No. 16-1329

IN THE

Supreme Court of the United States

MICHAEL S. BRYANT, M.D., *et al.*,

Petitioners,

v.

ROBERT E. KING AND JO ANN O'NEAL,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the North Carolina Supreme Court erred in holding that an arbitration agreement was unenforceable under state law because, in presenting the agreement to a prospective patient for signature without affirmatively disclosing its existence or terms, a physician and his practice committed constructive fraud by violating their fiduciary duty to disclose the nature and import of all material, potentially self-serving contract terms.

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INTRODUCTION

After petitioner Dr. Michael S. Bryant injured respondent Robert E. King during surgery, King and his wife, respondent Jo Ann O'Neal, filed a state-court medical negligence suit against Bryant and his medical practice, petitioner Village Surgical Associates, P.A. King did not realize, however, that when filling out a stack of forms given to him by petitioners' receptionist before his initial consultation with Bryant he had signed a document purporting to waive his right to pursue a suit in court and to require instead arbitration before a panel composed in part, and potentially in full, of physicians.

The North Carolina Supreme Court allowed King's suit to proceed because generally applicable state-law contract principles precluded enforcement of the arbitration agreement. Under North Carolina law, a contract is presumptively unenforceable as a product of fiduciary breach (or, equivalently, constructive fraud) where the parties to the contract have a relationship of trust and confidence and the superior party does not adequately disclose a provision from which that party seeks to derive a "possible benefit." *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 343 S.E.2d 879, 884 (N.C. 1986). Here, the North Carolina Supreme Court determined that the trial court's undisputed factual findings established a fiduciary breach.

Having lost on this issue of state law, petitioners now argue for the first time that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, preempts the application of North Carolina's general fiduciary principles to the facts of this case. If petitioners believed this argument had merit, they should have raised it in state court, during the nearly six years this litigation

has been ongoing. The North Carolina Supreme Court noted that petitioners had "failed to clearly advance a federal preemption argument," Pet. App. 25a, which constitutes "abandonment" of the argument under North Carolina procedural law. Although the court went on to discuss preemption briefly, this Court has, at a minimum, strong prudential reasons not to take up an issue that was never argued below and that was waived under state law.

Nor would review of the preemption issue be warranted if petitioners had raised it below. This Court has repeatedly recognized that the FAA does not preempt generally applicable state contract-law principles, such as those governing a fiduciary's obligations during contract formation, 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); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). Recognizing this rule, the court below pointed out that application of North Carolina's fiduciary principles to the circumstances of this case posed no such obstacle. Where, as here, a lower court correctly understands the governing federal law, the application of that law to a specific factual scenario is not a sufficiently important question to warrant review.

Review of such a question is particularly unwarranted in the absence of any conflict of lower-court authority on the proper application of federal law under like circumstances. At least one federal appeals court has held, consistent with the decision below, that the FAA does not preempt the application of generally applicable state-law fiduciary duties to the formation of an arbitration agreement. *See Smith v.*

JEM Grp., Inc., 737 F.3d 636, 640–42 (9th Cir. 2013). Petitioners point to no authority holding otherwise and do not claim there is any division among lower court decisions on whether the FAA preempts application of state-law standards governing contracts entered into by fiduciaries.

Instead, petitioners contend that review is warranted here because the decision below was calculated to "evade[]" this Court's precedents by "discriminating against arbitration agreements." Pet. 13. Petitioners are wrong. The court below expressly stated that, where the facts, as here, establish the existence of a confidential relationship, North Carolina's general fiduciary principles would invalidate *any* inadequately disclosed agreement substantially affecting the parties' respective rights. Pet. App. 27a. Petitioners point to no North Carolina precedent that calls the lower court's statement into question.

In short, there is no reason for this Court to overlook petitioners' waiver and the absence of any lower-court conflict on the proper application of the FAA solely to second-guess the good faith of North Carolina's high court. This Court should deny review.

STATEMENT

1. In April 2009, respondent Robert E. King, on the referral of his primary care physician, visited the medical offices of petitioners Village Surgical Associates, P.A., and Dr. Michael S. Bryant for a consultation regarding an anticipated hernia surgery. Pet. App. 113a. While King waited for the consultation, a receptionist gave him several intake forms to complete and sign. *Id.* Among them was a document entitled "Agreement to Alternative Dispute Resolution," which, alone among the forms, addressed a topic unre-

lated to medical history, insurance, or payment. *Id.* at 113a–114a. The Agreement purported to require binding arbitration of any dispute with Village Surgical Associates and any of its physicians, before an arbitral panel designed to be favorably disposed toward the medical practice. *Id.* at 126a. Specifically, the agreement provided, in pertinent part:

> In accordance with the term [*sic*] of the Federal Arbitration Act, 9 USC 1–16, I agree that any dispute arising out of or related to the provision of healthcare services by me [*sic*], by Village Surgical Associates, PA, or its employees, physician members and agents, shall be subject to final and binding resolution through private arbitration.
>
> The parties to this Agreement shall agree upon three Arbitrators and at least one arbitrator of the three shall be a physician licensed to practice medicine and shall be board certified in the same specialty as the physician party. The remaining Arbitrators either shall be licensed to practice law in [North Carolina] or licensed to practice medicine in [North Carolina].

