No. 16-1157

IN THE

Supreme Court of the United States

ACTIVELAF, LLC,
D/B/A SKY ZONE LAFAYETTE, *et al.*,

Petitioners,

v.

JAMES DUHON, *et al.*,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Louisiana Supreme Court erred in holding that the arbitration agreement at issue in this case—which, among other things, purported to require the non-drafting party, and only the non-drafting party, to pay $5,000 in liquidated damages should it sue in court—was so one-sided as to be unenforceable under general state-law principles applicable to challenged terms in adhesion contracts.

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INTRODUCTION

Like many states, Louisiana applies special scrutiny to standardized form contracts drafted by one party and presented on a take-it-or-leave-it basis to another party in an inferior bargaining position. Although Louisiana generally deems the terms of such adhesion contracts to be the product of mutual consent and therefore enforceable, the assumption of mutual consent falls away where a challenged term possesses certain features. One such feature is unreasonable one-sidedness in favor of the drafting party.

Relying on these unexceptional state-law principles, the Louisiana Supreme Court in this case declined to enforce a buried adhesion contract term that purported to bind the non-drafting party to arbitrate claims against the drafting party or else pay liquidated damages of $5,000 for initiating a lawsuit, while leaving the drafting party free to pursue its claims in any forum and without any threat of liquidated damages. This case-specific application of state law to a uniquely problematic contract term creates no decisional conflict over any issue of federal law and does not merit review by this Court.

Petitioners argue that review is warranted because the decision below rests on a state-law rule supposedly preempted by the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*. This Court has repeatedly recognized, however, that the FAA does not preempt generally applicable state contract-law principles, such as those governing the enforceability of adhesion contract terms, unless their application poses an "obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). Applying this rule, the court below determined

that application of Louisiana's adhesion principles to the particular arbitration provision at issue posed no such obstacle. Where, as here, a lower court correctly understands the governing federal law, the proper application of that law to an idiosyncratic factual scenario is not a question of sufficient importance to warrant review.

Moreover, at least four federal appeals courts and several other state high courts are in agreement with the court below that the invalidation of a grossly one-sided arbitration agreement under general state-law contract principles poses no impediment to the FAA's objectives. Petitioners point to no authority that has held otherwise. Instead, they suggest that the lower court did not rely on generally applicable contract principles, but rather on an arbitration-specific *per se* rule that would invalidate any asymmetrical arbitration agreement. Not only did the lower court expressly disavow any such rule, such a rule would be flatly inconsistent with the reasoning of at least six of the lower court's seven justices in this case.

Nor did the lower court deploy the general adhesion contract principles on which it relied in a manner that disfavors arbitration. Louisiana courts apply the same principles as those relied on below when examining challenged terms in adhesion contracts *outside* the arbitration context. And *within* the arbitration context, Louisiana courts routinely uphold arbitration provisions—even one-sided provisions—under these principles. The outcome in this case stems not from legal principles that discriminate against arbitration, but from the "blatant asymmetries" and "stunning lack of draftsmanship" particular to the specific contract provision at issue. Pet. App. 34a.

At bottom, Louisiana seeks as a matter of public policy to discourage sophisticated parties from slipping self-serving terms into the consumer contracts they draft. Petitioners read the FAA to insulate any arbitration agreement, no matter how brazenly one-sided, from this policy. The FAA does no such thing. Where, as here, a state's exercise of its sovereign prerogative to set public policy fully comports with established principles of federal law, this Court's intervention is wholly unnecessary. This Court should deny review.

STATEMENT

1. Petitioner ActiveLAF, LLC, d/b/a Sky Zone Lafayette ("Sky Zone"), an indoor trampoline park, requires its customers to complete and sign an electronic "Participant Agreement, Release and Assumption of Risk" document ("Agreement") before using Sky Zone's facilities. Pet. App. 1a. To complete the Agreement, a customer must check off three of its eight paragraphs. *Id.* at 2a–6a. The first of these three paragraphs states that the customer understands the physical risks associated with using Sky Zone's facilities. *Id.* at 2a–3a. The second paragraph purports to release Sky Zone from liability for death, injury, or property damage.[1] *Id.* at 3a–4a. The third paragraph addresses a number of topics, including Sky Zone's rules, the customer's physical fitness and assumption of medical risks, and severability. *Id.* at 4a. Beginning

[1] Louisiana law nullifies this provision to the extent that it attempts, "in advance, [to] exclude[] or limit[] the liability of one party" for "intentional or gross fault that causes damage to the other party" or for "causing physical injury to the other party." La. Civ. Code art. 2004.

on the eleventh line of this third paragraph is an arbitration provision. *Id.* at 4a–5a, 13a.

