No. _____

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, PHILIP MORRIS USA INC., COMMONWEALTH BRANDS, INC., ET AL.,

v.

COMMONWEALTH OF PENNSYLVANIA BY KATHLEEN G. KANE, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA.

On Petition For A Writ Of Certiorari To The Commonwealth Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when the Federal Arbitration Act ("FAA") governs an arbitration, the FAA's judicial-review standards apply in state court and preempt application of different state-law judicial-review standards.

2. Whether, when arbitrators have jurisdiction to resolve a contract dispute, the FAA prohibits a court from holding that they "exceeded their powers" if the court concludes on the merits that their contract interpretation is "unambiguously" and "irrationally" incorrect.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners here, who were Appellants below, are: R.J. Reynolds Tobacco Company; Philip Morris USA Inc.; Commonwealth Brands, Inc.; Daughters and Ryan, Inc.; House of Prince A/S; Japan Tobacco International U.S.A., Inc.; King Maker Marketing, Inc.; Kretek International, Inc.; Liggett Group LLC; Peter Stokkebye Tobaksfabrick A/S; P.T. Djarum; Santa Fe Natural Tobacco Company, Inc.; Sherman 1400 Broadway N.Y.C. Inc.; Top Tobacco, L.P.; Von Eicken Group; and Farmer's Tobacco Company of Cynthiana, Inc. (Another Defendant-Appellant below, Lorillard Tobacco Company, has since merged with R.J. Reynolds Tobacco Company.)

The Respondent here, who was Appellee below, is the Commonwealth of Pennsylvania, by Kathleen G. Kane in her official capacity as Attorney General of the Commonwealth.

Petitioner R.J. Reynolds Tobacco Co. is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., which in turn is a wholly owned subsidiary of Reynolds American Inc., a publicly held company. British American Tobacco p.l.c. and its subsidiaries collectively own more than 10% of the common stock of Reynolds American, Inc.

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Commonwealth Brands, Inc. is a subsidiary of CBHC, Inc. Imperial Brands P.L.C. indirectly owns more than 10% of the stock of Commonwealth Brands, Inc.

Petitioner Daughters & Ryan, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner House of Prince A/S is a subsidiary of British American Tobacco, p.l.c., and no other publicly held company owns 10% or more of its stock.

Petitioner Japan Tobacco International U.S.A., Inc., is a subsidiary of JTI (US) Holding Inc. Japan Tobacco Inc. indirectly owns more than 10% of the stock of Japan Tobacco International U.S.A., Inc.

Petitioner King Maker Marketing, Inc., is a subsidiary of ITC Ltd., and no other publicly held company owns 10% or more of its stock.

Petitioner Kretek International, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Liggett Group LLC is a subsidiary of VGR Holding LLC. Vector Group Ltd. indirectly owns 10% or more of the stock of Liggett Group LLC.

Petitioner Peter Stokkebye Tobaksfabrik, A/S, is a subsidiary of Scandinavian Tobacco Group Assens A/S. Scandinavian Tobacco Group A/S indirectly owns 10% or more of the stock of Peter Stokkebye Tobaksfabrik, A/S.

Petitioner P.T. Djarum has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Santa Fe Natural Tobacco Company is a subsidiary of Reynolds American Inc., and no other publicly held company owns 10% or more of its stock. British American Tobacco p.l.c. and its subsidiaries collectively own more than 10% of the common stock of Reynolds American, Inc.

Petitioner Sherman 1400 Broadway N.Y.C. Inc. is a subsidiary of Sherman Group Holdings Inc., and no publicly held company owns 10% or more of its stock.

Petitioner Top Tobacco L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Von Eicken Group has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Farmers Tobacco Company of Cynthiana, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

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The opinion of the Commonwealth Court of Pennsylvania (Pet.App. 1a) is reported at 114 A.3d 37. That opinion affirmed an opinion of the Court of Common Pleas of Philadelphia County (Pet.App. 59a) that is unreported but available at 2014 WL 3709672. The opinions reviewed an arbitration award (Pet.App. 133a).

JURISDICTION

The Commonwealth Court of Pennsylvania entered judgment on April 10, 2015. Pet.App. 58a. The Supreme Court of Pennsylvania denied a petition for allowance of appeal on December 23, 2015. Pet.App. 132a. On March 11, 2016, Justice Alito extended the time within which to file a certiorari petition until April 21, 2016. No. 15A942. Jurisdiction rests on 28 U.S.C. § 1257.

PROVISIONS INVOLVED

The appendix reproduces relevant statutory provisions in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and the Pennsylvania Uniform Arbitration Act ("PUAA"), 42 Pa. C.S. § 7301 *et seq*. The appendix also reproduces relevant contractual provisions in the tobacco Master Settlement Agreement ("MSA").

STATEMENT OF THE CASE

In this multi-hundred-million-dollar dispute under the landmark tobacco MSA, the state court below invalidated as "irrational" an arbitration award that had been unanimously issued by a Panel of three former federal judges, including Judge Abner Mikva of the D.C. Circuit. This remarkable rejection of the arbitrators' decision was based on two holdings about the scope of the FAA's judicial-review standards that warrant this Court's review.

First, the court below held that, even when an arbitration is governed by the FAA, the standards for judicial review in state court are governed by state law rather than the FAA. This issue has divided several state courts of last resort. And the side of the split adopted below flouts this Court's decisions concerning the FAA's objectives, because it allows states that are hostile to arbitration to undermine FAA-governed arbitration agreements by mandating more stringent judicial review of arbitration awards than the FAA authorizes. That is an especially grave threat to the FAA because judicial review of FAA-governed arbitrations typically occurs in state court rather than federal court.

Second, in an effort to equate the judicial-review standards under state law and the FAA, the court below held that the FAA's "exceeded their powers" standard allows a court to reverse the arbitrators' contract interpretation if the court concludes on the merits that the interpretation is "unambiguously" and "irrationally" wrong. But that holding conflicts with this Court's unanimous decision in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), which does not allow any merits review whatsoever.