Id. Nobody in the office drew the Agreement to King's attention or explained to King that his assent to its terms would waive his right to file court claims related to his treatment. *Id.* at 115a. Indeed, it was petitioners' "practice … to obscure the form arbitration agreement by presenting it among a pile of other doc-

uments without pointing it out or explaining its contents." *Id.* at 119a.[1]

King completed the intake documents and signed the Agreement without reading it, believing it was a routine form necessary for his medical care. *Id.* at 115a–116a. In so doing, King placed his trust and confidence in petitioners. *Id.* at 116a.[2]

2. Bryant began King's hernia operation and, in the process, injured King. Pet. App. 3a–4a. King then filed a medical malpractice suit against petitioners in a North Carolina trial court. *Id.* at 4a. Petitioners moved to stay judicial proceedings and enforce the arbitration agreement. *Id.*[3]

The state trial court denied petitioners' motion, holding that the Agreement was too indefinite to enforce because it left "material portions," such as selection of the arbitrators and establishment of arbitral procedures, "open to future agreements." *Id.* at 124a–125a. Having so held, the court did not reach King's alternative argument that the Agreement was unenforceable because it was unconscionable. *Id.* at 125a.

The court of appeals reversed. *Id.* at 85a. Because the Agreement explicitly contemplated that "the FAA [would] govern administration of the Agreement," *id.*

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[1] Petitioners' statements that the arbitration agreement was "prominent[]," Pet. 3, 13, are therefore highly misleading.

[2] Petitioners have not disputed these facts. *See* Pet. App. 18a.

[3] King's wife, respondent Jo Ann O'Neal, is also party to King's suit. Pet. App. 86a. Although there is no argument that she ever agreed to arbitrate anything with petitioners, the way the state courts resolved the question of the Agreement's enforceability made it unnecessary to consider separately whether she could be compelled to arbitrate her claims.

at 92a, and because the FAA provides for circumstances in which parties cannot agree on aspects of the arbitral proceedings, the court held that the Agreement's terms were sufficiently definite, *id.* at 94a–95a. Nonetheless, the court remanded for the trial court to consider King's unconscionability defense and directed that the inquiry "be undertaken with an understanding of the unique nature of the physician/patient relationship." *Id.* at 97a.

On remand, the trial court held the Agreement unenforceable on grounds of fiduciary breach. *Id.* at 111a. Under North Carolina law, a presumption of fiduciary breach attaches where the party asserting breach establishes, first, the existence of a relationship of trust and confidence and, second, a transaction within that relationship from which the trusted party potentially stood to gain. *See id.* at 106a–107a. Once the presumption is triggered, the trusted party has the burden of proving that he "acted in an open, fair and honest manner" and "made a full, open disclosure of material facts." *Id.* at 107a.[4]

Stressing the "fact dependent" nature of the inquiry, *id.* at 104a, the trial court held the Agreement to be the product of fiduciary breach. The court concluded first that petitioners owed a fiduciary duty to King. *Id.* at 121a. The court then found that the Agreement created "at least a possible benefit" for petitioners, *id.* at 108a, because of its "unique provi-

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[4] The courts below have referred interchangeably to "breach of fiduciary duty" and "constructive fraud." *Compare, e.g.*, Pet. App. 29a, *with, e.g.*, *id.* at 108a. Neither petitioners nor the courts below have suggested any distinction between the doctrines in the context of this case. *See id.* at 22a n.3.

sions," such as its requirement that at least one arbitrator be a physician who is board certified in Bryant's area of specialty, *id.* at 109a. With the presumption of fiduciary breach thus triggered, the court looked to petitioners' decision to obscure the Agreement within a stack of unrelated documents, *id.* at 108a, petitioners' failure to explain or highlight the Agreement, the Agreement's failure to clearly state that it entailed the waiver of King's trial rights, and the Agreement's "convoluted sentence structure and undefined legalistic terms," *id.* at 109a, and held that petitioners had not shown sufficient openness to overcome the presumption, *id.* at 108a–109a. Thus, the court held the Agreement unenforceable in light of "[a]ll of the facts and circumstances of this case." *Id.* at 111a.[5]

The court of appeals affirmed, holding the Agreement unenforceable "in the context of [the parties'] confidential, physician-patient, fiduciary relationship," *id.* at 83a, and the "limited factual circumstances presented here," *id.* at 84a. Believing that the

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[5] Petitioners' contention that the trial court found "no facts that supported the finding of a" fiduciary relationship, Pet. 6, is belied by the eight pages of factual findings that accompanied the trial court's opinion, Pet. App. 113a–121a; *see, e.g.*, *id.* at 116a ("At the time Plaintiff King signed the Agreement and provided his medical information on intake forms, … he was already placing his confidence and trust in [petitioners], as demonstrated by his willingness to share his confidential medical information."). These findings also belie petitioners' claim that the trial court had made "no finding of a physician-patient relationship from which" the state court of appeals could "conclude a fiduciary relationship" on subsequent appeal. Pet. 7; *see* Pet. App. 121a ("[Petitioners] were fiduciaries of Plaintiff King as the result of the physician-patient relationship.").

fact of a fiduciary relationship had already been established as law of the case during the prior appeal, the court placed the burden on petitioners to "show[] that they acted openly, fairly, and honestly in bringing about the transaction" at issue. *Id.* at 73a. Since petitioners had made no effort to do so, instead arguing only that no fiduciary relationship had existed and that the Agreement was not unconscionable absent such a relationship, the court affirmed the trial court's ruling that the Agreement was unenforceable due to fiduciary breach. *Id.* at 73a n.2.[6]

Although no party had raised the issue, the court of appeals further observed that its case-specific, state-law holding was consistent with the FAA because the holding did not represent a "condemnation of arbitration agreements in general, the arbitration process itself, or arbitration agreements employed in the physician-patient context," but instead represented a fact-dependent application of general state-law contract principles. *Id.* at 84a.

