No. 06-

IN THE

Supreme Court of the United States

HYNIX SEMICONDUCTOR, INC. AND HYNIX SEMICONDUCTOR AMERICA, INC.,

Petitioners,

v.

RAMBUS INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in light of the Federal Arbitration Act's strong federal policy favoring arbitration, a generic choice-of-law clause in a contract providing for arbitration incorporates state arbitration rules that limit or prevent arbitration.

LIST OF PARTIES AND CORPORATE DISCLOSURE

The petitioners are Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. Hynix Semiconductor, Inc. has no parent corporation, and no single publicly held company owns 10% or more of its stock. Hynix Semiconductor America, Inc., is a subsidiary of Hynix Semiconductor, Inc. Hynix Semiconductor, Inc. owns more than 10% of Hynix Semiconductor America, Inc.'s stock.

Respondent is Rambus Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California.

DECISIONS BELOW

The order of the California Supreme Court denying review is unreported and is reprinted in the Appendix ("App.") hereto at 1a. The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two is unpublished and is reprinted at App. 2a. The opinion of the Superior Court of the State of California, County of San Francisco is unpublished and is reprinted at App. 37a.

JURISDICTION

The order of the California Supreme Court denying review was issued on March 21, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Federal Arbitration Act, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The relevant portion of the California statute at issue, California Code of Civil Procedure Section 1281.2, is set forth at App. 42a.

INTRODUCTION

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15, was enacted to "overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985). It establishes an "emphatic federal policy in favor of arbitra[tion]," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), and requires all courts to construe arbitration agreements with a strong presumption in favor of arbitration, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The federal circuits and state supreme courts are directly and broadly divided over the effect of the FAA on generic choice-of-law clauses that select the law of states whose rules limit or prevent arbitration. This common issue arises because commercial contracts routinely include two kinds of clauses: arbitration clauses, which provide that all disputes under the contract are to be arbitrated; and generic choice-of-law clauses, which provide in broad terms that a particular state's law will govern interpretation of the contract, but say nothing specific about whether that choice of law also applies to arbitration procedures. Seven circuits and the courts of at least five states have held that, in light of the FAA, such generic choice-of-law clauses determine *only* the substantive law that will govern contractual disputes. In direct conflict with these decisions, two circuits and the courts of at least four states—including the court below—have held that generic choice-of-law clauses *also* incorporate state arbitration rules, even when those rules limit or prevent arbitration.

This broad division of authority arises directly from and mirrors an apparent conflict between two of this Court's own decisions. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468 (1989), this Court affirmed the California Court of Appeal's conclusion that a generic choice-of-law clause in a contract was intended to choose California arbitration rules,

including a procedure under which arbitration was stayed pending trial. Six years later, in *Mastrobuono v. Shearson Leahman Hutton, Inc.*, 514 U.S. 52 (1995), this Court cast serious doubt on that holding, ruling that a generic New York choice-of-law clause could *not* be interpreted to require application of a New York arbitration rule that significantly narrowed the scope of an arbitration.

This conflict should be resolved now. As the Second Circuit has noted, the question of how generic choice-of-law clauses affect the rules of arbitration has become "a recurring and troubling theme in many commercial contracts." *Security Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 323 (2d Cir. 2004). The split in authority on this question is widely recognized, *see, e.g.*, *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001) (noting the "circuit-split[]" on "the conceptually complex issue of how courts should determine whether parties have contracted out of the FAA's default rules"), and one federal judge has explicitly called on this Court to resolve it, *see id.* (Ambro, J., concurring) ("I would suggest [] that in light of the Circuit split on this issue, the Supreme Court may wish to clarify its holding in *Mastrobuono*."). Because the conflict is rooted in the tension between this Court's decisions in *Mastrobuono* and *Volt*, it is almost certain to persist unless and until this Court intervenes.

The conflict, moreover, has harmful practical effects. As the law stands, the same choice-of-law provision can have a very different effect depending on the jurisdiction in which it is reviewed: it can either serve to select only the substantive law that will govern interpretation of a contract, or it can determine as well that state arbitration rules will govern a dispute, sharply limiting the scope of the arbitration or preventing it from taking place at all. This lack of uniformity, and the forum-shopping it encourages, are directly contrary to the purposes of the FAA. Furthermore, in those jurisdictions that invoke *Volt* and interpret generic choice-of-law clauses

to incorporate arbitration-limiting state rules, the FAA's pro-arbitration policies are being frustrated, and disputes that parties agreed to arbitrate are instead being subjected to the costly and time-consuming process of full-blown civil litigation. This Court should thus grant review, in order to ensure that the FAA is being uniformly and correctly applied in all jurisdictions, and to clarify when, if at all, *Volt* continues to apply after *Mastrobuono*.

