NO. _____

In the Supreme Court of the United States

RYAN DALY, ET AL.,

Petitioners,

v.

ALEXIS CHECHOWITZ, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA"), pursuant to Article VI of the United States Constitution ("Supremacy Clause"), preempts Mass. R. Civ. P. 23 (which does not contain an "opt-out" provision), where Middlesex County Superior Court ("MSC") granted Respondents ALEXIS CHECHOWITZ ("Ms. Chechowitz") and AMEER ABDULLAH's ("Mr. Abdullah") (Ms. Chechowitz and Mr. Abdullah collectively, "Plaintiffs") Assented-To Motion for Final Approval of Class Action Settlement ("FAM") pursuant to Mass. R. Civ. P. 23(c), in violation of the express terms of Petitioners' valid, enforceable arbitration agreements and where Petitioners were actively pursuing their claims for unpaid wages in arbitration against AUTOFAIR INC. ("AI"), HAVERHILL FORD, LLC ("HFLLC"), and HAVERHILL SUBARU, LLC ("HSLLC") (AI, HFLLC, and HSLLC collectively, "Employers") (who willingly submitted to arbitration without objection) for approximately ten (10) months before Plaintiffs and Employers attempted to settle Petitioners' pending arbitration claims in the separate litigation before the MSC without Petitioners' consent?

2. Whether the Massachusetts Appeals Court ("MAC") erred as a matter of law when it affirmed the MSC's order granting Plaintiffs' FAM over Petitioner's objection?

3. Whether the MAC erred by applying the incorrect standard of review – abuse of discretion – in ruling that the FAM was "fair and reasonable" and in the "best interest of the class" pursuant to Mass. R. Civ. P. 23, instead of applying the *de novo* standard of review on a purely legal question of law, where

Petitioners argued that the MSC could not, *ab initio* and *as a matter of law*, grant Plaintiffs' FAM pursuant to Mass. R. Civ. P. 23, when doing so would be in violation of the express terms of their arbitration agreements and in violation of the FAA, this Court's corresponding binding precedent on the FAA (*see* cases, *infra*) and thus in violation of the Supremacy Clause?

PARTIES TO THE PROCEEDINGS

Petitioners and Objectors-Appellants Below*

- Ryan Daly
- David C. Thomas
- Paul T. Silva
- Diane Ingram

Respondents and Plaintiffs-Appellees below

- Alexis Chechowitz
- Ameer Abdullah

Respondents and Defendants-Appellees below

- Autofair Inc.
- Haverhill Ford, LLC
- Haverhill Subaru, LLC

* RYAN DALY ("Mr. Daly"), DAVID C. THOMAS ("Mr. Thomas"), PAUL T. SILVA ("Mr. Silva"), and DIANE INGRAM ("Ms. Ingram) (Messrs. Daly, Thomas, and Silva and Ms. Ingram collectively, "Petitioners") are in no way waiving their right to resolve their claims for unpaid wages in mandatory binding arbitration by filing this document with this Court.

LIST OF PROCEEDINGS

Direct Proceedings Below in Massachusetts State Court

Commonwealth of Massachusetts,
Middlesex County Superior Court

Civil Action No. 1881CV01492

Alexis Chechowitz, *et al.*, Plaintiffs v. Autofair, Inc., *et al.*, Defendants & Ryan Daly, *et al.*, Objectors

Final Order: December 14, 2021

Commonwealth of Massachusetts Appeals Court

Case No. 2022-P-0040

Alexis Chechowitz, *et al.*, Plaintiffs-Appellees *v.* Autofair, Inc., *et al.*, Defendants-Appellees & Ryan Daly, *et al.*, Objectors-Appellants

Final Opinion: January 18, 2023

Commonwealth of Massachusetts,
Supreme Judicial Court ("SJC")

FAR-29222

Alexis Chechowitz, *et al.*, Plaintiffs-Appellees *v.* Autofair, Inc., *et al.*, Defendants-Appellees & Ryan Daly, *et al.*, Objectors-Appellants

Denial of Further Appellate Review: March 22, 2023

Related Proceedings in the United States District Court for the District of Massachusetts, Eastern Division

United States District Court for the District of Massachusetts, Eastern Division

Civil Action No. 1:21-cv-10911-RGS

Ryan Daly, *et al.*, Petitioners *v.* Autofair Inc., *et al.*, Respondents

Decision: September 21, 2021

Reconsideration Denial: October 1, 2021

Related Pending Arbitration Proceedings American Arbitration Association[**]

AAA Case No. 01-20-0003-9694
Daly v. Autofair Inc.
Decision: February 8, 2021

AAA Case No. 01-20-0003-9695
Thomas v. Autofair Inc.
Decision: January 27, 2021

AAA Case No. 01-20-0003-9696
Silva v. Autofair Inc.
Decision: February 8, 2021

AAA Case No. 01-20-0003-9699
Ingram v. Autofair Inc.
Decision: February 5, 2021

** These decisions stayed the individual arbitration proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, by and through their counsel of record, respectfully petition this Court for a writ of certiorari to review the judgment of the MAC.

