IN THE SUPREME COURT OF MISSOURI

BRIDGECREST ACCEPTANCE CORPORATION, Appellant/Plaintiff, v. KELLY DONALDSON and ROBER HAULCY, Respondents/Defendants.	)	SC 99269

SUGGESTIONS OF *AMICI CURIAE*
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND MISSOURI CHAMBER OF COMMERCE AND INDUSTRY
IN SUPPORT OF BRIDGECREST ACCEPTANCE CORPORATION'S
APPLICATION FOR TRANSFER

This case necessitates the Court's review. The U.S. Supreme Court has repeatedly instructed state courts to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). Yet, as here, certain Missouri courts continue to invalidate arbitration agreements by imposing requirements on them not required for other types of contract provisions.

This case raises two devices used to improperly invalidate arbitration clauses. First, the lower court isolated the arbitration clause from the broader contract, stating that obligations from the contract are not consideration for the arbitration clause. Second, rather than apply established consideration requirements, the court imposed a mutual arbitration obligation. Under this theory, a court balances the claims each party agrees to arbitrate and invalidates the agreement if, in its view, the scales are not even. The result is an elusive, inconsistent level of consideration needed to uphold arbitration agreements.

This Court should grant this Application. The ruling below conflicts, not only with U.S. Supreme Court precedent, but with federal and state policies favoring arbitration as a fair, efficient, and less expensive alternative to litigation, including cases in other divisions of the Court of Appeals. The ruling below also upsets settled expectations of the parties and is of great interest and importance to commercial activity because it threatens the enforceability of arbitration agreements in this State.

Interest of *Amici Curiae*

Amici are the Chamber of Commerce of the United States of America and the Missouri Chamber of Commerce and Industry. The U.S. Chamber is the world's largest

business federation. It represents approximately 300,000 direct members and indirectly represents the interests of three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Missouri Chamber is the largest business association in Missouri, representing 40,000 employers. The two organizations advocate for policies and laws that enable businesses to thrive, promote economic growth, and improve people's lives. They regularly file *amici curiae* briefs in cases, like this one, that are of concern to the business community.

Amici and their members have a strong interest in the issues raised by this Application. Many of *amici's* members include arbitration provisions in their contracts. The efficiencies of arbitration reduce the cost of doing business, leading to lower prices for consumers and increased wages for employees. The ruling below injects significant uncertainty as to the enforceability of arbitration agreements across the State.

I. THE RULING BELOW VIOLATES THE FEDERAL ARBITRATION ACT BY IMPOSING REQUIREMENTS ON ARBITRATION AGREEMENTS NOT REQUIRED FOR OTHER TYPES OF CONTRACT PROVISIONS

The Federal Arbitration Act ("FAA") makes arbitration agreements "valid, irrevocable, and enforceable" except on grounds that would invalidate "any contract." 9 U.S.C. § 2. Although the FAA establishes "a liberal federal policy favoring arbitration," courts have occasionally resisted the right of the parties to agree to arbitrate any claim that should arise between them. *Concepcion*, 563 U.S. at 339. As a result, the U.S. Supreme Court has repeatedly stepped in "to reverse the longstanding hostility to arbitration agreements," exhibited by such courts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). This Court has done likewise, *see, e.g., Eaton v. CMH*

Homes, Inc., 461 S.W.3d 426 (Mo. banc 2015), and should do the same here.

The Court should first clarify that severability of an arbitration agreement from contemporaneous related agreements under the FAA, *see Ellis v. JF Enterprises*, LLC, 482 S.W.3d 417, 418 (Mo. banc 2016), does not mean an arbitration provision must have separate consideration, *see Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 169 (6th Cir. 1989). To the contrary, requiring independent consideration for an arbitration clause is the type of special requirement for arbitration provisions that the U.S. Supreme Court has repeatedly rejected. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1425 (2017). Severability is a concept limited to the notion that a party seeking to avoid enforceability of an arbitration provision must bring a discrete challenge to that arbitration provision—not the underlying contract. *See Ellis*, 482 S.W.3d at 418. Consideration for an arbitration agreement can be found anywhere within the contract and can include, as here, the counterparty's agreement to pay costs of arbitration along with a minimum award if the consumer prevails.

The Court should also make clear that the requirement of consideration does not require, as the lower court asserted here, that both sides must mutually agree to arbitrate all or even certain claims. It is not and has never been the law in Missouri or elsewhere that all contract provisions must be mutual or that all types of claims arising under a contract must be resolved in the same way. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 453 (2nd Cir. 1995) ("'[M]utuality of obligation' has been largely rejected as a general principle in contract law."). The parties to a contract are permitted to limit the issues subject to arbitration. *See Concepcion*, 563 U.S. at 344 (citing *Mitsubishi Motors*

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

The U.S. Court of Appeals for the Eighth Circuit has already rejected the mutuality of obligation theory as justification for invalidating arbitration agreements under Arkansas law. *See Plummer v. McSweeney*, 941 F.3d 341, 346 (8th Cir. 2019). The mutually theory "contravene[s] the FAA's directive that courts place arbitration contracts on an equal footing with other contracts." *Id.* State contract law, "for good reason, does not require on 'mutuality of obligation' grounds or any other, that a party's promise, say, to build a house is not enforceable unless the other party also promises to do so." *Id.* at 347 n.1. Thus, no such rule may be applied only to arbitration agreements. *See id.* at 346. Other federal courts of appeals have reached the same conclusion. *See, e.g.*, *Soto v. State Indus. Prods., Inc.*, 642 F.3d 67, 76 (1st Cir. 2011) (recognizing the FAA preempts state attempts to impose mutuality requirements only on arbitration provisions).

Notably, the FAA recognizes no distinction between special rules imposed to void arbitration agreements under the guise of unconscionability and those under the guise of contract formation; both are preempted. *Contra* Ct. App. Op. at *5 (acknowledging this Court has held that an arbitration clause cannot be deemed unconscionable due to a lack of mutuality, but asserting the issue is whether a valid arbitration agreement was formed).

II. CONGRESSIONAL AND JUDICIAL POLICIES FAVORING ARBITRATION REFLECT THE FACT THAT ARBITRATION IS A FAIR, EFFICIENT AND INEXPENSIVE ALTERNATIVE TO LITIGATION THAT BENEFITS BUSINESSES AND INDIVIDUALS

The Court should also grant this Application to give effect to the pro-arbitration policies established by Congress, the U.S. Supreme Court, and this Court. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (explaining the

"advantages of arbitration" including that "it is usually cheaper and faster than litigation," is often simpler, more flexible and less hostile); *Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. banc 2006) (stating "Missouri's preference for the arbitrability of disputes").

The data confirms these advantages. A study of "publicly available data from two of the largest consumer arbitration providers and a national litigation database" found that consumers are more likely to win and to receive higher awards in arbitration than in court, as well as resolve disputes faster. Nam. D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, ndp analytics (Nov. 2020). Also, businesses generally pass cost savings from arbitration to consumers and employees in the form of lower prices and higher wages. *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Action and Arbitration Fees*, 5 J. Am. Arb. 251, 254-56 (2006).

The Court should grant the Application and reverse the ruling below. The strain of cases improperly invalidating arbitration agreements this decision reflects is detrimental to Missouri businesses and consumers that have agreed to arbitration clauses in reliance on their validity under the FAA. They need to know these agreements will be enforced so they can anticipate the costs of dispute resolution and plan their affairs accordingly.

Respectfully submitted,
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CERTIFICATE OF SERVICE

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