No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Montana law, most provisions in contracts of adhesion—*i.e.*, non-negotiable form contracts—are enforceable if they are within the non-drafting party's "reasonable expectations"; the party's actual knowledge of the contract terms is irrelevant. But arbitration agreements may be enforced only if the court also determines, under a ten-factor test, that the non-drafting party "voluntarily, knowingly, and intelligently" waived the right to go to court. This Court has held repeatedly that Section 2 of the Federal Arbitration Act ("FAA") prohibits States from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008) (citing *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)).

The question presented is:

Whether the FAA preempts Montana's rule subjecting arbitration provisions in standard-form contracts to a heightened standard of consent that does not apply to other terms in form contracts.

PARTIES TO THE PROCEEDING BELOW

The petitioner, and defendant-appellant below, is Geneva-Roth Ventures, Inc. d/b/a Loan Point USA. Defendant Mark Curry was identified in the caption as an appellant, but he did not make an appearance in either the Montana Supreme Court or district court, and—to petitioner's knowledge—was never served with the complaint and a summons. Plaintiff also sued (and served) Geneva-Roth Capital, Inc., but the district court dismissed all claims against Geneva-Roth Capital, Inc. for lack of personal jurisdiction, and plaintiff did not appeal that ruling.

The respondent, and plaintiff-appellee below, is Tiffany Kelker.

CORPORATE DISCLOSURE STATEMENT

Geneva-Roth Ventures, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Geneva-Roth Ventures, Inc. d/b/a Loan Point USA respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Montana in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Montana (App., *infra*, 1a-24a) is reported at 369 Mont. 254. The opinion of the Thirteenth Judicial District Court of Montana (App., *infra*, 25a-35a) is unreported.

JURISDICTION

The Supreme Court of Montana's decision was entered on March 12, 2013. App., *infra*, 1a. By orders dated May 24, 2013 and July 1, 2013, Justice Kennedy extended the time to file a petition for a writ of certiorari until July 10, 2013 and July 24, 2013, respectively. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

The Montana Supreme Court invalidated the arbitration agreement here by applying a legal standard that—if extended beyond the arbitration context—would invalidate virtually every standard-form consumer contract. The fact that such contracts are *not* routinely invalidated in Montana confirms what the dissenting justices below expressly recognized: Montana's legal rule imposes heightened requirements on arbitration contracts that do not apply to other types of agreements and is therefore irreconcilable with the FAA's plain text and this Court's precedents. The holding below also conflicts with the decisions of numerous lower courts—including the Ninth Circuit, which recently held that Montana's standard is preempted by the FAA. See *Mortensen* v. *Bresnan Commc'ns, LLC*, __ F.3d __, 2013 WL 3491415, at *7 (9th Cir. July 15, 2013).

Under Section 2 of the FAA, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, * * * 'save upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987) (quoting 9 U.S.C. § 2; emphasis added by the Court). This Court repeatedly has emphasized that

Section 2 of the FAA prohibits States from discriminating against arbitration agreements or singling them out for suspect status. See, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996).

Montana has a history of disregarding the FAA, necessitating this Court's intervention. In *Casarotto*, this Court held that the FAA preempted a Montana statute that required contracts containing arbitration clauses to provide notice that they do so in "underlined capital letters on the first page of the contract." 517 U.S. at 683 (internal quotation marks omitted). The Court explained that Section 2 of the FAA forbids States from imposing "special notice requirements" on arbitration clauses that are not applicable to contracts generally. *Id.* at 688.

Regrettably, the Montana courts have failed to heed this Court's admonition not to treat arbitration clauses with disfavor. Over the ensuing years, the Montana Supreme Court has crafted a judge-made rule that disfavors arbitration provisions even more significantly than the statute struck down in *Casarotto*. Under that standard—known as the *Kortum-Managhan* test—courts may refuse to enforce arbitration provisions in contracts of adhesion upon concluding that the adhering party did not "voluntarily, knowingly, and intelligently" waive the right to a jury trial by agreeing to arbitrate. As the Ninth Circuit has explained, under this standard, "only arbitration agreements explained to and initialed by consumers"—"after receiving the proper information" about "the consequences of [the] provision"—"are valid and enforceable." *Mortensen*, 2013 WL 3491415, at *7.

By imposing this heightened consent standard, which does not apply to any other terms of standard-

form agreements, the Montana Supreme Court has not only reinstated the very "special notice requirements" that this Court invalidated in *Casarotto*, but also added new "special" grounds on which courts can refuse to enforce arbitration provisions. It is self-evident that these new factors—such as whether the arbitration provision was separately signed or initialed, whether the consequences of the provision were explained to the adhering party, and whether the adhering party had the benefit of advice of counsel when entering into the agreement—are not generally applicable to all provisions of all adhesion contracts in Montana; if they were, virtually every standard-form contract would be unenforceable and modern commerce in that State would grind to a halt. The *Kortum-Managhan* test accordingly is flatly irreconcilable with this Court's many precedents that make clear that courts may not apply more stringent standards to arbitration provisions.

Indeed, the Ninth Circuit recently has concluded that the FAA preempts the *Kortum-Managhan* test, stating 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." *Mortensen*, 2013 WL 3491415, at *7.

Because the decision below conflicts squarely with this Court's precedents, it naturally also conflicts with the overwhelming majority of decisions of lower courts across the country, including the Ninth Circuit's decision in *Mortensen*. Moreover, if allowed to stand, the Montana Supreme Court's decision not only would threaten the enforceability of nearly every form consumer or employment arbitration agreement to which Montana residents are parties but al-

so would provide a roadmap for other courts that are hostile to arbitration to nullify millions of additional arbitration agreements.

This Court's review is therefore essential. Indeed, the irreconcilability of the Montana Supreme Court's decision with this Court's precedents is so clear as to warrant summary reversal.

