No. 25-585

In the
Supreme Court of the United States

SUNTRUST BANK,
Petitioner,

v.

CHARLES DANIEL BICKERSTAFF, as Administrator of the Estate of Jeff Bickerstaff, Jr., on behalf of himself and all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Georgia

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber represents businesses with an interest in the fair and consistent interpretation of arbitration clauses. Many of the Chamber's members regularly rely on arbitration agreements because arbitration is efficient, fair, inexpensive, and less adversarial than litigation in court. The Chamber's members have entered into millions of contractual relationships providing for arbitration to achieve those benefits. They also have an interest in courts not allowing plaintiffs to take advantage of the class-action procedural device to alter contracting parties'

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amicus to file this brief.

substantive rights, such as the right to individual arbitration.

The decision below threatens these interests and contravenes this Court's precedent. Acting contrary to the commands of the Federal Arbitration Act ("FAA"), the court below nullified the plain language of the parties' arbitration agreement, permitting a class action to proceed where thousands of class members had agreed to arbitrate their claims individually. Although the Chamber has seen its fair share of erroneous arbitration decisions over the years, the decision below is both particularly egregious and part of the growing trend of class-action abuse that warrants this Court's attention. This case is also an excellent vehicle to address the question presented, as the text of the arbitration agreement is plain and similar to opt-out provisions that are common across the country. The Chamber and its members thus have a strong interest in this case and in reversal of the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The rapid growth in the number of cases allowed to proceed as class actions raises concerns that the lower courts are failing to enforce essential class-action requirements and turning a blind eye to abuse. Businesses across the United States have a strong interest in enforcing the requirements that apply before a case may proceed as a class action, including denying class certification where (as here) customers have agreed to arbitrate their disputes on an individual basis.

The Court should grant review in this case because the decision below contradicts both the FAA and this Court's precedents by failing to enforce the parties' arbitration agreement. It expands on the Georgia Supreme Court's improper decision in *Bickerstaff v. SunTrust Bank* (*Bickerstaff II*), 788 S.E.2d 787 (Ga. 2016), and sweeps into a class action customers who by the terms of their arbitration agreements expressly agreed that merely filing a lawsuit would not be sufficient to opt out of their arbitration obligations.

The decision below decides a question of critical importance in a manner that clashes with this Court's precedent. *See* Sup. Ct. R. 10(c). It misapplies federal arbitration law and its animating principles, applying a theory of representative litigation that extends the judicial power far beyond its traditional confines. Left uncorrected, the decision below will undermine the value of arbitration clauses, produce unnecessary delay through protracted litigation, and rob contracting parties of their choices regarding arbitration. The decision below will also serve as a dangerous precedent that allows plaintiffs to abuse the class-action process to gain new substantive rights for absent class members to which they are not entitled.

There is no reason lower courts should be permitted to discriminate against arbitration agreements, void contractual provisions, and permit class actions to proceed where the parties have agreed to arbitrate their disputes on an individual basis. This Court should grant certiorari to protect the enforceability of arbitration agreements and to

reaffirm the proper limits on the use of the class-action device.

ARGUMENT

I. The Court should grant review to enforce the Federal Arbitration Act and reaffirm its precedent.

The decision below contravenes the FAA and this Court's precedent. The court below refused to enforce the arbitration clause in the parties' revised deposit agreement, which was implemented beginning in 2013, and instead effectively applied a special rule that reflects an improper hostility to arbitration.

Congress enacted the FAA, which controls the interpretation and enforcement of arbitration agreements, *see DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53–54 (2015), to correct "widespread judicial hostility to arbitration." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 232 (2013). The FAA makes arbitration agreements "valid, irrevocable, and enforceable," and directs courts to read them "in accordance with [their] terms." 9 U.S.C. §§ 2–4. As this Court has recognized, the statute "places arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). It also preempts state laws that impede the "streamlined proceedings and expeditious results" that arbitration is designed to provide. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)); *see also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 662 (2022).

Like any other contract, courts are required to rigorously enforce arbitration agreements "as written." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 525 (2018); *accord Italian Colors Rest.*, 570 U.S. at 232–33; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The FAA accommodates a wide range of different agreements to arbitrate and generally leaves parties "free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). But "[w]hatever they settle on, the task for courts . . . remains the same: 'to give effect to the intent of the parties.'" *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010)).

Contrary to these settled principles, the court below concluded that conduct the parties expressly agreed would *not* be sufficient to reject individual arbitration—filing a lawsuit—sufficed to allow absent class members to escape their contractual commitments to arbitrate. *See* App.8a–9a. The relevant agreement, which was amended in March 2013, states that a customer cannot opt out of arbitration by filing a lawsuit but must instead provide express, personal written notice opting out of arbitration within 45 days of opening an account. App.43a. The lower court's failure to enforce this key provision transforms the agreement's opt-in default into an opt-out default, contravening basic principles of contract interpretation and enforcement.