STATEMENT OF THE CASE

A. Factual Background

Petitioners Hynix Semiconductor, Inc. and Hynix Semiconductor America, Inc. (collectively "Hynix") manufacture and sell computer memory chips known as dynamic random access memory ("DRAM") chips. Samsung Electronics Co., Ltd., Samsung Semiconductor, Inv., and Samsung Electronics America, Inc. (collectively "Samsung") also make DRAM chips. Respondent Rambus Inc. ("Rambus") designs and develops its own proprietary type of DRAM known as Rambus-DRAM, or "RDRAM." Rambus has entered into various licensing agreements with Hynix and Samsung for the manufacture, marketing, and sales of RDRAM. Rambus has also entered into a licensing agreement with Micron Technology, Inc., and Micron Semiconductor Products, Inc. (collectively "Micron"), another chip manufacturer.

This case concerns a 1994 licensing agreement between Rambus and Hynix. The agreement grants Hynix a worldwide, nonexclusive license to develop, manufacture, market, and sell RDRAM. The Agreement includes both a choice-of-law clause and an arbitration clause that requires the parties to resolve any dispute between them through binding arbitration. The choice-of-law clause provides:

> 9.1 *Governing Law.* This Agreement shall be governed by and interpreted in accordance with the laws of the State of California, U.S.A., without reference to conflict of laws principles.

The arbitration clause provides:

> 9.2 *Arbitration.* All disputes between [Hynix] and Rambus arising out of or in connection with this Agreement shall be settled amicably through negotiations. In case such dispute or difference cannot be settled by such means, it shall be finally settled by binding arbitration in English. If action is initiated by [Hynix], such arbitration shall take place in San Francisco, California under the Commercial Rules of Arbitration of the American Arbitration Association by one arbitrator appointed in accordance with such rules. If action is initiated by Rambus, such arbitration shall take place in Seoul, Korea pursuant to the U.S.-Korean Commercial Arbitration Agreement of December 1, 1974 by which each party is bound. The arbitrator shall apply California law to the merits of any dispute or claim, without reference to rules of conflicts of law or arbitration. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the partes may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision.

Samsung has a similar arbitration clause in its agreement with Rambus. Micron does not.

B. Proceedings Below

1. In May 2004, Rambus filed antitrust and other claims against Hynix, Samsung, and Micron in the Superior Court of the State of California, San Francisco County. Hynix and Samsung both filed motions to compel arbitration, based on the arbitration clauses in their agreements with Rambus. On August 30, 2005, the Superior Court denied Hynix's motion. The trial court acknowledged that the arbitration clause in Hynix's agreement was valid and enforceable, and covered Rambus' claims. App. 38a. However, the court asserted that because the choice-of-law and arbitration clauses in the

agreement provided that California law would apply to the merits of any dispute or claim under the contract, and because no language in the agreement indicated that California arbitration rules would *not* apply, "[t]he California rules of arbitration, including Section 1281.2(c) of the California Code of Civil Procedure, apply to this case." App. 39a. The court then observed that, under Section 1281.2(c)—a provision applicable when a party to an arbitration agreement is also party to a court action involving a third party—it had the discretion to refuse to enforce an arbitration clause if arbitration would produce a "substantial risk of inconsistent results and undue duplication of efforts." *Id.* Citing the pending action involving Micron and Samsung, the court denied the motions to compel arbitration. App. 39a-40a. The court also candidly acknowledged that, if California arbitration rules had not applied, it "would not have [had] discretion to deny arbitration." App. 39a. On October 31, 2005, the court denied Samsung's petition to compel arbitration, for essentially identical reasons. App. 3a.

2. Hynix and Samsung appealed, and the Court of Appeal, First Appellate District, affirmed. The court first determined that it would interpret Hynix's and Samsung's agreements as requiring application of the California rules of arbitration, rather than the FAA. The court acknowledged that the FAA had been "enacted in 1925 to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate.'" App. 9a (quoting *Dean Witter*, 470 U.S. at 219-20). The court further acknowledged that because the FAA did "not contain a provision similar to section 1281.2[c]," it required "an arbitration agreement to be enforced even if multiple parties are involved who are not bound to arbitrate." App. 9a. However, the court viewed its analysis as controlled by *Cronus Investments, Inc. v. Concierge Services*, 107 P.3d 217 (Cal. 2005). In that case, the California Supreme Court had held that Section 1281.2(c) was not preempted by the FAA, and that it applied "to any arbitration

agreement that includes a broad California choice-of-law provision unless the parties to an arbitration agreement '*expressly* designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law.'" App. 10a (quoting *Cronus*, 107 P.3d at 229.