OPINIONS BELOW

This petition arises from the MAC's opinion on review of the order Granting Plaintiffs' FAM ("Decision") affirming the MSC's Order Granting Plaintiffs' FAM in *Chechowitz v. Autofair, Inc.*, Civil Action No. 1881CV01492. Plaintiffs' FAM was an assented to motion seeking final approval of a class action settlement pursuant to Mass. R. Civ. P. 23 to which Petitioners objected because the settlement included Petitioners and their claims for unpaid wages that had been pending in separate, individual arbitrations.

Petitioners then applied for further appellate review ("FAR") of the MAC's Decision from the SJC (FAR-29222). Petitioners' FAR application was denied.

JURISDICTION

The MAC entered judgment on January 18, 2023. The SJC denied FAR on March 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND JUDICIAL RULES INVOLVED

- U.S. Const., Art. VI, cl. 2 (App.52a)
- 9 U.S.C. § 1 (App.53a)
- 9 U.S.C. § 2 (App.54a)
- Fed. R. Civ. P. 23 (App.55a)
- Mass. R. Civ. P. 23 (App.65a)

STATEMENT OF THE CASE

A. Background and Purpose of the FAA

Congress enacted the FAA in 1925 to put an end to judicial hostility towards agreements to arbitrate. *See Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (citing H.R. Rep. No. 68-96, at 1-2 (1924)) ("The need for the [FAA] arises from . . . the jealousy of the English courts for their own jurisdiction . . . This jealously survived for so lon[g] a period that the principle became firmly embedded in the English common law and as adopted with it by the American courts."); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985) ("[T]he Act was designed to overcome anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."). Passage of the FAA occurred during a climate of judicial hostility toward arbitration agreements and awards. *See, e.g.*, *Meacham v. Jamestown, F. & C.R. Co.*, 105

N.E. 653, 655 (N.Y. 1914) (Cardozo, J. concurring) (stating that courts should not enforce a contract "where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators"); *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065) ("[I]t cannot be correctly said, that public policy, in our age, generally favors or encourages arbitration."). Congress determined there was a need to overcome this judicial hostility toward arbitration and concluded the only appropriate means to remedy this judicial opposition was through federal legislation. *See* H.R. Rep. No. 68-96, at 1-2 (1924) ("The need for the law arises from an anachronism of our American Law. Some centuries ago because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction . . . The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment[.]").

The purpose of the FAA is to protect the enforceability of arbitration agreements to arbitrate disputes involving maritime transactions and interstate commerce. *See* 9 U.S.C. § 2. The *FAA requires* courts to enforce arbitration agreements according to their terms and arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]" *Id.*

This Court has consistently recognized a strong federal policy in favor of arbitration and has liberally interpreted the FAA in that direction. In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1

(1983), this Court stated that the FAA establishes a "federal policy favoring arbitration." *Moses*, 460 U.S. at 24. More significantly, this Court held that the FAA creates federal substantive law; therefore, under FAA section 3, both state and federal courts are obliged to stay legal proceedings involving disputes the parties agreed to resolve in arbitration. *See id.* at 1, 24-25 (noting that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Shortly after the *Moses* decision, this Court decided *Keating* and struck down a California law invalidating certain arbitration agreements covered by the FAA. *See Keating*, 465 U.S. at 10, 16 (The California Franchise Investment Law provided that "'[a]ny condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.'" The California Supreme Court held this statute required "judicial consideration of claims brought under the . . . statute and accordingly refused to enforce the parties' contract to arbitrate such claims." The statute and the court's holding, therefore, conflicted directly with section 2 of the FAA. This Court held the California statute could not stand because it was in direct conflict with federal law.) (internal quotations omitted). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expanded upon the national policy in favor of arbitration holding that claims under the Age Discrimination in Employment Act can be subject to compulsory arbitration. *See Gilmer*, 500 U.S. at 35. In interpreting an arbitration agreement or the substantive provisions of the FAA, it is important for this Court to keep in mind Congress and this Court's pronounced support of arbitration.

