No. 17-

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2 of the Federal Arbitration Act ("FAA") (9 U.S.C. § 2) makes written agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 1281.2(c) of the California Arbitration Act (Cal. Code of Civil Proc. § 1281.2(c)) provides that a California state court may "refuse to enforce" an otherwise valid arbitration provision based on the possibility of conflicting rulings in pending litigation with third parties. In *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Jr. University,* 489 U.S. 468, 479 (1989), this Court held that where the parties expressly choose California law to govern their agreement, § 1281.2(c) could be applied to stay an arbitration.

Where an arbitration agreement is governed by the FAA (because it involves interstate commerce), and the agreement is silent on choice of law—containing no provision adopting California (or any state) law—does the FAA preempt application of California Code of Civil Procedure § 1281.2(c), a provision of the California Arbitration Act ("CAA"), where the state statute is being used to deny enforcement of a valid arbitration provision?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Safety National Casualty Corporation is a wholly owned subsidiary of Delphi Financial Group, Inc. Delphi Financial Group, Inc. is a wholly owned subsidiary of Tokio Marine Holdings, Inc. Tokio Marine Holdings, Inc. is publically traded on the Tokyo Stock Exchange.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Safety National Casualty Corporation respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The decision of the California Court of Appeal, Second Appellate District, Division Eight, is reported at 13 Cal. App.5th 471, 220 Cal.Rptr.3d 546 (2017) and reprinted at Appendix ("App.") 1a-18a. The order of the California Supreme Court denying Petitioner's petition for review is not reported, but is reprinted at App. 36a. The opinion of the trial court is not reported, but is reprinted at App. 19a-35a.

JURISDICTION

The California Court of Appeal entered its decision on July 12, 2017. (App. 1a.) The California Supreme Court denied Petitioner's petition for review on October 11, 2017. (App. 36a.) The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, art. VI, Cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be bound thereby, any Thing

> in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1281.2 of the California Code of Civil Procedure, part of the California Arbitration Act ("CAA"), provides in pertinent part:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> (a) The right to compel arbitration has been waived by the petitioner; or

> (b) Grounds exist for the revocation of the agreement.
>
> (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact . . . .
>
> If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(The full text of section 1281.2 is set forth in Appendix D.)

INTRODUCTION

The California Court of Appeal refused to enforce a valid arbitration agreement, in a contract governed by

the FAA, based on a California statute granting the state court discretion to deny enforcement of an arbitration provision where there is the possibility of conflicting rulings in pending litigation with third parties. *See* California Code of Civil Procedure § 1281.2(c) ("Section 1281.2(c)"). The California court reached its decision based on the view that state procedural law trumps the FAA unless the contracting parties have expressly adopted the FAA in their agreement (App. 1a-2a), and that "Section 1281.2(c) does not contravene the letter or spirit of the FAA." (App. 13a.)

The decision below follows from and extends the California Supreme Court's decision in *Cronus Investments, Inc. v. Concierge Services,* 35 Cal.4th 376, 107 P.3d 217, 25 Cal.Rptr.3d 540 (2005), which held that Section 1281.2(c) applies to arbitration agreements governed by the FAA, but did "not preclude parties to an arbitration agreement to *expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions, rather than under state procedural law." 35 Cal.4th at 394, 107 P.3d at 229.

The California courts have the law backwards. State statutes that permit a court to deny enforcement of a valid arbitration provision conflict with the FAA and are preempted. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). Only where the contracting parties have expressly adopted state arbitration procedures has this Court approved application of such procedures instead of the FAA. *See Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Jr. University,* 489 U.S. 468, 496 (1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that

state procedural law did not apply under an agreement containing a choice of law provision generally adopting New York law). By flipping the order of priority and allowing state law to control over the substantive rights granted under the FAA, the California courts are acting in conflict with this Court's precedent.

The California courts are also acting in conflict with application of this Court's precedent by other state supreme courts. In *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, this Court held: "Under the [FAA] an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement," even if enforcement of the agreement "requires piecemeal resolution." 460 U.S. 1, 20 (1983). The California Supreme Court has rejected the application of this principle from *Moses H. Cone,* holding the decision "does not address the appropriate procedure in state courts." *Cronus,* 35 Cal.4th at 391, 107 P.3d at 227. Other state supreme courts disagree, holding that *Moses H. Cone*'s principle is a matter of substantive federal law that controls in state courts too. *See, e.g.*, *Taylor v. Extendicare Health Facilities, Inc.*, 637 Pa. 163, 191, 147 A.3d 490, 507 (Pa. 2016), *cert. denied*, 137 S. Ct. 1375 (2017); *Brown v. KFC Nat'l Mgmt. Co.*, 82 Haw. 226, 240, 921 P.2d 146, 160, n.17 (Haw. 1996); *Kennamer v. Ford Motor Credit Co.*, 153 So.3d 752, 763 (Ala. 2014). Here, by applying Section 1281.2(c) to deny enforcement of Petitioner's arbitration agreement, the California court is acting in conflict with *Moses H. Cone* and numerous state court authorities.

To make matters worse, the California courts recognize that their views on Section 1281.2(c) conflict

with that of the Ninth Circuit. *See Cronus*, 35 Cal.4th at 393, 107 P.3d at 229, fn.8 (declining to follow *Wolsey Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998)). The decision below widens that conflict, creating a situation where the enforcement of a valid arbitration agreement covered by the FAA now depends on the fortuity of whether federal jurisdiction is available. No one can deny that Petitioner's arbitration agreement would have been enforced in federal court. As this Court recognizes: "Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court." *Moses H. Cone*, 460 U.S. at 26, fn.34.

California courts have a disturbing trend of hostility towards arbitration extending back thirty years.[1] This

1. *See*, *e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 16-17 (1984) (reversing judgment of California Supreme Court denying enforcement of arbitration agreement and holding the FAA preempts contrary provision of California Franchise Investment Law); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (reversing judgment of California Court of Appeal denying enforcement of arbitration agreement, and holding the FAA preempts contrary provision of California Labor Code § 229); *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008) (reversing judgment of California Court of Appeal denying enforcement of arbitration agreement, and holding the FAA preempts contrary provisions of the California Talent Agencies Act); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 352 (2011) (holding that FAA preempts the California Supreme Court's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, and abrogating contrary California Supreme Court decision); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 471 (2015) (reversing judgment of California Court of Appeal denying enforcement of arbitration

Court's intervention is needed once again to stop that trend. California's violation of federal authorities is so manifest in this case that a summary reversal may be appropriate.

STATEMENT OF THE CASE

Petitioner Safety National issued an insurance policy to LAUSD that requires arbitration of "any dispute arising out of this Agreement." (App. 3a-4a.) It is undisputed that the insurance coverage conflict at issue falls within the arbitration provision, that the contract involves interstate commerce and therefore is governed by the FAA, and that the insurance contract contains no choice of law provision. (App. 1a-18a.) Despite the clear arbitration provision in the contract, the court below found that Section 1281.2(c) permits a trial court to deny enforcement of an arbitration provision "where the arbitration agreement is governed by the FAA (because it involves interstate commerce), but the agreement has no choice-of-law provision, and no provision stating the FAA's procedural provisions govern the arbitration." (App. 1a-2a.). According to the California court, when an agreement is silent on choice of law, "California procedure applies" and the trial court may apply Section 1281.2(c) to "den[y] an insurer's motion to compel arbitration with its insured, based on the possibility of conflicting rulings in pending litigation with third parties." (App. 2a.). The issue presented is whether the FAA preempts Section 1281.2(c).

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agreement, and holding the FAA preempted the California court's contrary contract interpretation that failed to place arbitration contracts on equal footing with other contracts); *see generally* Lyra Haas, *The Endless Battleground: California's Continued Opposition to the Supreme Court's Federal Arbitration Act Jurisprudence*, 94 B. U. L. Rev. 1419 (2014).

A. The Federal and State Arbitration Statutes

The FAA was enacted in 1925 by Congress "[t]o overcome judicial resistance to arbitration, and to declare a national policy favoring arbitration of claims that parties contract to settle in that manner." *Vaden v. Discover Bank*, 556 U.S. 49, 58 (2009) (internal citations and quotation marks omitted). Under the FAA, "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . 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. The FAA "reflects an 'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 631 (1985).)

The California Arbitration Act ("CAA"), Code of Civil Procedure section 1280 *et seq.*, was enacted in 1927. *See* History and Notes, Deering's Ann. Code Civ. Proc. § 1281.2, citing Stats. 1927, ch. 225, §§ 3, 7. Subdivision (c) of Section 1281.2 was added in 1978. *Id.,* citing Stats. 1978, ch. 260, § 1. "In most important respects, the California statutory scheme on enforcement of private arbitration agreements is similar to the [FAA]," due in large part to the fact that both the FAA and CAA "share origins in the earlier statutes of New York and New Jersey." *Rosenthal v. Great Western Fin. Securities Corp.,* 14 Cal.4th 394, 406, 926 P.2d 1061, 1067, 58 Cal.Rptr.2d 875 (1996). For example, like the FAA, the CAA provides that a written arbitration agreement is "valid, enforceable,

and irrevocable, save upon such grounds as exist for the revocation of any contract." Cal. Code Civ. Proc. § 1281. And like the FAA, the CAA permits a trial court to stay litigation pending completion of a related arbitration. *See* 9 U.S.C. § 3; Cal. Code Civ. Proc. § 1281.2(c).

But in at least one important respect—and of central concern to this dispute—the FAA and the CAA conflict: only Section 1281.2(c) permits a trial court to "refuse to enforce" a valid arbitration provision. *See* Cal. Code Civ. Proc. §1281.2(c) (where "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact," a trial court "may *refuse to enforce* the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding[.]") (emphasis added.) That is the provision the court below relied upon to deny enforcement of the arbitration provision in the Safety National insurance contract. (App. 34a.)