Instead, *Oxford Health* held that arbitrators exceed their powers on an issue within their jurisdiction *only* if they willfully adopt their "own notions of economic justice" — and thus *not* if they are even "arguably construing" the contract on the merits, *no matter how* "good, bad, or ugly." *See id.* at 2068-71. It is important that this Court reverse the court below for failing to follow *Oxford Health*: if a court can ever discard as "irrational" the arbitrators' contract interpretation, let alone the carefully reasoned interpretation of the MSA that was unanimously adopted by the distinguished Panel of former federal judges here, then no FAA award is safe from being judicially second-guessed.

Further underscoring the need for this Court's review, state appellate courts have divided on whether this very arbitration award must be upheld under the FAA. While a Maryland appellate court reached the same conclusions as the Pennsylvania appellate court did here, a Missouri appellate court held that the FAA review standard applied and required upholding the award. *Compare State v. Philip Morris, Inc.*, 123 A.3d 660 (Md. Ct. Spec. App. 2015), *cert. denied*, 132 A.3d 195 (Md. 2016), *with State v. Am. Tobacco Co.*, No. ED 101542, --- S.W. 3d ----, 2015 WL 5576135 (Mo. Ct. App. Sept. 22, 2015), *appeal transferred to Mo. S. Ct.* (Mo. Ct. App. Dec. 2, 2015). This Court should definitively resolve these critical questions.

1. This case involves the arbitration of a dispute under the landmark MSA that was entered into between certain cigarette manufacturers (the "Participating Manufacturers" or "PMs") and 52 States and Territories (the "MSA States"). The

dispute concerns the "NPM Adjustment," which is a potential reduction to the PMs' annual payment to the MSA States. During the arbitration of the dispute over the NPM Adjustment for 2003, the PMs and 22 of the States (the "Signatory States") reached a settlement — one that Pennsylvania and the other "Non-Signatory States" were offered, but declined to join. The arbitrators thus had to interpret the MSA with respect to how the 2003 NPM Adjustment should be allocated to the Non-Signatory States in light of the partial settlement.

a. Under the MSA, the PMs make an annual payment, subject to various potential adjustments, that is apportioned among the MSA States by each State's contractually specified "Allocable Share." Pet.App. 5a. One of these potential downward adjustments is the "NPM Adjustment." *Id.*; *see also id.* 209a (MSA § IX(d)).

Under MSA § IX(d)(2)(A), the NPM Adjustment, when it applies, shall apply to all MSA States, with each State bearing its Allocable Share. *Id.* 5a-6a, 214a-215a. But there is an exception in MSA § IX(d)(2)(B), under which an individual State may avoid its share of the Adjustment if it "diligently enforced" certain obligations pursuant to the MSA. *Id.* Where the exception is met, MSA § IX(d)(2)(C) provides that the diligent States' shares are "reallocated among all other [MSA] States *pro rata* in proportion to their respective Allocable Shares." *Id.*

In sum, under § IX(d)(2), diligent States are not responsible for any of the Adjustment, and non-diligent States are collectively responsible for the total available Adjustment, including the shares that were initially allocated to the diligent States.

b. There was a dispute over the MSA States' responsibility for the 2003 NPM Adjustment, which was roughly $1.15 billion. *Id.* 7a. The PMs requested arbitration pursuant to MSA § XI(c). *Id.* 7a-8a; *see also id.* 227a. MSA § XI(c) requires that the parties submit payment disputes, including over the NPM Adjustment, to "binding arbitration." *Id.* It further specifies that the arbitration shall be conducted by "three … former Article III federal judge[s]," and that "[t]he arbitration shall be governed by the United States Federal Arbitration Act." *Id.* Moreover, wholly apart from § XI(c), the FAA governs the arbitration because the MSA involves interstate commerce. *See* 9 U.S.C. § 2.

Pennsylvania and other MSA States refused to arbitrate the dispute and instead sought declaratory relief in their respective state courts. Pet.App. 8a. But the courts in virtually every MSA State ordered that the dispute be arbitrated (only Montana's courts disagreed). *See id.* Eventually, an arbitration Panel was selected. The States picked the Hon. Abner J. Mikva (D.C. Cir.), the PMs picked the Hon. William G. Bassler (D.N.J.), and Judges Mikva and Bassler then picked the Hon. Fern M. Smith (N.D. Cal.). *See id.* 8a-9a.

Because the diligence of a State affects the reallocation of the NPM Adjustment among the non-diligent States, the Panel afforded each State the opportunity to contest the diligence of any other State before the individual State hearings began. *See id.* 9a. But neither Pennsylvania nor any other State took this opportunity: after discovery, only the PMs contested the diligence of any States, and they contested only 35 of the States. *See id.*

c. During the arbitration, and before the Panel had issued diligence determinations for any of the States, the PMs and 19 States agreed to a multi-year NPM Adjustment settlement. *Id.* All other States were invited to join the settlement, and 3 more States joined before the arbitration concluded. *Id.* 10a. Pennsylvania declined to join. *Id.* The 22 Signatory States had an aggregate Allocable Share of about 46% of the NPM Adjustment, and they consisted of 20 States that the PMs had contested to that point as well as 2 States that the PMs had decided not to contest. *Id.*

With respect to the 2003 Adjustment, the settlement provides for the Signatory States to give the PMs specified credits against future MSA payments for part of that Adjustment. *See id.* The settlement, of course, did not provide how to allocate the 2003 Adjustment among the Non-Signatory States in light of the uncertainty about the Signatory States' diligence — *i.e.*, given that their diligence would no longer be contested by the PMs and had never been contested by the Non-Signatory States. *See id.* That issue was properly left for the Panel to decide under the MSA. *See id.*

The PMs and Signatory States contended that the MSA's reallocation provision did not directly address the issue and thus the Panel should look to background law to inform its interpretation. *See id.* By contrast, many of the Non-Signatory States, including Pennsylvania, contended that the MSA's reallocation provision requires a determination as to the diligence of each State, regardless of whether a State has settled with the PMs. *See Philip Morris*, 123 A.3d at 668 (quoting objectors' brief). Yet,

inconsistently, the Non-Signatory States did not contend that the Panel actually had to determine the diligence of the Signatory States in order to determine the Non-Signatory States' reallocated share of the Adjustment. Rather, the Non-Signatory States contended that the Panel should simply *treat* as *non*-diligent *all* the Signatory States that the PMs had contested, *whether or not* those Signatory States would have been found non-diligent absent the settlement. *See id.*

d. The Panel ordered extensive briefing on this post-settlement reallocation issue and held four days of hearings. Pet.App. 133a-134a. The Panel then unanimously entered a Settlement Award that rejected the Non-Signatory States' objection, and that interpreted the MSA in light of background law to provide a different method for reallocating the NPM Adjustment after a partial settlement. *See id.*

The Panel first ruled that it "ha[d] jurisdiction to rule on the issues raised concerning the MSA reallocation provisions." *Id.* 136a. Under MSA § XI(c), it had jurisdiction over all issues "relat[ing] to" the resolution of the "2003 NPM Adjustment dispute," including the Adjustment's allocation among the MSA States. *See id.* 135a, 227a. And under well-established caselaw, such jurisdiction covers "all matters necessary to dispose of the claim," including "the existence or effect of a settlement." *See id.* 135a-136a.

