arbitration. This caused the terms to read as follows.

First is a standard class-action waiver that begins: "Customer will not bring, join, or participate in any class action or multi-plaintiff action…against LoanPointUSA." Pet. App. 44a-45a. The waiver says nothing about arbitration. After this sentence appear two paragraphs about nonpayment and collection agencies that have nothing to do with class actions or multi-plaintiff actions. *Id.* at 45a.

Next are the two concededly misprinted sentences that seem to have originally been the remainder of the class-action provision:

> Customer agrees to the entry of injunctive relief to stop such a lawsuit or to remove Customer as a participant in the suit. This agreement does not constitute a waiver of any of Customer's rights to pursue a claim individually.

Id. The second sentence is an anti-waiver clause. Read in parallel with the first sentence, the "right to pursue a claim individually" appears to relate to an individual judicial proceeding (or as the prior sentence puts it, "a lawsuit"). *Id.* This language appears to explicitly preserve the consumer's right to bring an individual suit.

Finally, the paragraph after this anti-waiver clause is the arbitration provision, which explains that "both parties have the right to litigate disputes through the law courts but we have agreed instead to resolve disputes through binding arbitration." *Id.* at 46a. The effect of the drafting error, however, is that the anti-waiver clause—"[t]his agreement does not constitute a waiver of any of customer's rights to pursue a claim individually"—comes immediately before the arbitration clause, which appears to waive at least one of the customer's rights to pursue a claim individually: the right to litigate. *Id.* at 45a.

3. Proceedings below. Ms. Kelker sued Geneva-Roth, alleging that the 780% interest rate violated the Montana Deferred Deposit Loan Act 31-1-01 *et seq.* *Id.* at 3a. She also alleged that the loan agreement was unconscionable and that Geneva-Roth had operated without a license, failed to provide required disclosures, and engaged in unfair, deceptive, and/or fraudulent practices. *Id.* at 45a.

Geneva-Roth moved to stay the proceedings and compel arbitration. *Id.* The district court denied the motion, finding that the arbitration provision was unconscionable and therefore unenforceable. *Id.* at 35a. Geneva-Roth then appealed, arguing that the FAA preempted the district court's unconscionability ruling. *Id.* at 6a.

The Supreme Court of Montana affirmed. It began by recognizing that the FAA permits courts to determine the validity of an arbitration clause using generally applicable principles of state contract law, but forbids state-law rules that are "available solely to challenge an arbitration clause" or that "derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* at 4a-6a (internal quotation marks omitted). Consistent with this recognition, the court analyzed the arbitration clause in this case under the state's general rule that "an adhesion contract will not be enforced against the weaker party if it is not within their reasonable expectations." *Id.* at 6a. Reasonable expectations, in turn, are determined by a review of ten factors, including whether the weaker party was "compelled" by "economic duress," whether the weaker party had the opportunity or sophistication to actually negotiate the terms, and whether the terms were "ambiguous or misleading." *Id.* at 8a.

Applying these factors, the Montana Supreme Court held that the arbitration clause here fell outside Ms. Kelker's reasonable expectations. Crucial to the court's analysis was its finding that the clause was so "plague[d]" with "ambiguities" that it was unclear what Ms. Kelker had even agreed to. *Id.* at 14a. Indeed, the court discussed at some length cases that show why ambiguity—unlike other factors considered under the "reasonable expectations" inquiry—provides independent

justification for invalidating a clause: because courts "generally construe an ambiguity in a contract against the party who drafted the contract." *Id.*; *see also* 10a-11a.

Here, the Montana Supreme Court found that the anti-waiver sentence—which Geneva-Roth now concedes was "misprint[ed]," Pet. 6—provided Ms. Kelker the right to litigate in court because it ensured that the agreement was *not* "a waiver of *any* of Customer's rights to pursue a claim individually." Pet. App. 14a. (emphasis added). The court concluded that the arbitration clause, by contrast, appeared to waive at least one of these rights with its statement that "without this agreement" the parties "have the right to litigate disputes through the law courts." *Id.* The court further concluded that this ambiguity between two conflicting interpretations of the contract—one appearing to preserve the right to bring an individual claim in court; the other appearing to waive it—should be construed "against the party who drafted the contract." *Id.* The court thus held that the arbitration provision in this case was unenforceable as a matter of generally applicable state contract law. *Id.*

REASONS FOR DENYING THE PETITION

I. The Decision Below is an Unsuitable Vehicle for Review Because it Hinges on the Ambiguity in a Concededly "Misprint[ed]" Contract.

The issue on which Geneva-Roth seeks review is whether Montana law is preempted because it applies heightened standards to arbitration clauses. The decision below does not present that question. Unlike older Montana cases suggesting that arbitration clauses may be treated differently than other contract clauses, this decision spends several pages explaining why they must be treated the same. *Id.* at 5a-7a.

More importantly, the decision below hinges on a case-specific ambiguity between two clauses, not a heightened standard of consent. *See id.* at 10a-11a, 13a-14a. One clause emphasized that Ms. Kelker was not waiving "any of [her] rights to proceed individually"; a separate clause said that she was waiving her right to litigate individually. *Id.* at 13a-14a. Making things worse, the first clause was "misprint[ed]" (as Geneva-Roth now concedes, Pet. 6) and put in the wrong place.

Although the Montana Supreme Court cited other factors in holding that the arbitration clause was invalid under the reasonable-expectations test, *see* Pet. App. 12a, the clause's textual ambiguity was a key part of the court's decision. The court noted that it "considers whether ambiguities exist in all contracts" and discussed several Montana cases from outside the arbitration context, some of which hold that ambiguity by itself is sufficient to invalidate a clause. *Id.* at 10a (citing *Fitzgerald v. Aetna Ins. Co.*, 577 P.2d 370, 372 (Mont. 1978)). Additionally, the court applied the generally applicable presumption that "ambiguity should be construed against the drafter." *Id.* at 14a.

The ambiguity in Geneva-Roth's contract—a product of admittedly shoddy draftsmanship—renders the decision below a poor vehicle for any consideration of the question presented by the petition. Because any agreement can be invalidated for ambiguity (or be construed to resolve an ambiguity against the drafter), the decision below simply "places arbitration agreements on equal footing" with other contracts. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Put differently, it "make[s] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.*

v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967). That is all the FAA demands.

Geneva-Roth asks this Court to look past the decision's ambiguity analysis and focus instead on what it calls a "heightened standard of consent," derived from *other* Montana cases but found nowhere on the face of the decision below. Pet. 25. Geneva-Roth insinuates that the state court in this case used "unspoken" definitions to cloak its "naked hostility" and "write its way around" the FAA. *Id.* at 24, 32. But this Court should "not lightly" follow a suggestion about the role of state courts that "implies a distrust of their integrity." *Murdock v. City of Memphis*, 87 U.S. 590, 626 (1874). "When there is doubt" about whether a state law principle is established, this Court does not makes its "own assessment but accept[s] the determination of the state court." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 702 n.11 (2010).

The Montana Supreme Court determined that the specific arbitration clause at issue here was "plague[d]" by "[a]mbiguities." Pet. App. 13a. It makes no difference whether that determination is understood as an independent justification for invalidating the clause or as the dispositive factor in the court's reasonable-expectations analysis. What matters is that it is a generally applicable state-law principle that does not implicate the question presented by the petition.

As for Geneva-Roth's accusations about previous Montana cases, this Court should await a decision that actually applies a heightened standard of consent to an arbitration agreement rather than accept Geneva-Roth's assertion that the Montana Supreme Court has it out for arbitration. If that turns out to be true, then another

case will emerge soon enough, only without a clear drafting error, providing an appropriate vehicle for review.

Indeed, this case would present serious jurisdictional problems under 28 U.S.C. § 1257 if this Court were to grant review. *See* Gressman et al., *Supreme Court Practice* § 3.26 (9th ed. 2007). Geneva-Roth seeks review based on its general dissatisfaction with Montana's multi-factor reasonable-expectations test. But the judgment below rests on a case-specific finding of ambiguity, and this Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Because ambiguity alone provides a sufficient and independent basis for invalidating the arbitration agreement, "the same judgment would be rendered by the state court" even after any review on Geneva-Roth's question presented. Gressman, *Supreme Court Practice* § 3.26. The decision below thus contains an independent and adequate state-law ground for the judgment, and the petition does not argue that *this* ground is preempted by the FAA. Thus, even aside from the vehicle problems addressed above, it is unclear whether this Court could address the petition's general complaints regarding Montana's supposed "heightened standard of consent."

II. The Decision Below Does Not Conflict With the Law of Other States or of Any Federal Circuit.

Because the Montana Supreme Court held that the arbitration clause was ambiguous—and because ambiguity is an independent basis for invalidating a provision under generally applicable Montana contract law—the decision below does not conflict with decisions finding unconscionability doctrine preempted by the FAA. There is no doubt that "any contract" with contradictory wording is susceptible to invalidation on the basis of am-

biguity, regardless of whether it concerns arbitration. *See, e.g., C.H.I. Inc. v. Marcus Bros. Textile, Inc.*, 930 F.2d 762, 764 (9th Cir. 1991) (analyzing whether arbitration agreement is "intolerably ambiguous" and thus unenforceable"); *Davis v. EGL Eagle Global Logistics L.P.*, 243 F. App'x 39, 44 (5th Cir. 2007) (same). And there is no conflict over the ancillary principle that ambiguous language should be construed against the drafter. *See Restatement (Second) of Contracts* § 206 (1981); *Mastrobuono*, U.S. 514 at 62-63.

These points aside, Geneva-Roth's claims of conflict fail even on their own terms. For example, Geneva-Roth trumpets *Mortensen v. Bresnan Communications, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013), but fails to compare *Mortensen*'s holding with the decision below. Pet. 28. *Mortensen* held only that the "reasonable expectations/fundamental rights rule" is preempted "as that rule is currently employed." *Id.* at 1159. The decision below makes no mention of fundamental rights—its reasonable-expectations analysis adopts only standard unconscionability factors concerning the bargaining disparity of the parties. To be sure, the decision cites cases—like *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693 (Mont. 2009)—that *Mortensen* deems preempted, but it "employs" the cited factors differently and holds that the arbitration clause is ambiguous—an independent and adequate state-law ground to support the decision.

Geneva-Roth also attempts to manufacture a conflict with circuits that have rejected "knowing consent," "special notice," and "special prominence" requirements for arbitration provisions. Pet. 29 (citing *Awuah v. Coverall N. Am., Inc.*, 703 F.3d 36, 45 (1st Cir. 2012); *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 223-224 (3d Cir. 2008); *Iberia Credit Bureau, Inc. v. Cingular Wireless*

LLC, 379 F.3d 159, 172 (5th Cir. 2004)). Although it is true that *other* Montana opinions discuss heightened requirements for agreements that waive fundamental rights, *this* opinion does not. The holding by the Montana Supreme Court in this case—that the arbitration clause is unconscionable, in part because it is ambiguous—cannot be conflated with preempted doctrines in other jurisdictions merely because they also use the term "unconscionability." This Court does not review state-court decisions based on guilt by association.

III. The Decision Below is Correct and Does Not Conflict with this Court's Cases.

A. Geneva-Roth's arbitration clause is ambiguous under generally applicable state contract law.

The FAA requires that arbitration agreements be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has always held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening" the FAA, *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996), because they "concern the making of an agreement" and are therefore applicable to "any contract," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1755 (2011). Ambiguity disrupts the "making of an agreement" because language that can be read in multiple contradictory ways upends the necessary meeting of the minds. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

In this case, partly due to an acknowledged error, Geneva-Roth "drafted an ambiguous document" and "cannot now claim the benefit of the doubt." *Mastrobuono*, 514 U.S. at 62-63 (internal citations omitted). It

"cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it." *Id.* at 63.

FAA preemption has never been extended to constrain the discretion of state courts in making case-specific determinations about the wording of contracts. The decision below expressly detailed how its analysis derived from a ground that exists "for the revocation of any contract," citing non-arbitration cases that applied the same ambiguity principles. Pet. App. 10a (citing *Fitzgerald*, 577 P.2d at 372).

Under Montana law, a clause in a contract is ambiguous when it is susceptible to two inconsistent interpretations. That is true for arbitration clauses and non-arbitration clauses alike. Here, the contradiction between the anti-waiver clause and the arbitration clause was identified by the Montana Supreme Court and would have existed regardless of the "misprint." Pet. 6; *see* Pet. App. 13a-14a. But the misprint exacerbates the ambiguity by removing the anti-waiver clause from its context and juxtaposing the two contradictory clauses.

In an eleventh-hour attempt to reinterpret its own contract, Geneva-Roth now argues that "it is obvious" that the anti-waiver clause (which says that the contract does not waive "*any* of Customer's rights to pursue a claim individually") "was referring to substantive rights—not the procedural right to a jury trial in court." Pet. 25. But that just demonstrates why courts have long construed ambiguity against the drafter: "to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono*, 514 U.S. at 63. Had it not been for the misprint in this case—Geneva-Roth's pasting two unrelated paragraphs just before the

anti-waiver clause—that clause would have immediately followed the first part of a class-action waiver provision discussing procedural rights *in court*. Read as a reunited whole, the class-waiver provision requires Ms. Kelker to waive her right to proceed collectively in court, but the anti-waiver clause appears to guarantee her right to proceed individually in court. Pet. App. 45a. (Presumably, the anti-waiver provision predated the addition of the arbitration clause.)

Geneva-Roth also argues that it is "self-evident[]" that the anti-waiver clause (and the neighboring sentence about removal as a participant) were actually "intended to follow the last sentence of the arbitration provision," rather than the first part of the class-waiver provision. Pet. 6. Geneva-Roth contends that these two sentences "describe the consequences of the arbitration provision if a customer sues in court instead of arbitrating." *Id.* at 7. Far from being self-evident, a plain reading of the contract supports the opposite conclusion. The first misprinted sentence refers to "participants" in "such a lawsuit," which logically refers to the phrase "participate in any class action" from the first part of the class waiver. Pet. App. 45a. The anti-waiver clause refers to Ms. Kelker's right to "pursue a claim individually," which contrasts with pursuing a claim collectively. Thus, the most logical reading of the anti-waiver clause is that Ms. Kelker retains the right to litigate individually *in court*. And that conflicts with the arbitration clause.

Given these ambiguities, the decision below was correct as a matter of generally applicable Montana contract law. In Montana, ambiguity is sufficient to invalidate a clause regardless of whether the clause is also unconscionable or outside reasonable expectations, and regardless of whether an arbitration agreement is at issue.

See, e.g., *Riehl v. Cambridge Court GF, LLC*, 226 P.3d 581, 588 (Mont. 2010) (ambiguity between arbitration clause waiving rights and savings clause specifying no limitation of "Owner's inalienable legal rights"); *West v. Club at Spanish Peaks, L.L.C.* 186 P.3d 1228, 1240 (Mont. 2008) (ambiguity between commissions and bonuses after employee termination); *Hubner v. Cutthroat Commc'ns, Inc.*, 80 P.3d 1256, 1262 (Mont. 2003) (ambiguity between handbook and signed acknowledgment form). Moreover, as noted by the Montana Supreme Court in the decision below, ambiguity in any Montana contract of adhesion is construed against the drafter. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 16 (Mont. 2002). Thus, where the ambiguity is (as here) between a term guaranteeing the right to litigate and a term submitting any claims to arbitration, generally applicable Montana contract law dictates that the arbitration clause is unenforceable and the underlying dispute may be resolved in court.

B. In any event, Geneva-Roth's arbitration clause is unconscionable under generally applicable state contract law because it falls outside reasonable expectations.

The Montana Supreme Court's holding that the arbitration clause is ambiguous is sufficient to demonstrate that the decision below is not preempted by the FAA. But even if this case did not involve a misprinted ambiguity, Montana's reasonable-expectations doctrine would still comply with the FAA.

That doctrine is neither inherently fatal to, nor biased against, enforcement of an arbitration clause. Contrary to Geneva-Roth's claims that reasonable expectations is a smokescreen for unprincipled judicial hostility to arbitration, the Montana Supreme Court has repeat-

edly applied its reasonable-expectations test to *uphold* arbitration clauses in cases where the terms are not ambiguous and the agreement was not procedurally infirm due to duress or a disparity in the parties' bargaining positions. *See*, *e.g.*, *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 258 P.3d 999, 1004-05 (Mont. 2011); *Larsen v. W. States Ins. Agency, Inc.*, 170 P.3d 956, 959 (Mont. 2007); *Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26, 30 (Mont. 1993); *Passage v. Prudential-Bache Sec., Inc.*, 727 P.2d 1298, 1302 (Mont. 1986). And other courts examine unconscionability of arbitration agreements using the same factors as Montana's reasonable-expectations test: education, experience, opportunity to negotiate, awareness of specific provisions, economic compulsion, and clarity of terms. *See*, *e.g.*, *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 235-36 (3d Cir. 2012) (collecting cases).

These cases contravene Geneva-Roth's assertion that the decision below "trains on … and [sets] out a precise, arbitration-specific limitation." *Casarotto,* 517 U.S. 681, 687 (1996). Instead, they demonstrate that enforcement of arbitration provisions is subject to a factbound analysis that turns on the particular circumstances of a case, even when the contract is adhesive. *Casarotto* limited its preemption holding to a statutory heightened standard because the court there "did not assert as a basis for its decision a generally applicable principle of 'reasonable expectations' governing any standard form contract term." *Id.* The decision below did just that.

Ambiguity is absent from most cases involving arbitration clauses, and the invalidation of the clause in this case does not signal a conspiracy on the part of Montana courts to undermine the FAA. Because ambiguity is both a dispositive component of the reasonable-expectations

test and an independent ground for invalidating the arbitration clause under Montana law, the contradictory and misprinted terms of Geneva-Roth's contract set this case apart from others applying the reasonable-expectations test. Geneva-Roth can criticize that test for imposing a "heightened standard of consent," but because the Montana Supreme Court held that the arbitration clause in this case was ambiguous, there is no FAA preemption and no need for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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