IN THE SUPREME COURT
STATE OF GEORGIA

JEFF BICKERSTAFF, JR.,
on behalf of himself and all
persons similarly situated,

Case No. S15C1295

Petitioner,

v.

SUNTRUST BANK,

Respondent.

AMICUS CURIAE BRIEF OF GEORGIA WATCH AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER

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INTRODUCTION

The ruling of the Court of Appeals in *Bickerstaff v. SunTrust Bank*, No. A14A1780 (Ga. Ct. App. Mar. 30, 2015) departs from years of Georgia class action law, to say nothing of general law across the country. If permitted to stand, this ruling will directly conflict with this Court's precedents. The needless disruption that would result from the presence of such an outlier decision amid Georgia's broader precedent regarding class certification is the ill that can be prevented by a writ of certiorari.

As this Court has clearly stated, in Georgia, "*the general rule allow[s] the named plaintiffs in a class action to satisfy preconditions for suit on behalf of the entire class*." *Schorr v. Countrywide Home Loans, Inc.*, 287 Ga. 570, 573 (2010) (emphasis added). In *Bickerstaff*, however, the appellate court held that the named plaintiff, Jeff Bickerstaff Jr., could not exercise on behalf of putative class members an arbitration-rejection option contained in a standard form contract. The court gave two reasons for this outcome: (1) a named plaintiff's actions cannot bind the class members before class certification and (2) a named plaintiff cannot represent putative class members before litigation with respect to conditions arising from contract. The appellate court's holdings fundamentally misunderstand this Court's "general rule" regarding the representative nature of the class action.

Further, *Bickerstaff* could decimate class actions in Georgia and damage consumer protection.

This Court has made clear that pre-suit conditions will not immunize defendants from class actions. *See, e.g.*, *Schorr*, 287 Ga. at 573. *Bickerstaff* changes that. The Court of Appeals' decision will immunize companies from class actions asserting claims arising from form agreements—long considered the "classic cases" for class treatment. *Bickerstaff* will allow companies, insurance carriers, and banks to immunize themselves from class actions that assert claims arising under form agreements simply by inserting a prelitigation condition or pre-suit demand requirement into those contracts. The fact that this case involves an arbitration contract, as opposed to another type of pre-litigation requirement, does not change the analysis. Arbitration is a creature of contract, and the Federal Arbitration Act was designed to place such agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989) (internal quotations omitted). The ruling in *Bickerstaff* blows a hole in consumer protection in Georgia. Accordingly, this case presents issues of great public importance calling for this Court's *certiorari* review. Ga. Const. art. VI, § 6, ¶ V.

In light of the public importance of this case, Georgia Watch and the National Consumer Law Center file this Amicus Curiae Brief in support of

Bickerstaff's petition for *certiorari* pursuant to Supreme Court of Georgia Rules 23 and 38.

INTEREST OF AMICUS CURIAE

Georgia Watch, a non-profit, nonpartisan 501(c)(3) organization, is the state's leading consumer advocacy group. Georgia Watch utilizes education and advocacy to empower and protect Georgia's consumers, especially the most vulnerable of Georgia's population who may feel their interests are not represented in the legislature, in the state courts, or before the Public Service Commission. Among its goals, Georgia Watch works to safeguard consumer protection in the area of personal finance and to promote access to the courts.

The National Consumer Law Center, or "NCLC," advocates for the rights of low-income families and provides resources to civil legal aid and private attorneys representing low-income consumers. The staff lawyers of the NCLC provide policy analysis, advocacy, litigation, expert witness services, and training for consumer advocates throughout the United States. NCLC also works with federal and state policymakers and participates in major litigation across the nation. To aid in its mission, NCLC has inspired and helped to create two consumer justice organizations: The National Association of Consumer Advocates and Americans for Fairness in Lending. NCLC has also developed its own Student Loan Borrowers Assistance Project and National Elder Rights Training Project, as well

as other initiatives. Additionally, NCLC publishes a comprehensive set of legal treatises, considered by many to be the preeminent source on consumer law. The treatises are widely cited in judicial opinions by courts across the United States, including the Supreme Court.

Both Georgia Watch and NCLC are deeply concerned about the damage to the state of class-action and consumer-protection law that will result from the appellate court's aberrational decision. Neither Georgia Watch, nor NCLC take any position on the merits of this case.

Furthermore, consumer class-action litigation forms an important part of the Barnes Law Group's practice. The Barnes Law Group has represented consumer plaintiff classes in banking and insurance litigation, recovering more than $300 million for thousands of consumers and policy holders. Moreover, attorneys from the Barnes Law Group have participated in congressional and state hearings regarding abusive insurance and predatory lending practices. The Barnes Law Group takes no position on the merits of this case; however, it is also concerned that the appellate court's misguided ruling will cause severe harm to Georgia class-action law.

ARGUMENT AND CITATION TO AUTHORITY

I. Class Actions Are Essential To Consumer Protection In Georgia.

Class actions are essential to consumer protection. Where individual claims are for relatively small amounts, the class action provides the sole means by which individuals may recover compensation. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." (internal quotation omitted)); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."). By enabling small-claim suits, class actions work to deter wrongdoing in the first instance. *See Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969) ("Compensatory damages, especially when multiplied in a class action, have a potent deterrent effect."). Thus, "[a] class-based effort is more effective than an individual consumer in getting a defendant to modify its conduct." 6 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 21.1, p. 386 (4th ed. 2002). For these reasons, the class action reinforces regulatory schemes by protecting consumers where government enforcement falls short. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("The aggregation of individual claims in the context of

a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government.”). Advancing the consumer-protective purpose of the class action, the Barnes Law Group has litigated class actions before this Court as well as the Georgia Court of Appeals on behalf Georgia consumers who otherwise would have no practical recourse to recovery against defendants who otherwise would have an insufficient incentive to modify their conduct. *See, e.g.*, *Ga. Power Co. v. Cazier*, 321 Ga. App. 576, 576 (2013); *Ga. Cash Am., Inc. v. Greene*, 318 Ga. App. 355, 356 (2012); *Fortis Ins. Co. v. Kahn*, 299 Ga.App. 319 (2009); *USA Payday Cash Advance Center #1, Inc. v. Evans*, 281 Ga. App. 847, 847 (2006).

As Georgia courts have recognized, the class action is well-suited to claims arising under form agreements between individual consumers and large companies. *See UNUM Life Ins. Co. of Am. v. Crutchfield*, 256 Ga. App. 582, 583 (2002) (“[C]laims arising from interpretation of form agreements are considered to be ‘classic’ cases for treatment as a class action.” (internal citation omitted)); *J.M.I.C. Life Ins. Co. v. Toole*, 280 Ga. App. 372, 377 (2006) (finding that “actions involving materially similar form life insurance policies are ‘classic’ cases for treatment as a class action”) (internal quotation marks and citation omitted)). Speaking in terms of litigation economics, there is an asymmetry between individual consumers, on the one hand, and large companies, insurance carriers,

and banks. Class actions "level the playing field" so that, should relatively small claims arise under standard form agreements, a resort to the courts is an economically feasible forum for consumers and, concomitantly, offers a measure of deterrence against defendant who might otherwise be tempted to breach duties or commit unlawful acts on a grand scale. *See, e.g.*, *Ga. Cash*, 318 Ga. App. at 356 (class action against pay-day lender alleging usurious terms in loan agreement); *Payday Cash Advance Center #1*, 281 Ga. App. at 847 (same).

This Court has considered class claims for relatively small amounts arising under form agreements entered between individual class members and large companies, insurance carriers, and banks. For example, in *State Farm Mutual Auto Insurance Co. v. Mabry*, this Court heard the claims of a class of insureds who made first-party physical damage claims under their automobile insurance contracts, alleging that their insurers did not pay the post-repair diminution of value of their vehicles caused by the fact of the physical damage. 274 Ga. 498, 498 (2001). The *Mabry* class action resulted in a declaration that, in Georgia, automobile insurers had a duty to compensate policyholders for the loss in diminution of value, notwithstanding repairs that had returned the vehicle to its pre-loss condition in terms of appearance and function. *See id.* at 509. The *Mabry* class action also led to an injunction requiring an insurance company to develop a methodology to evaluate first-party physical damage claims for the existence of

diminution in value. *Id.* at 510. And, most significantly, class actions brought on behalf of Georgia automobile insurance policyholders resulted in hundreds of millions of dollars in recovery. *See, e.g.*, *Oldham v. Nationwide Mut. Ins. Co.*, No. SU-01-CV-4132-7 (Muscogee Cnty Sup. Ct., Sept. 4, 2002) (settlement order); *Mabry v. State Farm Mut. Auto. Ins. Co.*, No. SU-99-CV-4915 (Muscogee Cnty Sup. Ct., Mar. 6, 2002) (settlement order).

The diminished-value class actions provide a perfect example of the class form at work: First, these class actions were tied to claims arising under a form contract—the classic predicate. Second, absent action as a class, Georgia automobile insurance policyholders would have lacked a sufficient economic incentive to bring individual direct actions against large insurance companies for the post-repair loss of value to their automobiles. Third, before the class action, insurance companies had no procedure or methodology to evaluate diminution-in-value losses, and the class action resulted in a modification of their conduct. *See, e.g.*, *Mabry*, 274 Ga. at 510 (finding that "the undisputed evidence shows that State Farm had no such methodology in use"). Fourth, the class action filled a void created by the absence of administrative enforcement. Finally, the class action resulted in widespread compensation for Georgia consumers, which they would not have recovered but for the class representation.

The court of appeals' ruling in *Bickerstaff*, however, jeopardizes consumer class actions targeting uniform and unlawful practices by insurance companies, as in *Mabry*, and predatory lenders, as in *Georgia Cash*. Moreover, *Bickerstaff* could hobble class actions asserting claims arising from form agreements, undermining consumer protection in Georgia. The right of Georgia consumers to recover will be severely jeopardized if *Bickerstaff* is allowed to stand. This Court should not allow that: *Bickerstaff* clearly conflicts with this Court's precedents permitting prelitigation representation and misconceives the representational nature of the class action.

II. ***Bickerstaff* Creates A Sea Change That Undermines Class Actions in Georgia.**

A. In Georgia, a named plaintiff may act on behalf of a putative class before certification and even before litigation.

A named plaintiff represents and may act on behalf of a putative class before the commencement of litigation. This Court has recognized this general rule in multiple precedents. To allow *Bickerstaff* to stand would, at minimum, upset those precedents and, at worst, relegate Georgia to an outlier in terms of its class action jurisprudence.

In *Schorr*, this Court determined "that the satisfaction of any 'precondition for suit . . . by the class plaintiff normally will avoid the necessity for each class member to satisfy this requirement individually.'" 287 Ga. at 571–72. There, the

named plaintiffs had paid their mortgage and demanded that Countrywide cancel the security deed pursuant to O.C.G.A. § 44-14-3. *Id.* at 570. At the time, § 44-14-3(c) required that if the grantee or holder of the security deed did not cancel it pursuant to the statute, the grantee would be liable for $500 in liquidated damages, but only if the grantor made a written demand. *Id.* The named plaintiffs made a written demand for liquidated damages, and upon Countrywide's failure to pay, they filed a class action on behalf of Countrywide customers whose security deed had not been cancelled as required. *Id.* at 570–71. Countrywide moved to dismiss the claims of the putative class members because the complaint failed to allege that each class member individually made written demands for liquidated damages. This Court rejected Countrywide's argument, holding that individual demands were not necessary because the named plaintiff had made a demand. *Id.*

The *Schorr* Court also squarely rejected the dissent's view that a named plaintiff can act on behalf of members of the class, as in *Barnes*, only where "the particular precondition is exhaustion of administrative remedies, a constitutional challenge is involved and . . . the issue of liability to the class has already been determined." *Id.* at 573. The *Schorr* Court emphasized: "We decline to overturn a significant area of the law governing class actions"—*i.e.*, the general rule that a named plaintiff represents the putative class before litigation—"in any such

manner." *Id.*[1]; *see also Barnes v. City of Atlanta*, 281 Ga. 256, 258 (2006) (applying "those principles which apply generally in class actions, including that which permits a representative to act on behalf of an entire class").

