

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

Hiawatha Henry, Addie Harris, Montray Norris,  
and Roosevelt Coleman Jr., on behalf of themselves  
and for all others similarly situated,  
Petitioners,

v.

Cash Biz, L.P. Cash Zone, LLC d/b/a Cash Biz,  
and Redwood Financials, LLC  
Respondents.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF TEXAS*

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Whether the Texas Supreme Court erred in holding –in conflict with the Fifth Circuit Court of Appeals, the Nevada Supreme Court, and intermediary courts of appeals in Maryland and Utah - that Cash Biz did not waive its right to arbitration by substantially invoking the judicial process when it illegally filed criminal charges against Borrowers to recover civil debt, while ignoring its own forced arbitration clause which requires arbitration for “(f) all claims asserted by us against you, including claims for money damages to collect any sum we claim you owe us and/or the Lender.”

**TABLE OF CONTENTS**

**Page(s)**

QUESTION PRESENTED ..... ii  
TABLE OF CONTENTS..... iii  
TABLE OF AUTHORITIES ..... iv  
OPINIONS BELOW..... 1  
JURISDICTION ..... 1  
STATUTORY PROVISIONS INVOLVED ..... 1  
STATEMENT ..... 2  
ARGUMENT ..... 6  
CONCLUSION..... 15  
APPENDIX A - Texas Supreme Court Opinion  
    (February 23, 2018) ..... 1a  
APPENDIX B - 4<sup>TH</sup> Court of Appeals Opinion  
    (July 27, 2016)..... 19a  
APPENDIX C - 4<sup>th</sup> Court of Appeals Dissent  
    (July 27, 2016)..... 44a  
APPENDIX D - 5<sup>TH</sup> Circuit Court of Appeals  
    Opinion in No. 16-50847;  
    Vine v. PLS Loan Store  
    (May 19, 2017)..... 56a

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>AT&amp;T Techs., Inc. v. Communications Workers of Am.</i> .....	11
475 U.S. 643 (1986)	
<i>Cain v. Midland Funding, LLC</i> .....	14
452 Md. 141, 156 A.3d 807 (2017)	
<i>Cash Biz, LP v. Henry</i> .....	6
539 S.W.3d 342 (Tex. App.—San Antonio 2016) aff'd, 16-0854, 2018 WL 1022838 (Tex. Feb. 23, 2018)	
<i>Eman Henshaw v. Park Plaza Hosp.</i> .....	9
129 F.3d 610, 1997 WL 681184, at *2 (5th Cir. 1997) (per curiam)	
<i>Germany v. River Terminal Ry. Co.</i> .....	2
477 F.2d 546 (6th Cir. 1973)	
<i>Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.</i> .....	9
304 F.3d 476 (5th Cir. 2002)	
<i>Henry v. Cash Biz, LP</i> .....	6
16-0854, 2018 WL 1022838, at *6 (Tex. Feb. 23, 2018)	
<i>Manion v. Nagin</i> .....	11
394 F.3d 1062 (8th Cir.2005)	

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<i>Nelson v. Liberty Acquisitions Servicing LLC</i> .....	14
374 P.3d 27 (Utah Ct. App. 2016)	
<i>Nitro-Lift Techs., L.L.C. v. Howard</i> .....	1, 15
568 U.S. 17 (2012)	
<i>Pacheco v. PCM Const. Services, L.L.C.</i> .....	7, 9
602 Fed. Appx. 945 (5th Cir. 2015)	
<i>Palcko v. Airborne Express, Inc.</i> .....	11
372 F.3d 588 (3d Cir.2004)	
<i>Preston v. Ferrer</i> .....	9
552 U.S. 346 (2008)	
<i>Primerica Life Ins. Co. v. Brown</i> .....	11
304 F.3d 469 (5th Cir. 2002)	
<i>Principal Invs., Inc. v. Harrison</i> .....	13
366 P.3d 688 (Nev. 2016)	
<i>Southland Corp. v. Keating</i> .....	1, 9
465 U.S. 1 (1984)	
<i>Stifel, Nicolaus &amp; Co., Inc. v. Freeman</i> .....	2
924 F.2d 157(8th Cir. 1991)	
<i>Subway Equip. Leasing Corp. v. Forte</i> .....	2, 8, 10, 13
169 F.3d 324 (5th Cir. 1999)	

**TABLE OF AUTHORITIES**

**Page(s)**

*Suburban Leisure Ctr., Inc. v. AMF Bowling Products, Inc.* ..... 10  
468 F.3d 523 (8th Cir. 2006)

*Vine v. PLS Fin. Services, Inc.*, ..... 12  
689 Fed. Appx. 800 (5th Cir. 2017)

**Statutes**

9 U.S.C.A. § 3 ..... 1

28 U.S.C. § 1257(a) ..... 1

## **PETITION FOR WRIT OF CERTIORARI**

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Texas Supreme Court.

