No.

In the Supreme Court of the United States

SUNTRUST BANK,
PETITIONER,

v.

CHARLES DANIEL BICKERSTAFF, AS EXECUTOR OF THE ESTATE OF JEFF BICKERSTAFF, JR., ON BEHALF OF HIMSELF AND ALL PERSONS SIMILARLY SITUATED,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) "requires courts to place arbitration agreements on equal footing with all other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017). This Court has repeatedly applied that principle to invalidate state court rules that "apply only to arbitration," *id.* at 251, or that allow parties to an arbitration agreement to "abrogate that agreement after the fact." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 650 (2022).

In *Bickerstaff v. Suntrust Bank*, 788 S.E.2d 787 (2016) (*Bickerstaff II*), the Georgia Supreme Court nullified a provision in SunTrust's deposit agreement requiring individual customers to provide timely and particularized written notice to opt out of arbitration. The court held that by filing a class-action lawsuit, the plaintiff had effectively opted out of arbitration not only for himself, but for thousands of unnamed class members. Federal courts have declined to endorse that reasoning, recognizing that "[a]n arbitration-specific rule, such as the one set forth in *Bickerstaff*, would be preempted by the FAA." *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1093 (9th Cir. 2018). But in the decision below, the Georgia Court of Appeals doubled down, broadening *Bickerstaff II* to reach even those class members whose agreements expressly prohibit opting out via lawsuit. The Georgia Supreme Court subsequently denied review.

The question presented is:

Whether the FAA preempts a state court rule permitting a proposed class representative to effectively opt out of arbitration on behalf of all unnamed class members notwithstanding contrary, express requirements in the arbitration agreement.

PARTIES TO THE PROCEEDING

Petitioner SunTrust Bank was defendant in the trial court and appellant in the Georgia Court of Appeals.

Respondent, Charles Daniel Bickerstaff, as executor of Jeff Bickerstaff, Jr.'s estate and on behalf of himself and all others similarly situated, was the lead plaintiff in the trial court and appellee in the Georgia Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner SunTrust Bank has been succeeded in interest by Truist Bank, which is a wholly owned subsidiary of Truist Financial Corporation. No publicly held corporation owns 10% or more of Truist Financial Corporation's stock.

RELATED PROCEEDINGS

There are no proceedings in state or federal courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii) except as follows:

SunTrust Bank v. Bickerstaff, Nos. A24A1700, A24A1701, A24A1702 (Ga. App. Feb. 20, 2025), cert. denied, No. S25C0969 (Ga. Oct. 1, 2025).

SunTrust Bank v. Bickerstaff, No. A18A1519 (Ga. App. Mar. 6, 2019) (affirming motion for class certification).

Bickerstaff v. SunTrust Bank, No. A14A1780 (Ga. App. Jan. 5, 2017) (reversing denial of class certification and remanding).

SunTrust Bank v. Bickerstaff, No. 16-459 (U.S. Dec. 5, 2016) (denying petition for certiorari).

Bickerstaff v. SunTrust Bank, No. S15G1295 (Ga. July 8, 2016) (reversing denial of class certification and remanding).

Bickerstaff v. SunTrust Bank, Nos. A14A1780, A14A1781 (Ga. App. Mar. 30, 2015) (affirming denial of motion to compel arbitration and motion for class certification).

Bickerstaff v. SunTrust Bank, No. 10-EV-010485-D (Ga. State Ct. Feb. 19, 2014) (denying plaintiff's motion for class certification).

Bickerstaff v. SunTrust Bank, No. 10-EV-010485-H (Ga. State Ct. Mar. 16, 2012) (denying defendant's motion to compel arbitration).

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Petitioner SunTrust Bank respectfully petitions for a writ of certiorari to review the judgment of the Georgia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals is available at 913 S.E.2d 51 (2025). App., *infra*, 3a. The decision of the Georgia Supreme Court denying SunTrust's petition for a writ of certiorari is unpublished. App., *infra*, 1a. The opinions of the trial court are unpublished. App., *infra*, 146a, 162a.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on February 20, 2025. The Georgia Supreme Court denied SunTrust's petition for a writ of certiorari on September 16, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *Virginian Ry. Co. v. Mullens*, 271 U.S. 220 (1926).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State 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, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or 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 a 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.

STATEMENT

Petitioner SunTrust Bank (SunTrust), which as the result of a merger in 2019 became Truist Bank, offered banking services to hundreds of thousands of customers across Georgia. Each of SunTrust's depositors signed a deposit agreement containing a provision requiring disputes to be resolved through bilateral arbitration on an individual basis. Many of these deposit agreements permitted individual customers to opt out of arbitration, but only by sending a particularized written notice to SunTrust within a specified period.

