

No. 23-1812

**In the United States Court of Appeals
for the Seventh Circuit**

MARY RODGERS-ROUZIER, ET AL.
Plaintiffs-Appellants,

v.

AMERICAN QUEEN STEAMBOAT OPERATING CO. AND HMS GLOBAL MARITIME, LLC
Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, New Albany Division
No. 4:20-cv-00004-SEB-KMB, Hon. Sarah Evans Barker

APPELLANTS' REPLY BRIEF

Leah M. Nicholls
Counsel of Record
PUBLIC JUSTICE
1620 L Street NW
Suite 630
Washington, DC 20036
Tel: (202) 797-8600
Fax: (202) 232-7203
lnicholls@publicjustice.net

Douglas M. Werman
Maureen A. Salas
Sarah J. Arendt
WERMAN SALAS P.C.
77 West Washington Street
Suite 1402
Chicago, IL 60602
Tel: (312) 419-1008
Fax: (312) 419-1025
dwerman@flsalaw.com
msalas@flsalaw.com
sarendt@flsalaw.com

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIESiii

INTRODUCTION 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. AMERICAN QUEEN CANNOT AVOID THE APPLICATION OF
RULE 12(G)(2). 3

II. THE DISTRICT COURT LACKED AUTHORITY TO COMPEL
ARBITRATION UNDER INDIANA LAW. 9

A. Appellants Preserved the Argument. 9

B. The FAA Provides the Exclusive Mechanism for Compelling
Arbitration in Federal Court Under These Circumstances..... 10

C. The IUAA Does Not Purport to Require Federal Courts to
Compel Arbitration. 13

D. American Queen’s Contract States It Is Governed by the FAA,
Not the IUAA, and American Queen Must Abide By that Choice. 14

III. AMERICAN QUEEN’S ARBITRATION AGREEMENT IS
UNENFORCEABLE. 15

A. The Agreement Provides American Queen with the Unfettered
Discretion to Choose the Terms of Arbitration. 15

B. This Court Should Hold the Waiver of Rodgers-Rouzier’s FLSA
Rights Is Unenforceable..... 19

C. The Unenforceable Provisions Are Not Severable. 21

IV. THIS COURT SHOULD HOLD THAT THE OPT-IN PLAINTIFFS
ARE PARTIES TO THE LITIGATION..... 22

A. This Court Has Jurisdiction to Decide the Question. 22

B. The Text of the FLSA States that Individuals Who Opt-In to a
Collective Action Are Parties to that Action. 24

C. This Court Cannot Compel the Opt-Ins’ Claims to Arbitration. 25

CONCLUSION..... 26

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES

Alvarez v. City of Chicago,
605 F.3d 445 (7th Cir. 2010)24

Atlantic Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.,
571 U.S. 49 (2013).....4, 5

Bernhardt v. Polygraphic Co. of Am., Inc.,
350 U.S. 198 (1956).....12

Boaz v. FedEx Customer Info. Servs., Inc.,
725 F.3d 603 (6th Cir. 2013) 19-20

Bragg v. Linden Research, Inc.,
487 F. Supp. 2d 593 (E.D. Pa. 2007)19

Brooklyn Sav. Bank v. O’Neil,
324 U.S. 697 (1945).....19

Brumley v. Commonwealth Bus. Coll. Educ. Corp.,
945 N.E.2d 770 (Ind. Ct. App. 2011).....16, 20

Canaday v. Anthem Cos.,
9 F.4th 392 (6th Cir. 2021)25

Carbajal v. H & R Block Tax Servs., Inc.,
372 F.3d 903 (7th Cir. 2004)21

Clark v. A&L Homecare & Training Ctr.,
68 F.4th 1003 (6th Cir. 2023)25

Cloutier v. GoJet Airlines, LLC,
996 F.3d 426 (7th Cir. 2021)2

Coinbase, Inc. v. Bielski,
599 U.S. 736 (2023).....10, 11

Cole v. Burns Int’l Sec. Serv.,
105 F.3d 1465 (D.C. Cir. 1997).....12

Conrad v. Phone Directories Co.,
585 F.3d 1376 (10th Cir. 2009)8

DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.,
28 F.4th 956 (9th Cir. 2022)5

Devlin v. Scardeletti,
536 U.S. 1 (2002).....22

Dieng v. Coll. Park Hyundai,
2009 WL 2096076 (D. Md. July 9, 2009).....20

Dillon v. BMO Harris Bank, N.A.,
787 F.3d 707 (4th Cir. 2015)4

Doss v. Clearwater Title Co.,
551 F.3d 634 (7th Cir. 2008)24

Douglas v. W. Union Co.,
955 F.3d 662 (7th Cir. 2020) 22-23

Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs., Inc.,
7 F.4th 555 (7th Cir. 2021)5, 6, 7

Ennenga v. Starns,
677 F.3d 766 (7th Cir. 2012)9, 24

Escobar v. Nat’l Maint. Contractors, LLC,
2022 WL 17830001 (9th Cir. Dec. 21, 2022).....5

Espensheid v. DirectSatUSA, LLC,
688 F.3d 872 (7th Cir. 2012)24

Flores v. Transamerica HomeFirst, Inc.,
113 Cal. Rptr. 2d 376 (Cal. Ct. App. 2001)..... 18-19

Flyer Printing Co. v. Hill,
805 So. 2d 829 (Fla. Dist. Ct. App. 2001)18

Goplin v. WeConnect, Inc.,
893 F.3d 488 (7th Cir. 2018)4

Guaranty Trust Co. of N.Y. v. York,
326 U.S. 99 (1945).....12

Halle v. West Penn Allegheny Health System, Inc.,
842 F.3d 215 (3d Cir. 2016).....23