B. Factual Background

Petitioners are former sales associate employees of Employers. *See* Record Appendix ("RA") at 11, ¶ 3; 14, ¶ 3; 17, ¶ 3; 20, ¶ 3.[1]

AI is a Delaware corporation with its principal place of business and headquarters in Manchester, New Hampshire making it a citizen of Delaware and New Hampshire. *See id.* at 23, ¶¶ 3, 16. HFLLC and HSLLC are separate Delaware limited liability companies whose sole Manager is AI making them citizens of Delaware and New Hampshire. *See id.* at 3, ¶¶ 4-5, 16.

As a condition of Petitioners' employment with Employers, they entered into valid arbitration agreements with Employers. *See id.* at 11, ¶ 4; 14, ¶ 4; 17, ¶ 4; 20, ¶ 4; *see also id.* at 28, 34, 40, 46. Save for the signatures and dates on each of Petitioners' arbitration agreements, they are identical. *See generally id.* at 27-50; *see also id.* at 24, ¶ 11.

Linda Beaudoin ("Ms. Beaudoin") is AI's Human Resources Director. *See id.* at 24, ¶ 13. According to Ms. Beaudoin, who submitted a declaration[2] in support of [AI and HFLLC's] Motion to Compel Individual Arbitration and Strike Class Allegations with Incorporated Memorandum of Law ("MtC") (*see id.* 23,

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[1] References and/or citations to "RA" are to Petitioners' Record Appendix submitted to the MAC.

[2] A copy of Ms. Beaudoin's declaration was not provided with AI and HFLLC's MtC (just the citations to the declaration), but declarations such as these are typically signed under the pains and penalties of perjury. *See id.* at 24, ¶ 12. Moreover, Employers did not dispute that Ms. Beaudoin's declaration was made under pains and penalties of perjury in the MSC.

¶¶ 10-12; *see also id.* at 52-59), in the matter before the lower court, "[HFLLC] is located less than four miles from the New Hampshire border and sells and services vehicles to/for residents of Massachusetts, New Hampshire, and other nearby states." *Id.* at 53-54.[3] Ms. Beaudoin further declared, "[t]he vehicles and parts sold by [HFLLC] are primarily manufactured outside of Massachusetts, shipped to [HFLLC], and then sold to the public." *Id.* Pursuant to these declarations made by Ms. Beaudoin, AI and HFLLC argued in their MtC that the FAA governed Ms. Chechowitz's arbitration agreement. *See id.* at 52-59.

Ms. Chechowitz's arbitration agreement, save for its signatures and dates, is *identical* to Petitioners' arbitration agreements. *See id.* at 60-65; *compare id.* at 27-50; *see also id.* at 24, ¶ 11.

Moreover, in AI and HFLLC's MtC, they argued that FAA governed Ms. Chechowitz's arbitration agreement, AI and HFLLC specifically argued:

> the applicability of the FAA to the Agreement is clear. Defendant is an automobile dealership located in Massachusetts, which sells automobiles and parts manufactured outside Massachusetts to residents of both Massachusetts and other surrounding states. *There is no question that Autofair is engaged in interstate commerce sufficient to invoke the FAA* (emphasis added). *Rivera-Rivera,* 555 F.3d at 286 (auto dealers who purchase vehicles from out-of-state are engaged in interstate commerce) (citing *United States v.*

[3] AI and HFLLC served their MtC upon counsel for Ms. Chechowitz on or about November 6, 2020. *See id.* at 51-59.

> *Capozzi*, 347 F.3d 327, 337 (1st Cir. 2003)); *Edwards v. Costner*, 979 So. 2d 757, 762 (Ala. 2007) (holding that the FAA applied because "[i]t is unquestionable that the sale of an automobile, either new or used, 'use[s] the channels of interstate commerce,' 'involve[s] . . . things in interstate commerce,' and 'involve[s] general activities having a substantial effect on interstate commerce.'") The Arbitration Agreement [*i.e.*, the arbitration agreements at issue here] thus fall within the scope of the FAA, and the FAA's liberal policy favoring the enforcement of arbitration agreements applies to this case.

See id. at 55-56.

