No. _____

In the Supreme Court of the United States

THE KEY FINANCE, INC. AND THE KEY, LLC,
Petitioners,

v.

DJ KOON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decisions below violated the Federal Arbitration Act and decades of Court precedent by failing to enforce the express terms of the parties' Arbitration Agreements; and

Whether the decisions below violated the Federal Arbitration Act by delegating the decision as to whether to award attorneys' fees and costs to the trial court on remand, as opposed to vacating the arbitrator's award and leaving open the possibility of further proceedings under the Arbitration Agreements.

PARTIES TO THE PROCEEDING

Petitioners The Key Finance, Inc. and The Key, LLC ("Key" collectively) were Plaintiff/Third-Party-Defendant/Appellees in the trial and appellate courts below. Respondent DJ Koon ("Respondent") was a Defendant/Counter-Claimant/Third-Party Claimant/ Appellant before those courts.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent corporations and that no publicly traded company owns 10% or more of their stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Western District of Oklahoma (U.S.D.C. W.D.):

> *The Key Finance, Inc. v. DJ Koon,* Case No. CIV-13-998-C (October 4, 2013, Order Granting the Parties' Joint Motion to Remand)

In the Supreme Court of Oklahoma:

> *The Key Finance, Inc. v. DJ Koon,* Case No. 112,853 (April 4, 2016, Mandate – Reversed and Remanded)

District Court of Oklahoma County, State of Oklahoma:

> *The Key Finance, Inc. v. DJ Koon*, Case No. CS-2013-4939 (August 25, 2017, Order Granting Renewed Motion to Compel Arbitration)

In the Supreme Court of Oklahoma:

The Key Finance, Inc. v. DJ Koon, Case No. 116,388 (May 7, 2018, Order Affirming Trial Court Decision)

The Key Finance, Inc. v. DJ Koon, Case No. 119,063 (May 17, 2022, Corrected Order Denying Petition for Certiorari)

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All of the relevant decisions below are unreported. The Arbitrator's orders on the merits of the parties' claims and defenses are reprinted in the Appendix ("App.") at 30-42. The Arbitrator's orders denying the parties' motions for attorneys' fees and costs are reprinted at 24-29. The trial court's decision refusing to vacate the orders denying the parties' motions for attorneys' fees and costs is reprinted at 22-23. The Oklahoma Court of Civil Appeals' reversal of the trial court's decision is reprinted at 2-21. Lastly, the Oklahoma Supreme Court's summary denial of Petitioners' petition for certiorari is reprinted at 1.

JURISDICTION

The Supreme Court of Oklahoma, which is Oklahoma's highest court, rendered its decision on May 17, 2022. App. at 1. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part:

> The Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound

> thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 10 of the FAA, 9 U.S.C. § 10, provides in pertinent part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration: (1) where the award was procured by corruption, fraud or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the

arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

This case arises from the now-repeated defiance by Oklahoma's appellate courts of this Court's holdings that state courts (no matter the level) "must place arbitration agreements on equal footing with other contracts, and enforce them **according to their terms.**" *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 339 (2011) (emphasis added); *see also, Nitro-Lift Techs., L.L.C. v. Howard,* 568 U.S. 17 (2012) (reversing Oklahoma Supreme Court because it disregarded this Court's precedents on the FAA). Simply stated, state and federal courts are without power to "rewrite" arbitration agreements for the parties simply to reach a particular result.

In this case, the parties executed two Arbitration Agreements when Respondent purchased a 2005 Nissan Sentra from Petitioner The Key Cars, LLC in July 2012. Both Arbitration Agreements unambiguously provided that "[t]he **arbitrator shall decide who shall pay any additional costs and fees**." Relying on this language, and after a 3-day trial on the merits resulting in no monetary recovery for any

party, Arbitrator Larry Ottaway denied the parties' requests for attorneys' fees and costs, finding that the above-quoted language gave him broad discretion to decide whether to award fees and costs to anyone and that the only reasonable fee/cost award was to award nothing at all. App. at 24-29.