The arbitration provision reads:

> If there are any disputes regarding this agreement, I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. I further agree that the arbitration will take place solely in the state of Louisiana and that the substantive law of Louisiana shall apply. If, despite the representations made in this agreement, I or anyone on behalf of myself and/or my child(ren) file or otherwise initiate a lawsuit against [Sky Zone], in addition to my agreement to defend and indemnify [Sky Zone], I agree to pay within 60 days liquidated damages in the amount of $5,000 to [Sky Zone]. Should I fail to pay this liquidated damages amount within the 60 day time period provided by this Agreement, I further agree to pay interest on the $5,000 amount calculated at 12% per annum.

Id. at 4a–5a.

2. Logan Alicea—the minor son of respondents Theresa Alicea and Roger Alicea—and respondent James Duhon were both injured in separate incidents

while using Sky Zone's facilities. Pet. App. 1a, 35a. In August 2015, the Aliceas and Duhon filed separate state-law negligence suits against Sky Zone in separate state trial courts. *Id.* at 6a, 41a. Sky Zone responded in both cases by filing exceptions of prematurity, arguing that the Agreement required respondents' claims to go to arbitration. *Id.* The trial courts in both cases denied the exceptions. *Id.* at 53a–54a.[2]

Sky Zone sought state appellate review of both denials. A divided panel of the Third Circuit Court of Appeal denied review in *Alicea*, *id.* at 52a, but a divided panel of the First Circuit Court of Appeal granted review in *Duhon* and held that the arbitration clause must be enforced, *id.* at 50a–51a. Sky Zone and Duhon sought and were granted Louisiana Supreme Court review in *Alicea* and *Duhon*, respectively.

The Louisiana Supreme Court held that the Agreement's arbitration provision is an unenforceable adhesion contract term under Louisiana law. *Id.* at 18a, 41a. The lead opinion recognized that "Louisiana and federal law explicitly favor the enforcement of arbitration clauses in written contracts." *Id.* at 8a. Notwithstanding the presumption of enforceability, the court noted, "state contract principles still apply to assess whether … agreements to arbitrate are valid and enforceable, just as they would to any other contract dispute arising under state law." *Id.* at 10a.

Accordingly, the court proceeded to apply Louisiana's adhesion contract principles to assess whether the plaintiffs had consented to the challenged term. In

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[2] Sky Zone's insurers were also named as defendants. For present purposes, it is unnecessary to distinguish Sky Zone from its insurers.

doing so, the court was guided by its opinion in *Aguillard v. Auction Management Corp.*, 908 So. 2d 1 (La. 2005), which upheld a challenged arbitration provision after considering the four main case-specific factors that inform whether Louisiana law deems a non-drafting party to have consented to a challenged provision in an adhesion contract: (1) the provision's physical characteristics, (2) the provision's placement within the contract, (3) the degree to which the provision tends to favor the drafting party, *i.e.*, the degree to which it lacks "mutuality," and (4) the parties' relative bargaining power. Pet. App. 12a–13a.[3]

Applying the *Aguillard* factors to the arbitration provision at issue here, the court held that two features combined to indicate that the provision was not the product of mutual consent. First, the court found that the provision's placement within the Agreement indicated Sky Zone's intent "to conceal the arbitration language" from its patrons, *id.* at 13a, for two reasons: The provision was "cloak[ed] … within a blanket of boilerplate language regarding rules and risks of participating in the Sky Zone activities," and it was "the *only* specific provision not relegated to a separate paragraph or set apart in some explicit way." *Id.* at 14a (emphasis supplied). Second, the court held that

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[3] Because "mutuality" is a term of art that has multiple meanings, *see infra* at 17–18, Louisiana courts sometimes prefer to frame the third *Aguillard* factor as asking whether a challenged term is "unduly burdensome and extremely harsh." *Aguillard*, 908 So. 2d at 14 (citing *Sutton's Steel & Supply, Inc. v. BellSouth Mobility, Inc.*, 776 So. 2d 589 (La. Ct. App. 2000)); *see also First Page v. Network Paging Corp.*, 628 So. 2d 130, 135 n.1 (La. Ct. App. 1993) ("What courts call 'mutuality' is really better understood as simple fairness.").

the provision's substantive imbalance militated against a finding of consent. *Id.* at 15a. Not only did the provision require Sky Zone patrons (but not Sky Zone) to waive the right to a judicial forum for disputes arising under the contract, but "[e]ven more troublesome" in the eyes of the court was the provision's one-sided liquidated damages term. *Id.*

Finally, the court rejected Sky Zone's argument that the FAA preempts the adhesion principles under which the court found a lack of mutual consent. The court acknowledged that the FAA preempts state-law contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue … [or] that stand as an obstacle to the accomplishment of the FAA's objectives." *Id.* at 16a. But the court observed that *Aguillard*, upon which it had principally relied, "simply provided a template for considering" a general consent-based defense in the context of "an arbitration clause contained in a standard contract" and did not create any arbitration-specific rules. *Id.* at 17a.

