No. 17-1279

IN THE
Supreme Court of the United States

BERNSTEIN, SHUR, SAWYER & NELSON, P.A., ET AL.
Petitioners,

v.

SUSAN R. SNOW,
Respondent.

On Petition for a Writ of Certiorari
to the Maine Supreme Judicial Court

REPLY BRIEF FOR PETITIONERS

MATTHEW S. HELLMAN
Counsel of Record
ADAM G. UNIKOWSKY
WILLIAM K. DREHER
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

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REPLY BRIEF

The Maine Supreme Judicial Court's ("Maine SJC") ruling is yet another in a long line of state court decisions that defy this Court's Federal Arbitration Act ("FAA") precedents. This Court has made clear that state courts may not "adopt a legal rule hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). The Maine SJC did not even attempt to hide the fact that it was doing precisely that. The Maine SJC adopted a rule subjecting attorney-client engagement agreements to a heightened "informed consent" requirement, on the ground that those agreements "waive" the client's "fundamental right" under the Maine Constitution "to a jury trial in civil matters." Pet. App. 12a (quoting *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509) (internal quotation mark omitted). It is difficult to imagine a clearer articulation of a legal rule that violates the FAA.

Snow's brief in opposition makes no attempt to defend the Maine SJC's legal rule. Instead, Snow argues that the Maine SJC would have been permitted to adopt an entirely different hypothetical rule. Snow asserts that a decision that even-handedly applies to arbitration agreements the same informed consent requirement that "applies generally to all agreements between Maine lawyers and their clients that potentially impact clients' significant interests" would comply with the FAA. Br. in Opp'n 8. But that is not what the Maine SJC's decision did. Instead, the court declared that the parties' arbitration agreement was unenforceable *because* it was

an arbitration agreement. The FAA prohibits such a rule.

In any case, Snow's revisionist account cannot save the Maine SJC's decision. Even if the Maine SJC *had* applied the broader rule that Snow envisions, Snow admits that even then the Maine SJC's rule would cover only arbitration provisions and provisions involving "matters in which the parties have potentially conflicting interests." Br. in Opp'n 2. But if the Maine SJC had held that arbitration agreements are comparable to and must be policed like such conflict of interest provisions, that holding would exhibit the very sort of hostility toward arbitration that Congress sought to extinguish in the FAA. Conflict of interest provisions are subject to heightened consent requirements precisely because they run the risk of exposing the client to unethical or disadvantageous conduct. But there is nothing improper about arbitration, and the FAA permits only state law rules that treat arbitration provisions like all contract provisions, not disfavored ones.

Not only does the Maine SJC's decision violate Supreme Court precedent, but it conflicts with decisions of other federal courts. The sharpest conflict is with the federal district court in Maine, which held that the FAA requires enforcement of *this very arbitration agreement*. In *Kindred*, the Court granted certiorari to review a state court decision nullifying an arbitration agreement in almost identical circumstances. The Court should do the same here.

I. The Decision Below Defies This Court's FAA Precedents.

A. This Court's precedents teach that the FAA bars state law rules that subject arbitration agreements to a heightened standard because they waive an individual's right to a jury trial. In an effort to avoid those precedents, Snow characterizes the Maine SJC's decision as resting on a different rationale. According to Snow, the Maine SJC's informed consent requirement "applies generally to all agreements between Maine lawyers and their clients that potentially impact clients' significant interests." Br. in Opp'n 8; *id.* at 2 (describing the Maine SJC's purported "even-handed application of the requirement of informed consent to attorney-client agreements affecting significant interests"); *id.* at 7 (implying that Maine SJC's rule applies to "all material terms in an attorney-client agreement").

The actual decision of the Maine SJC says nothing of the sort. Instead, the Maine SJC rested its holding directly on the fact that attorney-client arbitration agreements waive the client's constitutional right to a jury trial. The Maine SJC stated that its rule is "rooted in Maine's 'broad constitutional guarantee of a right to a jury' trial in civil matters." Pet. App. 12a (quoting *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509).[1] And the court emphasized that the "heightened standard is required when an attorney . . . seeks to have [a] client *waive a fundamental right* through a provision

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[1] In light of that statement, Snow cannot seriously maintain that the Maine SJC "did not create a rule premised on the protection of constitutional rights." Br. in Opp'n 9.

in an engagement letter." *Id.* (emphasis added). That arbitration agreements "waive a fundamental right" was therefore the critical fact that triggered the court's application of its "heightened standard." *Id.* Indeed, even when the Maine SJC contended that its rule "applies to situations that go beyond arbitration," Pet. App. 17a, it acknowledged that was true only insofar as those situations involved a "decision to *waive significant rights*." *Id.* (emphasis added).

In other words, the Maine SJC's ruling did not rest on the fact that an arbitration agreement is a "significant" term in an attorney-client contract. If it did, then *all* significant provisions of an attorney-client agreement, whether they waived "fundamental rights" or not, would have been subjected to the same heightened-scrutiny standard. Rather, the Maine SJC applied its rule to attorney-client arbitration agreements *because* they are waivers of the jury trial right. That is a fatal flaw under *Kindred*'s holding that state-court rules' application to arbitration agreements cannot "hing[e] on the primary characteristic of [those] agreement[s]—namely, a waiver of the right to go to court and receive a jury trial." *Kindred*, 137 S. Ct. at 1427.

