No. 21-___

In The
Supreme Court of the United States

ROBERT L. ALEXANDER, *ET AL.*,
Petitioners,

v.

PSFS 3 CORPORATION,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

First Question Presented: Was it a violation of the Full Faith and Credit Clause and Statute for the Supreme Court of Iowa to refuse to give effect to the ruling of the federal district court, affirmed by the United States Court of Appeals, that the mandatory forum-selection clause giving Iowa jurisdiction was unenforcable, and apply *res judicata*?

Second Question Presented: Was it a violation of the Due Process rights of Petitioners for the Iowa state court to enter final judgments against them without affording them a trial?

PARTIES TO THE PROCEEDING

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[Format: Doctor's Name (State of Residence)
Business Organization of Doctor]

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Smile Now Dental Group

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Arvind Kenneth Vakani, DMD, MS, PA

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Jeff Wineinger (TX)
Cedar Park Vision Center, P.A.

Benjamin Wright (MD)
Wright Othodontics, LLC

Christine Yaste (NC)
Christian Yaste d/b/a Ballantyne Center for Dentistry

Respondent:

The respondent is PSFS 3 Corp., an Iowa corporation.

RULE 29.6 STATEMENT

None of the corporate petitioners has a parent corporation and no publicly held company owns 10% or more of their stock.

The parent corporation of PSFS 3 Corp. is NCMIC Group, Inc., an Iowa corporation. No publicly held company owns 10% or more of the stock of NCMIC Group, Inc., or PSFS 3 Corp.

RELATED PROCEEDINGS

In the United States Judicial Panel on Multidistrict Litigation:

> Docket No. MDL No. 2183, *In re: Brican America, LLC, Equipment Lease Litigation*
> Transfer Order Entered: August 12, 2010

In the United States District Court for the Southern District of Florida:

> Docket No. 10-MD-02183-PAS, *In re: Brican America, LLC, Equipment Lease Litigation*,
> Judgment Entered: May 17, 2015

In the United States Court of Appeals for the Eleventh Circuit:

> Docket Nos. 15-11999, 15-12000, and 15-12570, *Blank v. NCMIC Finance Corp.,*
> Opinion Issued: November 22, 2016

In the Iowa District Court in and for Polk County:

> Docket Nos. CL116236, CL114226, and CL117211, *PSFS 3 Corp. v. Michael P. Seidman, DDS, PC,*
> Judgment Entered: March 26, 2019

Related Proceedings

In the Supreme Court of Iowa:
Docket No. 19-0514, *PSFS 3 Corp. v. Michael P. Seidman, DDS, PC,*
Opinion Issued: June 25, 2021
Rehearing Denied: August 25, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioners are one-hundred eighteen doctors of optometry and dentistry, and their business entities, from seventeen states and the District of Columbia. They respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Iowa.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Iowa is published at 962 N.W.2d 810. It is reprinted at Pet. App. 1a. The order of the Supreme Court of Iowa denying a motion for rehearing is unpublished but is reprinted at Pet. App. 66a. An exemplar final judgment of the Iowa state court is not published but is included at Pet. App. 70a. The Ruling and Order on Plaintiffs' and Defendants' Motions for Summary Judgment of the Iowa state court is unpublished and included at Pet. App. 73a. The opinion of the Eleventh Circuit Court of Appeals is unpublished in Federal Reporter but available at 671 Fed.Appx. 734 (Mem). It is reprinted at Pet. App. 91a. The judgment of the Southern District of Florida is unpublished but included as Pet. App. 98a. The order of the Southern District of Florida is not published in Federal Supplement but is available at 2010 WL 11506061. It is reprinted at Pet. App. 100a. The order of the United States Panel on Multidistrict Litigation is not published but is included at Pet. App. 117a.

JURISDICTION

The opinion of the Supreme Court of Iowa was issued on June 25, 2021, and Petitioners' motion for rehearing was denied on August 25, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Full Faith and Credit Clause of the federal constitution provides in relevant part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, through which Congress prescribes the effect to be given to the judicial proceedings by every other state, provides in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

> Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of ... property, without due process of law; ..." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Introduction

The dual judicial system of the United States was created, in part, to allay fears of being hometowned in state courts. Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 494 (1928) citing *M'Donald v. Leach*, Kirby 72 (Conn. 1786) as one of several examples of hometowning predating the Constitution. In 2009, as the underlying cases were beginning, two lawyers from the law firm which ultimately represented Respondent wrote a published article about hometowning: Stuart Chanen and Aaron Chandler, *Do Not Get Hometowned: Take Your Case to Federal Court*, 17 PRETRIAL PRACTICE & DISCOVERY 1 (No. 3, Spring 2009, American Bar Association).