Having concluded that the plaintiffs had not consented to the arbitration provision and that this conclusion was consistent with the FAA, the court reversed the grant of Sky Zone's exception of prematurity in *Duhon*, *id.* at 18a, and affirmed the denial of Sky Zone's exception in *Alicea*, *id.* at 41a–42a.

3. Several justices issued separate opinions, but no justice disagreed with the lead opinion's conclusion that the FAA does not preempt the governing state-law adhesion contract principles.

Justices Crichton, Clark, and Hughes each separately concurred. Justice Crichton "agree[d] with the majority decision" but wrote separately to emphasize

the decision's consistency with the FAA. Pet. App. 33a. Justice Clark raised no disagreement with the lead opinion and reiterated only that the arbitration provision "lack[ed] mutuality to such an extent" that it was unenforceable. *Id.* at 31a. Justice Hughes concurred in the result only, disagreeing with the lead opinion's conclusion that the arbitration provision was hidden but agreeing that the provision's one-sidedness precluded its enforcement. *Id.* at 32a.

Justices Weimer and Guidry each separately dissented. Each justice agreed that *Aguillard*'s generally applicable adhesion principles provided the proper analytical framework. *Id.* at 19a, 27a–28a. However, each disagreed with the majority's evaluation and weighting of the *Aguillard* factors. *Id.* at 19a–26a, 27a–30a.

4. Sky Zone unsuccessfully petitioned the Louisiana Supreme Court for rehearing in both *Duhon* and *Alicea*. Pet. App. at 48a.

REASONS FOR DENYING THE WRIT

I. The decision below is consistent with the decisions of federal appeals courts and state high courts that have considered the question presented, and with this Court's FAA precedent.

The decision below reflects the application of Louisiana's general adhesion contract principles and FAA preemption doctrine to a particularly imbalanced contract term that threatened thousands of dollars in liability if an injured customer unwittingly sought redress in his choice of forum, while leaving the sophisticated party that drafted the contract free and clear of any commensurate risk. A factbound opinion addressing such uniquely "blatant asymmetries," Pet. App. 34a, does not merit review by this Court.

There is no division of authority as to the proper application of federal law under such circumstances. Every federal appellate court to have considered the issue has held, consistent with the opinion below, that the FAA does not preempt general state-law contract principles that render highly one-sided arbitration provisions unenforceable. *See Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611–13 (4th Cir. 2013); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167–71 (5th Cir. 2004); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939–41 (9th Cir. 2001); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314–16 (6th Cir. 2000); *see also In re Checking Account Overdraft Litig. MDL No. 2036*, 685 F.3d 1269, 1276–79 (11th Cir. 2012) (no FAA preemption of a state unconscionability doctrine that invalidates a

challenged term if it is both procedurally unfair and substantively "one-sided[]," *id.* at 1278).[4] State high courts are in accord. *See, e.g.*, *Global Client Solutions, LLC v. Ossello*, 367 P.3d 361, 369–71 (Mont. 2016); *Berent v. CMH Homes, Inc.*, 466 S.W.3d 740, 752 (Tenn. 2015); *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 495–96 (Mo. 2012) (en banc); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 818–19 (N.M. 2011).

Petitioners do not even attempt to argue that the Louisiana Supreme Court's application of *federal* law is inconsistent with that of any other jurisdiction. Instead, petitioners cite opinions from jurisdictions that have rejected claims that particular arbitration provisions are too unfairly one-sided to be enforceable under *state* law. Pet. 12–13. That substantive contract law is not identical across the several states is a feature of federalism. This Court sits to address questions of federal law, and petitioners cite to no case that has applied federal law to preempt an otherwise cognizable, general state-law contract defense based on the one-sidedness of an arbitration provision contained in an adhesion contract.