B. The Arbitration Agreement and Underlying Dispute.

Petitioner Safety National Casualty Corporation is a defendant in the action entitled *Los Angeles Unified School District v. Ace Property and Casualty Insurance Company, et al.*, currently pending in Los Angeles Superior Court, Case No. BC593234. The action involves an insurance coverage dispute between Plaintiff Los Angeles Unified School District and 27 of its insurers.

Safety National issued a high-level excess liability policy to LAUSD for a period of 13 months in 1982-83. (App. 3a; 3AA(14)0588-590.)[2] The policy is subject to limits of $5,000,000 per occurrence, excess of $20,000,000 per occurrence and a self-insured retention of $1,500,000. *Id.* The policy contains an arbitration clause, which provides, *inter alia*, that "any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration." (App. 3a-4a (text of provision); 3AA(14)0597.) The policy contains no choice of law provision. (App. 8a.)

In its complaint, LAUSD alleges the insurers each breached their insurance contracts and that some insurers (but not Safety National) tortiously breached the covenant of good faith and fair dealing by refusing to provide coverage—under more than 100 insurance policies spanning 1975-2012—for third party claims and lawsuits referred to collectively as the Miramonte litigation. These third party claims alleged that LAUSD's negligence "in hiring, retaining, and supervising caused hundreds of students to be repeatedly exposed to abuse by two teachers working at Miramonte Elementary School for decades…." (App. 2a; 1AA(1)0022[p.1:12-15].)

LAUSD seeks declaratory relief and claims more than $200 million in damages. The complaint alleges 203 causes of action against the various insurers, including two against Safety National for declaratory relief as to the duties to indemnify and to defend or pay defense costs, and one against all the insurers seeking a declaration that

2. Citations to the underlying record appendix filed with the California Court of Appeal take the following form: VolumeAA(Tab)Page[Pincite].

the Miramonte litigation constitutes a single occurrence under the insurance policies, such that "all defense and indemnity sums incurred by or on behalf of the [plaintiff] in connection with that Litigation result from that single occurrence." (App. 3a; 2AA(1)0277[p.256:1-3].) The remaining 200 causes of action do not name Safety National. (2AA(1)0386-394.) The lawsuit is currently pending without a trial date.

Although Safety National is a citizen of Missouri, it could not remove this action to federal court because it was sued along with a defendant that is a resident of California. (1AA(1)23-24, 26, 28.) Thus, diversity jurisdiction did not exist. *See* 28 U.S.C. §1332.

C. The Trial Court Proceedings.

Safety National filed a motion to compel arbitration and to dismiss or stay the action against it in accordance with the arbitration provision and the FAA. (App. 4a; 2AA(2)0423-436, (3)0437-446.) Because the dispute came within the agreement to arbitrate, Safety National contended the trial court was required under the FAA to direct the parties to proceed to arbitration in accordance with the terms of the agreement. (App. 4a; 2AA(3)0444[p.6:10-15].)

LAUSD opposed the motion, proffering multiple arguments, including that Section 1281.2(c) applied and compelled denial of the motion because the dispute arose out of a series of related transactions and there was a possibility of conflicting rulings; and that the FAA's "procedural provisions" do not apply unless the contract contains a choice-of-law clause expressly incorporating

those provisions. (App. 4a; 3AA(15)0614-636.) Safety National is the only party seeking arbitration. No other party besides LAUSD opposed Safety National's motion to compel arbitration.

The trial court denied the motion to compel arbitration based on Section 1281.2(c). (App. 5a; 3AA(20)0666-677.) The court found: (1) that "by purchasing the insurance coverage under the Safety National policy, LAUSD agreed to arbitration" (App. 26a; 3AA(20)0671[p.6:1-2]); (2) that "an agreement to binding arbitration exists" (App. 27a: 3AA(20)0671[p.6:17]); (3) that "the dispute at the center of this litigation—insurance coverage for the events arising from the underlying *Miramonte* litigation—falls under the agreement to arbitrate" (App. 26a-27a; 3AA(20)0671[p.6:11-14]); and (4) that "the FAA applies to the agreement" because "the insurance transaction between Safety National, a Missouri insurer, and LAUSD, a California school district, 'involves commerce'" within the ambit of the FAA. (App. 28a-29a; 3AA(20)0672-673 [p.7:27-p.8:6].)

Relying on California state court precedent purporting to interpret the FAA (*Valencia v. Smyth,* 185 Cal.App.4th 153, 110 Cal.Rptr.3d 180 (2010)), the trial court ruled: "[I]f a contract involves interstate commerce, the FAA's *substantive* provision (9 U.S.C. § 2) applies to the arbitration. But the FAA's *procedural* provisions (9 U.S.C. §§ 3, 4, 10, 11) do not apply unless the contract contains a choice-of-law clause expressly incorporating them." (App. 29a; 3AA(20)0673 [p.8:7-10], quoting *Valencia,* 185 Cal.App.4th at 173-174, italics in original, underlining by the trial court.) Instead, the trial court held that "California rules of procedure govern the agreement"

because "there is no choice-of law provision in the Safety National arbitration agreement which expressly incorporates the FAA's procedural provisions." (App. 29a; 3AA(20)0673[p.8:11-15].) According to the trial court, "[Section] 1281.2(c)'s procedural rule permits the Court to *not* order the parties to arbitrate where a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact." (App. 32a; 3AA(20)0675[p.10:1-4].)

In effect, the trial court found California rules of procedure, including Section 1281.2(c), trumped the FAA where the parties had not expressly adopted the FAA in their contract.

Turning to application of Section 1281.2(c), the trial court refused to enforce the arbitration provision in the Safety National policy because "LAUSD is also a party to the instant court action with several insurers which are not parties to the Safety National-LAUSD arbitration agreement," and that the action "arises out of a series of related transactions – namely, LAUSD's alleged entitlement to insurance coverage arising out of the underlying *Miramonte* litigation." (App. 32a; 3AA(20)0675[p.10:6-9].) The court further found that "[t]here certainly is a possibility of conflicting rulings on common issues of law or fact if the Safety National-LAUSD arbitration were to proceed concurrently with the litigation of the LAUSD's case against the insurers," because, as LAUSD argued, the *Miramonte* litigation represents a single occurrence under the insurance contracts and "depending on the outcome of the occurrence

question, it may or may not trigger potential excess coverage obligations on the part of Safety National." (App 32a-33a; 3AA(20)0675[p.10:9-18].)

The trial court concluded that "[u]nder these circumstances, the Court has discretion under § 1281.2(c) to refuse to enforce the arbitration agreement and order joinder of all parties in a single proceeding. There is no need to order joinder…since the Defendant insurers are already before the Court. The Court need only decline to enforce the arbitration agreement, consistent with § 1281.2(c). For these reasons, the motion to compel arbitration is denied." (App. 34a; 3AA(20)0676[p.11:9-15].)

D. The Decision Below.

In its published decision, the California Court of Appeal affirmed the trial court's order denying arbitration. (App. 1a-18a.) The court held that California procedure applies "where the arbitration agreement is governed by the FAA (because it involves interstate commerce), but the agreement has no choice-of-law provision, and no provision stating the FAA's procedural provisions govern the arbitration." (App. 1a-2a.)

In reaching its conclusion, the court principally relied on the California Supreme Court's decision in *Cronus Investments, Inc. v. Concierge Services,* 35 Cal.4th 376, 107 P.3d 217, 25 Cal.Rptr.3d 540 (2005). (App. 9a-13a.) In *Cronus*, the California Supreme Court interpreted *Volt* to mean that the FAA "does not preempt the application of section 1281.2, subdivision (c) *where the parties have agreed that their arbitration agreement would be governed by the law of California.*" *Cronus*, 35 Cal.4th

at 380, 107 P.3d at 219 (emphasis added). In that context, the California Supreme Court held Section 1281.2(c) does not conflict with the FAA nor does it contravene the spirt of the FAA because "'[t]here is no federal policy favoring arbitration under a certain set of procedural rules,'" and the parties are free to fashion their private arbitration agreement as they see fit. *Id.* at 391-92, quoting *Volt,* 489 U.S. at 476.[3]

The court of appeal read *Cronus* as concluding "*both* that section 1281.2(c) does not conflict with the procedural provisions of the FAA *and* that section 1281.2(c) does not contravene the substantive goals and policies of the FAA." (App. 10a.) The court of appeal quoted the *Cronus* decision's explanation of Section 1281.2(c) as "'determining only the efficient order of proceedings [and] not affect[ing] the enforceability of the arbitration agreement itself.'" (App. 10a, fn. 2, quoting *Cronus,* 35 Cal.4th at 389-390, 107 P.3d at 225-26 which in turn quotes *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 688 (1996) (explaining the *Volt* decision).) And it relied on a lengthy quote from *Cronus* describing the function of Section 1281.2(c) as in harmony with the FAA (but with reference only to the trial court's power under 1281.2(c) to "stay arbitration" or "stay the lawsuit," not the court's power to "refuse to enforce" the arbitration provision). (App 11a-12a, quoting *Cronus,* 35 Cal.4th at 393, 107 P.3d at 228-29.) The court of appeal concluded that where the parties do not expressly designate application of the FAA procedures, "California procedures necessarily apply." (App. 13a.)

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3. No party filed a petition for a writ of certiorari to review the California Supreme Court's *Cronus* decision.

Finally, turning to application of Section 1281.2(c), the court held that denial of Safety National's motion to compel arbitration was proper because the conditions of Section 1281.2(c) were satisfied. (App. 14a-18a.)

Safety National's timely petition for review to the California Supreme Court was denied October 11, 2017. (App. 36a.)

REASONS FOR GRANTING THE PETITION

A. The California Decision Conflicts with the FAA, This Court's Precedent, and Decisions from the High Courts of Other States.

The decision below conflicts with the FAA, this Court's precedent, and decisions from other states in several respects, including by (1) giving priority to state law over federal law, (2) failing to enforce the plain language of FAA §2, and (3) concluding that avoiding piecemeal litigation provides a basis to refuse to enforce a valid arbitration agreement governed by the FAA.