A. The Arbitration Agreement

Petitioner Geneva-Roth Ventures, Inc. ("Geneva-Roth"), which did business as Loan Point USA, was an online lender. App., *infra*, 2a. On January 14, 2011, respondent Tiffany Kelker used Loan Point USA's website to borrow $600. *Ibid.* To do so, Kelker completed an online loan agreement. *Ibid.* The full contract terms were displayed on the web page in a scrollable text box. Decl. of Brian McGowan ¶¶ 4-5 & Ex. B-2 at 2; see also App., *infra*, 36a-51a. Above the text box was a "Live Chat" button that Kelker could click to open an online chat with an "agent[]" who could "assist with any general questions about the application process." McGowan Decl. Ex. B-2 at 2.

To accept the contract, Kelker clicked on a box labeled "I agree" and typed her name in another box labeled "signature"; both boxes appeared immediately below the text box displaying the contract terms. *Ibid.*; see also *id.* ¶¶ 4-6. Next to the "I agree" check box was an acknowledgment stating: "By checking this box I have read and understood the terms and conditions above. Also by checking this box, I understand that in accordance with the 'Electronic Signatures in Global and National Commerce Act' [15 U.S.C. § 7001], by typing my name in the signature box below I know it is legally valid and binding as a

written signature." *Id.* Ex. B-2 at 2. Upon completing the transaction, Kelker was emailed a copy of the contract terms identical to the ones that she had been able to view before clicking her agreement and typing her signature. *Id.* ¶ 7.

The contract included an arbitration provision, which states: "Both parties agree that any claim, dispute, or controversy between us * * * shall be resolved by binding arbitration." App., *infra*, 45a.[1] The provision explains that "[t]his arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act." *Id.* at 46a.

The arbitration provision specifies that "[a]ny arbitration hearing, if one is held, will take place at a location near Customer's residence and shall be conducted by a mutually agreed to and certified arbitrator." *Id.* at 45a-46a. The provision further indicates that "Customer's arbitration fees will be waived in the event you cannot afford to pay them." *Id.* at 46a.

Finally, the end of the arbitration provision states: "Notice: Without this arbitration agreement, 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. As the result of what appears to be a misprint, a pair of sentences that self-evidently were intended to follow the last sentence in the arbitration provision instead appeared immediately before the arbitration provision itself. Those sentences, which de-

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[1] In a provision separate from the arbitration clause, the contract specifies that "Customer agrees, to the extent permitted by law, that Customer will not bring, join, or participate in any class action or multi-plaintiff action[.]" App., *infra*, 44a-45a.

scribe the consequences of the arbitration provision if a customer sues in court instead of arbitrating, state: "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.* at 45a.

B. Kelker's Lawsuit

In July 2011, Kelker filed a putative class action against petitioner Geneva-Roth Ventures, Inc., as well as Geneva-Roth Capital, Inc. and Mark Curry (who was alleged to be its "alter ego"), in the Thirteenth Judicial District Court for Yellowstone County, Montana. Compl. ¶¶ 1-3.[2]

In her amended complaint, Kelker acknowledged entering into a loan agreement with the defendants. Am. Compl. ¶ 4.[3] But she contended that the loan violated the Montana Deferred Deposit Loan Act, Mont. Code §§ 31-1-701 *et seq.*, alleging that (among other things) the defendants engaged in "unfair, deceptive and/or fraudulent practices in the making and collection of the loan" and collected an interest rate that exceeded the maximum rate permitted by Montana law. Am. Compl. ¶ 9.

Kelker requested compensatory and punitive damages, statutory damages of $1,000 per violation,

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[2] All claims against defendant Geneva-Roth Capital, Inc., were subsequently dismissed for lack of personal jurisdiction. App., *infra*, 28a. Defendant Mark Curry appears never to have been served with process.

[3] Kelker's amended complaint, dated September 14, 2011, shared the same caption and title as the original complaint; it was not labeled as an amended complaint.

declarations voiding all of Geneva-Roth's loans in Montana and barring Geneva-Roth from entering into new loans, and attorneys' fees and costs. *Id.* at 7 & ¶¶ 11-13.

Geneva-Roth responded to the complaint by moving to compel arbitration under the FAA. App., *infra*, at 3a. Kelker opposed the motion, arguing that her arbitration agreement is an unenforceable "contract of adhesion" under Montana law because arbitration fell outside her "reasonable expectations." Pl. Br. in Opp. to Mot. to Stay these Proceedings and Compel Arbitration 4-7 (Mont. Cir. Ct. Mar. 1, 2012).[4]

C. The District Court's Ruling

The district court denied the motion to compel arbitration, agreeing with Kelker that the arbitration provision is unenforceable under Montana law. App., *infra*, 33a.

The district court relied chiefly on the Montana Supreme Court's holding in *Kortum-Managhan* v. *Herbergers NBGL*, 204 P.3d 693 (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 funda-

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[4] Kelker also argued that her arbitration agreement is unconscionable under Montana law because the agreement forbids class arbitration. Pl. Br. in Opp. to Mot. to Stay these Proceedings and Compel Arbitration 7-8. The courts below did not address that argument, which in any event is foreclosed by this Court's holding that the FAA preempts state-law rules conditioning enforcement of arbitration agreements on the availability of class procedures. *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011); see also *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

mental 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.'" App., *infra*, 31a-32a (quoting *Kortum-Managhan*, 204 P.3d at 699). 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.* at 32a (quoting *Kortum-Managhan*, 204 P.3d at 699).

Kortum-Managhan instructs courts to consider ten "factors" in assessing whether a consumer "'deliberately, understandingly, and intelligently'" entered into an arbitration agreement. *Ibid.* (quoting *Kortum-Managhan*, 204 P.3d at 699):

- "[w]hether there were any actual negotiations over the waiver provision";
- "whether the clause was included on a take-it-or-leave-it basis as part of a standard-form contract";
- "whether the waiver clause was conspicuous and explained the consequences of the provision (e.g. waiver of the right to trial by jury and right of access to the courts)";
- "whether there was disparity in the bargaining power of the contracting parties";
- "whether there was a difference in business experience and sophistication of the parties";
- "whether the party charged with the waiver was represented by counsel at the time the agreement was executed";

- "whether economic, social or practical duress compelled a party to execute the contract";
- "whether the agreement was actually signed or the waiver provision separately initialed";
- "whether the waiver clause was ambiguous or misleading"; and
- "whether the party with the superior bargaining power lulled the inferior party into a belief that the waiver would not be enforced."

