No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN CARDEGNA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

SETH P. WAXMAN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
KELLY THOMPSON COCHRAN
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations. Chamber mem-

[1] Letters of consent from both parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

bers operate in every sector of the economy and transact business throughout the United States. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community. For example, the Chamber has previously filed briefs concerning arbitration issues before this Court in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Systems, Inc.* v. *Book*, 538 U.S. 401 (2003).

Many of the Chamber's members, constituent organizations, and affiliates have adopted as standard features of their business contracts provisions that provide for the arbitration of disputes arising from or related to such contracts. They use arbitration because it is a fast, fair, and inexpensive method of resolving disputes with consumers and other contracting parties. Because many Chamber members may be sued in a wide range of state and federal courts, they rely on the protection afforded by the Federal Arbitration Act to ensure that their arbitration agreements are enforced consistently.

STATEMENT OF THE CASE

Respondents brought a class action lawsuit in Florida state court against Petitioner Buckeye Check Cashing, Inc., alleging that certain transactions, in which they provided Petitioner with a check to be cashed at a future date in return for an immediate cash payment, constituted usurious loans. Because the parties' contracts contained clauses agreeing to arbitrate "[a]ny claim, dispute, or controversy . . . arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement" (Pet. App. 2a, 27a-28a), Petitioner moved to compel arbitration and stay the litigation. The trial court summarily denied the motion, but the intermediate appellate court reversed.

The Florida Supreme Court reversed again in a split decision, holding that because Respondents' usury claim if proven would render the entire contract—including the arbitration clause—void *ab initio* under state law, the dispute should be resolved in court. Pet. App. 7a-8a. The Florida court acknowledged that this Court held in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), that the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, requires arbitration unless a party disputes it agreed to arbitrate—even if that party claims the entire contract is unenforceable. However, the Florida court distinguished *Prima Paint* as applying only to challenges that would render a contract voidable under state law, like the fraudulent inducement claim specifically at issue in that case, and inapplicable to a claim that a contract is void *ab initio*. Pet. App. 5a-6a.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court's opinion in this case illustrates a dangerous point of confusion that has developed in arbitration caselaw in the 40 years since this Court decided *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). The Court should grant certiorari to resolve the growing split between state and federal authority over the proper application of this seminal precedent.

Prima Paint held that the "plain meaning" of the Federal Arbitration Act required that courts treat the validity of an arbitration provision as a "separable" threshold issue, independent from any consideration of the validity of the parties' underlying contract. 388 U.S. at 402-404. Thus, when the *Prima Paint* plaintiffs had resisted enforcement of their arbitration agreement on the grounds that the contract as a whole had been induced by fraud, the Court found that the FAA provided jurisdiction "only [over] issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404 (interpreting 9 U.S.C. § 4). Because the making of the arbitration agreement was not at issue, all other matters were to be resolved by the arbitrator. *Id.* at 403-404. This result not only complied with the plain language of the FAA,

but furthered its purposes by assuring that courts avoid unnecessary interference where parties have agreed to arbitrate their conflicts. *Id.* at 404.

The Florida Supreme Court in *Cardegna* distinguished *Prima Paint* as applying only to claims that the underlying contract is voidable under state law, but not to claims that the contract is void *ab initio*. This distinction was improper, as *Prima Paint* requires that courts limit their inquiries to "the making and performance of the agreement to arbitrate," 388 U.S. at 404, without regard to such state law distinctions.

Cardegna is merely the latest in a series of state court decisions that distinguish *Prima Paint* in this way. *See also, e.g., Alabama Catalog Sales* v. *Harris*, 794 So. 2d 312 (Ala. 2000); *Onvoy, Inc.* v. *Shal, LLC*, 669 N.W.2d 344 (Minn. 2003); *Nature's 10 Jewelers* v. *Gunderson*, 648 N.W.2d 804 (S.D. 2002). These state cases directly contradict decisions by at least five federal courts of appeals holding that allegations that a contract containing an arbitration clause is void for illegality should be subject to arbitration. *See, e.g., Bess* v. *Check Express*, 294 F.3d 1298 (11th Cir. 2002); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Burden* v. *Check Into Cash of Ky., LLC*, 267 F.3d 483 (6th Cir. 2001); *Harter* v. *Iowa Grain Co.*, 220 F.3d 544 (7th Cir. 2000); *Lawrence* v. *Comprehensive Bus. Servs. Co.*, 833 F.2d 1159 (5th Cir. 1987); *see also Dewey* v. *Wegner*, 138 S.W.3d 591 (Tex. App. 2004).

