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No. 02-

IN THE
Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
Petitioners,

v.

JEFFREY BOOK, D.O., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Glenn L. Kelly, M.D., Manual Porth, M.D., and Charles B. Shane, M.D., and (b) defendants-appellants Foundation Health Systems, Inc., n/k/a Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f/k/a United HealthCare Corporation, UnitedHealthcare, Inc. and WellPoint Health Networks Inc. This petition is being filed on behalf of PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealth Group Incorporated, and UnitedHealthcare, Inc. No publicly held companies owns 10% or more of PacifiCare Health Systems, Inc. or UnitedHealth Group Incorporated. PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., is owned 100% by PacifiCare Health Systems, Inc., a publicly held company, and UnitedHealthcare, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Incorporated, a publicly held company.

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PETITION FOR WRIT OF CERTIORARI

Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealthcare, Inc. and UnitedHealth Group Incorporated respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *In re Humana Inc. Managed Care Litigation.*

CITATION OF COURT OF APPEALS AND DISTRICT COURT OPINIONS

The opinion of the Court of Appeals is reported at 285 F.3d 971. App. 1. The order denying the petition for rehearing and rehearing *en banc* is unreported. App. 55. The first opinion of the District Court for the Southern District of Florida, which the Court of Appeals adopted as its opinion, is reported at 132 F. Supp.2d 989. App. 11. The second opinion of the District Court, which modified its first opinion in part, is reported at 143 F. Supp.2d 1371. App. 47.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals issued its decision on March 14, 2002 and denied a petition for rehearing or rehearing *en banc* on June 21, 2002. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing.

FEDERAL STATUTES INVOLVED IN THIS CASE

This petition involves Sections 2 and 4 of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* ("FAA"), and Section

1964 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq.* ("RICO"). Those sections are set forth in full in the Appendix. App. 57. Section 2 of the FAA states in relevant part:

> A written provision in ... 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, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA states in relevant part (with emphasis added):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. ... *The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement.* ... If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court

> shall proceed summarily to the trial thereof. ... *If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.*
>
> Section 1964(c) of RICO states in relevant part:
>
> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains ....

I. STATEMENT OF THE CASE.

On August 14, 2000, plaintiffs Dennis Breen, Jeffrey Book, Manual Porth and Glenn Kelly ("Plaintiffs"), along with several other individuals, filed a ten-count complaint against fifteen defendants, including PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare"), and UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United"). Several of the counts in the complaint allege that PacifiCare and United violated various provisions of the RICO statute (or aided and abetted violations of that statute). The District Court had jurisdiction over the complaint pursuant to 28 U.S.C. §1331 because Plaintiffs' RICO claims arose under the laws of the United States.[1]

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[1] Plaintiffs' substantive causes of action were for violations of RICO, *see* 18 U.S.C. §1962(a) & (c), the Employee Retirement Income and Security Act ("ERISA"), *see* 29 U.S.C. §1132(a)(1) & (3), a federal

At all times relevant to the complaint, Drs. Breen and Book were bound by contract to arbitrate disputes with PacifiCare, and hence PacifiCare filed motions to compel Drs. Breen and Book to arbitrate their claims against PacifiCare. Likewise, Drs. Porth and Kelly also were bound by contract to arbitrate their disputes with United, so United filed a similar motion to compel Drs. Porth and Kelly to arbitrate their claims against United.[2]

On December 11, 2000 and April 26, 2001, the District Court ruled on PacifiCare and United's motions to compel. The District Court found that enforceable arbitration agreements existed between PacifiCare and Drs. Breen and Book as well as between United and Drs. Porth and Kelly. *See* 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1000-01 & 1005. The District Court also held that those arbitration agreements required Plaintiffs to arbitrate at least some of their claims against PacifiCare and United. The District Court, however, stopped short of ordering Plaintiffs to arbitrate *all* of their claims against PacifiCare and United. In particular, the District Court held that Plaintiffs did not have to arbitrate their RICO claims because all of the relevant arbitration agreements limited the damages that an arbitrator could award in arbitration: Both PacifiCare agreements

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Medicare prompt-pay regulation, *see* 42 C.F.R. §417.500(a)(6), and various State prompt-pay statutes, as well as for breach of contract, *quantum meruit*, and unjust enrichment. Plaintiffs also included in their complaint causes of action for conspiring to violate RICO, *see* 18 U.S.C. §1962(d), and for aiding-and-abetting RICO violations (in alleged violation of 18 U.S.C. §2). Plaintiffs amended their complaint while PacifiCare and United's appeal was pending in the Court of Appeals. The amended complaint still includes all Plaintiffs, all defendants (including PacifiCare and United), and most of the causes of action (including all of the RICO causes of action) from the original complaint.

[2] Additional motions to compel arbitration were filed in the District Court, but they are not the subject of this petition.

stated that an "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [State] law, except that punitive damages shall not be awarded," United's agreement with Kelly stated that "arbitrators ... shall have no authority to award any punitive or exemplary damages," and United's agreement with Porth stated that "arbitrators ... shall have no authority to award extracontractual damages of any kind, including punitive or exemplary damages." App. 60-63.

While none of these damages limitations expressly addressed RICO trebled damages, the District Court interpreted the limitations as prohibiting arbitrators from awarding Plaintiffs RICO trebled damages. *See* 132 F. Supp.2d at 1001. Such prohibitions, the District Court held, prevented Plaintiffs from obtaining meaningful relief on their RICO claims in arbitration, and thus Plaintiffs were not required to arbitrate their RICO claims against PacifiCare and United pursuant to the Court of Appeals' earlier decision in *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).[3] Typical of the District Court's analysis was its discussion of the two arbitration agreements between PacifiCare and Dr. Breen:

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[3] The District Court also refused to compel arbitration of Drs. Porth and Kelly's ERISA and State prompt-pay statutory claims against United even though punitive or multiple damages is not a remedy available for either claim. The District Court did so, at least in part, because the relevant arbitration agreements required that arbitrations be commenced within a year after one party notifies the other in writing of a dispute. App. 62-63. The District Court incorrectly construed this notice requirement as altering the statute of limitations on Drs. Porth and Kelly's ERISA and prompt-pay claims, which the District Court held was impermissible and rendered the ERISA and prompt-pay claims inarbitrable. *See* 132 F. Supp.2d at 1000.

> Both arbitration agreements contain broad language indicating that the parties intended for "any controversy, dispute, or claim arising out of the agreement" to be arbitrated. However, both agreements prohibit the arbitrator from awarding punitive damages. Thus, we are faced with a potential *Paladino* situation, discussed earlier with the context of United's motion to compel arbitration (Section II(A)), where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum. ...
>
> Accordingly, the Court will not compel Dr. Breen to arbitrate his RICO claims against PacifiCare due to the arbitrator's inability to impose punitive (treble) damages. All other statutory and non-statutory claims shall be arbitrated, except for the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

132 F. Supp. 2d at 1005.[4]

PacifiCare and United appealed the District Court's decisions to the Court of Appeals, which had jurisdiction over the appeals pursuant to 9 U.S.C. §16(a)(1).[5] In a

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[4] As reflected in the quote in text, the District Court also held that Plaintiffs did not have to arbitrate their conspiracy and aiding-and-abetting claims against PacifiCare and United that "stem from contractual relationships with other managed care companies." 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1007. The Court of Appeals affirmed this holding. *See* 285 F.3d at 974-977.

[5] The District Court denied in part PacifiCare's motion to compel Dr. Breen to arbitrate and United's motion to compel Drs. Porth and Kelly to arbitrate on December 11, 2000. PacifiCare filed its notice of appeal on

published opinion, the Court of Appeals affirmed the District Court's holding that Plaintiffs did not have to arbitrate their RICO claims because the relevant arbitration agreements did not allow arbitrators to award punitive damages. *See* 285 F.3d at 973-74. In so doing, the Court of Appeals expressly adopted the reasoning used by the District Court to reach its holding: "We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F. Supp.2d 989 (S.D.Fla. 2000)." 285 F.3d at 973-74.

II. REASONS FOR GRANTING PETITION.

The Court of Appeals' decision, especially when read in conjunction with its earlier decision in *Paladino v. Avnet Computer Technologies*, is crystal clear: A district court in the Eleventh Circuit is authorized to refuse to compel arbitration of any RICO cause of action if the relevant arbitration agreement does not allow an arbitrator to award punitive damages. That decision (a) patently conflicts with the law of the Eighth Circuit, (b) addresses an issue over which there is a deep split among the First, Third, Fifth, Eighth, Ninth and Eleventh Circuits, (c) cannot be reconciled with opinions from the First, Second, Third, Fifth and Eighth Circuits, and (d) undermines the critical role that the FAA plays in promoting alternative dispute resolution. The Court of Appeals' decision also addresses an issue closely related to the issue presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, which this Court will decide during the

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January 5, 2001 and United filed its notice of appeal on January 9, 2001. Both notices were timely under Federal Rule of Appellate Procedure ("FRAP") 4(a)(1)(A). The District Court denied in part PacifiCare's motion to compel Dr. Book to arbitrate on April 26, 2001, and PacifiCare filed its notice of appeal on May 4, 2001. The notice was timely under FRAP 4(a)(1)(A). The Court of Appeals consolidated these appeals on July 10, 2001.

October 2002 Term. For all of these reasons, the Court should grant this petition.

A. The Court Of Appeals' Decision Conflicts With The Eighth Circuit's Decision In Larry's United Super, Inc. v. Werries.

The most obvious reason for the Court to grant this petition is that the Court of Appeals' decision is in undeniable and irreconcilable conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001). The relevant factual and procedural settings of both appeals are in perfect parallel: As in this case, the *Werries* defendants moved to compel arbitration of the plaintiffs' RICO claims under the FAA because the parties were bound by arbitration agreements. Also as in this case, the District Court held that the plaintiffs did not have to arbitrate their RICO claims because the agreements at issue did not allow arbitrators to award punitive damages. *Compare Werries*, 253 F.3d at 1084-85 *with In re Humana*, 285 F.3d at 973-74 & n.3 *and In re Managed Care*, 132 F. Supp.2d at 1000-01 & 1005.

Based on these operative facts, the *Werries* Court reversed the judgment of the District Court and held that a plaintiff was required to arbitrate RICO claims even if the relevant arbitration agreement did not allow for the recovery of punitive damages – a conclusion that stands in diametric opposition to the Court of Appeals' decision here. More specifically, the *Werries* Court reasoned:

> At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy

> conflicts with the remedies provided in the arbitration clause. There exists a valid agreement to arbitrate the RICO claims in this case, and the Supreme Court in [*Shearson/Am. Express, Inc. v.*] *McMahon*[, 482 U.S. 220 (1987)] has already determined that RICO claims are arbitrable, 482 U.S. at 242, 107 S.Ct. 2332; thus, there exists no "legal constraints external to the parties' agreement foreclos[ing] the arbitration" of this RICO dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Whether a prospective waiver of punitive damages violates the public policy underlying RICO's treble damages provision is a matter for the arbitrators in the first instance when fashioning an appropriate remedy if a RICO claim is proven to the arbitrators' satisfaction, and we express no views on the issue at this time. We are limited to determining whether the matter is arbitrable. We hold that it is.

253 F.3d at 1086.

The Court of Appeals' decision and the *Werries* decision cannot both be correct: Either the FAA requires district courts to compel arbitration of RICO claims under arbitration agreements that prohibit punitive damages (as is the law in the Eighth Circuit under *Werries*) or it does not (as is the law in the Eleventh Circuit under *In re Humana*). This Court should intercede to resolve this otherwise irreconcilable conflict.

B. The Court Of Appeals' Decision Addresses An Issue Over Which There Is A Split Among The First, Third, Fifth, Eighth, Ninth and Eleventh Circuits.

The specific and direct conflict between the Court of Appeals' decision and *Werries* reflects a deeper and more general conflict among the Courts of Appeals. A fundamental premise of the Court of Appeals' decision is that it is for a district court to determine, before ordering arbitration, whether a limitation on remedies contained within an arbitration agreement is valid. If the district court determines that it is not, the district court simply refuses to order arbitration, and the matter never reaches an arbitrator. *See* 285 F.3d at 973-74; 132 F. Supp.2d at 1005. This premise is well established in the Eleventh Circuit, *see Paladino*, 134 F.3d at 1062, and is also an accepted premise in the Fifth Circuit, *see Investment Partners v. Glamour Shots Lic., Inc.*, __ F.3d __, 2002 WL 149872, at *2 (5th Cir. July 15, 2002), and the Ninth Circuit, *see Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1995).

On the other side of the divide, as recently recognized by the Seventh Circuit, are at least the First, Third and Eighth Circuits. Those "[t]hree courts of appeals have held that under *Prima Paint* [*Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967),] the arbitrator determines whether contractual limitations on remedies [in arbitration agreements] are valid." *Metro East Center for Conditioning & Health v. Qwest Commun. Int'l, Inc.*, __ F.3d __, 2002 WL 1378752, at *6 (7th Cir. June 27, 2002) (citing *Werries*, 253 F.3d 1083; *MCI Telecomm. Corp. v. Matrix Commun. Corp.*, 135 F.3d 27 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997)).

The Eighth Circuit reached this holding (as discussed above) in *Werries*. It recently reaffirmed this holding in *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).

The First Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *MCI*. The First Circuit reasoned:

> Equally unavailing is Matrix's new contention that the Agent Agreement's arbitration clause is invalid because the Tariff arbitration rules foreclose remedies, such as multiple damages, to which it is entitled. Putting aside the question of waiver, this argument must be brought to the arbitrator because it does not go to the arbitrability of the claims but only to the nature of the available relief. *See Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3rd Cir. 1997) [parenthetical omitted]; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) [parenthetical omitted]. Matrix's reliance on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), is misplaced because, unlike the plaintiffs there, Matrix's claims are not brought under a statute specifically designed to protect bargaining rights. The applicable precedent in our circuit is instead that parties may contract to limit remedies in arbitration. *See Raytheon Co. v. Automated Bus. Sys.*, 882 F.2d 6, 12 (1st Cir. 1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-62, 115 S.Ct. 1212, 1217-19, 131 L.Ed.2d 76 (1995) [parenthetical omitted].

MCI, 135 F.3d at 33 n.12.

The Third Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *Great Western*, a case that served as the foundation for both *Werries*, *see* 253 F.3d at 1085-86, and *MCI*, *see* 135 F.3d at 33 n.12. In *Great Western*, the plaintiff argued that her arbitration agreement was invalid because, among other reasons, it "deprive[d her] of ... punitive damages." 110 F.3d at 226. The Third Circuit approached this argument by first setting forth the proper division of authority between district courts and arbitrators:

> Under the FAA the district court must be satisfied that the parties entered into a valid arbitration agreement. In conducting this inquiry the district court decides only whether there was an agreement to arbitrate, and if so, whether the agreement is valid. In so deciding, the district court is not to consider the merits of the claims giving rise to the controversy, but is only to determine, as we have stated, whether there is a valid agreement to arbitrate. Once such an agreement is found, the merits of the controversy are left for disposition to the arbitrator. Moreover, there is a strong presumption in favor of arbitration, and doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration."

Id. at 228 (citations and footnotes omitted).

After laying this groundwork, the Third Circuit rejected the plaintiff's argument that the (alleged) prohibition on

punitive damages in her arbitration agreement allowed her to avoid arbitration:

> The availability of punitive damages is not relevant to the nature of the forum in which [the plaintiff's] complaint will be heard. Thus, the availability of punitive damages cannot enter into a decision to compel arbitration. [The New Jersey Law Against Discrimination] provides that a victim of unlawful discrimination may be awarded punitive damages, but the issue of whether this right has been waived is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide.

Id. at 232 (citations omitted).

Finally, the Seventh Circuit also appears to be in accord with the First, Third and Eighth Circuits. Like the First Circuit, the Seventh Circuit has held that contracting parties have the right to prohibit the award of punitive damages in arbitration by express agreement. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709-10 (7th Cir. 1994). That Circuit has also recognized that parties generally can waive statutory rights as part of their arbitration agreements absent a federal statutory provision to the contrary. *See Metro East*, 2002 WL 1378752, at *5. These precedents strongly suggest that a district court in the Seventh Circuit cannot refuse to compel arbitration simply because an arbitration agreement prohibits an arbitrator from

awarding punitive damages or otherwise limits the arbitrator's remedial powers.[6]

In sum, there is a clear and mature split among the Circuits over who first decides the meaning and significance of a damages limitation contained in an arbitration agreement: Is it a district court when deciding whether to compel arbitration, or is it an arbitrator during arbitration proceedings (subject, of course, to district court review when the arbitrator's award is being enforced)?[7] The Court should grant this petition and resolve this irretractable Circuit split.

C. The Court Of Appeals' Decision Cannot Be Reconciled With Opinions From The First, Second, Third, Fifth And Eighth Circuits.

As explained in the preceding section, the Court of Appeals' primary holding – that a district court can deny a

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[6] In *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623 (7th Cir. 2002), the Seventh Circuit initially held that a district court could deny arbitration of a Title VII claim if the relevant agreement did not allow an arbitrator to award attorneys' fees, but the Seventh Circuit vacated that opinion days before *Metro East* was published. *See* 294 F.3d 879 (7th Cir. 2002).

[7] On which side of the divide the D.C. Circuit falls is unclear. In *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), the D.C. Circuit implied, but did not hold, that a district court could refuse to compel arbitration of a Title VII claim if an arbitration agreement limited the Title VII remedies that a plaintiff could obtain. In an earlier case, however, the D.C. Circuit held that a district court cannot refuse to compel arbitration on public policy grounds: "In sum, if parties have validly agreed to submit a dispute to arbitration, we see no reason not to enforce that agreement. If the arbitrator construes the contract so as to require someone to commit an illegal act, a court can then refuse to enforce the arbitrator's decision. A court cannot, however, bypass the arbitration process simply because a public policy issue might arise." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1071 (D.C. Cir. 1990).

motion to compel arbitration based on its belief that the remedies available in arbitration are inadequate – cannot be reconciled with published opinions from the First, Third and Eighth Circuits. *See Arkcom Digital*, 289 F.3d at 539; *Werries*, 253 F.3d at 1086; *MCI*, 135 F.3d at 33 n.12; *Great Western*, 110 F.3d at 232. In addition, the Court of Appeals' subsidiary holding – that an arbitration agreement barring punitive damages provides inadequate remedies to a RICO plaintiff – further conflicts with published opinions from the Second and Fifth Circuits.

In *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1356-58 (2nd Cir. 1993), the defendants moved to dismiss securities and RICO claims brought by investor plaintiffs because those plaintiffs had agreed by contract to resolve all claims through arbitration in England. The plaintiffs opposed the dismissal by claiming, among other things, that the arbitration would be inadequate due to the fact that an English arbitrator could not award them RICO trebled damages. The Second Circuit summarily rejected this view:

> That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the [plaintiffs'] contract clauses must be enforced. As we have explained, the [plaintiffs] have adequate potential remedies in England and there are significant disincentives to deter English issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

996 F.2d at 1366.[8] Under *Roby*, a plaintiff in the Second Circuit can be required to resolve her disputes in arbitration even if that arbitration does not allow her to recover RICO trebled damages; that same RICO plaintiff in the Eleventh Circuit, however, can escape arbitration under the Court of Appeals' *In re Humana* decision. Such a difference in outcomes is unacceptable.

The Court of Appeals' decision even more directly clashes with the Fifth Circuit's recent *Investment Partners* decision. Similar to Plaintiffs here, the *Investment Partners* plaintiff claimed that it should not have to arbitrate a federal cause of action allowing for trebled damages (in that case, a Clayton Act claim) because its arbitration agreement stated that "arbitrators shall not award punitive damages." 2002 WL 1498721, at *1. The Fifth Circuit agreed with the Court of Appeals that it was for a district court, not an arbitrator, to decide initially whether the remedies available in arbitration were adequate. *See id.* at *2. Thereafter, however, the Fifth Circuit held – in direct conflict with *In re Humana* – that the plaintiff nevertheless had to arbitrate its Clayton Act claims because "the prohibition in the parties' arbitration agreement against awarding 'punitive damages' does not extend to [bar the award of] statutory treble damages" for two reasons:

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[8] *Roby* is consistent with the view this Court expressed of RICO's trebled damages remedy in *McMahon*. There Justice O'Connor reasoned that RICO trebled damages were designed to be an "incentiv[e] for plaintiffs to pursue RICO claims that would advance society's fight against organized crime. But in fact RICO actions are seldom asserted 'against the archetypical, intimidating mobster.' The special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises." *McMahon*, 482 U.S. at 241-42 (citations omitted).

> First, the task in this case is to construe "punitive" in a private parties' arbitration agreement, which the Supreme Court has clearly said we interpret broadly to permit arbitration as far as possible. Second, it makes sense to draw the distinction, from the standpoint of the parties' expectations when they entered the arbitration agreement, between statutory treble damages and common law punitive damages. That is, punitive damages are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded. Treble damages, however, represent a mere mathematical expansion of the actual damages calculated by the arbitrator. While private parties might well exclude common law punitive damages, with all their uncertainty, from the arbitrator's authority, the riskiness of committing antitrust damages to the arbitrator is much smaller. Thus, antitrust treble damages may indeed be "punitive" simply because they exceed the actual damages that have been inflicted on the victim of violative conduct, but they are not "punitive" for purposes of interpreting the scope of an arbitration clause.

Id. at *3.

Following *Investment Partners*, if a plaintiff wants to sue a defendant for violating RICO but has an arbitration agreement with the defendant barring punitive damages, the validity and effect of that agreement changes dramatically as she travels across the country looking for a place to file suit: If she sues the defendant in Little Rock, Arkansas (in the Eighth Circuit), she will be required to arbitrate her RICO claim and the arbitrator will decide whether she can recover

RICO trebled damages; if she sues in Oxford, Mississippi (in the Fifth Circuit), she will again be required to arbitrate her RICO claim, but the arbitrator will have to allow her to recover RICO trebled damages; finally, if she sues in Birmingham, Alabama (in the Eleventh Circuit), she will be able to litigate her RICO claim in court and will be allowed to recover RICO trebled damages in court. *Compare Werries*, 253 F.3d at 1086 (Eighth Circuit) *with Investment Partners*, 2002 WL 1498721, at *2-3 (Fifth Circuit) *with In re Humana*, 285 F.3d at 973-74 & n.3 (Eleventh Circuit) (adopting District Court's opinion). Because such disparities can only promote intolerable forum shopping by plaintiffs, this Court should intercede to remedy this imbalance.

D. The Court Of Appeals' Decision Undermines The Critical Role That The FAA Plays In Promoting Alternative Dispute Resolution.

Even if there were not a mature split among the Circuits over the question presented by this petition, the Court of Appeals' decision would still merit review by this Court because it is a dangerous precedent antithetical to the effective operation of the FAA for the following reasons:

1. An unspoken, but necessary, assumption underlying the Court of Appeals' decision is that a federal court can decide that certain statutory rights cannot be waived in arbitration even when the legislative body that created the rights did not make them unwaivable. Only by embracing this assumption could the Court of Appeals hold that Plaintiffs were not required to arbitrate their RICO claims despite the facts that (1) Plaintiffs agreed to arbitrate their disputes, including statutory disputes, with PacifiCare and United under arbitration agreements that expressly limited remedies in arbitration, and (2) no provision of RICO

suggests that its rights and remedies are unwaivable.

The Court of Appeals' assumption, however, is incompatible with this Court's precedents broadly recognizing the authority of private parties to waive statutory rights. *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties"). As the Seventh Circuit noted in *Metro East*:

> As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver (as §206 of the Communications Act does not). Every day criminal defendants waive the most fundamental rights, such as the right to jury trial and proof beyond a reasonable doubt, in exchange for lower sentences or other benefits. *See United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998) (collecting authority). Public employees can and do waive constitutional rights – including the right of political speech – in exchange for employment. *See, e.g., CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). Political candidates can [even] surrender some of their speech rights in exchange for a federal subsidy. *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

Metro East, 2002 WL 137852, at *5 (emphasis in original). *See also Mitsubishi*, 473 U.S. at 628 ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

By concluding that federal courts can override the decisions of private parties to forego certain rights or remedies as part of an arbitration agreement, the Court of Appeals has undermined a basic premise of the FAA – that parties can contract to resolve their disputes in arbitration on such terms as they see fit. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).[9] This interference is troublesome in its own right, but it is made all the more troublesome in the context of this case. The arbitration agreement that binds Dr. Book and PacifiCare, to take one example, is an agreement between *commercial* actors that allows all parties to receive the *full range of compensatory relief* in arbitration (so that they can be "made whole") but also frees *all parties* (including Dr. Book and his affiliated doctors) from the risk of having punitive damages assessed against them. There is no reason that commercial actors should not be allowed to resolve their commercial disputes without resort to punitive damages, but that is exactly the outcome outlawed by the

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[9] This Court has remarked that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628). *See also McMahon*, 482 U.S. at 242 (stating that litigants can "effectively vindicate their RICO claim in an arbitral forum"). But it does not follow from this general proposition, which explains why statutory claims are generally arbitrable, that a party may *never* agree to waive statutory remedies as part of a valid agreement to arbitrate, or as the Court of Appeals phrased it in an earlier decision, that "the arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies." *Paladino*, 134 F.3d at 1062. The Court has never reached that much broader holding, which would require a special exception in the arbitration context from the rule that parties may validly agree to relinquish statutory rights. Such an exception would be wholly anomalous given that the arbitration setting is one deeply rooted in, and indeed premised on, private agreement. *See Mitsubishi*, 473 U.S. at 625.

Court of Appeals, in contravention of this Court's precedents. *Cf. Mastrobuono*, 514 U.S. at 58 (whether a claim for punitive damages is arbitrable "comes down to *what the contract has to say* about the arbitrability of ... [a] claim for punitive damages" (emphasis added)).[10]

2. This case also highlights well the danger of allowing district courts to resolve, at the motion to compel arbitration stage, whether damages limitations in an arbitration agreement are enforceable. No arbitration agreement at issue here expressly limits either trebled damages or RICO remedies; instead, all but one of the agreements simply prohibit arbitrators from awarding "punitive damages," while the remaining agreement does not allow an arbitrator to award "extracontractual damages" (which United explained to the Court of Appeals did not restrict an arbitrator's ability to award remedies on statutory causes of action).

Interpreting the meaning of these arbitration provisions, of course, is a task uniquely suited for the decisionmaker whom the parties selected to resolve their disputes – namely, a duly appointed arbitrator. To refuse arbitration in this case, however, the District Court and the Court of Appeals were required to usurp the arbitrator's authority and grant to themselves the power to decide whether RICO trebled damages were "punitive" or "extracontractual." Moreover, they were required to exercise this power without knowing whether Plaintiffs even have a legitimate claim against PacifiCare or United for RICO trebled damages (which cannot be known until the

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[10] The District Court expressly found as a factual matter that the parties to the instant dispute are sophisticated actors. *See* 132 F. Supp.2d at 998. Sophisticated commercial actors should be given considerable latitude in structuring their relationships and allocating risks.

appropriate decisionmaker – *i.e.*, an arbitrator – addresses the merits of whether PacifiCare or United violated RICO). Nothing in this Court's precedents supports this outcome; to the contrary, the outcome is inconsistent with the Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), which held that "[o]nce it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

3. As if the above reasons were not enough to show how the Court of Appeals' decision endangers effective, uniform enforcement of the FAA, an additional flaw taints the decision. In holding that Plaintiffs did not have to arbitrate their RICO claims, neither the District Court nor the Court of Appeals required Plaintiffs to make any showing whatsoever that they would be unable to vindicate their rights in arbitration; the courts simply assumed Plaintiffs could not do so and thus released Plaintiffs from their binding commitments to arbitrate with PacifiCare and United. Just two Terms ago, however, this Court (in reviewing another arbitration decision by the Eleventh Circuit) clearly instructed federal and State courts that the party seeking to escape arbitration under the FAA bears the burden of proving that an arbitration agreement is invalid in the specific context of that party's dispute. *See Green Tree Fina. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000). By presuming both (a) that the PacifiCare and United arbitration agreements prohibited RICO trebled damages when no agreement expressly so stated, and (b) that this prohibition crippled Plaintiffs' ability to obtain adequate RICO relief, when no Plaintiff offered proof to this effect, the District Court and the Court of Appeals turned *Green Tree* on its head. *See also McMahon*, 482 U.S. at 227 ("The

burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue").[11]

When confronted with a motion to compel arbitration of statutory claims, a federal court conducts a simple and straightforward analysis: It first asks "Is there an agreement to arbitrate between the parties that covers the statutory claims?" If so, it then asks "Is there any external legal constraint that forecloses arbitration of the claims?" *See Green Tree*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 627-28. Here, the District Court found (and the Court of Appeals agreed when it adopted the District Court's opinion) that Plaintiffs had arbitration agreements with PacifiCare and United and that those agreements covered Plaintiffs' RICO claims. This Court has settled the issue that Congress has not imposed a legal constraint against arbitrating RICO claims, *see McMahon*, 482 U.S. at 242, and the District Court did not find any "grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) that voided the parties' arbitration agreements. *See* 132 F. Supp.2d at 997-1000. At this point, the FAA-mandated analysis was complete and Plaintiffs' RICO claims should have been sent to arbitration. That the District Court and Court of Appeals did not stop there and instead grafted a third prong to the FAA analysis – "Are the