Unsatisfied with Arbitrator Ottaway's fee/cost ruling, Respondent asked the trial court to intervene, relying on the judicially-crafted ground for vacation known as "manifest disregard of the law." The trial court denied Respondent's motion to vacate, and Respondent appealed.

In an unpublished 2-1 decision, the Oklahoma Court of Civil Appeals ("COCA") reversed. In essence, the COCA majority substituted its judgment for that of Arbitrator Ottaway because it disagreed with Arbitrator Ottaway's interpretation of the Arbitration Agreements' fee/cost provision quoted above. In that regard, the COCA majority concluded that the phrase – "[t]he arbitrator shall decide who shall pay any additional costs and fees" – actually meant that Arbitrator Ottaway would decide who would pay "any additional **arbitration** costs and fees." The COCA dissent summarized what the majority did perfectly:

> After specifically allocating certain fees and costs, the contract here provided: "The arbitrator shall decide who shall pay **any additional costs and fees."** . . . In my view, this broad language vested the arbitrator with the authority to determine whether to award **any fee** or **any cost** to either party, or not. The majority opinion adds language to the contract

> in finding that "this provision of the Agreement appears to address ' **arbitration** costs and fees' and does not by its own encompass attorney fees." *Majority Opinion,* pg. 14 (emphasis added). In my view, the reference in the contract to **any** fee necessarily encompasses an attorney's fee.

Petitioners timely filed a petition for certiorari with the Oklahoma Supreme Court, but certiorari was summarily denied on May 16, 2022.

Because the COCA and Oklahoma Supreme Court decisions below are irreconcilable with the FAA and decades of binding precedent from this Court, Petitioners respectfully request that the Court grant the petition for certiorari, summarily reverse the appellate decisions below, and remand for further proceedings not inconsistent with these precedents. *See, e.g., Citizens Bank v. Alafabco*, 539 U.S. 52 (2003) (summarily reversing misapplication of this Court's FAA precedent). Alternatively, the Court should grant plenary review.

A. Factual Background

Petitioner The Key, LLC sold Respondent a 2005 Nissan Sentra in July 2012. Like most car sales, the transaction was embodied in a number of agreements Respondent signed on the day of purchase. Among those were two Arbitration Agreements. Critical to this appeal, both Arbitration Agreements unambiguously provided that the arbitrator "shall decide who shall pay any additional costs and fees"

and further provided that they were governed by the FAA.

Pursuant to an agreement between Petitioners, Petitioner The Key, LLC's interest in the transaction was assigned to Petitioner The Key Finance, Inc. Respondent eventually stopped making his car payments, and the car was repossessed and sold at auction leaving a deficiency balance of $7,596.17. Petitioner The Key Finance, Inc. then commenced the proceedings below seeking to collect this small deficiency from Respondent.

B. The Proceedings Below

Rather than narrowly tailor his defense to what would have otherwise been a simple deficiency claim, Respondent took a shotgun approach and turned this case into a complex class action and statutory lawsuit that largely had nothing to do with whether he had some legal justification for failing to make his car payments. His 16-count counterclaim included individual and class action claims for invasion of privacy, truth in lending violations and warranty fraud wherein Respondent clearly hoped to score a multi-million dollar settlement or judgment. He also asserted claims for violations of the Uniform Commercial Code, attacking various aspects of Petitioner The Key Finance, Inc.'s repossession and re-sale of the car.

Petitioners ultimately defeated Respondent's shotgun approach. Petitioner The Key Finance, Inc. succeeded in having the case compelled to arbitration, after which the parties mutually selected Arbitrator

Ottaway to arbitrate the case. Respondent then obtained leave to add Petitioner The Key, LLC as a third-party defendant and asserted the same set of claims against both Petitioners. Once in arbitration, Petitioners prevailed on all of Respondent's affirmative claims for relief whether on dismissal (at the pleading stage), on summary judgment or at trial. App. at 30-42. No party recovered any money damages at trial, and the only affirmative relief awarded was rescission of the car sale. *Id.* Arbitrator Ottaway's decisions on the merits of the parties' claims and defenses were never appealed.

