PETITION

FILED WITH THE U.S. SUPREME COURT

THIS BRIEF IS WHITE IN COLOR

No. 02-

IN THE
Supreme Court of the United States

DISCOVER BANK,

Petitioner,

v.

JOHN SZETELA,

Respondent.

Petition for a Writ of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the California Court of Appeal properly ruled—in conflict with the Federal Arbitration Act, this Court's precedents, and the decisions of all the federal courts of appeal to have addressed the issue—that parties to an arbitration agreement can be forced to arbitrate as a class or not at all, when their arbitration agreement expressly forecloses the use of class arbitration.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Discover Bank ("Discover") was defendant, appellee and petitioner below. Respondent John Szetela was plaintiff, appellant and respondent below.

Pursuant to S. Ct. Rule 29.6, petitioner states that it is wholly owned by Novus Credit Services, Inc., which is in turn wholly owned by Morgan Stanley, a publicly traded company.

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Discover Bank ("Discover") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 97 Cal. App. 4th 1094 and reprinted in the appendix hereto ("App.") at 1a. The order of the Supreme Court of California denying Discover's petition for review is unreported and reprinted at App. 12a.

JURISDICTION

The California Court of Appeal issued its decision on April 22, 2002. App. 1a. Rehearing was denied on May 16, 2002. App. 10a. The Supreme Court of California denied Dis-

cover's petition for review on July 31, 2002. App. 11a. On October 21, 2002, Justice O'Connor entered an order extending the time within which to file this petition to and including November 28, 2002. App. 12a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * 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. [U.S. Const., art. VI, cl. 2.]

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

> A written provision in any * * * contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

INTRODUCTION

This case presents the question whether under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, a state court may require parties to an arbitration agreement to proceed with class arbitration or forgo arbitration altogether, when the terms of their agreement to arbitrate expressly preclude a class arbitration procedure. It is also one of the unusual cases in which all the customary criteria for certiorari are readily met.

First, the California Court of Appeal's decision conflicts with the decisions of the federal circuit courts to have con-

sidered the same issue. S. Ct. Rule 10(b). The Seventh Circuit has held that courts are without authority to order class-wide arbitration unless the parties have expressly agreed to that procedure, *Champ* v. *Siegel Trading Co.*, 55 F.3d 269, 276-277 (7th Cir. 1995), and the Third, Fourth, Eighth, and Eleventh Circuits—unlike the court below—have enforced arbitration agreements despite the unavailability of class action procedures under those agreements. *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 638-639 (4th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3191 (Sept. 12, 2002) (No. 02-424); *Dominium Austin Partners, L.L.C.* v. *Emerson*, 248 F.3d 720 (8th Cir. 2001); *Randolph* v. *Green Tree Fin. Corp.*, 244 F.3d 814, 817-818 (11th Cir. 2001); *Johnson* v. *West Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001). The decision below likewise conflicts with the decisions of the Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have reached the related conclusion that the Arbitration Act precludes courts from requiring *consolidation* of arbitration proceedings unless the parties expressly provided for such procedures in their arbitration agreements.

Second, the Court of Appeal's decision squarely conflicts with the decisions of this Court. S. Ct. Rule 10(c). This Court has repeatedly emphasized the preemptive power of the Arbitration Act, and has repeatedly admonished, as the Act itself makes plain, that arbitration agreements must be enforced according to their terms—even when enforcement of the agreement results in piecemeal litigation of the contracting parties' claims. Indeed, this Court has previously recognized that an arbitration agreement may be enforced "even if the arbitration could not go forward as a class action." *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (quotation omitted).

Third, the conflict in this case concerns a matter of overriding national importance. S. Ct. Rule 10(c). The Court of Appeal's decision in this case contravenes the central pur-

pose of the Arbitration Act: enforcing arbitration agreements according to their terms. And the conflict between California's approach and that of the rest of the country plainly has nationwide implications. Tens of thousands of standard commercial and consumer contracts contain arbitration provisions. In California and the smattering of other jurisdictions adopting California's minority view, the parties to an arbitration agreement expressly precluding a class arbitration procedure—or an agreement that is silent as to class arbitration—can nonetheless be forced either to arbitrate their claims as a class, or not to arbitrate at all. In the rest of the country, courts enforce arbitration agreements as written, declining to rewrite them to include a class procedure for which the contracting parties did not provide. Thus, parties to standard contracts containing standard arbitration provisions face the prospect of starkly different proceedings arising from those contracts—all depending on whether they sue or are sued in California, or somewhere else.

In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court noted probable jurisdiction to determine whether the California Supreme Court's ruling imposing a class action structure on an arbitration conflicted with the Federal Arbitration Act. But after briefing and oral argument, this Court concluded that it could not exercise jurisdiction over that question because it had not been adequately raised below. *Id.* at 9. The question left open in *Southland* is squarely presented by this case, and the conflict between the California Supreme Court's approach and that of the overwhelming majority of federal and state courts of appeal has only deepened in the intervening years—as is evidenced by the recent proliferation of petitions for certiorari on this and related issues. Certiorari should be granted to resolve, at last, this important question.

STATEMENT OF THE CASE

1. The Federal Arbitration Act, 9 U.S.C. §§ 1-16, "declared a national policy favoring arbitration and withdrew the power of the state to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland*, 465 U.S. at 10. "[M]otivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered," the Act was passed to "ensure judicial enforcement of privately made agreements to arbitrate," placing arbitration agreements "upon the same footing as other contracts." *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 219, 220 (1985); *see Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (Arbitration Act's "central purpose" is "to ensure 'that private agreements are enforced according to their terms' ") (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

To carry out the Act's central purpose, state and federal courts are instructed to "rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation." *Dean Witter Reynolds*, 470 U.S. at 221 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 20 (1983)); *Perry* v. *Thomas*, 482 U.S. 483, 489 (1987).[1] And under the Supremacy Clause, state laws in conflict with the Act's strong policy in favor of arbitration must give way. *See, e.g., Perry*, 482 U.S. at 484 (finding preempted a California law allowing certain actions to be maintained in court " 'without regard to the existence of any private agreement to arbitrate' ") (quoting Cal. Lab. Code Ann. § 229);

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[1] The "liberal federal policy favoring arbitration agreements" embodied in Section 2 of the Act, *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24, applies to state and federal courts alike. *Southland*, 465 U.S. at 11-12; *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 272 (1995).