Without giving the required notice, respondent filed suit against SunTrust in Georgia state court seeking to represent a putative class of SunTrust's customers, numbering in the hundreds of thousands. The trial court and Georgia Court of Appeals initially denied respondent's attempt to certify a class, concluding that because the absent class members had not personally complied with the agreement's opt-out provision, there were not enough potential members to sustain a class.

The Georgia Supreme Court disagreed. *See Bickerstaff v. SunTrust Bank*, 788 S.E.2d 787 (2016) (*Bickerstaff II*), App., *infra*, 113a. It held that by filing a class action lawsuit, respondent had tolled the contractual opt-out period for all other members of the proposed class who were "existing depositors" at the time of the filing of the lawsuit. App., *infra*, 125a. The effect of that decision is to permit respondent to opt out of arbitration not only on behalf of himself, but also on behalf of all absent members of the putative class—regardless of whether those absent class members had complied with the agreement's requirement of individualized notice.

SunTrust sought a writ of certiorari from that decision, but this Court denied the petition. Since then, federal courts have readily rejected the reasoning of *Bickerstaff II*, concluding that it "sets forth" an "arbitration-specific rule" that "is preempted by the FAA." *O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1093 (9th Cir. 2018). But in the decision below, the Georgia Court of Appeals did not just reaffirm *Bickerstaff II*, it expanded upon it. *Bickerstaff II*'s constructive opt-out rule now stretches to individuals who were not "existing depositors" of SunTrust at the time Bickerstaff filed suit, and therefore did not have the right to opt out of arbitration at that time. The Court of Appeals further extended *Bickerstaff II* to reach even those depositors whose deposit agreements expressly prohibited them from opting out of arbitration by filing a lawsuit. The result is one of the most significant class actions in Georgia history, with the potential for hundreds of millions of dollars in supposed damages.

The lower courts' decisions fly in the face of the Federal Arbitration Act (FAA). The FAA was enacted a century ago to accomplish a simple but vital goal: to "place arbitration on equal footing with all other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017). At the time, "widespread judicial hostility to arbitration agreements" routinely prevented parties from vindicating their contractual right to arbitrate. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Thanks to the FAA and this Court's efforts to enforce it, arbitration of commercial and consumer disputes is now routine. Yet even today, state courts still sometimes fail to enforce the terms of arbitration agreements, invent rules that "singl[e] out" arbitration agreements for disfavored treatment, or place "uncommon barriers" in the way of arbitration. *Kindred Nursing*, 581 U.S. at 252.

Bickerstaff II and its progeny evince the same hostility to arbitration and violate the FAA in familiar ways. *Bickerstaff II* and the decision below adopt an expansive rule that permits hundreds of thousands of SunTrust's customers to evade the express terms of their contractual agreements to arbitrate, contrary to the FAA's requirement that such agreements be "enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). *Bickerstaff II*'s constructive opt-out rule also disfavors arbitration agreements based on a feature they commonly include—an opt-out provision—and thereby makes it uniquely easy for plaintiffs to convert what should be a single, speedy arbitration into a sprawling class action. As a result, businesses in Georgia and elsewhere face mounting uncertainty over whether state courts will enforce the arbitration agreements they bargained for as written, as federal law requires. And consumers face the prospect of losing the right to opt out of arbitration at all, as businesses in SunTrust's shoes may mitigate their risks by eliminating arbitration opt-out provisions like the one *Bickerstaff II* and the decision below exploited.

The Georgia courts have now had multiple opportunities to back away from *Bickerstaff II*'s anti-arbitration rule. Instead, they have doubled down on that rule and certified an enormous class for a trial that the FAA says should never have happened. Only this Court can correct these manifest errors and ensure that Georgia does not remain a glaring exception to the FAA's equal treatment mandate. This Court should grant review and reverse the decision below.

A. Factual Background

SunTrust provided banking services to millions of Americans across the southeastern United States, includ-

ing hundreds of thousands of customers in Georgia. SunTrust's relationship with its customers was governed by a written Deposit Agreement. App., *infra*, 109a. Each Deposit Agreement was made between SunTrust and an individual customer and expressly stated that it is "not for the benefit of, and may not be enforced by, any third party." *Id.* at 141a.

The Deposit Agreement required customers to maintain sufficient balances to cover draws against their accounts. *Id.* at 84a. If a customer's spending exceeded the amount in his account, resulting in a negative account balance at the time the transaction settled, SunTrust could assess a flat overdraft fee. *Id.* Overdraft fees are routine in consumer banking, were disclosed in the Deposit Agreement, and are authorized by Georgia law. *See* O.C.G.A. § 11-4-401(a).