Both parties requested prevailing party attorneys' fees and costs after trial, albeit on different statutory grounds. Keeping in mind the result obtained by the parties (no money damages recovered in a multi-million dollar case) and finding the Arbitration Agreements gave him broad discretion as to whether to award any attorneys' fees and costs, Arbitrator Ottaway declined to award the parties their requested attorneys' fees and costs. Respondent returned to the trial court and filed a motion to vacate Arbitrator Ottaway's fee/cost ruling, arguing that said ruling manifestly disregarded the law. However, the trial court denied Respondent's motion. App. at 22-23.

Respondent then appealed the denial of his motion to vacate. The appeal was not retained by the Oklahoma Supreme Court but was assigned to a three-member COCA panel. On September 29, 2021, COCA issued a 2-1 opinion reversing the trial court's denial of Respondent's motion to vacate and remanding the case to the trial court – as opposed to Arbitrator Ottaway –

to decide what, if anything, to award to Respondent in the form of attorneys' fees and costs.

Inexplicably, and despite the Arbitration Agreements' unambiguous directive that the FAA controls, the COCA majority relied upon state law (including Oklahoma's Uniform Arbitration Act) as a basis for vacation of Arbitrator Ottaway's fee/cost ruling and re-wrote the Arbitration Agreements in favor of Respondent and to Petitioners' detriment. App. at 2-21. Specifically, the COCA majority added language to the Arbitration Agreements by re-writing the phrase "any additional costs and fees" to say "any additional **arbitration** costs and fees." App. at. 21. Petitioners filed a petition for certiorari with the Oklahoma Supreme Court, but certiorari was summarily denied on May 16, 2022. App. at 1. This petition follows.[1]

C. Federal Questions Raised in the Proceedings Below

The application of the FAA was undisputed by the parties throughout the proceedings below. Petitioner The Key Finance, Inc. moved to compel arbitration based upon the FAA, and the case was ultimately

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[1] Respondent has renewed his request for attorneys' fees and costs in the trial court since the case was remanded. Remarkably, despite recovering no money damages, he is asking the trial court to award him $608,532.58 in attorneys' fees and costs. That figure includes a 40% lodestar multiplier that Respondent and his counsel apparently believe is warranted by the result obtained here, which included no monetary recovery at all and a victory on only one of sixteen (16) or more affirmative claims for relief. The trial court has not yet ruled on Respondent's request.

compelled to arbitration pursuant to the FAA after two arbitration-related appeals by Respondent and a final evidentiary hearing on the question of arbitrability at the trial court level. Subsequently, when Respondent moved to vacate Arbitrator Ottaway's fee/cost ruling, Petitioners cited FAA precedent in their objection to that motion, which the trial court presumably relied upon in denying that motion. Petitioners then cited much of this same precedent, as well as the text of the FAA itself, in their appellate briefing below and in their petition for certiorari to the Oklahoma Supreme Court. Thus, the federal questions presented in this petition were raised at every relevant turn in the proceedings below and are ripe for this Court's consideration.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Statutory Text of the FAA, as Interpreted by this Court, Forecloses Judicial Revision of Written Arbitration Agreements by State Courts.

The COCA majority's opinion below did not specify the statutory basis upon which they were acting in vacating Arbitrator Ottaway's fee/cost ruling. They quoted the statutory grounds for vacation contained in Oklahoma's Uniform Arbitration Act and relied primarily on Oklahoma Supreme Court precedent, notwithstanding the Arbitration Agreements' clear directive that that the FAA controls. It nevertheless appears that the COCA majority's decision rested on one of two grounds: that Arbitrator Ottaway either (1) exceeded his powers under the Arbitration

Agreements or (2) manifestly disregarded the law.[2] Neither ground was supported by the record.