Petitioners' arbitration agreements begin with an introduction that extols the virtues of arbitration and mandate binding arbitration as the exclusive means of resolving any disputes between Employers and their employees (which include Petitioners). *See id.* at 27, 33, 39, 45 (stating, "[Employers] require[] that disputes . . . be submitted to *mandatory, binding arbitration* (emphasis added)."). Immediately thereafter, Petitioners' arbitration agreements expressly incorporate the AAA's arbitration rules: "arbitration under this agreement shall be conducted pursuant to the arbitration process mechanism that arbitration will be pursuant to the rules of the [AAA] Employment Arbitration Rules[.]" *See id.* Petitioners' arbitration agreements then expressly apply the FAA to their arbitration agreements: "Arbitration is conducted in accordance with and pursuant to the [FAA] and/or applicable state arbitration laws." *Id.*

Under each Petitioner's arbitration agreement, Employers agreed to submit "claims for wages, benefits, or other compensation" to informal dispute resolution, then mediation, and then arbitration. *Id.* at 28, 34, 40, 46. In accordance with the terms of Petitioners' arbitration agreements, Employers agreed that any dispute arising out of or in any way relating to Petitioners' employment with Employers, which would constitute a legally cognizable cause of action in a court of law, "*must* . . . be submitted to binding arbitration under the terms of [Petitioners' arbitration agreements with Employers] (emphasis added)." *Id.* In addition, Petitioners' arbitration agreements provide that Petitioners and Employers:

> WAIVE[D] THE RIGHT TO BRING A LAWSUIT OVER ANY CLAIM COVERED BY THIS AGREEMENT. [Petitioners] ARE ALSO WAIVING [their] RIGHT TO A TRIAL BY JURY. THEREFORE, [Petitioners] MAY WISH TO CONSULT COUNSEL BEFORE SIGNING THIS AGREEMENT.
>
> BY SIGNING BELOW, [Petitioners] ACKNOWLEDGE THAT [they] HAVE READ AND UNDERSTOOD THIS AGREEMENT. [Petitioners] UNDERSTAND THAT ONCE [they] SIGN THIS AGREEMENT IT WILL BE BINDING UPON [Petitioners] AND [Employers] FOR THE DURATION OF MY EMPLOYMENT WITH [Employers], AND THEREAFTER.

Id. at 26, 32, 38, 44.

By signing Petitioners' arbitration agreements, Employers agreed that the Petitioners' arbitration

agreements include, but are not limited to any claim for "wages, benefits, or other compensation" and any claim for "any violation of state . . . law[.]" *Id.* at 28, 34, 40, 46. Petitioners' arbitration agreements also set forth Petitioners and Employers' further agreement that the Petitioners' "continued at-will employment [with Employers] and our mutual promises to arbitrate our claims rather than litigate them before courts or other bodies provide consideration for each other to sign this Agreement." *Id.* at 31, 37, 43, 49. Petitioners' arbitration agreements also provide:

> [Employers] and [Petitioners] agree that this Agreement will survive the termination of [Petitioners] employment by either party for any reason. *This Agreement can be revoked or modified only by a written document signed by* [*AI's*] *Chief Executive Officer and* [*Petitioners*] *which specifically states an intent to revoke or modify this Agreement* (emphasis added).

Id. Petitioners' arbitration agreements have not been revoked by Petitioners and Employers pursuant to these terms. *See id.* at 12, ¶ 19; 18, ¶ 19; 24, ¶ 19; 30, ¶ 19.

In paragraph 11 of Petitioners' arbitration agreements, they state:

> The [MAA] shall govern the interpretation, enforcement, and proceedings (except as otherwise outlined in the applicable [AAA] Rules) pursuant to this Agreement. To the extent that the [MAA] is not applicable, *then the* [*FAA*] *will apply* (emphasis added).

> In all other respects, Massachusetts law will govern all disputes in this Agreement.

Id. at 31, 37, 43, 49. The arbitration agreements also explicitly state that:

> Except as otherwise provided in this Agreement, [Employers] and [Petitioners] both agree that neither of us shall initiate, prosecute or *participate in any lawsuit* or administrative action (except for administrative charges to the National Labor Relations Board or Equal Employment Opportunity Commission) *that is in any way related to any claims covered by this Agreement* except where compelled by court or a government agency as allowable under Massachusetts law (emphasis added).

Id. at 28, 34, 40, 46.

In accordance with the terms of their arbitration agreements, each Petitioner commenced separate, individual arbitration with Employers in the AAA in or about April 2020.[4] *See id.* at 11, ¶ 2; 14, ¶ 2; 17, ¶ 2; 20, ¶ 2; *see also id.* at 24, ¶ 17. Petitioners' claims in their separate, individual arbitrations arise from Employers' failure to properly pay overtime and Blue Laws wages to Petitioners and are covered within the scope of Petitioners' arbitration agreements. *See id.* at 25, ¶ 19. At the time Petitioners' commenced arbitration with Employers, *no class* – settlement or otherwise – *had been certified by the MSC and the*

[4] Mr. Daly and Ms. Ingram with AI and HFLLC. Mr. Thomas with AI, HFLLC, and HSLLC. Mr. Silva with AI and HSLLC.