In taking this approach, the court below expanded on a previous decision by the Georgia Supreme Court that allowed the named plaintiff—whose contract

predated the amended 2013 arbitration agreement—to satisfy certain preconditions to filing suit (such as opting out of arbitration) on behalf of "existing depositors" merely because the putative class purportedly held *the same* opt-out rights as he did. *Bickerstaff II*, 788 S.E.2d at 789–90, 791 (observing that "a class representative may satisfy contractual notice requirements"); *id.* at 794–95 (discussing how the named plaintiff's filing of the complaint tolled the time until others ratify the action, thus making it as if they too filed a complaint). The court concluded that the named plaintiff, as the class representative, had authority to act on behalf of all *similarly situated* putative class members. *Id.*

That reasoning is wrong and calls out for correction. Merely because the putative class *held* the same opt-out rights as the named plaintiff does not mean that they *exercised* them. It was therefore wrong of the Georgia Supreme Court to nullify the federally protected right to arbitration with respect to putative class members who had not opted out of arbitration. The "right to enforce arbitration agreements" enshrined in the FAA "would not be a right to *arbitrate* in any meaningful sense if . . . principles of state law could be used to transform 'traditiona[l] individualized . . . arbitration' into the 'litigation it was meant to displace.'" *Viking River*, 596 U.S. at 651 (quoting *Epic Sys.*, 584 U.S. at 508–09).

In any event, the Georgia Supreme Court's reasoning in that earlier case—allowing the named plaintiff to opt out of arbitration under his pre-2013 agreement by filing litigation—should not have been extended to the unnamed customers who signed the

2013 version of the deposit agreement. Those customers are not similarly situated to the named plaintiff because their agreements prohibit them from opting out of arbitration by filing litigation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (class-action procedures are meant to "promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results" (quoting Fed. R. Civ. P. 23(b) advisory committee's note to 1966 amendment)). It is undisputed that the named plaintiff did not engage in the necessary conduct to opt out (even constructively) on those customers' behalf, as he never notified SunTrust in writing within 45 days of opening his account (as the 2013 version of the agreement expressly requires).

The lower court's approach is impermissibly specific—and hostile—to arbitration. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 248 (2017) (courts "violate the FAA" when their applications of state law "single[] out arbitration for disfavored treatment"). Although class representatives may have authority to exercise certain contractual rights on behalf of absent class members, their status as class representatives does not confer on them (or the class) new *substantive contractual rights* to file suit without complying with otherwise valid pre-suit contractual requirements. The lower court's contrary holding "appears to reflect the subject matter at issue here (arbitration), rather than a general principle," clashing with this Court's unambiguous directive to "place arbitration contracts 'on equal footing with all other contracts.'" *Imburgia*, 577 U.S.

at 56 (quoting *Buckeye Check Cashing*, 546 U.S. at 443).

In short, the class-action device allows nonparties to be subject to a court's judgment *only* when a nonparty is adequately represented by a party with the same interests. *See Viking River*, 596 U.S. at 654–55. The named plaintiff here does not have the same interests—or the same rights—as Sun Trust customers who signed agreements after March 1, 2013. Those customers are subject to a distinct agreement—one that must be read and enforced by its plain terms—reflecting their commitment to submit their claims to arbitration.

II. The Court should grant review because strong policy considerations support enforcing arbitration clauses as written.

This case demonstrates the excesses resulting from procedural innovations that take courts afield from traditional understandings of the judicial power and result in nullifying the federally protected right to individual arbitration. This Court should grant review to reassert the limits necessary to ensure that the class-action device is used consistently with constitutional requirements, to strike down a lower court decision that reflects impermissible hostility to arbitration, and to address the serious problem of class-action abuse.

Damages class actions are an "'adventuresome' innovation" allowing courts to amass and resolve through representative litigation damages claims that do not involve common rights or common funds. *Windsor*, 521 U.S. at 614–15 (quoting Benjamin

Kaplan, *A Prefatory Note*, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)). Courts adjudicating such actions exercise greater authority than courts at law or equity historically possessed to resolve claims by groups of individuals who are not fully joined as parties and whose rights are distinct from the rights of those who are parties. *See* Joseph Story, Commentaries on Equity Pleadings, ch. IV, § 120 (2d ed. 1840). As a result, courts overseeing a damages class action—even one in the state court system—must be careful not to stray beyond the traditional judicial power "to redress harms that defendants cause plaintiffs" into the realm of exercising a quasi-regulatory "freewheeling power to hold defendants accountable for legal infractions." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021) (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019)). Consistent with due process, state courts generally remain free to interpret and apply their class-action procedures as they see fit. But they cannot do so in a way that nullifies federal rights, such as the right to individual arbitration as required by the parties' agreement, guaranteed by the FAA. The FAA preempts even generally applicable state laws that impose "class proceedings without the parties' consent" because such laws are "flatly inconsistent with the foundational FAA principle that arbitration is a matter of consent." *Varela*, 587 U.S. at 188 (quotation marks omitted).