Southland, 465 U.S. at 11-12 (finding preempted a California law interpreted by state courts to require judicial consideration of claims).

2. When respondent John Szetela opened a credit card account with Discover in 1993, he entered into a Cardmember agreement with Discover governing the terms of their relationship. In 1999, Discover sent Szetela a proposed amendment to the Cardmember agreement, which provided in pertinent part:

> ARBITRATION OF DISPUTES. In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration.
>
> IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. [App. 2a.]

The agreement entitled Szetela to arbitrate any claims against Discover in the judicial district in which he resides

and to select between two nationally-known arbitration providers. The agreement did not limit the remedies Szetela could obtain in arbitration, and it required Discover, upon Szetela's request, to advance arbitration fees to Szetela. The agreement also capped Szetela's liability for arbitration fees, so that his arbitration expenses would be no greater than if he had brought his claims in court.

Szetela could have rejected the arbitration provision by notifying Discover of his objection and canceling his Discover Card. He did neither. Nor did Szetela object to the arbitration agreement in late 1999, when Discover upgraded his Card to a Platinum Card and sent him a new Cardmember agreement containing an identical arbitration provision.

3. In 2000, a New Jersey resident filed a putative class action against Discover in California state court, raising various tort and contract claims. The complaint was subsequently amended to add Szetela, a California resident, as an additional named plaintiff. Invoking the arbitration agreement, Discover moved to compel arbitration of Szetela's claim. The trial court granted the motion and compelled Szetela to arbitrate his claims against Discover.

Szetela prevailed at arbitration. He also appealed the trial court's order compelling arbitration to the California Court of Appeal, arguing that the arbitration agreement's preclusion of class-wide arbitration should have been stricken. Discover responded, among other things, that the Federal Arbitration Act required courts to enforce agreements according to their terms, even if the result was to preclude parties from bringing or participating in class actions. Resp. Br. 8, 13-15 & n.8, 30.

4. The California Court of Appeal treated Szetela's appeal as a petition for a writ of mandate. App. 1a. Invoking California law, the court considered whether the Cardmember agreement's arbitration provision was procedurally and substantively unconscionable. *Id.* at 6a-9a. Despite evidence

that there were hundreds of credit card issuers in California from whom Szetela could have obtained a credit card—many of whom offered credit cards without arbitration provisions—the Court of Appeal found the arbitration agreement to be procedurally unconscionable because it was presented to Szetela on a "take it or leave it" basis. *Id.* at 7a.

The court next concluded that the arbitration agreement's class action prohibition was substantively unconscionable, because it "contradict[ed] the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general." *Id.* at 8a (citing Cal. Bus. & Prof. Code §§ 17200 *et seq.*). Taking "exception" to the unavailability of the class action procedure, the court opined that the no-class-action provision "was meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money." App. 7a-8a. Without a class action procedure available in arbitration, the court went on, "relatively few, if any, customers will seek legal remedies, and * * * any remedies obtained will only pertain to that single customer without collateral estoppel effect." *Id.* at 8a. The Court of Appeal also concluded that the arbitration agreement's no-class-action provision violated the public policy underlying class actions—"to promote judicial economy and streamline the litigation process"—because it "allow[ed] litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole." *Id.* at 9a.

Because the Court of Appeal did not address Discover's argument that compelling class arbitration contrary to the terms of the parties' arbitration agreement would violate the Federal Arbitration Act, Discover petitioned for rehearing, again arguing that compelling class arbitration in these circumstances would violate the Act. Rehearing was denied. App. 10a.

5. Discover then filed a Petition for Review with the Supreme Court of California, arguing that the Court of Appeal's decision violated the Federal Arbitration Act. Discover argued, as it had below, that by requiring parties to arbitrate on a class-wide basis, regardless of the terms of the arbitration agreement, the Court of Appeal had created a rule that conflicted with, and was preempted by, the Arbitration Act's admonition that agreements be enforced according to their terms. Pet. for Rev. 2, 20-28.

The Supreme Court of California denied Discover's petition for review on July 31, 2002. App. 11a. Rather than be forced to conduct a complicated "class arbitration" on terms to which it had not agreed, Discover proceeded with class litigation in trial court.[2]

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[2] It is difficult to conceive how "class arbitration" could be accomplished without the extensive involvement of a trial judge. A judge must, among other things, define the class, rule on the best form of notice to the class, allow the class to opt out, and monitor the proceedings to ensure that the class is adequately represented and that the issues in play are common to the class. *See Keating* v. *Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982) (acknowledging that court, and not arbitrators, would conduct "arbitral class" certification procedures, monitor representation, approve proposed settlements, and the like), *rev'd in part*, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). Because the benefits of arbitration—speed, informality, and efficiency—do not attach when "class arbitration" has been ordered, Discover—rather than straddle arbitral and judicial fora to resolve the claims of the plaintiff class—opted to defend against the class claims in just one forum: state court.

REASONS FOR GRANTING THE WRIT

I. THIS CASE SQUARELY PRESENTS THE QUESTION TAKEN UP, BUT LEFT UNRESOLVED, IN *SOUTHLAND CORP.* v. *KEATING.*

1. In *Keating* v. *Superior Court*, 645 P.2d 1192, 1195 (Cal. 1982), the plaintiff franchisees brought a class action against their franchisor alleging numerous state law claims. The trial court granted Southland's motion to compel arbitration of the plaintiffs' claims and ordered that the arbitration proceed as a "class arbitration"—even though the parties' agreement did not specify that a class procedure was available in arbitration. The California Supreme Court granted review of the question whether the trial court could impose class action procedures on the parties. Advancing the same policy rationales the Court of Appeal identified in this case, the California Supreme Court concluded that the arbitration could go forward as a class proceeding, if the trial court concluded on remand that "gross unfairness" would otherwise result. *Id.* at 1209. Three justices dissented, observing that "[a]rbitration is a matter of agreement," and that the parties' arbitration contracts "do not provide for class arbitration, nor have the parties subsequently agreed thereto." *Id.* at 1214.

This Court noted probable jurisdiction over the question "whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts." *Southland*, 465 U.S. at 3.[3] But after briefing and argument, this Court dismissed that question for lack of

[3] The Court reversed the California Supreme Court on the second of the two questions over which the Court had noted probable jurisdiction: whether California's Franchise Investment Law precluded parties from arbitrating claims arising under the law. The California Supreme Court had held in *Keating* that it did; invoking again the preemptive force of the Act's animating purpose, this Court held in *Southland* that it did not.

jurisdiction, finding that the class arbitration procedure had been challenged below on state law grounds only. *Id.* at 9.

