No. 13-351

IN THE
Supreme Court of the United States

BINGHAM MCCUTCHEN LLP, *ET AL.*,

Petitioners,

v.

HARTWELL HARRIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL OF CALIFORNIA,
SECOND APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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October 21, 2013

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE SUPPORTING PETITIONER

Pursuant to Supreme Court Rule 37.2(b), New England Legal Foundation ("NELF") respectfully moves for leave to file the attached brief as amicus curiae in support of petitioner, Bingham McCutchen LLP.

NELF states that all parties were provided with at least 10-day written notice of NELF's intent to file this brief, as required under Rule 37.2(a), which NELF's counsel emailed to all counsel of record on October 1, 2013. A copy of petitioners' written consent is included in this filing. As of the filing of this motion and attached brief, counsel for respondent, Hartwell Harris, has not responded to NELF's October 1, 2013 written notice of intent.

NELF seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), preempts a Massachusetts rule of decision, announced in *Warfield v. Beth Israel Deaconess Med. Ctrs., Inc.*, 910 N.E.2d 317, 325 (Mass. 2009), that bars the arbitration of State-law employment discrimination claims unless an arbitration agreement identifies those claims "in clear and unmistakable terms."[1]

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored its proposed brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF is committed to the enforcement of arbitration agreements as a viable private means of dispute resolution. Amicus is also committed to upholding the supremacy of federal law over any conflicting State law that burdens federally protected arbitration agreements with additional drafting and notice requirements. In this connection, NELF has filed a number of amicus briefs before this Court, arguing for the enforcement of arbitration agreements according to their plain terms under the FAA.[2]

NELF requests permission to file the accompanying amicus curiae brief because it believes that its proposed brief provides additional arguments and insights that could be helpful to the Court in deciding whether or not to grant certiorari. For example, NELF argues in its proposed brief that the *Warfield* rule violates the FAA because it burdens the federal substantive law of arbitrability

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[2] *See Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003).

with State-law notice requirements. NELF also argues that *Warfield* has misapplied the "clear and unmistakable" rule that this Court announced under federal *labor* law, with respect to the arbitrability of statutory claims under *collective bargaining* agreements. The Court has rejected the application of this heightened notice rule to individual employment agreements falling under the FAA, such as the agreements at issue both in *Warfield* and in this case.

For the foregoing reasons, NELF respectfully requests that it be allowed to participate in this case by filing the attached amicus brief.

Respectfully submitted,

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October 21, 2013

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue presented in this case, namely whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), preempts a State rule of decision, announced in *Warfield v. Beth Israel Deaconess Med. Ctrs., Inc.*, 910 N.E.2d 317 (Mass. 2009), that bars the arbitration of State-law employment discrimination claims unless an arbitration agreement identifies those claims "in clear and unmistakable terms."[1] The California Court of Appeal in this case has applied the *Warfield* rule, pursuant to the parties' choice of Massachusetts law, and has invalidated the arbitration agreement of petitioner, Bingham McCutchen LLC, even though its agreement broadly covers "*any* legal disputes . . . which arise out of, or are related in any way to your *employment* with the Firm *or its termination* . . . ." *Harris v. Bingham*

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.2(a), amicus also states that, on October 1, 2013, counsel for petitioners provided NELF's counsel of record with written consent for the filing of this brief, a copy of which is filed with this brief. As of the date of this filing, however, counsel for respondent has not answered NELF's counsel's email of October 1, 2013, in which NELF's counsel stated his intent to file this brief. Accordingly, amicus has filed herewith a motion for leave to file the brief, pursuant to Supreme Court Rule 37.2(b).

McCutchen LLP, 154 Cal. Rptr. 3d 843, 844-45 (Ct. App. 2013) (emphasis added).

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include both large and small businesses located primarily in the New England region.