Turning to the text of the MSA's reallocation provision, the Panel determined that "the MSA does not directly speak as to the process to be used when some States settle diligent enforcement and some do not." *Id.* 149a. Although the MSA instructs that

diligent States are exempt from their share of the Adjustment (§ IX(d)(2)(B)), and that non-diligent States are subject to their initial and reallocated shares of the Adjustment (§ IX(d)(2)(C)), those provisions do not instruct what to do where it is *unknown* whether a State is diligent or non-diligent because its diligence is no longer contested due to a settlement. *See id.*; *id.* 214a-215a.

The Panel thus concluded that it had "to interpret the contract in light of governing law" to determine the appropriate process where there is a partial settlement. *Id.* 149a. The Panel looked to the well-established law of post-settlement judgment reduction. It found that "[w]here multiple parties have a potential shared contractual obligation and some of them settle and some do not, the non-settling parties" are "entitled to a judgment reduction" pursuant to one of "three standard methods" — the "*pro rata*" method, the "*pro tanto*" method, or the "proportionate fault" method. *Id.* 144a-145a.

The Panel concluded that the "*pro rata*" method is most appropriate under the MSA's language and structure, and that it is far superior to the objectors' "all Signatory States non-diligent" position, which has no basis in the MSA, the law, or the facts, and which would discourage partial settlements by giving the objectors a windfall profit. *See id.* 145a-146a, 148a-149a. Under the *pro rata* method, the 2003 NPM Adjustment amount that the Non-Signatory States are potentially subject to is reduced by the aggregate Allocable Share of the Signatory States (46%) — *i.e.*, the $1.15 billion Adjustment is reduced by $528 million. *See id.* 144a.

e. At the conclusion of the arbitration, the Panel entered final awards for the 15 Non-Signatory States whose diligence for 2003 was still contested. *Id.* 12a. The Panel unanimously held that Pennsylvania and five other States were non-diligent, and that the remaining nine States were diligent. *Id.* Thus, the 2003 NPM Adjustment, as reduced under the *pro rata* method, was allocated among the six non-diligent Non-Signatory States pursuant to MSA § IX(d)(2) as interpreted in the Settlement Award. *See id.* 144a.

2. Pennsylvania filed a motion in the Court of Common Pleas of Philadelphia County seeking, as relevant here, to vacate or modify the Settlement Award's *pro rata* judgment-reduction ruling. *Id.* 12a. That court granted the motion, *id.* 17a-19a, 110a-111a, and the Commonwealth Court of Pennsylvania affirmed, *id.* 4a.

a. On the judicial-review standard, the Commonwealth Court held that state law governed, not the FAA. *See id.* 24a-38a. That holding rested on two key conclusions of federal law.

The court's primary conclusion was that the FAA's judicial-review standards are "procedural" rules that neither apply in state court nor preempt the application in state court of different state-law judicial-review standards. *See id.* 34a-36a. The court noted that the FAA's substantive objective is to ensure the enforcement of the arbitration *agreement*, and the court asserted that this objective purportedly is not frustrated by applying different state-law judicial-review standards to the arbitration *award*. *See id.* But the court provided no reason why nominal enforcement of the underlying arbitration

agreement would satisfy the FAA when the resulting arbitration award is nullified through more stringent judicial review than the FAA authorizes. *See id.*

The court's secondary conclusion was that, in any event, there is no conflict here between the FAA standards and the state-law standards because the relevant provisions are effectively equivalent. *See id.* 36a-38a. The court acknowledged that the provisions, on their face, are quite different: PUAA § 7302(d)(2) authorizes setting aside an award to which Pennsylvania is a party when the award "is contrary to law and is such that had it been a verdict of a jury the court would have entered … a judgment notwithstanding the verdict," whereas FAA § 10(a)(4) authorizes setting aside an award only if the arbitrators "exceeded their powers." *Compare id.* 28a, *with id.* 25a. But the court claimed that these provisions, through judicial interpretation, have been given a similar scope: As for PUAA § 7302(d)(2), the court noted that the Pennsylvania Supreme Court had narrowly construed the provision to authorize setting aside the arbitrators' contract interpretation only where it "cannot rationally be derived" from the contract in light of a conflict with the contract's "unambiguous" language. *See id.* 28a-31a. As for FAA § 10(a)(4), the court asserted that the provision, as purportedly construed by this Court in *Oxford Health*, likewise authorizes setting aside an award that is not "rationally derived" from "the language of the agreement." *See id.* 25a-27a. But the court failed to reconcile the type of merits review that it adopted with *Oxford Health*'s actual interpretation of FAA § 10(a)(4): namely, that "[i]t is not enough … to show that the [arbitrators] committed … a serious

error," because they exceed their powers on an issue within their jurisdiction "[o]nly if … [they] issu[e] an award that 'simply reflects [their] own notions of economic justice.'" 133 S. Ct. at 2068.[1]

b. On the merits, the Commonwealth Court held that the Panel had exceeded its authority because it purportedly interpreted the MSA in an irrational manner that is contrary to its unambiguous language. *See* Pet.App. 44a-54a. The court's analysis vividly illustrates that it was engaging in merits-based judicial review that is far more stringent than is authorized by the FAA *Oxford Health* standard.