The FAA provides that 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[.]" 9 U.S.C. § 2. Based upon this language, this Court has long held that both state and federal courts "must place arbitration agreements on equal footing with other contracts, and enforce them **according to their terms.**" *Concepcion,* 563 U.S. at 339 (emphasis added). It is therefore a violation of the FAA for a state appellate court to re-write an unambiguous arbitration agreement, as re-writing such an agreement is the antithesis of enforcing that agreement "according to its terms." *Id.*; *BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd.,* 689 F.3d 481, 496 (5th Cir. 2012) ("for the district court to substitute its own notion of fairness in place of the explicit terms of the parties' agreement would deprive them of the benefit of their bargain just as surely as if the district court refused to enforce their decision to arbitrate"); *Williams v. E.F. Hutton & Co.,* 753 F.2d 117, 119 (D.C. Cir. 1985) ("The arbitration agreement is a contract, and the court will not rewrite it for the parties.").

"Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances." *Oxford Health Plans LLC v. Sutter,* 569 U.S. 564, 569 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 942 (1995)). If "full-bore legal and

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[2] It should be noted that manifest disregard of the law was the only ground for vacation raised by Respondent in his briefing below.

evidentiary appeals" from arbitration decisions were permissible, arbitration would merely be a "prelude to a more cumbersome and time-consuming judicial review process." *Hall Street Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 588 (2008). As a result, state courts at both the trial and appellate levels must exercise "great caution" when a party asks for an arbitral ruling to be set aside. *Ormsbee Dev. Co. v. Grace,* 668 F.2d 1140, 1147 (10th Cir. 1982).

Section 10(a)(4) of the FAA authorizes courts to set aside arbitral awards "where the arbitrator[] exceeded [his] powers." "A party seeking relief under that provision bears a heavy burden." *Oxford,* 569 U.S. at 569. "It is not enough . . . to show that the [arbitrator] committed an error – or even a serious error." *Stolt-Nielsen S.A. v. AnimalFees Int'l Corp.,* 559 U.S. 662, 671 (2010). "Because the parties 'bargained for the arbitrator's construction of their agreement,' an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Oxford,* 569 U.S. at 569 (quoting *Eastern Assoc. Coal Corp. v. Mine Workers,* 531 U.S. 57, 62 (2000)). Only when the arbitrator acts outside the scope of his contractual authority by issuing an award that merely reflects his own sense of justice can a court overturn his decision. *Id.* "So the sole question . . . is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.*

Manifest disregard challenges carry a similarly high burden of proof. Federal courts have emphasized that the manifest disregard doctrine is a "**doctrine of last**

resort" reserved for "those **exceedingly rare** instances where some **egregious impropriety** on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply." *Wallace v. Buttar,* 378 F.3d 182, 189 (2nd Cir. 2004) (emphasis added). Like Section 10(a)(4) challenges, the question in most instances where manifest disregard is raised is whether the arbitrator acted within the authority delegated to him by the relevant arbitration agreements, not whether he interpreted the law correctly or incorrectly. *Dish Network LLC v. Ray*, 900 F.3d 1240, 1248 (10th Cir. 2018).

Arbitrator Ottaway's fee/cost ruling here was nothing more than an exercise of what he perceived – *e.g.* interpreted – to be contractually-delegated discretion to decide whether any party would be entitled to their attorneys' fees and costs. Again, both Arbitration Agreements provided that "[t]he **arbitrator shall decide who shall pay any additional costs and fees**." App. at 22 (emphasis added). Arbitrator Ottaway made clear he was relying upon this provision in his second order denying an award of fees/costs by stating: **"[u]nder the broad discretion granted by the arbitration agreement** and the case law cited in my original order, I still believe that the proper and most equitable ruling is that 'no fee is the appropriate fee' in this case." App. at 25 (emphasis added). The question here should be whether Arbitrator Ottaway attempted to, and then did, interpret the Arbitration Agreements in fashioning that ruling. The answer is that he did, and federal law prohibits a state appellate court from undertaking an analysis of whether or not his interpretation of the

Arbitration Agreements in that respect was "right or wrong," or "correct or incorrect." *Oxford,* 569 U.S. at 569.