B. Federal Suits Under Class Action Fairness Act

In an effort to avoid being hometowned in Iowa, among other reasons, Petitioners and others filed a

putative class action for declaratory relief in the United States District Court for the Southern District of Florida ("Florida federal district court") under the Class Action Fairness Act, 28 U.S.C. § 1711 *et seq.*, seeking to have certain financial contracts determined to be unenforceable because they were procured by fraud. Class certification was ultimately denied and the action continued as a mass action with approximately 1400 putative class members as named Plaintiffs. 28 U.S.C. § 1332(c)(11)(B)(i).

There were three forms of financing contracts. The earliest form used, and the one involved in this appeal, was formatted in three columns and referred to as a 3-column contract. The later form was formatted in one column and referred to as a 1-column contract. The third form concerned a single contract, between Petitioner Jeff Wineinger and his business entity, Cedar Park Vision Center, P.A., and NCMIC Finance Corp. doing business as Professional Solutions Financial Services. This matter concerns only some of the 3-column contracts and the Wineinger contract.

The lender in the 3-column contract and the Wineinger contract, was NCMIC Finance Corp., ("NCMIC") an Iowa corporation using an alias of Professional Solutions Financial Services. The 1-column contract lender was an affiliate of the vendor, Brican America, Inc. The 1-column contracts were assigned to NCMIC as soon as they were formed. NCMIC funded each of the contracts.

The contracts differed in another way. The 1-

column contract contained a choice of venue and consent to personal jurisdiction clause selecting either the state or federal court in Miami, Miami-Dade County, Florida, as the venue. The 3-column contract contained no such clause; rather, it contained a floating forum selection clause triggered by an assignment of the contract. If assigned, the agreed upon forum would be the state or federal court where the assignee's principal offices are located. Without assignment, there was no agreement on venue. The Wineinger contract contained no choice of venue and no submission to Iowa jurisdiction.

There were 1647 finance contracts funded by NCMIC before it refused to fund any more contracts sold by Brican America, Inc. NCMIC learned that the finance contracts funded a Ponzi scheme operated by Brican America, Inc., and its affiliated company, Brican America, LLC. Petitioners were the victims of the Ponzi scheme.

When the Doctors learned that they were victims of fraud, they stopped paying the finance contracts, and sued to have them declared unenforcable. One group of Doctors (approximately 200, referred to in the Florida federal district court action as the *Wigdor* group) filed a putative class action in a Florida state court which was later removed to the Florida federal district court and consolidated with the action filed by the larger group of Doctors (approximately 1150, referred to in the Florida federal district court action as the *Blauzvern* group).

C. Iowa State Court Actions

By surreptitiously monitoring a Google© Group where the Doctors openly discussed their dilemma, NCMIC learned that the Doctors were contemplating legal action to invalidate the contracts. In response, NCMIC began filing individual collection actions in the state court in Polk County, Iowa, alleging in each petition, as the sole basis of Iowa jurisdiction, that the parties had agreed to venue in Iowa. A copy of the financing contract was attached to each suit and revealed the falsity of the jurisdictional allegation. A handful of such suits had been filed by NCMIC before the Doctors filed their putative class actions in the Florida state and federal district courts.

The financing contracts attached to the complaints contradicted the jurisdictional allegation in the complaint; therefore, the attachment controlled. *WINBCO Tank Co., Inc. v. Palmer & Cay of Minn., L.L.C.*, 435 F. Supp. 2d 945, 955 (S.D. Iowa 2006) (decided under federal rule comparable to the state rule). *See also*, 71 C.J.S. *Pleading* § 530; 61A AM. JUR. 2D *Pleading* § 71. As a result, the initial complaints were void for lack of jurisdiction. *See Evans v. Ober*, 256 Iowa 708, 711, 129 N.W.2d 78, 80 (1964)(decided under former rules).

After the federal putative class action was filed, the Doctors advised NCMIC that its Iowa suits contained false allegations of agreement to Iowa venue and demanded that NCMIC stop filing such suits. Because NCMIC waived attorney-client privilege by

forwarding to a third party an email it received from its attorneys, we know exactly what NCMIC did in response and why. New York, Miami, and Iowa counsel for NCMIC wrote to NCMIC:

> The governing law, jurisdiction and venue paragraph of the three column format leases to which PSFS is the original lessor is somewhat unclear as to whether jurisdiction and venue is proper in the home state and county of the [sic] PSFS. I recommend that all these leases be assigned to another Iowa corporation for the following reasons:
>
> (1) The above mentioned paragraph is very clear that jurisdiction and venue is proper in the home state and county of any assignee. Thus if these leases are assigned to an Iowa corporation located in Polk County we have a lock on jurisdiction and venue here in Polk County.
>
> * * *
>
> (3) The Polk County, Iowa courts have handled many leasing cases and a body of law has been developed over the last five years which upholds these leases. If PSFS or any assignee had to litigate these leases in jurisdiction[s] all over the United States there is an increased

> chance of inconsistent or adverse verdicts.