3. Petitioners sought review in the North Carolina Supreme Court, arguing, first, that no fiduciary relationship existed under state law when King signed the Agreement and, second, that the Agreement was not unconscionable under state law. Following briefing, the North Carolina Supreme Court determined that the court of appeals had incorrectly assumed that its opinion in petitioners' first appeal had established that a confidential, physician-patient relationship existed between King and petitioners when King signed

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[6] Separately, the court of appeals determined that the Agreement was also unenforceable on ordinary state-law unconscionability grounds. *Id.* at 79a–83a.

the Agreement. Pet. App. 57a–58a. The high court therefore remanded for the trial court to make additional factual findings as to the nature of the relationship between Bryant and King at the relevant time. *Id.* at 58a.

On remand, the trial court concluded that "[t]he physician-patient relationship began before Mr. King signed the arbitration agreement and was in existence at the time he signed the arbitration agreement." *Id.* at 55a. The court based this conclusion on its factual findings that, among other things, King had shared "private and confidential information" with petitioners; King "trusted Dr. Bryant as his doctor" because King's family doctor had referred King to Bryant; King would not have provided confidential information and signed the proffered documents if he had not reposed trust in Bryant; and petitioners were subject to North Carolina Medical Board confidentiality requirements with respect to King when King signed the Agreement. *Id.* at 54a. With these factual findings in place, the case returned to the North Carolina Supreme Court.

4. Based on the trial court's unchallenged factual findings, the North Carolina Supreme Court affirmed, holding that the Agreement was unenforceable on breach of fiduciary duty grounds and that it was unnecessary to decide whether the Agreement was unconscionable. Pet. App. 28a–29a & n.8.

The court began by observing that "the proper resolution of this case hinges upon the nature of the relationship that existed between Mr. King and Dr. Bryant at the time that the arbitration agreement was signed." *Id.* at 19a. The court then held, based on the trial court's undisputed factual findings, that under

state law King and petitioners had a confidential, fiduciary relationship at the relevant time. *Id.* at 23a–24a.[7] As fiduciaries, petitioners were obliged under state law to abide by a standard "stricter than the morals of the market place"—a standard characterized not by "honesty alone, but [by] the punctilio of an honor the most sensitive," *id.* at 21a (quoting *Dallaire v. Bank of Am., N.A.*, 760 S.E.2d 263, 266 (N.C. 2014)).

The court next determined that petitioners had violated their fiduciary duty to "make full disclosure of the nature and import" of the Agreement. *Id.* at 24a. Specifically, petitioners presented King with the Agreement, "which, at a minimum, could have been worded more clearly, in a collection of documents," *id.*, and failed to ensure that King knew of the Agreement's "substantial legal ramifications," *id.* at 25a. The court concurred with the trial court's "unchallenged findings of fact" in finding that petitioners sought the benefit of "ensuring that any subsequent dispute between the parties would be resolved using the forum, procedures, and decision makers of their choice." *Id.* at 24a. In particular, the court reiterated the trial court's factual findings that "[t]he Agreement's provision requiring at least one physician arbitrator, and its provision allowing all three arbitration panelists to be a physician [*sic*], confers a benefit to [petitioners]," *id.* at 10a, and that it was petitioners' practice "to obscure the form arbitration agreement by presenting it among a pile of other documents

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[7] The court noted that whether the relationship was characterized as a "physician-patient relationship" was not determinative. Pet. App. 19a.

without pointing it out or explaining its contents," *id.* at 10a–11a. Because petitioners' failure to draw King's attention to the potentially self-serving Agreement was inconsistent with their stringent fiduciary obligations, the Agreement was unenforceable under general state-law principles of fiduciary breach. *Id.* at 28a–29a.[8]

Finally, the court stated that its holding was consistent with the FAA. Although petitioners had "failed to clearly advance a federal preemption argument," and had thus "abandoned" any such argument, *id.* at 25a, the court briefly discussed FAA preemption principles *sua sponte*. The court stressed that the FAA does not preempt the neutral application of generally applicable state-law contract defenses, including fraud, and that North Carolina law has long considered a breach of fiduciary duty to constitute fraud. *Id.* at 26a & n.5. Here, the same disclosure standard would apply to any contract benefiting a fiduciary. As the court explained, it

> would have reached the same result on these facts with respect to any agreement that substantially affected Mr. King's substantive legal rights, such as an agreement absolving [petitioners] from the necessity for compliance with otherwise applicable confidentiality re-

[8] In light of this conclusive state-law holding from the state's highest court, petitioners' contentions that they "did not breach any fiduciary duty owed to [King]" and that "there was no constructive fraud in the inducement of the [A]greement" are inexplicable. Pet. 13. If petitioners wish to relitigate these purely state-law matters, they are addressing the wrong tribunal.

> quirements, providing for the transfer of items of real or personal property from Mr. King to [petitioners], or waiving any tort or contract-based claims that Mr. King might have had against either or both [petitioners].