The COCA majority's decision to re-write the Arbitration Agreements' fee/cost language was seemingly motivated by the sometimes mandatory fee-shifting language contained in 12 O.S. § 936, which provides in pertinent part as follows:

> In any civil action to recover . . . [on a] contract relating to the purchase or sale of goods . . . unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

12 O.S. § 936(A). Although fee/cost awards can be mandatory pursuant to this statute, that is not always the case. On its face, the statute makes clear that fee/cost awards are not mandatory when "otherwise provided by . . . the contract which is the subject of the action." *Id.* That is precisely the situation presented to Arbitrator Ottaway, the trial court, COCA and the Oklahoma Supreme Court in the underlying proceedings: the Arbitration Agreements provided that "[t]he **arbitrator shall decide who shall pay any additional costs and fees**," meaning the "contract which is the subject of the action" provided otherwise and a fee award under 12 O.S. § 936 was **not mandatory**. App. at 22 (emphasis added). The error here is that the COCA majority, in violation of the FAA and this Court's precedent, rewrote this language as part of an effort to make it appear as though the

language did not speak to the issue of awarding attorneys' fees and costs. That error was buttressed when the Oklahoma Supreme Court summarily refused to intervene by denying Petitioners' petition for certiorari.

Petitioners' only remaining avenue to reverse the erroneous decisions of COCA and the Oklahoma Supreme Court is to seek a writ of certiorari in this Court. The Court should grant a writ of certiorari, summarily reverse the decisions of both COCA and the Oklahoma Supreme Court and reinstate and affirm the trial court's denial of Respondent's motion to vacate Arbitrator Ottaway's fee/cost ruling. In the alternative, the Court should grant plenary review.

B. Even if Vacation Was Warranted, COCA Violated the FAA by Impermissibly Delegating Decision-Making Authority to the Trial Court as Opposed to Arbitrator Ottaway.

Section 10(b) of the FAA – which COCA should have applied here if it was going to vacate any portion of an arbitral award – provides as follows: "[i]f an award is vacated [as happened here] and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators." 9 U.S.C. § 10(b). As this Court has explained,

> Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, **as a rule the court must not foreclose further**

> **proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargain for** . . . Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 41 n. 10 (1987) (emphasis added). Applying this principle, courts have remanded questions to the original arbitrator for decision while bearing in mind the twin goals of arbitration, which are to settle disputes efficiently and avoid long and expensive litigation. *Cannelton Industries, Inc. v. District 17, United Mine Workers of Am.,* 951 F.2d 591, 595 (4th Cir. 1991).

For the reasons stated above, no portion of Arbitrator Ottaway's fee/cost ruling should have been vacated. Doing so in the fashion COCA did (which the Oklahoma Supreme Court refused to reverse) constituted precisely what the FAA and cases like this Court's decision in *Misco* prohibit: substitute a judicial determination by COCA for Arbitrator Ottaway's decision despite the fact that the latter is what the parties bargained for in Arbitration Agreements.

But at a minimum, Arbitrator Ottaway's fee/cost ruling should simply have been vacated to leave open

the possibility of further proceedings, with at most a remand to the trial court to make the decision as to **who should decide** how much, if any, in fees/costs to award to Respondent. Because COCA took things an impermissible step further and delegated decision-making authority to the trial court, it should be summarily reversed.

C. The Decision Below Is Exceptionally Important.

Given the direct conflict between the appellate decisions below with this Court's precedent, the actions taken by COCA and the Oklahoma Supreme Court in this case are inconsistent with this Court's fundamental role in our judicial system. The Supremacy Clause mandates that "the Judges in every state shall be bound" by federal law. U.S. Const. Art. VI, cl. 2. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312 (1994).

The threat that Oklahoma's appellate courts will continue to re-write arbitration agreements to reach a particular result in cases where the FAA controls is supported by the appellate courts' silence as to any limiting principle in the relevant decisions below. These decisions reveal a willingness to take such an approach regardless of the subject matter of the transaction containing the relevant arbitration agreement. It is important for this Court to once

again[3] put an end to Oklahoma courts' judicial encroachment into areas clearly preempted by the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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[3] *See Nitro-Lift,* 568 U.S. 17.