AMANDA KERNAHAN, individually and on behalf of others similarly situated,

Respondent/Respondent,

v.

HOME WARRANTY ADMINISTRATOR OF FLORIDA, INC., CHOICE HOME WARRANTY, JOHN DOE CORPORATION 1-10, JOHN DOES 1-10,

Petitioner/Appellant.

SUPREME COURT OF NEW JERSEY
Docket No.: 079680

On Petition for Certification from Superior Court of New Jersey Appellate Division

Docket No.: A-001355-16T4

Sat Below:
Hon. William E. Nugent, J.A.D. Hon. Heidi Willis Currier, J.A.D.

On Appeal From:
Superior Court of New Jersey
Law Division, Middlesex County
Case No. MID-L-7052-15

Sat Below:
Hon. Arnold L. Natali Jr., J.S.C.
Civil Action

Brief of Amici Curiae New Jersey Business and Industry Association, Commerce and Industry Association of New Jersey, and New Jersey Chamber of Commerce

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Proposed amici curiae New Jersey Business and Industry Association (NJBIA), Commerce and Industry Association of New Jersey (CIANJ), and New Jersey Chamber of Commerce (NJ Chamber) submit this brief in support of the arguments submitted by defendants Home Warranty Administrator of Florida, Inc. and Choice Home Warranty's ("Home Warranty") in their Petition for Certification.

This case raises an issue of significant importance to New Jersey's business community that this Court has not yet considered: Whether the Court's ruling in Atalese v. U.S. Legal Services Grp., L.P., 219 N.J. 430 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015), is overruled by the subsequent decision of the United States Supreme Court in Kindred Nursing Centers Ltd. P'ship v. Clark, 581 U.S. ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017). That issue is particularly important to these proposed amici, which collectively represent a significant portion of New Jersey's businesses and employers, and advocate for the advancement of the State's economy.

In Atalese, supra, this Court held that because arbitration amounts to a waiver of a person's "right to bring her claims in court or have a jury resolve the dispute," all agreements containing an arbitration provision must possess "clear and

unambiguous" language informing consumers that there is a difference between "resolving a dispute in arbitration and in a judicial forum" and that by agreeing to arbitration, the consumer is waiving the "time-honored right to sue." 219 N.J. at 444-47. However, after the Atalese decision the United States Supreme Court held that a state cannot condition the enforcement of an arbitration agreement on the satisfaction of a notice requirement simply because those agreements are in essence "a waiver of the right to go to court and receive a jury trial." Kindred Nursing, supra, 137 S. Ct. at 1426-27, 197 L. Ed. 2d 806. Indeed, pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, arbitration agreements cannot be treated with hostility, disfavored, or placed on unequal footing with all other contracts. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339-43, 131 S. Ct. 1740, 1745-47, 179 L. Ed. 2d 742, 750-53 (2011); see also 9 U.S.C. § 2.

Because this Court has not yet determined whether the notice requirement in Atalese is overruled by Kindred Nursing, lower courts are left to apply law that is no longer in conformance with the FAA and is contrary to the holding of Kindred Nursing. Accordingly, the Court should take this opportunity to address the viability of Atalese in light of Kindred Nursing, and reinforce the FAA's mandate of placing

arbitration agreements on equal footing with all other contracts.

STATEMENT OF INTEREST

Proposed amici curiae NJBIA, CIANJ, and NJ Chamber have a strong interest in this case because each are comprised of members of New Jersey's business community, who use arbitration provisions in their consumer contracts on a regular basis.

Founded in 1910, NJBIA is the nation's largest single state-wide organization of employers, with more than 19,000 member companies reflecting all industries and representing every region of New Jersey. Its membership ranges from most of the 100 largest employers in New Jersey to thousands of small and medium-sized employers from every sector of the economy. Its mission is to provide information, service, and advocacy for its members to build a more prosperous New Jersey. As a group, NJBIA's members employ over one million people. One of its goals is to advance business prosperity within the State, which includes the reduction of unwarranted litigation burdens. See New Jersey Business & Industry Association, About NJBIA, https://www.njbia.org/about/.

