IN THE COURT OF APPEALS
STATE OF GEORGIA

SUNTRUST BANK, Appellant, v. CHARLES DANIEL BICKERSTAFF, as executor of the Estate of JEFF BICKERSTAFF, JR., on behalf of himself and all persons similarly situated, Appellee.	Consolidated Case Nos. A24A1700 and A24A1702

AMICUS BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE GEORGIA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT

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IDENTITY AND INTEREST OF AMICI CURIAE

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. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Georgia Chamber of Commerce, Inc. ("Georgia Chamber") serves the unified interests of its nearly 50,000 members—ranging in size from small businesses to Fortune 500 corporations—covering a diverse range of industries across all of Georgia's 159 counties. The Georgia Chamber is the State's largest business advocacy organization and is dedicated to representing the interests of both businesses and citizens in the State. Established in 1915, the Georgia Chamber's primary mission is creating, keeping, and growing jobs in Georgia. The Georgia Chamber

pursues this mission, in part, by aggressively advocating the business and industry viewpoint in the shaping of law and public policy to ensure that Georgia is economically competitive nationwide and in the global economy.

Amici represent businesses with an interest in the fair and consistent contractual interpretation of arbitration clauses. Many of amici's members regularly rely on arbitration agreements because arbitration is speedy, fair, inexpensive, and less adversarial than litigation in court. Amici's members have entered into millions of contractual relationships providing for arbitration precisely to achieve those benefits. Amici's members also have an interest in preventing the class-action procedural device from being abused to alter contracting parties' substantive rights.

The trial court's decision has improperly allowed the class-action device to be used to create new substantive rights, and it has thwarted the contractual relationship between the parties by ignoring the language of parties' arbitration clauses. Amici 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 that are allowed to proceed as class actions raises serious concerns that courts are failing to enforce essential class-action requirements and turning a blind eye to abuse. Businesses in Georgia and across the United States have a strong interest in enforcing the important requirements that apply before a case may proceed as a class action, especially where (as in this case) parties have agreed to arbitrate their disputes. Although the appellant, SunTrust Bank, raises several important issues, amici focus in this brief on two issues that are of critical importance to the business community.

First, the trial court erred by failing to enforce the parties' arbitration agreement according to its distinct terms. The trial court instead summarily misapplied an earlier decision of the Georgia Supreme Court, *Bickerstaff v. SunTrust Bank* ("*Bickerstaff II*"), 299 Ga. 459 (2016), deeming that decision controlling, even though the putative class members there were bound by materially different contractual obligations than the depositors at issue in this appeal. The Georgia Supreme Court's interpretation of parties' rights under one contract should not be used to remake the rights of different parties under a

different contract that explicitly requires the claims raised to be adjudicated through arbitration. The trial court's misinterpretation of the parties' contract violates conventional understanding of arbitration agreements, produces unnecessary delay through protracted litigation, robs contracting parties of their choices regarding arbitration, and nullifies the advantages of arbitration.

Second, the trial court erred by misconstruing a statutory amendment that bars the core usury claims advanced in this action. In April 2014, the Georgia General Assembly amended the state's usury law to clarify that overdraft fees are not "interest" subject to Georgia's usury cap. *See* 2014 Ga. Laws 515 (H.B. 824) (codified at O.C.G.A. § 7-4-2). On its face, that amendment unequivocally defeats class members' usury claims based on overdraft fees assessed after the law's effective date. In refusing to apply the amendment, the trial court improperly relied on its carve-out for "pending" litigation. But that carve out cannot apply to claims that accrued *after the legislation's effective date*. *See* 2014 Ga. Laws 213, § 3 (H.B. 824). The trial court's decision is at odds with the statute's plain text and ignores settled authority instructing that the

class-action mechanism cannot be used to expand litigants' substantive rights.

Both of the trial court's errors require reversal. If the decision below is left uncorrected, the trial court's mistakes will undermine the value of arbitration clauses in Georgia and establish dangerous precedent allowing plaintiffs to abuse the class-action process to gain new substantive rights to which they are not entitled. This Court should preserve the value of arbitration agreements and properly construe the limits of the class-action vehicle.