MSC action had been stayed for eighteen (18) months with no docket activity. *See id.* at 3-7 (Docket Sheet).

Employers had, until on or about January 2, 2021, fully participated in each Petitioner's separate, individual arbitration. *See id.* at 25, ¶ 20; *see also id.* at 12, ¶¶ 16-18; 15, ¶¶ 16-18; 18, ¶¶ 16-18; 21, ¶¶ 16-18.

Notwithstanding Petitioners and Employers' valid agreements to submit such disputes to arbitration and Petitioners and Employers' participation in their separate, individual arbitrations, Employers moved to stay each Petitioner's arbitration on or about January 14, 2021. *See id.* at 25, ¶ 21. Notwithstanding Petitioners and Employers' valid arbitration agreements to submit such disputes to arbitration, in or about late January 2021 and early February 2021, each Petitioner's arbitration was stayed by the respective arbitrator upon Employers' motion. *See id.* at 25, ¶ 22. Notwithstanding Petitioners and Employers' valid arbitration agreements to submit such disputes to arbitration only, AI and HFLLC participated in the MSC action by assenting to Plaintiffs' Assented-to Motion for Preliminary Approval of Class Action Settlement ("PAMPA") on or about January 20, 2021. *See id.* at 25, ¶ 23. Notwithstanding Petitioners and Employers' valid arbitration agreements to submit such disputes to arbitration only, Employers participated in the MSC action by assenting to Plaintiffs' FAM on or about October 28, 2021. *See id.* at 8. *No court or government agency*, however, *compelled* AI and/or HFLLC to assent to the PAMPA or Plaintiffs' FAM. *See id.* at 25, ¶ 24.

In the MSC action, Ms. Chechowitz alleged that Employers improperly paid wages to her and putative class members. *See id.* at 25, ¶ 25.

Employers assented to the PAMPA in which plaintiffs requested the court to "settle on a class basis pursuant to Mass. R. Civ. P. 23(c)" and to:

> Preliminarily and conditionally certify the following settlement class: any individual who worked as a Sales Associate or Service Advisor paid on a commissioned basis at an [AI] branded automobile dealership in Massachusetts ([HFLLC], [HSLLC], and AutoFair Nissan of Tewksbury/Chelmsford) for all or part of the period between May 21, 2015 and June 28, 2019 and who did not receive premium pay for working in excess of 40 hours per week, or for working on Sundays and Holidays.

Id. at 25, ¶ 26. Under the Class Action Settlement Agreement and Release of Claims ("CASARC") at issue here, the class definition is as follows:

> All Sales Associates and Service Advisors paid on a commissioned basis who worked at an [AI] branded automobile dealership in Massachusetts ([HFLLC], [HSLLC], and AutoFair Nissan of Tewksbury/Chelmsford) for all or part of the period between May 21, 2015 and June 28, 2019, (the "Settlement Class"), and who did not receive premium pay for working in excess of 40 hours per week, or for working on Sundays or Holidays.

Id. at 67, ¶ 1. The class definition includes Petitioners, who were engaged in arbitration with Employers for approximately ten (10) months before Plaintiffs and Employers executed the CASARC and Employers

assented to Plaintiffs' PAMPA and FAM. *See* RA at 24-25, ¶¶ 17-18; *see also id.* at 6.

Unlike Fed. R. Civ. P. 23, Mass. R. Civ. P. 23 does not contain a provision that allows for a member of a settlement class to "opt-out." *See generally* F.R.C.P. 23. (App.55a); *compare* M.R.C.P. 23. (App.65a).

Petitioners filed an objection to Plaintiffs' FAM on or about October 3, 2021 (*see* RA at 8) raising the same arguments raised here – that the MSC could not, *ab initio* and *as a matter of law*, grant the FAM because the FAA (which applies to Petitioners and Employer's valid arbitration agreements), pursuant to the Supremacy Clause, preempts Mass. R. Civ. P. 23 to the extent that the MSC used Mass. R. Civ. P. 23 to resolve Petitioners' claims pending in arbitration without their consent and in violation of the express terms of the arbitration agreements. Despite the existence of Petitioners' valid, enforceable arbitration agreements, the MSC granted the FAM over Petitioners' objection. (App.4a). Petitioners subsequently filed their notice of appeal in the MSC on or about December 15, 2021 (*see* RA at 9) and brought their appeal before the MAC raising the same issues raised in their Objection.

Thereafter, the MAC affirmed the MSC's decision granting Plaintiff's FAM. (App.8a).