Critically, the court itself recognized that "the MSA did not address the effect of a partial settlement on the reallocation" of the NPM Adjustment. *Id.* 45a. The court thus held that "the panel was authorized to resolve the dispute" under MSA § XI(c)'s arbitration provision. *Id.* Yet the court then concluded, inconsistently, that the proper application of MSA § IX(d)(2)'s reallocation provision in this case was "not ambiguous" even though that provision concededly "does not address the effect of a partial settlement." *Id.* 48a. In particular, the court asserted that "the clear language" of § IX(d)(2)

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[1] Finally, the court separately held that the proper judicial-review standard is an issue that can be decided only by the courts, not by the parties. *See* Pet.App. 34a-35a. Under that holding, it is irrelevant whether the parties agreed to a standard of review. Nevertheless, the court also suggested that the parties' express incorporation of the FAA in MSA § XI(c)'s arbitration provision was limited to the conduct of the arbitration itself and thus did not extend to the FAA's standards for judicial review. *See id.*

requires "a determination of diligence" in all circumstances before any State can get "relief from the NPM Adjustment and Reallocation Provision." *See id.* 48a-50a. And the court further asserted that, because the Panel did not make such determinations for the 20 contested Signatory States, it was "irrational[ ]" for the Panel to apply the *pro rata* judgment-reduction method rather than treating all those States as non-diligent when determining Pennsylvania's reallocated share of the 2003 Adjustment. *See id.* 49a-54a.

Notably, while the court harshly criticized the merits of the Panel's contrary interpretation, it did not hold that the arbitrators had actually "abandoned their interpretive role" based solely on their "own notions of economic justice." *Compare id.* 44a-54a, *with Oxford Health*, 133 S. Ct. at 2068, 2070. Nor could the court have so held, because it is indisputable from the face of the Settlement Award that Judge Mikva and the other former federal judges on the Panel were at least conscientiously interpreting the MSA in good faith. *See* Pet.App. 144a-146a, 148a-149a. Indeed, the Panel's reasons for adopting the *pro rata* interpretation rather than the "all non-diligent" interpretation were not just given in good faith and entirely rational; they are compelling and correct. *Infra* at Part II.B.

c. The PMs filed a timely petition with the Pennsylvania Supreme Court for allowance to appeal the Commonwealth Court's judgment. Pet.App. 132a. The petition was denied. *Id.*

3. In parallel litigation in other MSA States, appellate courts have divided on whether the Settlement Award's *pro rata* ruling must be upheld

under the FAA. The Court of Special Appeals of Maryland reached the same conclusions as the Commonwealth Court of Pennsylvania. *See Philip Morris*, 123 A.3d at 673-80. But the Missouri Court of Appeals reached the exact opposite conclusions. It held that the FAA review standard applied, and that the *pro rata* ruling could not be set aside under FAA § 10(a)(4) because the Panel was interpreting the MSA in good faith, rather than willfully adopting its own notions of economic justice. *See Am. Tobacco*, 2015 WL 5576135, at *7-15.

REASONS FOR GRANTING THE PETITION

Because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," "[i]t is a matter of great importance … that [they] adhere to a correct interpretation of the legislation." *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 501 (2012) (per curiam). The state court here adopted two critical interpretations of the FAA to justify invalidating a multi-hundred-million-dollar arbitration award on the merits by accusing a distinguished Panel of former federal judges — including Judge Abner Mikva — of adopting an interpretation of the MSA that was "unambiguously" and "irrationally" wrong. Namely, the court held that the FAA's judicial-review standard (1) does not preempt state courts from engaging in such merits review, and (2) in fact itself authorizes such review.

Those two holdings, in turn, warrant this Court's review. The holdings implicate conflicts among the decisions of several state courts of last resort as well as conflicts with the decisions of this Court. Moreover, the holdings threaten to eviscerate the extraordinary deference that is due to arbitration

awards under the FAA as construed by this Court in *Oxford Health*. States that are hostile to arbitration would be allowed to undermine FAA-governed arbitration agreements by mandating merits-based judicial review that goes beyond the extremely narrow non-merits judicial review permitted by the FAA. Such expanded state-law review is particularly problematic because judicial review of FAA-governed arbitrations typically occurs in state courts given that the FAA provides no independent basis for federal-court jurisdiction. And divergent state-law standards are especially troubling in the context of the MSA, where there have been and will continue to be multi-State arbitrations reviewed in different state courts. Indeed, another state appellate court in parallel MSA litigation has held that the FAA requires upholding this very same arbitration award.

Accordingly, this Court should grant plenary review. Alternatively, this Court may wish to consider summarily vacating and remanding in light of *Oxford Health*: *i.e.*, reversing the holding below that the FAA itself authorized modification of the award, and then remanding for reconsideration of the holding below that the FAA did not preempt state-law modification of the award.

I. THIS COURT SHOULD RESOLVE WHETHER THE FAA PREEMPTS CONTRARY STATE-LAW JUDICIAL-REVIEW STANDARDS

The FAA governs arbitration agreements in contracts that, like the MSA, involve interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111-12 (2001). Section 2 of the FAA generally requires courts to enforce covered arbitration agreements, subject to certain narrow

defenses. 9 U.S.C. § 2; *Circuit City*, 532 U.S. at 111-12. And Sections 9-11 of the FAA generally require courts to confirm covered arbitration awards, subject to certain narrow grounds for vacatur or modification. 9 U.S.C. §§ 9-11; *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586-88 (2008). Notably, MSA § XI(c) itself expressly provides that the NPM Adjustment arbitration shall be "binding" and "governed by the United States Federal Arbitration Act." Pet.App. 227a.

The FAA is typically enforced in state courts because it does not confer independent jurisdiction on federal courts. *See Nitro-Lift*, 133 S. Ct. at 501; *Hall St.*, 552 U.S. at 581-82. Accordingly, the FAA preempts any state law that "stands as an obstacle to the accomplishment and execution of [its] full purposes and objectives." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477-78 (1989). This Court has thus repeatedly held that the FAA preempts contrary state laws that permit state courts to refuse "to enforce … agreements to arbitrate … in accordance with their terms." *See id.* at 478-79 (citing cases). But this Court has not yet decided whether the FAA likewise preempts state laws that permit state courts to subject arbitration awards to different standards of judicial review. *See Hall St.*, 552 U.S. at 590 (reserving the question).

This Court should now resolve that question. Several state courts of last resort have divided on it. So too have the state appellate courts in the parallel MSA litigation at issue here. And the reasoning of the decision below is contrary to this Court's decisions addressing the FAA's objectives.