ARGUMENT

I. Courts must honor textual differences in arbitration clauses and enforce them according to their plain terms.

The trial court erred by refusing to enforce the arbitration clause in the parties' revised deposit agreement implemented in 2013. That amended agreement—which excludes the possibility of one depositor opting out of arbitration on another's behalf by filing a lawsuit—should have been read and enforced according to its plain meaning. Instead, the trial court improperly rolled together all depositors without accounting for the different contractual language that binds them. As a result, the trial court wrongly concluded that the Georgia Supreme Court's decision

in *Bickerstaff II*, which tolled the opt-out period for existing depositors when the complaint was filed, applies with equal force to later-added members of the class who were not before the Court when it issued its decision and are subject to the materially different 2013 revised agreement. That error undermines the value of arbitration clauses in Georgia, which under controlling state and federal law must be enforced according to their terms.

A. The trial court's decision ignores the parties' contract and thus violates the Federal Arbitration Act.

In March 2013, SunTrust amended its deposit agreement to provide explicitly that a depositor cannot opt out of the arbitration provision by "filing … a lawsuit." V11-5655; *see* V16-8518. Instead, the contract provides that to reject an arbitration provision, the depositor must provide "express, personal written notice [opting out of arbitration] to SunTrust within 45 days of opening the account." V11-5655. The trial court's failure to take account of this key change from SunTrust's prior arbitration agreement turns the relevant contractual language on its head: any class member subject to the amended agreement must *opt in* to arbitration by *opting out* of the class. In taking that approach, the trial

court violated basic principles of contract interpretation and of federal and state law.

The Federal Arbitration Act ("FAA"), which controls the interpretation and enforcement of arbitration agreements, *see DirecTV, Inc. v. Imburgia*, 577 U.S. 47, 53–54 (2015), requires courts to enforce arbitration agreements according to their own terms. As the U.S. Supreme Court has explained, "the law is clear: Congress has instructed that arbitration agreements … must be enforced as written." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 525 (2018); *accord Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) ("[C]ourts must 'rigorously enforce' arbitration agreements according to their terms" (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985))). Indeed, "the FAA requires enforcement of a wide range of arbitration agreements and leaves to the parties the discretion to craft an appropriate arbitration procedure," including preconditions or requirements that must be satisfied "prior to actual arbitration." *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370 n.11 (11th Cir. 2005). And the Georgia Supreme Court has been no less exacting in its stance that arbitration agreements must be enforced faithfully according to their terms. *See Am.*

Gen. Fin. Servs. v. Jape, 291 Ga. 637, 640 (2012) ("The FAA thus requires courts, both federal and state, to enforce arbitration agreements in [commercial] contracts … in accordance with their terms.").

The trial court's decision upends these settled principles. The trial court concluded that Bickerstaff's filing of the complaint constitutes a timely opt-out request on behalf of *all* class members:

> [I]n this case it is the class representative's timely notification of rejection of arbitration by filing the complaint that serves to toll the time for the remaining class members to give notice. And for those members who ratify the class, the complaint provides the necessary notice. It demonstrates the member's intent to sue SunTrust in a court of law and to reject the requirement to arbitrate the claim.

V24-13549 (citing *Bickerstaff II*, 299 Ga. at 470). But that conclusion disregards the plain language of the March 2013 revised arbitration provision, which specifies that filing a lawsuit is insufficient to reject arbitration, and a valid rejection must instead be made directly to SunTrust in writing within 45 days of opening the account. V11-5655. The trial court erred by refusing to enforce this unambiguous requirement.

And while the March 2013 deposit agreement contains two limited carve-out provisions, neither applies here. The first carve-out is for

ongoing litigation. The agreement states that "this arbitration agreement will not apply to any Claims that are the subject of … a class action filed in court that is pending as of the effective date of this arbitration agreement in which you are alleged to be a member of the putative class." V24-13234 (quoting V23-13103). But the depositors subject to the 2013 agreement were not alleged to be members of any class at the time they signed the agreement, and class certification did not occur until 2017. *See* V12-6362 ¶ 68; V18-10165 ¶ 70 (referring only to depositors who had experienced an overdraft in the four years prior to the 2010 complaint filing); V3-809; *see Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (observing that it would be "novel and surely erroneous" to claim that "a nonnamed class member is a party to the class-action litigation *before the class is certified*" (emphasis in original) (quotation marks omitted)).

A separate carve-out within the 2013 deposit agreement is likewise inapplicable. That subsection provides that the new arbitration agreement will not apply to "claims that are the subject of … a motion to compel arbitration filed by [SunTrust] against [depositors] … pursuant to a prior version of this arbitration agreement." V16-8568. This

provision also does not apply to individuals whose claims accrued after March 1, 2013, as their claims could not have been compelled to arbitration "pursuant to a prior version of this arbitration agreement." The arbitration agreements must be read according to their plain terms, which clearly preclude Bickerstaff's suit from including these later depositors by implication.

