NO. 22-1237

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Respondents' Brief in Opposition ("RBO") is replete with misrepresentations of fact, law, what occurred in the proceedings below, and the issues actually before this Court. Respondents employ such tactics because the legal issue here is straightforward, uncontroversial, and ultimately requires this Court to reverse the Massachusetts Appeals Court's ("MAC") order affirming Middlesex County Superior Court's ("MSC") order granting Plaintiffs' Assented-to Motion for Final Approval of Class Action Settlement in which the class definition includes Petitioners[1] and their claims they have been arbitrating since April 2020 before the American Arbitration Association ("AAA"). Simply put, the MSC could not grant final approval of the class action settlement (nor could the MAC affirm the MSC's order granting final approval), *ab initio* and as a matter of law, that included Petitioners' arbitration claims pursuant to Mass. R. Civ. P. 23 (no "opt-out" provision) in violation of the express terms of Petitioners' arbitration agreements over Petitioners' objection. In so doing, the MSC and MAC violated the fundamental principles of 9 U.S.C. §§ 1, *et seq*. ("FAA") and this Court's corresponding binding precedent – and thus the Supremacy Clause of the United States Constitution – which requires courts to enforce arbitration agreements *according to their terms*. And

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[1] "Petitioners," collectively, are RYAN DALY, DAVID C. THOMAS, PAUL T. SILVA, and DIANE INGRAM who 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.

here, the express terms of Petitioners' arbitration agreements required their claims to be resolved *exclusively* in arbitration.

Accordingly, for these reasons, this Court should grant Petitioners' petition for a writ of certiorari.

REPLY BRIEF OF PETITIONERS

A. This Court Has Jurisdiction over this Matter as It Involves a Constitutional Issue: Whether the FAA, *Pursuant to the Supremacy Clause*, Preempts Mass. R. Civ. P. 23.

Contrary to Respondents' argument in their RBO and as discussed in Petitioners' petition, this Court has jurisdiction to hear this matter pursuant the Supremacy Clause because the FAA preempts Mass. R. Civ. P. 23 (which has no "opt-out") to the extent the MAC affirmed the MSC's use of it to approve the class action settlement (which included Petitioners' pending arbitration claims) without Petitioners' consent and in violation of the express terms of their arbitration agreements. In *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407 (2019), this Court held, "[t]he FAA requires courts to 'enforce arbitration agreements *according to their terms . . .' 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 (emphasis added)." *Id.* at 1415.

i. The FAA Governs Petitioners' Arbitration Agreements.

Respondents' most disingenuous argument – that the Massachusetts Arbitration Act (Mass. Gen. Laws ch. 251, §§ 1, *et seq.*) ("MAA") and not the FAA governs Petitioners' arbitration agreements (*see* RBO at 13-17) – is a complete pivot from their argument in the motion to compel arbitration they served plaintiffs in the MSC action, in which they argued the arbitration agreement (identical to Petitioners' arbitration agreements) was governed *by the FAA* because it affected interstate commerce. *See* MAC Record Appendix ("RA") at 54-58.

Respondents abandon the argument they made in their motion to compel[2] and now argue that (i) two of the arbitrators below ruled the MAA governs the arbitration agreements and (ii) the arbitration agreements (which incorporate the FAA *twice*) are "clear and unambiguous" as to which arbitration act applies. *See* RBO at 14-15.

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2 To "support" their disingenuous pivot, Respondents incredulously argued before the MAC that they changed their position "after Plaintiffs had pointed to the choice of law provision in the [arbitration] agreements." Respondents' MAC Brief at 28. Respondents wanted the MAC to believe that they, who (i) drafted the arbitration agreements, (ii) were engaged in seven arbitrations with counsel for Petitioners, and (iii) researched and served the motion to compel, did not read or know about the choice of law provision in the arbitration agreements! Respondents did not "see the light" until the MSC plaintiffs pointed to the choice of law provision, then realized they were wrong about the FAA governing the agreements. Respondents' duplicity knows no bounds.