## **OPINIONS BELOW**

The opinion of the Supreme Court of Texas can be found at 2018 WL 1022838 and is set forth at Pet. App. 1a. The opinion of the court of appeals in San Antonio is reported at 539 S.W.3d 342 and set forth at Pet. App. 14a.

## **JURISDICTION**

The Supreme Court of Texas rendered its decision on February 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984); *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20, 133 S. Ct. 500, 503, 184 L. Ed. 2d 328 (2012).

## **STATUTORY PROVISIONS INVOLVED**

Section 3 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 3 provides:

“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending,

upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” 9 U.S.C.A. § 3.

Courts interpreting Section 3, hold that the right to arbitration can be waived by substantially invoking the judicial process. *See, e.g., Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999); *Germany v. River Terminal Ry. Co.*, 477 F.2d 546 (6th Cir. 1973); *Stifel, Nicolaus & Co., Inc. v. Freeman*, 924 F.2d 157, 158 (8th Cir. 1991).

## STATEMENT

### **A. Factual Background**

In 2012, numerous consumers in Texas began reporting that Cash Biz, and other payday loan companies, were illegally filing criminal charges against its customers to collect on civil debts. CR 151-159. Texas Appleseed and the Texas Observer separately began investigating these allegations. CR 151-159.

Texas Appleseed is a nonprofit, nonpartisan organization that works to provide justice for children, low-income families, and those with



disabilities. CR 151-159. Texas Appleseed submitted open records requests to state regulators and several district attorneys and learned Cash Biz was illegally filing criminal complaints against low-income people to collect on civil debts. CR 151-159.

On December 17, 2014, Texas Appleseed found more than 1,500 cases where payday loan companies, primarily Cash Biz, were criminally charging people to further the collection of civil debts by misclassifying the cases as bad check cases. CR 151-159.

Texas Appleseed learned that not only was Cash Biz using criminal courts to collect civil debts, they were forcing people to pay fines and even sending people to jail. *Id.* For example, in one justice court, where more detailed data were available, arrest warrants were issued in 42% of the cases brought based on payday loan business complaints, and jail time or jail credit applied in 5.6% of the cases. *Id.* In another court, \$131,836 was collected from 204 individuals, representing just 28% of the complaints. *Id.* In another court, payment of \$918.91 was ordered on a bad check case for a defaulted \$225 payday loan and a warrant was issued for her arrest. *Id.*

Separately, the Texas Observer discovered Cash Biz wrongfully filed criminal charges against thousands of people in Houston, San Antonio, and Amarillo. CR 140-141. One such person was Christina McHan, who failed to repay a \$200 loan from Cash Biz near Houston. *Id.* In November 2012

she was arrested, assessed \$305 in additional fines and court costs and spent a night in jail because of Cash Biz's false allegation of check fraud. *Id.*

Belinda Cinque, the clerk for Justice of the Peace Tom Lawrence in Humble, Texas, discovered Cash Biz was improperly using the Court system to collect on civil debts by claiming the debts were bad checks. *Id.* Cinque discovered the vast majority of borrowers had either lost their jobs or had their hours reduced at work and was quoted as saying: "Correct me if I'm wrong, but they sound like sharks." *Id.* Cinque told the Observer she started getting calls from people, some in tears, making payments to Cash Biz through the court. *Id.* She learned Cash Biz was "threatening them that they were going to be taken to jail." *Id.* When she found out all of this, she told Cash Biz to stop filing hot-check complaints. *Id.*

In response to these investigations, the Texas Office of Consumer Credit Commissioner ("OCCC") ordered Cash Biz to pay \$10,000 in fines. Cash Biz admitted it improperly subjected its customers to criminal prosecution for failure to repay civil obligations. CR 140-141. Eamon Briggs, assistant general counsel with the OCCC, said they inform payday loan companies, such as Cash Biz, it is illegal to use the criminal justice system to collect civil debt and ask these companies whether they rely on the criminal justice system to collect civil debt. *Id.* But according to Eamon Briggs "people don't always answer that question during the examination process truthfully." *Id.*

The Borrowing Parties filed this class action lawsuit against Cash Biz for malicious prosecution and Cash Biz filed a motion to compel arbitration. The arbitration clauses relied on by Cash Biz were written and insisted upon by Cash Biz. CR, 80-130. The arbitration agreement says all “disputes” are to be resolved in arbitration and this includes “all federal or state law claims”, including all disputes in criminal court. CR, 85, RR, 13, lines 2-10.