The decision below did just that. *See* App.8a–9a. The net effect is to certify a damages class in which the named plaintiff seeks recovery on behalf of an unnamed class that includes individuals who are not entitled to pursue claims against SunTrust through

individually filed lawsuits. If a customer who signed the 2013 deposit agreement filed her own suit against SunTrust, she would have no credible argument that filing that lawsuit alone—without providing the specific written notice required by the deposit agreement—would allow her to opt out of arbitration. Any such argument would be foreclosed by the agreement's express language. By allowing such customers to participate in this damages class action, the court below subverted the "foundational FAA principle" that arbitration is a matter of contract, and "[p]arties may generally shape [arbitration] agreements to their liking." *Varela*, 587 U.S. at 184.

The decision below also contributes to the growing problem of class-action creep—the proliferation of ever-expanding class actions that do little to help consumers who allegedly suffered judicially cognizable harm, while depriving the parties of the bargain they struck by agreeing to arbitrate their disputes. The mutual benefits of arbitration are well-recognized by scholars and this Court alike: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Id.* at 185 (quoting *Stolt-Nielsen*, 559 U.S. at 685); *see also* Brian Farkas, *Arbitration at the Supreme Court: The FAA from RBG to ACB*, 42 Cardozo L. Rev. 2927, 2945 (2021). By contrast, the "typical class action" is characterized by "procedural complexity and slow pace." John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 710 (1986); *see also* Brian T. Fitzpatrick, *An Empirical Study of Class*

Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811, 820 (2010).

Refusing to enforce arbitration clauses as written robs both businesses and their customers of the chance to select a more efficient dispute resolution option. Analysis demonstrates that arbitration remains "fairer, faster, and better" than litigation for both consumers and employees. Nam D. Pham & Mary Donovan, ndp | analytics, U.S. Chamber of Com. Inst. for Legal Reform, Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration (2022), *available at* https://institutefor legalreform.com/wp-content/uploads/2022/03/Fairer-Faster-Better-III.pdf. Consumers prevail more often in arbitration terminated with awards (41.7%) as compared to litigation that is terminated with awards (29.3%). *See id.* at 4. Consumers on average received larger awards through arbitration ($79,945) as compared to awards through litigation ($71,354). *See id.* And consumers on average spend less time in arbitration (321 days) than in litigation (439 days). *See id.*; *see also* Sheryl L. Axelrod, *Why Arbitrate? Why Not? The Benefits of Arbitrating Commercial Disputes*, ABA Bus. L. Today (Aug. 29, 2025).

The decision below also robs businesses of predictability that can be used to cabin risk. A primary benefit of arbitration agreements is that they allow businesses to know with certainty which parties will arbitrate their disputes. When the text of an agreement is ignored, however, parties cannot know who will or will not be added to the class and who will or will not honor their decision to arbitrate. Delays arising from this uncertainty defeat the very purpose

of arbitration. "Belated enforcement of [an] arbitration clause . . . significantly disappoints the expectations of the parties and frustrates the clear purpose of their agreement." *Dean Witter Reynolds*, 470 U.S. at 225 (White, J., concurring). That undermines the FAA's objective to encourage "efficient and speedy dispute resolution." *Id.* at 221 (majority op.); *see also Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("Absent an automatic stay of district court proceedings [pending an appeal of a motion to compel arbitration], . . . many of the asserted benefits of arbitration (efficiency, less expense, less intrusive discovery, and the like) would be irretrievably lost.").

The decision below is particularly concerning because it discourages parties from including opt-out clauses in arbitration agreements. Opt-out provisions have social utility because they provide consumers with greater choice while simultaneously limiting uncertainty for businesses by adopting procedures and time limits governing opt-outs. *Cf. Cir. City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 1199–1200 (9th Cir. 2002) (concluding that the presence of an opt-out provision undermines arguments that the arbitration agreement was unconscionable). This balance benefits both parties, and as a result, opt-out provisions have become more common. *See, e.g.,* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. Rev. 1, 23 (2013).

Judicial failure to honor clear opt-out provisions has far-reaching implications. If opt-out language is not respected, businesses have no way to enforce any arbitration agreement against any contracting partner who could someday be added to a class-action

lawsuit. The ensuing uncertainty could only skew litigation incentives and create unacceptable risk for industry. *See 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.").

The better path—and the one this Court should take—is to grant certiorari to reaffirm the importance of enforcing opt-out provisions as written, which promotes consumer choice while mitigating risk to businesses.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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