Since its founding in 1927, CIANJ has been dedicated to leading free enterprise advocacy to provide an economic climate that fosters business potential through education, legislative

vigilance, and membership interaction. CIANJ's primary objective is to make New Jersey a better place to live, work, and do business. CIANJ's nearly 1,000 members consist of Fortune 100 companies and sole proprietors representing a variety of enterprises and industries. See Commerce and Industry Association of New Jersey, About Us, http://www.cianj.org/about-us/.

NJ Chamber is an advocacy organization for business that actively supports legislation and regulation that will lead to economic growth, an improvement in the State's business climate, and job creation. Members of NJ Chamber are comprised of every industry that does business in the State, and include some of New Jersey's most prestigious and innovative companies. See New Jersey Chamber of Commerce, About Us, http://www.njchamber.com/index.php/about-the-nj-chamber-of-commerce.

Many of the proposed amici's members utilize arbitration agreements in their contracts. Using arbitration provides businesses and consumers alike with a less expensive and faster method by which to resolve disputes, as compared with the often costly, time consuming, and burdensome process of litigation. Like other contract provisions, arbitration clauses are crafted based upon considerations of fairness, utility, and practicality. The FAA was created to support and protect

arbitration because of the many benefits it provides to consumers, businesses and the economy as a whole.

These benefits, however, are jeopardized by state-law jurisprudence like Atalese that impose heightened disclosure requirements for arbitration agreements than are required for other contracts. The proposed amici, therefore, have a strong interest in advocating for the elimination of the unequal notice requirement established in Atalese, which is now prohibited by Kindred Nursing. The appellate panel's decision is the result of a discriminatory rule that directly contradicts the FAA and current United States Supreme Court jurisprudence. As such, this Court should intervene.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The proposed amici curiae adopt and incorporate by reference the Procedural History and Statement of Facts set forth in the briefs of defendants-petitioners in their petition to this Court for certification. Amici add that the New Jersey Supreme Court granted certification on November 28, 2017. ___ N.J. ___ (2017).

LEGAL ARGUMENT

I. The FAA and United States Supreme Court Precedent Forbid the Notice Requirement That Was Established in Atalese and Applied by the Appellate Division Below.

The Appellate Division's decision erred because it applied the principles set forth in Atalese -- principles that are now

preempted by the FAA as made clear by the United States Supreme Court holding in Kindred Nursing -- to render the arbitration agreement at issue unenforceable. The Court should revisit the Atalese decision in light of subsequent precedent and find that arbitration agreements should not be deemed unenforceable simply because they lack special language; rather they should be analyzed under well-established contract principles applicable to all contracts.

The United States Supreme Court's decision in Kindred Nursing is directly on point here. Moreover, it supports Petitioners' and amici curiae's contention that Atalese is preempted by the FAA and was improperly relied upon by the Appellate Division below. In Kindred Nursing, supra, the United States Supreme Court granted certiorari to determine whether a Kentucky Supreme Court ruling that mandated specific language for the enforceability of certain arbitration agreements was preempted by the FAA. 581 U.S. at _____, 137 S. Ct. at 1424-25, 197 L. Ed. 2d at 810. In Kindred Nursing, the plaintiffs held power-of-attorney for two deceased relatives who were residents of a Kindred nursing home. Id. at ____, 137 S. Ct. at 1425, 197 L. Ed. 2d at 810-11. The plaintiffs filed claims against the nursing home alleging substandard care of their relatives. Ibid. However, both plaintiffs had signed arbitration agreements, among other documents, on behalf of their relatives

when they initially moved into the nursing home. Id. at ___, 137 S. Ct. at 1425, 197 L. Ed. 2d at 811. Kindred Nursing moved to dismiss the claims arguing that the arbitration agreements required that the disputes be arbitrated. Ibid. The trial court denied Kindred's motion and the Kentucky Court of Appeals affirmed. Ibid.