In the intervening two decades, California courts have built on the California Supreme Court's decision in *Keating*, regularly imposing classwide arbitration without regard to the terms of the parties' arbitration agreements.[4] The federal courts of appeal—along with the great majority of federal district courts and state appellate courts—have in the meantime taken a different path. *See infra* at 13-20.

2. This case raises the same question left unanswered in *Southland*—with an even more compelling twist. The parties' arbitration agreement in *Southland* was silent as to whether class action procedures were available in arbitration. Discover's arbitration agreement with Szetela expressly *precluded* class action procedures. The California Court of Appeal therefore did not just import new procedural terms into the agreement, as in *Keating*; it struck and rewrote the terms that were already there. Thus, under California's *Keating* rule as expanded by *Szetela*, class arbitration is available in California *whenever* the parties agree to arbitrate, *whatever* their agreement actually says about arbitral procedures. California accordingly requires parties to an arbitration agreement to submit to class-wide or representative arbitration, regardless of what their contract says—or forgo arbitration altogether.

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[4] *See, e.g., Sanders* v. *Kinko's Inc.*, 121 Cal. Rptr. 2d 766 (Cal. Ct. App. 2002); *Blue Cross of Cal.* v. *Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1998), *cert. denied*, 527 U.S. 1003 (1999); *Izzi* v. *Mesquite Country Club*, 231 Cal. Rptr. 315 (Cal. Ct. App. 1986); *Lewis* v. *Prudential Bache Secs., Inc.*, 225 Cal. Rptr. 69 (Cal. Ct. App. 1986); *Anesthesia Care Assocs. Med. Group, Inc.* v. *Blue Cross of Cal.*, 2002 WL 484662 (Cal. Super. Ct. Feb. 25, 2002).

This case does not suffer from the jurisdictional impediments to review that surfaced in *Southland*. The question whether the Federal Arbitration Act precluded the state court from engrafting class procedures onto the parties' arbitration agreement was raised below. The trial court concluded that federal law supported its ruling compelling arbitration. *See* Trial Tr. 15, lines 14-17 (May 1, 2001). On Szetela's appeal, Discover explained in its responsive brief that the Act preempted the court from rewriting the parties' arbitral bargain. Resp. Br. 8, 13-15 & n.8, 30. When the Court of Appeal ignored the issue in its opinion, Discover sought rehearing on the federal question. Pet. for Reh. 3-16. When the Court of Appeal denied rehearing, Discover filed a petition for review with the California Supreme Court, arguing, among other things, that the federal Act required the state court to enforce the parties' agreement according to its terms. Pet. for Rev. 2, 20-28. The issue was amply preserved for review. *See Clark* v. *Jeter*, 486 U.S. 456, 459-460 (1988).

Nor does the Court of Appeal's couching its ruling on "unconscionability" grounds blunt the Arbitration Act's preemptive force. Section 2 of the Act provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 686-687 (1996). But while the Arbitration Act permits parties to resist enforcement of their arbitration agreements based upon generally-applicable state-law contract defenses—including unconscionability—it does not grant a state court license to invalidate an agreement simply by declaring it to be in tension with an otherwise-preempted state policy, and thus "unconscionable." Further, as the Court explained in *Perry*, 482 U.S. at 493 n.9, a court "may not * * * in assessing the rights of litigants to enforce an arbitration agreement, * * * rely on the uniqueness of an agreement to arbitrate as a

basis for a state-law holding that enforcement would be unconscionable." That is exactly what the California Court of Appeal did here; it assessed the arbitration agreement's special procedures and the nonpreclusive effect of arbitral rulings, and declared the agreement's no-class-action provision "unconscionable" as against California policy. Section 2's limited contract-law safe harbor does not apply here.

II. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THE DECISIONS OF EVERY FEDERAL CIRCUIT TO HAVE ADDRESSED THE ISSUE.

The rule created by the California Court of Appeal—which forces parties to an arbitration agreement, no matter what the terms of the agreement, to arbitrate as a class or not at all—squarely conflicts with the decisions of all the federal courts of appeal to have considered the issue. Those decisions uniformly have stated that courts may not impose class arbitration unless the parties' arbitration agreement expressly provided for that procedure, and uniformly have enforced arbitration agreements containing no-class-action provisions.

1. In *Champ* v. *Siegel Trading Company*, 55 F.3d at 271, the Seventh Circuit held that "absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration." Analogizing to multiple circuit court decisions holding that a court may not order consolidated arbitration where the parties' arbitration agreement did not provide for that procedure, *see infra* at 17-18, the court of appeals concluded that it would not "order[] class arbitration where the parties' arbitration agreement is silent on the matter." *Id.* at 275.

As the *Champ* court explained, parties to an arbitration agreement " 'relinquish certain procedural niceties which are normally associated with a formal trial.' " *Id.* at 276 (quoting *Burton* v. *Bush*, 614 F.2d 389, 390 (4th Cir. 1980)). "One of

those 'procedural niceties' is the possibility of pursuing a class action." *Champ*, 55 F.3d at 276-277.[5] The court of appeals acknowledged the plaintiffs' "complain[t] that various inefficiencies and inequities will result from denying them the opportunity to pursue arbitration on a class basis." *Id.* But it held that "[w]hile that may or may not be the case, * * * the Supreme Court has repeatedly emphasized that we must rigorously enforce the parties' agreement as they wrote it, 'even if the result is piece-meal litigation.' " *Id.* (quoting *Dean Witter Reynolds*, 470 U.S. at 221). Accordingly, the Seventh Circuit "enforce[d] the type of arbitration to which these parties agreed, which does not include arbitration on a class basis." *Champ*, 55 F.3d at 277.

2. The federal courts of appeal that have subsequently spoken on the class arbitration issue all have followed *Champ*'s lead. In *Dominium Austin Partners, LLC* v. *Emerson*, 248 F.3d at 728, for example, the court of appeals affirmed a district court ruling compelling individual arbitration of the plaintiffs' claims. Citing the same precedents on which the *Champ* court relied, the Eighth Circuit acknowledged that its ruling might not "effect the most expeditious resolution of claims," but it properly elevated the contracting parties' intent over its own notions of economy: where "the partnership agreements make no provision for arbitration as a class, the district court did not err by compelling appellants to submit their claims to arbitration as individuals." *Id.* at 728-729.