With no conflict of authority in need of resolution by this Court, petitioners fall back on claiming that

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[4] The First Circuit has suggested in dicta that the FAA might preempt a "mutuality" doctrine that requires arbitration clauses, but not other kinds of contractual provisions, to be symmetrical in the obligations they impose. *See Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76–77 (1st Cir. 2011). The court had no occasion to so hold, however, because Puerto Rico law, which was at issue, had adopted no such doctrine. Louisiana likewise neither requires symmetry in arbitration agreements as a *per se* matter nor applies its adhesion contract principles exclusively to arbitration agreements. *See infra* at 14–16.

review is necessary because the decision below supposedly "flouts" this Court's precedent interpreting the FAA to "prohibit[] courts from singling out arbitration agreements for special, and disfavored, treatment." Pet. 2. But, citing much of the same authority as do petitioners, the lower court expressly acknowledged that "state courts cannot adopt defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Pet. App. 16a.

Stripped of its dramatic language, then, petitioners' argument for certiorari boils down to the claim that the Louisiana Supreme Court misapplied the settled principles of federal law on which it relied. Such a claim does not typically warrant certiorari. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). And petitioners offer no reason why this case merits an exception.

II. The decision below correctly held that the FAA does not preempt Louisiana's generally applicable adhesion contract principles.

Petitioners' claim of error in the lower court's application of FAA preemption principles not only fails to present an issue that has created any split of authority, but also fails on its merits. The FAA does not preempt Louisiana's adhesion contract principles because those principles apply generally to all challenged adhesion contract terms and because their application here is consistent with the FAA's objectives.

A. Section 2 of the FAA expressly provides that an arbitration agreement is subject to invalidation "upon such grounds as exist at law or in equity for the revo-

cation of any contract." 9 U.S.C. § 2. This Court has long understood that provision to mean 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, 687 (1996). Thus, FAA preemption is limited to "state laws applicable *only* to arbitration provisions," *id.*, and to those cases in which "a doctrine normally thought to be generally applicable … is alleged to have been applied in a fashion that disfavors arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), or that "stand[s] as an obstacle to the accomplishment of the FAA's objectives," *id.* at 343. Indeed, this Court emphasized in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, that "States remain free to take steps addressing the concerns that attend contracts of adhesion" as long as they do so through generally applicable contract law doctrines that do not conflict with the FAA. *Id*. at 347 n.6.

Here, the Louisiana Supreme Court held the arbitration provision at issue unenforceable under the state-law rule that a party's consent to a term in an adhesion contract may be "called into question" where that term "unduly burdens one party in comparison to the burdens imposed upon the drafting party and the advantages allowed to that party." Pet. App. 11a (quoting *Aguillard v. Auction Mgmt. Corp.*, 908 So. 2d 1, 10 (La. 2005)). Despite some disagreement among the justices below as to the proper application of this rule to the specific facts of this case, no justice questioned the lead opinion's assertion that this "standard state law contract defense[]" does not "apply only to arbitration." Pet. App. 16a.

Petitioners make no argument that a generally applicable rule that holds unduly one-sided terms in adhesion contracts to high standards of mutual consent contravenes the congressional objectives underlying the FAA. "[T]hat arbitration is a matter of consent," after all, is a "foundational FAA principle." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010). Because the Louisiana Supreme Court applied just such a generally applicable rule for determining consent in the adhesion contract setting, FAA preemption is not implicated here, as the court below correctly held.

B. Petitioners argue that this Court should not take the Louisiana Supreme Court at its word. Despite the lower court's contrary statements—with which even the dissenting justices below took no issue—petitioners argue that the court applied adhesion contract principles unique to arbitration. Specifically, petitioners contend that it is "[o]nly in the arbitration context" that Louisiana courts "require reciprocal rights and obligations on a provision-by-provision basis." Pet. 9. This contention misrepresents both the decision below and Louisiana law.

Although petitioners urge that the "requirement of mirror-image rights and obligations would be nonsensical" if applied generally to all contract terms, *id.* at 11, Louisiana has not adopted any such requirement, inside or outside the arbitration context. Rather, "Louisiana jurisprudence recognizes that certain contractual terms, especially when contained in dense standard forms that are not negotiated, can be too harsh" to be thought of as the product of "free consent." *Lafleur v. Law Offices of Anthony G. Buzbee, PC*, 960 So. 2d 105, 112 (La. Ct. App. 2007).