Applying *Cronus*, the Court of Appeal determined that neither the choice-of-law nor the arbitration clause in Hynix's and Samsung's agreements "expressly" designated that FAA procedural rules should govern enforcement of the arbitration clause. *Id.* The "broad choice-of-law provision," the court observed, "expressly states that California law governs." App. 12a. And the arbitration provision merely directed the arbitrator "to apply California law to the merits of the dispute," *id.*, remaining "silent about the procedural rules that the court should apply in determining the availability of arbitration," App. 13a. "Nowhere in the agreement," the court concluded, "is there any provision that states federal law rather than California law should apply to the procedure of selecting arbitration." *Id.*

Having concluded that the agreements required application of California law, including Section 1281.2(c), the court further concluded that such an application was not precluded by the FAA. App. 24a-28a. The court acknowledged that section 2 of the FAA "does not authorize courts to stay or deny arbitration in circumstances involving multiple parties." App. 25a. But the court asserted that this was a "procedural provision." *Id.* Quoting *Volt*, the court explained that "[t]o force the parties to arbitrate under the FAA's procedural rules where they have not expressly agreed to do so, 'would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.'" *Id.* *Volt*, the court continued, had held that the FAA does not preclude application of section 1281.2(c) where the parties have agreed to arbitrate in accordance with California law. *Id.* And the California Supreme Court had

held that "when the parties choose California law to govern their agreement, the procedural sections of the FAA are not 'applicable.'" *Id.* (quoting *Cronus*, 107 P.3d at 219). Here, the Court continued, because the agreements contained a "broad California choice-of-law clause and fail[ed] to designate the FAA as governing the enforcement or the interpretation of the arbitration provision," App. 28a, they effectively chose California procedure, and those procedures were not preempted by the FAA.

REASONS FOR GRANTING THE WRIT

I. FEDERAL AND STATE COURTS ARE IN CONFLICT OVER WHETHER A GENERIC CHOICE-OF-LAW CLAUSE INCORPORATES STATE RULES THAT LIMIT OR PREVENT ARBITRATION

A. Seven Circuits And Courts In Five States Have Relied On *Mastrobuono* To Hold That Generic Choice-of-Law Clauses Do Not Incorporate State Arbitration Procedures That Limit Or Prevent Arbitration

The federal and state courts are in conflict over whether, in light of the FAA, generic choice-of-law clauses incorporate state arbitration rules that limit or prevent arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court held that the FAA requires all courts to resolve any doubts in the interpretation of arbitration agreements in favor of arbitration. *See id.* at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.").

Applying this presumption in *Mastrobuono*, this Court held that a generic New York choice-of-law provision did

not incorporate a New York rule prohibiting arbitrators from awarding punitive damages. The choice-of-law provision provided that the contract would be "governed by New York law." 514 U.S. at 55. The Court noted that Congress had passed the FAA to "overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 55 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)). Acknowledging that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties," *id.* at 57, the Court noted that the FAA also "ensures that [an] agreement will be enforced according to its terms even if a rule of state law would otherwise" prevent arbitration of claims the parties agreed to arbitrate. *Id.* at 58.

The generic New York choice-of-law clause at issue in *Mastrobuono*, the Court observed, could "be reasonably read as merely a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." *Id.* at 59. And nothing in the contract evinced an intent to *exclude* punitive damages claims. *Id.* "At most," the Court observed, "the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* "[W]hen a court interprets such provisions in an agreement covered by the FAA," the Court concluded, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Id.*

In the wake of *Mastrobuono*, seven circuits and at least five states have held that generic choice-of-law clauses may not be interpreted to require application of state rules that hinder or thwart arbitration. In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), for example—a case that conflicts directly with the decision below—the Ninth Circuit held that the presence of a generic California choice-of-law provision did *not* permit a trial court to decline to enforce an arbitration agreement under Section 1281.2(c) of the Cali-

fornia Code of Civil Procedure. "*Mastrobuono*," the court explained, "dictates that general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators." *Wolsey*, 144 F.3d at 1213. Noting that Section 1281.2(c) "assuredly does affect California's 'allocation of power between alternative tribunals,'" the court concluded that the choice-of-law clause did not incorporate California arbitration law. *Id.* at 1212-13; *accord Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9th Cir. 2002) ("a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration").