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[5] Even the Court of Appeal in this case acknowledged that the class action is a "procedural mechanism." App. 9a. *See also Caudle* v. *American Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to *be* in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants.") (emphasis in original).

Similarly, in *Johnson* v. *West Suburban Bank*, 225 F.3d at 377 n.4, a case involving claims brought under the federal Truth In Lending Act (TILA), the Third Circuit cited *Champ* in observing that "it appears impossible [to pursue class arbitration] unless the arbitration agreement contemplates such a procedure." Despite the presumed unavailability of class procedures in arbitration, the court of appeals enforced the parties' arbitration agreement, reversing the contrary decision of the district court. As the Third Circuit noted, echoing *Champ*, "the right to proceed as a class * * * is merely a procedural one * * * that may be waived by agreeing to an arbitration clause." *Id.* at 369.

Agreeing with the Third Circuit's decision in *Johnson*, the Eleventh Circuit in another TILA case, *Randolph* v. *Green Tree Financial Corp.*, 244 F.3d at 819, held that a "contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures." *See also Snowden* v. *Checkpoint Check Cashing, Inc.*, 290 F.3d at 638-639 (citing *Johnson*, rejecting public policy arguments against no-class-action provision in arbitration agreement, and finding provision not unconscionable); *Deiulemar Compagnia de Navigazione S.p.A.* v. *M/V Allegra*, 198 F.3d 473 (4th Cir. 1999) (finding that where the parties' agreement did not provide for class arbitration, " 'the FAA has already provided the type of procedure to be followed in this case, namely, nonclass arbitration' ") (quoting *Champ*, 55 F.3d at 276), *cert. denied*, 529 U.S. 1109 (2000); *Iowa Grain Co.* v. *Brown*, 171 F.3d 504, 509 (7th Cir. 1999) (citing *Champ*, and noting that "[b]ecause arbitration is based fundamentally on an agreement between the parties, [a Rule 23 class action] is normally unavailable in arbitration").

Numerous federal district courts[6] and state courts of appeal[7] likewise have held, contrary to the California Court of Appeal, that courts may not compel class arbitration where

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[6] *See, e.g., Gray* v. *Conseco, Inc.*, 2001 WL 1081347, at *3 (C.D. Cal. Sept. 6, 2001); *Zawikowski* v. *Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *McCarthy* v. *Providential Corp.*, 1994 WL 387852, at *9 (N.D. Cal. July 19, 1994), *appeal dismissed*, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 525 U.S. 921 (1998); *Gammaro* v. *Thorp Consumer Discount Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993), *appeal dismissed*, 15 F.3d 93 (8th Cir. 1994).

The great majority of district courts have also rejected the notion that a no-class-action provision renders an arbitration agreement "unconscionable." *See, e.g., Lomax* v. *Woodmen of the World Life Ins. Soc.*, ___ F. Supp. ___, 2002 WL 31455600, at *3 (N.D. Ga. July 16, 2002) ("Generally, prohibiting class-wide arbitration does not render an otherwise valid arbitration clause unconscionable") (citing *Gilmer*, 500 U.S. at 32); *Lozano* v. *AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002); *Bischoff* v. *DirectTV, Inc.*, 180 F. Supp. 2d 1097, 1107-09 (C.D. Cal. 2002); *Vigil* v. *Sears Nat. Bank*, 205 F. Supp. 2d 566, 573 (E.D. La. 2002); *Arriaga* v. *Cross Country Bank*, 163 F. Supp. 2d 1189, 1194-95 (S.D. Cal. 2001); *Pick* v. *Discover Fin. Servs.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) ("it is generally accepted that arbitration clauses are not unconscionable because they preclude class actions") (citing *Gilmer*, 500 U.S. at 32).

[7] *See, e.g., Gras* v. *Associates First Cap. Corp.*, 786 A.2d 886 (N.J. Super. Ct. App. Div. 2001) (enforcing "no class action" provision in arbitration agreement), *cert. denied*, 794 A.2d 184 (N.J. 2002); *Pyburn* v. *Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App.) (FAA preempts state law favoring class), *appeal denied* (Nov. 19, 2001); *Stein* v. *Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. Ct. App. 2001)(relying on *Champ* and refusing to compel class arbitration where parties' agreement was silent); *Med Center Cars, Inc.* v. *Smith*, 727 So. 2d 9, 20 (Ala. 1998) ("to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration").

the parties' arbitration agreement did not provide for that procedure.

3. The California Court of Appeal's decision also conflicts with the decisions of six circuits to have addressed the related question whether arbitration proceedings can be *consolidated* absent an express agreement to do so. The Second, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have held that a court may not order consolidation of arbitration claims unless the contract expressly permits that procedure.[8] Those

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[8] *Government of the United Kingdom* v. *Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993) (court cannot consolidate arbitration proceedings "absent the parties' agreement to allow such consolidation") *American Centennial Ins. Co.* v. *National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings * * * when the agreement is silent regarding consolidation"); *Baesler* v. *Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp.* v. *Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) ("Parties may negotiate for and include provisions for consolidation of arbitration proceedings in their arbitration agreements, but if such provisions are absent, federal courts may not read them in."); *see also Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) ("under § 4 of the [FAA] the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (noting that "the only issue properly before this Court is whether [the parties] are parties to a written agreement providing for consolidated arbitration," and holding consolidation is not allowed absent such agreement), *cert. denied*, 469 U.S. 1061 (1984). *But cf. Connecticut General Life Ins. Co.* v. *Sun Life Assurance Co. of Canada*, 210 F.3d 771, 776 (7th Cir. 2000) (authorizing consolidated arbitration based on "practical and textual" considerations); *New England Energy Inc.* v. *Keystone Shipping Co.*, 855 F.2d 1, 6 (1st Cir. 1988) (holding that arbitrations may be consolidated when the agreement is silent on the

decisions uniformly recognize—just as the *Champ* line does—that "a court is not permitted to interfere with private arbitration arrangements in order to impose its own view of speed and economy. This is the case even where the result would be the possibly inefficient maintenance of separate proceedings." *American Centennial Ins.*, 951 F.2d at 108; *see United Kingdom*, 998 F.2d at 73 (same); *Baesler*, 900 F.2d at 1195. And as to the arguments that swayed the Court of Appeal—that multiple arbitrations may result in inconsistent determinations or cause other procedural problems—those decisions have responded that "[a]lthough these concerns may be valid concerns of the [parties], they do not provide us with the authority to reform the private contracts which underlie this dispute." *United Kingdom*, 998 F.2d at 74; *American Centennial Ins.*, 951 F.2d at 108. The Seventh Circuit relied on these authorities to reach its holding in *Champ*, observing that there is no meaningful basis for "distinguish[ing] between the failure [of an arbitration agreement] to provide for consolidated arbitration and class arbitration." 55 F.3d at 275. *See also Gammaro*, 828 F. Supp. at 674 (analogizing consolidated arbitration to class-wide arbitration); *McCarthy*, 1994 WL 387852, at *9 (same).