Thereafter, Petitioners petitioned the SJC for further appellate review and it denied Petitioner's petition for further appellate review. *See* App.16a.

C. Proceedings Below

On May 22, 2018, Ms. Chechowitz filed her Class Action Complaint and Jury Demand for unpaid wages

in the MSC naming AI and HFLLC as defendants. On August 21, 2018, Ms. Chechowitz, AI, and HFLLC jointly moved to stay the MSC action and their motion was allowed on August 28, 2018. The MSC action was stayed with no docket activity for over two (2) years.

On October 25, 2019, Petitioners and two (2) others filed their Individual and Class Action Complaint for unpaid wages in Essex County Superior Court naming Employers and Messrs. Crews and Hamel as defendants.

Once Petitioners and the two (2) others were informed of the existence of valid, enforceable arbitration agreements that mandated arbitration as the exclusive means to resolve their claims with Employers and Messrs. Crews and Hamel, on April 1, 2020, Petitioners each initiated individual arbitration by filing their separate, individual demands for arbitration for unpaid wages in the AAA against Employers and Messrs. Crews and Hamel.[5] Employers and Messrs. Crews and Hamel, *without any objection whatsoever*, submitted to arbitrate with each Petitioner. Each arbitration proceeded through discovery for approximately eight (8) months – Employers and Messrs. Crews and Hamel were actively involved in discovery and did not object to proceeding in arbitration – and then, on December 18, 2020 and December 19, 2020, after fact discovery had closed, Petitioners filed motions for summary judgment on their claims for unpaid wages. Thereafter, Employers and Messrs. Crews and Hamel moved to stay each arbitration announcing that Employers had reached a preliminary class action

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[5] *See* n.4, *supra*.

settlement in the action Ms. Chechowitz brought in the MSC – their motions to stay were allowed on January 27, 2021, February 5, 2021, and February 8, 2021, over Petitioners' oppositions. Each arbitrator's order staying the arbitrations essentially did so pending resolution of the MSC matter – each respective arbitrator's order clearly contemplated an outcome where Petitioners, Employers, and Messrs. Crews and Hamel would return to individual arbitration if the MSC did not issue an order granting the proposed class action settlement.

In an attempt to settle the putative class members' claims in the MSC, Ms. Chechowitz filed her First Amended Class Action Complaint and Jury Demand on January 20, 2021, naming Mr. Abdullah as an additional plaintiff and HSLLC as an additional defendant. On that same date, Plaintiffs filed their PAMPA with the assent of AI, HFLLC, and HSLLC in the MSC.

Thereafter, on February 17, 2020, Petitioners and two (2) others (i) moved to intervene in the MSC action, (ii) moved to compel their arbitrations and stay the MSC action, and (iii) opposed Plaintiffs' PAMPA. Petitioners' motion to intervene was denied by the MSC on May 21, 2021 solely on the basis that it was untimely (despite the fact that the MSC action had been stayed for over two (2) years without any docket activity). *See id.* at 185 (stating "[Petitioners] have an interest . . . in this lawsuit[,]" but denying intervention, "[b]ecause [Petitioners] have delayed until a time when intervention would cause . . . unfair prejudice[.]"). Petitioners and two (2) others filed their Notice of Appeal on the denial of their Motion to Intervene on May 27, 2021, but did not pursue

that appeal. Thereafter, the MSC granted Plaintiffs' PAMPA on June 1, 2021.

Also on June 1, 2021, Petitioners filed their Verified Petition for Order Compelling Arbitration, Staying State Court Proceedings, and Granting Declaratory Relief against Employers in the United States District Court for the District of Massachusetts, Eastern Division ("USDCMA"). Then, on August 6, 2021, Petitioners moved on an emergency basis in USDCMA for a preliminary injunction to stay the MSC action and compel their arbitrations.[6] Thereafter, USDCMA denied Petitioners' motion on September 14, 2021, holding that it did not have jurisdiction under the Anti-Injunction Act to stay the MSC proceeding. Petitioners moved for reconsideration of USDCMA's order on September 20, 2021, which was denied on October 1, 2021. Petitioners filed their Notice of Appeal concerning USDCMA's denial of their motion for a preliminary injunction to stay the MSC action and compel their arbitrations on October 4, 2021.

Meanwhile, Petitioners timely filed their Objection to Plaintiffs' FAM in the MSC on October 4, 2021, while pursuing their appeal of USDCMA's order denying their motion for a preliminary injunction to stay the MSC action and to compel their arbitrations in the United States Court of Appeals for the First Circuit ("First Circuit"). The First Circuit appeal was fully briefed and argument was scheduled for January 4, 2022.