1. By holding that absent an express election of the FAA in the contract, Section 1281.2(c) governs any arbitration agreement litigated in California court, even agreements involving interstate commerce, the decision below violates the Supremacy Clause and defies both the FAA and this Court's precedent. In *Volt,* this Court addressed Section 1281.2(c) specifically, and held the state statute applied in that case *because* the parties expressly elected to "abide by state rules of arbitration." *Volt*, 489 U.S. at 479 ("Where [] the parties have agreed to abide by state rules of arbitration, enforcing those

rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.") But where the parties have not expressly adopted California law, and the contract involves interstate commerce, the FAA governs and Section 1281.2(c) is preempted.

The California court's decision flouts this Court's *Volt* decision by adopting the opposite rule: a contract which involves interstate commerce is subject to Section 1281.2 (c) *unless* there is an affirmative adoption of the FAA. (1a-2a.) The court reached its conclusion by relying, in part, on the California Supreme Court's statement in *Cronus* that nothing "preclude[s] parties to an arbitration agreement to *expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions, rather than under state procedural law." *See* 35 Cal.4th at 394, 107 P.3d at 229.

In effect, the California courts hold that the state's arbitration rules govern by default where the parties have not expressly adopted the FAA, even if those rules permit the court to refuse to enforce the arbitration agreement on grounds that do *not* "exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This view is at odds with settled federal law. *See, e.g.*, *Porter Hayden Co. v. Century Indem. Co.,* 136 F.3d 380, 383 (4th Cir. 1998) ("[A]bsent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to govern."); *see also* cases cited in Section B, *infra*. The view is also at odds with this Court's decision in *Mastrobuono*, 514 U.S. at 59, which recognized that where a contract otherwise

governed by the FAA is silent on choice of law, the FAA necessarily applies.

In *Mastrobuono*, the parties' contract had an arbitration provision and a choice of law clause selecting New York law. *Id.* at 58-59. The Circuit Court interpreted the choice of law clause to incorporate New York's decisional law that arbitrators, unlike courts, may not award punitive damages, despite the fact that the clause did not reference punitive damages. *Id.* at 54–55 (citing *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 358 N.E.2d 793 (1976)). The Court held that general choice of law provisions incorporating a specific state's laws are not sufficient to defeat arbitration rights. 514 U.S. at 60-64. In other words, to incorporate state procedural rights that limit or defeat arbitration (such as Section 1281.2(c)), the contract's choice of law provision must clearly incorporate the state's procedural laws, as was the situation in *Volt*. *See Volt*, 514 U.S. at 474 (expressly declining to review the state court's interpretation of the arbitration agreement as incorporating California's procedural rules).

To make its point, this Court explained in *Mastrobuono* that if the contract had not contained a New York choice of law provision, the FAA would have governed: "if a similar contract, *without a choice-of-law provision*, had been signed in New York and was to be performed in New York, presumably 'the laws of the State of New York' would apply, even though the contract did not expressly so state. In such event, there would be nothing in the contract that could possibly constitute evidence of an intent to exclude punitive damages claims. Accordingly, punitive damages would be allowed because, *in the absence of contractual*

intent to the contrary, the FAA would pre-empt the Garrity rule." *Id*. at 59 (emphasis added). In other words, unless the contracting parties have expressly adopted state arbitration procedures, the FAA governs. While the California Supreme Court in *Cronus* attempted to distinguish Section 1281.2(c) from the state rule addressed in *Mastrobuono* (*Cronus*, 35 Cal.4th at 393, 107 P.3d at 228), the court of appeal decision below was more blunt: "where, as here, the parties do not '*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law' (*Cronus* [35 Cal.4th at 394]), California procedures necessarily apply." (App. 13a)

The California courts, including *Cronus* and the court below, have given *Volt* too broad a reading—one that cannot be reconciled with this Court's precedent. In *Cronus*, the California Supreme Court held that Section 1281.2(c) applied to allow a court to stay arbitration, even when the arbitration agreement expressly provided that the parties' choice of California law "shall not be deemed an election to preclude application of the [FAA], if it would be applicable." *Cronus*, 35 Cal.4th at 380, 393-94, 107 P.3d at 219, 228-29. In the present case, the California court of appeal extended *Cronus* further, by holding that Section 1281.2(c) can be invoked to deny the right to arbitrate under a contract governed by the FAA even when there is no attempt whatsoever to choose a particular state's procedural laws to displace the FAA's rules. (App. 8a-9a ["Under these circumstances [e.g., no choice of law], we hold the principles discussed in *Cronus* compel the conclusion that [Section 1281.2(c)] applies in California courts."].)

The California courts have the law backwards. They assume that Section 1281.2(c) is available to deny parties their right to arbitrate unless the arbitration agreements expressly provides that the FAA controls. *See Cronus*, 35 Cal.4th at 229, 107 P.3d at 394 ("[o]ur opinion does not preclude parties to an arbitration agreement to *expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions, rather than under state procedural law."); (App. 8a-9a.)

This reversal in assumptions stems from the California Supreme Court's misapplication of *Volt* and *Mastrobuono*. In *Cronus*, the California court put forth the following approach: "Under United States Supreme Court jurisprudence, we examine the language of the contract to determine whether the parties intended to apply the FAA to the exclusion of California procedural law and, if any ambiguity exists, to determine whether Section 1281.2(c) conflicts with or frustrates the objectives of the FAA." *Cronus*, 35 Cal.4th at 383, 107 P.3d at 221. This flips the burden. Application of the FAA is not conditioned on the contracting parties' consent; the FAA applies to every contract that involves interstate commerce.

In contrast, this Court made clear in *Volt* and *Mastrobuono* that the application of state arbitration rules in place of the FAA depends on the contracting parties' intent to apply the state arbitration law. *See Volt*, 489 U.S. at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."); *Mastrobuono*, 514 U.S. at 60-64 (holding that general choice of law provisions

incorporating a specific state's laws are not sufficient to defeat arbitration rights). The Decision below cannot be squared with *Volt* and *Mastrobuono*.

2. By permitting California's Section 1281.2(c) to be used to deny enforcement of a valid arbitration provision where the parties have not adopted California law in their contract, the California court's decision defies the plain language of the FAA's § 2 and numerous decisions of this Court construing that language. Section 2 commands that an arbitration agreement involving interstate commerce "shall be valid, irrevocable, and enforceable save upon such grounds as exist…for the revocation of any contract." 9 U.S.C. § 2. This broad principle of enforceability embodied in Section 2 "is [not] subject to any additional limitations under state law." *Southland*, 465 U.S. at 11. By permitting the trial court to "refuse to enforce" the arbitration provision in the Safety National insurance contract, forcing Safety National to litigate in court a dispute involving interstate commerce that the parties agreed to arbitrate, Section 1281.2(c) violates § 2 of the FAA and is pre-empted. *See Volt*, 489 U.S. at 478 ("the FAA pre-empts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'") (quoting *Southland*, 465 U.S. at 10.)

Although this Court in *Volt* held that application of Section 1281.2(c) in that case did not conflict with the FAA, that holding turned on the parties' agreement "to abide by state rules of arbitration." 489 U.S. at 479. Importantly, *Volt* does not hold that Section 1281.2(c) always controls over the terms of the FAA; it held that the parties, by agreement, may choose to follow Section 1281.2(c) instead

of the FAA's general rules. Enforcing arbitration pursuant to state procedures such as California's Section 1281.2(c) is not inconsistent with the FAA when the contract provides that *the parties elect to adopt such state procedures*. *Id*. At least one commentator has observed that application of Section 1281.2(c) likely would have been preempted in *Volt* absent the parties' express adoption of California law.[4]

Furthermore, the issue presented in *Volt* was a *stay* of arbitration under Section 1281.2(c), not, as is the case here, an outright denial of arbitration. *See Volt,* 489 U.S. at 471, 479. In explaining its *Volt* decision, this Court has twice made reference to the fact that only a stay of arbitration was at issue in *Volt*. *See Doctor's Associates,* 517 U.S. at 688 ("*Volt* involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the resolution of a related judicial proceeding."); *Preston v. Ferrer*, 552 U.S. 346, 360-361 (2008) (also explaining *Volt* as addressing only a stay of litigation). In *Doctor's Associates*, the Court further explained that application of a stay under Section 1281.2(c) in *Volt* did not undermine the goals and policies of the FAA because "[t]he state rule [§ 1281.2(c)] examined in *Volt* determined

4. See C. Drahozal, *Federal Arbitration Act Preemption,* 79 Ind. L.J. 393, 406 (2004) ("Although the Court did not say so in *Volt*, § 1281.2(c) likely would have been preempted by the FAA in the absence of the choice-of-law clause. (Indeed, the entire rationale of *Volt* would have been unnecessary otherwise.)"). *See, e.g.*, *BioMagic Inc. v. Dutch Brothers Enterprises*, LLC, 729 F.Supp.2d 1140, 1143 (C.D. Cal. 2010) (recognizing that under §3 of the FAA "if there's a chance of conflicting rulings in an arbitration and litigation, the court may *not* stay the arbitration.") (emphasis added).

only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself." *Doctor's Associates,* 517 U.S. at 688.

But Section 1281.2(c) involves more than simply the efficient order of proceedings—it also empowers the trial court to "refuse to enforce" an arbitration provision, which is what the trial court relied on here. (App. 34a.) This Court has never addressed whether the "refus[al] to enforce" aspect of Section 1281.2(c) comports with the FAA. It does not.

As this Court has stated repeatedly, the "primary purpose" of the FAA is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt,* 489 U.S. at 479; *see also Southland*, 465 U.S. at 16 (the FAA "creat[es] a substantive rule applicable in state as well as federal courts…intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) ("Section 2 … embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'"); *Doctor's Associates*, 517 U.S. at 687 ("Courts may not…invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995) ("state courts cannot apply state statutes that invalidate arbitration agreements."); *Preston*, 552 U.S. at 349-50 ("[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.").