In *Barnes*, this Court held that the administrative claims of the named plaintiffs satisfied an exhaustion requirement on behalf of all the members of the class. 281 Ga. at 260. There, a group of attorneys had demanded a refund of occupation taxes from the City of Atlanta pursuant to O.C.G.A. § 48-5-380. *Id.* at 256. A year later, named plaintiffs filed a class action against the city, seeking the tax refund. *Id.* In the class certification order, the trial court divided the attorney class members into those who had demanded a refund under O.C.G.A. § 48-5-380 and those who had not. *Id.* The trial court later held that the latter class had failed to exhaust their administrative remedies. *Id.* at 257. This Court, however, looked

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[1] The full quotation is emphatic, leaving little doubt as to this Court's reticence to depart from the representational principle so well-established in courts across the country:

> [T]here is no reason not to apply in this case *the general rule allowing the named plaintiffs in a class action to satisfy preconditions for suit on behalf of the entire class.* . . . Adoption of the dissent's position would convert *a general rule applicable to class actions* into an exceedingly narrow exception . . . . *The general rule permitting pre-litigation representation of a class* would be abrogated, leaving only a single exception to a newly adopted general rule in Georgia forbidding the satisfaction by a named plaintiff of a precondition for suit on behalf of a class . . . We decline to overturn *a significant area of the law governing class actions* in any such manner.

287 Ga. at 573 (emphasis supplied).

to "those principles which apply generally in class actions" and found "[w]here, as here, 'exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiff normally will avoid the necessity for each class member to satisfy this requirement individually.'" *Id.* at 258 (quoting 2 Alba Conte & Herbert B. Newberg, NEWBERG ON CLASS ACTIONS § 5:15, p. 438 (4th ed. 2002)).

Where this Court in *Schorr* and *Barnes* declined to tread, however, the Court of Appeals plunged headlong. For two reasons, the Court of Appeals held that Bickerstaff could not represent potential class members by rejecting arbitration on their behalf. Each fails.

B. Bickerstaff not only conflicts with this Court's general rule permitting prelitigation representation but also misconceives the representational nature of the class action.

First, the Court of Appeals held that even though Bickerstaff exercised the contractual right to reject the arbitration provision contained in the form contract with SunTrust, he could not also do so on behalf of other members of the class. *Bickerstaff*, No. A14A1780, slip op. at 17–18. The court determined that Bickerstaff could not opt out of the arbitration agreement on behalf of the putative class members because his actions could not bind them before class certification. The court's holding that Bickerstaff could not reject arbitration on behalf of putative class members conflicts with this Court's statements that, as a general

rule, a named plaintiff can satisfy preconditions for suit on behalf of the entire class. *Schorr*, 287 Ga. at 571–72, 573. Rather than following *Schorr*, the Court of Appeals reasoned its way to precisely the opposite conclusion.

The Court of Appeals cited the U.S. Supreme Court's decision in *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013), for the proposition that "'a plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified.'" *Bickerstaff*, No. A14A1780, slip op. at 17 (quoting *Standard Fire*, 133 S. Ct. at 1349). That is true. The Court of Appeals then reasoned that because Bickerstaff cannot bind putative class members before certification, he cannot exercise the contractual rejection of arbitration on their behalf. But that is incorrect.

The appellate court's error lies in its erroneous, silent premise—*viz.*, that Bickerstaff could reject arbitration on behalf of the putative class members only if his actions were binding upon them even before class certification. To the contrary, it is fundamental to class-action jurisprudence that actions taken by a named plaintiff before class certification become effective for members of a putative class that is subsequently certified when class-members ratify those earlier decisions by choosing not to opt-out of the class action. *See, e.g.*, *Barnes*, 281 Ga. at 257; *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550 (1974) (holding "that the filing of a timely class action complaint commences the action for all

members of the class as subsequently determined"); *id.* at 553 (holding that "the commencement of the original class suit tolls the running of the statute for all purported members of the class").