Hamrick v. Partsfleet, LLC,
1 F.4th 1337 (11th Cir. 2021)12

Hanna v. Plumer,
380 U.S. 460 (1965).....12

Harper v. Amazon.com Servs., Inc.,
12 F.4th 287 (3d Cir. 2021)12

Hartman v. BigInch Fabricators & Constr. Co.,
161 N.E.3d 1218 (Ind. 2021)18

Hawkins v. Aid Ass’n for Lutherans,
338 F.3d 801 (7th Cir. 2003)2

Hollins v. Regency Corp.,
144 F. Supp. 3d 990 (N.D. Ill. 2015)25

Hollins v. Regency Corp.,
867 F.3d 830 (7th Cir. 2017)25

Huntington Mortg. Co. v. DeBrotta,
703 N.E.2d 160 (Ind. Ct. App. 1998).....16

Jackson v. Payday Fin., LLC,
764 F.3d 765 (7th Cir. 2014)4

Johnson v. Orkin, LLC,
556 F. App’x 543 (7th Cir. 2014)4

Justus v. Justus,
581 N.E.2d 1265 (Ind. Ct. App. 1991)18

LeLouis v. W. Directory Co.,
230 F.Supp.2d 1214 (D. Or. 2001)18

Mason-Dixon Lines, Inc. v. Union No. 560,
443 F.2d 807 (3d Cir. 1971).....11

Moore v. Wells Fargo Const.,
903 N.E.2d 525 (Ind. Ct. App. 2009), *on reh’g*, 907 N.E.2d 1038 (Ind. Ct. App. 2009).....17

Oliveira v. New Prime, Inc.,
857 F.3d 7 (1st Cir. 2017), *aff’d*, 139 S. Ct. 532 (2019).....12

Parilla v. IAP Worldwide Servs., VI, Inc.,
368 F.3d 269 (3d Cir. 2004).....22

Peters v. Welsh Dev. Agency,
920 F.2d 438 (7th Cir. 1990)23

Rent-a-Center, W., Inc. v. Jackson,
561 U.S. 63 (2010).....20

Saxon v. Sw. Airlines Co.,
993 F.3d 492 (7th Cir. 2021), *aff'd*, 596 U.S. 450 (2022)12

Scheurer v. Fromm Family Foods LLC,
863 F.3d 748 (7th Cir. 2017)2

Seafarers Pension Plan on Behalf of Boeing Co. v. Bradway,
23 F.4th 714 (7th Cir. 2022)5

Sherwood v. Marquette Transp. Co.,
587 F.3d 841 (7th Cir. 2009)12

Sonner v. Premier Nutrition Corp.,
971 F.3d 834 (9th Cir. 2020) 12-13, 13, 14

Spinsky v. Kay,
550 N.E.2d 349 (Ind. Ct. App. 1990).....13

Taylor v. W. & S. Life Ins. Co.,
966 F.2d 1188 (7th Cir. 1992)20

The Winterton, LLC v. Winterton Investors, LLC,
900 N.E.2d 754 (Ind. Ct. App. 2009).....18

STATUTES

9 U.S.C. § 3.....7

29 U.S.C. § 216(b)24

Ind. Code Ann. § 34-57-2-115

Ind. Code Ann. § 34-57-2-20.....15

N.J.S.A. 2A:23B-3(a).....14, 15

OTHER AUTHORITIES

Blake, Harlan M., *Employee Agreements Not to Compete*,
73 Harv. L. Rev. 625 (1960).....22

Restatement (Second) of Contracts § 184, cmt. B22

INTRODUCTION

Defendants-Appellants American Queen Steamboat Operating Co. and HMS Global Maritime, LLC (collectively American Queen) fail to grapple seriously (or at all) with Appellants' arguments that Mary Rodgers-Rouzier's wage claims should not have been compelled to arbitration and that the Opt-In Plaintiffs were parties to the action below. Instead, American Queen refers to irrelevant standards of review and does not attempt to square this Court's recent jurisprudence treating motions to compel arbitration as Rule 12(b)(3) motions with its position. It misunderstands Appellants' argument that federal courts cannot provide the remedy of compelling arbitration without the Federal Arbitration Act (FAA), relying on cases that support Appellants' view. American Queen cannot (and so does not) defend the unenforceable terms in its arbitration agreement. It instead asks this Court to ignore the plain terms of the contract, argues the question is for the arbitrator, and fails to respond Appellants' severability arguments. But perhaps most tellingly, American Queen makes *no* argument that its position that the Opt-In Plaintiffs are not parties to the litigation is supported by the text of the Fair Labor Standards Act (FLSA).

In short, for the reasons in Appellants' Opening Brief and below, the district court's decision compelling Rodgers-Rouzier's claims to arbitration and concluding that the Opt-In Plaintiffs were not parties should be reversed, and American Queen offers no compelling arguments to the contrary.

STANDARD OF REVIEW

Where there are no relevant disputed factual issues, this Court reviews grants of motions to compel arbitration *de novo*. Opening Br. 12. The *de novo* standard applies regardless of whether the district court stayed or dismissed the action. *See Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 805-06 (7th Cir. 2003) (applying *de novo* standard where motion to compel arbitration granted and claims dismissed without prejudice); *see also Cloutier v. GoJet Airlines, LLC*, 996 F.3d 426, 434 n.2 (7th Cir. 2021) (“Regardless of whether we treat this issue as review of a motion to dismiss or a motion to compel, *de novo* review applies.”); *Scheurer v. Fromm Family Foods LLC*, 863 F.3d 748, 751-52 (7th Cir. 2017) (explaining standard of review for motions to compel without drawing any distinction between stayed and dismissed actions).

American Queen appears to contend (at 15) that an abuse of discretion standard applies to the question whether, after compelling arbitration, a district court should have stayed rather than dismissed an action. Which standard of review applies to that question is irrelevant. Because Appellants have not raised it on appeal and American Queen has not cross-appealed, it is not before this Court.

Similarly, American Queen’s statement (at 15) about the standard of review for a district court’s finding that collective treatment is inappropriate is irrelevant because the district court did not make any such finding and that issue is not before this Court either.¹ Rather, the issue before this Court is whether, under the FLSA,

¹ The district court denied Rodgers-Rouzier’s motion for conditional certification of the collective action without prejudice because American Queen failed to submit

individuals who file opt-in notices are parties to the litigation, a question of law subject to *de novo* review.