On appeal, the Kentucky Supreme Court also affirmed, finding that the powers-of-attorney documents did not specifically grant the plaintiffs the authority to enter into an arbitration agreement on the deceased relatives' behalf. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 312-13 (Ky. 2015), rev'd in part, 581 U.S. ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017). The Kentucky Court noted that arbitration agreements take away "a right that is sacred" -- right to a jury trial - and as such, it could not simply "infer" that the plaintiffs had authority to enter those contracts on another's behalf. Id. at 328-29 (emphasis in original). Instead, the Kentucky Supreme Court held that "the power to waive generally such fundamental constitutional rights must be unambiguously expressed in the text of the power-of-attorney document in order for the authority to be vested" in the plaintiffs. Id. at 328. Specific language was particularly important, according to the Kentucky Supreme Court, when the right at issue is "the right of trial by jury, which is the only thing that our Constitution

commands us to 'hold sacred.'" Ibid. (emphasis in original) (citing Ky. Const. § 7). Thus, the Kentucky Court found the arbitration agreements at issue unenforceable because absent the express authority to enter arbitration by the principal, the contracts lacked valid assent. Id. at 330.

To avoid singling out arbitration agreements, the Kentucky Court noted that in any contract where a fundamental right is being waived, such express language would be required.[1] Id. at 328-29. The Kentucky Supreme Court found its decision was in line with the FAA and corresponding precedent because the lack of assent is a "specific and concise ground[]" that exists at law or equity which is "applicable to the formation of contracts generally." Ibid. Indeed, the Kentucky Court stated that its "rule does nothing that even approaches **that** kind of restraint on arbitration. We simply require, as we do with any contract, that the parties to be bound by the agreement validly assented." Id. at 331.

Critically here, the United States Supreme Court found that the Kentucky Supreme Court's decision, requiring that the attorney-in-fact have specific authority to waive an

[1] The Court explained, for example, that it would not infer that a power-of-attorney, without such clear language, had the authority to waive a person's right to worship freely, put her child up for adoption, or consent to an arranged marriage. Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 328 (Ky. 2015), rev'd in part, 581 U.S. ___, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017)

individual's right to access to the courts and trial by jury, "singles out arbitration agreements for disfavored treatment" and is therefore in violation of the FAA. Kindred Nursing, supra, 581 U.S. at ___, 137 S. Ct. at 1425, 197 L. Ed. 2d at 810. According to the United States Supreme Court, Kentucky's "clear-statement rule" did not put arbitration agreements on equal footing with other contracts. Id. at ___, 137 S. Ct. at 1426-27, 197 L. Ed. 2d at 810. While the Kentucky Court based its decision on the fact that it was safeguarding an individual's "sacred" fundamental right, the United States Supreme Court held that it actually violated precedent by "adopt[ing] a legal rule [that] hing[ed] on the primary characteristic of an arbitration agreement -- namely, a waiver of the right to go to court and receive a jury trial." Id. at ___, 137 S. Ct. at 1427, 197 L. Ed. 2d at 812 (citing Concepcion, supra, 563 U.S. at 341-42, 131 S. Ct. at 1746-47, 179 L. Ed. 2d at 742). Such a rule, according to the United States Supreme Court, "is too tailor-made to arbitration agreements -- subjecting them, by virtue of their defining trait, to uncommon barriers -- to survive the FAA's edict against singling out those contracts for disfavored treatment." Ibid. Looked at practically, the "clear-statement rule" imposed a special impediment to the ability to enter into arbitration agreements, a consequence that contravenes the FAA's primary

objective to place those agreements "on equal footing with all other contracts." Id. at ___, 137 S. Ct. at 1429, 197 L. Ed. 2d at 814.