The First, Third, Fourth, Fifth, Sixth, and Eighth Circuits have likewise held that under the FAA, a generic choice-of-law clause does not incorporate state rules that limit or prevent arbitration. As these courts have recognized, generic choice-of-law clauses are generally intended to address the "horizontal" choice among different states' laws, not the "vertical" question of whether state or federal law will apply. *Roadway*, 257 F.3d at 293; *accord Mastrobuono*, 514 U.S. at 59. Under the FAA's presumption requiring courts to interpret ambiguities in arbitration agreements in favor of arbitration, such clauses cannot be construed as incorporating state rules that would limit or preclude arbitration. *See Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 29 (1st Cir. 2005) ("mere inclusion of a generic choice-of-law clause within the arbitration agreement is not sufficient to require the application of state [arbitration] law"); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 594 (1st Cir. 1996) ("Following the principles and analysis set forth in *Mastrobuono*, we . . . find that the choice-of-law clause in this case is not an expression of intent to adopt New York caselaw" regarding arbitration); *Roadway*, 257 F.3d at 296 ("a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards"); *Porter Hayden Co. v. Century Indem. Co.*, 136

F.3d 380, 383 (4th Cir. 1998) ("absent a clearer expression of the parties' intent to invoke state arbitration law, we will presume that the parties intended federal arbitration law to govern"); *Action Indus., Inc. v. United States Fidelity & Guaranty Co.*, 358 F.3d 337, 342 (5th Cir. 2004) ("In the wake of *Mastrobuono*, . . . a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules."); *Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005) ("Considering the federal policy in favor of arbitration" and "interpreting the agreement's choice-of-law provision in light of . . . *Mastrobuono*, . . . [w]e do not believe that the parties intended to displace the federal standard for vacatur [of an arbitration award] when the only evidence of such intent is a generic choice-of-law provision."); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 938 (6th Cir. 1998) ("we harmonize the provisions of the [contract] in the same manner as the Court in *Mastrobuono*: by ruling that the choice-of-law clause is not an 'unequivocal inclusion' of" Ohio law and that the FAA therefore applies); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 996 (8th Cir. 1998) ("a general choice-of-law provision, standing alone, is [in]sufficient to lead to the inference that the parties intended for a state arbitration statute to apply").

Courts in at least five states, including the highest courts of Connecticut and Texas, have likewise held that, consistent with the FAA, a generic choice-of-law provision may not be construed to require application of state arbitration rules that limit or block arbitration. *See Levine v. Advest Inc.*, 714 A.2d 649 (Conn. 1998) (generic New York choice of law clause did not permit application of New York law of arbitration); *L & L Kempwood Assoc., L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127-28 (Tex. 1999) (Texas choice-of-law clause did not require application of Texas arbitration law, because "[t]he choice-of-law provision did not specifically exclude the application of federal law"); *Autonation*

Fin. Servs. Corp. v. Arain, 592 S.E.2d 96, 98 (Ga. Ct. App. 2003) ("[a]lthough the installment contract also states that it 'will be governed by the laws of the State of Georgia' the language of the arbitration clause makes clear the parties' intention that it is governed by the FAA"); *1745 Wazee LLC v. Castle Builders Inc.*, 89 P.3d 422, 425 (Colo. Ct. App. 2003) (concluding that a Colorado choice of law clause "relates only to the substantive law in Colorado," and not Colorado's arbitration rules); *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 959 P.2d 1140 (Wash. Ct. App. 1998) (because general Japanese choice-of-law clause did not unequivocally indicate intent to invoke Japanese arbitration law, the FAA applied).

B. Two Circuits And Courts In At Least Four States Have Invoked *Volt* To Hold That Generic Choice-of-Law Clauses Permit Courts To Apply State Arbitration Procedures That Limit Or Thwart Arbitration

In direct conflict with the foregoing federal circuit and state court decisions, two circuits and courts in at least four states—including the highest courts of two states—have invoked this Court's opinion in *Volt* to hold that a generic choice-of-law clause *does* require application of state rules that restrict or block arbitration. *Volt* itself involved a generic choice-of-law provision that provided that a contract would "be governed by the law of" California. 489 U.S. at 470. After one party petitioned the California Superior Court to compel arbitration, the other party moved to stay the arbitration under Section 1281.2(c) of the California Code of Civil Procedure. The Superior Court granted the stay, and the California Court of Appeal affirmed, holding that by specifying that their contract would be "governed by" California law, the parties had intended to incorporate the California rules of arbitration into their arbitration agreement. *Id.* at 472.

This Court also affirmed. The FAA, the Court noted, did not confer a right to compel arbitration as such, but rather a "right to obtain an order directing that arbitration proceed in the manner provided for in the parties' agreement." *Id.* at 475 (internal quotation marks and alterations omitted). The Court noted that "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Id.* at 474. But it went on to conclude that the Court of Appeals' construction of the choice-of-law clause at issue did not violate the principle, set forth in *Moses Cone*, that "questions of arbitrability . . . be resolved with a healthy regard for the federal policy favoring arbitration." *Id.* at 475. "There is no federal policy," the Court asserted, "favoring arbitration under a certain set of procedural rules," and since the California arbitration rules "generally foster the federal policy favoring arbitration," the Court of Appeal's interpretation of the choice-of-law clause was consistent with *Moses Cone*. *Id.* at 476 & n.5. The Court further held that application of Section 1281.2(c) to stay arbitration did not "undermine the goals and policies of the FAA," and was therefore not preempted. *Id.* at 477-78. The purpose of the FAA, the Court explained, was to "require[] courts to enforce privately negotiated agreements to arbitrate . . . in accordance with their terms." *Id.* at 478. "Where, as here, the parties have agreed to abide by state rules of arbitration," the Court concluded, "enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479.

Invoking *Volt*, the Second and D.C. Circuits have both held that generic choice-of-law clauses incorporate state rules that restrict or prevent arbitration. In *Security Ins. Co. of Hartford*—a case, like this case and *Volt*, involving California Civil Procedure Code Section 1281.2(c)—the Second Circuit reviewed a contract with a generic California choice-of-law clause that provided: "[t]his Agreement shall be gov-

erned by and construed according to the laws of the state of California." 360 F.3d at 323 n.2. One party to the contract moved for a stay of arbitration pending a court proceeding. The district court granted the motion, and the Second Circuit affirmed. Citing *Volt*, the court concluded that Section 1281.2(c) was not preempted by the FAA. *Id.* at 326. It then turned to the question of the parties' intentions, and concluded—despite the fact that the clause was a standard, generic choice-of-law provision—that because the language of the choice-of-law clause was "broad and all encompassing," it incorporated Section 1281.2(c).

In *Ekstrom v. Value Health*, 68 F.3d 1391 (D.C. Cir. 1995), similarly, the D.C. Circuit analyzed a choice-of-law clause that provided: "[t]his Agreement shall be governed by and construed in accordance with the internal laws of the State of Connecticut." *Id.* at 1393. The district court ruled that, under this clause, Connecticut's 30-day clock, rather than the FAA's three-month window, governed the time to file a petition to vacate an arbitration award. The D.C. Circuit affirmed. The court interpreted the generic choice-of-law clause as incorporating Connecticut law governing the time limit for filing a challenge to an arbitration award. *Id.* at 1394-95. It also held, citing *Volt*, that the FAA did not preempt the applicable Connecticut law, because the FAA did not prevent parties from choosing rules different than the Act, but simply called for enforcing agreements according to their terms. *See id.* at 1395-96.

The highest courts of California and Tennessee have reached similar conclusions, as have intermediate courts in Illinois and Massachusetts. *See Cronus,* 107 P.3d at 217 (holding that state arbitration procedures presumptively apply to a contract with a generic choice-of-law clause); *Frizzell Construction Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79 (Tenn. 1999) (interpreting general Tennessee choice-of-law clause as requiring application of Tennessee arbitration rules, and therefore barring arbitration of a fraudulent inducement

claim); *Bishop v. We Care Hair Development Corp.*, 738 N.E.2d 610, 617 (Ill. App. Ct. 2000) (holding that generic Illinois choice-of-law provisions in franchise contracts "reflect an agreement by the parties to arbitrate in accordance with Illinois law"); *Thomson McKinnon Sec., Inc. v. Cucchiella*, 594 N.E.2d 870, 874 (Mass. App. Ct. 1992) ("By virtue of the choice of law provision of the contract, the remedy of punitive damages was prohibited.").

In the decision below, the California Court of Appeal reinforced this side of the split of authority. Purporting to apply *Volt* and the California Supreme Court's opinion in *Cronus*, it held that a generic California choice-of-law clause required application of California procedures that permitted the court to refuse to enforce an arbitration clause altogether. Strikingly, the Court of Appeal reached this conclusion not by deciding that the parties had expressly intended to choose California procedures, but rather by *presuming* that a generic California choice-of-law is intended to choose California procedure, absent an express indication that the FAA is to apply. This presumption is precisely the reverse of the presumption set forth by the FAA. *See Moses Cone*, 460 U.S. at 24-25.

* * * *

The broad conflict over the question presented here unquestionably merits review. To be clear, neither this case, nor the cases discussed above, turn on any individuated question of the contracting parties' subjective intent. That is, while parties are to some extent free to choose the procedures they wish to govern an arbitration, *see, e.g.*, *Mastrobuono*, 514 U.S. at 57, the question presented here arises when the parties have *not* made a specific choice about the rules they want to govern arbitration, but instead have simply designated a given state's law to govern the contract generally. Thus, the choice-of-law clauses at issue here merely provide that the contract will be "governed," "construed," "interpreted," or "enforced" according to the law of a par-

ticular state.[1] No special intent regarding arbitration procedures can be determined from parsing the words of the clauses, and the cases on either side of the split cannot be distinguished based on differences in the clauses at issue. Rather, relying on either *Mastrobuono* or *Volt*, the lower courts have simply interpreted the same basic contractual language differently, based on their conflicting assessment of the requirements of the FAA.

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[1] *See, e.g.*, *Security Ins. Co. of Hartford*, 360 F.3d at 323 ("This Agreement shall be governed by and construed according to the laws of the state of California."); *Ekstrom*, 68 F.3d at 1393 ("This Agreement shall be governed by and construed in accordance with the internal laws of the State of Connecticut."); *Cronus*, 107 P.3d at 220 (Cal. 2005) ("This agreement shall be construed and enforced in accordance with and governed by the laws of the State of California."); *Jacada*, 401 F.3d at 710 ("This Agreement will be governed by the laws of the State of Michigan."); *Puerto Rico Tel. Co.*, 427 F.3d at 23 ("This Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico."); *Action Indus.*, 358 F.3d at 341 (5th Cir. 2004) ("The law of the State of Tennessee shall govern the execution and performance of this agreement."); *Roadway*, 257 F.3d at 288 (contract "shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania"); *UHC Management Co.*, 148 F.3d at 994 ("To the extent not preempted by . . . federal law, this Agreement shall [be] governed by and construed under the laws of the State of Minnesota."); *Ferro*, 142 F.3d at 932 ("all of the provisions of this Agreement and any questions concerning its interpretation and enforcement shall be governed by the laws of the State of Ohio"); *Porter Hayden Co.*, 136 F.3d at 382 ("All disputes concerning the validity, interpretation and application of the Agreement . . . and all disputes concerning issues within the scope of the Agreement shall be determined in accordance with applicable common law of the states of the United States."); *PaineWebber*, 87 F.3d at 591 ("[T]his agreement and its enforcement shall be construed and governed by the laws of the State of New York."); *Levine*, 714 A.2d at 652 (Conn. 1998) ("this agreement and its enforcement shall be governed by the laws of the State of New York").

II. THE CONFLICT IN THE COURTS IS ENTRENCHED AND SHOULD BE RESOLVED NOW

This conflict should be resolved now. It has persisted for more than ten years, and because it is rooted in the tension between this Court's decisions in *Mastrobuono* and *Volt*, it is unlikely to resolve itself. The conflict, moreover, has harmful practical effects, generating uncertainty over the meaning of the generic choice-of-law clauses found in almost every commercial contract, and undermining in multiple respects the policies and purposes of the FAA. This case, finally, presents a particularly good vehicle for resolving this issue.

A. The Conflict Reflects The Lower Courts' Difficulty In Reconciling *Mastrobuono* And *Volt*, And Will Therefore Persist Until This Court Intervenes

As the preceding discussion makes clear, the conflict in the lower courts is rooted in the apparent conflict between *Mastrobuono* and *Volt*. The tension between *Volt* and *Mastrobuono* is patent: in one case, this Court held that a generic choice-of-law provision could not be held to displace the FAA; in the other case, it held the reverse. *Cf. Mastrobuono*, 514 U.S. at 64 (Thomas, J., dissenting) ("the choice-of-law provision here cannot reasonably be distinguished from the one in *Volt*"). The apparent conflict between these cases has led to a widespread conflict in the lower courts.