SunTrust's Deposit Agreement also contained an arbitration clause requiring all disputes relating to the customer's account to be resolved through individual arbitration. App., *infra*, 85a. In June 2010, SunTrust revised its Deposit Agreement to permit customers to opt out of arbitration by sending written notice to SunTrust. In relevant part, the opt-out provision states:

> **Right to reject arbitration agreement.** You may reject this arbitration agreement provision and therefore not be subject to being required to resolve any dispute, controversy or claim by arbitration. To reject this arbitration agreement provision, you must send the Bank written notice of your decision so that we receive it at the address listed below by the later of October 1, 2010 or within forty-five (45) days of the opening of your Account. Such notice must include a statement that you wish to reject the arbitration agreement section of these rules and regulations

> along with your name, address, Account name, Account number and your signature and must be mailed to SunTrust Bank Legal Department[.] . . . . *This is the sole and only method by which you can reject this arbitration agreement provision.*

App., *infra*, 111a (second emphasis added). SunTrust informed its customers of the amendment to the Deposit Agreement adding the opt-out provision via monthly statements distributed in August 2010. *Id.* at 110a.

SunTrust amended its Deposit Agreement several more times during the period relevant to this suit. Those amendments included a revision made in March 2013 providing that a depositor cannot opt out of the arbitration provision by "filing a lawsuit," and must instead provide express, personal written notice to SunTrust within 45 days of opening the account. *Id.* at 43a.

B. Procedural History

1. Before he passed away, Jeff Bickerstaff, Jr. was one of SunTrust's customers.[1] On July 12, 2010, Bickerstaff filed a complaint asserting that by charging overdraft fees, SunTrust had violated Georgia's criminal and civil laws prohibiting usury. Bickerstaff sought to represent a putative class of similarly situated SunTrust customers within Georgia.

Following the expiration of the opt-out period, SunTrust moved to compel arbitration against Bickerstaff. The trial court denied SunTrust's motion, holding Bickerstaff had substantially complied with the opt-out provision of the arbitration clause when he filed his complaint. App., *infra*, at 162a. The trial court separately denied

[1] Charles Bickerstaff, the legal representative of Jeff Bickerstaff's estate, is the respondent before this Court. App., *infra*, 3a.

Bickerstaff's motion for class certification for lack of numerosity. The court reasoned that Bickerstaff was the only putative class member who had invoked the opt-out provision, and so the remaining putative class members remained bound to the arbitration provision. *Id.* at 160a-161a.

2. The Georgia Court of Appeals affirmed the denial of both motions. App., *infra*, 128a. With respect to the motion for class certification, the appellate court agreed with the trial court that "although Bickerstaff effectively opted out of the agreement for himself by filing suit, he could not do so on behalf of the class." *Id.* at 138a. The court explained that "[i]n general, 'a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.'" *Id.* at 142a (quoting *The Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 593 (2013)). Bickerstaff therefore could not "legally bind class members to a rejection of the arbitration clause." *Id.* And because "Bickerstaff was not a privy nor a party" to the other class members' deposit agreements, he could not alter the arbitration contracts of the putative class. *Id.* In reaching these conclusions, the appellate court cited Section 2 of the FAA and the "liberal federal policy favoring arbitration" that it embodies. *Id.* at 155a (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)).

3. The Georgia Supreme Court reversed. App., *infra*, 127a. It concluded that by filing his lawsuit, Bickerstaff had effectively tolled the contractual opt-out period and thus preserved the right of SunTrust's then "existing depositors" to opt-out of their own arbitration agreements. *Id.* at 125a. The Supreme Court further held that because "Bickerstaff was acting for the class members," those individuals would be deemed to have "ratif[ied] the filing of the complaint" and "reject[ed] the

requirement to arbitrate" until such time as they chose whether to opt out of the class. *Id.* at 125a-126a. The Supreme Court also rejected SunTrust's argument that Bickerstaff's position was inconsistent with the individualized nature of the Deposit Agreement's opt-out provision. The court concluded that the contractual opt-out deadline was similar to "deadlines imposed by statutes or regulations," which courts in Georgia had previously held "can be suspended by the filing of a class action." *Id.* at 117a.

Aside from a passing citation to *Concepcion*, *id.* at 110a, the Georgia Supreme Court did not mention the FAA or this Court's precedents discussing the federal policy favoring arbitration.

4. SunTrust petitioned this Court for a writ of certiorari on the question of whether the Federal Arbitration Act preempted the rule announced in *Bickerstaff II*. *See* Pet. for Writ of Cert., *SunTrust Bank v. Bickerstaff*, No. 16-459 (U.S. Oct. 6, 2016). The Court denied the petition in December 2016. *See* 580 U.S. 1020 (2016); App., *infra*, 107a.

5. Subsequently, on remand, the trial court certified a class defined to include Georgia citizens who had an account with SunTrust and paid an overdraft fee on transactions under $500 between July 12, 2006 and October 6, 2017. App., *infra*, 83a. The Court of Appeals affirmed the certification, *id.* at 84a, and the Georgia Supreme Court denied SunTrust's application for discretionary review. *SunTrust Bank v. Bickerstaff*, 824 S.E.2d 717 (2019).