The same impermissible justifications used by the Kentucky Supreme Court were also used by this Court in Atalese, supra, when it required that all arbitration agreements contain "clear and unambiguous language" that an individual is waiving her right "to bring her claims in court or have a jury resolve the dispute." 219 N.J. at 447. Specifically, the Atalese Court found that an arbitration agreement in a consumer contract was unenforceable because it did not provide "sufficiently clear" language that the individual was waiving her right to seek relief in a court of law. Id. at 436. Just like the Kentucky Supreme Court in Kindred Nursing, the Atalese Court held that arbitration is the waiver of an individual's "time-honored right to sue" in a court of law and, as with any contract that involves a waiver of an individual's right, a valid arbitration agreement must "clearly and unmistakably establish[]" the waiver of that right. Id. at 444; see also Extendicare Homes, supra, 478 S.W.3d at 328-29. Without "clear and unambiguous" language "that the plaintiff is giving up her right to bring her claims in court or have a jury resolve the dispute," the Atalese Court could not find that arbitration was agreed upon with mutual

assent. Id. at 446-47; see also Extendicare Homes, supra, 478 S.W.3d at 328-29.

Because the justifications for the Court's decision in Atalese have now been expressly rejected by the United States Supreme Court, this Court should now revisit the issue and hold that the heightened notice requirement under Atalese is not compliant with the FAA, and hence is not required in arbitration agreements. The United States Supreme Court made clear that the FAA preempts any state law that is premised on the fundamental characteristic of arbitration -- the waiver of the right to resolve a dispute in a court before a jury. Kindred Nursing, supra, 581 U.S. at ___, 137 S. Ct. at 1427, 197 L. Ed. 2d at 812. The Atalese decision did exactly that; it required that all arbitration agreements contain identifiable "clear and unambiguous" language because, by their very nature, they waive an individual's ability to bring her claim before a judge and jury.

While the Atalese Court made clear that it was not requiring specific language - and, as such, was not contrary to Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 1655, 134 L. Ed. 2d 902, 909 (1996) - the Court still placed arbitration agreements on unequal footing with all other contracts. Indeed, pursuant to Atalese, supra, only arbitration agreements "must explain that" the consumer is foregoing a

particular right. 219 N.J. at 446-47 (emphasis added). This isolated rule directed to arbitration agreements undoubtedly places them "in a class apart from 'any contract,' and singularly limits their validity." Casarotto, supra, 517 U.S. at 688, 116 S. Ct. at 1657, 134 L. Ed. 2d at 910.

Kindred Nursing, supra, held that the FAA prohibits any state rule that discriminates against arbitration "by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." 581 U.S. at ___, 137 S. Ct: at 1426, 197 L. Ed. 2d at 812 (emphasis added). A rule, exactly like the rule set forth in Atalese, "might avoid referring to arbitration by name; but still . . . it [] 'rel[ies] on the uniqueness of an agreement to arbitrate as [its] basis' - and thereby violate[s] the FAA." Ibid.

In the Atalese decision, the Court criticized the arbitration provision because it did "not explain what arbitration is," did not "indicate how arbitration is different from" court proceedings, and did not explain in "plain language that would be clear and understandable to the average consumer that she is waiving statutory rights." Supra, 219 N.J. at 446. However, the Atalese decision placed that burden only on arbitration provisions thereby treating them differently from other contract provisions, in violation of the FAA.

Another earlier decision of the United States Supreme Court lends additional support for the position that the enforceability of arbitration agreements cannot be conditioned on compliance with a specific notice requirement. Casarotto, supra, 517 U.S. at 687, 116 S. Ct. at 1655, 134 L. Ed. 2d at 909. In Casarotto, the Court was tasked with determining whether the FAA preempted a Montana State law that rendered arbitration provisions unenforceable unless there was notice in underlined capital letters on the first page of the agreement explaining that the contract is subject to arbitration. Id. at 683, 116 S. Ct. at 1654, 134 L. Ed. 2d at 906. At issue was a franchise agreement that contained language on the ninth page stating, "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by Arbitration." Ibid. The Montana Supreme Court found that the arbitration provision was unenforceable because it did not satisfy that State's notice requirement -- a clear disclaimer on the first page. Id. at 684, 116 S. Ct. at 1654-55, 134 L. Ed. 2d at 907.