FED. R. CIV. P. 13 required that NCMIC file a counterclaim to enforce the financing contracts in the federal district court action. At the time of service of the putative class action complaint, NCMIC had filed fewer that 100 collection actions in Iowa and possessed unfiled claims against 1,400 putative class members to enforce the financing contracts; such claims arose out of the transaction or occurrence that was the subject of the putative class action complaint; and, filing such a counterclaim did not require adding another party over whom the court could not acquire jurisdiction. When the putative class action complaint was filed, the counterclaims were not the subject of another valid, pending action filed by NCMIC. Class certification was ultimately denied because almost all of the members of the class were named parties in the Florida federal district court consolidated action by the time of hearing on class certification.

No later than when class certification was denied, NCMIC should have filed its compulsory counterclaims against Petitioners, but did not. NCMIC had attempted to file counterclaims (which it erroneously labeled third party claims at one point in the pleading and Cross-Claims at another) against over 200 of the Doctors in the putative class action in the Florida federal district court consolidated action, asserting that the Doctors had encouraged other Doctors to purchase goods from the vendor, financed by NCMIC, in exchange for referral fees. After three

attempts by NCMIC to state a claim, the Florida federal district court ultimately dismissed the attempted counterclaims with prejudice for failure to state a claim for relief. Clearly, NCMIC knew that it could file counterclaims in the putative class action and mass action.

Instead of filing enforcement counterclaims in the Florida federal district court action, NCMIC followed its counsel's advice and formed a new Iowa corporation, PSFS 3 Corp. ("PSFS 3"). It then assigned all of the 3-column contracts and the Wineinger contract to PSFS 3, amended six already filed, but void, Iowa petitions (involved in this appeal) to reflect PSFS 3 as the Petitioner, and filed over one-thousand new petitions in the name of PSFS 3 in Iowa state court, alleging the triggering of the floating jurisdiction clause by the assignment.

The Doctors unsuccessfully moved to dismiss the Iowa state court actions for lack of jurisdiction.

D. MDL Action

Other putative class actions involving the same issues, but different doctors, were filed in several federal district courts. The Doctors in the Florida putative class actions filed a motion in the United States Panel on Multidistrict Litigation to transfer all actions to the Southern District of Florida pursuant to 28 U.S.C. § 1407, and to consolidate them for pretrial proceedings. The MDL panel assigned the style of *In re Brican America, LLC, Equipment Lease Litigation*, to

the action and assigned it MDL No. 2183.

NCMIC and PSFS 3 filed their response, agreeing that the cases should be consolidated but arguing that the litigants were bound by a "binding forum selection clause[] requiring any claims to be tried in the state or federal courts of Iowa." Accordingly, they argued that they had filed motions to dismiss based on the forum selection clause in the pending actions in Florida and California, and would soon file similar motions in the New Jersey and Georgia actions. They argued for transfer to, and consolidation in, the federal district court in Iowa. The Doctors filed a supplemental reply to the opposition to their motion to transfer filed by NCMIC and PSFS 3.

The MDL panel ordered transfer to the Southern District of Florida:

> Defendants NCMIC Finance Corp. and PSFS 3 Corp. (collectively NCMIC) support centralization but propose the Northern District of Iowa or the Southern District of Iowa as the transferee district. In the alternative, these defendants ask the Panel to defer its decision until the district courts have ruled upon the pending motions to dismiss.
>
> * * *
>
> We are persuaded that the

> Southern District of Florida is an appropriate transferee forum for this litigation. The Southern District of Florida has a nexus to the actions given the presence of Brican in that district, and centralization in this district has the support of plaintiffs in both Southern District of Florida actions as well as the Brican defendants. Centralization in this district also permits the Panel to assign the litigation to a judge who is presiding over both Southern District of Florida actions, is an experienced transferee judge who has presided over a multidistrict litigation to its completion and is currently overseeing only one such docket.

Pet. App. 118a-119a.

On the same day as the MDL Panel entered its transfer order, the Iowa state court denied the Doctors' motion to dismiss for lack of personal jurisdiction. The Doctors filed their application for permission to file an interlocutory appeal on the question of jurisdiction, but the Supreme Court of Iowa denied the application. The order denying the motion to dismiss on personal jurisdictional grounds remained interlocutory.

