NO. 23-369

In the Supreme Court of the United States

JAVITCH BLOCK, LLC, ANTHONY BARONE, AND ERICA KRAVCHENKO,

Petitioners,

v.

KHADIJA SMITH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeal, Eighth Appellate District

BRIEF OF AMICI CURIAE NATIONAL CREDITORS BAR ASSOCIATION, ACA INTERNATIONAL, INC., AND THE OHIO CREDITOR'S ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The National Creditors Bar Association (NCBA) is a nationwide, not-for-profit bar association of over 400 law firms and individual members, totaling over 2,500 attorneys, who are regularly engaged in the practice of creditors' rights law. The NCBA's membership standards promote professional, responsible, and ethical practices in the lawful collection of consumer debts and other litigation on behalf of creditors. The NCBA and its members have an ongoing interest in matters involving the interpretation and application of federal and state laws affecting creditors' rights and regularly files, either individually or in partnerships such as this, *amicus curiae* briefs.

ACA International (ACA) is a nonprofit corporation based in Minneapolis, Minnesota. Founded in 1939, as the American Collectors Association, ACA is the largest trade group for the debt-collection industry. ACA has members in every state and more than 30 countries. ACA represents more than 1,800 member organizations and their more than 133,000 employees worldwide, including third-party collection agencies, asset buyers, attorneys, creditors, and vendor affiliates. ACA International, Advocacy Booklet (Nov. 21, 2022), bit.ly/3UKuh5m.

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[1] The parties were timely notified of the intention to file. No counsel for a party authored this brief in whole or in part. No counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. Only the named Amici made such a monetary contribution.

ACA's members include sole proprietorships, partnerships, small businesses, and large corporations. Some members operate within a single state while others are large multinational corporations that operate in every state. Nearly 90% of ACA's members are small businesses with limited resources. *Id.* Many of their customers are small businesses as well.

The Ohio Creditor's Attorneys Association (OCAA) is a leading voice of Ohio attorneys who focus on representing creditors. The OCAA's members come from Ohio's largest, and smallest, law firms, as well as national banks and small businesses. OCAA's mission is to advance the legal profession and preserve the rights of attorneys to represent creditors without fear of discrimination.

This case is of the utmost importance to Amici Members because the holding from the Ohio court threatens to make attorneys (and other agents) the target of class action lawsuits, eliminating millions of consumer arbitration agreements that exist between businesses and their customers.

INTRODUCTION AND SUMMARY

The Ohio court erected a new procedural hurdle which contradicts the Federal Arbitration Act ("FAA"): namely, that an arbitration agreement must expressly entitle agents of the signatories to file a motion to stay and to compel arbitration. To arrive at its conclusion, the Ohio court improperly disregarded the FAA and rewrote the arbitration agreement. Specifically, the Ohio court inserted the following language into the agreement:

> If either party to the Agreement files a lawsuit asserting claims that are subject to arbitration, the other party **to the Agreement** may file a motion to compel arbitration with the court.

Smith v. Javitch Block LLC, 8th Dist. Cuyahoga No. 111532, 2023-Ohio-607, ¶ 41 ("*Smith II*") (bold emphasis added). That language in bold is not in the Arbitration Agreement. In contrast, here are the binding terms of the Arbitration Agreement:

> If a party files a lawsuit in court asserting claim(s) that are subject to arbitration and the other party files a motion with the court to compel arbitration, which is granted, it will be the responsibility of the party asserting the claim(s) to commence the arbitration proceeding.

Smith, II, *supra*, ¶ 34. That sentence concerns the obligation to "commence the arbitration proceeding." It does not restrict the rights found in 9 U.S.C. §§ 3

or 4, nor prohibit agents from filing a motion to stay and compel arbitration. That sentence uses "party" as it relates to the "lawsuit." *Id.* Despite this obvious reading, the Ohio court erroneously concluded that "[t]he Agreement does not contain any language to suggest that an agent or affiliate of PRA is entitled to file a motion to compel arbitration on PRA's behalf. Stated another way, the discretionary right to (1) demand arbitration in writing, or (2) file a motion to compel arbitration during a pending lawsuit, is contractually limited to Smith or PRA." *Id.* But that is a red-herring. The Arbitration Agreement did not need to expressly "entitle" an agent to file a motion to stay or compel.