A. State Courts Of Last Resort Have Split On Whether The FAA's Judicial-Review Standards Govern In State Court

Contrary to the court below, "a number of other state appellate courts … recogniz[e] the applicability of the [FAA] § 10 standards in appeals in state courts from arbitration awards" where the arbitration itself was governed by the FAA. *Birmingham News Co. v. Horn*, 901 So. 2d 27, 46 (Ala. 2004). Indeed, six state courts of last resort have so held. For example, the Court of Appeals of New York has ruled: "[a]s this matter affects interstate commerce, the vacatur of the arbitration award is governed by the Federal Arbitration Act." *US Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891, 892 (N.Y. 2011); *see also Vold v. Broin & Assocs., Inc.*, 699 N.W.2d 482, 487 (S.D. 2005); *Hecla Min. Co. v. Bunker Hill Co.*, 617 P.2d 861, 865 (Idaho 1980). Likewise, the Supreme Court of Georgia has concluded: "[s]ince the Federal Arbitration Act created a body of substantive federal law, if a state court has jurisdiction to vacate an award, federal law rather than state law governs the vacation of the award." *Hilton Constr. Co. v. Martin Mech. Contractors, Inc.*, 308 S.E. 2d 830, 832 (Ga. 1983); *see also Dowd v. First Omaha Secs. Corp.*, 495 N.W.2d 36, 41-42 (Neb. 1993); *Horn*, 901 So. 2d at 44-46. (These rationales apply even more strongly here, where the MSA itself expressly provides that the FAA governs the arbitration. Pet.App. 227a.)

By contrast, like the court below, at least two state courts of last resort have held that the FAA does not govern the judicial-review standard in state court. *See Henderson v. Summerville Ford-Mercury Inc.*, 748 S.E. 2d 221, 225-27 (S.C. 2013); *Atlantic*

Painting & Contracting Inc. v. Nashville Bridge Co., 670 S.W.2d 841, 846-47 (Ky. 1984). And another two state courts of last resort have issued decisions that contain broad language so suggesting, but that could be distinguished on the ground that the parties there had explicitly agreed to a non-FAA review standard. *See Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 597-99 (Cal. 2008); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 97-101 (Tex. 2011); *cf. Raymond James Fin. Servs., Inc. v. Honea*, 55 So. 3d 1161, 1166-69 (Ala. 2010) (drawing this distinction).

In sum, among state courts of last resort, there is either a lopsided 6-2 split or a more balanced 6-4 split. Either way, there is a significant conflict that warrants this Court's resolution.

B. State Appellate Courts In Parallel MSA Litigation Also Have Split On This Issue

Just like the court below, the Court of Special Appeals of Maryland held that state law governed its review of the Settlement Award's *pro rata* ruling. *Philip Morris*, 123 A.3d at 674-75. And it so held based on the same reasoning: namely, state-law standards for judicial review of arbitration awards are purportedly "procedural" rules for state courts that are not preempted because they do not frustrate the FAA's substantive objective of ensuring that the underlying arbitration agreement is enforced. *Id.*

In direct conflict with these courts, however, the Missouri Court of Appeals held that the FAA governed its review of the *pro rata* ruling. *Am. Tobacco*, 2015 WL 5576135, at *7. And it so held for the same reason as the state courts of last resort discussed above: namely, the arbitration agreement

was "in a [contract] involving commerce" — indeed, a contract that expressly provided that "the arbitration shall be governed by the [FAA]." *Id.*

That state appellate courts have split on this question in the context of the very MSA arbitration award at issue here confirms the propriety of this Court's intervention. The directly conflicting results on identical facts underscore that this is a conflict on a pure question of federal law that warrants this Court's definitive resolution. And that is so regardless of how the pending appeal in the Missouri Supreme Court is resolved, as the conflict among state courts of last resort will persist in any event.

C. The Decision Below Is Erroneous Under This Court's Decisions Explaining The FAA's Objectives

As discussed, the primary rationale of the court below was that state-law standards for judicial review of arbitration awards are mere "procedural" rules that do not frustrate the FAA's "substantive[ ]" objective of "ensur[ing] the enforceability" of the underlying "agreements to arbitrate." Pet.App. 34a-36a. But that reasoning is contrary to this Court's repeated characterization of the FAA's objectives.

As this Court has squarely held, the FAA establishes "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Hall St.*, 552 U.S. at 588; *see also Oxford Health*, 133 S. Ct. at 2068. The FAA's policy of limited review is an indispensable aspect of the FAA's "policy … to ensure the enforceability [of] … agreements to arbitrate." *See Volt*, 489 U.S. at 476.

After all, it would be meaningless to preempt state laws that refuse to enforce arbitration agreements on the front end if States nevertheless could implement their "hostil[ity] to arbitration" by nullifying arbitration awards on the back end through stringent judicial review. *See Circuit City*, 532 U.S. at 112. That would allow hostile States to "render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," thereby "bring[ing] arbitration theory to grief in postarbitration process." *See Hall St.*, 552 U.S. at 588. Indeed, "[a]ny other reading [would] open[ ] the door to … full-bore legal and evidentiary appeals." *See id.* States would be free to adopt or interpret even a *de novo* standard of review for arbitration awards. *Cf.* 42 Pa. C.S. § 7302(d)(2) (authorizing relief on its face whenever an award to which Pennsylvania is a party "is contrary to law"). And expanded merits review in state court would be especially problematic because "[s]tate courts rather than federal courts are most frequently called upon to apply the [FAA]," *Nitro-Lift*, 133 S. Ct. at 501, given that the FAA "bestow[s] no federal jurisdiction but rather require[s] an independent jurisdictional basis" to file in federal court, *Hall St.*, 552 U.S. at 581-82.