Id. at 27a. Accordingly, the court stated that its determination that the Agreement is unenforceable due to petitioners' breach of fiduciary duty is not precluded by the doctrine of federal preemption.[9]

5. Chief Justice Martin and Justice Newby filed separate dissents.

Chief Justice Martin, although agreeing that petitioners' reference to a single sentence in an earlier lower state-court opinion about unconscionability was "not the clearest articulation" of a federal preemption argument, *id.* at 35a n.12, would have held that the FAA preempted application of North Carolina's fiduciary breach doctrine in this case, *id.* at 37a–38a. While accepting that the doctrine would on the facts of this case have invalidated "any [other] agreement that substantially affected Mr. King's substantive legal rights," Chief Justice Martin took the view that the FAA effectively requires a carve-out to this general rule where the "substantive legal rights" at issue

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[9] Beyond these reasons to believe that federal preemption would not have affected the outcome even if petitioners had not abandoned the argument, the court also observed in a footnote that the FAA applies only to transactions "involving [interstate] commerce" and that petitioners, who bore the burden on this issue, had not demonstrated that the entirely intrastate medical services at issue here involved interstate commerce. Pet. App. 25a n.4.

are the trial rights that an arbitration agreement waives. *Id.* at 36a–37a. In other words, he viewed the FAA as requiring states to give preferential treatment to arbitration agreements in applying general principles of contract law involving fiduciary transactions.

Justice Newby objected to the application of fiduciary breach doctrine on state-law grounds because, in his view, King had not adequately raised the defense. *Id.* at 39a. Instead, Justice Newby understood King to have relied exclusively on North Carolina's ordinary unconscionability doctrine and, in Justice Newby's view, the FAA would have preempted the application of that doctrine here. *Id.* at 43a–44a.[10]

REASONS FOR DENYING THE WRIT

I. The petition seeks review of a waived issue.

After six years of litigation and hundreds of pages of briefing, petitioners now argue for the first time in their petition for certiorari that the Agreement's validity under state law—which, up to now, has been the exclusive focus of the parties' dispute—is irrelevant because the FAA preempts the application of that state law. Sound principles of appellate practice counsel against allowing litigants to spend years advancing state-law arguments in the lower courts and then, following the final rejection of those arguments by the court with the ultimate authority to adjudicate them, start over in this Court with a brand-new argument, this time based on federal law. Petitioners' failure to

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[10] On this point, the majority stated that petitioners had "never contended at any point in this litigation that the breach of fiduciary duty issue, which was clearly discussed in the trial court and raised before the Court of Appeals," was not properly at issue. Pet. App. 19a n.2.

raise their FAA preemption argument below raises substantial prudential barriers to this Court's review.

A. This Court's "longstanding rule" is to deny review of state-court decisions where the petition presents federal questions "not pressed or passed upon" below, *Heath v. Alabama*, 474 U.S. 82, 87 (1985), including questions of federal preemption, *see Clark v. Jeter*, 486 U.S. 456, 459–60 (1988). Even if the North Carolina Supreme Court's decision to briefly address the merits of the FAA preemption issue *sua sponte* suffices to establish this Court's jurisdiction under 28 U.S.C. § 1257, *see Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991), "the policies that animate the 'not pressed or passed upon below' rule" nonetheless create strong prudential reasons to deny review here, *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988); *see also City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted even though issue not raised below was arguably addressed by the court of appeals).

First among the considerations that militate against review of an issue raised for the first time in a petition for certiorari is "comity to the States." *Crenshaw*, 486 U.S. at 79. Here, petitioners failed to present the state courts—either initially or during three appeals and two remands—with any argument as to how federal preemption doctrine might interact with the application of state law in the unique circumstances of this case. Because petitioners never presented the lower court with "the adversarial dispute necessary to apprise the state court of the arguments" for preemption, the court's brief discussion of the issue was merely a "routine restatement and application of settled law" to a point on which "there was

never 'any real contest.'" *Illinois v. Gates*, 462 U.S. 213, 222–23 (1983) (quoting *Morrison v. Watson*, 154 U.S. 111, 115 (1894)). Under such circumstances, the purposes of the "'not pressed or passed upon' rule" would be ill-served by consideration of the federal issue by this Court in the first instance. *Id*. at 221.

Moreover, in contrast to cases where the Court has overlooked a waiver because of the urgency of addressing an issue of "'evolving definition and uncertainty,' and one of importance to the administration of federal law," *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991) (citations omitted) (quoting *St. Louis v. Praprotnick*, 485 U.S. 112, 120 (1988) (plurality opinion)), petitioners here ask this Court to resolve an issue—whether the FAA preempts generally applicable state-law fiduciary duties when applied to an arbitration agreement—that has seen almost no discussion in any federal circuit or state high court. *See infra* at 19–20. This largely unexamined question moreover arises in the "traditionally sensitive area[]" of the state-federal balance. *United States v. Bass*, 404 U.S. 336, 349 (1971). This Court should decline to step in and settle a novel question of federal preemption on review from a state court that had no opportunity to consider the issue with the focused attention that arises from adversarial presentation.