The Arbitration Agreement did not limit the parties which may file a motion to stay or compel arbitration. Nonetheless, with its interpretation of the Agreement, the Ohio court found an implied prohibition: by not expressly giving agents the ability to file a motion to stay or compel, the agreement prohibited agents from doing so. Amici urge this Court to take this case and decide whether the FAA permitted the Ohio court to erect this new hurdle restricting agents from filing a motion to compel arbitration when there is no such prohibition in the FAA, the arbitration agreement, nor in Utah or Ohio law.

If the Ohio court's decision stands, it will no doubt open a floodgate of class actions against Amici Members, as proxies for the creditors they represent. Complaint, ¶¶ 1-2, and Prayer for Relief (seeking bar to execution of the prior judgments). Since many judgment creditors are corporations, banks, and lenders, they are unable to represent themselves in court: they can only act through their attorneys. Amici

Members will become the target of disagreements between creditors and their customers. This is demonstrated in Respondent's Complaint which seeks to have prior judgments declared "void", even though the judgment creditors are not named as defendants here. It is Respondent's ill-disguised plan to eliminate the judgment creditors' rights by barring the attorneys from acting on the judgments. Specifically, Respondent seeks "injunctive relief . . . restraining defendants from . . . collecting or attempting to collect debt from the persons subjected to such unlawful conduct." Complaint, *Prayer for Relief,* para. c.

To avoid her Arbitration Agreement, Respondent sued only the lawyers, not the creditor (the signatory to the Arbitration Agreement). Nonetheless, she hopes to obtain a judgment on behalf of a class of judgment debtors, declaring that the judgments against them are uncollectable. Complaint, ¶¶ 1 and 2. The decision below will only encourage claims against attorneys and agents to strategically avoid written arbitration agreements.

The decision below hangs as a cloud over the ability of Amici Members who are saddled with the undue burden of litigating the validity (and enforceability) of their client's interests on a class-wide basis. Respondent, and the putative class she seeks to represent, have already agreed to resolve any disputes in a rational, predictable, consumer-friendly, and cost-effective manner: arbitration. All of the arbitration programs established by the principals of Amici Members are on the line.

Amici Members desire to be heard on the critically important questions presented by Petitioners and have a strong interest in the outcome of this case.

REASONS FOR GRANTING THE PETITION

I. REMOVING OHIO'S NEWLY ERECTED ANTI-ARBITRATION HURDLE IS NECESSARY.

The Ohio court violated a canon of statutory construction essential to the supremacy of the Federal Arbitration Act allowing its idiosyncratic interpretation of an arbitration agreement to nullify the right of a party to litigation to seek a stay and to compel arbitration. It is well-settled that any ambiguity in an arbitration agreement must be resolved in favor or arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Because of the strong presumption favoring arbitration, all doubts about the ability of a party to file a motion to compel arbitration should be resolved in favor of permitting such a motion.

The vast majority of arbitration agreements and class-action waivers intended to benefit Amici Members are governed by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq*. The FAA protects the parties' arbitration agreement against inconsistent judicial determinations and public policies. *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1416 (2019). Section Two of the FAA—the "savings clause"—requires that states not adopt interpretations of arbitration agreements that render those agreements void. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the

state legislature cannot.'" (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

No language in the Arbitration Agreement forbade Petitioners from filing a motion to stay or compel arbitration. In fact, to reach its conclusion, the Ohio court had to insert anti-arbitration language into the Arbitration Agreement. That violated the strong presumption favoring arbitration. *Moses H. Cone Mem'l Hosp.*, *supra,* 460 U.S. at 24. All doubts about the ability of a party to file a motion to stay and to compel arbitration should be resolved in favor of permitting such a motion.

The Ohio court's decision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, *Concepcion*, 563 U.S., at 352 (internal quotation marks omitted). The decision below rewards creative lawyering by encouraging class action litigation against agents, with the clear goal of attacking the principal's interest. In future cases, the enforcement of an arbitration agreement will depend on whether the plaintiff chooses to file suit against the principal or only the agent.

Amici Members view arbitration as a viable and predictable mechanism for resolving disputes arising from consumer transactions. Class-action lawsuits, on the other hand, have been one of the most costly types of litigation in the United States. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL. F. 475, 475 (2003). The decision below will only encourage class action claims against agents to strategically avoid written arbitration agreements.