The decision below affirmatively disavows any "*per se* rule that any degree of non-mutuality in an arbitration agreement renders it unenforceable." Pet. App. 17a; *see also id.* at 31a (finding the provision at issue to "lack[] mutuality *to such an extent*" that it is unenforceable (emphasis supplied)); *id.* at 33a (agreeing with lead opinion).[5] Consistent with *Aguillard*'s multifactor, case-by-case approach, the decision focuses not only on the *fact* of the challenged provision's asymmetry, but also on the *degree* of asymmetry, *see id.* at 15a (citing liquidated damages term as particularly "troublesome"); *id.* at 31a (same); *id.* at 34a (same), as well as the provision's misleading placement, *see id.* at 13a–15a, 34a.[6]

General application of the principles on which the lower court *actually* relied is far from "nonsensical." Considering the degree to which a challenged term in an adhesion contract benefits the drafting party and burdens the non-drafting party in assessing the existence of mutual consent is a mainstay of black-letter contract law. *See* Restatement (Second) of Contracts

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[5] To be sure, Justice Hughes concurred in the result on the shorthand basis that the arbitration provision "lacked mutuality." Pet. App. 32a. This one-sentence concurrence does not reflect the categorical rule that petitioners would impute to the majority, and, in any event, Justice Hughes's vote was not necessary to the result.

[6] Petitioners contend that the lead opinion's discussion of the arbitration provision's placement did not garner majority support. Pet. 19 n.3. In fact, the opinions do not indicate definitively how many of the justices agreed on this point. *See infra* at 21 & n.8. At any rate, the baseline point is that no majority of the justices below supported a categorical rule that would invalidate all asymmetrical arbitration agreements, and it is far from clear that *any* justice supported such a rule.

§ 211(3) (1981) (where the party that drafts a standardized contract "has reason to believe that the party manifesting … assent [to the contract] would not do so if he knew that the writing contained a particular term, the term is not part of the agreement"); *id.* § 211 cmt. f (assent to "bizarre or oppressive" terms is not to be expected). These commonly accepted adhesion contract principles are not "tailor-made to arbitration agreements," and one need not resort to hypothesizing "patently objectionable and utterly fanciful contracts," *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, No. 16-32, 2017 WL 2039160, at *5 (U.S. May 15, 2017), to envision how they apply outside the arbitration context.

Indeed, consistent with the lower court's approach, Louisiana courts regularly consider the unfairness or one-sidedness of challenged adhesion contract terms that are not arbitration provisions. *See, e.g.*, *Prince v. Paretti Pontiac Co., Inc.*, 281 So. 2d 112, 117 (La. 1973) (waiver of warranty against hidden defects unenforceable against purchaser of automobile unless expressly called to his attention); *Siegen Lane Invs., LLC v. Corporate Lodging Consultants, Inc.*, No. 2015 CA 1426, 2016 WL 1546104, at *3 (La. Ct. App. Apr. 15, 2016) (forum-selection clause unenforceable if "unreasonable and unjust"); *Ware v. Gemini Ins. Co.*, 51 So. 3d 179, 183–84 (La. Ct. App. 2010) (insured's contractual coverage limit unenforceable where insurance agent "select[ed] and enter[ed] the limit and then submit[ted] the form to the customer for signature without a discussion of the limit"); *Lawrence v. Wynne*, 598 So. 2d 1293, 1297 (La. Ct. App. 1992) (noting the absence "of any 'small print' provisions" in a challenged fee-splitting contract "that raise a question as to whether [the challenger] gave informed

consent to the terms"); *Lee v. Katz & Bestoff, Inc.*, 479 So. 2d 459, 460 (La. Ct. App. 1985) (invalidating as "manifestly unjust" an adhesion contract provision requiring employee to forfeit unused vacation time upon termination).

As the Fifth Circuit has explicitly held, Louisiana's adhesion contract cases addressing arbitration clauses do not "apply different rules than other Louisiana cases or … apply the usual rules differently." *Iberia Credit Bureau*, 379 F.3d at 170. To be sure, *Aguillard* "provided a template for considering consent to an arbitration clause contained in a standard contract." Pet. App. 17a. But nothing in *Aguillard* suggests that the principles on which that template was based were *limited* to arbitration provisions. Indeed, *Aguillard*'s adhesion contract principles have been cited outside the arbitration context. *See, e.g.*, *Piro v. Nexstar Broad., Inc.*, No. 11-2049, 2013 WL 2526056, at *3 (W.D. La. June 10, 2013) (applying the *Aguillard* factors to a release-of-claims agreement and upholding the agreement in part because its terms were not "grossly unequal"); *Bayou Fleet P'ship v. Phillip Family, LLC*, 976 So. 2d 794, 797 n.1 (La. Ct. App. 2008); *cf. One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, No. H-08-2059, 2010 WL 1463451, at *12 (S.D. Tex. Apr. 12, 2010) (referring to *Aguillard*'s "general contract principles"); *Top Branch Tree Serv. & Landscaping v. Omni Pinnacle, LLC*, No. 06-3723, 2007 WL 1234976, at *1–2 (E.D. La. Apr. 26, 2007) (borrowing *Aguillard*'s analysis to determine whether a forum-selection clause was unenforceable under federal common law).

