No. 17-____

IN THE

Supreme Court of the United States

NATIONWIDE BIWEEKLY ADMINISTRATION, INC.,

Petitioner,

v.

BMO HARRIS BANK, N.A.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There are numerous legal and equitable concerns raised when, as here, a district court grants an order compelling arbitration and dismisses a third-party complaint when the original plaintiff was not a signatory to the arbitration agreement. First and foremost, the original plaintiff is prejudiced by the loss of their federal right to have their entire Article III case heard in federal court, including supplemental claims that fall under the supplemental jurisdiction statute, 28 U.S.C. § 1367. Second, compelling arbitration may result in contrary conclusions on factual issues, legal issues, or remedies between the federal court proceeding and the arbitration proceeding, since the original plaintiff is not before the arbitrator, and the third-party defendant is no longer before the federal court. Thus, the federal court and the arbitrator could reach different conclusions regarding the same "supplemental claims," even though such claims "are so related to claims in the action" that "they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

Accordingly, the question presented in this case is:

1. Whether a plaintiff loses their right to have all claims that form part of the same case or controversy under Article III of the United States Constitution heard in federal court, pursuant to 28 U.S.C. § 1367, solely because of the existence of an arbitration agreement between a third-party plaintiff and third-party defendant which the original plaintiff is not a signatory?

PARTIES TO THE PROCEEDINGS

The petitioner, appellant, and third-party plaintiff below is Nationwide Biweekly Administration, Inc.

The respondent, appellee, and third-party defendant below is BMO Harris Bank, N.A.

CORPORATE DISCLOSURE STATEMENT

Nationwide Biweekly Administration, Inc., and its wholly-owned subsidiary, Loan Payment Administration LLC, are owned by Daniel S. Lipsky, who is the sole shareholder.

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The decision of the United States Court of Appeals for the Ninth Circuit of which review is sought, affirming the granting of Respondent's motion to compel arbitration and dismissing the third-party complaint, *Krogstad v. Loan Payment Administration LLC*, No. 17-15964 (9th Cir. filed Oct. 22, 2018) (per curiam), is included at Pet. App. 1a–4a.

The decision of the United States District Court for the District of Nevada granting Respondent's motion to compel arbitration and dismiss third-party complaint, *Krogstad v. Loan Payment Administration LLC*, No. 16-00465, (D. Nev. filed Apr. 13, 2017), is included at Pet. App. 5a–8a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the United States Court of Appeals for the Ninth Circuit, and this Petition, from a decision the Ninth Circuit rendered October 22, 2018, is timely filed under Rule 13.1 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of 28 U.S.C. § 1367 and 9 U.S.C. § 2 are included in the Appendix, at Pet. App. 9a–11a.

STATEMENT OF THE CASE

The initial complaint in this matter was filed against Petitioner, Nationwide Biweekly Administration, Inc. (hereinafter "Nationwide") and its subsidiary Loan Payment Administration, LLC. Dean Krogstad ("the original plaintiff" or "Mr. Krogstad") brought the action in federal district court, individually and as the representative of other similarly situated customers of Nationwide. Mr. Krogstad was a customer of Nationwide for its Interest Minimizer program, which is an automated program for accelerated payment of mortgages to reduce interest. The complaint seeks recovery for injuries allegedly sustained by the putative class members as a result of the suspension of services under Nationwide's "Interest Minimizer" program in which they were participants.

The Interest Minimizer program was dependent upon BMO Harris Bank, N.A. ("BMO Bank") performing certain designated electronic funds transfer services through a trust account for the benefit of Mr. Krogstad, and each of about 41,000 other Nationwide customers. Pursuant to an agreement with Nationwide (the "Master Agreement"), BMO Bank provided access to the funds transfer network known as Automated Clearing House ("ACH") for the Interest Minimizer participants.

After filing its answer to the complaint, Nationwide brought an unopposed Motion for Leave to File Third-Party Complaint against BMO Bank pursuant to Rule 14 of the Federal Rules of Civil

Procedure. Nationwide alleged that the suspension of services about which Mr. Krogstad complained was directly caused by the termination of access to the electronic banking system by BMO Bank in violation of the Master Agreement.[1] Specifically, the Third-Party Complaint filed by Nationwide pled that BMO Bank's conduct in ceasing to provide the essential ACH services to Nationwide and its customers, including the putative class members, forced Nationwide to suspend its services under the Interest Minimizer program and was the direct cause of the damages alleged by Mr. Krogstad.