NELF is committed to the enforcement of arbitration agreements as a viable private means of dispute resolution. Amicus is also committed to upholding the supremacy of federal law over any conflicting State law that burdens federally protected arbitration agreements with additional drafting and notice requirements. In this connection, NELF has filed a number of amicus briefs before this Court, arguing for the enforcement of arbitration agreements according to their plain terms under the FAA.[2]

Amicus, a Massachusetts organization, has a special interest in this case because it was decided under the so-called *Warfield* rule of decision, which conditions the arbitration of State-law employment discrimination claims upon compliance with special

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[2] *See Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003).

drafting requirements. For this reason, the *Warfield* rule violates the FAA because it refuses to enforce an arbitration agreement according to its terms, and because it burdens the federal substantive law of arbitrability with State-law notice requirements. This Court has long held that the FAA requires the arbitration of all statutory claims falling under a broadly worded arbitration agreement, such as the petitioner Bingham's in this case, which covers *all* claims arising from the employment relationship. This Court has also held that the FAA and the Supremacy Clause of the United States Constitution *forbid* Massachusetts, or any other State, from imposing additional drafting requirements that burden a party's federal right to compel the arbitration of statutory claims falling under a broad arbitration clause.

The *Warfield* rule is also based on a mistrust of arbitration as a competent forum for the vindication of substantive statutory rights, despite this Court's familiar and oft-repeated rejection of any such judicial concerns. Finally, the *Warfield* rule is unlawful because it is based on a misapplication of the "clear and unmistakable" rule that this Court announced under federal *labor* law, with respect to the arbitrability of statutory claims under *collective bargaining* agreements. The Court has already rejected the application of this heightened notice rule to individual employment agreements falling under the FAA.

As a result, the *Warfield* rule has subjected Massachusetts employers to an unlawful condition in the exercise of their federal right to compel the arbitration of statutory claims falling under a broad arbitration clause. Only this Court can right the

situation, by granting certiorari and abrogating the *Warfield* rule, thereby restoring to Massachusetts employers their federal rights under the FAA.

For these and other reasons provided below, amicus strongly believes that its brief will provide an additional basis for this Court to decide whether to grant certiorari in this case and abrogate the *Warfield* rule.

SUMMARY OF ARGUMENT

Certiorari should be granted to abrogate, under the Federal Arbitration Act ("FAA"), the rule of decision announced in *Warfield v. Beth Israel Deaconess Med. Ctrs., Inc.*, 910 N.E.2d 317 (Mass. 2009), and applied by the California Court of Appeal below. The so-called *Warfield* rule bars the arbitration of State-law discrimination claims unless employers identify those claims "in clear and unmistakable terms" in their arbitration agreements. The *Warfield* rule is preempted because it defeats the FAA's core purpose of ensuring the enforcement of arbitration agreements according to their terms. Where, as here, the terms of an arbitration agreement cover *all* claims arising from the parties' employment relationship, this Court has long held that, under the FAA, such an agreement includes all statutory claims falling within its scope. In fact, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court considered and rejected a heightened notice requirement substantially similar to the *Warfield* rule.

And yet *Warfield* has done precisely what *Mitsubishi* forbids, by erecting an unlawful

presumption against the arbitration of State-law employment discrimination claims, which employers must then overcome with express language to the contrary in the arbitration agreement. The *Warfield* decision apparently sidesteps this Court's long-standing and *dispositive* precedent, by relying on the erroneous premise that *State* contract law alone determines the scope of an arbitration agreement, i.e., the arbitrability of a claim. To the contrary, the arbitrability of a statutory claim under a broad arbitration clause is a matter of *federal* law under the FAA.

The *Warfield* rule must fall. The FAA mandates that no additional language is necessary, and *none may be required*, by Massachusetts or any other State, to compel the arbitration of statutory claims that fall under a broad arbitration clause, such as the petitioner Bingham's in this case.

The *Warfield* rule violates the FAA, and this Court's clear precedent, in two ways. The Massachusetts court has refused to enforce a broad arbitration agreement according to its terms, *and* the court has conditioned the exercise of that federal right of arbitrability upon compliance with an unlawful and extraneous drafting requirement.