By contrast, not once in its decision did the Maine SJC adopt the rule that Snow says it did. The Maine SJC never states or even implies that its rule applies to all provisions in an attorney-client agreement "that potentially impact clients' significant interests." Br. in Opp'n 8.

Snow's attempt to broaden the Maine SJC's rule after the fact is the very maneuver that this Court

rejected in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996). There, the Montana Supreme Court had enforced a rule requiring conspicuous notice in a contract that the contract is subject to arbitration. Although the rule was cast in arbitration-specific terms, the party defending it asked this Court to "regard [it] as but one illustration of a cross-the-board rule: Unexpected provisions in adhesion contracts must be conspicuous." *Id.* at 687 n.3. This Court had no trouble rejecting that attempted rewriting of the state supreme court's opinion, noting that "the Montana Supreme Court announced no such sweeping rule," and "did not assert as a basis for its decision a generally applicable principle of 'reasonable expectations' governing any standard form contract term." *Id.* Even if such a general rule would not be preempted, Montana's rule was, because the state supreme court's decision "train[ed] on and uph[eld]" an "arbitration-specific limitation." *Id.*

So too here. Perhaps a state court could require that attorneys explain *every* "significant" term in an attorney-client agreement—the fee structure, fee rates, treatment of confidential information, etc.—to obtain their client's informed consent to each term. Of course, such a rule would be far more onerous for attorneys—and so less likely to be adopted—than a rule limited to waivers of "fundamental right[s]." Pet. App. 12a. But in any event, the Maine SJC did not adopt an even-handed rule applicable to all significant terms in an attorney-client agreement, which is all that matters here.

B. Snow next argues that even if the Maine SJC's decision does not apply its rule to anything other than

arbitration agreements, the Maine Rules of Professional Conduct impose a similar informed-consent requirement on a few other types of provisions in attorney-client agreements. *See* Br. in Opp'n 10-12. Specifically, Snow contends informed consent is required for agreements to disclose client confidences, agreements to waive existing conflicts of interest, business transactions with clients, and a handful of other provisions. *See id.* at 10. Snow characterizes these as agreements "in which the parties have potentially conflicting interests." *Id.* at 2.

But the Maine SJC made clear in its decision below that it was requiring informed consent *for arbitration agreements* because those agreements waive the jury trial right, not because they present a conflict of interest. *See supra* 3-4. As explained above, that is unlawful under *Kindred* regardless of whether a State applies a similar informed-consent rule to other provisions for other reasons. *Id.*

Moreover, the FAA plainly would prohibit States from placing arbitration agreements on the same ground as agreements to disclose client confidences, agreements to waive existing conflicts of interest, and business transactions with clients. Such agreements are ordinarily treated as potentially unethical, and therefore unenforceable, because they may endanger client interests or create attorney-client conflicts. Precisely *because* such agreements are disfavored, they are subjected to a heightened-consent requirement that does not apply to other types of contractual provisions. *See* Br. in Opp'n 10-12. But the very premise of the FAA is that the law should *not* view arbitration agreements, which merely prescribe one procedure for resolving

disputes, with disfavor. To the contrary: the FAA "reflects a legislative recognition of the 'desirability of arbitration as an alternative to the complications of litigation.'" *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (quoting *Wilko v. Swan*, 346 U.S. 427, 431 (1953)). Discouraging arbitration by "[p]lacing arbitration agreements within th[e] class" of provisions presenting clear conflicts of interest or significant risk to the client would therefore, as in *Kindred*, "reveal[] the kind of 'hostility to arbitration' that led Congress to enact the FAA." 137 S. Ct. at 1428. Thus, even if the Maine SJC had written a different opinion that did not adopt a rule hinging on the fact that arbitration waives the jury trial right, it could not justify imposing special burdens on arbitration provisions by treating those provisions as akin to other suspect provisions in attorney-client agreements. *Cf.*, *e.g.*, *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 725 (4th Cir. 1990) (describing as "clearly contrary to the FAA" the notion "that a state may categorize arbitration agreements with other specific contractual terms which are void because they violate public policy").

C. Snow contends finally that even if the Maine SJC cannot refuse to enforce an attorney-client arbitration agreement absent informed consent, that has little practical effect because the State can nonetheless impose an ethical bar prohibiting attorneys from entering into such agreements. *See* Br. in Opp'n 17 ("Maine's ethical obligations unequivocally require informed consent in attorney-client arbitration agreements—regardless of whether such agreements are enforceable as a matter of federal law.").