Id. at 32a-33a (quoting *Kortum-Managhan*, 204 P.3d at 699).

The district court concluded that "nearly all of the factors" weighed against enforcement of Kelker's agreement. *Id.* at 33a. Specifically, (1) "the agreement was presented to * * * Kelker on a take-it-or-leave-it basis"; (2) "[n]o negotiations were had"; (3) the "arbitration clause was not conspicuous"; (4) "the consequences" of "waiving [Kelker's] fundamental constitutional right to a trial by jury or any access to the Montana court system" were "not explained to [her]"; (5) Kelker did not "sign[] or initial[]" the "arbitration" provision; and (6) Kelker "was not a sophisticated business woman * * *." *Ibid.*

The district court rejected Geneva-Roth's argument that the FAA preempts the *Kortum-Managhan* test. *Id.* at 34a-35a. The court acknowledged that it was "faced with a tension," because the "Montana Supreme Court has firmly and unequivocally noted its significant concern with arbitration provisions," but "the US Supreme Court [has] held [that] arbitration clause provisions are supposed to be enforced, with only certain exceptions." *Id.* at 34a. But it re-

solved that "tension" by denying the motion to compel arbitration.[5]

D. The Montana Supreme Court's Decision

A divided Montana Supreme Court affirmed the order denying arbitration by a 3-1-2 vote.

1. A three-justice plurality rejected Geneva-Roth's argument that the FAA preempts the "analysis * * * set forth in *Kortum-Monaghan*." App., *infra*, 5a. The plurality noted that "the FAA preserves 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Ibid.* (quoting *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011)). But while acknowledging that "these generally applicable contract formation defenses cannot be available solely to challenge an arbitration clause, or derive their meaning solely from the fact

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[5] The district court also held that the arbitration agreement is unconscionable under Montana law—and thus unenforceable notwithstanding the FAA—because the underlying loan agreement supposedly imposed an excessive interest rate. App., *infra*, 35a. The Montana Supreme Court did not embrace this ground (see *id.* at 1a-14a), which is irreconcilable with this Court's decisions in *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012) (per curiam), *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), and *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Those decisions establish that challenges to the underlying contract—as opposed to the arbitration provision itself—are for the arbitrator to resolve and cannot be the basis for refusing to compel arbitration. *E.g.*, *Nitro-Lift*, 133 S. Ct. at 503. Indeed, the district court acknowledged that it "understands it is up to the arbitrator to look at the interest rate charged and factor that into his or her decision," but declared that it "cannot stand by and not consider the interest rate when it is called to consider the context of the contract and its provisions." App., *infra*, 35a.

that an agreement to arbitrate is at issue," the plurality asserted that the court had already "recognized this principle" in "*Kortum-Managhan*" and that nothing in "*Concepcion* * * * invalidate[s] our analysis in *Kortum-Managhan*." *Id.* at 5a-6a.

Specifically, the plurality maintained that *Kortum-Managhan*'s "'reasonable expectations' analysis" "derives directly from generally applicable contract law rather than any unique law applicable only to arbitration agreements." *Id.* at 7a-8a. According to the plurality, Montana courts "consider the same factors when we analyze" an arbitration provision "as we do when we analyze" other types of contract terms. *Id.* at 8a.

The plurality then held that Kelker's arbitration agreement is unenforceable, agreeing with the district court that "nearly all of [the *Kortum-Monaghan*] factors weigh against enforcement of the arbitration clause." *Id.* at 12a. Specifically, the plurality found the following factors to warrant denying enforcement of the arbitration provision:

- "Kelker presented undisputed" testimony "that she did not understand the arbitration agreement";
- even though "Geneva-Roth highlighted several other sections of the Loan Agreement with bold or capital letters," "[n]othing conspicuous denotes the arbitration clause";
- "Kelker alleges in her undisputed affidavit that no one explained the arbitration clause";
- "Kelker entered the contract over the Internet with no contact with any employees or representatives of Geneva-Roth";

- Kelker signed the Loan Agreement as a whole"; "[s]he did not separately sign or initial the arbitration clause";
- "[n]o counsel represented Kelker when she signed the arbitration agreement";
- "a difference of business experience and sophistication of the parties existed at the time that [Kelker] executed the Loan Agreement";
- "it appears that economic duress compelled Kelker to enter into this contract for a $600 payday loan with a 780% APR"; and
- the arbitration clause was "plague[d]" by "[a]mbiguities" because its admonition that "'[w]ithout this arbitration agreement, both parties have the right to litigate disputes through the law courts but we have agreed instead to resolve disputes through binding arbitration'"—"cannot easily be reconciled" with the statement that the agreement "'does not constitute a waiver of any of Customer's rights to pursue a claim individually.'"

Id. at 12a-14a.

Based on these factors, the plurality concluded that the arbitration provision "falls outside Kelker's reasonable expectations" and is "unconscionable." *Id.* at 14a.

2. Justice Cotter concurred in the result, explaining that she "would deem the arbitration clause unenforceable on alternative grounds" not "advanced in the District Court." *Id.* at 14a, 16a. She observed that Mont. Code Ann. § 27-5-114(2)(b) forbids enforcement of "arbitration clauses contained in contracts when the total consideration is under $5,000."

App., *infra*, 15a. Because Kelker's loan was for just shy of $700, Justice Cotter deemed the arbitration provision in the agreement to be unenforceable under Section 27-5-114(2)(b). *Ibid.* Paying no heed to the preemptive effect of the FAA, Justice Cotter explained that "because here we are dealing with the waiver of fundamental rights, including the right to access to the court system, the right to trial by jury, and the right to an appeal, and because our Legislature has made a policy determination with respect to what contracts should be subject to mandatory arbitration, I feel it appropriate and necessary to apply" Section 27-5-114(2)(b). *Ibid.*

3. Justice Baker, joined by Justice Rice, dissented on the ground that the Montana Supreme Court's decision contravenes the FAA and this Court's precedents.

The dissent explained that "[o]utside the arbitration context, our generally applicable principles of contract law presume that '[a]bsent incapacity to contract, ignorance of the contents of a written contract is not a ground for relief from liability' under its provisions." *Id.* at 20a (quoting *Quinn* v. *Briggs*, 565 P.2d 297, 301 (Mont. 1977)). Moreover, "in contexts other than agreements to arbitrate, we have held that expectations contrary to the clear terms of a contract are *not* objectively reasonable." *Id.* at 21a (emphasis added; citing cases).

The dissenters continued that, "[u]nder *generally applicable* principles of contract law, our analysis of contracts of adhesion for unconscionability should include examining the challenged provision itself to determine whether it is 'unreasonably favorable to the drafter,' 'unduly oppressive, or against public policy.'" *Id.* at 22a-23a. They noted that the arbitration

clause at issue in this case "is not one-sided and does not unreasonably favor Geneva-Roth" and that "it is difficult to determine how this provision is unconscionable, except that—like *any* arbitration agreement—it waives Kelker's right to a jury trial and access to the courts." *Id.* at 23a (emphasis added).

The dissenters further explained that in "*Kortum-Managhan*" and similar decisions the Montana Supreme Court has "applied a more stringent standard when faced with a consumer's claim that she has not read or understood the arbitration clause in a contract." *Id.* at 21a. Indeed, they noted, "*Kortum-Managhan*'s ten-factor test" was "derived from the fundamental nature of the rights given up by arbitration" and has been applied "*only* to evaluate an arbitration clause." *Id.* at 22a.

The dissenters concluded that, by using *Kortum-Managhan*'s ten-factor test to analyze Kelker's arbitration agreement, the plurality's "decision fosters a rule of state law with 'disproportionate impact on arbitration agreements' that is preempted" by the FAA. *Id.* at 17a (quoting *Concepcion*, 131 S. Ct. at 1747). Because "'[t]he times in which consumer contracts were anything other than adhesive are long past,'" the dissent maintained, the "fact that the Loan Agreement Kelker accepted is typical of such adhesive consumer Internet transactions does not make its arbitration provisions less worthy of enforcement than other contracts subject to the FAA." *Id.* at 24a (quoting *Concepcion*, 131 S. Ct. at 1750).

REASONS FOR GRANTING THE PETITION

The decision below warrants review—and summary reversal—for three reasons.

First, the Montana Supreme Court's holding rests on an arbitration-specific rule that is irreconcilable with this Court's FAA precedents, including *Casarotto*, which squarely rejected a similar arbitration-specific rule imposed by the Montana Legislature.

Second, the decision below conflicts with the decisions of the many federal courts of appeals and state appellate courts that have faithfully followed *Casarotto* and the Court's other precedents rejecting arbitration-specific rules.

Third, review is critical because, if allowed to stand, the decision below will undermine the strong federal policy favoring arbitration. Under the *Kortum-Managhan* standard, every consumer or employee arbitration agreement in a form contract is vulnerable to challenge and invalidation in Montana state courts. And—unless it is dispatched soon—Montana's recalcitrant approach may inspire other state courts to create similar herculean impediments to the enforcement of arbitration agreements in standard-form contracts. "Such a preliminary litigating hurdle"—particularly one that applies only or primarily to arbitration provisions—"would undoubtedly destroy the prospect of speedy resolution that arbitration * * * was meant to secure." *American Express Co.* v. *Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

A. Montana's *Kortum-Managhan* Rule Is Irreconcilable With This Court's FAA Precedents.

Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements," "to place [these] agreements upon the same

footing as other contracts," and to "manifest a liberal federal policy favoring arbitration agreements." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks omitted); see also *American Express*, 133 S. Ct. at 2308-09 ("Congress enacted the FAA in response to widespread judicial hostility to arbitration.") (citing *Concepcion*, 131 S. Ct. at 1745).

At its core, the FAA requires that States impose no greater requirements for the enforceability of arbitration agreements than they impose for other types of contracts. This Court has articulated this antidiscrimination principle on numerous occasions. See, *e.g.*, *Marmet Health Care Ctr., Inc.* v. *Brown*, 132 S. Ct. 1201, 1204 (2012) (per curiam); *Concepcion*, 131 S. Ct. at 1745; *Rent-A-Center, West, Inc.* v. *Jackson*, 130 S. Ct. 2772, 2776 (2010); *Arthur Andersen LLP* v. *Carlisle*, 556 U.S. 624, 630 (2009); *Preston* v. *Ferrer*, 552 U.S. 346, 356 (2008); *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006); *Casarotto*, 517 U.S. at 687-88 & n.3; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 270-71 (1995); *Volt Info. Scis., Inc.* v. *Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989); *Perry*, 482 U.S. at 492 n.9; *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 & n.11 (1984).

The centerpiece of the FAA is Section 2, which "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2; emphasis added). In other words, Section 2's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, du-

ress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quoting *Casarotto*, 517 U.S. at 687). Most significantly here, Section 2 preempts state laws that condition enforcement of arbitration agreements on compliance with "special notice requirements" that are not applicable to other types of contracts. *Casarotto*, 517 U.S. at 688.

More broadly, Section 2 prohibits States from "impos[ing] prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally." *Preston*, 552 U.S. at 356. Similarly, a State may neither "construe [arbitration] agreement[s] in a manner different from that in which it otherwise construes nonarbitration agreements under state law" nor "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]" *Perry*, 482 U.S. at 492 n.9.

The court below purported to recognize these principles. See App., *infra*, 5a-6a. But it proceeded to ignore them in practice by holding that, notwithstanding the FAA, the arbitration provision in the contract between Kelker and Geneva-Roth is unenforceable under *Kortum-Managhan*'s ten-factor test. *Id.* at 11a-14a.

The *Kortum-Managhan* test contravenes this Court's FAA precedents in two ways. First, because the test is designed to ascertain whether a consumer who entered into an adhesion contract containing an arbitration provision knowingly and intelligently waived her rights to a jury trial and to sue in court, it is an impermissible, arbitration-specific rule. Se-

cond, as applied by the court below, the test's various factors discriminate against arbitration agreements.

1. The *Kortum-Managhan* test is an impermissible, arbitration-specific rule.

In invalidating the parties' arbitration agreement here, the Montana Supreme Court repeatedly asserted that the *Kortum-Managhan* test is a "generally applicable" principle of Montana law. App., *infra*, 7a; see also *id.* at 7a-11a. Saying it does not make it so, however. As the dissent explained, *Kortum-Managhan*'s ten-factor test "expressly was to be used to determine 'whether an individual deliberately, understandingly and intelligently waived their fundamental constitutional rights to trial by jury and access to the courts.'" *Id.* at 21a (Baker, J., dissenting) (quoting *Kortum-Managhan*, 204 P.3d at 699). It is thus unsurprising that "[s]ince *Kortum-Managhan* was decided, [the Montana courts] have applied its ten-factor test *only* to evaluate an arbitration clause." *Id.* at 22a (emphasis by Justice Baker).[6]

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[6] Our research confirms Justice Baker's observation that, in practice, *Kortum-Managhan* has been applied only in the arbitration context; it has *never* been applied to evaluate the enforceability of other contract provisions. See, *e.g.*, *Riehl* v. *Cambridge Court GF, LLC*, 226 P.3d 581, 584 (Mont. 2010); *Woodruff* v. *Bretz, Inc.*, 218 P.3d 486, 491 (Mont. 2009); *Mortensen* v. *Bresnan Commc'n, L.L.C.*, 2010 WL 4716744, at *2 (D. Mont. Nov. 15, 2010), rev'd, ___ F.3d ___, 2013 WL 3491415 (9th Cir. July 15, 2013); *Mulcahy* v. *Nabors Well Servs. Co.*, 2010 WL 1881846, at*3 (D. Mont. May 7, 2010). Although the Ninth Circuit stated that the *Kortum-Managhan* test "does not invalidate only [arbitration] agreements" and that "[m]any other types of agreements may be equally affected by the Montana rule"

That the rule adopted in *Kortum-Managhan* is not generally applicable to all contracts is clear from that decision itself. In *Kortum-Managhan*, the Montana Supreme Court evaluated the enforceability of an arbitration clause in a form credit-card agreement. 204 P.3d at 695-96. The court stated that, as a matter of Montana law, terms in a "contract of adhesion"—a non-negotiable form contract drafted by the "party possessing superior bargaining power"—are unenforceable if they are either "not within [the consumer's] reasonable expectations" or "unduly oppressive, unconscionable, or against public policy." *Id.* at 698 (internal quotation marks omitted).

But for *an arbitration clause* to be within the consumer's "reasonable expectations," the consumer

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(*Mortensen*, 2013 WL 3491415, at *7), the court did not cite any case that actually has done so.

In an earlier concurring opinion that laid the groundwork for his opinion for the court in *Kortum-Managhan*, Justice Nelson suggested that years earlier the Montana Supreme Court had applied a state-law "knowing and voluntary" requirement to invalidate a forum-selection clause. See *Kloss* v. *Edward D. Jones & Co.*, 54 P.3d 1, 16 (Mont. 2002) (Nelson, J., concurring) (citing *May* v. *Figgins*, 607 P.2d 1132 (Mont. 1980)). In fact, the *May* court based its decision on the *federal* Constitution. 607 P.2d at 1138 (citing *Fuentes* v. *Shevin*, 407 U.S. 67, 95 (1972)). Justice Nelson also asserted that the Montana Supreme Court had applied a "knowing and voluntary" requirement to a surety contract. *Kloss*, 54 P.3d at 16 (Nelson, J., concurring) (citing *Mont. Bank of Circle, N.A.* v. *Ralph Meyers & Son, Inc.*, 769 P.2d 1208 (Mont. 1989)). But in that case, the court merely observed that the "constitution[]" and "public policy" forbid some "waivers of rights" altogether (769 P.2d at 1211-12) and did not purport to hold any such waiver to a "knowing" and "voluntary" standard. In any event, it is beyond peradventure that Montana courts do not apply a knowing-and-voluntary standard to all terms in all contracts of adhesion.

must have "voluntarily, knowingly[,] and intelligently" accepted the clause after having been "informed of the consequences" because "[a]rbitration clauses, *by their very nature*, waive a consumer's fundamental constitutional rights to trial by jury, access to the courts, due process of law and equal protection of the laws." *Ibid.* (emphasis added). These rights, the court asserted, "deserve the highest level of court scrutiny and protection." *Ibid.*

Needless to say, a rule that is limited to provisions that waive constitutional rights—especially ones that by their nature cannot coexist with arbitration—is not a rule of general applicability. *See* 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.").

As the dissenting justices below put it, by "impos[ing] more stringent standards for evaluating the waiver of fundamental constitutional rights," Montana has "created a state-law rule with disproportionate impact on arbitration agreements" that reflects "the type of judicial hostility towards arbitration that is expressly foreclosed by the FAA." App., *infra*, 22a (Baker, J., dissenting) (internal quotation marks omitted). In other words, if "*Kortum-Managhan*'s heightened standard" were "remov[ed] * * * from the analysis," Kelker's arbitration agreement "would not be subject to invalidation under [Montana's] generally applicable principles of contract law." *Id.* at 23a-24a.

Indeed, the history of the *Kortum-Managhan* test reflects that this rule is the product of judicial hostil-

ity to arbitration. When Justice Nelson, the author of *Kortum-Managhan*, first suggested the test in an earlier concurring opinion, he justified it as needed to protect "the sacredness and inviolability of the fundamental right to trial by jury" and to "access to the courts." *Kloss* v. *Edward D. Jones & Co.*, 54 P.3d 1, 12-13 (Mont. 2002) (Nelson, J., concurring). And he contended that arbitration clauses therefore must be "rigorously examined" and held to "the highest level of court scrutiny." *Id.* at 12.

In short, the *Kortum-Managhan* test is preempted by the FAA because it "rel[ies] upon the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable[.]" *Perry*, 482 U.S. at 492 n.9; *see also Concepcion*, 131 S. Ct. at 1746; *Preston*, 552 U.S. at 356; *Casarotto*, 517 U.S. at 688.