Thus, while *Hall Street* reserved the question whether *the parties* "may contemplate enforcement under state statutory or common law … where judicial review of different scope is arguable," that reservation in no way suggested that *a State may compel* parties to submit to expanded review despite the FAA. *Id.* at 590. To the contrary, this Court expressly admonished that it was "deciding nothing

about other possible avenues [besides the FAA] for judicial enforcement of arbitration awards." *Id.*

Likewise, while Congress specified a particular federal district court where judicial review may be sought, 9 U.S.C. §§ 9-11, that provision in no way suggested that the FAA's review standards are inapplicable in state courts. As this Court has held, those "venue provisions" are merely "permissive," not "restrictive," such that review may be sought wherever venue is proper. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 197-204 (2000). And it is hornbook law that state courts are generally proper forums to hear federal claims. *See Tafflin v. Levitt*, 493 U.S. 455, 458-61 (1990) (so holding for federal civil RICO statute, which likewise contains a "permissive, not mandatory," provision authorizing suit "in any appropriate United States district court"); *see also Horn*, 901 So. 2d at 46 (applying FAA § 10 even though it "facially is applicable only to the federal district courts").

Finally, in light of all this, it is unsurprising that the court below tried to hedge its blanket holding that the FAA review standards lack preemptive force by also holding that the FAA § 10(a)(4) standard is basically the same as the relevant state-law standard here. *See* Pet.App. 36a-38a. But this secondary rationale fails to salvage the court's judgment. To the contrary, it underscores the need for this Court's review because it directly conflicts with *Oxford Health*, as demonstrated next.

II. THIS COURT SHOULD REAFFIRM THAT THE FAA DOES NOT AUTHORIZE REVIEWING THE MERITS OF AN ARBITRATION AWARD IN ANY RESPECT

As discussed, the court below asserted that, under FAA § 10(a)(4), arbitrators have "exceeded their powers" if their award cannot be "rationally derived" from the contract. Pet.App. 25a. And the court further asserted that an award is "irrational" if it is contrary to the "clear and unambiguous" language of the contract. *Id.* 30a. Based on these assertions, the court thus concluded that the FAA § 10(a)(4) standard is no different than the PUAA § 7302(d)(2) standard as interpreted by Pennsylvania courts. *Id.* 36a-38a; *see also id.* 25a-31a.

Critically, however, the court's articulation of the FAA § 10(a)(4) standard is irreconcilable with *Oxford Health*. That decision forecloses any level of merits review of the arbitrators' contract interpretation on issues within their jurisdiction. And the court's application of its purported standard underscores the importance of reaffirming the line that *Oxford Health* drew. No FAA award would be safe from judicial second-guessing if even the careful contract interpretation here by three distinguished former federal judges can be blithely deemed "irrational."

A. The Decision Below Conflicts With This Court's Decision In *Oxford Health*

At the outset, *Oxford Health* noted that a party "bears a heavy burden" when asking a court to set aside an arbitration award under FAA § 10(a)(4) on the ground that the arbitrators "exceeded [their] powers." 133 S. Ct. at 2068. That is "[b]ecause the parties 'bargained for the arbitrator[s'] construction

of their agreement'" with respect to the disputes covered by the arbitration clause. *Id.*

Accordingly, *Oxford Health* held that, so long as a dispute was within the arbitrators' jurisdiction, a decision "'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id.* at 2068 & n.2. By definition, the arbitrators' merits decision cannot have exceeded their "powers": "[i]t is [their] construction of the contract which was bargained for," and thus "the courts have no business overruling [them]" because "[t]he potential for … mistakes is the price of agreeing to arbitration." *Id.* at 2070.

Instead, *Oxford Health* held that arbitrators "act[ ] outside the scope of [their] contractually delegated authority" on issues within their jurisdiction "*[o]nly if* … [they] issu[e] an award that 'simply reflects [their] own notions of economic justice." *Id.* at 2068 (emphasis added). In other words, the arbitrators must have willfully "abandoned their interpretive role," not just merely "misinterpreted the contract." *Id.* at 2070.

Critically, *Oxford Health* emphasized that this is true even if "the arbitrator committed … a serious error." *Id.* at 2068. "[C]onvincing a court of an arbitrator's error — even his grave error — is not enough," because "[t]he arbitrator's construction holds, however good, bad, or ugly." *Id.* at 2070-71.

Oxford Health thus forecloses *any* merits review of the arbitrators' good-faith contract interpretation, including a merits review that is purportedly limited to "unambiguous" or "irrational" errors. And that is confirmed by this Court's application of the *Oxford*

Health standard to the arbitration award at issue in that case. This Court refused even to consider, much less uphold in any respect, the merits of the arbitrator's interpretation: "[n]othing we say in this opinion should be taken to reflect *any* agreement with the arbitrator's contract interpretation, or *any* quarrel with Oxford's contrary reading." *Id.* at 2070 (emphasis added). In concluding that the arbitrator was at least arguably interpreting the contract, this Court did not assess the rationality of his decision, but instead found that conclusion evident "just by summarizing [his] decisions": he "focused on the [contract]'s text, analyzing (whether correctly or not makes no difference) [its] scope." *Id.* at 2069.

Tellingly, here, the court below failed to quote any language in *Oxford Health* using any variant of the words "irrational" or "unambiguous," because no such language exists. Pet.App. 25a-27a. Likewise, the Court of Special Appeals of Maryland did not even mention *Oxford Health* at all. *Philip Morris*, 123 A.3d at 674-76. By contrast, the Missouri Court of Appeals properly held that the relevant question under *Oxford Health* is not whether the Panel rationally construed the MSA's language, but whether the Panel maliciously implemented its "own notions of economic justice." *Am. Tobacco*, 2015 WL 5576135, at *13-15. And that court correctly held that there was not even "any hint" of such misconduct: "it is clear from the [Settlement Award] that the Panel took its decision-making role seriously … and made its decision carefully," by "constru[ing] the MSA just as it was asked to do … to resolve the dispute regarding the NPM Adjustment … in light of [the] Partial Settlement." *See id.*

In sum, the decision below is irreconcilable with *Oxford Health*. This Court should not permit state courts to engage in such flagrant defiance of its precedent. And that is particularly true where the precedent is recent, unanimous, and involves the FAA — which itself targets "state courts" that are "hostile to arbitration," *Circuit City*, 532 U.S. at 112.