Thus, when the California court below stated that "Section 1281.2(c) does not contravene the letter or spirit of the FAA" (App. 13a), repeating a similar statement by the California Supreme Court in *Cronus*, 35 Cal.4th at 393, 107 P.3d at 228, it defies this Court's holdings as to the Congressional intent behind the FAA.

3. The California court's additional justification for applying California law instead of the FAA—that Section 1281.2(c) merely implicates "procedural" provisions of the FAA which are not applicable to the states (App. 11a-13a)—ignores that the conflict presented is with the FAA's *substantive* provision in § 2. In other words, by granting to a trial court the discretion to "refuse to enforce" an arbitration agreement based on case management concerns, Section 1281.2(c)—which applies *only* to arbitration agreements—squarely conflicts with the Congressional directive in the FAA's § 2 that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." This result conflicts with this Court's clear precedent. *See Perry*, 482 U.S. at 492, fn.9 ("[T]he text of § 2 provides the touchstone for choosing between the state-law principles and the principles of federal common law envisioned by passage of that statute…A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2."); *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S.Ct. 1421, 1426 (2017) (under the FAA, "[a] court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that

an agreement to arbitrate is at issue.'") (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).)

Moreover, the same case management concerns that permit a California court to "refuse to enforce" an arbitration provision under Section 1281.2(c)—the presence of other parties or other claims not subject to the arbitration agreement—have been rejected by this Court as a basis to deny arbitration under the FAA. Unlike Section 1281.2(c), the FAA does *not* permit arbitration to be denied because it would be inefficient to maintain two proceedings. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217 (1985) (the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"). And unlike Section 1281.2(c), the FAA does *not* permit arbitration to be denied because the litigation also involves persons not parties to the arbitration agreement. *See Moses H. Cone,* 460 U.S. at 20 ("Under the [FAA] an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement"). As this Court explained in *Moses H. Cone*, the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.*

In *Cronus*, however, the California Supreme Court found that "[*Dean Witter*] and *Moses H. Cone* do not address the appropriate procedure in state courts," characterizing this Court's holdings in those cases as addressing only procedural aspects of the FAA, not the substantive aspects, and therefore inapplicable in state

court. 35 Cal.4th at 391, 107 P.3d at 227. Turning to Section 1281.2(c), the *Cronus* court then concluded, in direct disregard of the holding in *Moses H. Cone*, that nothing in the FAA prevents a California state court from refusing to give effect to an arbitration agreement in order to avoid piecemeal resolution: "Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement. The California provision giving the court discretion not to enforce the arbitration agreement under such circumstances—in order to avoid potential inconsistency in outcome as well as duplication of effort—does not contravene the letter or the spirit of the FAA." 35 Cal.4th at 393 (internal citations omitted). The Decision below relied on this language from *Cronus* to conclude that Section 1281.2(c) "does not contravene the letter or spirit of the FAA." (App. 13a.)

Once again, the California courts have it backwards. The holding in *Moses H. Cone* that arbitration agreements must be enforced, even if it means piecemeal litigation, cannot be dismissed as simply an FAA procedural rule, inapplicable to the states. Under the FAA, "state courts cannot apply state statutes that invalidate arbitration agreements." *Allied-Bruce,* 513 U.S. at 272. Other state courts addressing the same issue have concluded that avoiding piecemeal litigation provides no basis to refuse to enforce an otherwise valid arbitration agreement governed by the FAA. *See, e.g.*, *Taylor v. Extendicare Health Facilities, Inc.*, 637 Pa. 163, 191, 147 A.3d 490, 507 (2016), *cert. denied*, 137 S. Ct. 1375 (2017)("where a plaintiff has multiple disputes with separate defendants arising from the same incident, and only one of those claims is subject to an arbitration agreement, the [United

States Supreme] Court requires, as a matter of law, adjudication in separate forums."); *Brown v. KFC Nat'l Mgmt. Co.*, 82 Haw. 226, 240, 921 P.2d 146, 160, n.17 (1996) ("we deem the reasoning of … *Moses H. Cone Memorial Hosp.* to be controlling"); *Kennamer v. Ford Motor Credit Co.*, 153 So.3d 752, 763 (Ala. 2014)("The United States Supreme Court has recognized that, even though ordering arbitration as to fewer than all defendants may result in proceedings in two forums, the FAA '*requires* piecemeal resolution when necessary to give effect to an arbitration agreement'"); *Ex parte Scrushy*, 940 So.2d 290, 296 (Ala. 2006) ("the United States Supreme Court has also concluded that concepts of judicial economy are secondary to the strong federal policy favoring arbitration.").

In sum, where an arbitration agreement is governed by the FAA (because it involves interstate commerce), and the agreement is silent on choice of law, the FAA preempts application of California Code of Civil Procedure § 1281.2(c), particularly where the state statute is being used, as here, to deny enforcement of a valid arbitration provision. Any other result defies the FAA, the Supremacy Clause and this Court's precedent.

B. The Decision Below Conflicts With Decisions of the Federal Circuit Courts and Creates a Clear Incentive to Forum Shop.

1. Federal courts hold that the FAA presumptively applies, absent an intent to apply a specific state law. In *Ario v. Underwriting Members of Syndicate 53, etc.*, 618 F.3d 277 (3rd Cir. 2010), for example, the Third Circuit explained "[w]e have interpreted the FAA and *Volt* to

mean that 'parties [may] contract to arbitrate pursuant to arbitration rules or procedures borrowed from state law, [and] the federal policy is satisfied so long as their agreement is enforced." *Id.* at 288 (citation omitted). The court further explained "[t]his is not because the agreements 'cease being subject to the FAA,' but is instead because 'the FAA permits parties to 'specify by contract the rules under which …arbitration will be conducted.'" *Id.* (citations omitted). And that, "while parties may opt out of the FAA's default rules, they cannot 'opt out' of FAA coverage in its entirety because it is the FAA itself that authorizes parties to choose different rules in the first place." *Id.* (citation omitted). The Third Circuit concluded: "'[T]he FAA standards control 'in the absence of contractual intent to the contrary.'" *Id.* at 292 (citations omitted).

The First Circuit applied the same analysis in *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996), concluding that the FAA applies absent intent to the contrary. There, the court held federal arbitration law provides "default rules and presumptions" such that "New York law cannot *require* the parties in this case to submit [the question of whether a time bar applied] to a court; the question is whether the parties *intended*, through their general choice of New York law, to adopt for themselves the New York caselaw requiring that courts, not arbitrators, decide the time bar." *Id.* at 593-94.

The other circuits to address the issue agree. *See Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126, 131, (2nd Cir. 1997) cert. denied, 522 U.S. 948, ("[E]ven the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability

issues, unless it is clear that the parties intended state arbitration law to apply on a particular issue"); *Porter Hayden Co. v. Century Indem. Co.* 136 F.3d 380, 383 (4th Cir. 1998) ("[A]bsent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to govern"); *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355, 361 (5th Cir. 2003) (because "the FAA is part of the substantive law of Texas…the FAA applies in an arbitration agreement unless the choice-of-law provision 'specifically exclude[s] the application of federal law'"); *Ferro Corp. v. Garrison Indus.,* 142 F.3d 926, 937 (6th Cir. 1998) (FAA applies where "the choice-of-law clause is not an 'unequivocal inclusion' of [state law]"); *Zell v. Jacoby-Bender, Inc.,* 542 F.2d 34, 37 (7th Cir. 1976) ("[F]ederal law governs the validity of an arbitration agreement when the Federal Arbitration Act is applicable"); *UHC Management Co., Inc. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) ("[W]e will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear"); *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269 (9th Cir. 2002), opinion amended on denial of reh'g 289 F.3d 615 (9th Cir. 2002) ("[T]he strong default presumption is that the FAA, not state law, supplies the rules for arbitration"); *Kong v. Allied Professional Ins. Co.,* 750 F.3d 1295, 1303 (11th Cir. 2014) ("[t]he FAA applies to all contracts involving interstate commerce" such that "if a contract involves interstate commerce, a court must resolve arbitration disputes according to the FAA, regardless of whether that court is a federal court sitting in diversity."). By adopting a contrary rule, one requiring application of

state arbitration procedure *unless* the contracting parties expressly adopted the FAA, the decision below conflicts with this settled federal authority.

2. Additionally, for California litigants in particular, the decision below now creates a clear incentive to forum shop. As it now stands, parties subject to arbitration agreements in California will receive different substantive decisions on whether arbitration is required depending on whether their case is filed in federal or state court. In the Ninth Circuit, arbitration contracts silent on choice of law are subject to the FAA. *E.g. Sovak,* 280 F.3d at 1269. In California state court, under the decision below, contracts silent on choice of law are now subject to Section 1281.2(c) by default. (App. 1a-2a.) In other words, but for being joined in a lawsuit with non-diverse co-defendants, Petitioner Safety National would have had the right to a federal forum, which in turn would have mandated enforcement of the arbitration provision.

This Court has repeatedly recognized that disparities between state and federal enforcement of arbitration provisions are contrary to the intent of Congress in enacting the FAA. *See Moses H. Cone*, 460 U.S. at 26, fn.34 ("Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court."); *Southland*, 465 U.S. at 15 ("We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted."); *Allied Bruce*, 513 U.S. at

272 ("Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases.")

This Court's review is essential to restore uniformity to the rules of law that govern the FAA.

C. The Issue Presented is Exceptionally Important.

1. Review is warranted because "[s]tate courts rather than federal courts are most frequently called upon to apply the … FAA," and "[i]t is a matter of great importance … that state supreme courts adhere to a correct interpretation of the legislation." *Nitro-Lift Technologies, L.L.C. v. Howard,* 568 U.S. 17, 17-18 (2012). And where a state supreme court has declined to review an intermediate appellate court that incorrectly interprets the FAA, review by this Court is appropriate. *E.g.*, *Perry*, 482 U.S. 483, 489 (reversing California Court of Appeal decision that incorrectly interpreted the FAA, after California Supreme Court declined review); *DIRECTV*, 136 S.Ct. 463, 467 (same).