When Cash Biz filed criminal charges, participated in criminal trials, threatened to send its customers to jail, and actually sent its customers to jail; it was solely in an attempt to collect on the debts owed to them under the terms of the contracts.

#### **B. The Proceedings Below**

The Borrowing Parties filed this class action lawsuit against Cash Biz for malicious prosecution and Cash Biz filed a motion to compel arbitration. The arbitration clauses relied on by Cash Biz were written and insisted upon by Cash Biz. CR 80-130. The arbitration agreement says all “disputes” are to be resolved in arbitration and this includes “all federal or state law claims”, including all disputes in criminal court. CR 85, RR 13, lines 2-10.

The motion was assigned to the 166th District Court. A full oral hearing was held on Cash Biz’s motion on July 9, 2015. At the close of the hearing, the trial court denied the motion.

Cash Biz immediately appealed the trial court’s interlocutory order of July 9, 2015, which denied

Cash Biz's motion to compel arbitration and to enforce a waiver-of-class-action provision.

Two of the three judges issued the majority opinion and reversed, rendered, and ordered the case to arbitration. *Cash Biz, LP v. Henry*, 539 S.W.3d 342 (Tex. App.—San Antonio 2016), aff'd, 16-0854, 2018 WL 1022838 (Tex. Feb. 23, 2018). Justice Rebeca C. Martinez dissented. *Id.* at 354.

The Supreme Court of Texas granted Borrowers' Petition for Review and affirmed the majority opinion, compelling the case to arbitration. *Henry v. Cash Biz, LP*, 16-0854, 2018 WL 1022838, at \*6 (Tex. Feb. 23, 2018)

This petition for certiorari followed.

### **ARGUMENT**

Cash Biz wrongfully and illegally filed criminal charges against over six hundred of its customers in Bexar and Harris County alone. CR 233-245. Cash Biz knew filing criminal charges to enforce a civil debt was illegal, was fined for its illegal activity by the Texas Office of Consumer Credit Commission ("OCCC"), and admitted to the OCCC it illegally filed criminal charges against its customers. When Cash Biz illegally filed criminal charges against its customers, it was an attempt to enforce the contracts containing the arbitration clauses. In other words, Cash Biz ignored the mandatory arbitration provisions in its own contracts and instead used the criminal justice system to collect civil debts.

Cash Biz is now attempting to use the very arbitration clause it ignored to avoid a class-action lawsuit and to avoid being punished for its actions. As the Consumer Financial Protection Bureau (“CFPB”) recently reported to the United States Congress, payday loan companies insist on arbitration because consumers whose disputes go to arbitration are awarded far less money and obtain little to no relief. The problem is so bad for consumers that the CFPB recommended removing arbitration clauses and class action waivers from all payday loan companies’ agreements.

The arbitration clause in this case is governed by the Federal Arbitration Act (“FAA”), yet the Supreme Court of Texas ignored federal law and instead improperly applied Texas state law to this case. Without intervention by this Court, state courts are free to improperly apply state law standards to arbitration clauses governed by the FAA.

**I. The Question presented is important because The Supreme Court Of Texas Improperly Ignored Federal Law In Interpreting Waiver Under The FAA**

A party waives its right to arbitration by (1) substantially invoking the judicial process (2) to the detriment or prejudice of the other party. *Pacheco v. PCM Const. Services, L.L.C.*, 602 Fed. Appx. 945, 948 (5th Cir. 2015). Under the FAA, substantially invoking the judicial process occurs when the proponent of arbitration actively tried to achieve a satisfactory result in litigation before

turning to arbitration. *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999).

The only reason Cash Biz invoked the criminal justice system, threatened Borrowers with jail, and filed criminal charges, was to achieve a satisfactory result in litigation before turning to arbitration.