On appeal, the United States Supreme Court explained that "state law may be applied [to negate an arbitration provision] 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally'"; however, "[c]ourts may not . . . invalidate arbitration

agreements under state laws applicable only to arbitration provisions." Id. at 686-87, 116 S. Ct. at 1656, 134 L. Ed. 2d at 908-09 (emphasis in original). Applying these principles, the Supreme Court found that Montana's law "directly conflict[ed] with § 2 [of the FAA] because the [] law condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." Id. at 687, 116 S. Ct. at 1655, 134 L. Ed. 2d at 909 (emphasis added).

In light of Casarotto and now Kindred Nursing, this Court should now overrule Atalese, and reverse the decision of the Appellate Division below; these cases confirm the impropriety of state laws that require particular language in arbitration agreements that are not required for all contracts. In sum, such a specific burden violates the FAA. See 9 U.S.C. § 2.

II. Arbitration Agreements Should Be Enforced When They Clearly Indicate That All Claims Are Subject To That Alternative Dispute Resolution Process.

Because the notice requirement set forth in Atalese is in violation of the FAA, as confirmed by Kindred Nursing, amici respectfully ask the Court to uphold the purpose behind the FAA and set arbitration provisions on equal footing with all other contractual terms. Specifically, arbitration provisions that, like other enforceable contracts, are clear should enforced as written.

In 1925, Congress enacted the FAA "to place arbitration agreements upon the same footing as other contracts" and to put an end to the "longstanding judicial hostility" American courts had adopted up to that point against arbitration agreements. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L. Ed. 2d 26 (1991) (citation omitted). To achieve that purpose, Section 2 of the FAA provides that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Accordingly, arbitration agreements can be invalidated by "'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." Concepcion, supra, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L. Ed. 2d at 751 (quoting Casarotto, supra, 517 U.S. at 687, 116 S. Ct. at 1656, 134 L. Ed. 2d at 909).

Consistent with Section 2 of the FAA and the purpose behind its enactment, this Court should recognize "the fundamental principle that arbitration is a matter of contract." Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 67, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403, 410 (2010). Thus, as the Court stated in Atalese, supra, arbitration agreements must be treated the

same as any other contract in that they "must be the product of mutual assent." 219 N.J. at 442. In other words, the "parties [must] have an understanding of the terms to which they [] agreed." Ibid.

"When the terms of [a] contract are clear, it is the function of a court to enforce it as written and not make a better contract for either of the parties [because the] parties are entitled to make their own contracts." McMahon v. City of Newark, 195 N.J. 526, 545-46 (2008) (citing Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)). Accordingly, "the court must discern and implement the common intention of the parties [and the court's] role is to consider what is written in the context of the circumstances at the time of drafting and to apply a rational meaning in keeping with the expressed general purpose." Id. at 546; see also Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353 (1992) ("A party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect." (citation omitted)).

Here, the arbitration provision at issue clearly established that "[a]ny and all disputes, claims and causes of action" that arise from or are connected with the contract "shall be resolved exclusively through the American Abritration Association . . . . Controversies or claims shall be submitted

to arbitration regardless of the theory under which they arise, including without limitation contract, tort, common law, statutory, or regulatory duties or liability." (Da49). Because the contract at issue clearly states that any and all claims will be resolved through arbitration, it should be enforced as written. The fact that the contract did not explain the difference between arbitration and a judicial proceeding or any failure to contain language specifically explaining that the consumer is waiving her right to have her dispute resolved before a court and a jury, is of no consequence in light of Kindred Nursing. As discussed above, waiving the right to bring a dispute before a court or jury is the very nature of an arbitration agreement. As long as the arbitration provision is clear and the parties execute the agreement, it should be enforced as written just like any other contract.

CONCLUSION

For the foregoing reasons, proposed amici curiae NJBIA, NJCJI, and NJ Chamber respectfully request that this Court grant them leave to appear as amici curiae, apply Kindred Nursing to overrule Atalese, and reverse the Appellate Division's decision.

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Dated: