No. 15-___

IN THE

Supreme Court of the United States

APPLIED UNDERWRITERS, INC., APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC. and CALIFORNIA INSURANCE COMPANY,
Petitioners,

v.

ARROW RECYCLING SOLUTIONS, INC. and ARROW ENVIRONMENTAL SOLUTIONS, INC.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When Respondents obtained insurance through a workers' compensation program from Petitioners, the parties executed agreements with arbitration clauses that did not call for application of California law. Respondents later sued Petitioners and the broker who had set up the insurance transaction in state court in California, claiming they had been misled as to the cost of the insurance program. The trial court refused to compel arbitration, applying a California rule that allowed arbitration to be stayed, or even dispensed with entirely, where the parties to the arbitration agreement were also parties to litigation in which a party not subject to the arbitration agreement—in this case, the broker—was also involved. The California Court of Appeal affirmed, rejecting the argument that the Federal Arbitration Act ("FAA") preempted the California rule and reading *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), to hold that the FAA "does not prevent courts from enforcing agreements to arbitrate under rules different from those set forth in the FAA."

The question presented is:

Should a generic choice-of-law provision in an otherwise broad arbitration agreement, one that does not reference a particular State, be read to reflect intent by the parties to avoid preemption under the FAA and instead to apply a rule of that State that limits or bars arbitration of an otherwise covered dispute despite the strong preference for enforcement of arbitration provisions as expressed in the FAA?

RULE 29.6 STATEMENT

Petitioners California Insurance Company and Applied Underwriters Captive Risk Assurance Company are wholly owned subsidiaries of North American Casualty Co., which is owned by Petitioner Applied Underwriters, Inc. Petitioner Applied Underwriters, Inc. is a wholly owned subsidiary of AU Holding Company, Inc., which is wholly owned by Berkshire Hathaway Inc. Berkshire Hathaway Inc. is a publicly traded company. No publicly traded corporation other than Berkshire Hathaway Inc. owns 10% or more of any of Petitioners' stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeal of the State of California, Second Appellate District.

OPINIONS BELOW

The order of the California Supreme Court denying review (Pet. App. 1a) is unreported. The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three (Pet. App. 2a-24a) is unpublished. The opinion of the Superior Court of the State of California, County of Los Angeles (Pet. App. 25a-26a) is unpublished.

JURISDICTION

The order of the California Supreme Court denying review was issued on April 1, 2015, making the petition due on June 30, 2015 under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

9 U.S.C. § 2 Validity, irrevocability, and enforcement of agreements to arbitrate

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.

Cal. Civ. Proc. Code § 1281.2 – Order to arbitrate; Determination of other issues

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact.

....

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

STATEMENT

Federal Circuits and state Supreme Courts disagree on whether, consistent with the strong preference of the Federal Arbitration Act ("FAA") for enforcing arbitration clauses as written, generic choice-of-law clauses that select the law of States whose rules limit or prevent arbitration should be enforced. The split in the way these cases are decided arises from differing interpretations of two decisions of this Court, and of their relationship to one another. In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468 (1989), the Court affirmed the California Court of Appeal's conclusion that a generic choice-of-law clause in a contract was intended to invoke California arbitration rules, which included a procedure under which arbitration was stayed pending trial. But in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), six years later, the Court appeared to cast doubt on that holding when it held that a generic New York choice-of-law clause would *not* be interpreted to require application of a New York arbitration rule that significantly narrowed the scope of an arbitration.

The split of authority that has resulted from different courts' readings of these cases, and their reliance on one over the other, has had harmful practical effects. The instant case presents the Court with an excellent vehicle for resolving this disagreement.

A. Factual Background

Petitioner Applied Underwriters, Inc. ("Applied") is part of a program that provides workers' compensation insurance in California through an affiliate, Petitioner California Insurance Company ("CIC"). CIC issues workers' compensation policies, and Petitioner Applied

Underwriters Captive Risk Assurance Company, Inc. ("AUCRAC") acts as a reinsurer. Patriot Risk and Insurance Services, Inc. ("Patriot"), a defendant below but not affiliated with Petitioners, is a broker. Patriot assisted Respondents Arrow Recycling Solutions, Inc., and Arrow Environmental Solutions, Inc. ("Respondents") with finding a workers' compensation policy.

In or around March 31, 2011, Respondents applied for and obtained a guaranteed cost workers' compensation insurance policy from CIC. This policy was issued under Petitioners' EquityComp® program through the execution of two documents – a Request to Bind and a Reinsurance Participation Agreement ("RPA"). The EquityComp® program allowed a company that had recently suffered a negative loss experience, and resulting increased rates for workers' compensation coverage, to obtain workers' compensation insurance at a more reasonable *net* rate provided that the company took steps to improve their loss experience on a going-forward basis. If a company remained below a certain loss threshold, it would be eligible to receive a profit-sharing distribution.

To effectuate this program, the parties executed the Request to Bind and the RPA. Each included an arbitration provision, but neither referenced California law. The Request to Bind provided, in relevant part, that:

> [A]ny claims, disputes and or controversies between the parties involving the Proposal or any thereof (including but not limited to the Agreements and Policies) shall be resolved by alternative dispute resolution and submitted to and determined exclusively by binding arbitration *under the Federal Arbitration Act*

> *in conformity with the Arbitration Act of the State of Nebraska*. Arbitration shall be in accordance with JAMS by a single arbitrator, with the arbitration held in Omaha, Nebraska.

(Emphasis supplied.) The RPA provided, in relevant part, that:

> . . . Any dispute or controversy that is not resolved informally . . . arising out of or related to this Agreement shall be fully determined in the British Virgin Islands *under the provisions of the American Arbitration Association*.
>
> . . . *Participant hereby irrevocably and unconditionally submits to the exclusive jurisdiction of the Courts of Nebraska for the purpose of enforcing any arbitration award rendered hereunder and any other purposes related to this Agreement*, and agrees to accept service of process in any case instituted in Nebraska related to this Agreement and further agrees not to challenge venue in Nebraska provided such process is delivered in accordance with the applicable rules for service of process then in effect in Nebraska. To the extent necessary, this consent shall be construed as a limited waiver of sovereign immunity only with respect to this Agreement.

(Emphasis supplied.) Following the execution of these documents, Respondents received CIC's Workers' Compensation and Employer's Liability insurance policy.

B. Proceedings Below

On May 16, 2012, Respondents sued Petitioners in California Superior Court (Los Angeles). Their claims

were based on the assertion that they were misled as to the costs of the EquityComp® program, its three-year commitment, charges for early cancellation, and its provisions for arbitration of disputes. Respondents also asserted a claim against Patriot for professional negligence, related to Patriot's obtaining a quote from Petitioners for the discrete period between February 27, 2011 and March 31, 2011. Petitioners moved to compel arbitration. On October 30, 2012, the trial court issued a minute order denying the motion without explanation. Pet. App. 25a-26a.

Petitioners appealed the denial of their motion to compel arbitration to the California Court of Appeal. The Court of Appeal affirmed the trial court, primarily based on Patriot's presence in the case. The court held, in part, that it could decline to enforce the arbitration provision under Cal. Civ. Proc. Code § 1281.2(c)(1) because the parties to the arbitration clauses (Petitioners and Respondents) were also parties to "a pending court action . . . with a third party," *i.e.*, Patriot. Pet. App. 2a-24a.

In rejecting Petitioners' claim that § 1281.2(c)(1) was preempted by the FAA, the Court of Appeal relied on *Volt*, as interpreted by the California Supreme Court in *Cronus Investments, Inc. v. Concierge Services* 35 Ca1.4th 376 (2005). Pet. App. 19a-21a. In doing so, though, the Court of Appeal misapplied those cases, in both of which a choice of law provision called for the application of California law, to this case, which addressed clauses that did not. The Court of Appeal opined that *Volt*, in upholding application of the third party litigation exception in § 1281.2(c) to an arbitration provision that chose *California* law, had held as a general matter that application of that rule "did not undermine the goals and policies of the FAA

and therefore was not preempted." Pet. App. 19a. (The court added, somewhat inconsistently with the FAA's preference for arbitration (as well as the RPA's express reference to the FAA), that the FAA "does not prevent courts from enforcing agreements to arbitrate under rules different from those set forth in the FAA." Pet. App. 19a). And the Court of Appeal drew a similar conclusion regarding *Cronus*:

> The California Supreme Court in *Cronus* . . . similarly held that the FAA did not preempt the application of the third party litigation exception in that case. . . . *The arbitration agreements in Cronus included a California choice-of-law provision but also stated that the choice of law did not preclude the application of the FAA, if applicable*.

Pet. App. 20a (emphasis supplied; citations omitted).

The Court of Appeal thus concluded that § 1281.2 (c) "does not conflict with the procedural or substantive provisions of the FAA and is not preempted by the FAA." Pet. App. 20a-21a. But in applying California's law regarding when arbitration may be stayed or refused the Court of Appeal did not address the fact that, unlike the choice of law provisions at issue in *Volt* and *Cronus*, which expressly designated the law of California, those found in the Request to Bind and the RPA did not. Nor did it explain how applying California law—and specifically a rule that had the effect of voiding an otherwise broad arbitration clause—to arbitration agreements that did not call for its application adhered to the FAA's preference for enforcing such agreements as written.

Petitioners sought review of the Court of Appeal's decision by the California Supreme Court. On April 1,

2015, the California Supreme Court denied review. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

As this Court has often observed, most recently in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321, 325 (2011), the Federal Arbitration Act, 9 U.S.C. §§ 1-15 ("FAA"), was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. It established an "emphatic federal policy in favor of arbitra-[tion]," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985).

Section 2 of the FAA, "the primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), enforces that policy procedurally. It provides, in relevant part, that arbitration agreements in interstate commerce "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. Section 2 reflects "the fundamental principle that arbitration is a matter of contract," *Rent–A–Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010). It requires that courts place arbitration agreements on an equal footing with other contracts, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006), and to enforce them according to their terms. It further requires courts to construe arbitration agreements with a strong presumption in favor of arbitration, *Moses H. Cone*, 460 U.S. at 24-25.

Despite these seemingly well-settled principles and public policy preferences, the federal Courts of Appeals and state supreme courts are divided on an important issue: the effect of the FAA on the enforcement of

generic choice-of-law clauses that call for the application of the law of a State whose rules limit or even bar arbitration. This split arises directly from the way courts interpret *Volt*, on one hand, and *Mastrobuono*, on the other. Seven federal Circuits and the courts of at least five States have held that generic choice-of-law clauses determine only the substantive law that will govern contractual disputes, grounding their rulings on the refusal in *Mastrobuono* to enforce a New York provision that limited the availability of arbitration. By contrast, two Circuits and the highest courts of at least four States, including California, have held that generic choice-of-law clauses also incorporate state arbitration rules, even when those rules limit or prevent arbitration. These courts, like the court below, ground their opinions on *Volt*.

This case presents the proper vehicle to resolve this conflict, and the time is right to resolve it. 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 directly 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 perceived tension between the Court's decisions in *Mastrobuono* and *Volt*, it is almost certain to persist unless and until this Court intervenes.

In addition to promoting uniformity across the jurisdictions, taking this case to resolve the issue presented will also mitigate the harmful practical effects of the split. These often arise because commercial contracts routinely include two kinds of clauses: (1) arbitration clauses, which provide that all disputes under the contract are to be arbitrated; and (2) generic choice-of-law clauses, which provide, often in broad terms, that a particular State's law will govern interpretation of the contract but that say nothing specific about whether they apply to the selection of arbitration procedures. As things stand the same choice-of-law provision can have a very different effect on when, how and even whether arbitration will occur depending on the jurisdiction in which it is to be applied; in some jurisdictions, as described below, such a clause governs only the substantive law employed in interpreting a contract, but in others it will also dictate whether state arbitration rules will govern a dispute, including those that would significantly limit the scope of an arbitration or even prevent it from taking place at all.

This situation poses an intolerable challenge to the FAA's policy preferences. In jurisdictions that invoke *Volt* (like the state courts of California) and interpret these clauses to incorporate arbitration-limiting state rules, as occurred in this case, the FAA's pro-arbitration policies are frustrated, as disputes that parties plainly meant to arbitrate are instead being subjected to the costly and time-consuming process of civil litigation. And this division of authority also encourages forum shopping. For example, whether a plaintiff chooses to litigate in federal court or state court in California would result in diametrically opposed results on the question because a California state court would follow

Volt (as it did here), while a federal District Court, following the Ninth Circuit's guidance, would adhere to *Mastrobuono*.

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. Tension Between *Volt* and *Mastrobuono* Has Given Mixed Signals To Lower Courts.

Volt involved a choice-of-law provision under which a contract would "be governed by" California law. 489 U.S. at 470. The California Court of Appeal upheld a stay of arbitration under § 1281.2(c)(4), holding that, by specifying that their contract would be "governed by" California law, the parties had intended to incorporate California rules of arbitration, such as § 1281.2(c), into their agreement. *Id.* at 472.

This Court agreed. 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. 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 § 1281.2(c)(4) 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.

Justice Brennan, joined by Justice Marshall, dissented. After criticizing the majority for "overlook[ing]" cases that held that "in order to guard against arbitrary denials of federal claims, a state court's construction of a contract in such a way as to preclude enforcement of a federal right is not immune from review in this Court as to its 'adequacy'"), 489 U.S. at 482 (Brennan, J., dissenting), the dissent explained that the use of a California choice of law clause did not establish that the parties intended to incorporate § 1281.2(c) because that clause did not address the interaction between state law and federal law (*i.e.*, the FAA):

> The great weight of lower court authority similarly rejects the notion that a choice-of-law clause renders the FAA inapplicable. Choice-of-law clauses simply have never been used for the purpose of dealing with the relationship between state and federal law. There

> is no basis whatsoever for believing that the parties in this case intended their choice-of-law clause to do so.

Id. at 488–90 (Brennan, J., dissenting).

Six years later, though, the Court reached a different result when considering the effect of the FAA on a state choice-of-law clause when it held, in *Mastrobuono*, that a generic New York choice-of-law provision did not incorporate a New York rule prohibiting arbitrators from awarding punitive damages. The Court noted that Congress had passed the FAA to "overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 55 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)). While acknowledging that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties," *id.* at 57, the Court, somewhat echoing the view of the dissent in *Volt*, added 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. *Mastrobuono*, 513 U.S. at 58 (emphasis supplied). Ultimately the Court held that "[a]t most" the choice-of-law clause left the issue of whether the arbitrator could award punitive damages subject to ambiguity. *Id.* But "when 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.*

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

Since *Mastrobuono*, seven Circuits and the courts of 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.

The Ninth Circuit

In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998) – 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 § 1281.2(c) of the California 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 § 1281.2(c) "assuredly does affect California's allocation of power between alternative tribunals," the court concluded that the choice-of-law clause at issue did not incorporate California arbitration law. *Id.* at 1212-13 (citation and internal quotation marks omitted); see also *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

The First, Third, Fourth, Fifth, Sixth, and Eighth Circuits, like the Ninth circuit in *Wolsey*, have held that, in light of the FAA, a generic choice-of-law clause does not incorporate state rules that limit or prevent arbitration. These courts have held, consistent with *Mastrobuono*, 514 U.S. at 59, that generic choice-of-law clauses are intended to address "horizontal" choices among different States' laws, rather than the "vertical" question of whether state or federal law will apply. See *Roadway*, 257 F.3d at 293. These courts have thus applied the FAA's presumption in favor of finding arbitrability to avoid construing choice-of-law clauses to incorporate 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 (Third Circuit) ("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"); *Hudson v. ConAgra Poultry Co.* 484 F.3d 496, 503 (8th Cir. 2007) ("the arbitration and choice of law provisions in the present case are best harmonized by interpreting the choice-of-law provision in the same fashion as the Court in *Mastrobuono*: 'to read the laws of the [chosen state] to encompass substantive principles the state courts would apply,' but not to include the limitations on the scope of arbitrable matters.")

Courts in at least five States have also held, consistent with the FAA and *Mastrobuono*, that 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"); *In re Olshan Found. Repair Co., L.L.C.*, 277 S.W.3d 124, 130 (Tex. Ct. App. 2009) ("A general choice of law clause will not be read to exclude the application of federal law, i.e., the FAA, unless the clause 'specifically exclude[s] 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) (Colorado choice of law clause "relates only to the substantive law in Colorado," and not Colorado's arbitration rules); *Barrett v. Inv. Mgmt. Consultants, Ltd.*, 190 P.3d 800, 803 (Colo. Ct. App. 2008) ("The parties' choice of the law that will apply to the arbitration proceeding controls the arbitration even where, as here, the agreement provides that a different law will govern the substantive rights and duties of the parties.") *Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 959 P.2d 1140, 1147-48 (Wash. Ct. App. 1998) (because general Japanese choice-of-law clause did not unequivocally indicate intent to invoke Japanese arbitration law, the FAA applied).

C. 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 Arbitration.

In contrast to the cases discussed above, two Circuits and courts in at least four States, including the California Supreme Court, have relied on *Volt* to hold that a generic choice-of-law clause *does* require application of state rules, even if they significantly limit the scope of arbitrable matters.

Second and D.C. Circuits

In reliance on *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*, 360 F.3d 322 (2d. Cir. 2004)—a case that, like this case and *Volt*, involved California Civil Procedure Code § 1281.2(c)—the Second Circuit reviewed a contract with a generic California choice-of-law clause that provided: "[t]his Agreement shall be governed by and construed according to the laws of the state of California." *Id.* 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 § 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 § 1281.2(c).

Similarly, in *Ekstrom v. Value Health*, 68 F.3d 1391 (D.C. Cir. 1995), the D.C. Circuit considered 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, interpreting the generic choice-of-law clause to incorporate 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 Connecticut 30-day rule 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. In contrast to the case cited in the preceding section, then, the court construed the choice-of-law clause to address horizontal and vertical (federal/state) choices.

California

In *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376 (2005), upon which the court below also relied, the California Supreme Court was asked to decide whether the language in an arbitration agreement that included a general California choice-of-law provision evinced the parties' intent to proceed in accordance with California procedure as well as its substantive law. The court also considered, in light of what it thought was the parties' intent to adopt California procedures, whether application of § 1281.2(c)(4)'s provision allowing a court to stay arbitration where a party to arbitration is also a party to litigation involving an arbitration non-party was preempted by the FAA. 35 Cal. 4th at 382.

The agreement in Cronus provided that it "shall be *construed and enforced* in accordance with and governed by the laws of the State of California . . ." *Id.* at 381 (emphasis supplied). It also provided that "[t]he designation of . . . a governing law for this agreement or the arbitration shall not be deemed an election to preclude application of the [FAA], if it would be applicable." *Id.* Nonetheless, the California Supreme Court gave it just that effect.

First, on the question whether the parties' agreement should be interpreted to require application of California arbitration procedure, the court assumed that it should because "[t]he parties seem to agree that the broad choice-of-law provision generally incorporates California law, including the California Arbitration Act." 35 Cal. 4th at 387. And the court noted that this assumption made sense in light of a recent Court of Appeal decision, *Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal. App. 4th 711 (2002). The arbitration clause in *Cronus* stated that the agreement should be "*construed and enforced*" in accordance with California law. 35 Cal. 4th at 381 (emphasis supplied), and the *Mount Diablo* Court had held that a choice of law clause with an "explicit reference to enforcement reasonably includes such matters as whether proceedings to enforce the agreement shall occur in court or before an arbitrator." 101 Cal. App. 4th at 722. Thus, the California Supreme Court determined that the choice of law provision's particular reference to "enforcement" evidenced an intent to abide by the chosen state's arbitration procedures, including, as a general matter, Cal. Civ. Proc. Code § 1281.2(c). 35 Cal. 4th at 387.

Turning to the second question, the Court then considered whether the FAA preempted the application of

§ 1281.2(c) to the agreement at issue. The parties had agreed that the clause stating that the choice of a governing law "shall not . . . preclude application of the [FAA]" meant that California procedures—and, more specifically, § 1281.2(c)—would apply so long as the FAA did not conflict with it. 35 Cal. 4th at 387. The Court found that applying § 1281.2(c) to simply "stay arbitration proceedings while the concurrent lawsuit proceeds" in this particular case would not conflict with the FAA's "policy of enforceability of arbitration agreements." *Id.* at 391, 393:

> "We simply hold that the language of the arbitration clause in this case . . . should not be read to preclude the application of § 1281.2(c), because it does not conflict with the applicable provisions of the FAA and does not undermine or frustrate the FAA's substantive policy favoring arbitration."

35 Cal. 4th at 394.

In California, then, if a litigant filed its suit in federal court, the court, following *Mastrobuono* and *Wolsey*, would likely rule that a generic choice of law provision in an agreement otherwise governed by the FAA did not adopt state court procedures, and especially those that would limit arbitrability. However, if the same litigant filed in California Superior Court instead, that court, in accordance with *Volt* and *Cronus*, would find that that the California Arbitration Act's procedures would apply, including those, like § 1281.2(c), that significantly limit arbitrability.

Other State Courts

The state courts in Tennessee, Illinois and Massachusetts have also relied on *Volt* when presented with the generic choice of law question. See *Frizzell*

Construction Co. v. Gatlinburg, L.L.C., 9 S.W.3d 79 (Tenn. 1999) (interpreting generic Tennessee choice-of-law clause as requiring application of Tennessee arbitration rules to bar arbitration of a fraudulent inducement claim); *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1190-91 (1st Dist. 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.").

The ruling below deepened this split of authority. Purporting to apply *Volt* and *Cronus*, it took both cases one step further. While both those cases involved choice-of-law clauses that selected California, the court below applied a California rule that allowed arbitration to be stayed or even barred based on a choice of law provision that did not reference California law. The Court of Appeal reached this conclusion not by deciding that the parties had expressly intended to choose California or Nebraska state arbitration procedures, but rather by *presuming* that California procedures applied, absent an express indication that the FAA is to apply. That holding stands the FAA's presumption in favor of arbitration on its head. See *Moses Cone*, 460 U.S. at 24-25.

* * * *

In *Mastrobuono*, the Court held that a generic choice-of-law provision would not displace the FAA. In *Volt*, it held the reverse. *See 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 tension between those opinions has, not surprisingly, led to a conflict among jurisdictions (both federal and state) and has resulted in disparity in how the question is resolved among those courts—sometimes, as in California, a disparity within the same State.

The divisive split in the handling of the choice-of-law provisions and the FAA unquestionably merits review. The choice-of-law clauses at issue in these cases merely provide that the contract will be "governed," "construed," "interpreted," or "enforced" according to the law of a particular state. Relying on either *Mastrobuono* or *Volt*, the lower courts have simply interpreted the same sort of basic contractual language differently, based on their conflicting reviews of the FAA.

II. THE *MASTROBUONO/VOLT* CONFLICT SHOULD BE RESOLVED IN THIS CASE.

A. The Conflict Will Not Be Resolved Without Clarification From The Court.

This conflict should be resolved now. It has persevered for more than twenty years, and because it stems from the opinions of this Court, the conflict is unlikely to abate without further clarification from the Court. The conflict is not merely academic; it has harmful practical effects, as it creates contracting uncertainty and significantly limits the policies and purposes of the FAA. Finally, this case presents a good vehicle for resolving this issue.

This Court, and several lower courts, have attempted to explain how *Volt* and *Mastrobuono* can be read harmoniously. In *Mastrobuono*, the 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), the Court suggested that *Volt* was limited to situations where a state rule determines "only the efficient order of proceedings," and does not "affect the enforceability of the arbitration agreement itself." *Id.* at 688.

These distinctions are not conclusive. More to the point, they have not resolved the ongoing conflict among the lower courts. While *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 was consistent with the FAA's requirement that arbitration agreements be construed in favor of arbitrability. See *Volt*, 489 U.S. at 475-76. And it is unclear that the distinction made in *Doctors Associates* 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). That is the same result the Court of Appeal dictated in the instant case.

In any event, the lower courts have neither fully adopted these distinctions nor applied them consistently. At least two of the courts that have followed *Volt* and applied state arbitration rules did so absent any state court determination of contractual intent. See *Cronus*, 35 Cal. 4th at 387; *Security Ins. Co. of Hartford*, 360 F.3d at 322. As will be discussed below, the California Court of Appeal, in its opinion in this case,

likewise did not analyze the parties' subjective intent with regard to application of the California arbitration rules. Rather, it simply presumed intent, and intent inconsistent with the FAA to boot.

Other courts have followed *Volt* where application of the state rule at issue did 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. 19a-20a; *Ekstrom*, 68 F.3d at 1394-95; *Thomson McKinnon Sec.*, 594 N.E.2d at 871. And despite *Doctors Associates*, the California Court of Appeal failed to honor this Court's distinction between provisions that limit arbitration and those that "merely reorder proceedings." The result in this case was, instead, that arbitration was simply precluded.

The Court's efforts to harmonize *Volt* and *Mastrobuono* by limiting *Volt's* application to certain limited situations have not resolved the ongoing conflict in the lower courts. They have continued to take conflicting positions regarding the meaning of generic choice-of-law clauses, citing either *Mastrobuono* or *Volt* in support of their conclusions. Therefore, this Court should clarify the ongoing viability and/or application of *Volt* given the subsequent (and more widely accepted) opinion in *Mastrobuono*.

B. The "*Volt* Jurisdictions" Are Frustrating The Strong Pro-Arbitration Presumptions and Policies of the FAA.

In the lower courts that follow *Volt*, the pro-arbitration policies of the FAA are being infringed upon in at least two meaningful ways. First, in those jurisdictions arbitration agreements, even broad ones like the one in this case, are not being interpreted consistent with

a strong presumption in favor of arbitration. Second, arbitration provisions are not being fully enforced in accordance with their terms or with the intent of the parties. *Volt*, or at least the lower courts interpreting *Volt*, have greatly, and improperly, expanded the breadth and meaning of "standard" or "generic" choice-of-law provisions.

As various courts have correctly noted, 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. Accordingly, when parties include a generic choice-of-law clause in their contracts, they presumptively mean only to choose the origin of the substantive law that will govern interpretation of their contract—but *not* to dictate that state arbitration rules will supersede federal law on arbitrability, which is unmentioned in clauses of that kind. By doing so, though, jurisdictions that purport to follow *Volt* threaten to render the FAA inapplicable to most agreements to arbitrate. As the Sixth Circuit 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 Corp.*, 142 F.3d at 938.

C. The Instant Case Presents An Excellent Vehicle For Resolving The Two-Decade-Old Conflict.

This case presents an excellent vehicle for resolving this conflict of authority and clarifying the continuing viability and scope of *Volt* in light of *Mastrobuono*.

Procedurally, this case is strikingly similar to the decision this Court reviewed in *Volt*: like that decision, this case involves an arbitration dispute in a contract with a choice-of-law provision resolved by the California Court of Appeal in an unpublished ruling, after which review was denied by the California Supreme Court. See *Board of Trustees of Leland Stanford Jr. Univ. v. Volt Information Sciences, Inc.*, 240 Cal. Rptr. 558, n.* (Cal App. 1987) ("In denying review, the Supreme Court ordered that the opinion be not officially published."). 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 need await further comment by that 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 the Court's proposed distinctions between *Volt* and *Mastrobuono*.

In *Volt*, the Court noted "the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." 489 U.S. at 474. Subsequent opinions have attempted to harmonize

Mastrobuono and *Volt* by claiming that the Court in *Mastrobuono* deferred to the California Court of Appeal's state-law interpretation of the agreement. See *Mastrobuono*, 514 U.S. at 60 n.4. But in this case neither the RPA nor the Request to Bind called for the application of California law. Accordingly there was no basis to hold that the parties intended that California's arbitration rules apply; indeed, there is no indication in the Court of Appeal's opinion that it even tried to interpret the language of those clauses. The instant case thus presents a "clean slate" in which the Court can provide the lower courts with guidance on how to handle a generic choice-of-law provision without having to defer to the state court's interpretation of the contract (because there was none below).

Furthermore, the instant case comes with a fact that sets the problem with *Volt* in sharp relief; that is, the absence of any reference in the actual choice-of-law clause at issue to the very State whose arbitration-limiting rule the court decided to apply. There is no reference to California law in either the RPA or the Request to Bind, but the California Court of Appeal held that the third-party limitation found in § 1281.2(c)(1) afforded discretion to deny arbitration altogether, presumably due to the mere fact that Respondents chose to sue Petitioners in the California state courts. That interpretation does not actually rest on anything in *Volt*. It is instead tantamount to a holding that a reference to the law of any State is the same as a reference to "any state law."

Moreover, in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), the only case in which the Court has attempted to reconcile *Volt* and *Mastrobuono*, the Court suggested that *Volt* was limited to situations where a state rule determines "only the efficient order

of proceedings," and does not "affect the enforceability of the arbitration agreement itself." *Id.* at 688. Unlike *Volt* (which only dealt with a stay of proceedings), in this case the Court of Appeal applied § 1281.2(c)(1), which provides, based on the presence in the lawsuit of a party not also a party to the arbitration clause, that "the court may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding." That provision cannot fairly be characterized as merely addressing "the efficient order of proceedings." Thus this case presents an opportunity for the Court to conclusively address and/or distinguish *Volt* from other instances where the consequences are not merely ministerial, but rather go to the very enforceability of the agreement to arbitrate.

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.

III. IN THE ALTERNATIVE, THE COURT SHOULD HOLD THIS PETITION PENDING ITS RULING IN *DIRECTV v. IMBURGIA*.

Just over three months ago the Court granted review of the California Court of Appeal's decision in *DIRECTV, Inc. v. Imburgia*, cert. granted, 135 S.Ct. 1547 (March 23, 2015). In that case, the same district of the California Court of Appeal invalidated an arbitration provision in a contract that explicitly stated that FAA procedures were to apply because there was a later reference to California law in the contract. It did so despite the lack of any statement in the contract either that (a) California procedural law *should* apply or (b) the FAA *should not* apply. In essence, and as it

did in this case, the Court of Appeal presumed the parties' intent to have California procedural law govern whether there would be arbitration (in that case a state law limit on the ability to proceed with class-wide arbitration) based on a passing and general reference to California law elsewhere in the agreement, and did so despite an explicit reference to the FAA and no specific adoption of California arbitration rules.

The question presented in DIRECTV's successful petition in *Imburgia* was as follows:

> Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act.

Petition for a Writ of Certiorari, *DIRECTV, Inc. v. Imburgia*, No. 14-462, at p. i. The answer to this question will bear directly on whether the outcome of the instant case, in which the same district of the same court barred arbitration by applying a state procedural rule based solely on a general choice-of-law reference, was correct. Indeed, the instant petition could have utilized most or all of the language in the question presented in *Imburgia*. As in *Imburgia*, there was no language in the agreements at issue from which one could conclude that the parties intended that California procedural law apply. But the California Court of Appeal nonetheless determined, merely because Respondents chose to file suit in California, that California procedural law should apply, contrary to the strong pro-arbitration aims of the FAA.

Should the Court ultimately reverse the California Court of Appeal in *Imburgia* and hold that a general

reference to state law in an underlying agreement does not warrant the application of state law essentially to invalidate an arbitration provision, the Court of Appeal's decision in this case would at best be called into serious question, and might well be undermined. The agreements at issue in this case, which said nothing about California law *anywhere* in them, have even less of a connection to California than the agreement at issue in *Imburgia*. Accordingly reversal of *Imburgia* might well dictate the same result here. Given that confluence of issues, Petitioners ask, in the alternative, that the instant petition be held by the Court pending its ruling in *Imburgia*, and that, if that ruling is reversed or vacated, this case be remanded to the California Court of Appeal for reconsideration in light of that ruling. *See, e.g., Hoevenaar v. Lazaroff*, 545 U.S. 1101 (2005); *Board of Trustees of the University of Illinois v. Doe*, 526 U.S. 1142 (1999).

CONCLUSION

For the foregoing reasons, the petition should be granted, or, in the alternative, held pending the Court's decision in *DIRECTV v. Imburgia*, No. 14-462, and then remanded for reconsideration in light of that ruling.

Respectfully Submitted,

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June 30, 2015

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA
En Banc

S224449

ARROW RECYCLING SOLUTIONS, INC. et al.,
Plaintiffs and Respondents,

v.

APPLIED UNDERWRITERS, INC. et al.,
Defendants and Appellants.

The petition for review is denied.

Supreme Court
FILED
April 1, 2015
Frank A. McGuire Clerk
Deputy

APPENDIX B

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

B245379
(Los Angeles County Super. Ct. No. BC484846)

ARROW RECYCLING SOLUTIONS, INC., et al.,

Plaintiffs and Respondents,

v.

APPLIED UNDERWRITERS, INC., et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, Deirdre H. Hill, Judge. Affirmed.

Barger & Wolen, Spencer Y. Kook and James C. Castle for Defendants and Appellants.

Bremer, Whyte, Brown & O'Meara, John H. Toohey, Jeremy A. Johnson,

Holly A. Bartuska; Jeffrey A. Simmons and Everett L. Skillman for Plaintiffs and Respondents.

Applied Underwriters, Inc. (Applied), Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRAC), and California Insurance Company (CIC) appeal the denial of their motion to compel the arbitration of a complaint by Arrow Recycling Solutions, Inc., and Arrow Environmental Solutions, Inc. (collectively Arrow).

Applied, AUCRAC, and CIC contend arbitration agreements in two documents are binding and enforceable and there was no valid basis for the trial court's refusal to order arbitration. We conclude that the moving defendants failed to establish the existence of an agreement to arbitrate in one of the documents, and the court properly refused to order arbitration based on the third party litigation exception to the general rule requiring the enforcement of an agreement to arbitrate. We therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Parties*

Arrow is a metal recycler. Doug Kunnel is president of both Arrow entities. CIC is an insurer and offers workers' compensation insurance as part of a profit sharing program together with Applied, as program manager, and AUCRAC, a reinsurer. Patriot Risk and Insurance Services, Inc. (Patriot), is an insurance broker.

2. *Arrow's Complaint*

Arrow filed a complaint against Applied, AUCRAC, CIC, and Patriot in May 2012. Arrow alleges that its workers' compensation insurance coverage was due to expire on April 1, 2011. Arrow provided payroll information to Patriot for the purpose of obtaining a proposal for a replacement policy. On March 31, 2011, Patriot provided information on the workers' compensation insurance and profit sharing program offered by Applied, AUCRAC, and CIC, including a Producer's Quote Transmittal. The Producer's Quote Transmittal stated under "Billing Terms" that based on the payroll information provided the estimated "annual pay-in amount" was $232,094.

Patriot also provided a document entitled Request to Bind Coverages & Services (Request to Bind). The Request to Bind stated that Arrow was requesting that Applied, through its affiliates or subsidiaries (defined in the Request to Bind collectively as "Applied"), issue a workers' compensation insurance policy "pursuant to the Workers' Compensation Program Proposal & Rate Quotation (the 'Proposal')" and "subject to Applicant [Arrow] executing the following agreements (collectively the 'Agreements'): (1) Reinsurance Participation Agreement; and where available, (2) Premium Finance Agreement." The Request to Bind included an arbitration provision stating:

"Applicant [Arrow] understands that Applied engages in alternative dispute resolution of conflicts. Applicant further agrees that any claims, disputes and or controversies between the parties involving the Proposal or any part thereof (including but not limited to the Agreements and Policies) shall be resolved by alternative dispute resolution and submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act in conformity with the Arbitration Act of the State of Nebraska. Arbitration shall be in accordance with JAMS by a single arbitrator with the arbitration held in Omaha, Nebraska. Each party shall pay one-half of the cost of the arbitration, and the arbitrator is not authorized to award consequential or punitive damages."

The words "Initial Here" appeared under a box next to the arbitration provision. That box was empty and contained no initials in the copy of the Request to Bind attached to the complaint.

Arrow alleges that it executed the Request to Bind on March 31, 2011, and later received a workers' compensation insurance policy effective April 1, 2011, and a document entitled Reinsurance Participation Agreement (RPA). A copy of the RPA executed by Arrow and AUCRAC is attached to the complaint.

The RPA set forth a profit sharing plan involving reinsurance and stated that the parties to the agreement were AUCRAC and Arrow. Paragraph 4 of the RPA stated:

"This Agreement and any Schedules hereto may not be modified, amended or supplemented in any manner except in writing signed by the parties hereto and represents the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, proposals, letters of intent, correspondence and understandings relating to the subject matter hereof. . . . "

Paragraph 13 of the RPA included an arbitration provision stating:

"(A) It is the express intention of the parties to resolve any disputes arising under this Agreement without resort to litigation in order to protect the confidentiality of their relationship and their respective businesses and affairs. Any dispute or controversy that is not resolved informally pursuant to sub-paragraph (B) of Paragraph 13 arising out of or related to this Agreement shall be fully determined in the British Virgin Islands under the provisions of the American Arbitration Association.

"(B) All disputes between the parties relating in any way to (1) the execution and delivery, construction or enforceability of this Agreement, (2) the management or operations of the Company, or (3) any other

breach or claimed breach of this Agreement or the transactions contemplated herein shall be settled amicably by good faith discussion among all of the parties hereto, and, failing such amicable settlement, finally determined exclusively by binding arbitration in accordance with the procedures provided herein. . . . "

[¶]…[¶]

"(I) All arbitration proceedings shall be conducted in the English language in accordance with the rules of the American Arbitration Association and shall take place in Tortola, British Virgin Islands or at some other location agreed to by the parties."

[¶]…[¶]

"(K) This arbitration clause shall survive the termination of this Agreement and be deemed to be an obligation of the parties which is independent of, and without regard to, the validity of this Agreement."

Paragraph 16 of the RPA included a choice-of-law provision stating:

"This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska and any matter concerning this Agreement that is not subject to the dispute resolution provisions of Paragraph 13 hereof shall be resolved exclusively by the courts of Nebraska without reference to its conflict of laws."

Arrow alleges that despite a "very good claims history," the actual pay-in amount billed for the first year was approximately $490,000, which exceeded the estimated annual pay-in amount of $232,094. Arrow alleges that the reason for this discrepancy was that the Billing Terms "contained mathematical falsehoods" involving the misclassification of payroll amounts from higher premium classifications to lower premium

classifications. Arrow alleges that it would not have purchased the workers' compensation insurance if it had known of this inaccuracy.

Arrow alleges counts for (1) breach of the implied covenant of good faith and fair dealing; (2) breach of contract; (3) fraud; (4) negligent misrepresentation; (5) fraudulent inducement; (6) rescission; (7) conversion; (8) accounting; (9) unfair business practices; (10) declaratory relief; and (11) professional negligence. Arrow alleges the first 10 counts against Applied, AUCRAC, and CIC, and alleges count 11 against Patriot only.

3. *Motion to Compel Arbitration*

Applied, AUCRAC, and CIC filed a motion in July 2012 to compel arbitration and stay the trial court proceedings. They argued that all of the counts alleged against them were within the scope of the arbitration agreement in the RPA. Alternatively, they argued that any claims not covered by the arbitration agreement in the RPA were within the scope of the arbitration agreement in the Request to Bind. They also argued that Patriot had agreed to participate in any court—ordered arbitration and that the fact that Patriot was not a party to the arbitration agreements did not preclude arbitration. They argued that arbitration was required under the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.) and the California Arbitration Act (CAA) (§ 1280 et seq.). They did not invoke the law of Nebraska.

Arrow argued in opposition to the motion to compel arbitration that it could not be compelled to arbitrate because (1) AUCRAC and CIC were transacting insurance business without a required certificate of authority from the California Department of Insurance, so

the policy and the entire scheme were illegal, and the arbitration provisions were unenforceable; (2) the arbitration provisions in the RPA and the Request to Bind were conflicting and unconscionable; (3) the moving parties failed to show an adequate prior demand for arbitration; (4) Patriot was not a party to any arbitration agreement and therefore could not be compelled to arbitrate; and (5) Arrow did not initial the arbitration provision in the Request to Bind and therefore did not agree to such arbitration provision. Arrow cited California law and did not invoke the law of Nebraska. Arrow also filed a request for judicial notice and evidentiary objections.

Applied, AUCRAC, and CIC argued in reply that the reinsurance arrangement and the profit sharing program were legal, and that the arbitration provisions in the RPA and the Request to Bind were enforceable and not unconscionable. They argued regarding Patriot as a nonparty to the arbitration agreements: "To the extent the Court determines that the claim asserted against Patriot cannot be compelled to arbitration, the Court should stay this action as the issues underlying the claim against Patriot can and will likely be litigated and resolved within the context of the arbitration. Because factual and legal issues relating to the claim against Patriot will likely be addressed in arbitration, there is good cause for staying this action pending resolution of the arbitration."

Applied, AUCRAC, and CIC filed a declaration by T. J. Koch, Applied's Director of Customer Service, stating that Applied had received from Arrow two signed and initialed copies of the Request to Bind. The documents attached to the Koch declaration each bore the signature of Doug Kunnel and initials in the box next to the arbitration provision. The defendants also

filed a supplemental declaration by Kook stating that they demanded arbitration in a letter dated July 17, 2012, and attached a copy of the letter. The letter demanded arbitration under the arbitration provision in the RPA and alternatively under the arbitration provision in the Request to Bind. The defendants also filed a request for judicial notice.

Arrow filed objections to evidence submitted with the reply and filed declarations by Doug Kunnel and his wife Patti Kunnel stating that the Request to Bind that he signed and she sent by e-mail to Patriot was signed by Doug Kunnel, but was not initialed in the box next to the arbitration provision. They both declared that the initials and the word "none" in handwriting appearing in another provision in the versions of the Request to Bind attached to the Koch declaration were not authentic.

4. *Tentative Ruling, Hearing, and Denial of Motion to Compel Arbitration*

The trial court filed a tentative ruling before the hearing on the motion to compel arbitration stating (1) that the demand for arbitration was insufficient because it failed to specify the place for arbitration, when the RPA specified the British Virgin Islands and the Request to Bind specified Nebraska; (2) regarding the disputed initials on the Request to Bind, "The evidence is inconclusive and weighs in favor of plaintiffs that no agreement exists"; (3) regarding the RPA, that the defendants disputed the legality of the workers' compensation insurance program, and, "This issue is at the crux of the case, whether the Program is legal. [¶] The Court does not find an agreement to arbitrate in

the RPA";[1] (4) that the arbitration provisions were broadly worded and encompassed the claims in this action; (5) regarding procedural unconscionability, "There is no surprise. [¶] There are elements of adhesion and oppression, although slight"; (6) regarding substantive unconscionability, "Requiring plaintiffs to arbitrate in the British Virgin Islands is substantively unconscionable. The costs of arbitrating in a foreign territory would constitute a large portion of the amount in controversy"; and (7) regarding Patriot as a nonparty to the arbitration agreements, "Here, although Patriot is agreeable to participating in any court-ordered arbitration, there is no special relationship between the [moving parties] and Patriot. Patriot was Arrow's broker. Patriot cannot be compelled to arbitrate against Arrow. Patriot is being sued for professional negligence, separate from the other defendants."

The tentative ruling did not expressly state whether the arbitration provisions were unenforceable due to unconscionability. It concluded, "The motion is denied."

At the hearing on the motion to compel arbitration, counsel for the moving defendants requested a continuance to allow discovery concerning whether the arbitration provision in the Request to Bind was initialed by Arrow or on its behalf. Counsel for those defendants also argued that if the trial court ordered an arbitration of the claims against the defendants other than Patriot, "a lot of the factual issues and maybe the legal issues relating to Patriot would be resolved in the arbitration, and, therefore, at least it seems like it

[1] The trial court acknowledged at the hearing that this statement in its tentative ruling was intended to refer to the Request to Bind.

would be a good idea to stay this case in the interim while the arbitration is resolved."

The trial court heard oral argument and took the matter under submission. No party requested a statement of decision (see Code Civ. Proc., § 1291).[2] The court filed a minute order on the date of the hearing, October 30, 2012, stating only, "The motion is denied." The court did not rule on the evidentiary objections.

5. *Appeal*

Applied, AUCRAC, and CIC timely appealed the order denying their motion to compel arbitration.

CONTENTIONS

Applied, AUCRAC, and CIC challenge the reasons stated in the tentative ruling for tentatively denying the motion to compel arbitration, while acknowledging that the basis for the trial court's final ruling is unknown. They contend in their appellants' opening brief (1) the failure to specify the place of arbitration in their demand for arbitration cannot justify the denial of their motion to compel arbitration; (2) the evidence suggests that Patriot, as Arrow's agent, initialed the arbitration provision in the Request to Bind, and Arrow failed to show otherwise, so Arrow is bound by that provision; (3) the denial of their request for discovery relating to the initials appearing on the Request to Bind was an abuse of discretion; (4) the profit sharing program is not illegal, so the arbitration provision in the RPA is not unenforceable as a result of such purported illegality; (5) the arbitration agreements are not unconscionable, and any unconscionable provisions should be severed rather than invalidate the entire

[2] All statutory references are to the Code of Civil Procedure unless stated otherwise.

arbitration agreement; and (6) the trial court erred by refusing to compel arbitration based on the third party litigation exception rather than ordering arbitration and staying this litigation under section 1281.2.

We requested supplement briefing on certain questions, including whether the third party litigation exception (§ 1281.2, subd. (c)) applies. In response to our request, Applied, AUCRAC, and CIC contend (1) the FAA (9 U.S.C. § 1 et seq.) preempts the application of the third party litigation exception; and (2) even if there is no preemption, the third party litigation exception is inapplicable because there is no possibility of conflicting rulings on a common factual or legal issue.

DISCUSSION

1. *Implied Findings*

An order denying a motion to compel arbitration is appealable. (§ 1294.)

A statement of decision is required if timely requested when an appealable order is made under the CAA. (§ 1291; *Metis Development LLC v. Bohacek* (2011) 200. Cal.App.4th 679, 689.) A statement of decision explains the factual and legal basis for the court's ruling. (§ 632.)

No party requested a statement of decision in this case. A tentative ruling is nonbinding and is not a substitute for a statement of decision.[3] (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268-269.) Absent a statement of decision, we must presume that the trial court resolved all of the principal controverted issues in favor of the prevailing party as necessary to

[3] Rule 3.1590(c) of the California Rules of Court states that a court may direct that its tentative decision will become the statement of decision in certain circumstances. The trial court here did not do so.

support the appealed order. (*In re Marriage of Arceneaux* (1990) 51 Ca1.3d 1130, 1133-1134; see §§ 632, 634.)

2. *Applied, AUCRAC, and CIC Have Shown No Error in the Implied Finding That Arrow Never Agreed to the Arbitration Provision in the Request to Bind*

a. *Substantial Evidence Supports the Implied Finding*

The parties disputed whether Arrow's president, Doug Kunnel, initialed the arbitration provision in the Request to Bind. Absent a statement of decision, we presume that the trial court found that he did not initial the provision and that there was no arbitration agreement in the Request to Bind. Applied, AUCRAC, and CIC challenge this implied finding.

A party moving to compel arbitration bears the burden of proving by a preponderance of evidence the existence of an arbitration agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) The trial court sits as the trier of fact for purposes of ruling on the motion. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.) We review the court's factual findings under the substantial evidence standard. (*Avery v. Integrated Healthcare Holdings, Inc.* (2013) 218 Cal.App.4th 50, 60.)

Substantial evidence is evidence that a rational trier of fact could find to be reasonable, credible and of solid value. We view the evidence in the light most favorable to the judgment or appealed order and accept as true all evidence tending to support the trial court's ruling, including all facts that reasonably can be deduced from the evidence. We must affirm the judgment or order if an examination of the entire record viewed in this light discloses substantial evidence to support

the ruling. (*Crawford v. Southern Pacific Co.* (1935) 3 Ca1.2d 427, 429; *Mealy v. B-Mobile, Inc.* (2011) 195 Cal.App.4th 1218, 1223.)

Doug Kunnel stated in his declaration that the box next to the arbitration provision in the Request to Bind that he signed was left blank and did not contain his initials. He also declared that the word "none" in handwriting appearing in another provision in the versions of the Request to Bind attached to the Koch declaration was not present in the document that he signed. He declared that the initials and the word "none" were not of his hand and were added to the document without his knowledge or consent. Patti Kunnel declared that she sent the signed Request to Bind to Patriot and that neither the initials nor the word "none" was present on the document that she provided.

Applied, AUCRAC, and CIC argue that Arrow failed to negate the possibility that Patriot as Arrow's agent initialed the Request to Bind. But the defendants as the parties moving to compel arbitration had the burden of producing evidence sufficient to establish the existence of an arbitration agreement in the Request to Bind, such as evidence that Patriot initialed the Request to Bind as Arrow's agent. The defendants failed to present such evidence. We conclude that the declarations of Doug Kunnel and Patti Kunnel constitute substantial evidence supporting the implied finding that Arrow never agreed to the arbitration provision in the Request to Bind and that, therefore, there was no such arbitration agreement.

b. *The Trial Court Properly Denied a Continuance*

Applied, AUCRAC, and CIC cite no authority in support of their argument that they were entitled to a continuance of the hearing on their motion to compel

arbitration for the purpose of conducting discovery concerning the initials. We review the denial of their request for a continuance for abuse of discretion. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254.)

"An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law. We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise. [Citations.]" (*Mejia v. City of Los Angeles* (2007) 156 Cal.App.4th 151, 158 (Mejia).)

Applied, AUCRAC, and CIC in their motion to compel arbitration referred to the Request to Bind attached to the complaint, which had no initials in the box next to the arbitration provision. They submitted initialed versions of the Request to Bind for the first time with their reply. In our view, the trial court reasonably concluded that having neglected to address the missing initials in their motion, the moving defendants failed to show good cause to continue the hearing. We conclude that the defendants have shown no abuse of discretion in this regard.

3. *Third Party Litigation Exception*

A party to an arbitration agreement can be compelled to arbitrate a dispute that is within the scope of the arbitration agreement.[4] Section 1281.2 states that

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[4] The arbitration provision in the Request to Bind stated that any dispute must be resolved "by binding arbitration under the Federal Arbitration Act in conformity with the Arbitration Act of the State of Nebraska." A choice-of-law provision in the RPA

on a petition filed by a party to a written arbitration agreement, a court must order a party to the agreement to arbitrate a controversy if it finds that an agreement to arbitrate the controversy exists, unless any of three specified exceptions applies. The CAA "reflects a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citation.]" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 380.)

Section 1281.2, subdivision (c) states that a court need not order arbitration if it determines that "[1] [a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, [2] arising out of the same transaction or series of related transactions and [3] there is a possibility of conflicting rulings on a common issue of law or fact." We will refer to this as the third party litigation exception. If a court determines that the third party litigation exception applies, it may refuse to enforce the arbitration agreement and instead order intervention or joinder of all parties to the dispute in a single action, among other options. (§ 1281.2, final par.)

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stated, "This Agreement shall be exclusively governed by and construed in accordance with the laws of Nebraska . . . . " Yet the parties did not assert Nebraska law in the trial court, relying instead on California law and, to a limited extent, the FAA. The parties also fail to invoke Nebraska law on appeal. We conclude that by failing to assert the choice-of-law provisions in the trial court and on appeal, the parties have forfeited any reliance on Nebraska law for purposes of this appeal. (*Segal v. Silberstein* (2007) 156 Cal.App.4th 627, 632; *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551, 1554, fn. 1.)

The final paragraph of section 1281.2 states:

"If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

Thus, under the CAA a court finding that the third party litigation exception applies may refuse to order arbitration and instead join all parties to the dispute in a single action, or order arbitration and stay either the arbitration or the litigation, in order to avoid conflicting rulings on a common issue of fact or law. As used in section 1281.2, subdivision (c), the term "third party" means a person who is neither bound by nor entitled to enforce the arbitration agreement. (*Thomas v. Westlake* (2012) 204 Cal.App.4th 605, 612; *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1407.)

The third party litigation exception was at issue in the trial court. Arrow argued in opposition to the motion to compel arbitration that the motion should be denied because Patriot was not a party to any arbitration agreement and therefore could not be compelled to arbitrate. Absent a statement of decision, we presume that the court found that each of the requirements for application of the third party litigation exception was present and that the exception applied, and elected to

refuse to compel arbitration rather than order arbitration and stay either the arbitration or this litigation.

4. *The FAA Does Not Preempt the Application of the Third Party Litigation Exception*

   a. *Applied, AUCRAC, and CIC Forfeited the Preemption Argument by Failing to Assert it Earlier*

Applied, AUCRAC, and CIC did not argue in their appellants' opening brief that the FAA preempts the application of the third party litigation exception. They argued that California has a strong public policy favoring the arbitration of disputes and that section 2 of the FAA (9 U.S.C. § 2) "also provides guidance as it reflects an equally strong federal public policy favoring arbitration." But they did not argue in their opening brief that the FAA preempted the application of the CAA in any manner.

Applied, AUCRAC, and CIC argued in their opening brief that the trial 'court erred by refusing to compel arbitration based on the third party litigation exception rather than ordering arbitration and staying this litigation under section 1281.2. We requested supplemental briefing on the question whether the third party litigation exception applies. Applied, AUCRAC, and CIC argue in their supplemental brief that the third party litigation exception is inapplicable because there is no possibility of conflicting rulings on a common legal or factual issue. They also argue for the first time in their supplemental brief that the FAA preempts the application of the third party litigation exception. We conclude that the defendants forfeited the preemption argument by failing to assert it in their opening brief. (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 753,

fn. 2.) We nonetheless will address the merits of the preemption argument.

b. *There Is No Preemption*

The United States Supreme Court in *Volt Info. Sciences v. Leland Stanford Jr. Univ.* (1988) 489 U.S. 468 [109 S.Ct. 1248] (*Volt*) held that the application of the third party litigation exception of section 1281.2, subdivision (c) to stay the arbitration of a contract dispute involving interstate commerce, and therefore covered by the FAA, did not undermine the goals and policies of the FAA and therefore was not preempted. (*Volt, supra*, at pp. 477-478.) The contract in *Volt* included a choice-of-law provision designating the law of the situs state, which was California. The United States Supreme Court assumed the correctness of the ruling by the California Court of Appeal that the choice of California law included California's arbitration rules and specifically section 1281.2, subdivision (c). (*Volt, supra*, at p. 474.)

Volt stated that section 2 of the FAA requires courts to enforce arbitration agreements and does not prevent courts from enforcing agreements to arbitrate under rules different from those set forth in the FAA. (*Volt, supra*, 489 U.S. at p. 474.) *Volt* stated, "[W]e think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration. As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for

contradictory judgments. *See Calif. Civ. Proc. Code Ann.* § 1281.2(c)." (*Id* at p. 476, fn. 5.)

The California Supreme Court in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Ca1.4th 376 (*Cronus*) similarly held that the FAA did not preempt the application of the third party litigation exception in that case. (*Cronus, supra*, at p. 380.) The arbitration agreements in Cronus included a California choice-of-law provision but also stated that the choice of law did not preclude the application of the FAA, if applicable. (*Cronus, supra*, at p. 381.) Cronus concluded that section 1281.2, subdivision (c) did not conflict with the FAA's procedural provisions because the FAA's procedural provisions applied only in federal court. (*Cronus, supra*, at pp. 388-390.) Cronus also concluded that section 1281.2, subdivision (c) did not contravene the FAA's substantive policy favoring arbitration. (*Cronus, supra*, at pp. 391-392, citing *Volt, supra*, 489 U.S. at p. 476 & fn. 5.) *Cronus* therefore concluded that the arbitration agreements did not preclude the application of section 1281.2, subdivision (c) because the California statute did not conflict with the FAA or undermine the FAA's substantive policy favoring arbitration. (*Cronus, supra*, at p. 394.) *Cronus* stated further, "Our opinion does not preclude parties to an arbitration agreement to expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." (*Ibid*.)

Thus, the third party litigation exception of section 1281.2, subdivision (c) does not conflict with the procedural or substantive provisions of the FAA and is not

preempted by the FAA.[5] We therefore reject the contention that the FAA preempts the application of the third party litigation exception in this case.

5. *The Third Party Litigation Exception Applies*

Applied, AUCRAC, and CIC expressly concede that the first two requirements for application of the third party litigation exception are satisfied because (1) Patriot is a defendant in this action and is not a party to any arbitration agreement, and (2) the claims subject to arbitration and the claim against Patriot arise from the same transaction or series of related transactions. The defendants argue, however, that there is no possibility of conflicting rulings because the 10 counts alleged against them are separate and distinct from, and share no common issues with, the single professional negligence count alleged against Patriot. This contradicts the defendants' argument in the trial court.

Applied, AUCRAC, and CIC argued in the trial court that the claims against them shared common issues with the claim against Patriot. They argued in their reply in support of their motion to compel arbitration that even if Patriot could not be compelled to arbitrate, an arbitration of the claims against Applied, AUCRAC,

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[5] The third party litigation exception is inapplicable if the contracting parties expressly elected to proceed under the procedural provisions of the FAA rather than the CAA. (*Cronus, supra*, 35 Ca1.4th at p. 394; *Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 174, 177.) The defendants appear to assert this argument with respect to the Request to Bind, which, unlike the RPA, provided for arbitration "under the Federal Arbitration Act." We need not decide the effect of this language because our conclusion that substantial evidence supports the implied finding that Arrow never agreed to the arbitration provision in the Request to Bind (discussed *ante*) renders the issue moot.

and CIC would likely resolve "the issues underlying the claim against Patriot." They argued further that "[b]ecause factual and legal issues relating to the claim against Patriot will likely be addressed in arbitration, there is good cause for staying this action pending resolution of the arbitration." They argued at the hearing that if the court ordered an arbitration of the claims against them, "a lot of the factual issues and maybe the legal issues relating to Patriot would be resolved in the arbitration, and, therefore, at least it seems it would be a good idea to stay this case in the interim while the arbitration is resolved." Thus, in arguing that the court should order arbitration and stay this litigation rather than refuse to order arbitration, Applied, AUCRAC, and CIC acknowledged that the claims against them share common legal and factual issues with the claim against Patriot. Such an acknowledgment effectively concedes the existence of a possibility of conflicting rulings on a common issue of law or fact.

The doctrine of invited error prevents a party from asserting an alleged error as grounds for reversal when the party through its own conduct induced the commission of the alleged error. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403; *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.) The doctrine is based on the principle of estoppel. (*Norgart, supra*, at p. 403.) The purpose of the doctrine is to prevent a party from misleading the court and then profiting on appeal from doing so. (*Ibid*.)

We conclude that by arguing in the trial court that the claims against them shared common issues with the claim against Patriot, the moving defendants invited any error in the court's finding of a possibility of conflicting rulings if the same issue were decided both in this litigation and in arbitration. Accordingly,

Applied, AUCRAC, and CIC have shown no error in the trial court's implied finding that the third party litigation exception applies.

6. *The Trial Court Properly Refused to Compel Arbitration Based on the Third Party Litigation Exception*

Applied, AUCRAC, and CIC also contend the trial court, having found that the third party litigation exception applied, abused its discretion by refusing to order arbitration rather than ordering arbitration of the claims against them and staying this litigation.

The standard of review of an order denying a petition to compel arbitration depends on the particular issue decided. (*Laswell v. AG Seal Beach, LLC, supra*, 189 Cal.App.4th at p. 1406.) If the trial court finds that the third party litigation exception applies, its selection of one of the alternatives under the final paragraph of section 1281.2 is a discretionary decision and is reviewed for abuse of discretion. (*Lindemann v. Hume* (2012) 204 Cal.App.4th 556, 567-568.)

Applied, AUCRAC, and CIC argue that the gravamen of this action concerns Arrow's dispute with them, the 10 counts alleged against them are all within the scope of the arbitration agreements, and the presence of a single count against Patriot for professional negligence should not prevent the arbitration of the counts against them. But section 1281.2 does not state that a trial court has no discretion to refuse to order arbitration in a case in which most of the claims are arbitrable. Applied, AUCRAC, and CIC have failed to persuade us that the trial court's discretion under the statute should be so limited.

The trial court's reasons for refusing to order arbitration rather than ordering arbitration and staying either the arbitration or this litigation are unknown because no party requested a statement of decision, and the order ruling on the motion to compel arbitration states only "The motion is denied." We cannot presume that the court's decision was based on a legally impermissible reason or that the court abused its discretion in a manner not shown by the record. Instead, we must presume that the court properly applied the law and acted within its discretion unless an appellant affirmatively shows otherwise. (*Mejia, supra*, 156 Cal.App.4th at p. 158.)

We conclude that Applied, AUCRAC, and CIC have shown no abuse of discretion in the trial court's refusal to order arbitration based on the third party litigation exception. In light of our conclusion, we need not decide whether the court properly denied the motion to compel arbitration for another reason.

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DISPOSITION

The order denying the motion to compel arbitration is affirmed. Applied, AUCRAC, and CIC are entitled to recover their costs on appeal.

NOT TO BE *PUBLISHED* IN THE OFFICIAL REPORTS

ALDRICH, J.

WE CONCUR:

EDMON, P.J.

KITCHING, J.

APPENDIX C

Date: 10/30/12
Honorable Diedre Hill
Dept. 49
8:32 a.m. BC484846

ARROW RECYCLING SOLUTIONS, INC. et al.

vs.

APPLIED UNDERWRITERS INC. et al.

Plaintiff Counsel	JEFFREY SIMMONS
Defendant Counsel	SPENCER KOOK
	PENELOPE DIEHL
	(APPEARS VIA COURTCALL)

NATURE OF PROCEEDINGS:

MOTION TO COMPEL;

ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE TO IMPOSED FOR FAILURE TO FILE THE FOLLOWING: PROOF OF SERVICE; APPLICATION FOR PUBLICATION; FILE DEFAULT; FILE CASE MANAGEMENT STATEMENT; FILE DEFAULT JUDGMENT; OR IN THE ALTERNATIVE, CASE MANAGEMENT CONFERENCE;

The Stipulation and Order to Use Certified Shorthand Reporter appointing official Court reporter pro tempore in the current proceedings is signed and filed this date.

Matter is called for hearing, argued and ruled upon as fully reflected in the notes of the Official Court Reporter, incorporated herein by reference to the court file.

Matter is taken under submission.

LATER:

The Court issues its ruling on the matter taken under submission.

The motion is denied.

Order to Show Cause RE Closure of the Pleadings and Case Management Conference is set for November 28, 2012 at 8:30 a.m. in this department.

All parties to file case management statements.