No such presentation occurred here. In their briefing in the North Carolina Supreme Court, petitioners argued that the lower state courts had erred in declining to enforce the Agreement because (1) the lower-court rulings were "based on the incorrect premise that [petitioners] were fiduciaries to Mr. King" under state law and (2) the Agreement was not unconscionable under state law based on "traditional contract

principles and longstanding North Carolina precedent." Def.-Appellants' New Br. (1/20/2015), N.C. No. 294PA14, at 4–5. In making these state-law arguments, petitioners did not once cite the FAA. *See id.* at viii; Def.-Appellants' Reply Br. (3/30/2015), N.C. No. 294PA14, at ii; Def.-Appellants' Supp. Br. (3/21/2016), N.C. No. 294PA14, at iii.[11]

In all of petitioners' submissions during the six years this litigation has proceeded in state court, only two lone sentences even arguably invoke FAA preemption. In arguing to the North Carolina Supreme Court that the Agreement was not substantively unconscionable under the state-law standard laid out in *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008), petitioners mentioned a state appellate court opinion holding that this Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), had undermined *Tillman*. *See* Def.-Appellants' New Br., *supra*, at 42 (citing *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802 (N.C. Ct. App. 2014)). Making no argument that the state appellate court's analysis was correct, and saying nothing about *Concepcion*, petitioners wrote only, "If [the

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[11] Perhaps cognizant of this defect, the petition makes several references to the Agreement's mention of the FAA and the state appellate court's determination that "the FAA governed the arbitration agreement at issue." Pet. 5. But the appeals court's conclusion that the Agreement was not fatally indefinite in light of the Agreement's forward-looking intention that the FAA would "govern [the Agreement's] administration," *id.* at 92a, is irrelevant to the question whether petitioners advanced the wholly distinct legal argument of federal preemption during litigation over whether the Agreement was validly formed under North Carolina's fiduciary breach doctrine. Petitioners did not.

North Carolina Supreme Court] deems *Tillman* overruled by decisions of the Supreme Court of the United States," then the lower courts' unconscionability analysis "cannot stand." *Id.* This passing reference is hardly adequate to invite probing inquiry into the merits of a federal preemption claim.

Moreover, petitioners' oblique, conditional, two-sentence allusion to the possible interaction between *Concepcion* and *Tillman*'s unconscionability principles addresses an issue distinct from the issue petitioners now seek to press. The opinion below explicitly declined to address unconscionability, instead applying the distinct doctrine of fiduciary breach. Petitioners never even mentioned FAA preemption in connection with the latter doctrine in state court. As a result, the exploration of that consequential matter of federal law would need to start from scratch—fully six years into this litigation—were this Court to grant certiorari.[12]

B. The state court's recognition that petitioners have, under North Carolina procedural law, abandoned any federal preemption argument provides an additional prudential reason to deny review. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation."

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[12] Petitioners cannot excuse this default by claiming surprise that the North Carolina Supreme Court relied on fiduciary breach principles to resolve this case. The fiduciary relationship between King and petitioners was central to the lower state courts' analyses, and petitioners' lead argument to the North Carolina Supreme Court was that no such relationship existed. In addition, the court of appeals' brief mention of preemption surely should have prompted petitioners to address the issue in the North Carolina Supreme Court if they felt it had merit.

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 184 (1959). Accordingly, this Court is reluctant to review "federal issues that can have no effect on [a] state court's judgment." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 387 (1986).

Here, the North Carolina Supreme Court stated in no uncertain terms that petitioners had "failed to clearly advance a federal preemption argument." Pet. App. 25a. The court then cited the state-law rule that an insufficiently developed argument is deemed abandoned. *Id.* (citing *State v. Garcell*, 678 S.E.2d 618 (N.C. 2009)). Petitioners have offered no reason to doubt the lower court's determination that their federal preemption argument is waived under state law. Thus, even were this Court to rule in petitioners' favor on the merits of their federal claim, the outcome below would remain unchanged on remand.

Petitioners not only ask this Court to further prolong this litigation by allowing a fourth appeal to address an issue they did not raise in the three appeals below, but they ask this Court to take that disfavored step despite the strong likelihood that they stand to gain nothing from it beyond the delay itself. Regardless of whether the lower court's invocation of waiver was sufficiently clear to establish an adequate and independent state-law ground for decision that would preclude review here as a jurisdictional matter, *see Michigan v. Long*, 463 U.S. 1032, 1042 (1983), the likelihood is that petitioners' waiver of the preemption issue would cause "the same judgment [to] be rendered by the state court after [this Court] corrected its views of federal laws," *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). This outcome strongly counsels

against this Court's use of its limited resources to review this case.

II. The decision below implicates no decisional conflict over FAA preemption.

Even if this Court were inclined to overlook petitioners' failure to raise an FAA preemption claim below, review would be unwarranted. The opinion below reflects the application of North Carolina's general fiduciary principles to a specific, unusual arbitration agreement arising in the unique factual context of a constructive fraud. The proper application of accepted FAA preemption principles to the specific circumstances of this case is not a sufficiently important matter to merit this Court's review.

There is no division of authority on how federal law should be applied in cases similar to this one. At least one federal appeals court has held, consistent with the opinion below, that the FAA does not preempt the application of a state-law fiduciary disclosure rule to an arbitration clause. *See Smith v. JEM Grp., Inc.*, 737 F.3d 636, 640–42 (9th Cir. 2013) (no FAA preemption of state-law rule that an arbitration provision in an attorney fee agreement is a material contract term that an attorney, as a fiduciary, must disclose just as he would any other material term). Petitioners cite no authority that has held to the contrary; indeed, they cite no decisions that address the application of FAA preemption principles to state common-law fiduciary duties. Given the scarcity of lower-court opinions addressing the issue, and the harmony between what seem to be the only two federal appellate or state supreme courts that have considered it, review of this highly fact-specific and infrequently recurring application of FAA preemption doc-

trine is unnecessary. Review is particularly unwarranted in this case, where petitioners' failure to raise and brief the matter below would require this Court to deal in the first instance with arguments that almost no federal circuit or state high courts have considered.