ARGUMENT

The district court's decision dismissing Appellants' claims should be reversed. To begin, the district court erred in considering American Queen's second Rule 12(b)(3) motion to dismiss and compel arbitration of Rodgers-Rouzier's wage claims because it is a serial motion to dismiss barred by Federal Rule of Civil Procedure 12(g)(2). But even if the court could have evaluated the motion, it lacked the authority to compel arbitration under state law as a matter of federal law, state law, and the terms of American Queen's arbitration agreement. And it should also not have compelled arbitration because multiple provisions in American Queen's arbitration agreement are unenforceable: the provision granting American Queen unfettered discretion to choose the arbitral forum, rules, and arbitrator and the shortening of the statute of limitations for FLSA claims. Further, the 127 Opt-In Plaintiffs were party-plaintiffs to the litigation under the FLSA, and this Court has jurisdiction to reverse the district court on that point.

I. American Queen Cannot Avoid the Application of Rule 12(g)(2).

The district court's order granting American Queen's motion to compel arbitration and dismissing Rodgers-Rouzier's claims should be reversed because

sufficient evidence that the prospective members of the collective action had agreed to arbitrate, and, as such, the district court lacked sufficient information to decide the question. A71-A72. That does not constitute a finding that a collective action is inappropriate. Regardless, Appellants are not appealing that order.

American Queen’s renewed motion to compel arbitration under Indiana law was barred by Rule 12(g)(2). Opening Br. 13-16. That Rule prohibits successive Rule 12(b)(3) motions to dismiss. Because this Court views motions to compel arbitration and dismiss as Rule 12(b)(3) motions—both before and after *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas*, 571 U.S. 49 (2013)—American Queen was prohibited from bringing its second motion, and the district court should not have considered it.²

1. *Atlantic Marine* does not displace this Court’s precedent that motions to dismiss and compel arbitration are Rule 12(b)(3) motions. For starters—as American Queen admits (at 18 n.3)—this Court has frequently continued to consider motions to compel arbitration and dismiss as Rule 12(b)(3) motions even after the Supreme Court’s 2013 decision in *Atlantic Marine*. See, e.g., *Goplin v. WeConnect, Inc.*, 893 F.3d 488, 490-91 (7th Cir. 2018) (Barrett, J.); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 773 (7th Cir. 2014); *Johnson v. Orkin, LLC*, 556 F. App’x 543, 544 (7th Cir. 2014). But also, the consequences that flow from applying *Atlantic Marine*, which did not involve arbitration, in the context of arbitration would upend the way that this Court and others handle motions to compel arbitration.

In *Atlantic Marine*, the Supreme Court held that valid forum-selection clauses designating another federal forum are best enforced via a motion to transfer under

² American Queen cites *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015), for the proposition that serial motions to compel arbitration are permitted, but *Dillon* did not address the argument that serial Rule 12(b)(3) motions to dismiss are prohibited. See American Queen Br. 20.

28 U.S.C. § 1404(a), and that valid forum-selection clauses pointing to state or federal forums are best addressed via the doctrine of *forum non conveniens*, not through Rule 12(b)(3) motions. 571 U.S. at 60-61. The Supreme Court laid out the standard to apply when evaluating *forum non conveniens* motions based on valid forum-selection clauses, setting a high bar for not enforcing valid forum-selection clauses. *Id.* at 61. The Court did not address situations where—as with arbitration—the forum selected is not federal, state, or foreign.³

Without acknowledging or reckoning with its longstanding practice of viewing motions to dismiss and compel arbitration as Rule 12(b)(3) motions, this Court has once tinkered with applying *Atlantic Marine* to motions to compel arbitration and treating them under the doctrine of *forum non conveniens*. See *Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs., Inc.*, 7 F.4th 555, 560 (7th Cir. 2021). In addition to creating an unacknowledged intra-circuit split, this decision did not consider the ways in which extending *Atlantic Marine* to arbitration clauses is incompatible with the way courts handle motions to compel arbitration. And, even assuming the doctrine of *forum non conveniens* could apply to some subset of arbitration agreements, the arbitration clause in *Meinders* was more akin to the

³ The *Atlantic Marine* standard for assessing when a forum-selection clause is not enforced presumes a *valid* forum-selection clause and does not apply unless and until a court first determines the clause is valid. See *Seafarers Pension Plan on Behalf of Boeing Co. v. Bradway*, 23 F.4th 714, 724-27 (7th Cir. 2022); see also *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 967 (9th Cir. 2022); *Escobar v. Nat'l Maint. Contractors, LLC*, 2022 WL 17830001, at *1 (9th Cir. Dec. 21, 2022) (holding *Atlantic Marine* does not apply to question whether geographic forum selection in an arbitration clause is unconscionable).

forum-selection clauses discussed in *Atlantic Marine*, which designated a specific geographical forum, than the one here.⁴

In *Meinders*, the arbitration clause designated the specific state in which arbitration was to occur. *Id.* This Court explained, “Because the clause selects a state forum, United should have brought a motion under the forum non conveniens doctrine to enforce it.” *Id.* *Meinders* thus rested on the designation of a state forum and did not address the question whether and to what extent *Atlantic Marine*’s holding applies when an arbitration agreement does not include a geographic designation like that contemplated in *Atlantic Marine*. Here, unlike in *Meinders*, American Queen’s arbitration agreement designates no specific state forum. A75 (providing that arbitration will take place in the county of the worker’s last employment with American Queen). Thus, even if *Atlantic Marine* applies to some arbitration agreements, under *Meinders*, it would not apply here.

Further, applying *forum non conveniens* to motions to compel arbitration and dismiss would lead to anomalies in the way courts handle motions to compel arbitration—a result the Supreme Court likely did not intend when addressing an issue that did not arise in the context of arbitration. First, considering motions to compel arbitration and dismiss under the doctrine of *forum non conveniens* would undermine the option to stay provided by the FAA. While a stay of litigation for

⁴ Circuit Rule 40(e) requires that opinions overruling prior precedent or creating a intra-circuit split be circulated to the full court for potential *en banc* treatment before the opinion is published, and that a footnote reflecting that circulation be included. *Meinders* contains no such footnote.

arbitration is expressly provided for under the FAA, 9 U.S.C. § 3, there is no stay traditionally available under *forum non conveniens*, only dismissal. Indeed, *Meinders* explained that treating motions to compel as *forum non conveniens* inquiries required it to dismiss the action. *Meinders*, 7 F.4th at 561 n.7. If applied to all motions to compel, and not just those accompanied by a motion to dismiss, that would undercut the FAA's provision for stays of litigation during arbitration proceedings. *See* 9 U.S.C. § 3.⁵