Moreover, a rule imposing heightened standards for the enforcement of provisions that waive rights to jury trials and access to the courts has a discriminatory effect on arbitration provisions, the very essence of which is to "trade[] the procedures * * * of the courtroom for the simplicity, informality, and expedition of arbitration." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (internal quotation marks omitted). As the Ninth Circuit explained, the *Kortum-Managhan* test "runs contrary to the FAA as interpreted by *Concepcion* because it disproportionally applies to arbitration agreements, invalidating them at a higher rate than other contract provisions." *Mortensen*, 2013 WL 3491415, at *7.

2. As applied by the Montana Supreme Court, the *Kortum-Managhan* test discriminates against arbitration agreements.

The plurality below contended that the *Kortum-Managhan* test is merely an application of generally applicable Montana law—and avoids preemption under Section 2 of the FAA—because that test's various factors apply outside the arbitration context. In fact, Montana courts do not neutrally apply the *Kortum-Managhan* factors to all contract terms; nor could they without wiping out a broad swath of form contracts routinely used in Montana. Consequently, as applied by the plurality below, the *Kortum-Managhan* test is flatly irreconcilable with *Casarotto*, *Perry*, and the many other decisions of this Court that make clear that the FAA requires even-handed treatment of arbitration provisions.

In *Casarotto*, this Court held that Section 2 of the FAA preempted a Montana law "declar[ing] an arbitration clause unenforceable unless '[n]otice that [the] contract is subject to arbitration' is 'typed in underlined capital letters on the first page of the contract.'" 517 U.S. at 683 (quoting Mont. Code § 27-5-114(4) (1995)).

Here, the Montana Supreme Court re-imposed the same kind of "special notice requirements" that are not applicable to contracts generally (*id.* at 687) by holding that Kelker's arbitration clause is unenforceable because it was not especially "conspicuous"; "highlight[ed]" by "bold or capital letters"; "explained" to her; and "separately sign[ed] or initial[ed]." App., *infra*, 12a-13a.

The Montana court's invocation of the other *Kortum-Managhan* factors similarly violates the FAA's "equal footing" guarantee (*Buckeye Check Cashing*, 546 U.S. at 443). As the dissent pointed out, there can be no doubt that "the Loan Agreement [that] Kelker accepted is typical of * * * adhesive consumer Internet transactions." App., *infra*, 24a (Baker, J., dissenting). Such online agreements are virtually always entered into by individuals who lack "significant business experience," are not "represented by counsel," and have had no contact with "employees" of the business or opportunity to negotiate the agreement's terms. *Id.* at 12a-13a. Given the FAA's equal-footing guarantee, "arbitration provisions in [standard-form] contracts must be enforced unless states would refuse to enforce all off-the-shelf package deals" (*Oblix, Inc.* v. *Winiecki*, 374 F.3d 488, 491 (7th Cir. 2004)), which, of course, Montana does not. As the dissenting justices below observed, because "'[t]he times in which consumer contracts were anything other than adhesive are long past,'" Kelker's arbitration agreement is no "less worthy of enforcement than other contracts * * *." App., *infra*, 24a (Baker, J., dissenting) (quoting *Concepcion*, 131 S. Ct. at 1750).

Finally, the court's conclusion—reached without the benefit of briefing by the parties—that *Kortum-Managhan*'s ambiguity factor is present here (App., *infra*, 13a-14a) is based on naked hostility to arbitration of the sort that this Court has repeatedly declared out of bounds under the FAA. See, *e.g.*, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 266 (2009); *Gilmer*, 500 U.S. at 30; *Shearson/Am. Express Inc.* v. *McMahon*, 482 U.S. 220, 231-32 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

Indeed, the ambiguity that the plurality purported to find is no ambiguity at all—which likely is why Kelker never advanced the argument herself. The contract says both that there are no limitations on "any of [the] Customer's rights to pursue a claim individually" and that "any claim" must be pursued in arbitration. App., *infra*, 45a. The arbitration provision also expressly states: "Without this arbitration agreement, 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 plurality below stated that these statements "cannot be easily reconciled." *Id.* at 14a. But in context, it is obvious that the first statement was referring to *substantive* rights—not the *procedural* right to a jury trial in court.[7]

By instead adopting a construction that negates the arbitration clause, the court below abandoned the generally applicable principle that contracts should be interpreted as a whole, "so as to give effect to every part if reasonably practicable." Mont. Code § 28-3-202; see also *id.* § 28-3-204 ("Repugnancies in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses[.]"). In doing so, the court disregarded this Court's admonition that "[a] court may not, * * *

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[7] The language in question simply echoes this Court's repeated observation that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors*, 473 U.S. at 628; see also, *e.g.*, *Preston*, 552 U.S. at 359; *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 123 (2001); *Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989); *McMahon*, 482 U.S. at 229-30.

in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry*, 482 U.S. at 192 n.9.

The plurality below also disregarded this Court's repeated instruction that "as a matter of federal law, 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." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added).[8]

In short, although the court below couched the various *Kortum-Managhan* factors as part of the "reasonable expectations" inquiry, "[i]n practice," those factors have an impermissibly "disproportionate impact on arbitration" (*Concepcion*, 131 S. Ct. at 1747). As the dissenting justices explained, the *Kortum-Managhan* test is a version of the "reasonable expectations" standard that applies *only* to arbitration agreements and that—if applied more broad-

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[8] See also *Volt*, 489 U.S. at 475-76 ("[A]mbiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration."); *AT&T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (an order compelling arbitration "'should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, because "'[d]oubts should be resolved in favor of coverage"') (quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)); *Mitsubishi Motors Corp.*, 473 U.S. at 626 ("[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

ly—would invalidate all standard-form contracts. App., *infra*, 18a-24a. As such it runs afoul of this Court's repeated admonition that "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Casarotto*, 517 U.S. at 687 n.3 (quoting *Perry*, 482 U.S. at 492 n.9) (omission by Court).