B. The Merits Review Sanctioned By The Court Below Is Especially Excessive And Harmful To Arbitral Finality

This case underscores why *Oxford Health* was right to bar any type of merits review of the arbitrators' contract interpretation. After carefully considering the MSA's text, the background law of judgment reduction, and the facts, the Panel determined that the *pro rata* interpretation was superior to the "all non-diligent" interpretation. No FAA award would be safe from judicial second-guessing if the state court below nevertheless is permitted to substitute its preferred interpretation for the interpretation unanimously adopted by Judge Mikva and the other former federal judges on the Panel — especially if courts can simply deem the arbitrators' interpretation to be "unambiguously" wrong and thus ipso facto "irrational." Indeed, although the merits discussion that follows is not necessary under *Oxford Health*, it illustrates how the court below rendered arbitration "merely a prelude to a more cumbersome and time-consuming judicial review process." *Oxford Health*, 133 S. Ct. at 2068.

1. Starting with the MSA's text, the Panel correctly observed that § IX(d)(2) "does not directly speak as to the process to be used when some States settle diligent enforcement and some do not."

Pet.App. 149a. That provision says only that the NPM Adjustment "shall apply" to all States "except" for States that "diligently enforced," and that the diligent States' shares are "reallocated" to the "other" non-diligent States. Pet.App. 214a-215a. It says nothing, much less unambiguously, about how reallocation operates where it is *unknown* whether a State is diligent or non-diligent due to a settlement. *See Am. Tobacco*, 2015 WL 5576135, at *13.

The Panel's *pro rata* interpretation addresses that uncertainty in a way that is consistent with the MSA's text. As the Signatory States' diligence is unknown, the *pro rata* interpretation *treats their diligence status as unknown* under § IX(d)(2). Since it is unknown whether the Signatory States were diligent for purposes of § IX(d)(2)(B), none of their 46% share is reallocated to the Non-Signatory States; but since it is also unknown whether the Signatory States were non-diligent for purposes of § IX(d)(2)(C), they are not subject to reallocation of any of the Non-Signatory States' 54% share. Indeed, § IX(d)(2) itself expressly reallocates diligent States' shares to the non-diligent States on a "pro rata" basis, not on a relative-fault basis. *See* Pet.App. 144a-146a; *see also Am. Tobacco*, 2015 WL 5576135, at *14.

By contrast, the state court's "all non-diligent" interpretation has no basis in the MSA's text. The court claimed that "the clear language" of § IX(d)(2) requires "a determination of diligence" in all circumstances before any State can get "relief from the NPM Adjustment and Reallocation Provision," and that the Panel's failure to determine the diligence of the contested Signatory States requires "treat[ing] them as non-diligent." Pet.App. 50a, 52a.

But § IX(d)(2) simply does not say that a State's diligence must still be determined even where it has settled and its diligence is no longer contested by any party. And § IX(d)(2) certainly does not say that a State must be treated as non-diligent just because the Panel did not determine its diligence, let alone where the non-settling States like Pennsylvania *opposed* the Panel's determination of its diligence. *Supra* at 6-7; *Philip Morris*, 123 A.3d at 678 n.11.

2. Given the MSA's lack of express instruction, the Panel correctly explained that it could "interpret the contract in light of governing law" to help "determine what the appropriate process" was. Pet.App. 149a; *see also, e.g.*, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); 11 Williston on Contracts § 30:19 (4th ed.).

The Panel likewise correctly explained that the law of "judgment reduction" was the appropriate background law to look to for guidance, because it was developed to apply in this common circumstance where multiple defendants have shared potential liability (*e.g.*, under a contract, as joint tortfeasors, or under a statute), and some defendants wish to settle and some do not. Pet.App. 144a-145a. Around the nation, courts and legislatures have developed judgment-reduction rules for partial settlements because the strong public policy "favor[ing]" the "settlement of complex litigation" would be "inhibit[ed]" if non-settling defendants were allowed to obtain a windfall in the determination of their own share of the liability merely because of the uncertainty about the settling defendants' share of the liability. *See, e.g.*, *Eichenholtz v. Brennan*, 52 F.3d 478, 486-87 (3d Cir. 1995); Restatement

(Second) of Contracts § 294(3); *see also Am. Tobacco*, 2015 WL 5576135, at *14. And the Panel also correctly explained that the three "standard" judgment-reduction methods for calculating the non-settling defendants' setoff are "*pro rata*," "*pro tanto*," and "proportionate fault." Pet.App. 144a-145a.

As for the Panel's selection of the *pro rata* method, Petitioners have explained why that method is consistent with the MSA's text. *Supra* at 24-26. It also warrants emphasis that Pennsylvania and the other objecting States did not ask the Panel to adopt one of the other two methods, but rather asked for all the contested Signatory States to be treated as non-diligent — even though the proportionate-fault method would have determined their diligence. *Supra* at 6-7; *Philip Morris*, 123 A.3d at 678 n.11.

By contrast, the state court's "all non-diligent" interpretation has no basis in background judgment-reduction law. As the Panel explained, settlement is *not* treated as "tantamount to an admission of liability" and "settling defendants are not regarded as necessarily culpable or liable." Pet.App. 148a-149a. The court below thus did not and could not cite any law supporting its "all settlers liable" position. *Id.* 48a-54a. Instead, the court asserted that it was "irrational[ ]" for the Panel to consider judgment-reduction law because that law is purportedly "premised" on "the doctrine of joint and several liability." Pet.App. 49a. But the court cited no authority limiting the application of judgment-reduction law to joint-and-several liability cases, and it provided no principled reason for doing so. *Id.*

3. Finally, the Panel's *pro rata* interpretation better reflects the factual uncertainty concerning the

contested Signatory States' diligence than does the state court's "all non-diligent" interpretation. This is seen through the following chart:

Approach	**Adjustment Amount Owed by PA**
No reduction	$370 million
Pro Tanto	$354 million
Proportionate Fault > if (as before) PA did not contest Signatory States' diligence > if PA did contest Signatory States' diligence	$370 million $116 million to $370 million (depending on findings of the Signatory States' actual diligence)
Pro Rata	$242 million
"Assume all non-diligent"	$116 million

Absent the settlement, Pennsylvania's liability would have ranged from $116 million to $370 million, depending on how many contested Signatory States would have been found diligent. Under the *pro rata* method, Pennsylvania owes $242 million, which is thus a fair estimation of what its liability would have been. By contrast, under the "all non-diligent" approach, Pennsylvania's liability would plummet to $116 million, which is what it would have been only if all 20 of the contested Signatory States would have been found non-diligent.