E. Finding by Florida federal district court that forum selection clause was unenforceable

A few days before the denial by the Supreme Court of Iowa of the Doctors' application to appeal, the Florida federal district court orally announced it was denying NCMIC and PSFS 3's motion to dismiss. The announcement was followed by an order which held:

> Here, Plaintiffs who executed the PSFS Agreements [3-column contracts] have satisfied their burden of establishing this is a "rare" case where the Court should decline to enforce a mandatory forum-selection clause because they have shown that a transfer would clearly contravene "the interest of justice." The *Blauzvern* and *Wigdor* Plaintiffs filed their action before the Agreements were assigned, and it would be inequitable to allow Defendants to shop the actions to another forum simply by assigning the Leases after the lawsuit is filed. NCMIC has also presented no facts giving rise to a belief that Iowa is a more convenient forum than Florida, especially given that the Brican corporate and individual Defendants all reside in Florida and all Brican documents are located here. Finally, NCMIC informed the MDL Panel of the existence of the floating forum-selection clauses, and the MDL

> Panel still sent the cases to Florida. [fn5 omitted.] Because the MDL Panel has already expended resources in deciding where these actions should be litigated and the clauses in the PSFS Agreements are being triggered belatedly for the purposes of forum shopping, the Motion To Transfer[1] will also be denied as to the cases involving PSFS Agreements [3-column contracts].

Pet. App. 108a-109a.

NCMIC did not seek permission to file an interlocutory appeal concerning the order establishing jurisdiction. The order, like the Iowa order, remained interlocutory.

F. Florida federal district court final judgment affirmed by Eleventh Circuit

The Florida federal district court entered a final judgment for Respondent on the enforceability of the 3-column and Wineinger contracts. Petitioners appealed. Respondent did not cross-appeal the exercise of jurisdiction by the Florida federal district court and refusal to enforce the floating jurisdiction clause. The Eleventh Circuit affirmed the final judgment. Pet.

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[1]The trial judge used the shorthand "Motion to Transfer" to refer to the motion filed by NCMIC and PSFS 3 to dismiss the matter for lack of personal jurisdiction or in the alternative, to transfer.

App. 91a.

G. Iowa Court Exercises Jurisdiction Solely under forum selection clause the Florida federal district court determined to be unenforceable

After the Eleventh Circuit ruling, Petitioners filed their Answer and Affirmative Defenses to Petition at Law, and Counterclaim at Law, in the Iowa state court and asserted the lack of personal jurisdiction over them.

At the trial of two bellwether cases in Iowa, Petitioners introduced into evidence the decision of the Eleventh Circuit and argued that the decisions of the federal courts were entitled to issue preclusion status, precluding the exercise of jurisdiction by the Iowa state court under the forum selection clause because the Florida federal district court found the clause to be unenforceable.

After the bellwether trials, the Iowa trial court issued what it entitled "Ruling and Order on Plaintiffs' and Defendants' Motions for Summary Judgment." Pet. App. 73a. In this order, the Iowa trial court did not address the issue preclusion defense. Rather, the trial court simply relied on an initial finding years earlier, before the decision of the Eleventh Circuit which would be the basis for issue preclusion, that Iowa had jurisdiction:

> In an earlier ruling [which occurred

> before the decision of the Eleventh Circuit], the Iowa District Court in and for Polk County, Iowa, through the Honorable Judge Michael Huppert ruled that these assignments were valid and it provided Iowa jurisdiction over the agreements. The Defendants' Interlocutory Appeal on this issue was denied[2].

Pet. App. 78a.

H. Supreme Court of Iowa refuses to apply issue preclusion

In the briefing to the Supreme Court of Iowa, Petitioners raised issue preclusion concerning the finding of the Florida federal district court that "it would be inequitable to allow Defendants [NCMIC and PSFS 3] to shop the actions to another forum simply by assigning the Leases [financing contracts] after the lawsuit [was] filed."

The Supreme Court of Iowa refused to apply issue preclusion, stating:

> [T]he MDL Panel and the Florida federal

---

[2]There was no interlocutory appeal, and thus, no denial of the interlocutory appeal. There was an "Application for Three-Justice Review Pursuant to IOWA R. APP. P. 6.1002(5)." It was this application for an interlocutory appeal which was denied without explanation.

> district court determined that it would be inequitable to transfer the cases to Iowa based on the assignment after the doctors' litigation had already been filed in Florida. Nothing more was decided. In order for res judicata to apply, however, the issue in the previous litigation must be identical. *Van Haaften,* 815 N.W.2d at 22; *Soults Farms, Inc. v. Schafer,* 797 N.W.2d 92, 104 (Iowa 2011). As a result, the action in federal court has no res judicata effect on the unaddressed question of whether there was personal jurisdiction over the defendants in Polk County, Iowa.

Pet. App. 34a.

REASONS FOR GRANTING THE PETITION

I. The Full Faith and Credit Statute 28 U.S.C. § 1738 required that the Iowa state courts give *res judicata* effect to the finding by the Florida federal district court that the contractual forum selection clause was not enforceable

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972), this Court held:

> [Forum selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting

> party to be "unreasonable" under the circumstances.

This phrase is quoted in *Liberty Bank, F.S.B. v. Best Litho, Inc.,* 737 N.W.2d 312, 315 (Iowa Ct. App. 2007) as being controlling law in Iowa.