With no pertinent conflict of lower-court authority, petitioners claim that the decision below is inconsistent with *AT&T Mobility Corp. LLC v. Concepcion*, 563 U.S. 333. *See* Pet. 12. *Concepcion* did not hold, however, that the FAA forecloses the neutral application of state-law fiduciary duties to an arbitration clause. Insofar as petitioners mean to argue that the lower court disregarded *Concepcion*'s broader teachings about FAA preemption, the lower court expressly acknowledged *Concepcion*'s holding that the FAA preempts state laws that "apply 'only to arbitration' or 'derive [their] meaning from the fact that an agreement to arbitrate is at issue,'" Pet. App. 27a (quoting *Concepcion*, 563 U.S. at 339), or that "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, *id.* (quoting *Concepcion*, 563 U.S. at 343). The lower court merely observed that applying state-law fiduciary principles to the specific factual circumstances presented here was consistent with these uncontroversial propositions of federal law.[13]

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[13] Petitioners also claim in passing that the lower court's opinion is inconsistent with *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). *See* Pet. 12. Yet Petitioners offer no explanation of this contention beyond citing *Italian Colors*' statement that "arbitration agreements are a matter of contract that must be 'rigorously enforced' according to [their] terms." *Id.* at 17 (citing *Ital. Colors*, 133 S. Ct. at 2309). The

(*Footnote continued*)

Petitioners' argument for certiorari boils down to the claim that the North Carolina Supreme Court misapplied the settled principles of federal law that it cited—a claim that does not 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."). Petitioners offer no reason for an exception here.

III. The lower court correctly stated that the FAA does not preempt application of North Carolina's generally applicable fiduciary principles to the specific facts of this case.

Petitioners' waived preemption argument also fails on the merits. The FAA does not preempt the application of North Carolina's fiduciary principles because those principles apply generally to the material terms of all contracts formed within a fiduciary relationship and because their application in this case comports with the FAA's objectives.

A. Section 2 of the FAA provides that an arbitration agreement is subject to invalidation "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has long interpreted 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.

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plaintiffs in *Italian Colors* never claimed that the arbitration agreement at issue there had not been validly formed under general state-law contract principles. *See Ital. Colors*, 133 S. Ct. at 2312–13 (Thomas, J., concurring). *Italian Colors* has no bearing here.

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 cases in which "a doctrine normally thought to be generally applicable … ha[s] been applied in a fashion that disfavors arbitration," *Concepcion*, 563 U.S. at 341, or that "stand[s] as an obstacle to the accomplishment of the FAA's objectives," *id.* at 343.

Here, the North Carolina Supreme Court held the Agreement unenforceable under the general state-law rule that fiduciaries cannot enforce material contract terms from which they seek to derive even a "possible benefit," *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 343 S.E.2d 879, 884 (N.C. 1986), unless they carry the burden of showing that they affirmatively disclosed the terms during contract formation. *See* Pet. App. 21a–22a. The majority below explicitly stated—and no dissenting justice disputed—that this rule applies equally to *all* material contract terms put forth by a fiduciary. *See id.* at 27a.

Petitioners dispute the lower court's characterization of North Carolina's fiduciary principles as generally applicable, arguing that the same principles "would not have been applied to other contracts underlying the medical contract, such as the bill for services." Pet. 16. Petitioners cite nothing to back up this *ipse dixit*. To the contrary, the lower court limited its analysis to the arbitration agreement only because nobody had "complained about, much less challenged the validity of, any of the other documents that Mr. King signed." Pet. App. 3a n.1. Had other documents "substantially affect[ing] Mr. King's substantive legal rights" been at issue, the lower court clearly stated

that the same fiduciary principles would have applied. *Id.* at 27a.

The outcome below therefore squares with this Court's FAA jurisprudence—which has consistently recognized that the FAA does not preempt generally applicable state-law contract defenses—including this Court's most recent FAA decision, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017). In *Kindred*, this Court held that the FAA preempted a Kentucky state-law rule under which a principal's broad, otherwise enforceable delegation of authority to enter into contracts did not, absent a clear statement, encompass the authority to enter into an arbitration agreement. *Id.* at 1429. Although the Kentucky Supreme Court characterized its clear-statement rule as applying to any contract purporting to waive "fundamental constitutional rights," such as the right to worship freely or the right not to be enslaved, this Court found the lower court's characterization to be an attempt to "cast [an arbitration-specific] rule in broader terms" by "hypothesiz[ing] a slim set of both patently objectionable and utterly fanciful contracts that would be subject to [the] rule." *Id.* at 1427. Unlike the state-law rule invalidated in *Kindred*, which "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements," *id.* at 1429, the rule applied here applies exactly the same disclosure requirements to the full range of potentially advantageous contracts entered into by fiduciaries. It thus "put[s] arbitration agreements on an equal plane with other contracts," *id.* at 1427.