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issue and state law specifically provides for consolidation, over dissenting Judge Selya's objection that "[b]y fashioning an arbitral clause which omits reference to consolidation, the parties have made a choice. By imposing consolidation *ab extra*, the majority trumps that choice."), *cert. denied*, 489 U.S. 1077 (1989).

4. On the other side of the ledger, a few district courts[9] and some state courts of appeal[10] have adopted the California view, imposing class action procedures on arbitration agreements that are either silent as to such procedures or that expressly preclude them. That minority approach reflects a sharply divergent view of the policy behind and preemptive force of the Arbitration Act. Under the view of *Champ* and the many cases adopting its approach, the Arbitration Act's policy requiring enforcement of arbitration agreements according to their terms precludes class-wide procedures unless the parties expressly agree to them. Under the minority view, classwide arbitration procedures are always available—no matter what the parties' contract says. The majority approach furthers the Arbitration Act by enforcing the parties' choice of arbitral procedures; the minority approach

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[9] *See Comb* v. *PayPal, Inc.*, 218 F. Supp. 2d 1165, 1175-76 (N.D. Cal. 2002) (citing *Szetela*); *Acorn* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1171 (N.D. Cal. 2002) (citing *Szetela*); *Luna* v. *Household Fin. Corp.*, ___ F. Supp. 2d ___, 2002 WL 31487425, at *8 (W.D. Wash. Nov. 4, 2002) (citing *Szetela*); *Lozada* v. *Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (relying on district court decision in *Johnson*, later reversed by the Third Circuit); *cf. Ting* v. *AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (finding no-class-action provision unconscionable in case not implicating the Arbitration Act).

[10] *See, e.g., Leonard* v. *Terminix Int'l Co.*, ___ So. 2d ___, 2002 WL 31341084, at *5-6 (Ala. Oct. 18, 2002) (finding no-class-action provision unconscionable and unenforceable, and citing *Keating*); *Bazzle* v. *Green Tree Fin. Corp.*, 569 S.E.2d 349, 360 (S.C. 2002) ("adopt[ing] the approach taken by the California courts" and approving class-wide arbitration), *petition for cert. filed*, 71 U.S.L.W. 3320 (Oct. 23, 2002) (No. 02-364); *State ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265, 280 (W. Va. 2002) (finding "unconscionable" arbitration agreement's prohibition on punitive damages and class action relief), *petition for cert. filed*, 71 U.S.L.W. 3163 (Aug. 27, 2002) (No. 02-315).

undermines the animating intent of the Act by empowering courts to impose arbitral procedures contrary to the will of the contracting parties.

III. THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

The need for plenary review of the Court of Appeal's decision is heightened further by the fact that it conflicts with this Court's own decisions. *See* S. Ct. Rule 10(c). This Court repeatedly has ruled in favor of enforcing agreements to arbitrate—even when the result is "piecemeal" litigation. *Dean Witter Reynolds*, 470 U.S. at 221 (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 20). In *Dean Witter Reynolds*, this Court in plain terms "reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims." 470 U.S. at 219. The Act mandates the enforcement of contracts to arbitrate, no more and no less, and this Court has strongly cautioned more than once that courts must not "allow the fortuitous impact of the Act on efficient dispute resolution to overshadow" that central purpose of the legislation. *Id.* at 220. As the Court put it in *Moses H. Cone Memorial Hospital*, "the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement." 460 U.S. at 20 (emphasis in original).

In keeping with its repeated admonition that the intent of the parties to an arbitration agreement trumps alleged notions of procedural efficiency, this Court has strongly signaled its preference for enforcing agreements to arbitrate, even if enforcement results in the preclusion of a class action. *Gilmer*, 500 U.S. at 32. The *Gilmer* Court addressed whether claims arising under the Age Discrimination in Employment Act (ADEA) could be arbitrated, and found that they could. One of Gilmer's arguments against arbitration of his ADEA claims was that "arbitration procedures cannot adequately further the purposes of the ADEA because they do not

provide for * * * class actions." *Id.* at 32. This Court rejected that argument, observing that " 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Id.* (quoting *Nicholson* v. *CPC Int'l, Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)). The lower courts since *Gilmer* that have adopted the *Champ* majority view—declining to impose class procedures on an arbitration where the parties' agreement provided for no such thing—repeatedly have invoked this passage as additional support for their holding. *See, e.g.*, *Randolph*, 244 F.3d at 816-817; *Johnson*, 225 F.3d at 377; *see also Snowden*, 290 F.3d at 639.

The California Court of Appeal's decision thus stands in conflict not just with the raft of court of appeals cases to have addressed class arbitration and consolidation issues, but also with *Gilmer* and with each of this Court's cases emphasizing the Act's "central purpose" of enforcing arbitration agreements "according to their terms." *Mastrobuono*, 514 U.S. 53-54 (internal quotation omitted).

IV. THE QUESTION PRESENTED IS RECURRING AND IMPORTANT AND SHOULD BE DECIDED BY THIS COURT.

1. When it took up in *Southland* the question whether the California Supreme Court had erred in precluding resolution in arbitration of certain state statutory claims, this Court observed that the state court's decision, if allowed to stand without immediate review, would "seriously erode federal policy" favoring arbitration agreements: "Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration." 465 U.S. at 7 (internal quotation omitted). So too here. The

parties to the arbitration agreement in this case agreed to arbitrate their claims. They did not agree to class arbitration procedures; indeed, their agreement specifically disallowed such procedures. The California court's decision, which deletes a term of the parties' contract, strikes directly at the core purpose of the Arbitration Act: to enforce arbitration agreements according to their terms. The question presented here is plainly of national importance.