6. Back in the trial court, SunTrust filed a motion to compel arbitration against certain groups of class members. App., *infra*, 38a. One such group included individuals who had opened their accounts after July 12, 2010—the date Bickerstaff filed his complaint. *Id.* at 43a. Those

individuals, SunTrust argued, did not even have arbitration agreements with SunTrust when Bickerstaff sued, and thus could not have been "existing depositors" or "putative class members" as those terms had been used in *Bickerstaff II*. *Id.* Another group consisted of class members whose deposit agreement differed in material respects from Bickerstaff's agreement. This group included, among others, customers who opened accounts after March 1, 2013, the date on which SunTrust amended its deposit agreement to provide that customers could not opt out of arbitration by filing a lawsuit. *Id.*

The trial court denied SunTrust's motion as it related to these groups, *id.* at 43a, and the Court of Appeals affirmed. *Id.* at 20a. As relevant here, the Court of Appeals concluded that *Bickerstaff II* "did not limit its holding to those depositors whose arbitration provisions were identical to Bickerstaff's," and instead applied to "*all* putative class members." *Id.* at 8a.

7. SunTrust petitioned the Georgia Supreme Court for a writ of certiorari. In addition to raising arguments under state law, SunTrust contended that the Georgia Supreme Court should reconsider *Bickerstaff II* in light of intervening precedent from this Court holding that the FAA preempted state rules discriminating against arbitration. *See* Pet. for Writ of Cert., *SunTrust Bank v. Bickerstaff,* No. S25C0969 (Ga. Apr. 8, 2025) at 31-34 (discussing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246 (2017) and *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022)).

On September 16, 2025, the Georgia Supreme Court denied SunTrust's petition for certiorari. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

This is a paradigmatic vehicle for reaffirming the FAA's core mandate to enforce arbitration agreements as

written, in the same manner as any other contract. In *Bickerstaff II*, the Georgia Supreme Court effectively eliminated the written opt-out requirement in SunTrust's arbitration provision by adopting novel interpretations of state law inconsistent with established contract and class-action principles. The result is a rule that singles out arbitration for unique disfavor based on a common feature of arbitration agreements: an opt-out provision. This Court has repeatedly found similar anti-arbitration rules preempted under the FAA. *See, e.g.*, *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017). And other courts have rightly recognized that *Bickerstaff II* is no different than those earlier preempted rules. *See O'Connor v. Uber Tech., Inc.*, 904 F.3d 1087, 1093 (9th Cir. 2018).

Even if *Bickerstaff II* were not facially discriminatory against arbitration agreements, it still contravenes and obstructs the FAA's clear federal policy favoring arbitration. *Bickerstaff II* makes it trivially easy for a single plaintiff to convert affordable and efficient arbitrations into expensive and sluggish class actions, paving the way for lawsuits that will clog the court dockets contrary to the FAA's purpose. The ruling also undermines the FAA's bedrock precept that contracts should be enforced according to their terms and by their signatories by permitting plaintiffs to unilaterally rewrite arbitration provisions to void agreements they were never party to.

The practical consequences of the Georgia Supreme Court's wayward decision are substantial. In this case alone the rule has resulted in over 15 years of protracted and expensive litigation. And opt-out provisions remain important to arbitration agreements across the nation's industries. Transforming them into on ramps to mass litigation upends settled expectations for the parties to those agreements. The Georgia Supreme Court's rule

also places enormous pressure on companies like SunTrust to forgo opt-out provisions entirely, even though such provisions promote consumer choice.

This Court has not hesitated to strike down state-court rules that impair the right to arbitrate. *Bickerstaff II*'s constructive opt-out rule, and the Georgia Court of Appeals recent expansion of it, should meet the same fate. The petition should be granted.

II. The Georgia Supreme Court's Decision in *Bickerstaff II* Violates the FAA and This Court's Precedents

This Court has consistently held that state courts cannot use state law to circumvent the FAA. State courts may not adopt rules that "single[] out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017). And "[e]ven rules that are generally applicable as a formal matter are not immune to preemption by the FAA." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651 (2022). What matters is whether the state rule "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

The Georgia Supreme Court's decision in *Bickerstaff II* flunks each of these tests. It permits a single individual to abrogate hundreds of thousands of arbitration agreements to which he is not a party, in violation of the agreements' unambiguous requirement of individualized notice. That outlier decision is irreconcilable with the FAA and this Court's decisions interpreting it.

A. *Bickerstaff II* Creates An Impermissible Arbitration-Specific Rule

1. Congress enacted the FAA in 1925 "in response to a perception that courts were unduly hostile to arbitration." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 505 (2018).

"[T]he central or 'primary' purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). Congress accomplished that goal largely through Section 2, the FAA's "primary substantive provision." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 provides that an arbitration provision within a written contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2.