However, Respondents' arguments fail for several reasons. First, case law is clear that the FAA governs Petitioners' arbitration agreements. In order for the MAA to govern, the arbitration agreement must "unambiguously express an intent to displace the FAA." *Martis v. Dish Network Serv., L.L.C.*, 597 F. App'x 301, 303-04 (6th Cir. 2015); *see also Cooper v. WestEnd Corp. Mgmt., L.L.C.*, 832 F.3d 534, 544 (5th Cir. 2016) (same); *BNSF Ry. Co. v. Alstom Transp., Inc.*, 777 F.3d 785, 790 (5th Cir. 2015) (same). In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 53 (1995), this Court relied upon *contra proferentum* doctrine where the arbitration agreement contained a choice-of-law provision for New York law while also incorporating NASD arbitration rules, instructing:

> [a]t most, the choice-of-law clause introduces *an ambiguity* into an arbitration agreement . . . [and defendant] cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language *against the interest of the party who drafted it* (emphasis added).

Id. at 62 (internal citations omitted); *see also Uhl v. Komatsu Forklift Co., Ltd.*, 512 F.3d 294, 302-03 (6th Cir. 2008) (concluding that FAA applied where the parties' arbitration agreement stated that *both the state and federal arbitration acts apply*); *Martis*, 597 F. App'x at 303-04 (stating, "In the instant case, the Arbitration Agreement does not unambiguously express an intent to displace the federal standard with Michigan law because it states that it is governed by both the FAA and Michigan's substantive law. Ambiguities are resolved in favor of the federal standard, thus [the FAA] applied[.]"); *Cooper*, 832 F.3d at 544

("FAA rules apply absent clear and unambiguous contractual language to the contrary."); *Alstom Transp., Inc.*, 777 F.3d at 790 (same); *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 341 (5th Cir. 2004) (same).

Here, the language in Petitioners' arbitration agreements makes clear that the FAA governs as the FAA is invoked *twice* (*see* RA at 27, 33, 39, 45 and 31, 37, 43, 49). Moreover, Petitioners' arbitration agreements also invoke the AAA Rules, the MAA, and Massachusetts law ("choice-of-law" provision). *See* RA at 27-50, 60-65. It is difficult to see how incorporating the FAA *twice* evidences a "clear intent to displace the FAA." At most, this creates an ambiguity that must cut against the interest of Respondents and also be resolved in favor of the FAA. The facts here are on all fours with *Uhl*, *supra*, where the court held the FAA applied when the arbitration agreement invoked both the FAA and the state arbitration act. Further, where, as here, the arbitration agreements affect interstate commerce, then the FAA applies. *See Mastrobuono*, *supra*; *see also Uhl*, *supra*.[3]

In the rare cases where courts have found a "clear and unambiguous intent to displace the FAA[,]" the arbitration clause invokes *only* the state arbitration act and not the FAA – unlike here, in *Uhl*, and *Mastrobuono, supra*. *See, e.g., Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. U.*, 489 U.S. 468, 477-79 (1989) (California's arbitration act applied

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[3] Moreover, this Court has instructed that incorporation of the AAA rules, as is the case here, also favors application of the FAA. *See Preston v. Ferrer*, 552 U.S. 346, 988 (2008).

where arbitration agreement expressly referenced the state arbitration act, but not the FAA); *Ford v. NYLCare Health Plan of Gulf Coast, Inc.*, 141 F.3d 243, 244, 249 (5th Cir. 1998) (arbitration agreement displaced FAA where it *made no mention of the FAA* and where front page of agreement stated: "NOTICE: THIS AGREEMENT IS SUBJECT TO ARBITRATION UNDER THE TEXAS GENERAL ARBITRATION ACT."); *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 890 (Tex. 2010) (state arbitration act applied where arbitration agreement *did not mention FAA*, but stated all disputes "shall be resolved . . . pursuant to the Texas General Arbitration Act[.]").

It is hard to imagine how the arbitration agreements here, which invoke the FAA *twice*, evidence a "clear and unambiguous intent to displace the FAA." At most, incorporating the FAA twice, the MAA, and AAA Rules creates an ambiguity that requires application of the FAA – especially where, as here, the agreements affect interstate commerce. *See Mastrobuono* 514 U.S. at 62-63; *see also Uhl* 512 F.3d at 304 (concluding that FAA applied where parties' arbitration agreements stated both state and federal arbitration acts apply); *Martis*, 597 F. App'x at 304 (holding ambiguities are resolved in favor of the FAA).

Lastly, there were four arbitrations below and all four arbitrators simply ruled on a motion to stay the individual arbitration pending the outcome in the courts through the entire appellate process. To the extent that Arbitrator Roth stated that the MAA applied – this was in *dicta* on an order to stay – in no way was the issue fully briefed. Further, the second arbitrator simply stated that "Massachusetts law" applied – not that the MAA applied.