Cash Biz filed criminal charges solely to resolve the arbitrable dispute as defined by its own contract: “to collect any sum we claim you owe us”. CR 85, RR 13, lines 2-10. Cash Biz provides no explanation for filing criminal charges against Borrowers and there are some undisputed facts Cash Biz cannot deny: 1) Cash Biz was required to arbitrate any dispute it had “to collect any sum we claim you owe us”; 2) Cash Biz ignored this arbitration requirement when it filed criminal charges to collect the sums it claimed was owed; 3) Cash Biz sought a satisfactory result when it filed criminal charges; and 4) Cash Biz achieved a satisfactory result before attempting to arbitrate.

Cash Biz’s actions, and the results, clearly show Cash Biz engaged in overt acts in criminal court to resolve this arbitrable dispute. *Subway Equip. Leasing Corp.*, 169 F.3d at 329. Therefore, the trial court correctly held Cash Biz substantially invoked the judicial process and waived its right to arbitration.

The Supreme Court of Texas was required to apply federal law to its analysis of whether Cash Biz waived its right to arbitrate. As this Court held, the FAA establishes a national policy for arbitration when the parties contract for that mode of dispute

resolution. See *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Preston v. Ferrer*, 552 U.S. 346, 349, 128 S. Ct. 978, 981, 169 L. Ed. 2d 917 (2008). The FAA, which rests on Congress' authority under the Commerce Clause, supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration. *Id.*

Under the FAA, federal law, not state law, governs whether a party has waived the right to arbitration under the FAA. *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 484-85 (5th Cir. 2002) (applying federal law to interpret waiver under FAA); *Eman Henshaw v. Park Plaza Hosp.*, 129 F.3d 610, 1997 WL 681184, at \*2 (5th Cir. 1997) (per curiam) (same); *Pacheco v. PCM Constr. Servs., LLC*, 2014 WL 145147, at \*6 (N.D. Tex. Jan. 15, 2014) (Lindsay, J.) (same), *aff'd*, 602 Fed. Appx. 945 (5th Cir. 2015).

In deciding *Cash Biz*, the Supreme Court of Texas relied solely on Texas state law to determine whether Cash Biz waived its right to arbitrate:

Here, the factors generally examined to determine waiver—how much discovery has been conducted, who initiated it, and whether it relates to the merits; how much time and expense has been incurred in litigation; and the proximity in time between a trial setting and the filing of the motion seeking arbitration—

may serve as guideposts. See *Perry Homes*, 258 S.W.3d at 590–92.

*Cash Biz* at \*4.

The federal standard for determining if a party waived its right to arbitrate is whether that party actively tried to achieve a satisfactory result in litigation before turning to arbitration. *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 328 (5th Cir. 1999). The Supreme Court of Texas ignored the federal standard governing waiver and instead applied the Texas state law standard by looking at the amount of discovery conducted and the expenses of the parties involved. *Cash Biz* at \*4.

If the Supreme Court of Texas applied federal law in interpreting waiver in this case, it is clear that *Cash Biz* waived its right to arbitrate. *Cash Biz* actively tried to achieve a satisfactory result in litigation when it filed criminal charges against the Borrowers to collect the civil debt owned. Therefore, in ignoring federal law in deciding waiver, the Supreme Court of Texas erred in compelling this case to arbitration.

The Supreme Court of Texas not only ignored federal law in interpreting waiver under the FAA, it ignored the requirement under the FAA to accept the allegations in the Borrowers' pleadings as true. *Suburban Leisure Ctr., Inc. v. AMF Bowling Products, Inc.*, 468 F.3d 523, 525 (8th Cir. 2006); *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 597 (3d Cir.2004); *Manion v. Nagin*, 394 F.3d 1062, 1065 (8th Cir.2005).



Federal law under the FAA requires courts to focus only on the nature of the dispute as pled and are prohibited from analyzing the merits of the underlying action. *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 (5th Cir. 2002).

The Supreme Court of Texas did not accept Borrower's allegations as true, ignored Borrowers' pleadings, and analyzed the merits of the underlying action to determine waiver. *Cash Biz* at \*4-6. The Supreme Court of Texas relied heavily on the affidavit of Cash Biz's owner in determining Cash Biz did not waive its right to compel arbitration. *Id.* This affidavit addressed the merits of the underlying action and was not part of the pleadings. *Id.*

If the Supreme Court of Texas applied federal law and accepted Borrowers' pleadings as true, it is clear that Cash Biz waived its right to arbitrate. Plaintiffs' First Amended Class Action Petition explained how Cash Biz tried to receive a satisfactory result in litigation by "threatening the borrowers with criminal prosecution." CR 20. According to the Petition, Cash Biz filed criminal charges against Borrowers solely to collect on the debts owed them. CR 20-24.