The appellate court also forgot that a class action is "a truly representative suit." *American Pipe*, 414 U.S. at 550. In holding that Bickerstaff could not reject arbitration on behalf of potential class members, the appellate court effectively determined that a class action against SunTrust could proceed only if potential class members individually opted out of arbitration and joined Bickerstaff's action. But courts have long since rejected that view of class-action procedure. *See Shutts*, 472 U.S. at 812 (rejecting the argument that absent plaintiffs must "opt in" to be part of a class action); *American Pipe*, 414 U.S. at 764–65 (finding that after the 1966 amendment to Federal Rule of Civil Procedure 23 "[a] federal class action is no longer 'an invitation to joinder' but a truly representative suit"); *see also In re Am. Reserve Corp.*, 840 F.2d 487, 493 (7th Cir. 1988) (Easterbrook, J.) ("A class action under Rule 23 is more than permissive joinder—the 'spurious class action' under the version of Rule 23 in force between 1938 and 1966.").

Rather, a class action is a species of representational litigation. "[I]t is a device by which the representative is an agent for persons who have not appeared or given even tacit consent." *Am. Reserve*, 840 F.2d at 493 (citing Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 Sup. Ct.

Rev. 459, 497–507). And, as this Court clearly said in *Schorr*, that representation may occur prior to litigation. 287 Ga. at 573. While the appellate court correctly acknowledged that the actions of a class representative bind class members only if the class is certified (and only those who do not opt out), the court forgot that "[p]utative agents keep the case alive pending the decision on certification." *Am. Reserve*, 840 F.2d at 493. Putative agents—*i.e.*, the named plaintiffs in a class action—act on behalf of potential class members with the certainty that, after certification and opt-out, their actions, including actions they took prior to certification and even prior to litigation, will be effective for the class members. *See id.* At the point of certification and opt-out, the class members effectively ratify the actions of the named plaintiff. *See id.*

Even though class members are bound by the actions of named plaintiffs at a later stage of class-action litigation—namely, at the procedural juncture of certification, notice, and opt out—it does not follow that named plaintiffs do not act on behalf of potential class members at an earlier stage. They manifestly do, with respect to a wide variety of legal action. *See, e.g.*, *American Pipe*, 414 U.S. at 550 (named plaintiff files on behalf of potential class members); *id.* at 553 (named plaintiff tolls running of statute on behalf of potential class members); *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1325 (11th Cir. 2013) (class representative may consent to trial before magistrate judge on behalf of potential class members);

Freeman v. Celebrity Cruises, Inc., No. 94 CIV. 5270 (LMM), 1994 WL 689809, at *3 (S.D.N.Y. Dec. 8, 1994) (named plaintiff can give pre-suit notification to cruise line and toll contractual statute of limitations on behalf of all putative class members); *Schorr*, 287 Ga. at 571–72, 573 (named plaintiff satisfies statutory requirement of pre-suit demand on behalf of potential class members); *Smith v. AirTouch Cellular of Ga., Inc.*, 244 Ga. App. 71, 72–73 (2000) (named plaintiff can act so as to voluntarily submit potential class members to jurisdiction of forum); *Hess v. I.R.E. Real Estate Income Fund, Ltd.*, 629 N.E.2d 520, 529–30 (Ill. App. Ct. 1993) (class representative can exercise the statutory right to rescind the sale of a security on behalf of putative class members); *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91 (N.Y. App. Div. 2013) (named plaintiffs can "waive [] the penalty of treble damages. . . [and] proceed by way of a class action to recover their actual damages plus interest, provided class members are allowed to opt out and pursue individual actions").

The majority of the actions a named plaintiff takes on behalf of absent class members satisfy deadlines expiring long before certification, but are not binding until after certification, notice, and the opt-out procedure. For example, a class complaint filed the day before the statute of limitations expires is timely for everyone who, after certification, does not opt out, even if the opt-out stage is years later. Those class members who do not opt out are bound by the choices of the

named plaintiffs, including, *inter alia*, choices as to venue, claim selection (and omission), and waiver of jury trial.

Against this background of representative action, it is clear that *Standard Fire* presented a special case, one that was driven by jurisdictional imperatives. In *Standard Fire*, the named plaintiff attempted not only to act on behalf of the putative class members before certification but also to bind them with respect to any potential award in the case before their opportunity to opt out by stipulating that the class would not seek damages in excess of $5 million. 133 S. Ct. at 1347. The apparent motive for the stipulation was to circumvent the monetary amount that, under the Class Action Fairness Act of 2005, triggered federal jurisdiction. Noting that stipulations to avoid jurisdiction must be binding at the outset of the case, the Supreme Court concluded that the named plaintiff could not stipulate as to damages at the outset because he could not bind the absent class members before their opportunity to opt out. *Id.* at 1348–49. By so doing, however, the Supreme Court neither questioned the general representational principles underlying Rule 23, nor held that named plaintiffs cannot *act on behalf* of absent class members prior to certification. That would have amounted to a *sub silentio* overruling of *American Pipe* and *Shutts*—decisions that are among the guiding lights of federal and state class action procedure.

Thus, *Standard Fire* concerned the enforceability of a pre-certification stipulation and how that stipulation impacted the court's subject matter jurisdiction. Overlooking the nuance of the jurisdictional issue at the heart of *Standard Fire*, the appellate court led itself astray. That the Court of Appeals mistook *Standard Fire* to allow for such a conclusion proves just how mistaken it was.

C. Bickerstaff creates an exception to the general rule permitting prelitigation representation that swallows the rule and undermines class actions in Georgia.

The appellate court also held that Bickerstaff could not reject arbitration on behalf of the putative class members because the agreement between putative class members and SunTrust supposedly prohibited anyone but the parties and their privies from opting out of the arbitration agreement. *Bickerstaff*, No. A14A1780, slip op. at 18. The court determined that even if a named plaintiff could act on behalf of members of the class to satisfy some pre-suit conditions, the named plaintiff could not do so with respect to pre-suit conditions based in contract. *Id*. at 19 ("The cases Bickerstaff cites for the proposition that plaintiffs may satisfy preconditions for suit in a class action are distinguishable, and do not demand or even recommend a different result, *because none of them implicate the type of contractual language at issue here.*") (emphasis added). Thus, the *Bickerstaff* court determined that a named plaintiff cannot act on behalf of members of the

putative class to satisfy prelitigation conditions created by contract, even while it acknowledged that a class representative can act on behalf of class members to satisfy prelitigation conditions created by statute. *See id.* (distinguishing *Schorr*, 287 Ga. at 570–71, 573; *Barnes*, 281 Ga. at 257–58).

Bickerstaff therefore creates an exception to the general rule permitting prelitigation representation for the satisfaction of contractual conditions. In reality, the exception swallows the rule set forth in *Schorr* and will preclude "classic" class actions in Georgia. This Court should grant *certiorari* and reject it, for four principal reasons.

First, the exception that a putative agent cannot satisfy contractual conditions on behalf of potential class members is anomalous. There is no convincing reason (and the appellate court offered none) why a named plaintiff cannot satisfy prelitigation conditions set forth by a large company in form contracts on behalf members of the class, while a named plaintiff is allowed to representatively satisfy prelitigation conditions set forth by the General Assembly in a statute—as in *Schorr* and *Barnes*. Other courts have discerned no such categorical difference, permitting prelitigation representation of potential class members with respect to contractual conditions. *See, e.g.*, *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1336–37 (11th Cir. 1984) ("The filing of a class action, however, commences the suit for the entire class for the purpose of the

statute of limitations whether or not each member of the class is cognizant of the action. . . . *There is no essential difference between contractual and statutory limitations*." (citing *American Pipe*, 414 U.S. at 550–51)) (emphasis supplied); *Taranto v. La. Citizens Prop. Ins. Corp.*, 62 So. 3d 721, 735 (La. 2011) (holding that filing of class action tolls contractual limitations period); *Yollin v. Holland Am. Cruises, Inc.*, 97 A.D.2d 720, 720 (N.Y. App. Div. 1983) (holding "that the timely commencement of the action by plaintiff herein satisfied the purpose of the contractual limitation period as to all persons who might subsequently participate in the suit as members of a class" (citing *American Pipe*, 414 U.S. at 551)).