In arguing that the analysis of the court below treated arbitration agreements differently from other

contracts, petitioners cite cases that stand only for the proposition that a bilateral exchange of promises can create a binding contract even if those promises are asymmetrical. Pet. 10–11. The Louisiana Supreme Court's decision is entirely consistent with that proposition. Respondents did not assert below that the terms of an arbitration agreement, unlike the terms in other contracts, must be symmetrical. Instead, they argued—and the lower court agreed—that an unduly one-sided term in an adhesion contract is usually not the product of mutual consent. Petitioners cite no Louisiana authority suggesting that a different rule applies outside the arbitration context.

Petitioners nevertheless argue that the cases they cite are relevant because they stand for the widely accepted rule, supposedly inconsistent with the opinion below, that a contract supported by consideration does not fail for lack of "mutuality." This argument is wholly semantic. Because the lower court at times referred to the one-sidedness of the challenged arbitration provision as a "lack of mutuality," *e.g.*, Pet. App. 16a, and because the venerable contract doctrine of "mutuality of obligation" merely requires *some* bilateral exchange of promises—even if asymmetrical—for the formation of an enforceable contract, *see* "Mutuality of Obligation," *Black's Law Dictionary* (10th ed. 2014), petitioners understand the court below to have deviated from the norms of contract law by applying "the mutuality doctrine on a provision-by-provision basis," Pet. 12. In addition to the doctrine of "mutuality of obligation," however, Louisiana courts recognize the equally venerable doctrine of "mutuality of remedy," which *does* specifically contemplate the relative parity of a contract's enforcement mechanisms in isolation. *See, e.g.*, *Alley v. New Homes Promotion, Inc.*,

247 So. 2d 218, 221 n.3 (La. Ct. App. 1971). And in the context of adhesion contracts, Louisiana courts have acknowledged that "[w]hat courts call 'mutuality' is really better understood as simple fairness." *First Page*, 628 So. 2d at 135 n.1.

Looking at the substance of the rule the Louisiana Supreme Court applied in the instant case is therefore more instructive than looking at an isolated word the court used when characterizing that rule. When analyzed in terms of its substance, the adhesion analysis performed below is entirely consistent with ordinary principles of contract law, even if other jurisdictions use alternative linguistic formulations to describe those principles. *See, e.g.*, *Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 380 P.3d 747, 756 (Mont. 2016) (terms that "unreasonably favor the drafter"); *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 515 (S.C. 2016) ("oppressive, one-sided terms"); *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1161 (Fla. 2014) ("one-sided terms that are oppressive to the consumer"); *Anderson v. Ashby*, 873 So. 2d 168, 176–77 (Ala. 2003) (terms that are "grossly favorable" to the drafting party).

C. Finally, petitioners attempt to impugn the good faith of the Louisiana Supreme Court by ascribing its thoroughly reasoned opinion to an invidious intent to "discriminate[] against federally protected arbitration rights" and thereby "flout[] … the integrity of this Court's precedents and the binding effect of federal law." Pet. 2. As discussed above, the lower-court opinion's consistency with uncontroversial principles of state and federal law offers no occasion for such surmise.

At any rate, Louisiana courts regularly uphold arbitration provisions challenged on adhesion grounds. *Aguillard* itself upheld the arbitration provision at issue. And Louisiana courts applying *Aguillard* have routinely enforced challenged arbitration provisions. *See, e.g.*, *Facundus v. Baton Rouge Gen. Med. Ctr.*, 152 So. 3d 185, 185 (La. 2014) (mem.); *Coleman v. Jim Walter Homes, Inc.*, 6 So. 3d 179, 183–84 (La. 2009); *Bradstreet v. Kinchen*, 10 So. 3d 331, 338–39 (La. Ct. App. 2009); *Vishal Hospitality, LLC v. Choice Hotels Int'l*, 939 So. 2d 414, 417 (La. Ct. App. 2006). Indeed, they have even upheld asymmetrical arbitration provisions less egregiously one-sided than the provision at issue here. *See, e.g.*, *Hanlon v. Monsanto Ag Prods., LLC*, 124 So. 3d 535, 543 (La. Ct. App. 2013) ("The lack of mutuality, alone, does not mandate a finding that the arbitration provision is adhesionary and unenforceable."); *Hoffman, Siegel, Seydel, Bienvenu & Centola, APLC v. Lee*, 936 So. 2d 853, 859 (La. Ct. App. 2006) (enforcing arbitration clause that allowed the drafting party to litigate certain claims while requiring the non-drafting party to arbitrate all claims).