"'It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *Nitro-Lift*, 568 U.S. at 21 (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994)). This Court has repeatedly intervened, and summarily reversed, state court decisions that refused to follow precedent and to enforce valid, binding arbitration provisions. Examples include:

- *Marmet Health Care Center, Inc. v. Brown,* 565 U.S. 530 (2012) (per curiam)—vacating judgment of the Supreme Court of Appeals of West Virginia, where that court "by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing th[e] basic principle" that both "[s]tate and federal courts must enforce the Federal Arbitration Act." *Id*. at 530-31.

- *Nitro-Lift*, 568 U.S. at 20 (per curiam)—vacating the Oklahoma Supreme Court's decision refusing to apply this Court's severability doctrine and instead declaring the underlying contract containing an arbitration provision null and void – a decision which blatantly "disregard[ed] this Court's precedents on the FAA."

- *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011) (per curiam)— vacating the Florida court's refusal to compel arbitration as "fail[ing] to give effect to the plain meaning of the [Federal Arbitration] Act and to the holding of *Dean Witter [Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)]."

- *Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 56-58 (2003) (per curiam)—reversing the Alabama Supreme Court's refusal to apply the FAA based on an "improperly cramped view of Congress' Commerce Clause power" that was inconsistent with this Court's decision in *Allied-Bruce*, 513 U.S. 265.

This case also is a good candidate for summary reversal.

2. Intervention by this Court is also warranted because it furthers the important goal of the FAA in protecting the right to arbitration from state rules hostile to that procedure. As this Court has explained when interpreting the FAA, the "fundamental attributes of arbitration" are "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344, 348 (2011) (citing *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010)). Many businesses, including insurance companies like Safety National, price and structure their contractual obligations around arbitration agreements. And businesses that use standardized contracts on a nationwide basis, like Safety National, rarely include specific state choice of law provisions. These companies rely on the fair enforcement of their contracts to ensure they will not be deprived of the benefits of arbitration. Compelling a party to participate in multi-party litigation, involving many issues that will have no impact on Safety National's own rights and obligations, adds costs to the insurance transaction not contemplated when Safety National priced its products, thereby depriving Safety National of the benefits of the contract with its insured. *See Allied-Bruce,* 513 U.S. at 281 ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.")

Absent intervention by this Court, Safety National will be compelled to litigate in court a dispute the contracting parties agreed to arbitrate. That violates the FAA.

The Court should grant review, reverse the judgment of the California Court of Appeal, and remand the case with instructions to compel arbitration.

CONCLUSION

The petition for writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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December 21, 2017

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT, FILED JULY 12, 2017

COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

B275597

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

SAFETY NATIONAL CASUALTY CORPORATION,

Defendant and Appellant.

July 12, 2017, Opinion Filed

APPEAL from an order of the Superior Court of Los Angeles County, No. BC593234, Kenneth R. Freeman, Judge. Affirmed.

GRIMES, J.

SUMMARY

The question in this case is whether the procedural provisions of the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) apply to a motion to compel arbitration in a

California state court, where the arbitration agreement is governed by the FAA (because it involves interstate commerce), but the agreement has no choice-of-law provision, and no provision stating the FAA's procedural provisions govern the arbitration.

We conclude California procedure applies in these circumstances, and the trial court did not abuse its discretion when it denied an insurer's motion to compel arbitration with its insured, based on the possibility of conflicting rulings in pending litigation with third parties. (Code Civ. Proc., § 1281.2, subd. (c) (section 1281.2(c)).)

FACTS

In September 2015, plaintiff Los Angeles Unified School District sued 27 insurance companies that had issued policies of primary or excess liability insurance to plaintiff. Plaintiff alleged the insurers breached their insurance contracts and tortiously breached the covenant of good faith and fair dealing by refusing to provide coverage—under more than 100 insurance policies spanning the years between 1975 and 2012—for third party claims and lawsuits referred to collectively as the *Miramonte* litigation. These third party claims alleged that plaintiff's negligence "in hiring, retaining, and supervising caused hundreds of students to be repeatedly exposed to abuse by two teachers working at Miramonte Elementary School for decades … ."

Plaintiff sought declaratory relief and more than $200 million in damages. The complaint alleged 203

causes of action against the various insurers, the last one seeking a declaration against all the insurers that the Miramonte litigation constituted a single occurrence under the policies, and "all defense and indemnity sums incurred by or on behalf of the [plaintiff] in connection with that Litigation result from that single occurrence." The lawsuit was designated a complex case. (Cal. Rules of Court, rule 3.400.)

Defendant Safety National Casualty Corporation is one of the 27 insurers. Plaintiff alleged defendant's wrongful refusal to defend and indemnify plaintiff under two policies, the "Safety 82/83 1ST XS Policy" and the "Safety 83/84 1ST XS Policy." (A declaration from defendant says it issued a policy "for at least the policy period June 1, 1982 to July 1, 1983," and that an endorsement "appears to extend coverage for the following year, but there is evidence … that makes it unclear if that extended coverage was subsequently cancelled." The policy "contains limits of $5,000,000 per occurrence excess of $20,000,000 per occurrence, and a self-insured retention of $1,500,000.")

Defendant's policy contained an arbitration clause, and defendant filed a motion to compel arbitration, and to dismiss or stay the action against it. The policy's arbitration clause provides, in pertinent part:

> "As a condition precedent to any right of action under this Agreement, … any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration. The board of

> arbitration will be composed of two arbitrators and an umpire, meeting in St. Louis, Missouri, unless otherwise agreed. [¶] The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. … [¶] … [¶] The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed."

Defendant contended the FAA applied as a matter of law to the parties' dispute, because the policy is a contract evidencing a transaction involving interstate commerce. Because there was a valid agreement to arbitrate encompassing the dispute at issue, defendant argued, the court was required under the FAA to "make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (9 U.S.C. § 4.)

Plaintiff opposed the motion, proffering multiple arguments, including that section 1281.2(c) applied and compelled denial of the motion and that the FAA's procedural provisions do not apply unless the contract contains a choice-of-law clause expressly incorporating those provisions.

Defendant's reply contended the lack of any choice-of-law clause mandated application of the FAA, and even if California rules applied, arbitration would be proper because plaintiff "failed to make any showing to support a finding of possible inconsistent rulings, as is necessary under … section 1281.2(c)."

The trial court denied the motion to compel arbitration. The court found an agreement to binding arbitration existed, and the policies themselves, together with pertinent legal authorities, showed the insurance transaction involved interstate commerce. Relying on *Valencia v. Smyth* (2010) 185 Cal.App.4th 153 [110 Cal. Rptr. 3d 180], the court concluded the FAA's substantive provisions applied, but its procedural provisions did not, because the contract did not contain a clause expressly incorporating those provisions. Accordingly, the court found California rules of procedure governed. The court further found there was a possibility of conflicting rulings under section 1281.2(c). (We will describe the court's comments on the last point in connection with our legal discussion, pt. 3, *post.*)

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends the trial court's application of California's procedural law on arbitration was error, and even if California law applies, the trial court erred in denying arbitration based on the possibility of inconsistent rulings. We disagree on both points.

We review the first question de novo, and the second for abuse of discretion. (*Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1262–1263 [147 Cal. Rptr. 3d 717].)

1. The Legal Background

We begin with a brief description of the relevant statutes and principles.

It is undisputed that the substantive provisions of the FAA govern the arbitration agreement, because the insurance contract involves interstate commerce. As the high court has said, "the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court … ." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 477, fn. 6 [103 L.Ed.2d 488, 109 S.Ct. 1248] (*Volt*).) Section 1 defines the term "commerce," and section 2 is "the primary substantive provision of the FAA … ." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 384 [25 Cal. Rptr. 3d 540, 107 P.3d 217] (*Cronus*).) Section 2 provides in pertinent part that "[a] written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, … 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.)

Sections 3 and 4 of the FAA are procedural provisions. (*Cronus, supra*, 35 Cal.4th at p. 389.) Section 3 of the FAA

provides that if a suit is brought "in any of the courts of the United States" on an issue referable to arbitration under a written arbitration agreement, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement … ." (9 U.S.C. § 3.) Section 4 allows a party aggrieved by an alleged refusal to arbitrate to "petition any United States district court" that would have jurisdiction of the subject matter in a civil action "for an order directing that such arbitration proceed in the manner provided for in such agreement." (9 U.S.C. § 4.)

In California, section 1281.2(c) allows a court to refuse to enforce an agreement to arbitrate, if the court determines that "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."[1] Unlike the procedure in California, the FAA by its terms "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to

1. Under those circumstances, "the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." (§ 1281.2(c).)

which an arbitration agreement has been signed." (*Dean Witter Reynolds Inc. v. Byrd* (1985) 470 U.S. 213, 218 [84 L. Ed. 2d 158, 105 S. Ct. 1238]; *id.* at p. 217 [holding the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums"].)

2. California Procedure Applies.

Many cases have discussed whether and when the FAA's procedural provisions apply in state courts. *Volt* tells us the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." (*Volt, supra*, 489 U.S. at p. 478.) The FAA does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself." (*Volt*, at p. 479.) So, for example, "[w]here … the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." (*Ibid.*)

In this case, however, there is no agreement to abide by state rules, and no agreement to abide by FAA procedural rules. Instead the agreement is completely silent, with no terms mentioning or alluding to the FAA, California law, or any other state law or rules of procedure.

Under these circumstances, we hold the principles discussed in *Cronus* compel the conclusion that California procedure applies in California courts.

Cronus described or established several pertinent principles.

First, the FAA "does not preempt the application of section 1281.2, subdivision (c) where the parties have agreed that their arbitration agreement would be governed by the law of California." (*Cronus, supra*, 35 Cal.4th at p. 380 [describing the holding in *Volt, supra*, 489 U.S. 468].)