Second, if actions could still be stayed for arbitration, there would be an unjustified disparity in the standard of review between cases dismissed and cases stayed. As explained *supra*, this Court, like other courts, reviews decisions on motions to compel arbitration *de novo*, and that standard has never depended on whether the action was dismissed or stayed. However, stays are not traditionally available under the doctrine of *forum non conveniens*, only dismissal, and the standard of review for dismissals under *forum non conveniens* is abuse of discretion. *Meinders*, 7 F.4th at 561 & n.7. Thus, motions to compel and stay litigation would be reviewed under a *de novo* standard and motions to compel and dismiss would be decided under an abuse of discretion standard. *See id.* at 561. Indeed, *Meinders* flagged the problem of which standard of review to apply but declined to resolve it. *Id.*

⁵ While the FAA does not enforce the arbitration agreement here, it is relevant to this question because it is the primary way in which federal courts enforce and compel arbitration.

In sum, neither *Atlantic Marine* nor *Meinders* squarely addresses whether arbitration agreements, without considering the location component, are subject to the analysis in *Atlantic Marine*. Doing so would create a host of other issues, and this Court should instead follow its cases that continue to treat motions to dismiss and compel arbitration as Rule 12(b)(3) motions.⁶

2. Nor can American Queen avoid the application of Rule 12(g)(2) by pretending this case was stayed instead of dismissed. American Queen filed an express Rule 12(b)(3) motion to dismiss and compel arbitration or, alternatively, stay the action. Dkt. 75. By compelling arbitration and dismissing Rodgers-Rouzier's claims, the district court effectively granted American Queen's Rule 12(b)(3) motion to dismiss, not the alternative motion for a stay. *See* A34.

American Queen asserts that the district court did not evaluate its Rule 12(b)(3) motion to dismiss, but rather considered its alternative motion to stay—which was the same document as the Rule 12(b)(3) motion to dismiss—and then nevertheless dismissed the case instead of granting the requested relief. American Queen Br. 21. But American Queen cannot simply ignore the motion to dismiss it filed that the court granted—American Queen presented no other basis for dismissal.

⁶ American Queen also cites *Conrad v. Phone Directories Co.*, 585 F.3d 1376 (10th Cir. 2009), as support for the idea that motions to compel arbitration are not Rule 12 motions. American Queen Br. 20-21. But the issue there was whether a generic Rule 12 motion sufficiently invoked the FAA such that an immediate appeal was available under 9 U.S.C. § 16, not whether an express motion to dismiss and compel arbitration was a Rule 12(b)(3) motion. *See Conrad*, 585 F.3d at 1376. Further, if interpreted as American Queen implies, *Conrad* conflicts with this Court's substantial precedent holding that motions to dismiss and compel are Rule 12(b)(3) motions.

That is the motion and relief it must defend on appeal; American Queen has not cross-appealed the district court's decision to dismiss rather than stay.⁷

3. The fact that American Queen raised a new venue argument in its second Rule 12(b)(3) motion does not exempt it from Rule 12(g)(2). As this Court has explained, Rule 12(g)(2) “requires litigants to consolidate certain dismissal *arguments* in a single motion,” in order to “prevent piecemeal litigation in which a defendant moves to dismiss on one ground, loses, then files a second motion on another ground.” *Ennenga v. Starns*, 677 F.3d 766, 772-73 (7th Cir. 2012) (emphasis added). Even the district court here recognized that American Queen's multiple Rule 12(b)(3) motions fell squarely within the types of serial motions the rule intended to prohibit. A14-A15.⁸

II. The District Court Lacked Authority to Compel Arbitration Under Indiana Law.

A. Appellants Preserved the Argument.

American Queen contends Appellants failed to preserve the argument that the district court lacked authority to compel arbitration under state law, but that is false. *See American Queen Br. 26*. Appellants argued that a federal court's “power to compel arbitration flows from the [FAA],” and if arbitration cannot be compelled under the

⁷ American Queen's argument that the district court really granted a motion to stay is in tension with its argument that it should be considered a *forum non conveniens* motion, under which there would not be a stay.

⁸ American Queen argues (at 24-26) that it did not waive its right to compel arbitration under common-law waiver principles. Appellants do not appeal the district court's holding on common-law waiver, and that issue is not before this Court.

FAA, federal courts “lack power to compel to compel [Rodgers-Rouzier] to arbitrate.” Dkt. 81, at 1, 4; *see also id.* at 5, 8; Dkt. 37, at 1, 4-5; Dkt. 156, at 7 n.3. That is precisely the thrust of Appellants’ primary argument here. Further, Appellants expressly argued that the court could not compel arbitration under state law rather than federal law. Dkt. 149, at 9-13; Dkt. 156, at 6-8. And the district expressly rejected those arguments. A23-A29.

B. The FAA Provides the Exclusive Mechanism for Compelling Arbitration in Federal Court Under These Circumstances.

The core of Appellants’ argument that federal courts lack the power to provide the equitable remedy of compelling arbitration where arbitration cannot be compelled under § 4 of the FAA is straightforward: Prior to the FAA’s enactment in 1925, federal courts lacked the power to provide the particular equitable remedy of compelling arbitration. The FAA granted federal courts the power to compel arbitration, but *only* where the agreement is enforceable under the FAA. While federal courts with jurisdiction have always, even before the FAA, been able to apply state law as the rule of *decision* when evaluating arbitration agreements, their *remedial* power does not include the power to compel arbitration unless so provided by the FAA, and state law cannot alter the equitable remedial powers of federal courts. Opening Br. 18-24.

American Queen calls this approach “arcane and antiquated,” but it is exactly the approach the Supreme Court takes when interpreting the FAA. Most recently, in *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023), the Supreme Court started with the background rule that existed at the time the relevant amendments to the FAA were

enacted, then looked to see whether Congress evidenced its intent to change that background rule when it amended the FAA. *Coinbase*, 599 U.S. at 740-41. Because Congress did not alter the background rule, that rule—in *Coinbase*, a stay of district court proceedings during the pendency of an interlocutory appeal—continued to apply. *Id.* Applying the same framework here, the background rule that federal courts could not provide the remedy of compelling arbitration continues, except where Congress has provided otherwise in § 4 of the FAA or another federal statute.