Meanwhile, Plaintiffs filed their FAM with the assent of Employers in the MSC on October 18, 2021.

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[6] There was a delay due to the passing of Counsel of Record's co-counsel's father passing away in June 2021.

A hearing on Plaintiffs' FAM was held on November 23, 2021. Then, on December 14, 2021, the MSC granted Plaintiffs' FAM over Petitioners' objection before the First Circuit could hear oral argument of Petitioners' appeal. Accordingly, Petitioners moved to dismiss the First Circuit appeal as "moot" as was suggested by the First Circuit at the January 4, 2022 hearing.

Petitioners then filed their Notice of Appeal concerning the MSC's order granting Plaintiffs' FAM on December 15, 2021.

On January 18, 2022, Petitioners and Employers filed their joint stipulation to dismiss the First Circuit appeal as, again, the issue of staying the MSC action was moot as the MSC granted Plaintiffs' FAM (despite Petitioners' request for a stay) before the First Circuit could rule on the merits of Petitioners' appeal.

Petitioners pursued the appeal of the MSC's order granting Plaintiffs' FAM in the MAC, the appeal was fully briefed and argued, and, on January 18, 2023, the MAC issued its Decision.

Thereafter, Petitioners petitioned the SJC for further appellate review of the Decision. Then, on March 22, 2023, the SJC denied Petitioners petition for further appellate review.

Petitioners' petition for a writ of certiorari to this Court followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted because the MSC's order on Plaintiffs' FAM and the MAC's Decision decided an important federal question in a way that conflicts with relevant decisions of this Court.

First, the Decision clearly ignores this Court's prior decisions requiring arbitration agreements to be enforced according to their terms pursuant to the FAA and the Supremacy Clause. Here, those terms expressly forbid Petitioners' claims *from being resolved in any court action* while mandating arbitration as the *sole means* to resolve Petitioners' claims. Nonetheless, *in direct contravention of the express terms of Petitioners' arbitration agreements*, the MSC's order (affirmed by the MAC) granting Plaintiffs' FAM – in which the class definition included Petitioners and their claims for unpaid wages that had been in arbitration for eight (8) months without objection by Employers – is precisely the "judicial hostility" towards arbitration agreements that spurred Congress to pass the FAA. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (stating, "[t]he FAA was enacted . . . in response to widespread judicial hostility to arbitration agreements.") (internal citations omitted). This Court has described the FAA's purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985); *see also Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 274, n.2 (1932) (stating, "'The purpose of this bill is to make *valid and enforceable agreements for arbitration* (emphasis added)'") (quoting H.R.Rep. No. 96, 68th

Cong., 1st Sess., 1 (1924); 65 Cong. Rec. 1931 (1924) ("[The FAA] creates no new legislation, grants no new rights, except a remedy to enforce an [arbitration] agreement[.]").

This Court's binding precedent is also pellucid on the issue – valid, enforceable arbitration agreements *must* be enforced *according to their terms*. *See*, *e.g.*, *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1415 (2019) (stating, "[t]he FAA *requires courts* to enforce arbitration agreements *according to their terms*, [moreover] state law is preempted to the extent it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the FAA[.]") (internal quotations and citations omitted);[7] *Moses*, 460 U.S. at 20 (stating, "[i]t is true, therefore, that if Mercury obtains an arbitration order for its dispute, the Hospital will be forced to resolve these related disputes in different forums. That misfortune . . . is not the result of any choice between the federal and state courts; it occurs because the [the FAA] *requires piecemeal resolution* when necessary *to give effect to* [*the terms of*] *an arbitration agreement* (emphasis added)."); *id.* at 20 ("Under the [FAA], an arbitration agreement *must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute* but not to the arbitration agreement (emphasis added)."); *Concepcion*, 563 U.S. at 341 (2011) (holding, "[b]ecause it 'stands as an obstacle to the accomplishment and execution of the

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[7] In *Varela*, this Court continued, "[p]arties may generally shape such agreements to their liking . . . [w]hatever they settle on, *the task for courts and arbitrators at bottom remains the same: to give effect to the intent of the parties* (emphasis added)." *Id.* at 1415 (internal citations omitted).