The state cases that improperly distinguish the FAA analysis described in *Prima Paint* have serious adverse consequences for Chamber members and all other parties that rely upon agreements to arbitrate. Judicial consideration of claims that the parties' contract as a whole is void frustrates the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404. Furthermore, the split in authority promotes forum shopping. For example, a claim that an entire agreement (that includes an arbi-

tration provision) is void for illegality will be sent to arbitration by federal courts in the Eleventh Circuit, but remain in court in Alabama and Florida. Finally, this effort to carve out exceptions to *Prima Paint* is yet another demonstration of the enduring suspicion of arbitration that the FAA was intended to overcome.

Confusion over *Prima Paint* undermines the enforcement of arbitration provisions across the country. This Court should grant certiorari and reaffirm that the FAA requires that courts confine themselves to determining whether the making of an arbitration agreement is at issue.

REASONS FOR GRANTING THE WRIT

I. THE FLORIDA SUPREME COURT'S REFUSAL TO ENFORCE AN ARBITRATION AGREEMENT THAT WAS UNQUESTIONABLY ENTERED INTO BY THE PARTIES DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE DECISION OF THIS COURT IN *PRIMA PAINT*.

This case involves conflicting approaches to lawsuits claiming that a contract that includes an arbitration provision is wholly invalid. Such lawsuits pose a special problem because it is uncertain where such claims should first be heard. If the contract (including the arbitration provision) is in fact unenforceable, the claim belongs in court. If the contract is valid, the claim belongs in arbitration under the terms of the parties' agreement. But a final decision as to which forum should hear the merits cannot be made until the merits have already been resolved. This conundrum requires a policy choice about which initial forum will hear such claims.

In *Cardegna*, the Florida Supreme Court resolved this dilemma by allowing litigation of plaintiffs' claims that their contract as a whole was void for illegality despite the undisputed fact that the parties had agreed to arbitrate all disputes. Pet. App. 5a-8a. That resolution conflicts with this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). In *Prima Paint*, the Court determined that "Congress has provided an explicit answer" to this policy question through the Federal

Arbitration Act, which requires that the court order arbitration as soon as it is satisfied that "'the making of *the agreement for arbitration* or the failure to comply (with the arbitration agreement) is not in issue.'" 388 U.S. at 403 (quoting 9 U.S.C. § 4) (alteration in original, emphasis added).

Thus, in passing on an application for a stay pending arbitration under section 3 of the FAA, *Prima Paint* held that courts "may consider only issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404. For example, a court could resolve claims of "fraud in the inducement of the arbitration clause itself . . . [b]ut the statutory language does not permit . . . consider[ation] [of] claims of fraud in the inducement of the contract generally." *Id.* at 403-404. In *Prima Paint*, the absence of claims directed to the making of the arbitration provision itself meant that the contract dispute should be arbitrated. *Id.* This result was supported not only by "the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Id.* at 404.[2]

In the instant case, there was no dispute below that the parties had made a written agreement, and that it contained a broad arbitration provision. Pet. App. 2a. The borrowers only contended that the underlying contract was void as a matter of Florida policy or law. *Id.* Thus, under *Prima Paint*, once the courts had established that "'the making *of the agreement for arbitration* . . . is not in issue,'" 388 U.S. at

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[2] Justice Black argued in dissent that the majority's decision improperly exalted arbitration provisions by enforcing them while the enforceability of the remainder of the contract remains at issue. *See* 388 U.S. at 423 (Black, J. dissenting) (stating that the FAA was only intended to place arbitration agreements "'upon the same footing as other contracts'" (citation omitted)). However, the alternative approach taken by the *Cardegna* court—judicial consideration of general contract claims before any arbitration is ordered—would render arbitration agreements nugatory by resolving in court disputes that may well be subject to a valid arbitration agreement.

403 (quoting 9 U.S.C. § 4) (emphasis added), the arbitration provision was enforceable as a matter of federal substantive law, and the merits of the case (that is, a decision about the validity of the entire contract) should have been directed to arbitration instead of decided by the court.