Second, the *Cronus* case presented circumstances where the parties agreed that their arbitration agreement would be governed by California law, "but they further agreed that the designation of California law 'shall not be deemed an election to preclude application of the [FAA], if it would be applicable.'" (*Cronus, supra*, 35 Cal.4th at p. 380.) The court concluded that "in this situation, the FAA also does not preempt the application of section 1281.2, subdivision (c)." (*Ibid.*)

Third, in reaching its conclusion, the *Cronus* court stated the analytical principle to be applied: "Under United States Supreme Court jurisprudence, we examine the language of the contract to determine whether the parties intended to apply the FAA to the exclusion of California procedural law and, if any ambiguity exists, to determine whether section 1281.2(c) conflicts with or frustrates the objectives of the FAA." (*Cronus, supra*, 35 Cal.4th at p. 383.)

Fourth, *Cronus* concluded *both* that section 1281.2(c) does not conflict with the procedural provisions of the FAA *and* that section 1281.2(c) does not contravene the substantive goals and policies of the FAA. The court first discussed procedure, and then turned to substance.

In concluding that "the procedural provisions of the FAA [(§§ 3, 4)] and section 1281.2 do not conflict" (*Cronus, supra*, 35 Cal.4th at p. 390), the court observed: "[t]he language used in sections 3 and 4 and the legislative history of the FAA suggest that the sections were intended to apply only in federal court proceedings." (*Id.* at p. 388; see also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1351 [82 Cal. Rptr. 3d 229, 190 P.3d 586] (*Cable Connection*) ["Sections 3 and 4 of the FAA, governing stays of litigation and petitions to enforce arbitration agreements, do not apply in state court"].)[2]

2. *Cronus* also observed that the high court "does not read the FAA's procedural provisions to apply to state court proceedings. '[W]e do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings.' [Citation.] In *Volt*, the high court later confirmed that, 'While we have held the FAA's "substantive" provisions—§§ 1 and 2—are applicable in state as well as federal court [citation], we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court [citations], are nonetheless applicable in state court.' (*Volt, supra*, 489 U.S. at p. 477, fn. 6.) Reaffirming *Volt*'s distinction between the procedural and substantive aspects of the FAA, the court further described section 1281.2(c) as 'determin[ing] only the efficient order of proceedings [and] not affect[ing] the enforceability of the arbitration agreement itself.' [Citation.]" (*Cronus, supra*, 35 Cal.4th at pp. 389–390.)

Cronus also relied on the court's prior decision in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394 [58 Cal. Rptr. 2d 875, 926 P.2d 1061] (*Rosenthal*), quoting *Rosenthal*'s statement (*id.* at p. 409) that, "'Like other federal procedural rules, therefore, "the procedural provisions of the [FAA] are not binding on state courts … *provided applicable state procedures do not defeat the rights granted by Congress*."'" (*Cronus, supra*, 35 Cal.4th at p. 390, italics added by *Rosenthal*.) Further: "'Our statutes do establish procedures for determining enforceability not applicable to contracts generally, but they do not thereby run afoul of the [FAA's] section 2, which states the principle of equal enforceability, but does not dictate the procedures for determining enforceability.'"[3] (*Cronus*, at p. 390.)

Finally, *Cronus* rejected claims that application of section 1281.2(c) would contravene the substantive goals and policies of the FAA (*Cronus, supra*, 35 Cal.4th at p. 387), and that section 1281.2(c) "conflicts with the spirit of the FAA because its application would undermine and frustrate … section 2's policy of enforceability of arbitration agreements." (*Cronus*, at p. 391; see *id.*, pp. 391–393.) The court observed:

"[S]ection 1281.2(c) is *not* a special rule limiting the authority of arbitrators. It is an evenhanded law that

3. In *Rosenthal*, the court held that, while an agreement was subject to the FAA, "the federal provision for a jury trial of questions regarding the existence of an arbitration agreement (9 U.S.C. § 4) does not operate in California state courts." (*Rosenthal, supra*, 14 Cal.4th at p. 402.)

allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds *or* stay the lawsuit while arbitration proceeds to avoid conflicting rulings on common issues of fact and law amongst interrelated parties. Moreover, '[s]ection 1281.2(c) is not a provision designed to limit the rights of parties who choose to arbitrate or otherwise to discourage the use of arbitration. Rather, it is part of California's statutory scheme designed to enforce the parties' arbitration agreements, as the FAA requires. Section 1281.2(c) addresses the peculiar situation that arises when a controversy also affects claims by or against other parties not bound by the arbitration agreement. The California provision giving the court discretion not to enforce the arbitration agreement under such circumstances —in order to avoid potential inconsistency in outcome as well as duplication of effort—does not contravene the letter or the spirit of the FAA.'" (*Cronus, supra*, 35 Cal.4th at p. 393.)

The court concluded: "Our opinion does not preclude parties to an arbitration agreement to *expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law. We simply hold that the language of the arbitration clause in this case, calling for the application of the FAA 'if it would be applicable,' should not be read to preclude the application of 1281.2(c), because it does not conflict with the applicable provisions of the FAA and does not undermine or frustrate the FAA's substantive policy favoring arbitration." (*Cronus, supra*, 35 Cal.4th at p. 394.)

In sum, *Cronus* leaves us with several incontrovertible principles. Section 1281.2(c) does not contravene the letter or spirit of the FAA. (*Cronus, supra*, 35 Cal.4th at p. 393.) California procedure ordinarily applies in California courts, and sections 3 and 4 of the FAA ordinarily do not. (*Cronus*, at p. 388; see also *Cable Connection, supra*, 44 Cal.4th at p. 1351.) Consequently, where, as here, the parties do not "*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law" (*Cronus*, at p. 394), California procedures necessarily apply. (See also *Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619, 632 [181 Cal. Rptr. 3d 622] ["Absent an agreement by the parties to apply the procedural provisions of the FAA to their arbitration, federal procedural rules apply only where state procedural rules conflict with or defeat the rights Congress granted in the FAA."]; *Valencia v. Smyth, supra*, 185 Cal.App.4th at p. 174 ["the procedural provisions of the [California Arbitration Act] apply in *California* courts by default"].)

3. Denial of the Motion to Compel Was Proper.

Defendant argues the trial court abused its discretion when it denied arbitration under the authority of section 1281.2(c). Again, we disagree.

As stated earlier, section 1281.2(c) allows a court to refuse to enforce an arbitration agreement if a party to the agreement is also a party to a pending court action with a third party, "arising out of the same transaction or series of related transactions and there is a possibility

of conflicting rulings on a common issue of law or fact." A trial court "may deny a party's contractual right to arbitration only when all of section 1281.2(c)'s conditions are satisfied." (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 980 [153 Cal. Rptr. 3d 135] (*Acquire II*).)

Defendant contends two conditions are not satisfied.

Defendant first asserts plaintiff's court action against the other insurers does not arise out of "the same transaction or series of related transactions" as plaintiff's action against defendant. Defendant tells us the "transactions at issue" are the insurance contracts issued by each insurer, and "[t]here are no related 'transactions' because the policies were purchased at different times, from different insurers, and involve different contract terms and cover different time periods."

Defendant—who did not make this argument to the trial court—admits that section 1281.2(c) does not define the term "transaction," and cites no authority that supports its constricted notion of the term.[4] The

4. Defendant cites *Acquire II, supra*, 213 Cal.App.4th 959, where "the record fail[ed] to show that … the claims of any group of Plaintiffs who agreed to arbitration and the claims of any group of Plaintiffs who did not agree to arbitration arose out of the same transaction or series of related transactions … ." (*Id.* at p. 973.) The case involved a wide variety of fraud-related claims by 250 investors against the defendants, who had created six different investment funds over a 10-year period to purchase and manage six portfolios of commercial real estate. (*Id.* at pp. 963, 965–966.) The defendants filed six motions to compel six of the 12 groups of plaintiffs to

trial court's view was this: "This litigation arises out of a series of related transactions—namely, [plaintiff's] alleged entitlement to insurance coverage arising out of the underlying *Miramonte* litigation." Defendant says this ruling was "incorrect," but offers no cogent reason for that assertion. Indeed, defendant admits that plaintiff's claims "against all its insurers arise out of a common set of underlying claims," but at the same time insists that plaintiff's dispute "with each insurer arises out of each separate insurance transaction." We think not; the dispute arises out of each insurer's refusal to defend or indemnify against the very same underlying claims, and further arises in the context of plaintiff's claim, against all the insurers, that the Miramonte litigation constituted a single occurrence under the policies. We find no fault in the trial court's assessment.

Defendant's second contention is that plaintiff "failed to provide substantial evidence that there would be a possibility of conflicting rulings on a common issue of law or fact." Specifically, defendant says the "only possibility of inconsistent rulings noted in the trial court's order"

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arbitrate their claims. (The other six groups invested in funds that had no arbitration agreements in their governing documents.) (*Id.* at p. 963.) Each group of plaintiffs invested in different funds or properties, at different times, under separate private placement memoranda, and "executed separate agreements to define their rights and obligations depending on the fund or property in which they invested." (*Id.* at p. 974.) And the plaintiffs' claims "regarding Defendants' management of the funds and properties also arose out of separate transactions because Defendants managed different funds and different properties for each group of Plaintiffs." (*Ibid.*) We see nothing in *Acquire II* that assists defendant in this case.

is whether or not the underlying litigation represents a single "occurrence" for purposes of insurance coverage. And, defendant tells us, "there is no real possibility of either the court or the arbitration panel ruling that there was only one occurrence, and even if one tribunal did, such inconsistent rulings would not impact the triggering of the excess coverage obligations under [defendant's policy] because they are so high level."

Defendant's view is mistaken on multiple levels.

First, "the allegations of the parties' pleadings may constitute substantial evidence sufficient to support a trial court's finding that section 1281.2(c) applies. [Citation.] A party relying on section 1281.2(c) to oppose a motion to compel arbitration does not bear an evidentiary burden to establish a likelihood of success or make any other showing regarding the viability of the claims and issues that create the possibility of conflicting rulings. [Citation.] An evidentiary burden is unworkable under section 1281.2(c) because the question presented is whether a '"possibility"' of conflicting rulings exists [citation] and a motion to compel arbitration is typically brought before the parties have conducted discovery." (*Acquire II, supra*, 213 Cal.App.4th at p. 972.)