Nor can the *Warfield* rule survive a preemption challenge under the FAA merely because the Massachusetts court has characterized it as a general rule of contract law, applicable to any contractual waiver of rights under State law. The FAA preempts the *Warfield* rule, notwithstanding the Massachusetts court's characterization, because the *Warfield* rule relies on the uniqueness of an agreement to arbitrate as its basis, namely the

waiver of judicial and administrative avenues of relief.

Certiorari is further warranted to rectify the *Warfield* court's mistrust of arbitration as an adequate forum for the vindication of statutory rights. *Warfield* has failed to heed this Court's well-established principle that an arbitration agreement merely selects the forum for adjudicating a statutory claim. The agreement does not sacrifice any substantive rights associated with that claim. Since the employee who enters an arbitration agreement is not relinquishing any substantive statutory rights, no special notice is required to secure her consent to the arbitration of those statutory claims.

Certiorari is also warranted because *Warfield* has misapplied the "clear and unmistakable" rule that this Court announced under federal *labor* law, with respect to the arbitrability of federal statutory claims under collective bargaining agreements. This Court has declined to extend the "clear and unmistakable" notice rule to individual employment agreements falling under the FAA.

Moreover, *Warfield* has justified its misplaced reliance on this "clear and unmistakable" rule by quoting incompletely from *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), a case decided under the National Labor Relations Act, and not the FAA. The full quotation from this case does not support the *Warfield* rule because it has absolutely nothing to do with the arbitrability of a State statutory claim under a broad arbitration clause--the sole issue in this case. Instead, this quotation from *14 Penn Plaza* addresses the unrelated issue whether a

federal statutory claim is arbitrable based on the statutory text itself.

Finally, certiorari should be granted to dispel any possible confusion that certain language contained in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), would support heightened notice requirements in the arbitrability of State-law claims. This *dictum* from *Concepcion* is inapposite because it does not address in any way the *content* requirements to ensure the arbitrability of statutory claims under a broad arbitration clause. Instead, this *dictum* is restricted to the unrelated, and highly specific, issue of the *form* of a class action waiver appearing in an adhesive consumer form contract.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO ABROGATE A STATE RULE OF DECISION THAT FORBIDS THE ARBITRATION OF STATE-LAW EMPLOYMENT DISCRIMINATION CLAIMS UNLESS EMPLOYERS IDENTIFY THOSE CLAIMS "IN CLEAR AND UNMISTAKABLE TERMS" IN THEIR ARBITRATION AGREEMENTS.

This Court should grant certiorari in this case and abrogate, under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), the rule of decision announced in *Warfield v. Beth Israel Deaconess Med. Ctrs., Inc.*, 910 N.E.2d 317 (Mass. 2009), and applied by the California Court of Appeal below. The so-called *Warfield* rule bars the arbitration of State-law discrimination claims unless employers identify

those claims "in clear and unmistakable terms" in their arbitration agreements. In *Warfield*, the Supreme Judicial Court of Massachusetts held:

> Consistent with the public policy against workplace discrimination reflected in [Massachusetts' employment anti-discrimination statute], we conclude that an employment contract containing an agreement by the employee to limit or waive any of the rights or remedies conferred by [that statute] is *enforceable only if such an agreement is stated in clear and unmistakable terms*.

Warfield, 910 N.E.2d at 325 (emphasis added). It should be noted here that Massachusetts is not alone among the States in requiring "clear and unmistakable" language for the arbitration of statutory employment discrimination claims. *See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 673 (N.J. 2001) ("Because the choice of [administrative or judicial] forum permitted by [State anti-discrimination law] is an integral component of the statute, *we will not assume that an employee intends to surrender that choice in favor of arbitration unless that intention has been clearly and unmistakably established*.") (internal citation and quotation marks omitted) (emphasis added). And, in this case, a California court has applied the *Warfield* rule to invalidate an arbitration agreement. Therefore, a grant of certiorari would present this Court with the opportunity to address the failure by *all* of these lower courts to comply with the FAA's mandate.