Nevertheless, the Florida Supreme Court explained that "the rationale of *Prima Paint* should not be extended to the facts of this case," because "if the underlying contract is held entirely void as a matter of [state] law, all of its provisions, including the arbitration clause, would be nullified as well." Pet. App. 5a-6a. The court's conclusion that the risk of such nullification was grounds for not enforcing the parties' arbitration provision was based on state law: "Florida public policy and contract law prohibit breathing life in to a potentially illegal contract by enforcing the included arbitration clause of the void contract . . . there are no severable, or salvageable, parts of a contract found illegal and void under Florida law." *Id.* at 7a-8a. In short, the *Cardegna* court found that Florida law forbade the application of *Prima Paint.*

This approach conflicts with *Prima Paint* and ignores the pre-emptive effect of the FAA. The clearest proof of the conflict is that the Florida court's decision essentially adopts the logic of the *dissent* in *Prima Paint.* Justice Black had argued, in his dissenting opinion, that fraudulent inducement challenges to a contract as a whole should be decided by courts because "[i]f the contract was procured by fraud, then, unless the defrauded party elects to affirm it, there is absolutely no contract, nothing to be arbitrated." 388 U.S. at 412 (Black, J., dissenting). In *Cardegna*, the argument is the same, except that it is now applied to state law claims that the contract is unenforceable for illegality rather than for fraudulent inducement. This invocation of "Florida public policy and contract law" (Pet. App. 7a), to forbid arbitration of certain types of contract challenges not only contradicts *Prima Paint*, but is pre-empted by the Federal Arbitration Act. *See, e.g., Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996); *Mastrobuono* v. *Shearson Lehman Hutton,*

Inc., 514 U.S. 52, 57-58 (1995); *Southland Corp.* v. *Keating*, 465 U.S. 1, 12-15 (1984).

Cardegna justified this result by relying on previous state and federal cases that have distinguished *Prima Paint* as applying only to challenges that would render a contract voidable under state law, but not to challenges that would render a contract void *ab initio*. Pet. App. 6a-7a.[3] As is described in detail *infra*, this distinction is a source of considerable conflict and confusion in both state and federal appellate courts. However, it is not a distinction that matters in the context of *Prima Paint*.

Prima Paint explains that the FAA requires as a matter of substantive federal law that courts focus solely on "issues relating to the making and performance of the agreement to arbitrate," and refer remaining disputes to arbitration if the arbitration agreement itself is not at issue. 388 U.S. at 404. This reading of the FAA does not turn on whether the state law involved would make the contract void or merely voidable.[4] Indeed, *Prima Paint* specifically

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[3] A "voidable contract" is generally defined as "[a] contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void." *Black's Law Dictionary* 350 (8th ed. 2004). A "void contract," in contrast, is generally defined as "[a] contract that is of no legal effect, so that there is really no contract in existence at all." *Id.* Void contracts generally fall into two categories, one involving contracts in which one of the normal requirements for the creation of a contract (such as assent) is absent, and the other in which the normal requirements are satisfied but the agreement is deemed unenforceable because the law disapproves of its purpose or the terms by which it seeks to achieve such purpose. *Id.* (quoting P.S. Atiya, *An Introduction to the Law of Contract* 36-37 (3d ed. 1981)). *See generally Restatement (Second) of Contracts*, § 7 & cmt. a (1981); 1 *Corbin on Contracts* §§ 1.6, 1.7 (Joseph M. Perillo ed., 1993); Joseph M. Perillo, *Calamari & Perillo on Contracts* § 1.8 (5th ed. 2003).

[4] Nothing in the majority opinion or the dissent accords any particular significance to the fact that it was technically possible for the plaintiffs to ratify their contract under state law. The majority opinion does not focus at all on the specific nature of the challenge to enforceability under state law. *See id.* at 402-404. And the dissent criticizes the majority opin-

rejected a decision by the Court of Appeals for the First Circuit that had suggested that the issue whether an arbitration clause is separable from the underlying contract should be determined by state law. *Id.* at 402-403 (discussing *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 280 F.2d 915 (1st Cir. 1960)); *see also id.* at 404-406 (holding that the FAA is an exercise of Congress's Commerce Clause powers and must be applied by federal courts even in diversity jurisdiction cases).