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It couldn't be clearer that Montana has once again violated the FAA by adopting a rule that discriminates against arbitration provisions. As the Ninth Circuit observed, the *Kortum-Managhan* test "disfavor[s] arbitration" and effectively prohibits "the arbitration of entire categories of claims," including "essentially all" claims subject to "adhesive consumer arbitration agreements." *Mortensen*, 2013 WL 3491415, at *7 n.14 (internal quotation marks omitted). Because the decision below is irreconcilable with multiple decisions of this Court articulating the even-footing requirement, the Court may wish to consider summary reversal to correct the Montana Supreme Court's "obvious" error. *Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006) (per curiam). Alternatively, the Court should grant plenary review to reaffirm that the FAA preempts efforts by States—whether patent or disguised—to disfavor arbitration and impose special requirements for enforcing arbitration agreements that do not apply to other contract terms.

B. The Decision Below Conflicts With The Decisions Of Other Courts Holding That The FAA Bars States From Subjecting Arbitration Agreements To Heightened Consent Requirements.

In light of the clear incompatibility of the ruling below with this Court's precedents, it should be no surprise that the Montana Supreme Court's decision conflicts with numerous decisions of federal and state appellate courts around the country.

Most strikingly, the Ninth Circuit recently held that Montana's "reasonable expectations/fundamental rights rule" from "*Kortum-Managhan* * * * runs contrary to the FAA" and therefore is "preempt[ed]." *Mortenson*, 2013 WL 3491415, at *7. Thus, whether arbitration agreements in standard-form consumer contracts will be enforced in Montana turns entirely on whether the dispute is litigated in federal or state court.

The decision below also conflicts with the decisions of other courts. For example, the First Circuit recently reversed a district court's decision imposing a "knowing and voluntary" requirement on arbitration clauses under Massachusetts law. *Awuah* v. *Coverall N. Am., Inc.*, 703 F.3d 36, 45 (1st Cir. 2012). The First Circuit declared that "[e]ven if the district court had identified a principle of state law that imposed a special notice requirement before parties such as these could enter into an arbitration agreement, as it did not, such a principle would be preempted by the FAA." *Ibid.*

Similarly, the Third Circuit has rejected a "knowing consent" requirement for arbitration clauses under state law, explaining that "applying a

heightened 'knowing and voluntary' standard to arbitration agreements would be inconsistent with the FAA." *Morales* v. *Sun Constructors, Inc.*, 541 F.3d 218, 223-24 (3d Cir. 2008).

Moreover, numerous federal and state courts of appeals have recognized that the FAA precludes states from using procedural unconscionability or other facially neutral state-law doctrines to impose special notice requirements on arbitration clauses. See, *e.g.*, *Iberia Credit Bureau, Inc.* v. *Cingular Wireless LLC*, 379 F.3d 159, 172 (5th Cir. 2004) ("The FAA prohibits states from passing statutes that require arbitration clauses to be displayed with special prominence, and courts cannot use unconscionability doctrines to achieve the same result.") (internal citations omitted); *Harris* v. *Green Tree Fin. Corp.*, 183 F.3d 173, 182-83 (3d Cir. 1999) (rejecting procedural-unconscionability attack on arbitration clause that was not highlighted in the agreement, because under *Casarotto* "courts may not invalidate arbitration agreements under state laws that single out the provisions of arbitration agreements for suspect status"); *MS Credit Ctr., Inc.* v. *Horton*, 926 So. 2d 167, 178 (2006) (Miss. 2006) (arbitration clause "was at least as open and obvious as other contractual provisions, fulfilling the requirements set forth in *Casarotto*, beyond which we may not constitutionally travel"); *Autonation USA Corp.* v. *Leroy*, 105 S.W.3d 190, 199 (Tex. App. 2003) ("[E]ven if Texas [unconscionability] law imposed a specific conspicuousness requirement that might otherwise be applicable to this arbitration provision, such a law would likely be preempted by the FAA.").

Because the decision below is in square conflict with all of these cases—and presents an impossible

conflict for parties who contract with Montana residents—the Court should grant plenary review if it does not reverse summarily.

C. The Issue Presented Is A Recurring One That Is Of Great Practical Importance.

Finally, review and reversal are warranted because the decision below is no aberration. It instead is part of a long and growing line of Montana Supreme Court decisions that—in spite of this Court's admonition in *Casarotto* and other cases—persist in refusing to enforce arbitration provisions after applying a heightened standard of consent.

For example, in a case involving the purchase of a motor home, the consumer had initialed next to an acknowledgment that "I understand the agreement that I will be signing requires binding arbitration rather than the use of the traditional legal system." *Woodruff* v. *Bretz, Inc.*, 218 P.3d 486, 492 (Mont. 2009) (internal quotation marks omitted). The Montana Supreme Court nevertheless held that the clause was outside the consumer's "reasonable expectations" because, among other reasons, she was not "advise[d] * * * of the constitutional and procedural rights she effectively will be waiving": the "rights of access to the courts, trial by jury, due process of law, and equal protection of the laws, as well as various procedural rights such as the rights to court-ordered discovery, to have the admissibility of evidence determined under the Montana Rules of Evidence, to receive findings of fact and legal analysis based on the evidence, and to enforce the applicable law by way of appeal." *Id.* at 491, 493.

In another case, the contract included a notice about the arbitration clause in boldface capital letters immediately above the signature line. Br. of Appellants at 2-4, *Zigrang* v. *U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237 (Mont. 2005) (No. 04-455), 2004 WL 2319412. The Montana Supreme Court nevertheless refused to enforce the clause, stating that the "mere" fact that "an arbitration provision in an investment agreement" is "conspicuous" is not sufficient to "bring the provision within the reasonable expectations" of the investor. *Zigrang* v. *U.S. Bancorp Piper Jaffray, Inc.*, 123 P.3d 237, 242 (Mont. 2005).

It is thus no exaggeration to say that the Montana Supreme Court is hostile to arbitration. Indeed, the number of scholars and commentators who have expressed that conclusion is remarkable.