B. The Standard of Review on a Question of Law is *De Novo*.

Recognizing that they cannot prevail on the merits of Petitioners' federal preemption argument, Respondents attempt to twist the issue before this Court (the same tactic they engaged in before the MAC) by positing that the issue is "whether the class action settlement was fair and reasonable" – which would require an "abuse of discretion" standard of review. *See* RBO at 17-18.

However, Petitioners argued before the MSC, MAC, in their FAR application, and argue here that the *actual* legal issue is whether the lower court could, *ab initio* and as a matter of law, approve the class settlement pursuant to Mass. R. Civ. P. 23 (which does not contain an "opt-out"), when doing so would be in violation of the express terms of the arbitration agreements, and thus in violation of the FAA and Supremacy Clause. *See generally* Petition.

Thus, the primary issue before the MSC and MAC was one of federal preemption of a state rule of procedure, which is reviewed *de novo*. *See Drake v. Lab. Corp. of Am. Holdings*, 458 F.3d 48, 56 (2d Cir. 2006) ("[A] determination regarding preemption is a conclusion of law, and we therefore review it de novo."); *see also Meredith v. Louisiana Fed'n of Tchrs.*, 209 F.3d 398, 404 (5th Cir. 2000) ("[p]reemption is a question of law . . . review[ed] de novo."); *BNSF Ry. Co. v. Hiett*, 22 F.4th 1190, 1193 (10th Cir. 2022) (same); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 767 (11th Cir. 1998) (same); *PCS Phosphate Co. Inc. v. Norfolk S. Co.*, 559 F.3d 212, 217-18 (4th Cir. 2009) (same); *Casavant v. Norwegian Cruise Line, Ltd.*, 952 N.E.2d

908, 911 (Mass. 2011) ("[appellate courts] review a [lower court's] . . . conclusions of law de novo.").

Accordingly, the correct standard of review here is *de novo*.

C. The Arbitrators Did Not Rule on Whether the FAA Preempts Mass. R. Civ. P. 23.

Respondents next attempt to twist the granting of simple motions to stay Petitioners' arbitrations to "support" their illogical argument that the arbitrators already ruled on the federal preemption issue. *See* RBO at 19-23. This is simply false – each arbitrator granted a stay in order to see what the courts would do – nothing more. In *Thomas*, the arbitrator issued a stay because, "[t]he issue of claimant being part of the Chechowitz class . . . is better heard by the [MSC] who can decide whether or not Claimant is part of the class[,]" and concluded, "[i]f the [MSC] holds [Mr. Thomas] is not part of the Chechowitz class settlement . . . then th[e *Thomas* arbitration] can be heard at that time." Appendix at App.25a. In *Silva*, the arbitrator issued a stay pending the outcome in Chechowitz so as not to have, "active litigation on multiple tracks[,]" and concluded, "[should] the Court determine that Silva is not subject to the terms of the [class settlement] and his claims should not be released, *this arbitration will continue afterward* (emphasis added)." *Id.* at App.42a-App.43a. In *Ingram*, the arbitrator noted, "should the court reject the class settlement or otherwise exempt [Ms. Ingram] from it . . . this [arbitration] can begin apace." *Id.* at App.50a. Lastly, in *Daly*, the arbitrator issued a stay after, "weighing the competing interests of avoidance of duplicative legal proceedings and the possibility of inconsistent results[,]" and concluded that, if Mr.

Daly was not deemed to be subject to the Chechowitz class settlement, "or otherwise exempted[,]" then the temporary stay would be lifted and arbitration would proceed. *Id.* at App.30a.[4] It is clear that all four arbitrators merely granted stays in order to see what the courts would do and in no way did they rule on the issues raised by Petitioners here or before the courts. All four arbitrators clearly contemplated an outcome where Petitioners' claims would not be resolved in the courts and return to be resolved in arbitration. Respondents attempt to make more out of the arbitrators' rulings on simple motions to stay is unavailing and contradicted by the express language in the very rulings cited above. Moreover, all four arbitrations are currently pending before the AAA waiting for final resolution in the courts.[5]

D. The Cases Respondents Cite to Argue the Lower Court Could Approve the Class Action Settlement are Inapposite.

Respondents' last argument also completely misses the mark as they continue to misrepresent law. Res-

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[4] Respondents suggest that courts cannot rewrite the class definition to exclude Petitioners (*see* RBO at 22 n.9), but that is irrelevant because the settlement agreement requires the parties to "negotiate in good faith in an effort to secure a substitute agreement for the Settlement Class, with terms that conform as closely to this Agreement[,]" should the settlement not be approved by the courts. RA at 70.