American Queen claims that *Mason-Dixon Lines, Inc. v. Union No. 560*, 443 F.2d 807 (3d Cir. 1971), rejected Appellants’ argument, but that is incorrect. There, as here, the workers’ contracts were exempt from the FAA under § 1, and the court could not order arbitration under § 3 of the FAA. *Id.* at 809. However, another *federal* statute, the Labor Management Relations Act (LMRA), did authorize the court to order arbitration under the circumstances of that dispute. *Id.*; see Opening Br. 17 n.5 (explaining Congress has also authorized compelling arbitration under the LMRA and two other federal statutes, none of which applies here). In reaching that conclusion, the Third Circuit explained that “the effect of Section 1 is merely to leave the arbitrability of disputes in the excluded categories as if the Arbitration Act had never been enacted.” *Mason-Dixon*, 443 F.2d at 809. Appellants wholeheartedly agree. There, even without the FAA, Congress had authorized federal courts to compel arbitration under the LMRA. But here, in contrast, absent the FAA—or another federal statute compelling arbitration—there is *no* Congressional authorization for federal courts to compel arbitration. See Opening Br. 18-22.

American Queen also relies heavily on cases holding that if federal law does not govern the *enforceability* of an agreement to arbitrate, state law must.⁹ But this focus on enforceability mischaracterizes Appellants’ argument as an argument that the FAA preempts all state arbitration law. Far from it. Appellants agree that state law may very well govern the enforceability of an agreement to arbitrate where the FAA does not—that is, provide the rule of decision—but federal courts lack the authority to order the particular *remedy* of compelling arbitration where the FAA (or another federal statute) does not authorize it.

Appellants agree with American Queen (at 31) that § 2 of the FAA, in addition to state laws that govern the validity of arbitration agreements, are substantive laws, and that a federal court may apply state substantive law as the law of decision. But compelling arbitration is an equitable *remedy*, and equitable *remedies* are procedural. *See Hanna v. Plumer*, 380 U.S. 460, 464 (1965). “State law cannot define the remedies which a federal court must give[.]” *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 106 (1945). In particular, “a state statute does not change the nature of the federal courts’ equitable powers.” *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842 (9th

⁹ *See Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 202-05 (1956) (considering whether arbitration agreement valid under state law, but not addressing what remedy federal courts could provide); *Oliveira v. New Prime, Inc.*, 857 F.3d 7 (1st Cir. 2017) (not addressing question whether the federal court can provide the remedy of compelling arbitration under state law), *aff’d*, 139 S. Ct. 532 (2019); *Harper v. Amazon.com Servs., Inc.*, 12 F.4th 287 (3d Cir. 2021) (same); *Saxon v. Sw. Airlines Co.*, 993 F.3d 492 (7th Cir. 2021) (same), *aff’d*, 596 U.S. 450 (2022); *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337 (11th Cir. 2021) (same); *Cole v. Burns Int’l Sec. Serv.*, 105 F.3d 1465 (D.C. Cir. 1997) (same). Appellants addressed *Sherwood v. Marquette Transp. Co.*, 587 F.3d 841 (7th Cir. 2009), at length in their Opening Brief (at 23).

Cir. 2020) (internal quotations and citation omitted). For example, federal courts decline to award remedies of equitable restitution provided for by state law precisely because state law cannot dictate the equitable remedies available in federal court. *Id.* at 844; *see id.* at 843 (collecting cases declining to award state-law equitable remedies).

C. The IUAA Does Not Purport to Require Federal Courts to Compel Arbitration.

Unsurprisingly, because state-law equitable remedies only apply in state court, not in federal court, the Indiana Uniform Arbitration Act (IUAA) does not purport to require federal courts to impose the state-law equitable remedy of compelling arbitration. As explained in Appellants' Opening Brief (at 25-26), under the plain text of the statute, only Indiana state courts can provide the remedy of compelling arbitration under the IUAA. And Indiana law does not authorize the remedy of specific performance unless a statute so provides—a court cannot compel arbitration under Indiana law except under the IUAA. *See Spinsky v. Kay*, 550 N.E.2d 349, 351 (Ind. Ct. App. 1990).

American Queen agrees that the IUAA only grants the jurisdiction to compel arbitration under the statute to state courts, and does so because states may not create jurisdiction in federal court. American Queen Br. 36-37. Where American Queen misses the mark is failing to understand that that reasoning applies equally

to equitable remedies—like compelling arbitration—because states may not impose equitable remedies on federal courts. *See Sonner*, 971 F.3d at 841-44.¹⁰

D. American Queen’s Contract States It Is Governed by the FAA, Not the IUAA, and American Queen Must Abide By that Choice.

Indiana law governs the interpretation of American Queen’s arbitration contract, and when parties have a choice-of-law provision in their arbitration agreement, Indiana law holds the parties to that choice. Here, American Queen’s arbitration agreement states that it is governed by the FAA. A76. Under Indiana caselaw, they are stuck with that choice.

American Queen makes no attempt to grapple with the Indiana law cited by Appellants (at 27-29). The best American Queen can do is point to a New Jersey case interpreting a New Jersey statute and contend that the IUAA should, like the New Jersey law, automatically apply to all arbitration agreements regardless of what the parties specify in their agreements. American Queen Br. 34-35. But Indiana courts have never interpreted the IUAA—which contains more ambiguous language than the New Jersey statute—as automatically applying regardless of the contracting parties’ intent. On the contrary, Indiana courts have held contract drafters to their choice-of-law. *Compare* N.J.S.A. 2A:23B-3(a) (applies to “all agreements to arbitrate

¹⁰ The unpublished district court decisions from other circuits holding otherwise did not consider this argument, and their holdings are unpersuasive.

made on or after” a certain date), *with* Ind. Code Ann. § 34-57-2-20 (“applies only to agreements made after” a certain date).¹¹

Next, American Queen contends that the provision stating the FAA governs should be severed under the agreement’s severability clause. There are a host of reasons why the severability clause should be given no weight, discussed *infra*, but, on its face, the severability clause—which provides, “If any portion of this Agreement is held to be invalid or unenforceable, it shall not affect the remaining portions of this Agreement”—does not apply. A76. The term that the FAA governs is not “invalid” or “unenforceable.” It is just that the result of the FAA governing is that no arbitration can be compelled. American Queen cannot sever provisions because it dislikes the outcome; it is bound to the outcome that the contract terms dictate.