As Professor Burnham put it eight years ago, as a result of the Montana Supreme Court's "[g]uerilla [w]ar" against the FAA, until this Court intervenes, "arbitration is dead in Montana." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 MONT. L. REV. 139, 178, 200 (2005).[9]

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[9] Justice Nelson—who formulated the rule later adopted in *Kortum-Managhan*—has left no doubt regarding his hostility to this Court's interpretations of the FAA. See, *e.g.*, *Martz* v. *Beneficial Mont., Inc.*, 135 P.3d 790, 796 (Mont. 2006) (Nelson, J., specially concurring) ("[T]he United States Supreme Court has, from the beginning, improperly conflated the Federal Arbitration Act (FAA) into something which Congress never intended it to be."); *ibid.* ("[U]nder the High Court's jurisprudence, the FAA and pre-dispute arbitration clauses in contracts of adhesion have now become little more than instruments of economic Darwinism by which predatory lenders * * * and other large corporations victimize main-street businesses, the unsophisti-

Another commentator has observed that "[r]ecent Montana caselaw," including *Kortum-Managhan,* "confirms that the [Montana Supreme] Court has joined with other state courts nationwide in finding indirect ways to invalidate arbitration agreements." Anna Conley, *The Montana Supreme Court's Continued, Not-So-Subtle Assault on Arbitration*, 35 MONT. LAWYER 6, 6 (Feb. 2010). These Montana decisions, the commentator explains, have created "unspoken 'arbitration definitions' and 'non-arbitration definitions' for contract law principles such as contracts of adhesion, reasonable expectation, and unconscionability." *Ibid.*

A number of scholars have focused in particular on the Montana Supreme Court's heightened consent standard for arbitration provisions. For example, Professor Rau has characterized Montana's rule requiring "knowing and voluntary" acceptance of arbitration provisions as "heretical" and its overall approach to arbitration as "irrepressible." Rau, 22 AM. REV. INT'L ARB. at 537 n.340.

Similarly, Professor Bruhl has identified Montana as the paradigmatic "example of how a [state] court can write its way around" *Casarotto* "and frustrate review" by "shift[ing]" its "doctrinal basis" for invalidating arbitration clauses to "squishy state law doctrines like unconscionability and reasonable expectations." Aaron-Andrew P. Bruhl, *The Uncon-*

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cated, the elderly, the poor, and what is left of the middle class."). This is just the kind of attitude that this Court has taken pains to correct. See, *e.g.*, *Marmet*, 132 S. Ct. at 1203 (granting summary reversal in case in which West Virginia court had "found unpersuasive this Court's interpretation of the FAA, calling it 'tendentious,' and 'created from whole cloth'") (citation omitted).

scionability Game: Strategic Judging and the Evolution of Federal Arbitration Law, 83 N.Y.U. L. REV. 1420, 1459-63 (2008).

Many other scholars and commentators—including some who have been critical of some of this Court's arbitration decisions—have concluded that Montana courts have given only lip service to the FAA and *Casarotto*. See, *e.g.*, Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBLEMS 129, 156 & n.149 (2012) (citing Montana as an example of state courts "thumb[ing] their noses at th[is] Court" and the "FAA"); Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PENN. L. REV. 1233, 1295 (2011) (noting that some Montana judges "can scarcely conceal [their] distaste for arbitration"); Benjamin D. Tievsky, Note, *The Federal Arbitration Act After* Alafabco*: A Case Analysis*, 11 CARDOZO J. CONFLICT RESOL. 675, 685 & n.60 (2010) ("Montana steadfastly continues this tradition" of adhering to state "arbitration-hostile" laws despite this Court's decisions); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 626 n.87 (2009) (noting the "tug-of-war between the U.S. Supreme Court and the Montana state courts" over arbitration); James M. Gaitis, *The Ongoing Federalization of Commercial Arbitration in Montana*, 30 MONT. LAW. 12, 29 (Apr. 2005) ("[I]t would appear that the [Montana Supreme] [C]ourt is on the brink of creating a narrowly crafted common law unconscionability/adhesion doctrine that applies solely to arbitration provisions."); Carroll E. Neesemann, *Montana Court Continues Its Hostility to Mandatory Arbitration*, 58 DISP. RESOL. J. 22, 24,

26 (2003) (Montana Supreme Court has "turned" the "concept" of "reasonable expectations" "on its head," which "signals that the judicial animosity toward arbitration that prompted the FAA is still alive"); Bryan L. Quick, Note, Keystone, Inc. v. Triad Systems Corporation*: Is the Montana Supreme Court Undermining the Federal Arbitration Act?*, 63 MONT. L. REV. 445, 473 (2002) (predicting over a decade ago that "the U.S. Supreme Court will again overrule the Montana Supreme Court for its circumvention of the FAA").

If the heightened standard of consent employed by the Montana Supreme Court in the decision below and the line of cases preceding it is allowed to stand, the FAA's "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Moses H. Cone*, 460 U.S. at 24) will be jeopardized and arbitration in Montana courts will become a dead letter—at least for parties who are unable to invoke federal jurisdiction. Cf. *Nitro-Lift Techs., L.L.C.* v. *Howard*, 133 S. Ct. 500, 501 (2012) (per curiam) ("State courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation.") (internal citation omitted). Because Montana's rule effectively declares invalid any arbitration clause that is part of a non-negotiated consumer or employment agreement, hundreds of thousands of arbitration agreements, if not more, are in danger of being voidable at will.

Moreover, unless promptly reversed, the decision below—and the heightened consent standard it em-

braces—could become a road map for other state courts that are hostile to arbitration. Urged on by a plaintiffs' bar that is desperate to evade the consequences of this Court's decisions in *Concepcion* and *American Express*, those courts readily could follow Montana's lead and impose their own heightened consent standards for arbitration agreements under their state-law unconscionability doctrines. That, in turn, could threaten hundreds of millions of arbitration agreements involving consumers and employees. Unless this Court acts, the FAA's uniform federal policy favoring arbitration—a policy that affected how parties have structured a vast array of contractual relationships—would yield to an uneven patchwork of unprincipled "reasonable expectations" or "unconscionability" carve-outs from the FAA that differ from state to state.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal.

Respectfully submitted.

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