This Court has identified two ways in which the cases can be reconciled. In *Mastrobuono*, this Court distinguished *Volt* by noting that in *Volt*, the Court had deferred to the California courts' interpretation of the contract at issue. *See Mastrobuono*, 514 U.S. at 60 n.4. And subsequently, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), this Court suggested that *Volt* was limited to situations where a state rule determines "only the efficient order of proceed-

ings," and does not "affect the enforceability of the arbitration agreement itself." *Id.* at 688.

Neither distinction, however, is fully convincing. Although *Volt* discussed the deference generally due to a state court's interpretation of private contracts under state law, it also concluded that the California Court of Appeal's construction of the contract at issue in *Volt* was consistent with the FAA's requirement that arbitration agreements be construed in favor of arbitration. *See Volt*, 489 U.S. at 475-76. Moreover, this Court has consistently stated that the FAA was designed to ensure that the enforceability of an arbitration clause would not depend on the forum in which enforcement is sought. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984); *Allied-Bruce*, 513 U.S. at 272. And it is unclear that the distinction set forth in *Casarotto*, between a re-ordering of proceedings and a more substantial interference with arbitration, is substantively meaningful: as the dissenting opinion in *Volt* pointed out, "[a]pplying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties' dispute will be litigated rather than arbitrated." *Volt*, 489 U.S. at 487 (Brennan, J., dissenting).

In any event, the lower courts have not fully adopted these distinctions or applied them consistently. At least one of the courts that has followed *Volt* and applied state arbitration rules did so absent any state court determination of contractual intent. *See Security Ins. Co. of Hartford*, 360 F.3d at 322. Other courts have followed *Volt* despite the fact that application of a state rule would do more than merely reorder proceedings. *See, e.g., Frizzell Constr.*, 9 S.W.3d at 85-86. Still others—including the Court of Appeal in this case—have done so when both distinctions should have applied. *See, e.g.*, App. 24a-28a; *Ekstrom*, 68 F.3d at 1394-95; *Thomson McKinnon Sec.*, 594 N.E.2d at 871.

This Court's efforts to distinguish *Volt* and *Mastrobuono* have thus not sufficed to resolve the conflict in the lower

courts: despite these distinctions, the lower courts have continued to reach conflicting positions regarding the meaning of generic choice-of-law clauses, invoking either *Mastrobuono* or *Volt* for support. This conflict is therefore unlikely to be resolved unless and until this Court clarifies the continuing scope and viability of *Volt* in light of *Mastrobuono*.

B. The Conflict Is Having Harmful Practical Effects And Undermining The Purposes Of The FAA

The current uncertainty over the appropriate interpretation of generic choice-of-law clauses is having damaging practical effects and undermining the purposes of the FAA. *See, e.g., Security Ins. Co. of Hartford*, 360 F.3d at 323. As was noted earlier, generic choice-of-law clauses are found in almost every commercial contract. Such clauses make commercial sense, because they clarify the meaning of contractual provisions (by making clear which law will govern their interpretation), and help forestall expensive litigation over which law will apply in the event of a dispute. *See, e.g., Roadway*, 257 F.3d at 293.

Because of the split in authority over the correct interpretation of such clauses, however, parties who include them in their contracts cannot be sure of what effect, if any, they will have on the rules governing an arbitration under the contract. In some jurisdictions—including commercially important jurisdictions such as the Second Circuit, the D.C. Circuit, and the State of California—the presence of these clauses will have the dramatic (and likely unintended) effect of subjecting the arbitration to state procedural rules that may limit the arbitration or prevent it altogether. In other jurisdictions, the clause will operate as intended, choosing the law that will govern the interpretation of the contract. Further, if a dispute arises, parties will have a clear incentive to attempt to litigate the meaning of the choice-of-law clause in a jurisdiction that will construe the clause either broadly or narrowly, depending on whether they seek to evade or compel arbitration. This uncertainty, and the forum-shopping it encourages, is

commercially disruptive, and runs directly contrary to the FAA, which (as noted above) was enacted in part to establish uniform enforcement of arbitration clauses in every jurisdiction across the country. *See Southland*, 465 U.S. at 15; *Allied-Bruce*, 513 U.S. at 272.