The Florida federal district court found that the Petitioners

> have satisfied their burden of establishing this is a "rare" case where the Court should decline to enforce a mandatory forum-selection clause because they have shown that a transfer would clearly contravene "the interest of justice."

Pet. App. 108a.

A. Issue Preclusion denied by Iowa

The law of issue preclusion in Iowa is straightforward and consistent with issue preclusion in almost every state, including Florida:

> The party asserting issue preclusion must establish four elements:
>
> > (1) the issue in the present case must be identical, (2) the issue must have been raised and litigated in the

> prior action, (3) the issue must have been material and relevant to the disposition of the prior case, and (4) the determination of the issue in the prior action must have been essential to the resulting judgment.

Fischer, 654 N.W.2d at 547 (citing *Hunter*, 300 N.W.2d at 123). When issue preclusion is invoked offensively, two additional considerations are present:

> (1) whether the opposing party in the earlier action was afforded a full and fair opportunity to litigate the issues ..., and (2) whether any other circumstances are present that would justify granting the party resisting issue preclusion occasion to relitigate the issues.

Id.; *see also Hunter,* 300 N.W.2d at 126 (*citing* RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tentative Draft No. 2, 1975) (now RESTATEMENT (SECOND) OF JUDGMENTS § 29)).

Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 104 (Iowa 2011).

Both Florida and Iowa cite favorably RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) ("the preclusive effect of a federal decision is determined by applying federal law"). *In re Brose*, 242 B.R. 531, 532 (Bankr. M.D. Fla. 1999); *Shumaker v. Iowa Dept. of Transp.*, 541 N.W.2d 850, 854 (Iowa 1995).

> The federal courts have traditionally adhered to the related doctrines of res judicata and collateral estoppel. Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 [(1876)]. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 [(1979)]. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*, at 153–154, 99 S.Ct., at 973–974.

Allen v. McCurry, 449 U.S. 90, 94 (1980).

In refusing to give full faith and credit to the finding of the Florida federal district court that the forum selection clause was unenforcable, the Iowa courts created an inconsistent decision which encourages all others trying cases in Iowa to not rely on the adjudication of an essential threshold question made by the federal court: the jurisdiction of the Iowa court to adjudicate a claim. If any federal court anywhere decided the issue adverse to Iowa jurisdiction, fret not, Iowa will not give that federal court decision any effect—the Full Faith and Credit Clause and Statute notwithstanding.

The Supreme Court of Iowa found that the issue of jurisdiction was not identical in the two actions. It referred to the finding of the Florida federal district court as being only that "it would be inequitable to transfer the cases to Iowa based on the assignment after the doctors' litigation had already been filed in Florida." The court distinguished that finding from a finding that "there was personal jurisdiction over the defendants in Polk County, Iowa," claiming that the Florida federal district court did not find that Iowa did not have jurisdiction. Pet. App. 34a.

Petitioners assert that the Supreme Court of Iowa made a distinction without meaning. Respondent asked the Florida federal district court to dismiss the complaint because it was without jurisdiction, arguing that the forum selection clause was mandatory and that only Iowa had jurisdiction. The Florida federal

district court refused, finding that although the forum selection clause was mandatory, it was unenforcable because "it would be inequitable to transfer the cases to Iowa based on the assignment after the doctors' litigation had already been filed in Florida."

The only basis for Iowa jurisdiction claimed by Respondent in the complaints filed in Iowa was the forum selection clause. The Florida federal district court found that the forum selection clause was unenforceable. If the forum selection clause was unenforceable, and it was the only basis for personal jurisdiction asserted by Respondent in the state court actions, then Iowa had no jurisdiction. By logical interpretation of the order, the Florida federal district court found that Iowa had no jurisdiction under the forum selection clause because the forum selection clause was unenforceable.

Thus, applying federal, Iowa, or Florida law of issue preclusion to the Florida federal district court decision should have resulted in Iowa finding that it had no personal jurisdiction because the forum selection clause was not enforceable. The contrary finding violates the Full Faith and Credit Clause and Statute.

II. Due Process Violations

As trial approached on the first 20 cases to enforce 3-column contracts in Iowa, the parties orally agreed to try 2 bellwether trials. The trial court issued an order based on the oral stipulation:

> The parties agree that the two trials on December 11 and 12, 2017 and the rulings and orders therefrom shall be binding as to all other remaining cases filed with similar issues and parties and shall constitute issue preclusion.

There were several "similar issues" which were common to all cases, such as the affirmative defenses of lack of personal jurisdiction, res judicata on the issue of personal jurisdiction, improper venue, violation of the Iowa Credit Agreement Statute of Frauds, and violation of the Iowa Usury Statute. There were issues which were not "similar issue[s]" common to all and which could not be governed by issue preclusion; specifically, the identity of the proper parties and the amount of money paid, and remaining to be paid, by each individual Defendant under that individual's contract.