In fact, Louisiana law, consistent with federal law, affirmatively *favors* the enforcement of validly formed arbitration agreements. *See* Pet. App. 8a (citing La. Rev. Stat. § 9:4201). To the extent that the opinion below reflects disapproval of anything at all, it reflects disapproval of the brazen overreach and "stunning lack of draftsmanship," *id.* at 34a, particular to the specific arbitration agreement at issue.[7]

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[7] Appropriately relegated to a footnote is petitioners' argument that the lower court's failure to interpret the arbitration

(*Footnote continued*)

III. This case is a poor vehicle for resolving the issue petitioners claim it presents.

A. The fractured majority below leaves the case's precedential value uncertain.

The question presented seeks review of whether the FAA preempts the "special 'mutuality' rule" that petitioners say the court below applied. Pet. i. It is unclear what petitioners think that rule might be.

The opinions below cannot reasonably be read to establish as Louisiana law that any degree of one-sidedness necessarily invalidates an adhesion contract term. Five of the seven justices below agreed that the arbitration provision at issue was an unenforceable adhesion contract term, but for at least three of these justices, the provision's one-sidedness—the only aspect of the decision below as to which petitioners seek review, *see* Pet. i—was not outcome-determinative; it was secondary to the provision's misleading placement. *See* Pet. App. 15a ("*Additionally*, the lack of

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provision as binding Sky Zone and Sky Zone's patrons equally bespeaks the court's impermissible hostility toward arbitration. Pet. 15 n.2. This argument contradicts the concession of petitioners' counsel at oral argument in the trial court that the provision imposes very different burdens and obligations on the parties. *See* Application for Supervisory Writs (5/2/2016), La. S. Ct. No. 2016-CC-0818, Exh. A, at 6 ("It is clear that there is a lack of mutuality in this arbitration clause. I agree to that."); Opposition to Application for Writ of Supervisory Review (5/17/2016), La. S. Ct. No. 2016-CC-0818, at 17 ("Sky Zone's previous counsel did concede the issue of mutuality at the trial court's hearing on Sky Zone's exception. Sky Zone does not dispute what was stated at the trial court by its former counsel."). In any event, the text of the provision speaks for itself and nowhere suggests that the requirement of arbitration of all claims and the onerous penalty provision apply to Sky Zone. Pet. App. 4a–5a.

mutuality in the arbitration clause *fortifies* our finding that [the clause] is adhesionary." (emphases supplied)); *id.* at 33a (agreeing with lead opinion). A fourth justice, Justice Clark, rested his three-sentence concurrence on the fact that the provision "lacked mutuality *to such an extent* that the contract [was] adhesionary." *Id.* at 31a (emphasis supplied). Although the two dissenters would have held that the provision did not lack "mutuality," *id.* at 24a, 29a, they did not suggest how they would have ruled had they read the provision to impose one-sided obligations.

The opinions below could perhaps be read to indicate that *sufficiently stark and unfair* one-sidedness, standing alone, can invalidate an adhesion contract term. That rule, however, would not support petitioners' claim that the court applied a principle discriminatory to arbitration. It is moreover unclear whether the three justices who expressly took into account the misleading placement of the provision or the two dissenters would subscribe to such a rule. It is likewise unclear whether Justice Clark, whose concurrence did not reference the provision's misleading placement, but who—unlike Justice Hughes—neither limited his concurrence to the case's result nor expressly disagreed with any portion of the lead opinion's analysis, would vote to invalidate a grossly imbalanced but prominently delineated adhesion contract term.[8]

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[8] Petitioners argue that the fact of Justice Clark's "concurrence indicates that [he] 'did not agree with all of the language or rationale of the [lead] opinion.'" Pet. 8 n.1 (quoting *State v. Barnard*, 287 So. 2d 770, 774 (La. 1973)). Given that both concurring and dissenting justices referred to the lead opinion as the "majority," Pet. App. 19a, 27a, 33a, petitioners' argument is du-

(*Footnote continued*)

Counting justices in an effort to divine the state-law contract rule for which the opinion below stands is doubly fraught in light of the fact that "Louisiana's civilian tradition does not recognize *stare decisis* as an authoritative source of law." *First Nat'l Bank of Picayune v. Pearl River Fabricators, Inc.*, 971 So. 2d 302, 315 (La. 2007). Instead, Louisiana assigns strong persuasive authority to only those decisions that "form a 'constant stream of uniform and homogenous rulings having the same reasoning.'" *Id.* at 315 n.13 (quoting James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. 1, 15 (1993)). The result in the splintered decision below—where *at least* three of the justices who supported the result, plus the two dissenters, explicitly adopted a case-specific, multifactor analysis—therefore is unlikely to qualify as establishing a clear and persuasive rule of law that the single factor petitioners focus on is dispositive.