But a State can no more exhibit hostility toward arbitration agreements by prohibiting parties from entering into those agreements than it can by prohibiting their enforcement. As this Court emphasized just last Term: "the Act cares not only about the 'enforce[ment]' of arbitration agreements, but also about their initial 'valid[ity]'—that is, about what it takes to enter into them." *Kindred*, 137 S. Ct. at 1428. That means *both* that "a state may not refuse to enforce . . . an *existing* arbitration agreement on the ground that the contract did not comply with rules of contract formation applicable only to arbitration provisions" *and* that a State may not "enact[] special rules to discourage or prohibit the formation of [*future*] agreements to arbitrate." *Saturn Distrib. Corp.*, 905 F.2d at 723. State rules making it more difficult for particular parties to enter into arbitration agreements are equally invalid under the FAA. *See id.* at 724-26 (invalidating Virginia law prohibiting arbitration agreements in motor vehicle franchise agreements unless those agreements were negotiable).

That is true whether or not the rule is characterized as a rule of ethics. In *Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1122-23 (1st Cir. 1989), for example, the First Circuit invalidated an ethical ban on the use of nonnegotiable arbitration agreements by state-regulated securities broker-dealers. The court rejected the argument that it mattered that the ethical rule did not address arbitration agreements themselves, but rather "purport[ed] to address broker-dealers who would require customers to sign [arbitration agreements]." *Id.* at 1122. "Even if we grant the claim

that a contract made in the face of such an ethical order to a contracting party would be enforceable . . . the [ethical order] would still be preempted." *Id.* at 1122-23. Thus, just as Maine could not enact a "Franchisee Code of Conduct" barring business owners from entering into arbitration agreements, Maine cannot selectively discriminate against arbitration by enacting ethical rules making it harder for attorneys to enter into otherwise valid arbitration agreements. *See Kindred*, 137 S. Ct. at 1428 (noting that allowing States to burden formation of arbitration agreements "would make it trivially easy for States to undermine the Act—indeed, to wholly defeat it").

II. The Decision Below Conflicts With The Decisions Of Other Federal Courts.

Snow does not dispute that the decision below conflicts with the District of Maine's decision upholding the very same arbitration agreement at issue in this case, and holding that the FAA preempted the very informed-consent requirement adopted by the court below. *Bezio v. Draeger*, No. 2:12-CV-00396, 2013 WL 3776538, at *3 (D. Me. July 16, 2013), *aff'd on other grounds*, 737 F.3d 819 (1st Cir. 2013). Snow emphasizes that the First Circuit affirmed that decision on alternative grounds, predicting—incorrectly, it turns out—that the Maine SJC would not adopt such an informed-consent rule. *See Bezio v. Draeger*, 737 F.3d 819, 825 (1st Cir. 2013). But that does not counsel against certiorari. Far from "lay[ing] to rest any possibility that the First Circuit's decision could lead to a different result in a case brought in a Maine federal court," Br. in Opp'n 3, the Maine SJC's decision below brings the

conflict with the district court's decision in *Bezio* to the fore. Going forward, federal courts will no longer be able to avoid the question whether Maine's informed-consent rule complies with the FAA, and the *only* decision considering that question has held that it does. In *Kindred*, this Court granted certiorari when presented with precisely the same type of split between the state supreme court and the federal district courts in that state. Petition for Certiorari 17-19, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S. Ct. 1421 (2017) (No. 16-32), 2016 WL 3640709.

Snow also does not dispute that other circuits have held that it violates the FAA to impose a heightened consent requirement on arbitration agreements because those agreements waive an individual's jury-trial right. As the Third Circuit explained, "applying a heightened 'knowing and voluntary'" standard to arbitration agreements because they relinquish "valuable rights" is "inconsistent with the FAA." *Morales v. Sun Contractors, Inc.*, 541 F.3d 218, 223-24 (3d Cir. 2008); *accord Smith v. Lindemann*, 710 F. App'x 101, 104 (3d Cir. 2017) ("[T]o the extent Smith seeks a more searching review of the advice attorneys provide new clients when an agreement to arbitrate is at issue, her argument is foreclosed by the FAA."). Or, as the Ninth Circuit put it, requiring informed consent for arbitration agreements because they waive "a party's fundamental constitutional rights to trial by jury and access to the courts" runs "contrary to the FAA" because it "disproportionally applies to arbitration agreements." *Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1160-61 (9th Cir. 2013).

Snow argues that these decisions are irrelevant because the Maine SJC's decision does not in fact apply an informed-consent requirement to arbitration agreements because those agreements waive the jury trial right. *See* Br. in Opp'n 13-14. But the Maine SJC left no doubt on that score: it stated that it was applying a "heightened" informed-consent requirement to attorney-client arbitration agreements because those agreements "waive" the client's "fundamental right" "to a jury trial in civil matters." Pet. App. 12a (quoting *DiCentes v. Michaud*, 1998 ME 227, ¶ 7, 719 A.2d 509) (internal quotation mark omitted). The Third Circuit and Ninth Circuit agree that such reasoning conflicts with the FAA.

At bottom, Snow does not dispute that if the Maine SJC said what it meant, its informed-consent rule is in conflict with the FAA, this Court's decision in *Kindred*, and the decisions of numerous federal courts. This Court should take the Maine SJC at its word and grant the petition.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

MATTHEW S. HELLMAN
Counsel of Record
ADAM G. UNIKOWSKY
WILLIAM K. DREHER
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW,
Suite 900
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com