After trial, the court issued what it entitled "Ruling and Order on Plaintiffs' and Defendants' Motions for Summary Judgment," (Pet. App. 73a) which found for Respondent herein and against Petitioners. Respondent then filed a motion to enforce the stipulation quoted above. In support of the motion, Respondent filed an affidavit of an employee of NCMIC which set out what PSFS 3 asserted were the number of payments not paid by each Defendant. Defendants opposed the motion by memorandum of law. In reply to the opposition, PSFS 3 for the first time (and at a time when the Doctors did not have the right to respond) requested that the trial court treat the

motion to enforce as a motion for summary judgment although no other provisions of Iowa's summary judgment procedural rule were fulfilled by PSFS 3.

At the hearing on the motion to enforce, Defendants argued, as they did in their opposition papers, that entering final judgments against Defendants on issues which were not resolved in the bellwether trials (because they were not subject to issue preclusion) violated Defendants' Due Process rights.

At the conclusion of the hearing, the trial judge made no ruling, but rather directed PSFS 3's attorneys to submit proposed final judgments, and stated:

> I won't rule on the final order judgment until I see what you present and give the defendants an opportunity to respond.

The Doctors reasonably interpreted that oral pronouncement as meaning that the trial court had not yet ruled on the motion to enforce stipulation. The trial court will determine, after reviewing what PSFS 3 presents, whether it will grant the motion to enforce. If it determines that it will not grant the motion to enforce, it will enter an order saying so, and the Doctors will not need to submit anything. If, though, the court determines that it will grant the motion to enforce, it will enter an order saying so and expressly give the Doctors an opportunity to respond to the proposed final judgments within a specified number of days after the order was entered. Such an opportunity

is required by Due Process. *Boddie v. Connecticut*, 401 U.S. 371, 377–79 (1971).

> Also of importance to our analysis is the concept that "[d]ue process mandates that persons who are required to settle disputes through the judicial process 'must be given a meaningful opportunity to be heard.'" *In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, 118 (1971)).

Fin. Mktg. Services, Inc. v. Hawkeye Bank & Tr. of Des Moines, 588 N.W.2d 450, 460 (Iowa 1999).

No such opportunity to be heard was ever given to the Doctors; rather, the district court received PSFS 3's submission of proposed final judgments and entered them. In doing so, it issued final judgments against 38 Petitioners in this appeal who were not a party to any contract with NCMIC or PSFS.

PSFS 3 had the burden of proof of its allegations, which included the allegation that each Defendant had signed the contract sought to be enforced against them and was therefore obligated under the contract, and that each had consented to Iowa jurisdiction. The contracts attached to the complaints in 38 collection actions involved in this appeal showed that they were not signed by the named Defendant. The number was 73 such Defendants in

front of the Supreme Court of Iowa and higher in the trial court—about one-third of the Defendants. Additionally, PSFS 3 could not prove that the Wineinger Defendants had consented to Iowa jurisdiction.

All of the attorneys involved for the Doctors had decades of trial experience. Those attorneys never ignored a court order or oral pronouncement from any of the many courts involved in these cases and always submitted a response to a court order. Never had they been deprived of an opportunity to be heard until the final judgments were entered without the opportunity which the trial court said he would give the Doctors. The Doctors waited for their opportunity to challenge the evidence presented by PSFS 3 at a trial, and to submit their evidence establishing the lack of jurisdiction of the trial court over all Defendants, and the improper joinder of about 100 named Defendants who had not signed any financing contract.

That opportunity never was provided to Defendants and that is how the Due Process rights of Petitioners were violated.

The following table identifies those against whom final judgments were entered but who were not a party to the contract sued upon:

Non-Party Judgment Obligor	**Contracting Party Per Contract**
Jorge R. Angulo, DDS, PA	Jorge R. Angulo, DDS

Dr. J.E. Atkinson Family Eye Care	J.E. Atkinson
Advanced Family Eye Care--Doctors of Optometry, PLLC	Advanced Family Eye Care
Richard Y Boerner, DDS, Inc.	Richard Y. Boerner, DDS
Christopher A. Bowan, DDS, PA dba Advanced Dentistry of Charlotte	Advanced Dentistry of Charlotte
Michelle T. Bui, DDS, Inc.	Michelle T. Bui, DDS
Stone Creek Dental, PC	Casey S. Butterfield
All Eyes Optometrists, PC	All Eyes Optometrists
John X. Cordoba, DDS, MS, PA	John X. Cordoba, DDS, MS
Maple Grove Vision Clinic, PA	Dr. Scott A. Frick Maple Grove Vision Clinic
Scott R. Gardner DDS PC	Scott R. Gardner
Larry Golson, OD, dba Envision Eyecare, OD, PA	Larry Golson
Modern Eye Care, OD, PA	Modern Eye Care
Randall K. Harwood, DDS, Inc.	Dr. Randy Harwood
Denis T. Iwamoto, OD, PC	Denis T. Iwamoto
B. M. Javier & Associates, LLC	Bonifacio M. Javier