B. *Bickerstaff II* does not apply to class members who executed SunTrust deposit agreements after March 2013.

The Georgia Supreme Court's decision in *Bickerstaff II* did not consider or even address the March 2013 amended deposit agreement. The trial court thus erred by assuming, without any textual evidence or other support, that the Georgia Supreme Court considered this language. *See* V24-13545 n.6.

The "proposed class"—as explicitly recognized in *Bickerstaff II*—consisted of Georgia citizens who had not been refunded for an overdraft payment made to SunTrust in the four years before the filing of Bickerstaff's complaint (that is, between July 2006 and July 2010). 299 Ga. at 461–62; *see also* V3-775 n.9 (on remand, Bickerstaff acknowledging that depositors "with no overdraft before July 1, 2011 [were] not in the

class"). There is no basis to assume, as the trial court mistakenly did, that this class could extend to those bound by the 2013 deposit agreement. To the contrary, the date range identified by the Georgia Supreme Court expressly excludes those who only opened an account after March 1, 2013. 299 Ga. at 461. The later depositors, many of whom opened accounts after *Bickerstaff II* was decided, are subject to a different agreement with different contractual rights than the depositors who were members of the putative class identified in *Bickerstaff II*.

To be clear, nothing in *Bickerstaff II* conflicts with SunTrust's arguments in this appeal. The Court in *Bickerstaff II* explicitly relied on the arbitration provision in the 2010 deposit agreement, not the arbitration provision in the 2013 deposit agreement. *See id.* at 460. That latter agreement was simply not before the Court. *See id.* And the Court in *Bickerstaff II* did not purport to conclusively resolve the arbitrability of any putative class members' claims. The obvious reason is that the Court issued its *Bickerstaff II* decision before the lower court's ruling on SunTrust's motion to compel arbitration, which did not occur until March 2024. *See* V24-13546; *see also Bickerstaff v. SunTrust Bank*, 340 Ga. App. 43, 44 (2017) (the Court of Appeals denying Bickerstaff's motion seeking

a determination that *Bickerstaff II* mooted the need for further rulings on arbitrability given that "[t]he trial court ha[d] not ruled on the issue of whether SunTrust waived a right to compel arbitration against putative class members other than Bickerstaff").

The class members here are thus differently situated from those before the Court in *Bickerstaff II*. As noted above, the revised arbitration agreement explicitly provides that a depositor cannot opt out of the arbitration provision by "filing … a lawsuit." V11-5655. That plain language means that *Bickerstaff II* is not controlling. Unlike the class members at issue in the earlier appeal, Bickerstaff's mere filing of a lawsuit could not operate to exercise opt-out rights on behalf of class members who signed the amended version of the deposit agreement. *See id.* Those class members—the group bound by the revised March 2013 deposit agreement—could not opt out without first providing written notice, as required by their agreement with SunTrust.

The trial court failed to appreciate this critical distinction. Instead, it concluded that the consequences of filing a complaint applied equally to all class members. *See* V24-13549. But that logic does not hold. The Georgia Supreme Court allowed Bickerstaff to satisfy certain pre-suit

requirements (such as the exercise of opt-out rights) on behalf of "existing depositors" because they held the *same opt-out rights* as he did. *Bickerstaff II*, 299 Ga. at 460, 463 (observing that "a class representative may satisfy contractual notice requirements"); *id.* at 469 (discussing how Bickerstaff's filing of the complaint can toll the time until others ratify the action, thus making it as if they too filed a complaint). Settled authority instructs that class representatives have authority to act on behalf of *similarly situated* class members. *See Amchem Prod., 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" (emphasis added) (quoting Fed. R. Civ. P. 23(b) advisory committee's note to 1966 amendment)); *Schorr v. Countywide Home Loans, Inc.*, 287 Ga. 570, 573 (2010) ("[T]he general rule allow[s] the named plaintiffs in a class action to satisfy preconditions for suit on behalf of the entire class."). But here, the post-March 1, 2013, depositors *do not* have the same opt out rights as Bickerstaff. And Bickerstaff did not engage in the necessary act to execute a valid opt out on their behalf

under the revised agreement, *i.e.*, notifying SunTrust directly in writing within 45 days of opening his account.