The broadly worded arbitration agreement at issue here, between the respondent Hartwell Harris, an attorney, and the petitioner Bingham McCutchen LLC ("Bingham"), a law firm, covered "*any* legal disputes which may occur between you and the Firm and which *arise out of, or are related in any way to your employment* with the Firm *or its termination* . . . ." *Harris v. Bingham McCutchen LLP*, 154 Cal. Rptr. 3d 843, 844-45 (Ct. App. 2013) (emphasis added). The agreement also provided that Massachusetts law would govern the interpretation of its terms. *Id*., 154 Cal. Rptr. 3d at 846. Harris sued Bingham in California Superior Court, alleging employment discrimination and wrongful termination under State law. *Id*. at 844. Bingham moved to compel arbitration of her claims, arguing that the FAA preempts the *Warfield* rule. *Id*. at 844, 846. The California Court of Appeal rejected Bingham's preemption challenge and enforced the *Warfield* rule, thereby invalidating the arbitration clause with respect to Harris' discrimination claims. *Id*. at 848-49.

The lower court has erred. The *Warfield* rule is preempted because it defeats "[t]he overarching purpose of the FAA . . . to ensure the enforcement of arbitration agreements *according to their terms* . . . ." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Where, as here, the terms of an arbitration agreement cover *all* claims arising from the parties' employment relationship, this Court has long held that such an agreement must be interpreted, under the *federal* substantive law of arbitrability, to include all statutory claims falling within its scope. *See Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 23 (1991) (FAA requires

arbitration of employee's ADEA claims under broad agreement requiring arbitration of "[a]ny controversy . . . *arising out of the employment or termination of employment* of such [employee]") (emphasis added); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 617, 626-27 (1985) (FAA requires arbitration of State and federal antitrust claims where distributor agreement broadly provided that "*[a]ll* disputes, controversies or differences which may arise between [the parties] out of or in relation to . . . this Agreement or for the breach thereof, shall be finally settled by arbitration . . . ."") (emphasis added). *See also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123-24 (2001) ("*Gilmer,* of course, involved a federal [employment anti-discrimination] statute, while the argument here is that a [cognate] state statute ought not be denied state judicial enforcement while awaiting the outcome of arbitration. That matter, though, was addressed in [our FAA precedents], and we do not revisit the question here."); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25 (1983) (Section 2 of FAA "create[s] a body of *federal substantive law of arbitrability*, applicable to any arbitration agreement within the coverage of the Act[,] . . . [under which] any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .") (emphasis added).

The *Warfield* decision apparently sidesteps this long-standing and *dispositive* precedent, by relying on the erroneous premise that *State* contract law alone determines the scope of an arbitration agreement, i.e., the arbitrability of a claim. "We apply general principles of *State* contract law to determine whether a particular agreement requires

arbitration of a claim." *Warfield*, 910 N.E.2d at 323 (emphasis added).

To the contrary, the arbitrability of a statutory claim under a broad arbitration clause is a matter of *federal* law under the FAA. *See Gilmer*, 500 U.S. at 23; *Mitsubishi Motors Corp.*, 473 U.S. at 617, 626-27. The FAA mandates an inclusive interpretation of arbitration agreements. As this Court explained nearly 30 years ago in *Mitsubishi*:

> [T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the *federal substantive law of arbitrability*, applicable to any arbitration agreement within the coverage of the Act. . . . And that body of law counsels that . . . , *as a matter of federal law*, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .

Mitsubishi, 473 U.S. at 626 (citations and internal quotation marks omitted) (emphasis added).

In fact, this Court in *Mitsubishi* considered and rejected a heightened notice requirement substantially similar to the *Warfield* rule. In *Mitsubishi*, as in this case, the plaintiff "argue[d] that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate." *Mitsubishi Motors Corp.*, 473 U.S. at 625. The Court flatly rejected this argument and concluded that the FAA does not permit the burdening of arbitration agreements with

any such presumption *against* the arbitration of statutory claims. "[W]e find no warrant in the [FAA] for implying in every contract within its ken a presumption against arbitration of statutory claims. . . ." *Id*. Any such presumption would contravene "the liberal *federal* policy favoring arbitration agreements . . . [which] is at bottom a policy guaranteeing the enforcement of private contractual arrangements" according to their plain terms. *Id*. (emphasis added). The Court emphasized that "[t]here is no reason to depart from these [federal] guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights." *Id*.