Second, defendant's mere assertion "there is no real possibility" that any tribunal would rule there was only one occurrence is of no moment. Defendant tells us "[t]he majority of jurisdictions" follow the rule "that multiple acts of sexual abuse against different victims do not constitute one occurrence" and, in a footnote, cites

10 cases from California and other jurisdictions (one of which held otherwise). Defendant presents no analysis or argument as to why and how these cases are analogous to the facts alleged here, and cites no controlling authority from our Supreme Court. It is obvious that an appellate court cannot decide that issue in the absence of a record developed in the trial court.

Third, we see no error in the trial court's analysis. The court explained: "There certainly is a possibility of conflicting rulings on common issues of law or fact if the [defendant-plaintiff] arbitration were to proceed concurrently with the litigation of the [plaintiff's] case against the insurers. As [plaintiff] notes, its position is that the *Miramonte* litigation represents a 'single occurrence,' entitling it to coverage. While the Court is in no position to make that assessment at this time, the gravamen of this case will require the Court to ultimately resolve this important coverage question. This question will certainly also be part of any arbitration proceeding between [defendant] and [plaintiff]; depending on the outcome of the occurrence question, it may, or may not, trigger potential excess coverage obligations on the part[] of [defendant]. To allow the arbitration to proceed would risk potentially inconsistent results with the Court's ultimate findings in the instant litigation."

Further, the trial court properly rejected the claim defendant repeats on appeal, that even if there were conflicting rulings, "there would be no practical impact on the litigation," because defendant "is a high-level excess carrier and the policy attaches excess of $20

million." Defendant asserts that "even if the $200 million loss alleged by [plaintiff] is divided over the 40 years of coverage, the $5 million assigned to [defendant's] policy year would not impact [defendant's] Policy, which attaches excess of $20 million." Like the trial court, we are not prepared to so conclude as a matter of law. As the court stated: "The Court is not persuaded by [defendant's] argument that [defendant's] potential for coverage, at most, would be for two years, and that any overlap is 'minimal.' The standard under § 1281.2(c) requires only a 'possibility' of conflicting rulings on a common issue of law or fact. Certainly, and at the very least, there is such a possibility here." (Fn. omitted.)

DISPOSITION

The order denying defendant's motion to compel arbitration is affirmed. Plaintiff shall recover its costs on appeal.

Bigelow, P. J., and Sortino, J.,* concurred.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, FILED MAY 31, 2016

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

LASC Case No: BC593234

LOS ANGELES UNIFIED SCHOOL DISTRICT, A SCHOOL DISTRICT,

Plaintiff,

v.

ACE PROPERTY AND CASUALTY INSURANCE COMPANY AS SUCCESSOR-IN-INTEREST TO AETNA INSURANCE COMPANY; ACE PROPERTY AND CASUALTY INSURANCE COMPANY AS SUCCESSOR-IN-INTEREST TO CENTRAL NATIONAL INSURANCE COMPANY OF OMAHA; ACE PROPERTY AND CASUALTY INSURANCE COMPANY AS SUCCESSOR-IN-INTEREST TO INSURANCE COMPANY OF NORTH AMERICA; AIG SPECIALTY INSURANCE COMPANY AS SUCCESSOR-IN-INTEREST TO AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY; AIU INSURANCE COMPANY: ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO RIUNIONE

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ADRIATICA DI SICURTA; ALLIED WORLD NATIONAL INSURANCE COMPANY; ALLIED WORLD NATIONAL ASSURANCE COMPANY AS SUCCESSOR IN-INTEREST TO NEWMARKET UNDERWRITERS INSURANCE COMPANY; ALLSTATE INSURANCE COMPANY AS SUCCESSOR-IN-INTEREST TO NORTHBROOK INSURANCE COMPANY; ASSOCIATED INTERNATIONAL INSURANCE COMPANY; ENDURANCE AMERICAN SPECIALTY INSURANCE COMPANY, AS SUCCESSOR-IN-INTEREST TO TRADERS AND PACIFIC INSURANCE COMPANY; EVEREST NATIONAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE COMPANY: FIRST STATE INSURANCE COMPANY; GRANITE STATE INSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; LEXINGTON INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; NEW ENGLAND REINSURANCE CORPORATION; NORTH AMERICAN SPECIALTY INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; RLI INSURANCE COMPANY; SAFETY NATIONAL CASUALTY CORPORATION AS SUCCESSOR-IN-INTEREST TO SAFETY MUTUAL CASUALTY CORPORATION; STARR INDEMNITY AND LIABILITY COMPANY; UNITED NATIONAL INSURANCE COMPANY; WESTPORT INSURANCE COMPANY, AS SUCCESSOR IN-INTEREST TO EMPLOYERS REINSURANCE CORPORATION; WESTPORT

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INSURANCE CORPORATION AS SUCCESSOR-IN-INTEREST TO MANHATTAN FIRE AND MARINE INSURANCE COMPANY; and DOES 1-250, Inclusive,

Defendants.

COURT'S RULING AND ORDER RE: MOTION TO COMPEL ARBITRATION AND EITHER TO DISMISS OR STAY ACTION AGAINST SAFETY NATIONAL

Hearing Date: May 24, 2016

I.

BACKGROUND

In this insurance coverage litigation, Plaintiff Los Angeles Unified School District ("LAUSD") has sued several of its insurers for allegedly breaching their insurance contracts and committing bad faith in failing to provide coverage for numerous claims and lawsuits. Such lawsuits include complex litigation consolidated in *A.M. v. Los Angeles Unified School District,* LASC Case No. BC4841 11 (also known as the *Miramonte* litigation).[1] The primary and/or excess policies were in effect from August 31, 1975 to July 1, 2012.[2] In all, the complaint alleges 203 causes of action, and seeks $200 million in damages.

1. Complaint, ¶1.

2. Complaint, ¶2.

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One of LAUSD's excess insurers, Safety National Corporation ("Safety National"), has moved to compel arbitration pursuant to the terms of the Safety National policy. For the reasons discussed *infra,* the motion to compel arbitration is denied.

II.

MOTION TO COMPEL ARBITRATION

A. Standards on Petitions/Motions to Compel Arbitration

A written agreement to submit to arbitration, a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. CCP § 1281. California has a strong public policy in favor of arbitration. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and where a patty thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate if it determines an agreement to arbitrate the controversy exists. CCP § 1281.2; *Gorlach v. Sports Club Co.* (2012) 209 Cal.App.4th 1497, 1505 (noting that "when presented with a petition to compel arbitration, the trial court's first task is to determine whether the parties have in fact agreed to arbitrate the dispute"). The initial burden is on the party petitioning to compel arbitration to prove the existence of the agreement by a preponderance of that evidence. *Villacreses v. Molinari* (2005) 132 Cal. App.4th 1223, 1230.

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Once petitioners allege that an arbitration agreement exists, the burden shifts to respondents to prove the falsity of the prompted agreement, and no evidence or authentication is required to find the arbitration agreement exists. *Condee v. Longwood Mgt. Corp.* (2001) 88 Cal.App.4th 215, 219. *See also Brodke v. Alphatec Spine Inc.* (2008) 160 Cal.App.4th 1569, 1575-76 (petition or motion to compel arbitration must allege arbitration agreement exists, and cannot contest it). *But see Bouton v. USAA Casualty Ins. Co.* (2008) 167 Cal.App.4th 412, 423-24 ("in considering a Code of Civil Procedure section 1281.2 petition to compel arbitration, a trial court must make the preliminary determinations whether there is an agreement to arbitrate and whether the petitioner is a party to that agreement (or can otherwise enforce the agreement)"); *Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 633 ("petitioner bears the burden of proving the existence of a valid arbitration agreement ...."); *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal.App.4th 1276, 1284 ("'petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence ....'"); *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (as to a petition to compel arbitration, "petitioner bears the burden of proving its existence by a preponderance of the evidence."); *Banner Ent., Inc. v. Sup. Ct.* (1998) 62 Cal.App.4th 348, 356 (citing *Rosenthal, supra).*

"'Absent a clear agreement to submit dispute to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citation.]" *Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1518.

Further, "the FAA [Federal Arbitration Act] relies on *state*-law contract principles in determining whether an arbitration agreement exists." *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1466.

B. Discussion

1. An Agreement to Arbitrate Exists

As the party moving for arbitration, the burden is on Defendant Safety National to prove, by a preponderance of the evidence, that an agreement to arbitrate exists between itself and Plaintiff LAUSD. The excess liability coverage form also includes a provision entitled "Arbitration," which provides as follows:

> 11. Arbitration
>
> As a condition precedent to any right of action under this Agreement, with the exception of commutation, any dispute arising out of this Agreement shall be submitted to the decision of a board of arbitration. The board of arbitration will be composed of two arbitrators and an umpire, meeting in St. Louis, Missouri, unless otherwise agreed.
>
> The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance comp1mies. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before

instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire with four weeks after their nominations, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots.

The claimant shall submit its initial brief within twenty (20) days from the appointment of the umpire. The respondent shall submit its brief within twenty (20) days after receipt of the claimant's brief and the claimant may submit a reply brief within ten (10) days after receipt of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed.

If more than one Employer is involved in the same dispute, all such Employers shall constitute and act as one party for purposes of this Clause and communications shall be made by the Corporation to each of the Employers constituting the one party; provided, however,

> that nothing therein shall impair the rights of such Employers to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the Employers under the terms of this Agreement from several to joint.
>
> Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceeding shall be allocated by the board.[3]

It is evident that the above provision exists, and that, by purchasing the insurance coverage under the Safety National policy, LAUSD agreed to arbitration. The language providing that "[a]s a condition precedent to any right of action", as well as the language stating that the dispute "shall be submitted to the decision of a board of arbitration" suggests that the parties intended for the arbitration to be binding. "It is the general rule that parties to a private arbitration agreement impliedly agree that the arbitrator's decision will be both binding and final. Indeed, the very essence of the term 'arbitration ... connotes a binding award." *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at 9. As such, the Court is not persuaded by LAUSD's argument to the contrary (that the arbitration agreement calls only for a non-binding, advisory arbitration).