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[11] Relieving Plaintiffs of this burden is especially unwarranted in this case because Plaintiffs conceded on appeal that they will not pursue any claim sent to arbitration, including the RICO claims of other defendants that the District Court ordered to arbitration. *See, e.g.*, Appellees' Br. in 11th Circuit Appeal No. 01-10247-CC, at 21 ("Plaintiffs are not going forward with any claim referred to arbitration"). Plaintiffs should not be allowed to avoid arbitration by contending that arbitral remedies are inadequate when they have no intention of going forward with arbitration regardless of the available remedies.

parties' agreed-to remedies adequate?" – turns the otherwise administrable question of whether to compel arbitration into a judicial quagmire. It forces judges to decide what remedies an arbitration agreement permits, how those remedies apply to a plaintiff's claims,[12] and whether those remedies are somehow "adequate."[13] Bogging down motions to compel arbitration with such issues rather than leaving them to be addressed in the first instance by the arbitrator charged with resolving the parties' disputes destroys the twin goals of the FAA (to put arbitration agreements on par with other contracts and to promote their efficient enforcement). *See Gilmer*, 500 U.S. at 24.

E. At A Minimum, This Petition Should Be Held Pending The Court's Decision In Howsam v. Dean Witter Reynolds, Inc.

The question presented in this case addresses a pure question of law relating to the proper allocation of authority between a district court and an arbitrator: "Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration." Page i, *supra*. This question parallels the

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[12] *Compare Investment Partners*, 2002 WL 1498721, at *3 (arbitration clause not allowing for recovery of punitive damages still allows for recovery of trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration clause not allowing for recovery of punitive damages also does not allow for recovery of trebled damages).

[13] *Compare Roby*, 996 F.2d at 1366 (arbitration provides for "adequate potential remedies" even if it does not allow for recovery of RICO trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration remedies not adequate if they do not allow for recovery of RICO trebled damages).

question presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800: "[*W*]*hether a court or the arbitrators should decide* if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that '[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy'" (emphasis added).

This Court granted the petition for certiorari to review *Howsam* (a decision by the Tenth Circuit) on February 25, 2002 and will decide *Howsam* during the October 2002 Term. The Court's decision will inevitably address the proper allocation of authority between a court asked to compel arbitration versus an arbitrator selected by the parties to arbitrate their substantive disputes. If the Court reverses the Tenth Circuit's judgment in *Howsam*, its rationale will almost certainly require the reversal of the judgment by the Court of Appeals in *In re Humana* as well. *Howsam*, after all, involves a question of whether a court or an arbitrator decides if a plaintiff's claim is time-barred, which is an issue normally addressed *before* a decisionmaker reaches the merits of a dispute. If a court at the motion to compel stage is required to leave such an issue to an arbitrator to decide, the court also must leave for an arbitrator the issue of whether the parties' agreed-to remedies are adequate, since that issue can only be addressed *after* a decisionmaker reaches (and resolves) the merits of a dispute.

If this Court is not inclined to grant the current petition based on the reasons set forth in the preceding sections, then at the least the Court should hold this petition until it resolves *Howsam*. When the Court's resolution of a case already set for argument is likely to address issues germane to a pending petition for certiorari, it is consistent with Court

practice to hold the petition until the Court decides the case and thereafter to grant the petition, vacate the judgment on which the petition is based, and remand the matter to the court that originally issued the judgment for reconsideration in light of the Court's recent decision. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 192-93 (7th ed. 1993). The Court should follow this well-charted course here if it believes that full review of the Court of Appeals' decision is unnecessary.

III. CONCLUSION.

For the foregoing reasons, Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United HealthCare, Inc. and UnitedHealth Group Incorporated respectfully requests that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *In re Humana Inc. Managed Care Litigation.* Alternatively, Petitioners respectfully request that this Court hold this petition pending its decision in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, and, after that decision is issued, grant this petition, vacate the Court of Appeals' judgment, and remand this matter to the Court of Appeals for further proceedings consistent with *Howsam.*

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Respectfully Submitted,

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