III. American Queen’s Arbitration Agreement Is Unenforceable.

A. The Agreement Provides American Queen with the Unfettered Discretion to Choose the Terms of Arbitration.

An agreement providing the drafting party with unfettered discretion to choose the arbitral forum at the time the dispute arises and, in turn, the arbitral rules and the arbitrator, is unenforceable. This issue renders American Queen’s entire arbitration agreement unenforceable. Opening Br. 30-35. At the very least, the unfettered discretion provision is unconscionable under Indiana law, given the

¹¹ American Queen’s argument that the IUAA should be treated identically with the New Jersey law is further undercut by the statutes’ clear, material differences. *E.g., compare* Ind. Code Ann. § 34-57-2-1 (exempting certain consumer contracts), *with* N.J.S.A. 2A:23B-3(a) (exempting certain labor contracts).

obvious gross disparity in bargaining power between Rodgers-Rouzier and American Queen and because no sensible person would agree to resolve disputes in a forum, under rules, and in front of a decisionmaker selected by the opposing party after the dispute has arisen. *See Brumley v. Commonwealth Bus. Coll. Educ. Corp.*, 945 N.E.2d 770, 777 (Ind. Ct. App. 2011).

Perhaps aware that it cannot enforce its terms as written, American Queen's response is to pretend the agreement says something else. But, as with the choice-of-law governing arbitration, American Queen is stuck with the contract it drafted. "It is not within the province of th[e] court to make a new contract for the parties or to ignore or eliminate any provisions in the instrument." *Huntington Mortg. Co. v. DeBrotta*, 703 N.E.2d 160, 164 (Ind. Ct. App. 1998). The text of American Queen's agreement provides, "The arbitration shall be conducted under the rules and procedures of the American Arbitration Association, Judicial Arbitration and Mediation Services or another arbitration service selected by the Company." A75. Under a straightforward reading of that language, "the Company"—American Queen—has unfettered, unilateral power to choose that any arbitration take place under the rules and procedures of the AAA, JAMS, or any other service it wants, with no input from the employee. The district court appears to agree with Appellants' interpretation, as well as the conclusion that it is unenforceable, as the district court's

analysis focuses on severability and whether a court could appoint the arbitrator in lieu of American Queen making that selection. *See* A25-A29.¹²

American Queen tries to avoid the upshot of its agreement by contending that American Queen would only be able select another arbitration service if AAA and JAMS were unavailable. American Queen Br. 39. But that is not what the contract says. Its plain terms place *no* limits on American Queen’s ability to select whatever arbitral forum it would like. And, Indiana law “give[s] effect to the intentions of the parties as expressed in the four corners of the document,” not what American Queen now avers. *Moore v. Wells Fargo Const.*, 903 N.E.2d 525, 531 (Ind. Ct. App. 2009), *on reh’g*, 907 N.E.2d 1038 (Ind. Ct. App. 2009).

American Queen further attempts to rely on the fact that it has not (yet) invoked its right to select the arbitral forum when Rodgers-Rouzier and many of the Opt-In Plaintiffs filed claims with AAA.¹³ But American Queen’s grace in not objecting to the employees’ selection does not transform an unenforceable term into an enforceable one. For starters, American Queen has not entered into any stipulation or other binding agreement to acquiesce to the selection made by the employees—even if, as here, employees file in AAA, American Queen has the right, under its contract, to object to or enjoin those proceedings if American Queen would

¹² The district court nevertheless ordered Rodgers-Rouzier to arbitrate in accordance with the terms of American Queen’s agreement. A34.

¹³ Many of the Plaintiffs have filed claims in arbitration to protect their claims from timeliness challenges, but they do so without waiving their arguments that their claims cannot be compelled to arbitration.

prefer a different arbitral service. American Queen has in no way surrendered its contractual rights.

Further, as a matter of Indiana contract law, the interpretation and enforceability of contracts is based on “the intent of the parties *at the time the contract was made* by examining the language used in the instrument to express their rights and duties.” *The Winterton, LLC v. Winterton Investors, LLC*, 900 N.E.2d 754, 759 (Ind. Ct. App. 2009) (emphasis added). *See also Hartman v. BigInch Fabricators & Constr. Co.*, 161 N.E.3d 1218, 1223 (Ind. 2021) (“Our goal in contract interpretation is to determine the parties’ intent when they entered into their agreement.”). “The doctrine of unconscionability necessarily looks to the time of execution” of the contract. *Justus v. Justus*, 581 N.E.2d 1265, 1272 (Ind. Ct. App. 1991). Thus, as a matter of state contract law, American Queen cannot now offer to ignore the problematic parts of its agreement.

In the arbitration context, courts have largely held that companies’ attempts to mitigate the unfair provisions in their arbitration agreements by, for example, later offering to pay unfairly high arbitration fees do not remedy the unfair provisions. *See, e.g., LeLouis v. W. Directory Co.*, 230 F.Supp.2d 1214, 1224-25 (D. Or. 2001); *Flyer Printing Co. v. Hill*, 805 So. 2d 829, 833 (Fla. Dist. Ct. App. 2001). Instead, companies must answer to the contract terms they drafted. It is “woefully unfair” to allow a company to, after a dispute has arisen, “to refute the unconscionable aspects of the arbitration agreement which [the company] itself drafted and from which [the company] stood to benefit over the life of the [larger contract].” *Flores v.*

Transamerica HomeFirst, Inc., 113 Cal. Rptr. 2d 376, 385 (Cal. Ct. App. 2001); *see also Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 612 (E.D. Pa. 2007) (“The Court declines to rewrite the agreement, at Linden’s request, to save an unconscionable arbitration provision which Linden itself drafted and now seeks to enforce.”). It would be both contrary to Indiana law and “woefully unfair” to allow American Queen to now, after a dispute has arisen and it faces the consequences of its drafting, repudiate the unenforceable terms it imposed on Rodgers-Rouzier and her coworkers.