Bickerstaff II thus simply does not govern here. The decision's holding does not apply because it considered the rights of different litigants subject to a different opt-out provision in a different arbitration agreement. Accordingly, *Bickerstaff II*'s holding is not "law of the case" as to the post-March 1, 2013, depositors. Although "the 'law of the case' rule makes 'any ruling by the Supreme Court … binding in all subsequent proceedings in that case in the lower court[s],'" the doctrine applies only to "those issues actually considered and ruled upon by th[e] Court." *Shadix v. Carroll County*, 274 Ga. 560, 562–63 (2001) (quoting *Sec. Life Ins. Co. v. Clark*, 273 Ga. 44, 46 (2000)). Because the post-March 1, 2013, depositors were not part of the contemplated class before the Georgia Supreme Court in *Bickerstaff II*, that decision did not "actually consider[] and rule[] upon" their opt-out obligations. *Id.*

Indeed, the rule that a court's judgment binds only the parties to the case is "subject to a handful of discrete and limited exceptions." *S. LNG, Inc. v. MacGinnitie*, 294 Ga. 657, 663 n.12 (2014) (quoting *Smith*, 564 U.S. at 312). One such exception is the properly conducted class

action, in which a nonparty was adequately represented by a party with the same interests. *Id.* But that exception cannot apply here because Bickerstaff did not have the same interests—or the same rights—as depositors after March 1, 2013, whose contractual obligations are controlled by a materially different arbitration clause than the one that binds Bickerstaff. It was therefore wrong for the lower court to apply *Bickerstaff II* to a group of depositors to whom the decision is plainly inapplicable. These depositors are subject to a distinct agreement—one which should be read and enforced as it is written—and they should be compelled to submit their claims to arbitration.

C. Strong policy considerations support enforcing arbitration clauses as written.

As discussed above, the trial court failed to undertake the rigorous analysis necessary to assess class members' contractual obligations and enforce the arbitration provisions at issue according to their terms. This failure exacerbates the problem of class-action creep, *i.e.*, the proliferation of ever-expanding class actions that do little to help consumers, while depriving the parties of the benefit of the bargain they struck by agreeing to arbitrate disputes.

The benefits of arbitration are well-recognized by scholars and the Supreme Court alike: "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 185 (2019); *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). Refusal to enforce arbitration clauses as written robs both businesses and their customers of the chance to exercise a more efficient dispute resolution option.

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 what parties will enter into arbitration. But when the text of an agreement is ignored, parties simply

cannot know who will or will not be added to the class and who will 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); *see also In re Piper Funds, Inc., Institutional Gov't Income Portfolio Litig.*, 71 F.3d 298, 303 (8th Cir. 1995) (observing that a party's "contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management").

For this reason, the FAA encourages "efficient and speedy dispute resolution." *Dean Witter Reynolds*, 470 U.S. at 221. The Supreme Court has even held preempted state laws that impede "streamlined proceedings and expeditious results." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)). Far from aiding in the streamlined process, the trial court's decision places arbitration agreements in disfavored status by refusing to read and enforce them according to their plain meaning. This was error. *See Italian Colors Rest.*, 570 U.S. at 232–33 (noting that the FAA sought to correct the "widespread judicial hostility to arbitration" by

requiring courts to "rigorously enforce arbitration agreements according to their terms" (quotation marks omitted)).

The trial court's decision is particularly concerning because it discourages parties from including opt-out clauses in arbitration agreements. Opt-out provisions have social utility because they allow consumers more choice while simultaneously limiting uncertainty for businesses by adopting procedures and time limits governing opt-outs. *Cf. Hopkins v. World Acceptance Corp.*, 798 F. Supp. 2d 1339, 1346 (N.D. Ga. 2011) (concluding that the presence of an opt-out provision undermines any argument that the arbitration agreement was unconscionable). This balance benefits both parties, and as a result, opt-out provisions are becoming more common. For example, more than a quarter of credit card contracts contain opt-out clauses. *See* Peter B. Rutledge & Christopher 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 would 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 skews litigation incentives, creates unacceptable risk for industry, and robs consumers with valuable latitude over the settlement of their claims. *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."); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1289 (N.D. Ga. 2008) (observing that "[c]ourts have stressed the importance of such opt-out provisions in enforcing class action waivers in arbitration agreements," which are an "integral part of modern commerce" (quotation marks omitted)).

The better path—and the one this Court should take—is to enforce opt-out provisions as written, which encourages consumer choice while at the same time mitigating risk to businesses.

II. The class-action device cannot be wielded to create new substantive rights for class members.

The trial court also erred because it failed to recognize that the Georgia legislature's 2014 amendment is fatal to the usury claims for

post-enactment depositors.[1] Here, again, instead of completing the rigorous analysis that the law requires, the trial court took a superficial approach that failed to account for the General Assembly's legislative judgment.