This Court should seize this opportunity to provide needed guidance to the state courts around the country interpreting arbitration clauses governed by the FAA. Due to the increased use of

arbitration clauses in this country, this issue is important and needs to be addressed. Unless this Court grants review now, the state courts will continue to improperly apply state law to arbitration clauses governed by the FAA.

**II. The CASH BIZ Decision is in Conflict with the Fifth Circuit Court of Appeals and Three State Courts**

This Court should also grant certiorari because the *Cash Biz* decision directly conflicts with nearly identical cases addressing the same issues raised in this case.

In *Vine v. PLS Fin. Services, Inc.*, PLS filed criminal charges against its borrowers to enforce payday loans. *Vine v. PLS Fin. Services, Inc.*, 689 Fed. Appx. 800, 807 (5th Cir. 2017). The Fifth Circuit held:

Moreover, it is alleged that the criminal proceedings were an integral component of PLS's litigation strategy to collect on outstanding debt. If PLS attempted to "game the system" by initiating theft by check proceedings in place of submitting collection actions to an arbitrator, PLS should not be allowed "a second bite at the apple through arbitration" to resolve related issues. See *Cargill Ferrous Int'l v. SEA PHX. MV*, 325 F.3d 695, 701 (5th Cir.2003) ("Under the facts of this case, it is clear Serene is not gaming the system by seeking a win at trial, and in the case of loss, anticipating a second bite at the apple through arbitration.").

*PLS* at 807.

The Fifth Circuit ultimately held:

Therefore, by allegedly submitting false worthless check affidavits, PLS “invoke[d] the judicial process to the extent it litigate[d] a specific claim it subsequently [sought] to arbitrate.” See *Subway Equip. Leasing Corp.*, 169 F.3d at 328.

*PLS* at 807.

Similarly, the Nevada Supreme Court held that a payday loan company that obtained default judgments against its borrowers in separate actions before the current litigation waived its right to arbitration under the loan contracts. *Principal Invs., Inc. v. Harrison*, 366 P.3d 688, 697-98 (Nev. 2016). In that case, during a seven-year period, Rapid Cash filed more than 16,000 individual collection actions in justice of the peace court in Clark County, Nevada against its borrowers seeking repayment of the loans. *Id.* at 690. Relying on affidavits of service by its process server, Rapid Cash obtained thousands of default judgments. *Id.* at 690-91. The borrowers filed a class-action lawsuit against Rapid Cash alleging fraud upon the court through false affidavits of service, abuse of process, negligence, civil conspiracy and violation of fair debt collection laws. *Id.* at 691. Rapid Cash moved to compel arbitration under the provision contained in the loan agreements, but the trial court denied the motion based on waiver due to the collection actions in justice court. *Id.* at 691-92.

Acknowledging that FAA waiver law requires “prior litigation of the same legal and factual issues as those the party now wants to arbitrate,” the Nevada Supreme Court affirmed the finding of waiver, reasoning the class-action claims “arise out of, and are integrally related to, the litigation Rapid Cash conducted in justice court.” *Id.* at 697.

In another similar case, *Nelson v. Liberty Acquisitions Servicing LLC*, 374 P.3d 27 (Utah Ct. App. 2016), Utah's intermediate appellate court, applying the FAA, found that a debt buyer had waived its right to arbitrate claims challenging its debt collection practices by pursuing collection actions in court. *Id.* at 30.

Finally, in *Cain v. Midland Funding, LLC*, 452 Md. 141, 156 A.3d 807 (2017) a Maryland Court of Appeals determined that that Midland funding waived its contractual right to arbitrate by filing and pursuing collection actions in state court.

*Cash Biz* is in direct conflict with courts, including the Fifth Circuit, analyzing waiver under nearly identical facts. As a result, this Court should grant this Petition and address the conflicts that exist between the *Cash Biz* case and all other similar cases addressing waiver under the FAA. Additionally, this Court needs to set forth a uniform standard for determining waiver under the FAA. See *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 133 S. Ct. 500, 501, 184 L. Ed. 2d 328 (2012).

**CONCLUSION**

For all of these reasons, the petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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May 24, 2018