This Court has interpreted Section 2 to require states to "place[] arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). Under this equal-treatment principal, courts may decline to enforce arbitration agreements based on "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Concepcion*, 563 U.S. at 339. But courts may not single out arbitration agreements for disfavor or invent legal rules "that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Id.* Those kinds of arbitration-specific rules are precluded by the FAA.

2. Although the FAA is a federal statute, it plays an important role in state-court litigation. In fact, this Court has noted that "[s]tate courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). Not all state courts, however, have consistently followed this Court's and the FAA's directive to treat agreements to arbitrate the same as other kinds of contractual agreements. In such cases, this Court routinely stepped in to ensure that the FAA's

equal-treatment guarantee is enforced. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam); *Concepcion*, 563 U.S. at 341; *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

For example, in *Kindred Nursing*, the Court considered a Kentucky Supreme Court decision that "declined to give effect to two arbitration agreements executed by individuals holding 'powers of attorney.'" 581 U.S. at 248. The Kentucky court reasoned that "the general grant of power (even if seemingly comprehensive)" was not sufficient to allow the recipient to "enter into an arbitration agreement for someone else." *Id.* Instead, "the representative must possess specific authority to 'waive his principal's fundamental constitutional rights to access the courts [and] to trial by jury.'" *Id.*

This Court rejected the Kentucky Supreme Court's "clear-statement rule," deeming it "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers—to survive the FAA's edict against singling out those contracts for disfavored treatment." *Id.* at 252. The Court further rejected Kentucky's attempt to recast its clear-statement rule as a special protection for "fundamental constitutional rights" rather than a special disfavor for arbitration. *Id.* at 253. As the Court explained, the FAA's equal-treatment mandate applies regardless of whether the rule "discriminates on its face against arbitration" or "covertly accomplishes the same objective . . . by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Id.* at 251. Because the Kentucky Supreme Court's rule "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements," it "flouted

the FAA's command to place those agreements on an equal footing with all other contracts." *Id.* at 255-56.

3. *Bickerstaff II* flouts the FAA in the same way as the rule in *Kindred Nursing*: it adopts a novel construction of state law to erect an "uncommon barrier[]" to arbitration. *Id.* at 252. Georgia's rule, like Kentucky's, thus conflicts with the FAA's requirement that agreements to arbitrate be enforced according to their terms and in the same manner any other contracts.

The Georgia Supreme Court acknowledged that SunTrust's deposit agreements contained a "contractual deadline requiring *individual* action." App., *infra*, 117a (emphasis added); *see also id.* at 118a (agreement "requires individual notification of rejection of arbitration"). Blackletter Georgia contract law provides that "[i]f the language of a contract is clear and unambiguous, the terms of the agreement are controlling." *Id.* at 133a (quoting *Terry v. State Farm Fire & Cas. Ins. Co.*, 504 S.E.2d 194, 195 (Ga. 1998)); *accord* Restatement (Second) of Contracts § 202 (1981) ("where language has a generally prevailing meaning, it is interpreted in accordance with that meaning"). So under Georgia law, individuals who signed SunTrust's deposit agreement could validly exercise their right to opt out of arbitration—but only by individually complying with the unambiguous timing and written-notice procedures specified in the opt-out provision.

Those well-established principles should have made this an easy case. The unnamed class members respondent purported to represent never exercised their individual rights to opt out of arbitration. And respondent could not exercise that individualized right collectively for them. As the Georgia Court of Appeals correctly recognized before *Bickerstaff II*, respondent "was not a privy nor a party to any contract between SunTrust and putative

class members," nor were those unnamed class members "beneficiaries of one another's contracts." App., *infra*, 142a. Georgia contract law therefore barred respondent from exercising the contractual right to reject arbitration on behalf of an entire putative class with whom he has no contractual relationship. *See Walls, Inc. v. Atl. Realty Co.*, 367 S.E.2d 278, 281 (1988) (third party does not have standing to enforce a contract unless it appears from the contract that it was intended for his benefit); Ga. Code Ann. § 9-2-20 (only "[t]he beneficiary of a contract . . . may maintain an action against the promisor").

Rather than apply these general principles of Georgia contract law, however, the Georgia Supreme Court focused on the fact that respondent had filed a class action. App., *infra*, 118a-120a. The court reasoned that respondent served as the absent class members' "putative agent," and thus could "act as a representative" for those class members "until such time as a class member may opt out of such representation." *Id.* at 118a. In other words, the court concluded that because respondent had filed a class action, he and hundreds of thousands of depositors could avoid the plain terms of their arbitration agreements.