full purposes and objectives of Congress' . . . California's Discover Bank rule is pre-empted by the FAA.") (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Marmet Health Care, Inc. v. Brown*, 132 U.S. 1201, 1203-04 (2012) (citing *Concepcion* and stating, "[a]s this Court reaffirmed last Term, '[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced [preempted] by the FAA[,]'" and holding that West Virginia's state rule prohibition against arbitration agreements for personal injury and wrongful death claims in nursing homes "contrary to the terms and coverage of the FAA."); *Byrd*, 470 U.S. at 217 (stating, "[§ 2 of the FAA] *requires* courts to enforce *the bargain of the parties to arbitrate* (emphasis added)."); *KPMG LLP v. Cocchi*, 565 U.S. 18, 21 (2011) (stating, "§2 of the FAA, 'reflects an emphatic federal policy in favor of arbitral dispute resolution.'"); *Mitsubishi*, 473 U.S. at 625 (stating, "manifested by this provision [9 U.S.C. § 2] and the Act as a whole, is at bottom a policy *guaranteeing the enforcement of private contractual arrangements* . . . [t]he preeminent concern of Congress in passing the Act was to *enforce private agreements* into which parties had entered, a concern which *requires* that we rigorously enforce agreements to arbitrate (emphasis added).") (internal citations and quotations omitted).

Simply put, and as Petitioners argued before the MSC and MAC, the MSC could not, *ab initio* and *as a matter of law*, grant Plaintiffs' FAM pursuant to Mass. R. Civ. P. 23 (which does not contain an "opt-out" provision) so long as the class definition included Petitioners and their claims pending in arbitration because, in so doing, the MSC and the MAC violated

the express terms of Petitioners' arbitration agreements, and thus violated the mandates of the FAA and Supremacy Clause. Accordingly, to the extent that the MSC granted Plaintiffs' FAM pursuant to Mass. R. Civ. P. 23 and the MAC affirmed, Mass. R. Civ. P. 23 is preempted by the FAA and the MSC's order granting Plaintiffs' FAM and the MAC's Decision must be reversed.

Moreover, and as further evidence that the MAC ignored the mandates of the FAA and this Court's precedent concerning the FAA, the MAC incorrectly applied an "abuse of discretion" standard of review of the MSC's order granting Plaintiffs' FAM, essentially affirming that the class action settlement was "fair and reasonable" pursuant to Mass. R. Civ. P. 23, as it was in the "best interests of the class." App.14a. However, as Petitioners argued in their opening and reply briefs in the MAC, the correct standard is *de novo* as the issue before the MAC (and the MSC) was whether the court could, *ab initio* and *as a matter of law*, grant Plaintiffs' FAM when doing so violated the express terms of Petitioners' arbitration agreements in violation of the FAA and corresponding binding precedent – *not* whether the proposed settlement was "fair and reasonable" under Mass. R. Civ. P. 23 and in the "best interest of the class." *See Casavant v. Norwegian Cruise Line, Ltd.*, 952 N.E.2d 908, 911 (Mass. 2011) (stating, "[appellate courts] review a [lower court's] findings of fact under the clearly erroneous standard and [its] *conclusions of law de novo* (emphasis added)."); *see also McReynolds v. Richards-Cantave*, 588 F.3d 790, 800 (2d Cir. 2009) (stating there are several standards of review applicable for a class action settlement: "[w]e . . . review a

district court's factual findings relating to a settlement agreement in a class action lawsuit under the clearly erroneous standard . . . [the] determination that a settlement . . . is 'fair, reasonable and adequate' . . . for abuse of discretion . . . [and] to the extent that a district court's decision rests on an *interpretation of law*, [appellate] review is *de novo* (emphasis added)") (internal citations omitted); *Charron v. Wiener*, 731 F.3d 241, 247 (2d Cir. 2013) ("We review factual findings related to the settlement for clear error and issues of law *de novo*."); *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 965 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 2509 (2020) ("[W]e first review a class certification determination *for legal error under a de novo standard*, and if no legal error occurred, we will proceed to review the decision for abuse of discretion (emphasis added).") (quoting *Sali v. Corona Reg'l Med. Ctr.*, 909 F.3d 996, 1002 (9th Cir. 2018); *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239-240 (1991) (noting that an appeals court reviews a lower court's determinations and interpretation of state law *de novo*); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 379 (8th Cir. 1995) (citing *Russell* and concluding, "we review de novo a [lower] court's interpretation of state law, giving *no deference* to that interpretation (emphasis added)."). Moreover, the First Circuit has held that a lower court abuses its discretion when approving a class settlement when "one side is obviously correct in its assertion of law and fact and it would be clearly unreasonable" to approve the class settlement. *Greenspun v. Bogan*, 492 F.2d 375, 381 (1st Cir. 1974); *see also Salvas v. Wal-Mart Stores, Inc.*, 893 N.E.2d 1187 (Mass. 2008) (concluding that a court abuses its discretion "if the court adopts an *incorrect legal rule* (emphasis added)").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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