Longstanding state-court precedent confirms the North Carolina Supreme Court's statement that the state-law fiduciary principles relied upon below regu-

larly apply to contracts other than arbitration agreements. *See, e.g.*, *Forbis v. Neal*, 649 S.E.2d 382, 388–89 (N.C. 2007) (applying fiduciary principles to certain banking contracts); *Curl ex rel. Curl v. Key*, 316 S.E.2d 272, 275 (N.C. 1984) (applying fiduciary principles to contract for transfer of property); *Eubanks v. Eubanks*, 159 S.E.2d 562, 567–68 (N.C. 1968) (applying fiduciary principles to separation agreement); *N.C. State Bar v. Gilbert*, 566 S.E.2d 685, 692 (N.C. Ct. App. 2002) (applying fiduciary principles to attorney's fee agreement); *Brown v. Roth*, 514 S.E.2d 294, 296–97 (N.C. Ct. App. 1999) (applying fiduciary principles to real estate contract). Nor need one escape into fantasy to find examples of non-arbitration contracts even in the limited context of medical services that would almost certainly fall subject to the fiduciary principles applied below. *See, e.g.*, *Tatham v. Hoke*, 469 F. Supp. 914, 917 (W.D.N.C. 1979), *aff'd*, 622 F.2d 587 (4th Cir. 1980) (30-day notice provision for suits and a $15,000 damages cap); *Brooks v. Paul*, No. 4D16-2538, 2017 WL 2457247, at *1 (Fla. Dist. Ct. App. June 7, 2017) (pre-treatment release of malpractice claims).

Petitioners make no argument that a generally applicable state-law rule requiring fiduciaries to disclose material contract provisions to the clients whose trust they enjoy contravenes the congressional objectives underlying the FAA. Nor could they: the FAA operates on the "basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The court below correctly discerned that the neutral application of a generally applicable state-law rule de-

signed to ensure that consequential agreements within fiduciary relationships are the product of knowing consent does not hinder the FAA's objectives.

B. Unable to argue that the application of general state-law fiduciary principles to the facts of this case is inconsistent with the FAA, petitioners instead quibble with the state-law basis for applying those principles in the first place. According to petitioners, North Carolina's decision to impose fiduciary obligations on a physician during "the preliminary stages of health care settings, where the physician has yet to accept the patient," is a fig-leaf effort to "negate" this Court's FAA jurisprudence by eschewing the application of standard unconscionability principles that would—petitioners assume—have been preempted. Pet. 12.[14]

Whether a fiduciary relationship was formed on the facts of this case is a pure question of state law. The lower court's state-law determination that the facts of this case establish such a relationship does not disproportionately affect arbitration. Rather, a fiduciary relationship entails heightened obligations regarding many contractual dealings, as the lower court recognized. *See* Pet. App. 27a. Petitioners therefore do not even attempt to argue that the FAA preempts a state-law rule that imposes fiduciary obligations on

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[14] Petitioners offer scant support for their assumption that the FAA would have preempted the application of North Carolina's ordinary unconscionability doctrine to the facts of this case in the absence of a fiduciary relationship. At any rate, the lower court explicitly withheld judgment on this question, *see* Pet. App. 28a n.8, and the issue is not before this Court, although it would remain open on remand even if this Court were to decide this case.

physicians' offices during their initial patient interactions.

Instead, petitioners invite this Court to infer the North Carolina Supreme Court's supposed hostility toward arbitration from the fact that the court applied a state-law fiduciary duty rule where, for the first time, an arbitration agreement was subject to a claim of fiduciary breach. Beyond the trial court's undisputed factual findings leading inexorably to the conclusion that a fiduciary relationship existed in this case, *see id.* at 23a–24a, the lower court's finding of a fiduciary relationship was consistent with North Carolina precedent. *See, e.g.*, *Mozingo ex rel. Thomas v. Pitt Cty. Memorial Hosp., Inc.*, 415 S.E.2d 341, 344–45 (N.C. 1992) (recognizing that a physician can owe a duty of care to a patient before having met that patient). And even if the lower court's finding of a fiduciary relationship reflected a new rule of state law, rather than a fact-dependent application of existing law, a state court is not "precluded from announcing a new, generally applicable rule of law in an arbitration case." *Kindred*, 137 S. Ct. at 1428 n.2.

Unsurprisingly, petitioners have offered no support for their remarkable intimation that the high court of a sovereign state reached an outcome-driven conclusion on a substantial, generally applicable question of state law in a precedential opinion solely to invalidate a contract in one particular case. Were the outcome below animated by hostility toward arbitration, it is hard to comprehend why the lower court took pains to indicate that physicians can enter into enforceable arbitration agreements with patients if the physicians comply with the same fiduciary duties that apply to other contracts. Pet. App. 29a.

The North Carolina courts' long track record of regularly enforcing validly formed arbitration agreements also contradicts petitioners' argument of illicit motive. *See, e.g.*, *HCW Ret. & Fin. Servs., LLC v. HCW Emp. Benefit Servs., LLC*, 747 S.E.2d 236, 237 (N.C. 2013); *Register v. White*, 599 S.E.2d 549, 556 (N.C. 2004); *Epic Games, Inc. v. Murphy-Johnson*, 785 S.E.2d 137, 144 (N.C. Ct. App. 2016); *Bailey v. Ford Motor Co.*, 780 S.E.2d 920, 928 (N.C. Ct. App. 2015); *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 818 (N.C. Ct. App. 2014). Consistent with this solicitude toward arbitration, the lower court made clear that nothing in the opinion below "should be understood to cast any doubt upon the ability of physicians and patients, assuming that proper disclosure is made, to enter into appropriately drafted agreements providing for the arbitration of disputes." Pet. App. 29a. In other words, if physicians fulfill their fiduciary duties, they can enforce an agreement identical to the one in this case, absent some other valid basis for holding it unenforceable under generally applicable contract principles. Petitioners offer no reason to doubt the lower court's sincerity.

C. Finally, petitioners take issue with the lower court's factual determination that petitioners sought to derive a possible benefit from the Agreement, asserting that the lower court arrived at this conclusion "solely because [the Agreement] was an arbitration agreement." Pet. 14.