The parallels to *Kindred Nursing* are striking. Kentucky's rule distorted agency principles to make it uniquely difficult for willing parties to enter into arbitration agreements. *Bickerstaff II* distorted agency principles to make it uniquely *easy* for parties who had willingly agreed to arbitrate to avoid that obligation. And like Kentucky's clear-statement rule, *Bickerstaff II* upsets settled expectations only with respect to agreements to arbitrate, based on a feature that many arbitration agreements contain: an opt-out provision. *See* Ryan Miller, Current Development 2018-2019, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After Concepcion and*

American Express, 32 GEO. J. LEGAL ETHICS 793, 822 (2019) (noting that the use of opt-out provisions increased significantly following *Concepcion*). The decision thus places arbitration agreements on a different footing than other contracts, in clear violation of the FAA.

The Georgia Supreme Court's invocation of "a doctrine normally thought to be generally applicable"—in this case, class action principles—does not "salvage" its constructive opt-out rule. *Kindred Nursing*, 581 U.S. at 253. To begin with, in the years since *Bickerstaff II* was decided, no Georgia court has applied the decision to invalidate opt-out provisions in any other kind of contract. That absence of authority makes sense. After all, contractual requirements to arbitrate individually are the most obvious requirements that a party would seek to evade by filing a class action—a reality this Court's precedents bear out. *See Concepcion*, 563 U.S. at 351-52 (FAA preempts state rules deeming class-action waivers in arbitration agreements unenforceable); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238-39 (2013) (enforcing class action waiver in arbitration agreement despite limited potential recovery from individual arbitration). The Georgia Supreme Court's justification of its rule fails even on its own terms. None of the class action cases cited in *Bickerstaff II* address a class representative's ability to opt out of arbitration; they instead concern the distinct issue of a class representative's ability to satisfy procedural requirements for bringing suit on behalf of class members. *See In re Charter Co.*, 876 F.2d 866, 873 (11th Cir. 1989); *In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988). The decisions provide no support for the novel rule adopted by the Georgia Supreme Court.[2]

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[2] The sole contract-law case relied on in *Bickerstaff II* is also plainly inapposite. *See Res. Life Ins. Co. v. Buckner*, 698 S.E.2d 19, 23 (Ga. Ct. App. 2010) (cited App., *infra*, 116a). Although that case involved

General principles of class action law similarly undermine, not support, *Bickerstaff II*. Like its federal equivalent Rule 23, OCGA § 9–11–23 is merely a procedural rule that "does not alter the substantive law." *Goodyear v. Tr. Co. Bank*, 284 S.E.2d 6, 7 n.2 (1981). As a result, the class-action mechanism in Georgia cannot "enlarge" a party's "legal rights" beyond those already existing. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 407-08 (2010); *see Ga.-Pac. Consumer Prods., LP v. Ratner*, 762 S.E.2d 419, 421 n.3 (Ga. 2014) ("[W]hen Georgia courts interpret and apply OCGA § 9–11–23, they commonly look to decisions of the federal courts interpreting and applying Rule 23."). Yet *Bickerstaff II* permits a class-action plaintiff to exercise contractual arbitration opt-out rights not possessed by that individual. In fact, as interpreted in the decision below, *Bickerstaff II* allows respondent to exercise opt-out rights on behalf of class members who did not even have agreements with SunTrust when Bickerstaff sued, or whose agreements expressly prohibit opting out through the filing of a lawsuit. In no other context besides arbitration has Georgia permitted class-action plaintiffs to exercise such ephemeral contractual rights. The Georgia courts' startling, unexplained departures from longstanding principles further illustrates that *Bickerstaff II*'s true foundation is the same hostility to arbitration that the FAA was designed to combat.

4. Given its blatant inconsistency with the FAA, it is unsurprising that other courts have had no trouble rejecting *Bickerstaff II*'s conclusion that the "lead plaintiffs" in

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a contractual notice requirement, the notice provision there—unlike SunTrust's deposit agreement—specifically authorized third parties to satisfy the notice requirement "on behalf of" the contracting party. *Res. Life Ins. Co. v. Buckner*, 698 S.E.2d 19, 23 (Ga. Ct. App. 2010).

a class action can "constructively opt[] out of arbitration on behalf of the entire class." *O'Connor v. Uber Tech., Inc.*, 904 F.3d 1087, 1093 (9th Cir. 2018); *see also Magana v. DoorDash, Inc.*, 343 F. Supp. 3d 891, 897 (N.D. Cal. 2018) (rejecting the "unintuitive proposition" from *Bickerstaff II* that all plaintiffs could opt out of arbitration "so long as a single [plaintiff] did"); *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, 2017 WL 2536846, at *12 & n.158 (N.D. Ga. June 9, 2017) (denying class certification because, notwithstanding *Bickerstaff II*, "the issue of notice" for a breach of warranty claim should be considered "an individual question").