In 2014, the Georgia General Assembly amended the state's interest and usury law. *See* 2014 Ga. Laws 515 (H.B. 824). That amendment clarified that, under Georgia law, certain banking fees, including the overdraft fees at issue here, are not "interest" subject to the state's usury cap. O.G.C.A. § 7-4-2(d); *see also* O.G.C.A. § 7-4-18 (2020). An overdraft fee assessed after April 15, 2014, the effective date of the legislation, thus could not be considered interest under Georgia law or used to support the core usury claim advanced in the class action. Summary judgment should have been granted to SunTrust for usury claims based on overdraft fees assessed after April 15, 2014.

In passing the 2014 amendment, the Georgia General Assembly provided that it was "not [its] intent … to affect the law applicable to litigation pending as of February 19, 2014." 2014 Ga. Laws 213, § 3 (H.B.

[1] While this brief does not address the other aspects of Bickerstaff's usury claim or the Omnibus Order's treatment of that claim, amici understand that those issues are being challenged and addressed by SunTrust.

824). But that carve out does not affect depositors whose rights accrued after the legislation's effective date in 2014. "[L]egislative exceptions in statutes are to be strictly construed and applied only so far as their language fairly warrants," and a court should resolve "[a]ll doubts … in favor of the general statutory rule, rather than in favor of the exemption." *Sawnee Elec. Membership Corp. v. Ga. Pub. Serv. Comm'n*, 273 Ga. 702, 704 (2001) (quotation marks omitted). An exception for "pending" litigation points only to those claims already raised in court, in "the intervening time between presentation of the claim and action thereon by the governing authorities." *City of Rome v. Rigdon*, 192 Ga. 742, 742 (1941); *see also State Farm Auto. Ins. Co. v. Great Am. Ins. Co.*, 164 Ga. App. 457, 459 (1982) (explaining that "pending" means something has already "[b]egun" (quotation marks omitted)). The post-enactment depositors do not fall within the exception's plain text and are subject to different law.

The class-action device cannot be used to create new substantive rights not intended by the legislature. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (authorizing Congress to promulgate procedural rules governing class actions "with

the limitation that those rules 'shall not abridge, enlarge or modify any substantive right'" (citing the Rules Enabling Act, 28 U.S.C. § 2072(b))). Likewise, under Georgia law, a claimant cannot "do indirectly" through class actions what that claimant "would not be permitted to do directly." *Speer, Inc. v. Manis*, 164 Ga. App. 460, 460 (1982); *see also Goodyear v. Tr. Co. Bank*, 248 Ga. 407, 408 & n.2 (1981) (noting that Georgia's rules of civil procedure cannot be invoked to alter substantive law).

If they were not swept into this class action, depositors who were assessed overdraft fees after April 15, 2014, would have had no right to challenge those fees as usury. And those individuals were not members of the class at the time of the 2014 amendment's enactment. At that stage, the only proposed class litigants (there was no certified class) were existing depositors subject to the same deposit agreement and usury law as Bickerstaff (*i.e.*, depositors who were not refunded SunTrust overdraft fees between July 2006 and July 2010). V24-13548 (citing *Bickerstaff II*, 299 Ga. at 464). Accordingly, the legislature could not have meant to exempt those accountholders whose claims necessarily arose after the usury law was changed.

Given that federal and state law prohibit using procedural rules to alter substantive rights, the trial court's decision creates an unexpected and unfairly retroactive sanction. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (noting the "presumption against retroactive legislation"). SunTrust should be able to rely on this generally accepted principle in assessing overdraft fees that are legal at the time of their assessment without fear that new depositors will be subsequently granted conflicting substantive rights through the class-action procedure. This Court should avoid the serious constitutional due process issues that result from the trial court's decision and decline to include post-amendment depositors in the class here. *See Stone v. Stone*, 297 Ga. 451, 455 (2015) ("Statutes should be interpreted to avoid serious constitutional concerns where such an interpretation is reasonable."); *O'Neal v. Bagley*, 743 F.3d 1010, 1015 (6th Cir. 2013) (courts violate due process by advancing a statutory interpretation that is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

CONCLUSION

The trial court made two serious errors that undermine policies favoring arbitration and improperly use the class-action procedure to create new substantive rights. This Court should reverse.

Respectfully submitted this 12th day of August 2024,

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CERTIFICATE OF COMPLIANCE WITH GA. CT. APP. R. 24

I certify that this brief was drafted using Microsoft Word 365 for enterprise, and the word count function of that program confirms that this submission does not exceed the word count limit imposed by Rule 24.

Dated: August 12, 2024

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CERTIFICATE OF SERVICE

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