Dr. Stephen R. Kepley & Associates dba Tropical Eye Associates	Stephen R. Kepley
Kivlin Eye Clinic, SC	Dr. Jim Kivlin / Kivlin Eye Clinic
Jack T. Krauser, DMD, PA	Jack T. Krauser, DMD
David M. Lewis dba Victory Point Dental	David M. Lewis
Percy Luecke III, DDS, MSD dba Braceland	Percy Luecke III, DDS, MSD
Kelly B. Mansfield, DDS, PC	Kelly B. Mansfield
Dr. John H. Mason, P.A.	Dr. John H. Mason
David J. Matthews, OD dba Devine Eyes	David Matthews
Robert W. Anderson, O.D. & Anthony M. McDonald, O.D., Ltd. dba McDonald Eye Care Associates	Dr. Anthony M. McDonald / McDonald Eye Care Associates
Ernest H. McDowell DMD dba McDowell Albert Orthodontics	(1) McDowell Orthodontics and (2) McDowell Albert Orthodontics
Brad Pitts DMD, LLC	Brad R. Pitts
Russell C. Pool, DMD, PA	Russell C. Pool
Dr. Bradford R. Ripps dba Total Eye Care, Inc.	Dr. Bradford R. Ripps / Total Eye Care
Evelyn Salazar DDS Dental Corp.	Evelyn Salazar

Thomas C. Shields, DDS, PA	Thomas C. Shields
C. H. Smith, Jr. dba First In Sight Optometric Clinic, PA	First In Sight
Shelly Soch, DMD, PLLC, Mayte Accornero, Mayte Accornero, DMD, PA	Shelly Soch, DMD, PLLC, assigned to Mayte Accornero (discharged in Bankruptcy)
Hamilton Mill Eye Care, Inc., Dr. Kurt E. Treu, OC dba Commerce Vision Center	(1) Hamilton Mill Eye Care; and (2) Commerce Vision Center
Arvind Kenneth Vakani, DMD, MS, PA	Vakani Orthodontics
Derin Van Loon, OD, PA, dba Blustin Optical Center	Dr. Derin J. Van Loon / Blustin Optical
J. Foster Weems, DDS, Inc.	J. Foster Weems, DDS

Petitioners also objected to the submission of an affidavit as substantive proof, arguing that such violates Iowa's rules of evidence, citing *Harvey v. Platter,* 495 N.W.2d 350, 353 (Iowa Ct. App. 1992).

The Supreme Court of Iowa put a different interpretation on the oral pronouncement of the trial court while acknowledging that the Doctors were entitled to Due Process. The Supreme Court of Iowa put the trial court's management of the case above the Due Process rights of the Doctors:

After the bellwether cases were decided, the district court invited the plaintiffs to submit individualized judgments in each case where the damages would be calculated under the methodology accepted in the bellwether cases. The inputs for the calculation came from one party, PSFS 3. Again, the defendants were clearly entitled to contest these claimed amounts.

The district court seems to have recognized the need to provide the defendants with their day in court on the issue. At the hearing inviting PSFS 3 to submit proposed judgments, the district court expressly stated that once the proposed judgments were submitted, the district court would "give the defendants an opportunity to respond." Here, once the judgments were submitted, the district court ***seems to*** have put the burden of affirmatively filing a resistance on the defendants. When no resistances were filed, the district court, without a hearing, began entering a series of judgments against the individual defendants.

This procedure was a reasonable effort by the district court to manage a massive piece of consolidated litigation. ***When the proposed judgments were***

> ***submitted, the defendants knew they had an opportunity to respond but chose not to file any resistance to the specific calculations in any individual case. The district court regarded the occasion as "put up or shut up" time on the question of factual challenges to individual damages.*** After nearly thirty days had passed without any resistances, the district court began entering judgments in the individual pending cases.
>
> Under the circumstances, it cannot be said that the defendants were deprived of notice and an opportunity to be heard on the issue of individual damages. When the proposed judgments were submitted, they had an opportunity to object to the calculations or to offer any other objections to entry of judgment. The fact that they chose not to avail themselves of the opportunity they were provided does not create a problem of fundamental fairness in the litigation which was already eight years old at the time the district court fashioned its approach to the remaining cases.

Pet. App. 47a-48a (emphasis added).

The italicized portion of the quote above is a complete assumption on the part of the Supreme Court

of Iowa, having no support in the record before the court, and is contrary to the import of the oral pronouncement. The Supreme Court of Iowa interpreted the oral pronouncement of the trial court as suggesting something–"seems to"–and found a waiver of Petitioners' Due Process rights because Petitioners did not draw the same "seems to" conclusion. That is not a waiver voluntarily, knowingly, and intelligently made as required by this Court's jurisprudence, including *Boddie v. Connecticut*, 401 U.S. 371, 377–79 (1971).