But that never would have happened. As the Panel instead found, "[t]here is no basis in the facts to assume that every [one of the 20 contested] Signatory State[s] was non-diligent in 2003." Pet.App. 149a. Accordingly, the "all non-diligent" interpretation would improperly guarantee that Pennsylvania *will profit* from the partial settlement, potentially by hundreds of millions of dollars. That windfall, which comes at the expense of the settling parties, contravenes the strong public policy to "encourage settlement." *See Eichenholtz*, 52 F.3d at 486. Nothing in the MSA suggests, let alone unambiguously provides, that the parties intended to reject this established policy, to create obstacles to partial settlements, or to reward the states that decline to participate in them.

III. THIS CASE IS A PARTICULARLY GOOD VEHICLE TO ADDRESS THE QUESTIONS PRESENTED

A. This Court's review of the questions presented will be facilitated because this case arises in the MSA context. Most importantly, the issues have been well ventilated through parallel litigation in different MSA States, and so further percolation is unnecessary in light of the three extensive appellate opinions. Moreover, the parties to the MSA are sophisticated companies and sovereign entities, which means that the case will be well litigated on both sides and also avoids any concern that some Justices may have about one-sided arbitrations in the consumer context.

The significance of the questions presented is also heightened in the MSA context. Most obviously, hundreds of millions of dollars turn on the validity of the Settlement Award's *pro rata* ruling. Moreover,

the parties need a definitive resolution of the rules governing judicial review of MSA arbitrations because there will inevitably be many more awards challenged in state courts in the future, given that state courts have jurisdiction over such challenges under the MSA, there are already pending NPM Adjustment disputes for each year since 2003, and the MSA's annual payment obligations continue into perpetuity. *See* Pet.App. 5a-8a. Indeed, the very reason that the MSA provides for "a single, nationwide arbitration" of NPM Adjustment disputes is to obtain "a uniform determination," *McGraw v. Am. Tobacco Co.*, 681 S.E.2d 96, 112 (W. Va. 2009), and that objective will be thwarted unless state courts consistently apply the FAA review standard.

B. It is not a vehicle problem that the court below suggested, erroneously, that the arbitration provision in MSA § XI(c) incorporates the FAA only for the conduct of the arbitration, not for judicial review of the arbitration. *See* Pet.App. 34a. That is immaterial to Petitioners' argument: namely, that where the FAA governs the arbitration because the agreement involves interstate commerce, the FAA's judicial-review standards *themselves* preempt contrary state-law review standards, wholly apart from whether the parties have *also agreed* to the FAA standards. *Supra* at Part I.

Nor is it a vehicle problem that the court below further suggested, again erroneously, that the choice-of-law provision in MSA § XVIII(n) instead incorporates the state-law review standards. *See* Pet.App. 34a. That is so for two reasons.

First, the court itself held that the proper judicial-review standard is an issue that can be

decided *only* by the courts, *not* by the parties. *See id.* 34a-35a. Accordingly, for that reason alone, this Court can and should review the holdings below that pass on the proper scope of the FAA's review standard under federal law. *Supra* at 9-11.

Second, earlier this Term and after the state court's decision, this Court held that the FAA preempts state courts from discriminating against arbitration when interpreting arbitration clauses. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015). Yet that is precisely what the state court here did. In particular, when interpreting the MSA's arbitration provision — which says that "[t]he arbitration shall be governed by the [FAA]" — the court implausibly suggested that the parties only agreed to have the FAA govern "the arbitration" *itself*, not judicial review of the arbitration. Pet.App. 34a, 227a. But then, when interpreting the MSA's choice-of-law provision — which says that "[t]his Agreement … shall be governed by the laws of the relevant [MSA] State" — the court inconsistently suggested that the parties agreed to have state law govern, not just "the Agreement" *itself*, but *also* judicial review of an arbitration provided for in the MSA yet governed by the FAA. *Id.* 34a, 228a.

As in *Imburgia* (136 S. Ct. at 469-70), the state court therefore has inconsistently interpreted a contractual phrase in a manner that disfavors arbitration: here, by inconsistently interpreting the phrase "[subject] shall be governed by [law]" in order to expand judicial review of the arbitration. Moreover, as in *Imburgia* (*id.* at 469), the contrary interpretation of the MSA's arbitration provision is unambiguously correct: this Court has already

squarely held that "the best way to harmonize [a] choice-of-law provision with [an] arbitration provision" is that the former "covers the rights and duties of the parties" under the contract whereas the latter "covers arbitration" rules, such that "neither sentence intrudes upon the other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995). Thus, as in *Imburgia*, the FAA preempts the state court's discriminatory interpretation of the arbitration clause. Accordingly, for that reason as well, the court's interpretation of the MSA poses no obstacle to this Court's review of the questions presented concerning the FAA.

C. In light of the foregoing, this Court should grant plenary review on both questions presented. Each one is independently important and warrants this Court's definitive resolution.

Alternatively, this Court may wish to consider summarily reversing on the second question and then remanding for reconsideration of the first question. In particular, *Oxford Health* squarely forecloses the state court's interpretation of the FAA's review standard. *Supra* at Part II.A. And this Court has often summarily reversed state courts that fail to comply with FAA precedent. *See, e.g.*, *Nitro-Lift*, 133 S. Ct. at 501-04; *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202-04 (2012) (per curiam). Moreover, here, the state court's erroneous interpretation of the FAA review standard was at least part of the basis for the court's holding that the FAA does not preempt application of the state-law review standard. *Supra* at 20. And this Court has often summarily vacated the judgments of state courts that were at least potentially tainted by

a clearly erroneous understanding of the FAA. *See, e.g.*, *Marmet*, 132 S. Ct. at 1204; *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 24-26 (2011) (per curiam).

Finally, although Petitioners do not believe that either option above is precluded by the state court's interpretation of the MSA's arbitration and choice-of-law provisions, if this Court has any doubts, it should at a minimum GVR in light of its intervening decision in *Imburgia*. With the benefit of *Imburgia*, the state court could and should reconsider its improper interpretations of the MSA, thus eliminating any conceivable obstacle to this Court's review if the state court persists in its erroneous interpretations of the FAA.

CONCLUSION

This Court should grant the petition for a writ of certiorari. Alternatively, this Court may wish to consider a summary vacatur and remand in light of *Oxford Health*, or a GVR in light of *Imburgia*.

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Respectfully submitted,

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