B. This Court Should Hold the Waiver of Rodgers-Rouzier’s FLSA Rights Is Unenforceable.

In 1945, the Supreme Court explained that parties may not contract to waive substantive rights under the FLSA and that a limitation on damages is a waiver of those substantive rights. *See Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945). Because shortening the statute of limitations for FLSA claims acts as a limitation on damages, it cannot be waived by contract. Opening Br. 35-39; DOL Br. 8-17. Thus, since 1945, it has been evident that clauses purporting to shorten the statute of limitations for FLSA claims are invalid.

No wonder then, that American Queen makes no real argument to the contrary. American Queen makes no attempt to explain why its statute of limitations can be enforced under the Supreme Court precedent highlighted by Appellants. It does not try to persuade this Court not to follow the Sixth Circuit’s holding on this issue in *Boaz v. FedEx Customer Information Services, Inc.*, 725 F.3d 603 (6th Cir.

2013). In support of enforcing its contract as written, American Queen cites only an irrelevant decision from this Court addressing shortening the statute of limitations under an entirely different statute, *Taylor v. W. & S. Life Ins. Co.*, 966 F.2d 1188 (7th Cir. 1992) (addressing Title VII claims), and an unpublished district court decision that did not address any FLSA-specific arguments, *Dieng v. Coll. Park Hyundai*, 2009 WL 2096076 (D. Md. July 9, 2009). This Court should follow Supreme Court precedent and decline to enforce American Queen’s provision shortening the statute of limitations for FLSA claims.

Left without any plausible arguments on the merits, American Queen contends that the enforceability of the statute of limitations provision must be decided by the arbitrator, not the Court. That is wrong.

As American Queen admits (at 42), under Indiana law, challenges to the enforceability of the arbitration agreement (as opposed to the larger agreement) are questions for courts, not arbitrators. *See Brumley*, 945 N.E.2d at 777 (“If a party challenges the validity of the precise agreement to arbitrate, the court must address the challenge before ordering compliance with that agreement[.]”); *cf. Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010) (“If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4”). Here, Rodgers-Rouzier is challenging the enforceability of the arbitration clause, in part, on the basis that that the arbitration agreement’s shortened statute of limitations is unenforceable. *See* Opening Br. 35-39; A76 (six-month limitations period part of

arbitration agreement). Because Rodgers-Rouzier is challenging the enforceability of the arbitration clause, the bases for that argument—including the statute of limitations—are for this Court to decide. A court cannot enforce an arbitration agreement without first determining whether that arbitration agreement is enforceable.¹⁴

C. The Unenforceable Provisions Are Not Severable.

The unenforceable provisions in American Queen’s arbitration agreement preclude arbitration altogether. First, the provision giving American Queen unfettered discretion to choose the arbitral forum, rules, and arbitrator after a dispute has arisen alone precludes arbitration because the non-drafter cannot know the terms of arbitration at the time they enter into the agreement. Under those circumstances, no enforceable agreement is formed. *See* Opening Br. 31-33. American Queen makes no attempt to respond to Appellants’ argument on this front.

But even if the unfettered discretion clause could be severed, it cannot be severed here because American Queen’s arbitration agreement contains multiple unenforceable provisions—the unfettered discretion clause as well as the shortened statute of limitations. Because severing multiple unenforceable provisions rewards

¹⁴ American Queen relies on *Carbajal v. H & R Block Tax Services, Inc.*, 372 F.3d 903 (7th Cir. 2004), for the proposition that questions about whether waivers of federal rights are enforceable are for the arbitrator. However, it is unclear from *Carbajal* whether the federal rights in question were part of the challenge to the arbitration clause, and to the extent *Carbajal* held that challenges to the enforcement of the arbitration clause are for the arbitrator, it conflicts with *Rent-a-Center*’s clear statement to the contrary.

drafters' including unenforceable provisions in their agreements in an effort to chill claims and take advantage of their power, courts decline to do so and instead hold the entire agreement is invalid. *See* Opening Br. 39-41. *See also Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 289 (3d Cir. 2004) (“a multitude” of defects “will preclude severance” when they reflect an employer’s “deliberate attempt” to abuse a dominant bargaining position and produce “biased” results); Restatement (Second) of Contracts § 184, cmt. B. (“[A] court will not aid a party who has taken advantage of his dominant bargaining power.”); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 683 (1960) (explaining that any other rule would invite a race to the bottom whereby those with more power would “fashion truly ominous covenants with confidence that they will be pared down and enforced”). Again, American Queen makes no attempt whatsoever to respond to Appellants’ argument that the arbitration agreement cannot be enforced in light of its multiple unenforceable provisions. *See* Opening Br. 39-41.

IV. This Court Should Hold that the Opt-In Plaintiffs Are Parties to the Litigation.

A. This Court Has Jurisdiction to Decide the Question.

This Court has jurisdiction over the Opt-In Plaintiffs’ appeal of the district court’s holding that they are not party-plaintiffs to the litigation. That is a final order as to their party status, and this Court and the Supreme Court entertain appeals presenting the question whether a person was a party to a class or collective action below. *See Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002); *Douglas v. W. Union Co.*, 955

F.3d 662, 664 (7th Cir. 2020); Opening Br. 42-45. American Queen is correct that the Opt-In Plaintiffs cannot appeal the district court’s order compelling Rodgers-Rouzier to arbitration, but that is not what they are appealing—the Opt-In Plaintiffs appeal only the decision that they are not party-plaintiffs and the dismissal of *their* claims. That question is entirely independent of the question whether Rodgers-Rouzier’s claims were properly compelled to arbitration. Indeed, American Queen appears to concede that opt-ins *can* appeal the dismissal of their own claims. American Queen Br. 48 (“It was the dismissal of those specific opt-ins (a decision directly affecting their substantive rights) which the *Mickles* court deemed appealable—not issues pertaining to the original plaintiff.”).