[5] Respondents argue that the arbitrators decided the "gateway" issue of arbitrability when granting the stays. *See* RBO at 9. This "gateway" issue was already decided in favor of arbitrability when the parties submitted to arbitration with no objection made by Respondents. *See Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (arbitrability is a gateway issue).

pondents cite *federal court cases* for the proposition that the MSC could settle Petitioners' pending arbitration claims pursuant to Mass. R. Civ. P. 23. *See* RBO at 23-26. These *federal cases*, however, are factually and legally inapposite. First, Respondents cite class settlements that were brought pursuant to Fed. R. Civ. P. 23, which includes "opt-out" provisions, in contrast to the class settlement here, which was governed by Mass. R. Civ. P. 23 and does not contain "opt-out" provisions. This critical, damning difference undercuts Respondents' argument – if Petitioners could have opted out, they would have. Second, in all of the cases Respondents cite, arbitration was either initiated *after* (i) the "bar date" to submit claims (after preliminary approval of the proposed class settlement) or (ii) final approval of the class settlement. Here, Petitioners filed demands for arbitration in April 2020 and were arbitrating with Respondents for ten months before Respondents moved to stay the arbitrations. Final approval of the MSC settlement (which is still not "final" as it is being appealed here) took place in December 2021, seventeen months after Petitioners initiated arbitration. Petitioners take each case Respondents cite in turn.

In *In re VMS Ltd. P'Ship Sec. Litig.*, 26 F.3d 50 (7th Cir. 1994), the plaintiff first submitted a claim in the class settlement, then filed for arbitration, and then attempted to "opt-out" after the deadline to do so. *See id.* at 51. The court held that "[b]y electing not to opt-out of the class [when he first submitted his claim], Berger received the benefits and accepted the detriments of the settlement." *Id.* In *In re Citigroup Inc. Sec. Litig.*, 2014 WL 3610988 (S.D.N.Y. Jul. 21, 2014), a settlement notice was sent out with an "opt-

out" provision (Fed. R. Civ. P. 23) and final approval of the settlement occurred. *See id.* at *1-2. The claimant failed to "opt-out" of the settlement and brought a demand for arbitration four months *after final approval* of the settlement. *See id.* at *4-6. In *Burgess v. Citigroup, Inc.*, 625 F. App'x 6 (2d Cir. 2015), the plaintiff failed to properly "opt-out" (Fed. R. Civ. P. 23) under the express terms of the settlement notice, and thus his claims were included in the settlement and released. *See id.* at 9-10. In *Anderson v. Beland (In re Am. Exp. Fin. Advisors Sec. Litig.)*, 672 F.3d 113 (2d Cir. 2011), a settlement notice was sent out with instructions on how to opt-out (Fed. R. Civ. P. 23), but the plaintiff failed to opt-out and the settlement was approved. *See id.* at 121. After failing to opt-out, the plaintiff brought a FINRA complaint alleging claims that were covered by the settlement – but the court did not allow him to proceed because the claims were already released as part of the settlement. *See id.* at 124.

Further, in *In re Lehman Bros. Secs. & Erisa Litig.*, 2012 WL 2478483 (S.D.N.Y. Jun. 29, 2012), Respondents completely miss the point and, contrary to their reading of the case, the court denied SunTrust's motion to enforce the settlement and enjoin the bank's arbitration because the bank's arbitration claims were not based on an "identical factual predicate" as the "settled" claims and arbitration proceeded. *See id.* at *8.

Lastly, Respondents argue that language in the arbitration agreements permitted the court to tear up the arbitration agreements (*see* RBO at 23 (arguing that the arbitration agreements mandate the claims be settled in arbitration "except where compelled by

[a] court")). This argument falls flat as Respondents forget that no court "compelled" them to attempt to settle Petitioners' arbitrable claims in the MSC. This argument is beyond the pale and an affront to logic and reason.

CONCLUSION

Petitioners' petition for a writ of certiorari should be granted.

Respectfully submitted,

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