2. The California Court of Appeal's decision also substantially undermines the other ancillary benefits of the Arbitration Act. When a party agrees to arbitrate a dispute, it waives a wide range of procedural rights and protections that it would otherwise be entitled to claim in a judicial proceeding. Most notable among them is the most basic: a party who agrees to arbitrate waives the right to bring his claim in a judicial forum. Smaller waivers, too, are so common as to be presumed: one who agrees to arbitrate waives certain discovery proceedings, agrees to relaxed or otherwise altered rules of evidence, and accepts limited grounds for appeal. *See Gilmer*, 500 U.S. at 31-32. Thus, when a party agrees to arbitrate, he "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). *See also Allied-Bruce Terminix*, 513 U.S. at 280 (noting, among "[t]he advantages of arbitration," that "it is usually cheaper and faster than litigation [and] can have simpler procedural and evidentiary rules").

Yet California's rule—that classwide arbitration may be imposed when the parties agree to arbitrate, even if the parties expressly preclude classwide arbitration in their contract—creates a non-waivable right to a class *procedure*, utterly flouting the commonly accepted view that such procedural rights are readily waivable. *See Champ*, 55 F.3d at 276. And in the same vein, the California rule substantially undermines arbitration's "simplicity, informality and

expedition." *Mitsubishi*, 473 U.S. at 628. Indeed, it is difficult to imagine an alteration to an arbitration proceeding more fundamentally at odds with arbitration's strengths than engrafting a messy class action procedure onto it. But after the Court of Appeal's decision, parties to arbitration agreements in California are faced with the prospect of entanglement with the very thing they bargained to avoid—and which the Arbitration Act allows them to avoid—costly and complicated litigation in a judicial, or semi-judicial, forum. *See supra* n.2. That is inimical to the purpose of arbitration.

3. The split among the courts also may lead to markedly different arbitral proceedings arising from a single standard arbitration agreement—all depending on where the parties sue or are sued. In California or another jurisdiction that follows the minority rule, a party to a standard commercial arbitration contract that precludes, or is silent on, class arbitration, may nonetheless force its opponent to arbitrate or litigate claims against a class. A plaintiff seeking arbitration under that same agreement in one of the majority jurisdictions, however, will be held to the terms of its agreement and be required to arbitrate individually. Those conflicting results will inexorably lead to forum-shopping on a massive scale—to the extent they have not already. *See supra* at 7 (noting that the original plaintiff in this case, hailing from New Jersey, sued Discover in California court).[11]

4. Finally, the question whether and to what extent parties to an arbitration agreement may curtail their arbitral rights and remedies is presently a particularly active front of

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[11] The nationwide class ultimately certified by the trial court includes many cardholders who do not live in California, and whose home states would presumably enforce the Delaware choice-of-law provision in the parties' arbitration agreement. Delaware courts have upheld no-class-action provisions. *See Lloyd* v. *MBNA Amer. Bank*, 2001 WL 194300, *3-4 (D. Del. Feb. 3, 2001), *aff'd*, 27 Fed. Appx. 82 (3d Cir. 2002).

litigation. On October 15, this Court granted certiorari to consider whether a court may refuse to compel arbitration of claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), where the parties' arbitration agreement waived any right to punitive damages. *Pacificare Health Sys., Inc.* v. *Book*, 123 S. Ct. 409 (2002). Where the *Pacificare* case presents the question whether parties to an arbitration may waive certain remedies, this case asks whether parties to an arbitration may agree to forgo certain arbitral *procedures*.

That question equally warrants review by this Court—as other recent filings testify.[12] A pending petition for certiorari to the West Virginia Supreme Court asks whether the Federal Arbitration Act permits a state court to refuse to enforce an arbitration agreement that precluded punitive damages (the question in *Pacificare*) as well as class-action arbitrations (the question here). *Friedman's Inc.* v. *West Virginia*, 71 U.S.L.W. 3163 (Aug. 27, 2002) (No. 02-315). And on October 23, 2002, a petition for certiorari was filed in *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634, presenting a

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[12] Commentators, too, have noted the sharp divergence in views regarding the propriety of imposing class proceedings on arbitrating parties. *See* Carroll E. Neesemann, *Should an Arbitration Provision Trump the Class Action? YES: PERMITTING COURTS TO STRIKE BAR ON CLASS ACTIONS IN OTHERWISE CLEAN CLAUSE WOULD DISCOURAGE USE OF ARBITRATION*, 8 No. 3 Disp. Resol. Mag. 13, 17 (2002); Jean R. Sternlight, *Should an Arbitration Provision Trump the Class Action? NO: PERMITTING COMPANIES TO SKIRT CLASS ACTIONS THROUGH MANDATORY ARBITRATION WOULD BE DANGEROUS AND UNWISE*, 8 No. 3 Disp. Resol. Mag. 13, 21 (2002); Alan S. Kaplinsky, *Arbitration and Class Actions—A Contradiction in Terms*, 1302 PLI/Corp 7 (2002); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: Modernizing, Revising, And Clarifying Arbitration Law*, 2001 J. Disp. Resol. 1, 15 (noting "the hotly debated issue of class-action arbitrations").

question substantially similar to this one: "Whether the Federal Arbitration Act prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration." 71 U.S.L.W. 3320.

These issues have percolated in the lower courts for twenty years, ever since the California Supreme Court's decision in *Keating*. To this day California's minority view persists; and it is still, more than ever, in the minority. Certiorari should be granted in this case and the decision of the California Court of Appeal reversed.

CONCLUSION

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

Respectfully submitted,

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APPENDICES

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G029323
(Super. Ct. No. OOCC12582)

JOHN SZETELA,
Plaintiff and Appellant,

v.

DISCOVER BANK,
Defendant and Respondent.

Filed April 22, 2002

OPINION

Appeal from an order of the Superior Court of Orange County, Stuart T. Waldrip, Judge. Appeal treated as a petition for a writ of mandate, and petition granted.

* * *

In this putative class action, plaintiff John Szetela challenges an order granting Discover Bank's (Discover) motion to compel arbitration. Szetela argues the arbitration agreement, to the extent it prohibits class treatment of small individual claims, is unconscionable and unenforceable. We

agree and therefore issue a writ of mandate directing the trial court to strike the portion of the arbitration clause prohibiting class or representative actions.