Second, the exception that named plaintiffs cannot satisfy contractual prelitigation conditions on behalf of putative class members swallows the general rule permitting prelitigation representation. *See Schorr*, 287 Ga. at 573. As Georgia courts have recognized, claims arising under form agreements are "classic cases" for class-action treatment and the most significant for consumer protection. *Toole*, 280 Ga. App. at 377; *Crutchfield*, 256 Ga. App. at 583. Form agreements are often drafted with conditions that require a party's satisfaction prior to bringing suit. Thus, *Bickerstaff* will prevent prelitigation representation in the core cases for class treatment. By excepting the "classic cases" for class treatment, *Bickerstaff* swallows the general rule permitting prelitigation representation.

Third, if allowed to stand, *Bickerstaff* will decimate representative class actions in Georgia. Its exception for contractual conditions to the rule permitting prelitigation representation will allow companies to immunize themselves from class actions that assert claims arising from interpretations of form agreements. To avoid a class action, a company would need simply to insert into its agreement with its customers a requirement for a pre-suit demand or other procedure calling for an individualized action by the customer. In that event, under *Bickerstaff*, a named plaintiff could not bring a class action asserting a claim arising from such a form agreement. Again, the fact that this case involves an arbitration contract, as opposed to another type of pre-litigation requirement, does not change the analysis. Arbitration is a creature of contract, and the Federal Arbitration Act was designed to place such agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 474 (1989) (internal quotations omitted). Thus, the consequence of the appellate court's decision will eliminate the "classic cases" for class action treatment in Georgia, and will apply to *any* type of contractual requirement bearing on litigation requirements. Accordingly, *Bickerstaff* creates an obvious yet likely unintended windfall for large companies, insurance carriers, and banks, at a huge cost to consumer protection in Georgia.

Further, class actions similar to those that have resulted in judgments affirmed by this Court are jeopardized by *Bickerstaff*'s ruling. *See, e.g.*, *Mabry*, 274 Ga. at 498 (class action asserting claim arising from automobile insurance contract). In a *Bickerstaff* world, State Farm could have precluded the *Mabry* class action and the recovery resulting therefrom simply by requiring individualized pre-suit demand in its form insurance policy agreement. [2] The benefits of the *Mabry* class action for Georgia automobile insurance policyholders would have never been achieved.

Finally, *Bickerstaff*'s exception for contractual conditions from the general rule permitting prelitigation representation threatens to bifurcate class action procedure in Georgia. On the one hand will be class actions asserting non-contractual claims. These will proceed as normal, representative class-action litigation under O.C.G.A. § 9-11-23. But, on the other hand, for those class actions asserting claims arising from form contracts (*i.e.*, most class actions), plaintiffs will likely be required to individually satisfy some condition of a form contract—such as an arbitration or pre-suit demand requirement—and then join the named plaintiff's action. Thus, *Bickerstaff*'s rule augurs a splitting of class actions (at

[2] Because *Mabry* and many other class cases based on form contracts involve insurance policies, *see, e.g.*, *Mabry*, 274 Ga. at 498 (automobile insurance); *Toole*, 280 Ga. App. at 372 (credit life insurance), they are not subject to arbitration agreements, *Love v. Money Tree, Inc.*, 279 Ga. 476, 479 (2005). Nonetheless, if *Bickerstaff* remains the law, class actions that assert claims arising from form insurance policies could be eliminated by individual pre-suit demand requirements.

least in Georgia) into two sub-categories: one consistent with the contemporary class-action procedure and the other harkening back to the "spurious class action" procedure that existed before the 1966 amendments to the Federal Rule of Civil Procedure 23 and that has been rejected by the federal courts under the modern Rule 23. *See American Pipe*, 414 U.S. at 764–65; *Am. Reserve*, 840 F.2d at 493. To put it mildly, there is no legal support for such a remarkable judicial revision to statutory enactment of class actions in Georgia under Rule 23. This result alone merits this Court's *certiorari* review.

III. Conclusion

This Court should grant *certiorari*.

This 18th day of June, 2015.

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<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that on this day I caused to be served a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF GEORGIA WATCH AND NATIONAL CONSUMER LAW CENTER IN SUPPORT OF PETITIONER** by filing same with the Court's electronic case management system and also via United States First Class Mail upon the following counsel of record:

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