Under *Mitsubishi*, then, it has long been settled law that a broad arbitration clause presumptively includes statutory claims under the FAA. *See also Gilmer*, 500 U.S. at 23, 26. And yet the Massachusetts court in *Warfield* has done precisely what *Mitsubishi* forbids. The *Warfield* rule has erected an unlawful presumption against the arbitration of certain State statutory claims, which employers must then overcome with express language to the contrary in the arbitration agreement.

The *Warfield* rule must fall. The FAA mandates that no additional language is necessary, and *none may be required*, by Massachusetts or any other State, to compel the arbitration of any statutory claims that fall under a broad arbitration clause, such as Bingham's in this case. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (FAA preempts state law "condition[ing] the enforceability of arbitration agreements on

compliance with a special notice requirement not applicable to contracts generally.").

The *Warfield* rule therefore violates the FAA, and this Court's clear precedent, in two ways. The Massachusetts court has refused to enforce a broad arbitration agreement according to its terms, *and* the court has conditioned the exercise of that federal right of arbitrability upon compliance with an unlawful and extraneous drafting requirement. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (unconstitutional conditions doctrine bars State from, *inter alia*, burdening exercise of federal right with extraneous requirements) (discussing *Mem'l Hosp. v. Maricopa County,* 415 U.S. 250 (1974)).

Nor can the *Warfield* rule survive a preemption challenge under the FAA merely because the Massachusetts court has characterized it as a general rule of contract law, applicable to any contractual waiver of rights under State law. Presumably the lower court has attempted to place the *Warfield* rule under the FAA's saving clause, which is contained in 9 U.S.C. § 2.[3] *See Warfield,* 910 N.E.2d at 326 ("Our interpretive rule states only that as a matter of the Commonwealth's *general law of contract*, a private agreement that purports to waive or limit--whether in an arbitration clause *or on some other contract provision*--the employee's otherwise available right to seek redress for

[3] The FAA's saving clause provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added).

employment discrimination through the remedial paths set out in [the Massachusetts anti-discrimination statute], must reflect that intent in unambiguous terms.") (emphasis added).

Notwithstanding the Massachusetts court's efforts, the FAA preempts the *Warfield* rule because it "rel[ies] on the uniqueness of an agreement to arbitrate as [its] basis[,]" namely the waiver of judicial and administrative avenues of relief. *Concepcion*, 131 S. Ct. at 1747 (discussing hypothetical examples of putatively general State contract rules that are nonetheless preempted by FAA). "In practice, of course, the [*Warfield*] rule would have a disproportionate impact on arbitration agreements . . . ." *Concepcio*n, 131 S. Ct. at 1747. Certiorari is therefore warranted to abrogate this preempted rule of decision.

Certiorari is further warranted to rectify the *Warfield* decision's mistrust of arbitration as an adequate forum for the vindication of statutory rights. While the Massachusetts court acknowledges the federal presumption of arbitrability under broad arbitration clauses, the court nevertheless concludes that "the *countervailing public policy* reflected in [the Massachusetts anti-discrimination statute] of protecting against employment discrimination and offering employees comprehensive administrative and judicial remedies is so strong that, in our view, it calls for distinct treatment [in the arbitration agreement]." *Warfield*, 910 N.E.2d at 326, n.16 (emphasis added).

The FAA defeats the lower court's concerns. There can only be a "*countervailing* public policy" reflected in a Massachusetts statute if arbitration is

antagonistic to that public policy, such as by depriving the Massachusetts employee of the substantive protections afforded under that statute. However, this Court has stated repeatedly that, "[b]y agreeing to arbitrate [statutory] claim[s], . . . 'a party *does not forgo the substantive rights* afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Am. Express. Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2314 (2013) (quoting *Mitsubishi*, 473 U.S. at 628) (emphasis added). Therefore, arbitration does not conflict with the public policies embodied in the Massachusetts anti-discrimination statute.