For example, the Ninth Circuit—no stranger to anti-arbitration state-law rules—deemed a plaintiff's reliance on *Bickerstaff II* "unpersuasive for multiple reasons." *O'Connor*, 904 F.3d at 1093. Among other things, the Ninth Circuit noted that "[a]n arbitration-specific rule, such as the one set forth in *Bickerstaff*, would be preempted by the FAA." *Id.* The decision below, which expands *Bickerstaff II* to reach even class members who never possessed the right to opt out via litigation, confirms that the Ninth Circuit was right not to follow the Georgia Supreme Court's lead. But the Ninth Circuit's holding is cold comfort to SunTrust and tens of thousands of other businesses in Georgia, who remain subject to *Bickerstaff II* and are therefore unable to fully realize the promise of the FAA.

B. *Bickerstaff II* Is Inconsistent with the FAA's Pro-Arbitration Scheme

Even if *Bickerstaff II* were not an impermissible arbitration-specific rule, it would still be preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA." *Concepcion*, 563 U.S. at 352. "Even rules that are generally applicable as a formal matter are not immune to

preemption by the FAA." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651. That is because "Section 2's mandate protects a right to enforce arbitration agreements." And to be meaningful, that right must trump efforts by state courts to allow parties to an arbitration agreement to "abrogate that agreement after the fact and demand . . . judicial proceedings." *Id.* at 661. *Bickerstaff II* effects just such a state-sponsored abrogation of the right to arbitrate. And it does so in a way that "interferes with fundamental attributes of arbitration, and thus creates a scheme inconsistent with the FAA." *Concepcion*, 563 U.S. at 344.

1. A key feature of arbitration is its "individualized and informal nature," which in turn promote the "virtues" of "speed and simplicity and inexpensiveness." *Epic*, 584 U.S. at 508-509; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (FAA aims to encourage "efficient and speedy dispute resolution"). *Bickerstaff II* turns those virtues on their head. This case proves the point. The litigation was filed by one plaintiff in 2010, but over the past 15 years it has ballooned to involve a certified class with hundreds of thousands of members, many of whom signed different deposit agreements at different times. Under the terms of the parties' contract, respondent's complaint about overdraft fees should have been resolved in an individualized, fast-paced arbitration. Instead, the Georgia courts have permitted respondent to concoct a slow-moving, aggregated class action involving class members who never complied with the requirements of their own agreements. The result is that a claim that could have been resolved quickly and at minimal cost in an individualized arbitration has already required years and significant sums of money even before any trial on the merits.

Making matters worse, *Bickerstaff II* meant that SunTrust could not know which of its customers remained bound to arbitration until the period for opting out of the class action had passed, nearly six years following the Supreme Court of Georgia's ruling. That process added even more time and expense to the process of resolving this dispute, contrary to Congress's desire that the FAA "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (quoting *Moses H. Cone,* 460 U.S. at 22); *see Dean Witter Reynolds*, 470 U.S. at 225 (White, J., concurring) ("Belated enforcement of [an] arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement.").

2. Another benefit of arbitration is customization: the "principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Concepcion*, 563 U.S. at 344 (cleaned up). Parties can shape those terms "to their liking" by deciding in advance "the issues subject to arbitration" and "the rules by which they will arbitrate." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019); *see also Epic*, 584 U.S. at 514 (parties may adopt "individualized arbitration procedures of their own design").

Bickerstaff II contravenes that purpose, too. It permits respondent to rewrite thousands of arbitration agreements in a way SunTrust did not agree to, and that fundamentally alters the bargain SunTrust struck with its customers. *Bickerstaff II* also means that parties like SunTrust who carefully craft arbitration provisions can no longer expect those provisions will be enforced according to their terms. In fact, the Georgia Supreme Court openly acknowledged that, "[p]ractically speaking," SunTrust has lost the ability to enforce its arbitration provision

against any member of respondent's class action. App., *infra*, 120a. If SunTrust were to seek enforcement of that provision, the customer can simply "reject[] SunTrust's demand to arbitrate on the ground that he or she timely rejected the arbitration clause at the time Bickerstaff's class action complaint was filed." *Id.* This Court should not countenance an approach that "make[s] it trivially easy for States to undermine the Act." *Kindred Nursing*, 581 U.S. at 255.

III. The Question Presented Is Exceptionally Important and Warrants Review Now

Certiorari is also warranted given the immense practical significance of the question presented. As this Court has previously recognized when summarily reversing another anti-arbitration state-court decision, "[i]t is a matter of great importance . . . that state supreme courts adhere to a correct interpretation of the [FAA]." *Nitro-Lift*, 568 U.S. at 17-18. Recent decisions like *Kindred Nursing* and *Viking River Cruises* have vividly illustrated the problems with state courts' novel, anti-arbitration rules. Yet the Georgia Supreme Court has endorsed a rule that undermines the letter and the spirit of the FAA, while greatly expanding the ability of plaintiffs to evade voluntary arbitration agreements.