Thus, certiorari is warranted because *Cardegna* "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Although this Court has not had occasion to revisit the specific issues presented by *Prima Paint* in nearly 40 years, it has reaffirmed generally in subsequent decisions that because "the policy of the Arbitration Act requires a liberal reading of arbitration agreements ... some issues that might be thought relevant to arbitrability are themselves arbitrable." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 n.27 (1983) (discussing *Prima Paint*). Indeed, *Prima Paint*'s separability rule is simply a specific application of the general principle that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25; *see also, e.g., Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 & n.8 (1995); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

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ion in a manner that obliterates any distinction between void and voidable contracts: Justice Black's concern was that "a court might, after a fair trial, hold the entire contract—including the arbitration agreement—*void* because of fraud in the inducement." *Id.* at 407 (Black, J., dissenting) (emphasis added).

II. THE FLORIDA SUPREME COURT'S REFUSAL TO ENFORCE AN ARBITRATION AGREEMENT IN A CONTRACT ALLEGED TO BE VOID DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT DIRECTLY CONFLICTS WITH THE DECISIONS OF AT LEAST FIVE FEDERAL COURTS OF APPEALS

Even if it could legitimately be determined that there were no direct conflict between the decision below and *Prima Paint* itself, certiorari is warranted because there is a unambiguous split in authority between at least four state supreme courts, on the one hand, and at least five federal courts of appeals, on the other, regarding the arbitrability of allegations that a contract is void for illegality. *See* Sup. Ct. R. 10(b).

The Florida Supreme Court is one of many state appellate courts that have held that claims that a contract is illegal and so void should be withheld from arbitration. *See Alabama Catalog Sales* v. *Harris*, 794 So. 2d 312 (Ala. 2000) (alleged violation of usury law); *R.P.T. of Aspen, Inc.* v. *Innovative Communications, Inc.*, 917 P.2d 340 (Colo. Ct. App. 1996) (state antitrust law); Pet. App. 6a-7a (usury law); *Onvoy, Inc.* v. *Shal, LLC*, 669 N.W.2d 344 (Minn. 2003) (corporate statute concerning transactions approved by interested directors); *Nature's 10 Jewelers* v. *Gunderson*, 648 N.W.2d 804 (S.D. 2002) (franchise registration statute).

Many of these state court decisions rely upon a set of opinions by federal courts of appeal that have mistakenly suggested that state law distinctions between void and voidable contracts are relevant to the application of *Prima Paint*. This error is largely traceable to *Three Valleys Municipal Water District* v. *E.F. Hutton & Co.*, 925 F.2d 1136 (9th Cir. 1991), which held that a court should hear a dispute over whether a particular signatory had authority to bind a particular party to a contract that included an arbitration provision. That holding was consistent with *Prima Paint*, as a party who asserts that it never assented to *any* part of a contract has raised an "issue[] relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. However, the Ninth Circuit supported its holding by assert-

ing that *Prima Paint* was "limited to challenges seeking to *avoid* or *rescind* a contract—not to challenges going to the very existence of a contract that a party claims never to have agreed to," and that "*Prima Paint* applies [only] to 'voidable' contracts." 925 F.2d at 1140. Several federal courts of appeals have followed *Three Valleys*' void/voidable distinction when deciding the arbitrability of claims that a party did not assent to a contract. *See, e.g., Sphere Drake Ins.* v. *Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 31 (2d Cir. 2001); *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99, 106-107 (3d Cir. 2000); *Chastain* v. *Robinson Humphrey Co.*, 957 F. 2d 851, 855 (11th Cir. 1992).

Cardegna and several other state decisions have extended the void/voidable distinction beyond cases in which assent was allegedly lacking, to encompass claims that the contract was illegal under state law. That application creates a direct conflict with a group of federal courts of appeals that have held that such illegality challenges are subject to arbitration under *Prima Paint*. *See, e.g., Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-882 (11th Cir. 2005); *Bess* v. *Check Express*, 294 F.3d 1298, 1304-1306 (11th Cir. 2002); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 636-638 (4th Cir. 2002); *Burden* v. *Check Into Cash of Ky., LLC*, 267 F.3d 483, 488-492 (6th Cir. 2001); *Harter* v. *Iowa Grain Co.*, 220 F.3d 544, 550-551 (7th Cir. 2000); *Lawrence* v. *Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-1162 (5th Cir. 1987); *see also Dewey* v. *Wegner*, 138 S.W.3d 591, 597-602 (Tex. App. 2004).