Certiorari should therefore be granted to reinforce this key principle that an arbitration agreement merely selects the forum for adjudicating a statutory claim. The agreement does not sacrifice any substantive rights associated with that claim. Since the employee who enters an arbitration agreement is not relinquishing any substantive statutory rights, no special notice is required to secure her consent to the arbitration of those statutory claims.

Certiorari is also warranted because the *Warfield* decision has misapplied the "clear and unmistakable" rule that this Court announced under federal *labor* law, with respect to the arbitrability of federal statutory claims under *collective bargaining* agreements. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009); *Wright v. Univ. Maritime Serv. Corp.*, 525 U.S. 70, 79-81 (1998). In *Wright*, the Court explained that this heightened notice requirement applies to collective bargaining agreements because a union representative has negotiated an agreement on behalf of several

employees. *See Wright*, 525 U.S. at 80-81. Since this concern for adequate notice in a collectively negotiated agreement does not pertain to an *individually* negotiated agreement, the Court has therefore declined to extend the "clear and unmistakable" rule to individual employment agreements falling under the FAA:

> [The] broad arbitration clause in *Gilmer*--applying to "any dispute, claim or controversy"--was held to embrace federal statutory claims. But *Gilmer involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees and hence the "clear and unmistakable" standard was not applicable.*

Wright, 525 U.S. at 80-81 (emphasis added).

In this connection, it should be noted that neither *Wright* nor *14 Penn Plaza* was decided under the FAA. Instead, both of those cases were decided under federal labor statutes. *See 14 Penn Plaza*, 556 U.S. at 257-58 ("[T]he [collective bargaining agreement's] arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the *NLRA's broad sweep*.") (emphasis added); *Wright*, 525 U.S. at 78 n.1. ("[W]e *decline to consider the applicability of the FAA* to the present case [decided under the Labor Management Relations Act].") (emphasis added).

Not only has the Massachusetts court apparently disregarded *Wright*'s limitation of the "clear and unmistakable" rule to collective bargaining agreements. But the lower court has also justified its misplaced reliance on this rule by

quoting *incompletely* from *14 Penn Plaza*, a case decided under the NLRA and not the FAA.[4] In *14 Penn Plaza*, this Court decided the issue, entirely inapposite here, whether ADEA claims were arbitrable under collective bargaining agreements. The *full* quotation from *14 Penn Plaza* reads: "The *Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. *Nothing in the law suggests a distinction between the status of*

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[4] The *Warfield* court's truncated quotation from *14 Penn Plaza* appears at the end of the following excerpt from *Warfield*, set off in italics:

> A recent decision of the United States Supreme Court supports our view that an intent to arbitrate statutory employment discrimination claims should be clearly stated in order to be enforced. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456, 173 L.Ed.2d 398 (2009). The *14 Penn Plaza* case concerned a collective bargaining agreement, and although we are aware of the significant differences between collective bargaining agreements and individual employment contracts, the Supreme Court's decision is instructive. The Court upheld the validity of agreements to arbitrate statutory discrimination claims in a NLRA-governed collective bargaining agreement, so long as the agreement to arbitrate such claims is "explicitly stated" in the agreement. *Id.* at 1465. In reaching this conclusion, the Court stated that *"[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." Id*.

Warfield, 910 N.E.2d at 327 (emphasis added).

arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza*, 556 U.S. at 258 (emphasis added).

The *Warfield* court has omitted the first sentence of this quotation from *14 Penn Plaza* and has reproduced only the italicized portion in its opinion.[5] The Massachusetts court has then relied on this truncated quotation as its sole "basis" for applying the "clear and unmistakable" rule for collective bargaining agreements to individual employment agreements under the FAA.

When viewed in full, this quotation from *14 Penn Plaza* does not support the *Warfield* rule because it has absolutely nothing to do with the arbitrability of State-law claims under a broad arbitration clause, which is the sole issue presented in this case and in *Warfield*. (And, of course, *Mitsubishi* and its progeny have already resolved that issue in favor of arbitrability.) Instead, the quotation from *14 Penn Plaza* addresses the altogether unrelated issue, unique to *federal* statutory claims, of whether a federal claim is arbitrable based on the statutory text itself.