That the decision below was without prejudice and did not adjudicate the merits of the Opt-In Plaintiffs’ claims, and that Opt-In Plaintiffs may file another action is of no moment. Whatever the Third Circuit’s view in *Halle v. West Penn Allegheny Health System, Inc.*, 842 F.3d 215 (3d Cir. 2016), which is admittedly difficult to parse, this Court recognizes that decisions dismissing an entire *action*—as opposed to dismissals of a *complaint*—are final decisions that may be appealed, even if they are dismissed without prejudice. *See, e.g., Peters v. Welsh Dev. Agency*, 920 F.2d 438, 439-40 (7th Cir. 1990) (distinguishing between dismissals of a *complaint*, which cannot be appealed, and dismissals of an *action*, which may be appealed). Here, the district court dismissed the action in its entirety, A34, and issued a final judgment, A36. Because the district court indicated it was finished with this case, and the Opt-In Plaintiffs cannot re-open *this* action, it can be appealed. *See*

Ennenga, 677 F.3d at 772 (dismissals without prejudice are appealable when the district court makes clear it is finished with the case). Further, if the Court were to rule that the Opt-In Plaintiffs were never parties to the action, they may be barred by the statute of limitations from filing a new action. This Court also takes into consideration whether not allowing an appeal would mean the party was time-barred from filing a new action. *See Doss v. Clearwater Title Co.*, 551 F.3d 634, 639 (7th Cir. 2008). This Court has jurisdiction to decide whether the Opt-In Plaintiffs are parties to this case.

B. The Text of the FLSA States that Individuals Who Opt-In to a Collective Action Are Parties to that Action.

The FLSA expressly states that individuals become parties to a collective action at the time they file their opt-in notices with the district court, regardless of whether a collective action has been certified. *See* 29 U.S.C. § 216(b); Opening Br. 45-53; DOL Br. 18-30. The FLSA text is so straightforward American Queen makes *no* attempt to argue the statutory text supports its position. That should be the end of the discussion.

Instead, American Queen defends the holding below based on its misreading of this Court's precedents. First, neither *Alvarez v. City of Chicago*, 605 F.3d 445 (7th Cir. 2010), nor *Espensheid v. DirectSatUSA, LLC*, 688 F.3d 872 (7th Cir. 2012), control the question presented here. Both those cases dealt with situations in which the collective action had been finally decertified. That is, that the court had made the final determination that the plaintiffs' claims were not sufficiently similar for them

to proceed collectively. This case does not challenge the proposition that where a court determines claims may not proceed collectively, there is no collective action.

Both the Opt-In Plaintiffs and the Secretary of Labor have already explained at length why *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017), does not decide this case either. See Opening Br. 53, DOL Br. 23-26. In *Hollins*, the district court had not ruled on the question the district court ruled on here: whether, pre-certification, the opt-ins are party-plaintiffs. Rather, the district court dismissed their FLSA claims on the merits, holding the opt-ins were not employees for purposes of the statute. *Hollins v. Regency Corp.*, 144 F. Supp. 3d 990, 1007 (N.D. Ill. 2015). Their party status was relevant only to whether there was an appealable order. Unlike in *Hollins*, the district court has not adjudicated the merits of Opt-In Plaintiffs' claims, and their claims remain live.¹⁵

C. This Court Cannot Compel the Opt-Ins' Claims to Arbitration.

Because it cannot counter Appellants' statutory arguments, American Queen focuses on what happens after this Court rules the Opt-In Plaintiffs are parties. Opt-

¹⁵ American Queen also cites *Clark v. A&L Homecare & Training Ctr.*, 68 F.4th 1003 (6th Cir. 2023), which rejects entirely the premise that Rule 23 class actions and FLSA collective actions should be handled similarly, including the use of "certification" procedures. In the course of that decision, the court seems to say that opt-ins are not party-plaintiffs until a court finally decides their claims are sufficiently similar. However, *Clark* fails to square that view with either the text of § 216(b), or with the Sixth Circuit's holding in *Canaday v. Anthem Cos.*, 9 F.4th 392, 394 (6th Cir. 2021), that "[o]nce they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action."

In Plaintiffs' claims should be remanded to the district court to allow for further proceedings. This Court cannot compel arbitration of the Opt-In Plaintiffs' claims for the straightforward reason that American Queen has not yet moved to compel arbitration of their claims, the district court never reached the issue, and it is not before this Court.

Further, contrary to American Queen's assertion (at 51), whether American Queen has shown the Opt-In Plaintiffs agreed to arbitrate is disputed. The district court *rejected* American Queen's initial attempt to show that the potential collective-action members agreed to arbitrate. A71-A72. American Queen has not cross-appealed that ruling, and it is not before this Court. American Queen did submit additional evidence that the Opt-In Plaintiffs agreed to arbitrate, but Appellants disputed the additional evidence was sufficient. Dkt. 149, at 7-8. The district court never resolved that dispute. A34 (dismissing as moot).

Nor before this Court is the question whether American Queen has waived any right to compel arbitration of the Opt-In Plaintiffs' claims. Given that American Queen has not yet sought to arbitrate their claims, that question is premature.

CONCLUSION

This Court should reverse the district court's order compelling arbitration of Rodger-Rouzier's claims and dismissing the claims of Rodgers-Rouzier and the 127 Opt-In Plaintiffs, and remand for further proceedings.

November 2, 2023

Respectfully submitted,

/s/ Leah M. Nicholls

Leah M. Nicholls

PUBLIC JUSTICE

1620 L Street NW

Suite 630

Washington, DC 20036

Tel: (202) 797-8600

Fax: (202) 232-7203

lnicholls@publicjustice.net

Douglas M. Werman

Maureen A. Salas

Sarah J. Arendt

WERMAN SALAS P.C.

77 West Washington Street

Suite 1402

Chicago, IL. 60602

Tel: (312) 419-1008

Fax: (312) 419-1025

dberman@flsalaw.com

msalas@flsalaw.com

sarendt@flsalaw.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32(c) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) and Local Rule 32(b) because this brief has been prepared in proportionally spaced typeface using 12-point Century Schoolbook font.

/s/ Leah M. Nicholls

Leah M. Nicholls

November 2, 2023

CERTIFICATE OF SERVICE

I certify that on November 2, 2023, I electronically filed the foregoing Appellants' Opening Brief via the CM/ECF system and served all parties or counsel via CM/ECF system.

/s/ Leah M. Nicholls
Leah M. Nicholls