I

FACTS AND PROCEDURAL BACKGROUND

Szetela opened a Discover credit card account in July 1993. The terms of his account were governed by a Cardmember Agreement. In July 1999, Discover sent Szetela a notice inserted inside his billing statement that purported to amend the terms of the Cardmember Agreement to include an arbitration clause.

In relevant part, the amendment states: **"ARBITRATION. WE ARE ADDING A NEW SECTION TO READ AS FOLLOWS: [¶] ARBITRATION OF DISPUTES.** In the event of any past, present or future claim or dispute (whether based upon contract, tort, statute, common law or equity) between you and us arising from or relating to your Account, any prior account you have had with us, your application, the relationships which result from your Account or the enforceability or scope of this arbitration provision, of the Agreement or of any prior agreement, you or we may elect to resolve the claim or dispute by binding arbitration. [¶] IF EITHER YOU OR WE ELECT ARBITRATION, NEITHER YOU NOR WE SHALL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE A JURY TRIAL ON THAT CLAIM. PRE-HEARING DISCOVERY RIGHTS AND POST-HEARING APPEAL RIGHTS WILL BE LIMITED. NEITHER YOU NOR WE SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS IN ARBITRATION BY OR AGAINST OTHER CARDMEMBERS WITH RESPECT TO OTHER ACCOUNTS, OR ARBITRATE ANY CLAIMS AS A REPRESENTATIVE OR MEMBER OF A CLASS OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. Even if all parties have opted to litigate a claim in court, you or we may elect arbitration with respect to any claim made by a new party or any new claims later asserted in that lawsuit,

and nothing undertaken therein shall constitute a waiver of any rights under this arbitration provision."

If Szetela did not wish to accept the terms of the amendment, his only option was to notify Discover, which would then close his account. If he had selected this option, he would have been permitted to pay his remaining balance under the terms of the Cardmember Agreement prior to the amendment.

Szetela was not the original named plaintiff in this case. In October 2000, James Shea, a New Jersey resident, filed the present action against Discover as a putative class action. Discover filed a motion in New Jersey seeking relief that would effectively bar the California action.[1] In December 2000, a first amended complaint was filed adding Szetela, a California resident, as an additional named plaintiff. The amended complaint asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent or negligent misrepresentation, and deceptive business practices. These claims were based on alleged practices by Discover that resulted in cardholders being improperly charged fees for exceeding their credit limits ("overlimit fees") and incurring other penalties: (1) incorrectly stating the cardholder's "available credit" amount on their monthly statements, and (2) incorrectly calculating cardholders' "minimum payment due" on their monthly statements. Discover's overlimit fee was $29.

Based on the arbitration clause purportedly added to Szetela's Cardholder Agreement in 1999, Discover moved to compel arbitration of Szetela's claim on an individual basis. The court granted the motion, and Szetela eventually prevailed at arbitration, recovering $29, and then filed the present appeal. Discovery was also conducted to locate a new class representative, a person to whom the arbitration clause did not apply. A second amended complaint adding a new class representative was subsequently filed.

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[1] Discover lost the motion. The trial court's subsequent opinion is the subject of a request for judicial notice, see *post*, section II.B.

II

DISCUSSION

A. Discover's Motion to Dismiss

A threshold issue is whether this court has jurisdiction to hear Szetela's appeal. Discover argues that we do not and has moved to dismiss the appeal on the ground that an order compelling arbitration is not appealable. (See, e.g., *Melchor Investment Co. v. Rolm Systems* (1992) 3 Cal.App.4th 587, 591.) Szetela argues that the order to arbitrate signaled the "death knell" of the putative class action and is therefore appealable. The death knell doctrine permits the appellate court to review an order denying a motion to certify a class when it is unlikely the case will proceed as an individual action. (See, e.g., *Richmond v. Dart Industries, Inc.* (1981) 29 Cal.3d 462, 470.)

Both sides raise valid points. Discover argues the death knell doctrine generally applies only in the context of a trial court's denial of a motion to certify a class. Szetela points out that although the court's order does not signal the death knell for the entire class, it does sharply limit the scope of the class to those not facially bound by the "no class action" provision. This alone, however, is not sufficient to create appellate jurisdiction.

Discover suggests the proper procedure is an appeal from an order on a motion to confirm or vacate the arbitrator's award. Yet Szetela, obviously, does not want to confirm the award, and grounds to vacate are extremely limited. (See Code Civ. Proc., § 1286.2.) It is not in Discover's interest to create an appealable order. Therefore, although the order is not appealable under the death knell doctrine, because of the unusual circumstances present here, we exercise our discretion to treat the appeal as a petition for a writ of mandate. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 401; *Rogers v. Municipal Court* (1988) 197 Cal.App.3d 1314, 1317.) Unless we do so, this issue will effectively evade appellate review, establishing the lack of an adequate remedy of law necessary for a writ. The essential facts are undisputed and

the case has been extensively briefed. The motion to dismiss is denied, and we therefore consider the merits of the case.

B. Szetela's Requests for Judicial Notice

Szetela requests that we take judicial notice of a trial court opinion in a parallel case in New Jersey. As part of the record in the court of another state, we have discretion to take judicial notice of the opinion. (Evid. Code, § 452, subd. (d).) Discover apparently fears that if we take judicial notice of the opinion, we will unquestioningly adopt its findings, which is not the case. Szetela's request is granted; however, the opinion will be given the weight appropriate to an out-of-state trial court decision.

Szetela further requests that we take judicial notice of a document purporting to be Citibank's recently amended credit card agreement. This document includes a no class action provision similar to Discover's amendment. Because this issue is not relevant to our decision in this appeal, we decline to do so. (See *People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6.) The request is denied.

C. Enforceability of the Arbitration Clause

The essence of Szetela's argument is that the no class action provision is unconscionable and should not be enforced.[2] Because no material facts are in dispute, we review the enforceability of the arbitration clause de novo. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

An agreement to arbitrate is enforceable unless a recognized contract defense, such as unconscionability, exists. (*Doctor's Associates, Inc. v. Casarotto* (1996) 517 U.S. 681, 686-687.) As our Supreme Court has noted, "under both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Citations.]" (*Armendariz v. Foundation Health Psychcare*

[2] We do not rule on the arbitration clause as a whole, merely that portion of it prohibiting class or representative actions.