Moreover, in those jurisdictions that follow *Volt*, the pro-arbitration policies of the FAA are being frustrated in at least two respects: arbitration agreements are neither being interpreted with a strong presumption in favor of arbitration, nor being fully enforced in accordance with their terms. As various courts have recognized, it is "beyond dispute that the normal purpose of" generic contractual choice-of-law clauses "is to determine that the law of one State rather than that of another State will be applicable; they simply do not speak to any interaction between state and federal law." *Volt*, 489 U.S. at 488 (Brennan, J., dissenting); *see also Mastrobuono*, 514 U.S. at 59; *Porter Hayden Co.*, 136 F.3d at 384 n.5 ("[C]hoice-of-law provisions typically embody the parties' choice of one state's laws over another's, rather than express a preference between federal and state law."); *Roadway*, 257 F.3d at 288, 293-94. This is confirmed by standard texts on conflicts-of-laws, the UCC, and the Restatement of Conflicts, none of which refers to or discusses the choice between federal and state law in its discussion of contractual choice-of-law clauses. *See* Restatement (Second) of Conflict of Laws § 187 (1986); E. Scoles & P. Hay, Conflict of Laws § 18 (4th ed. 2000); D. Siegel, Conflicts § 67 (2d ed. 1994). Accordingly, when parties include a generic choice-of-law clause in their contracts, they presumptively mean only to choose the substantive law that will govern interpretation of their contract—*not* to indicate that state arbitration rules will also govern their contract.

Those jurisdictions that purport to follow *Volt* and interpret generic choice-of-law clauses as choosing state procedures are thus ignoring the FAA's direction, clarified in *Moses Cone*, to interpret ambiguities in arbitration agree-

ments in favor of arbitration. As this Court recognized in *Mastrobuono*, a generic choice-of-law clause at *best* introduces an ambiguity into an arbitration agreement over whether state law applies. And under the FAA's pro-arbitration presumption, any such ambiguities must be construed in favor of arbitration. Those jurisdictions that purport to apply *Volt* are failing to do so.

These jurisdictions are also failing to enforce the parties' intent to arbitrate their agreements as fully as possible, in direct contravention of the FAA's purpose of ensuring that the arbitration agreements are fully enforced according to their terms. *See, e.g.*, *Mitsubishi Motors*, 473 U.S. at 631; *Moses Cone*, 460 U.S. at 24. In the present case, for example, the arbitration clause states without qualification that "[a]ll" disputes arising out of the contract will be resolved through arbitration. App. 5a. Despite this unequivocal provision, the court below invoked the parties' generic choice-of-law clause to override the parties' decision to arbitrate, applying California arbitration law and refusing to enforce the arbitration agreement at all. That result is antithetical to the policies and purpose of the FAA.

Indeed, the position adopted by those jurisdictions that purport to follow *Volt* threatens to render the FAA inapplicable to most agreements to arbitrate. As one court has recognized, "[m]ost contracts include a choice-of-law clause, and, thus, if each of these clauses were read to foreclose the application of the substantive law enacted by Congress in the FAA, the FAA would be applicable in very few cases. Such an interpretation of the FAA is simply not viable, as it would effectively emaciate the Act itself." *Ferro*, 142 F.3d at 938.

C. The Conflict Should Be Resolved Here

This case presents an exceptionally good vehicle for resolving this conflict of authority and clarifying the continuing viability and scope of *Volt* in light of *Mastrobuono*. Procedurally, this case is identical to the decision this Court re-

viewed in *Volt*: like that decision, this case involves an arbitration dispute in a contract with a California choice-of-law provision resolved by the California Court of Appeal. And, as here, the parties in *Volt* sought review from an unpublished Court of Appeal decision after review was denied by the California Supreme Court. *See Volt*, 489 U.S. at 472-73 ("The California Supreme Court denied Volt's petition for discretionary review."). Further, although the decision below is from the Court of Appeal, that court rested its decision squarely on the California Supreme Court's decision in *Cronus*. Accordingly, this is not a case in which the California Supreme Court's views are unknown, or in which review should await a decision by the state supreme court.

Substantively, the decision below directly implicates the tension between *Mastrobuono* and *Volt*, and sharply challenges the scope and viability of the FAA's interpretive presumption requiring ambiguities in arbitration agreements to be resolved in favor of arbitration. As discussed above, the Court of Appeal in this case ignored both of this Court's proposed distinctions between *Volt* and *Mastrobuono*, applying *Volt* and holding that a generic choice-of-law clause incorporated state procedures absent a state court determination of specific contractual intent, and where the state procedures did not simply re-order arbitration and litigation proceedings, but resulted in a refusal to enforce an arbitration agreement altogether. The Court of Appeal also applied a presumption—that California arbitration rules apply absent an express election of the FAA—that is precisely the reverse of the presumption set forth in the FAA. This case thus raises squarely the most central issues relevant to the conflict over the appropriate interpretation of generic choice-of-law clauses in contracts that provide for arbitration.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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