Aguillard's four-factor adhesion contract analysis may have itself achieved such precedential status. But petitioners do not seek review of that analysis in its entirety. Rather, they attempt to wrest the "mutuality" factor alone free from its contextual moorings and argue that they are justified in doing so because in this one case that factor was at least a part of what led five justices to the result they reached. To the extent that petitioners seek review of whether the FAA preempts a *per se* state-law requirement that an arbitration clause create symmetrical obligations, or even

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bious. Moreover, nothing in Louisiana law invites litigants to speculate about the substance or scope of a concurring justice's assumed disagreement based on inferences drawn from silence.

an arbitration-specific "mutuality" factor that forms part of a generally applicable multifactor contract defense, this case does not present that issue: Louisiana courts regularly consider the substantive fairness of challenged non-arbitration terms in adhesion contracts as part of a holistic inquiry. *See supra* at 15–16.

Petitioners may intend to suggest that this Court should hold that the FAA forecloses state courts from considering the substantive imbalance, no matter how egregious, of any arbitration agreement, no matter how buried. *See* Pet. 19 n.3 (suggesting that this Court can hold that the FAA preempts the lower court's "mutuality rationale" and then remand for a fresh adhesion analysis based on the three remaining *Aguillard* factors). The FAA jurisprudence of neither this nor any other court supports excising the one-sidedness inquiry from a generally applicable state-law defense against enforcement of an unfair adhesion contract. Even were this Court inclined to consider such a sweeping proposition, the uncertainty over the precise significance of the multiple opinions below strongly indicates that this case does not offer a promising opportunity for this Court to clarify the proper application of the FAA.

B. The case comes from a state court, and there is continued disagreement on this Court over whether the FAA applies in state courts.

Petitioners' claim that the FAA preempts the application of Louisiana adhesion contract principles to the arbitration agreement at issue presupposes that the FAA applies to state-court actions. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), a majority of this

Court concluded that Section 2 of the FAA applies to state-court actions, and thus preempts state courts from applying inconsistent standards. The Court's adoption of that view in *Southland*, and subsequent adherence to *Southland* in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), came over substantial dissents. *See Allied-Bruce*, 513 U.S. at 284 (Scalia, J., dissenting); *id.* at 297 (Thomas, J., dissenting); *Southland*, 465 U.S. at 21 (O'Connor, J., joined by Rehnquist, J., dissenting).

Although other Justices have accepted the matter as settled, in *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), Justice Thomas made clear that he "remain[s] of the view that the [FAA] … does not apply to proceedings in state courts" and "does not require state courts to order arbitration," *id.* at 471 (Thomas, J., dissenting). That view continues to determine the disposition that will command Justice Thomas's vote in a case where the issue is whether the FAA preempts a state court's refusal to compel arbitration. *See*, *e.g.*, *Kindred Nursing Ctrs.*, 2017 WL 2039160, at *8 (Thomas, J., dissenting).

The continuing disagreement on the Court over this question makes a case coming from a state court a poor candidate for resolving any significant FAA issue (even assuming that the case, unlike this one, actually presents a significant issue). Such issues have often closely divided the Court. *See, e.g.*, *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Concepcion*, 563 U.S. 333; *Stolt-Nielsen S.A.*, 559 U.S. 662. For example, *Concepcion* was decided by a bare 5-4 majority. Had the case arisen from a state court, this Court would likely have divided 4-4 on the merits of the FAA preemption question, with the de-

ciding vote resting on another basis entirely. Such a decision would have contributed nothing to the definitive resolution of any question of federal law.

Even if petitioners' preemption arguments here were strong enough to command any votes at all, a similarly indecisive outcome would be a significant possibility. In such a case, the parties' investment of resources in briefing the question of federal law petitioners seek to present, and the Court's efforts to consider and resolve it, would be wasted effort. The case's origin in the state-court system thus makes it a poor candidate for review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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