The calculation of damages addressed by the Supreme Court of Iowa was the least offense to the Due Process rights of Defendants. More important than the calculation of damages was the identity of the contracting parties and the jurisdiction of the Iowa court over them.

The Supreme Court of Iowa wrote "where the damages would be calculated under the methodology accepted in the bellwether cases." Pet. App. 47a. There was no such acceptance and the record was clear in the Supreme Court of Iowa that the Doctors objected to the three different calculation methods presented in the bellwether cases. Pet. App. 6a.

In short, the Supreme Court of Iowa found Due Process was afforded the Doctors by the statement of the trial court that:

> I won't rule on the final order judgment until I see what you present and give the

defendants an opportunity to respond.

According to the Supreme Court of Iowa, it was up to the Doctors to devine what the trial court meant by this statement and if they gave it a reasonable interpretation, but misunderstood what he was actually trying to say, too bad—their Due Process rights were lost.

Such a treatment by the Supreme Court of Iowa is contrary to the many rulings of this Court that a waiver of due process rights has to be voluntarily, knowingly, and intelligently made, an intentional relinquishment or abandonment, and that the court cannot presume acquiescence in the loss of those rights:

> Even if, for present purposes, we assume that the standard for waiver in a corporate-property-right case of this kind is the same standard applicable to waiver in a criminal proceeding, that is, that it be voluntary, knowing, and intelligently made, *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970); *Miranda v. Arizona*, 384 U.S., at 444, 86 S.Ct., at 1612, or 'an intentional relinquishment or abandonment of a known right or privilege,' *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct., 1019, 1023, 82 L.Ed. 1461 (1938); *Fay v. Noia*, 372 U.S., at 439, 83 S.Ct., at 849, and even if, as the

> Court has said in the civil area, '(w)e do not presume acquiescence in the loss of fundamental rights,' *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093 (1937), that standard was fully satisfied here.

D. H. Overmyer Co. Inc., of Ohio v. Frick Co., 405 U.S. 174, 185–86 (1972).

The decision of the Supreme Court of Iowa that the Defendants failed to "put up or shut up" is a presumed acquiescence in the loss of fundamental rights proscribed by this Court without any evidence of a voluntary, knowing, or intelligently made decision, without evidence of an intentional relinquishment or abandonment of a known right or privilege, all based on an assumed interpretation of an oral pronouncement of the trial court, which oral pronouncement was subject to alternative, reasonable interpretations.

The Doctors' reasonably interpreting the trial court's oral pronouncement and awaiting a written order stating that the trial court is inclined to grant PSFS 3's motion to enforce stipulation so the Doctors may file their responses within a stated number of days, is not a voluntary, knowing, or intelligent waiver of due process rights. It is a path opened by the trial court's choice of ambiguous words in an oral pronouncement.

The Supreme Court of Iowa recognized that the Wineinger Defendants had raised the issue of personal jurisdiction over them (Pet. App. 76a) but then incorrectly shifted the burden of proof to Wineinger on this issue, stating:

> But other than to file an answer generally denying personal jurisdiction, Wineinger took no further affirmative steps to obtain a district court ruling on the question. When the district court received a proposed judgment from the plaintiffs, no resistance was filed asserting that there was an unresolved claim of lack of personal jurisdiction.
>
> Under the circumstances, with hundreds of cases pending, there was simply no way for the district court to know there was an underlying unique personal jurisdictional issue in the Wineinger matter. When the district court asked for proposed judgments in the cases, including the case involving the Wineinger defendants, it was incumbent upon them to speak up. When they did not, we conclude they failed to preserve their personal jurisdiction claim.

Pet. App. 42a-43a.

"[T]here was simply no way for the district court

to know there was an underlying unique personal jurisdictional issue in the Wineinger matter?" Sure there was. Enter an order stating that the trial court is inclined to grant the motion to enforce stipulation, and provide a number of days within which Defendants were to submit any substantive responses to the affidavit of "proof"; or, set the cases for trial. There were plenty of ways to provide Petitioners with Due Process.

III. Conclusion

The Supreme Court of Iowa has decided an important federal question of the effect to be given to the order of a federal district court under the Full Faith and Credit Clause and Statute in a way that conflicts with the relevant decisions of this Court. The order of the Florida federal district court, finding that a venue selection clause, although mandatory, was unenforceable under this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), became a final order when not challenged in the Circuit Court of Appeals. That final order should have been accorded Full Faith and Credit by the Iowa courts by finding jurisdiction lacking in the Iowa courts because the forum selection clause was unenforcable.

The Supreme Court of Iowa has decided an important federal question of Due Process under the Fourteenth Amendment to the Constitution of the United States which is contrary to relevant decisions of this Court.

Accordingly, Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

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Fort Lauderdale, Florida

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