It should be emphasized here that the arbitrability of federal statutory claims (the issue in *14 Penn Plaza*), differs from the arbitrability of State statutory claims (the issue in this case and in *Warfield*), because it requires consideration of both the parties' *and* Congress's intent. Whereas the arbitrability of State-law claims is a one-step inquiry based on the scope of the arbitration agreement, the

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[5] *See* n.4 above.

arbitrability of federal statutory claims is a two-step inquiry that considers both the scope of the agreement and the text of the relevant federal statute, to determine whether Congress has barred the arbitrability of those federal claims, even if the agreement provides otherwise. *See Mitsubishi,* 473 U.S. at 626-27. *See also CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("a contrary congressional command" in another federal statute can override FAA's mandate).

In this connection, the quotation from *14 Penn Plaza*, on which *Warfield* mistakenly relies for its sole support, addresses the second step of this arbitrability test for federal statutory claims, which is inapposite to this case and *Warfield*. The quotation merely states that ADEA claims are arbitrable, whether the employee invoking the ADEA's protections is a union employee or an individual employee. *See 14 Penn Plaza*, 556 U.S. at 258. But the arbitrability of a federal statutory claim, which is determined in part by the language of the applicable statute, has nothing whatsoever to do with the arbitrability of a State statutory claim, which is determined *entirely* by the language of the arbitration agreement. In short, *14 Penn Plaza* provides no support for the *Warfield* rule. Certiorari is therefore warranted to clarify this point of law and reinforce the FAA's mandate.

Finally, certiorari should be granted to dispel any possible confusion that certain language in *Concepcion* would support heightened notice requirements in the arbitrability of State-law claims. The California court in this case has relied on footnote six from *Concepcion* to uphold the *Warfield* rule. *See Harris v. Bingham McCutchen*, 154 Cal.

Rptr. 3d at 849. In footnote six of *Concepcion*, this Court stated:

> Of course States remain free to take steps addressing the concerns that attend contracts of adhesion--for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. *Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.*

Concepcion, 131 S. Ct. at 1750 n.6 (emphasis added).

This *dictum* is inapposite here because it does not address in any way the *content* requirements to ensure the arbitrability of statutory claims under a broad arbitration clause. Instead, this footnote addresses the unrelated and highly specific issue of the *form* of a class action waiver appearing in an adhesive consumer form contract. The narrow scope of this footnote is underscored by the Court's prior decision in *Casarotto*, discussed above, which held that the FAA preempts a State's imposition of special form requirements for an arbitration clause contained within a contract. *See Doctor's Assocs., Inc. v. Casarotto* 517 U.S. at 687 (FAA preempts state law "condition[ing] the enforceability of arbitration agreements on compliance *with a special notice requirement* not applicable to contracts generally.") (emphasis added). *Casarotto* would therefore suggest that footnote six of *Concepcion* is focused narrowly on the appearance of class action waivers only, and not on the appearance of the arbitration clause generally.

Moreover, the Court in *Concepcion* carefully qualified its observations in footnote six with the clear statement that States cannot interfere in any way with the FAA's mandate to enforce arbitration agreements according to their terms. *See Concepcion*, 131 S. Ct. at 1750 n.6 And it is well-settled law, under *Mitsubishi* and its progeny, that the terms of a broad arbitration agreement, such as the petitioner Bingham's in this case, do include State statutory claims.

In sum, certiorari should be granted to reinforce the core principle, applicable to all of the States, that statutory claims are arbitrable under a broad arbitration clause, as a matter of federal law under the FAA. The mere imposition of the unlawful *Warfield* rule on the petitioner Bingham, and on all other Massachusetts employers, warrants a grant of certiorari and redress by this Court, even if compliance with the rule may not create a substantial inconvenience. *Cf. Elrod v. Burns,* 427 U.S. 347, 374 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Certiorari should therefore be granted to abrogate the *Warfield* rule under the FAA and thereby protect a party's federal right to compel the arbitration of State-law claims under a broad arbitration clause.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the petitioners' petition for a writ of certiorari.

Respectfully submitted,

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