Millions of arbitration agreements have been effectively nullified by the Ohio court. This type of gamesmanship (suing only the agent to avoid arbitration) is what Congress intended to overcome when it enacted the FAA. Only this Court can make it right and restore the overriding policy favoring arbitration. *See Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

II. THE OHIO DECISION IS CONTRARY TO 9 U.S.C. § 3, WHICH AUTHORIZES "PARTIES" TO THE CASE TO FILE A MOTION TO COMPEL ARBITRATION.

The Ohio court has enacted a new procedural hurdle not found in the FAA: namely, an arbitration agreement must expressly authorize an agent to file a motion to stay and to compel arbitration. That is contrary to 9 U.S.C. § 3, which entitles "parties" to the litigation to file a motion to stay and compel arbitration. The Arbitration Agreement did not need to expressly "entitle" Petitioners to file a motion to stay pending arbitration. Congress did that. 9 U.S.C. § 3. The Ohio court's decision was a palpable evasion of that Section.

This Court has recognized that, under the FAA, agents of a signatory to an arbitration agreement may compel arbitration. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 (2009); *see also Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 257 (5th Cir. 2014).

> Section 3 . . . allows litigants already in federal court to invoke agreements made enforceable by § 2. That provision requires the court, "on application of one of the parties," to stay the action if it involves [* * 1902] an "issue

> referable to arbitration under an agreement in writing." 9 U.S.C. § 3.

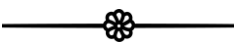
Arthur Andersen LLP, *supra*, 556 U.S. at 630. "[T]raditional principles" of state law allow a contract to be enforced by or against nonparties to the contract through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel[.]" *Id., at* 1902, citing 21 R. Lord, WILLISTON ON CONTRACTS § 57:19, p 183 (4TH ED. 2001). This makes sense because "[t]he overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC*, *supra*, 563 U.S. at 344.

The Ohio court found "restrictions concerning motions to compel arbitration", namely that only "the other party to the Agreement may file a motion to compel arbitration with the court." *Smith II*, *supra*, ¶ 41. There are no such "restrictions" in the Arbitration Agreement. In fact, the phrase "party to the Agreement" is not in the Agreement. In finding such a restriction, the Ohio court erected a new, arbitration-specific barrier contrary to 9 U.S.C. §§ 3 and 4. Indeed, Ohio courts otherwise permit agents to invoke contracts signed by their principals. *Rivera v. Rent A Ctr., Inc.*, 2015-Ohio-3765, ¶ 22 (Ct. App.), citing *Manos v. Vizar*, 9th Dist. Medina No. 96 CA 2581-M, 1997 Ohio App. LEXIS 3036 (July 9, 1997); *Zilbert v. Proficio Mtge. Ventures, L.L.C.*, 8th Dist. Cuyahoga No. 100299, 2014-Ohio-1838, at *7; *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, at *3-4; *Tomovich v. USA Waterproofing & Found. Services, Inc.*, 9th Dist. Lorain No. 07CA009150,

2007-Ohio-6214, at *3; *Genaw v. Lieb*, 2nd Dist. Montgomery No. CIV.A. 20593, 2005-Ohio-807, at *2-4; *Terry v. Bishop Homes of Copley, Inc.*, 9th Dist. Summit No. 21244, 2003-Ohio-1468, at *5-6; *Manos v. Vizar*, 9th Dist. Medina No. 96 CA 2581-M, 1997 WL 416402, *2 (July 7, 1997); *Atricure, Inc. v. Meng*, 12 F.4th 516, 532 (6th Cir. 2021).

If left in place, it is easy to imagine how the Ohio court's holding will reverberate to other contexts, rewarding artful pleading (suing only the agents and not the principal) to avoid arbitration. There are likely very few, if any, arbitration agreements which expressly state that an agent may file a motion to stay or to compel arbitration. For example, supervisors, who do not sign an employee's arbitration agreement with her employer, are not likely to be identified in the agreement as parties "entitled" to file a motion to compel arbitration in an unfair employment practices case. Likewise, the same would be true for sub-contractors who perform work on behalf of a general contractor. Nonetheless, the FAA permits them to file such a motion if they are parties to the litigation.

The Ohio court's holding would frustrate the letter and the spirit of the FAA.



CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted,

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