Services, Inc. (2000) 24 Cal.4th 83, 98, fn. omitted (hereafter *Armendariz*).) Unconscionability is one such ground. (Civ. Code, § 1670.5, subd. (a).)

Szetela, as the party opposing arbitration, has the burden of proving the arbitration provision is unconscionable. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) Unconscionability includes both substantive and procedural elements.[3] (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1531.) Procedural unconscionability addresses the manner in which agreement to the disputed term was sought or obtained, such as unequal bargaining power between the parties and hidden terms included in contracts of adhesion. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1212-1213.) Substantive unconscionability addresses the impact of the term itself, such as whether the provision is so harsh or oppressive that it should not be enforced. (*Ibid.*) These elements, however, need not be present to the same degree. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz, supra*, 24 Cal.4th at p. 114.)

1. Procedural Unconscionability

Discover argues that a contract provision lacks procedural unconscionability unless the opposing party can demonstrate that no meaningful opportunity existed to obtain the offered goods or services from any other provider without the offending contract term. We disagree this is the relevant test for unconscionability. The availability of similar goods or services elsewhere may be relevant to whether the contract is

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[3] Szetela primarily argues California and federal cases in support of his argument regarding unconscionability. Discover states the Discover Cardmember Agreement is governed by Delaware law, but argues that Discover should prevail under either state's law. As Discover has not established the law of another state should apply, we apply California law to our analysis. To the extent Delaware law is more favorable, Discover has waived this argument by failing to brief the choice of law issue.

one of adhesion, but even if the clause at issue here is not an adhesion contract, it can still be found unconscionable. Moreover, "in a given case, a contract might be adhesive even if the weaker party could reject the terms and go elsewhere. (Citation.)" (*Villa Milano Homeowners Assn. v. Il Davorge* (2000) 84 Cal.App.4th 819, 827.) Therefore, whether Szetela could have found another credit card issuer who would not have required his acceptance of a similar clause is not the deciding factor.

Procedural unconscionability focuses on the manner in which the disputed clause is presented to the party in the weaker bargaining position. When the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present. (See *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329.) These are precisely the facts in the case before us. Szetela received the amendment to the Cardholder Agreement in a bill stuffer, and under the language of the amendment, he was told to "take it or leave it." His only option, if he did not wish to accept the amendment, was to close his account. We agree with Szetela that the oppressive nature in which the amendment was imposed establishes the necessary element of procedural unconscionability.

2. Substantive Unconscionability

Substantive unconscionability addresses the fairness of the term in dispute. Substantive unconscionability "traditionally involves contract terms that are so one-sided as to 'shock the conscience,' or that impose harsh or oppressive terms." (*24 Hour Fitness, Inc. v. Superior Court, supra*, 66 Cal.App.4th at p. 1213.) The manifest one-sidedness of the no class action provision at issue here is blindingly obvious.

Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover, because credit card companies typically do not sue their customers in class action lawsuits. This provision is clearly

meant to prevent customers, such as Szetela and those he seeks to represent, from seeking redress for relatively small amounts of money, such as the $29 sought by Szetela. Fully aware that few customers will go to the time and trouble of suing in small claims court, Discover has instead sought to create for itself virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights.

While adhesive arbitration provisions are not per se unconscionable, "there may be arbitration provisions which do give an advantage to one party. . . . In those cases . . . it is not the requirement of arbitration alone which makes the provision unfair but rather the . . . manner in which the arbitration is to occur." (*Strotz v. Dean Witter Reynolds, Inc.* (1990) 223 Cal.App.3d 208, 216, fn. 7, disapproved on other grounds in *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 407.) It is the *manner* of arbitration, specifically, prohibiting class or representative actions, we take exception to here. The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness.

While the advantages to Discover are obvious, such a practice contradicts the California Legislature's stated policy of discouraging unfair and unlawful business practices, and of creating a mechanism for a representative to seek relief on behalf of the general public as a private attorney general. (See, e.g., Bus. & Prof. Code, § 17200 et seq.) It provides the customer with no benefit whatsoever; to the contrary, it

seriously jeopardizes customers' consumer rights by prohibiting any effective means of litigating Discover's business practices. This is not only substantively unconscionable, it violates public policy by granting Discover a "get out of jail free" card while compromising important consumer rights.

Furthermore, the clause violates public policy in another important way. One of the policy reasons for class actions is to promote judicial economy and streamline the litigation process in appropriate cases. To allow litigants to contract away the court's ability to use a procedural mechanism that benefits the court system as a whole is no more appropriate than contracting away the right to bring motions in limine, seek directed verdicts, or use other procedural devices that allow the courts to operate in an efficient manner.

III

DISPOSITION

Let a writ of mandate issue directing the superior court to vacate its order directing Szetela to arbitrate his claim, and to enter a new order striking the provision prohibiting representative or class actions from the arbitration clause. Szetela shall recover his costs.

MOORE, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

APPENDIX B

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G029323
(Sup. Ct. No. OOCC12582)

JOHN SZETELA,
Plaintiff and Appellant,

v.

DISCOVER BANK,
Defendant and Respondent.

Filed May 16, 2002

ORDER

The petition for rehearing is DENIED.

MOORE, J.
MOORE, J.

WE CONCUR:
SILLS, P.J.
SILLS, P.J.

RYLAARSDAM, J.
RYLAARSDAM, J.

APPENDIX C

Court Of Appeal, Fourth Appellate District
Division Three – No. G029323

S107248

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JOHN SZETELA, Plaintiff and Appellant,

v.

DISCOVER BANK, Defendant and Respondent.

Filed: July 31, 2002

Petition for review DENIED.

Brown, J., was absent and did not participate.

Chin, Jr., was recused and did not participate.

GEORGE
Chief Justice

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 21, 2002

Mr. John G. Roberts Jr.
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Re: Discover Bank
v.
John Szetela
Application No. 02A325

Dear Mr. Roberts:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 21, 2002, extended the time to and including November 28, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By: /s/
Melissa A. Blalock
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. John G. Roberts Jr.
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004

Mr. Brian R. Strange
12100 Wilshire Blvd.
Suite 1900
Los Angeles, CA 90025

Clerk
Court of Appeal of California,
Fourth Appellate District
750 B Street
3rd Floor
San Diego, CA 92101