In so arguing, petitioners disregard that under North Carolina law even the "slightest trace" of advantage establishes that an agreement within a fiduciary relationship produces a possible benefit and shifts the burden to the fiduciary to demonstrate af-

firmative disclosure. *Rhodes v. Jones*, 61 S.E.2d 725, 726 (N.C. 1950). Contrary to the petition's assertion, the lower court never "presum[ed] that arbitration itself would be harmful" to King. Pet. 13. Rather, the court simply relied upon the trial court's unchallenged findings of fact that petitioners sought King's signature on the Agreement to benefit themselves and that the requirement of at least one physician arbitrator, and the possibility of an arbitral panel entirely composed of physicians, conferred a benefit to petitioners. Pet. App. 24a–25a; *see also id.* at 10a. State law required nothing more for the burden to shift to petitioners to prove that they acted in an open, fair, and honest manner by disclosing all material facts.[15]

The lower court's factual conclusion did not rest on any unique features of arbitration, but rather on the commonsense notion that a party that proposes that future disputes be resolved in a certain way likely believes this proposal to be at least potentially in its own interests. The years petitioners have spent litigating the Agreement's enforceability belie the notion that they perceive no benefit from the Agreement. Moreover, petitioners obscured the Agreement "among a pile of other documents," *id.* at 10a–11a, and the Agreement itself contained "poorly drafted, confusing, and nonsensical" language, *id.* at 8a–9a,

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[15] Even assuming that fiduciary breach under state law requires that the challenged term impose a possible detriment on the weaker party and not just confer a possible benefit on the fiduciary, petitioners are wrong to contend that the lower court "did not establish any harm or detriment" the Agreement might impose on King. Pet. 13. The lower courts found as fact that the Agreement's terms regarding the composition of the arbitral panel were potentially detrimental to King. Pet. App. 10a.

and made no effort to define or explain arbitration or its consequences at all—let alone in a manner that a person of King's background and experience would understand. These undisputed findings of fact supported the lower court's conclusions that petitioners received a possible benefit from the Agreement and breached their fiduciary duty. Nothing suggests that the lower court would have reached a different determination had the Agreement concerned a similarly significant matter other than arbitration.

Even if the FAA somehow foreclosed a state from recognizing that a fiduciary drafting a contract derives at least a *de minimis* benefit from selecting the forum in which disputes will be heard, the arbitration agreement at issue here contains "unique provisions," *id.* at 109a, that benefit petitioners and that are not inherent, "primary characteristic[s] of an arbitration agreement," *Kindred*, 137 S. Ct. at 1427. Specifically, the Agreement requires that at least one member of the arbitral panel be a physician who is board certified in Bryant's area of specialty and permits a situation in which all three arbitrators are physicians. The trial court found that these provisions "confer[] a benefit to [petitioners]," Pet. App. at 10a, and "would not have been included in the Agreement but for [that] perceived benefit," *id.* at 109a. The North Carolina Supreme Court ratified these uncontested factual findings. *See id.* at 10a, 24a–25a.

The lower court's determination that the Agreement conferred at least a possible benefit on petitioners thus derived not from hostility to arbitration, nor solely from the fact that the subject of the agreement was arbitration, but from the fact that the arbitration agreement possessed one-sided features. Nothing in

the decision below would prevent enforcement of an arbitration provision that offers such benefits to the fiduciary who proposes it, as long as the fiduciary meets the fiduciary duties applicable to any other contractual provision that offers it possible benefits. The opinion below is thus entirely consistent with the FAA. Indeed, *excusing* fiduciaries who proffer arbitration agreements to those reposing trust and confidence in them from the disclosure standards that apply to beneficial non-arbitration contracts would conflict with the fundamental principle that the FAA does not require courts to give preferential treatment to arbitration agreements under state law. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (to "elevate" an arbitration agreement "over other forms of contract" is "inconsistent" with the FAA).

IV. There is continued disagreement on this Court over whether the FAA applies in state courts.

Petitioners' claim that the FAA preempts the application of North Carolina fiduciary 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), and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the Court held, over substantial dissents, that Section 2 of the FAA applies to state court actions and preempts state courts from applying inconsistent standards.

Although other Justices have accepted this departure from the purposes manifested in the FAA's language as settled, Justice Thomas has made clear that he "remain[s] of the view that the [FAA] does not apply to proceedings in state courts" and "does not re-

quire state courts to order arbitration." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Thomas, J., dissenting) (citation omitted). That view continues to determine Justice Thomas's vote in cases, like this one, where a party asserts that the FAA preempts a state court's refusal to compel arbitration. *See*, *e.g.*, *Kindred*, 133 S. Ct. at 1429–30 (Thomas, J., dissenting).[16]

The continuing disagreement on this Court over this question makes a case coming from a state court a poor candidate for resolving any FAA issue on which the remaining Justices are likely to be divided, as such cases raise the possibility of a 4–4 division on the merits of FAA preemption, with the deciding vote resting on a different basis—an outcome that contributes nothing to the clarification of federal law. Here, even if petitioners' waived preemption arguments were strong enough to command any votes, they likely could not command the supermajority effectively needed for a decisive outcome. Wasteful investment of the parties' and the Court's resources in such a case serves no one's interests.

CONCLUSION

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

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[16] Acceptance of petitioners' arguments would also require this Court to conclude that surgical malpractice committed in the intrastate practice of medicine involves interstate commerce sufficiently to call the FAA into play, a subject that this Court has not previously considered.

Respectfully submitted,

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