Moreover, even after the Georgia Court of Appeals expanded *Bickerstaff II* in the decision below, the Georgia Supreme Court has refused to revisit the case. As a result, businesses across Georgia who rely on arbitration agreements to resolve disputes with customers have been left "in a state of limbo" as they face the possibility that "many more lawsuits will be able to proceed as class actions." David Cromer, *The Great Escape: How One Plaintiff's Sidestep of A Mandatory Arbitration Clause Was Applied to A Class in* Bickerstaff v. Suntrust Bank,

68 MERCER L. REV. 539, 552, 554 (2017). And these potential class actions, as *Bickerstaff II* demonstrates, can have enormous numbers of class members. As this Court has recognized, class actions of this size subject businesses to "the risk of 'in terrorem' settlements" even where (as here) the underlying claims are dubious on the merits. *See Concepcion*, 563 U.S. at 350; *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that [the defendant] may find it economically prudent to settle and to abandon a meritorious defense."). Only this Court can lift that cloud of uncertainty and ensure that courts in Georgia comply with the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631 (1985).

This dispute has implications far beyond Georgia. Opt-out provisions like the ones in SunTrust's Deposit Agreements are routinely included in arbitration agreements governing all kinds of commercial and consumer relationships across the United States. *See* Tim R. Samples, et al., *TL;DR: The Law and Linguistics of Social Platform Terms-of-Use*, 39 BERKLEY TECH. L.J. 47, 99 (2024) (finding nearly 46% of the arbitration agreements in the data set contained opt-out provisions); Farshad Ghodoosi & Monica M. Sharif, *Arbitration Effect*, 60 AM. BUS. L.J. 235, 255 (2023) ("Corporations often allow consumers or employees to opt out of arbitration agreements."). Indeed, precedent in many courts encourages the inclusion of opt-out provisions, on the theory that "the existence of a meaningful right to opt-out" of arbitration will render the arbitration clause "procedurally conscionable as a matter of law." *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016).

Bickerstaff II upended decades of clarity for companies and consumers in Georgia on their respective rights in agreeing to arbitrate. While *Bickerstaff II* has not yet extended its reach beyond Georgia, its logic jeopardizes all opt-out provisions in all arbitration provisions. Companies nationwide who retain an opt-out provision face the possibility that an enterprising plaintiff—and an arbitration-skeptical court—will follow *Bickerstaff II*'s playbook and use the opt-out provision to create a class action containing thousands of potential members (or more). Few rational companies will be willing to take that risk. Consumers, in turn, will lose the flexibility that opt-out provisions are meant to provide. *See* Miller, *Next-Gen Arbitration*, 2 GEO. J. LEGAL ETHICS at 822 (noting that opt-out provisions are "strongly pro-consumer"). The end result will be less consumer choice and more class actions, even though class actions typically result in lower recoveries for consumers and longer wait times for everyone involved. *See* Nam D. Pham & Mary Donovan, U.S. Chamber of Com., Inst. for Legal Reform, Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration 4 (Mar. 2022).

This case is an excellent vehicle in which to reiterate the foundational principle that arbitration agreements should be enforced as written. There is no dispute that the arbitration provision in SunTrust's Deposit Agreement would be valid and enforceable but for the decision in *Bickerstaff II*. Whether *Bickerstaff II* is consistent with the FAA and this Court's precedents is a purely legal question that turns on well-established federal law. And there is no need for the Court to await resolution of any remaining state law issues before granting review. Reversal on the federal question would end the class action and "preclude any further proceedings." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80 (1988).

The Court's earlier denial of certiorari is no barrier to review, either. When SunTrust last petitioned, no class had been certified and SunTrust had available several state-law arguments that could defeat class certification. Since then, however, the Georgia courts have not only rejected those arguments, they have certified a class that goes beyond what even *Bickerstaff II* contemplated. There is accordingly no doubt that if left to stand, *Bickerstaff II* and the expansive gloss placed on it by the decision below would "seriously erode federal policy" in the arbitration context. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 483 (1975). As it has done before, this Court should step in to prevent that result.[3]

[3] *See, e.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 6-7 (1984) (holding that a judgment invalidating an arbitration agreement was reviewable even though further proceedings were pending in state court); *see also*, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-57 (1989) (holding that the Court had jurisdiction to review a First Amendment challenge to an Indiana Court of Appeals decision despite pending state proceedings); *Moore v. Harper*, 600 U.S. 1, 19 (2023) (holding that the Court had jurisdiction to review an Elections Clause challenge to a North Carolina Supreme Court decision Clause despite continuing state proceedings); *Pierce County, Washington v. Guillen*, 537 U.S. 129, 142 (2003) (holding that the Court had jurisdiction to review a Public Disclosure Act action under *Cox* in a consolidated case even though the companion tort action was dismissed for lack of jurisdiction).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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