The analytical problem that underlies this conflict is that the state law concepts underlying "void contracts" and "voidable contracts" do not align with *Prima Paint*'s analysis of whether a particular dispute raises an issue directly "relating to the making and performance of the agreement to arbitrate." 388 U.S. at 404. In particular, the term "void contract" may be used to refer *either* to situations in which no contract was ever formed (*e.g.*, because one party never assented) *or* to situations in which the parties' contract is merely unenforceable for policy reasons (*e.g.*, because one of

the parties lacked a license to conduct a certain activity, or because the substantive terms of the contract violated a state statute). *See supra* n.3. The first scenario, which was at issue in *Three Valleys* and the federal cases following it, raises an issue that relates to the making of the parties' arbitration agreement, since it challenges whether *any* agreement was reached. In contrast, the second scenario, which was at issue in *Cardegna* and similar state court cases, challenges only the substantive terms of the underlying contract. This latter type of challenge does not relate to the making of the arbitration agreement, and so is subject to arbitration under *Prima Paint.*

At least five federal courts of appeals have recognized that not all claims that a contract is void are grounds for allowing a party to evade arbitration. *See Bess*, 294 F.3d at 1305; *Snowden*, 290 F.3d at 637; *Burden*, 267 F.3d at 490; *Harter*, 220 F.3d at 550-551; *Lawrence*, 833 F.2d at 1161-1162. In contrast, *Cardegna* and other state appellate cases have treated all claims that a contract is void as subject to adjudication, notwithstanding *Prima Paint. See Alabama Catalog Sales*, 794 So. 2d at 314-317; *R.P.T. of Aspen*, 917 P.2d at 342; Pet. App. 6a-8a; *Onvoy*, 669 N.W.2d at 352-356; *Nature's 10 Jewelers*, 648 N.W.2d at 807. As noted by Justice Bell in his special concurrence in *Cardegna*, a grant of certiorari is the only way to resolve the growing conflict over this issue, since state courts are not bound by the decisions of federal courts of appeal. Pet. App. 9a (Bell, J., specially concurring).

III. THERE IS A COMPELLING NEED FOR CERTIORARI TO PREVENT *CARDEGNA* AND SIMILAR DECISIONS FROM UNDERMINING THE GOALS AND CONSISTENT APPLICATION OF THE FAA

The state court decisions that improperly distinguish *Prima Paint* undermine the core goals of the FAA. Absent a ruling reaffirming the breadth of *Prima Paint*'s holding and the supremacy of federal law on this issue, courts will face increasing numbers of claims that contracts are void, as parties invoke and attempt to expand contract doctrines that

allow them—in some state courts—to evade their obligation to arbitrate.

Decisions such as *Cardegna* have direct negative impacts on the use of arbitration clauses across the country. First, they prolong litigation and thus increase "the very kind of costs and delay . . . that Congress wrote the [Federal Arbitration] Act to help the parties avoid." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 278 (1995). This issue is a concern not only for the party actually forced to litigate a matter that properly belongs in arbitration, but for the wide range of other businesses and organizations, including Chamber members, who face increased uncertainty regarding the enforceability of arbitration agreements incorporated into their contracts.

Second, decisions misinterpreting *Prima Paint* undermine the uniformity of the FAA and provide a significant incentive to forum-shop. In the Eleventh Circuit, for example, a challenge to the parties' contract as void for illegality will be referred to arbitrators if heard in federal court, but will be decided by state judges in Alabama and Florida. *Compare Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-882 (11th Cir. 2005), *and Bess* v. *Check Express*, 294 F.3d 1298, 1304-1306 (11th Cir. 2002), *with Alabama Catalog Sales* v. *Harris*, 794 So. 2d 312, 314-317 (Ala. 2000), *and* Pet. App. 7a-8a. That risk of inconsistent results is antithetical to the FAA and creates significant tension with this Court's decisions on the pre-emptive force of the FAA. *See, e.g., Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984) ("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."). This issue is of vital importance to many of the businesses represented by the Chamber, which rely on the FAA to ensure that their arbitration agreements are enforced consistently across the many jurisdictions in which they do business.