It is also apparent that the dispute at the center of this litigation—insurance coverage for the events arising

3. Hansen Decl., ¶2. Exh. A at 11.

from the underlying *Miramonte* litigation—falls under the agreement to arbitrate. The agreement, as noted above, applies to "any dispute arising out of this Agreement[.]" This language is broad, and necessarily encompasses the coverage claims alleged against Safety National.

Accordingly, tlle Court finds that an agreement to binding arbitration exists.

2. Applicability of FAA vs. CCP §1281.2

The Federal Arbitration Act ("FAA") provides for enforcement of arbitration provisions in any contract "'*evidencing* a transaction *involving* commerce.'" California Practice Guide, Alternative Dispute Resolution, ¶5:50 (*The Rutter Group* 2015) (citing 9 USC §2; *Rent-A-Center West, Inc. v. Jackson* (2010) 130 S. Ct. 2772, 276; *Rogers v. Royal Caribbean Cruise Line* (9th Cir. 2008) 547 F.3d 1148, 1153-1154).

The term "involving commerce" is functionally equivalent to "affecting commerce" and "signals an intent to exercise Congress' commerce power *to the full.*" California Practice Guide, Alternative Dispute Resolution, ¶5:50.1 (The Rutter Group 2015) (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson* (1995) 513 U.S. 265, 277 (emphasis added by Rutter Guide)).

The words "evidencing a transaction" "mean only that the transaction must turn out, in fact, to involve interstate commerce, i.e., the parties need not have intended any interstate activity when they entered into the contract."

California Practice Guide, Alternative Dispute Resolution, ¶5:50.2 (*The Rutter Group* 2015) *(*citing *Allied-Bruce Terminix Cos., Inc. v. Dobson, supra,* 513 U.S. at 277; *Shepard v. Edward Enterprises, Inc.* (2007) 148 Cal. App.4th 1092, 1097). Additionally, the dispute need not arise from the *particular part of the transaction* involving interstate commerce. The FAA applies if the underlying transaction *as a whole* involved interstate commerce. *Shepard v. Edward Mackay Enterprises, Inc., supra,* 148 Cal.App.4th at 1101. A party seeking to enforce an arbitration agreement has the burden of showing FAA preemption. *See Lane v. Francis Capital Management, LLC* (2014) 224 Cal.App.4th 676, 687 (citing *Wools v. Superior Court* (2005) 127 Cal.App.4th 197, 211).

At the outset, the Court must determine whether the insurance transaction at issue "involves commerce." The 9th Circuit recognized that in the context of federal antitrust regulation, "[i]nterstate insurance transactions fall within the definition of interstate commerce[.]" *De Voto v. Pacific Fidelity Life Ins. Co.* (9th Cir. 1975) 516 F.2d 1, 5, cert. denied, 423 U.S. 894. The U.S. Supreme Court declined to except insurance from being beyond the regulatory power of Congress under the Commerce Clause in *U.S. v. South-Eastern Underwriters Ass'n.* (1944) 322 U.S. 533, 553 (noting that "[n]o commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance").

Here, it is evident that the insurance transaction between Safety National, a Missouri insurer, and LAUSD,

a California school district, "involves commerce." The excess policies issued by Safety Mutual Casualty are attached as Exhibits A and B to the motion. While there is an evidentiary burden under California law to demonstrate the transaction involves interstate commerce *(see Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 234), the policies themselves, along with the authorities cited above, show that the insurance transaction involves commerce. As such, the FAA applies to the agreement.

Importantly, however, "if a contract involves interstate commerce, the FAA's *substantive* provision (9 U.S.C. §2) applies to the arbitration. But the FAA's *procedural* provisions (9 U.S.C. §§3, 4, 10, 11) do not apply unless the contract contains a choice-of-law clause expressly incorporating them." *Valencia v. Smyth* (2010) 185 Cal. App.4th 153, 173-174 (italics in original; underlining added). Here, there is no choice-of-law provision in the Safety National arbitration agreement which expressly incorporates the FAA's procedural provisions. As such, those provisions do not apply. Instead, California rules of procedure govern the agreement here. *See Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409 (noting that "[i]t is a 'general and unassailable proposition ... that States may establish the rules of procedure governing litigation in their own courts,' even when the controversy is governed by substantive federal law. [Citation.]")

With that in mind, CCP § 1281.2 "provides a *procedure* by which a party may petition the court to order arbitration of a controversy." *Rosenthal v. Great Western*

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Fin. Securities Corp., supra, 14 Cal.4th at 406 (emphasis added). CCP §1281.2(c) states as follows:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, *unless* it determines that:
>
> (c) A party to the arbitration agreement is *also* a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions *and there is a possibility of conflicting rulings on a common issue of law or fact.* For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

Further, CCP § 1281.2 provides that "[i] f the court determines that a party to the arbitration is also a party

to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding." CCP § 1281.2.

The Practice Guide addresses the effect of § 1281.2(c) as follows:

> When one of the parties to an arbitration agreement is involved in litigation with third party arising out of the same transaction, CCP § 1281.2(c) allows a court to refuse to enforce the arbitration provision or stay arbitration pending the outcome of the related litigation *(see* ¶5:327).The FAA contains no such provision and would require the arbitration to proceed (see 9 USC §§ 3, 4). When the FAA applies, and it is determined that the parties also intended to apply California procedural law, no conflict exists between the procedural provisions of the FAA and CCP § 1281.2(c). A court may apply § 1281.2(c) notwithstanding the FAA. California Practice Guide, Alternative Dispute Resolution, ¶5:49.15 *The Rutter Group* 2015) (citing *Volt*

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Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ. (1989) 489 US 468, 477-479; *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 383, 388-390, 394; *Mastick v. TD Ameritrade, Inc.* (2012) 209 Cal.App.4th 1258, 1263-1264).

Again, pursuant to *Valencia, supra,* absent a specific agreement to apply the FAA's procedural rules to the arbitration, California's procedural rules control. In this case, § 1281.2(c)'s procedural rule permits the Court to *not* order the parties to arbitrate where a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

ln this case, LAUSD is also a party to the instant court action with several insurers which are not parties to the Safety National-LAUSD arbitration agreement. This litigation arises out of a series of related transactions—namely, LAUSD's alleged entitlement to insurance coverage arising out of the underlying *Miramonte* litigation. There certainly is a possibility of conflicting rulings on common issues of law or fact if the Safety National-LAUSD arbitration were to proceed concurrently with the litigation of the LAUSD's case against the insurers. As LAUSD notes, its position is that the *Miramonte* litigation represents a "single occurrence," entitling it to coverage. While the Court is in no position to make that assessment at this time, the gravamen of

this case will require the Court to ultimately resolve this important coverage question. This question will certainly also be part of any arbitration proceeding between Safety National and LAUSD; depending on the outcome of the occurrence question, it may, or may not, trigger potential excess coverage obligations on the party of Safety National. To allow the arbitration to proceed would risk potentially inconsistent results with the Court's ultimate findings in the instant litigation.

The Court is not persuaded by Safety National's argument that Safety National's potential for coverage, at most, would be for two years, and that any overlap is "minimal."[4] The standard under §1281.2(c) requires only a "possibility" of conflicting rulings on a common issue of law or fact. Certainly, and at the very least, there is such a possibility here.

It should also be noted that, based on LAUSD's counsel's review of the 91 insurance policies relevant to this action (and that have been located to date), 53 policies do not have arbitration clauses, 27 policies have arbitration clauses with varied provisions and which designate different locations (California; New York, NY; Boston, MA; St. Louis. MO), and 11 policies follow form to some terms of policies with arbitration clauses.[5] This illustrates that there are multiple third party insurers in this case which are not parties to the arbitration agreement between Safety National and LAUSD.

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4. Safety National's Reply Brief at 8:23.

5. Declaration of Stephen Masterson, ¶2.

Under these circumstances, the Court has discretion under § 1281.2(c) to refuse to enforce the arbitration agreement and order joinder of all parties in a single proceeding. There is no need to order joinder of all parties in a single proceeding, since the Defendant insurers are already before the Court. The Court need only decline to enforce the arbitration agreement, consistent with § 1281.2(c).

For these reasons, the motion to compel arbitration is denied.

3. Missouri Revised Statutes

Given the Court's determination that it will exercise the authority to deny arbitration based on CCP § 1281.2(c), it need not address LAUSD's non-enforceability argument under §435.350 of the Mo. Rev. Statutes.[6]

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6. Mo. Rev. Statutes §435.350 provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Contracts which warrant new homes against defects in construction and reinsurance contracts are not "contracts of insurance or contracts of adhesion" for purposes of the arbitration provisions of this section.

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III.

RULING AND ORDER

For the foregoing reasons, Safety National's motion to compel arbitration against LAUSD is denied.

Dated: May 31, 2016

/s/_____
Kenneth Freeman
Judge of the Superior Court

APPENDIX C — DENIAL OF PETITION FOR REVIEW BY THE SUPREME COURT OF CALIFORNIA, FILED OCTOBER 11, 2017

IN THE SUPREME COURT OF CALIFORNIA

S243836

En Banc

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Plaintiff and Respondent,

v.

SAFETY NATIONAL CASUALTY CORPORATION,

Defendant and Appellant.

Court of Appeal, Second Appellate
District, Division Eight - No. B275597

The petition for review is denied.

/s/_____
Chief Justice

APPENDIX D — RELEVANT STATUTORY PROVISIONS

California Code of Civil Procedure Section 1281.2

§ 1281.2. Order to arbitrate controversy; petition; determination of court

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

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If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.