Third, the evasion of the rule in *Prima Paint* is simply the latest manifestation of the persistence of judicial suspicion toward arbitration. At bottom, the courts that fail to order arbitration of certain contract claims have decided that it is better to litigate issues that might be subject to arbitration than to arbitrate issues that might belong in court. That choice is not only at odds with the FAA and *Prima Paint*, *see supra* pp. 5-9, but the long line of Supreme Court cases rejecting generalized attacks based on "'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,'" *Green Tree Fin. Corp.-Ala.* v. *Randolph*, 531 U.S. 79, 89-90 (2000) (citation omitted), and "the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators," *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). *See also Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (cataloguing previous cases "recogniz[ing] that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum'" (citation omitted)). Here, as in *Randolph*, *Mitsubishi Motors*, *Gilmer* and a host of other cases, certiorari is necessary to reinforce the strong federal policy in favor of arbitration.

Indeed, if the Court does not resolve the split in authority and reaffirm its holding in *Prima Paint*, courts are likely to see a rise in voidness challenges, as parties attempt to find reasons to claim that a contract is void rather than voidable to evade arbitration.[5] Depending on the particular

[5] The persistence of attacks on arbitration strongly suggests that any claim that allows litigation rather than arbitration will become common. For example, the FAA allows unconscionability challenges to arbitration agreements because such challenges are generally applicable to any contract. 9 U.S.C. § 2. However, now *most* unconscionability cases involve arbitration agreements. *See* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buff. L. Rev. 185, 194-196 (2004) (finding that the total number of unconscionabil-

state's case law, a contract may be void not only if it involves the commission of a crime or tort or involves the violation of a state statute that specifically provides that contravening contracts are void, but also if it conflicts with general regulatory or administrative statutes, *see, e.g., Calamari & Perillo on Contracts* § 22.1, or is otherwise contrary to public policy under various balancing tests, *see Restatement (Second) of Contracts* § 194. There is substantial uncertainty and complexity to such claims. *See generally* 15 *Corbin on Contracts* §§ 79.1-79.5 (Joseph M. Perillo ed., 2003); 5 *Williston on Contracts* §§ 12.1-12.3 (Richard A. Lord ed., 4th ed. 1993); 6 *Williston on Contracts* § 12.4 (Richard A. Lord ed., 4th ed. 1995). Under the rule in *Cardegna*, cases involving such allegations promise prolonged litigation before a court can determine whether litigation—rather than arbitration—is appropriate. Such prolonged litigation entails significant time and expense to businesses that, under *Prima Paint*, should not be in court at all.

This Court has repeatedly rejected past attempts to impede the functioning of the FAA and of parties' arbitration agreements by imposing procedural or substantive burdens that would increase pre-arbitration litigation and undermine "Congress's clear intent, in the Arbitration Act, to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). *See, e.g., Randolph*, 531 U.S. at 90-91 (refusing to hold arbitration agreements invalid based on vague allegations that the costs of arbitration might prevent parties from vindicating their federal statutory rights); *Allied-Bruce Terminix*, 513 U.S. at 275 (rejecting an assertion that parties must demonstrate that they intended their contract to involve interstate commerce to come within the scope of the FAA because such a result would "risk[] the very kind of costs and delay through

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ity cases available through computerized searches jumped from 54 in 1982-1983 to 235 in 2002-2003 and that nearly 70% of the recent cases involved claims that arbitration agreements were unconscionable).

litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid"); *Southland*, 465 U.S. at 7 (refusing to delay Supreme Court review of a state judicial decision denying enforcement of an arbitration provision because prolonged litigation is "one of the very risks the parties, by contracting for arbitration, sought to eliminate"); *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (recognizing the separability doctrine as furthering the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"). Certiorari in this case would once again help protect the FAA from being undermined by state law doctrines that prevent the enforcement of arbitration agreements.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

SETH P. WAXMAN
Counsel of Record
CHRISTOPHER R. LIPSETT
ERIC J. MOGILNICKI
KELLY THOMPSON COCHRAN
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

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