Leave to file the Third-Party Complaint was granted. As such, the District Court exercised its supplemental jurisdiction under 28 U.S.C. § 1367 over the Third-Party Complaint to the original Complaint, all in the same action. However, BMO Bank filed a motion to compel arbitration and dismiss the Third-Party Complaint. The Master Agreement contained an arbitration provision that required that all disputes "arising out of or relating to" the Agreement or services provided under that

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[1] Nationwide alleged in the Third Party Complaint that when BMO Bank terminated all ACH services effective November 23, 2015: (i) BMO Bank breached the termination provisions of the Master Agreement; (ii) BMO Bank breached the inherent covenant of good faith and fair dealing when it terminated the ACH Contract because BMO Bank internally recognized that it had no legitimate business justification for taking such action and that (iii) BMO Bank's termination of services negated Nationwide's ability to administer the Interest Minimizer Program on behalf of Mr. Krogstad as well as more than 41,000 Program participants.

agreement be submitted to arbitration. The Master Agreement does not make any specific reference to third-party complaints against BMO Bank. Nationwide opposed BMO Bank's motion. However, the District Court granted the motion to compel arbitration and dismissed the third-party action. The Ninth Circuit Court of Appeals affirmed the District Court's granting of the motion to compel arbitration and dismiss the Third-Party Complaint.

I. THE COURT SHOULD CLARIFY WHETHER A PLAINTIFF LOSES THEIR RIGHT TO HAVE ALL CLAIMS THAT FORM PART OF THE SAME CASE OR CONTROVERSY UNDER ARTICLE III OF THE UNITED STATES CONSTITUTION HEARD IN FEDERAL COURT, PURSUANT TO 28 U.S.C. § 1367, SOLELY BECAUSE OF THE EXISTENCE OF AN ARBITRATION AGREEMENT BETWEEN A THIRD-PARTY PLAINTIFF AND A THIRD-PARTY DEFENDANT WHICH THE ORIGINAL PLAINTIFF IS NOT A SIGNATORY

This case provides a vehicle for this Court to clarify whether a plaintiff loses their right to have all claims that form part of the same case or controversy under Article III heard in federal court, pursuant to 28 U.S.C. § 1367, solely because of the existence of an arbitration agreement between a third-party plaintiff and a third-party defendant which the original plaintiff is not a signatory. In this case, Mr. Krogstad sued Nationwide, and Nationwide added BMO Bank as a third-party

defendant in order to establish that any harm claimed by Mr. Krogstad was, if true, caused by BMO Bank. BMO Bank then filed a motion to compel arbitration based on a contract between Nationwide and BMO Bank.

The District Court granted the motion to compel arbitration and dismissed the third-party complaint, which the Ninth Circuit affirmed. Thus, the original plaintiff, Mr. Krogstad, now is unable to fully vindicate his federal right to have all claims properly included in his Article III case decided in the federal court proceeding. In short, without supplemental jurisdiction over BMO Bank, Mr. Krogstad is now unable to have his rights vindicated in the federal court case, all because of an arbitration agreement of which he is not a signatory. This result contradicts the language of 28 U.S.C. § 1367 and the purpose of supplemental jurisdiction.

Generally, "once a court has original jurisdiction over some claims in the action, it may exercise supplemental jurisdiction over additional claims that are part of the same case or controversy." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Congress codified this principle in 28 U.S.C. § 1367—the supplemental jurisdiction statute. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997). As this Court stated in *Exxon Mobil,* § 1367(a) is a "broad grant of supplemental jurisdiction over other claims within the same case or controversy, as long as the action is one in which the district courts would have original jurisdiction." *Exxon Mobil Corp.*, 545 U.S. at 558. Moreover,

"[o]rdinary principles of statutory construction apply" to the analysis of § 1367. *Id.*

Section 1367(c) lists four specific situations in which a district court may decline to exercise supplemental jurisdiction over a particular claim. *See Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 545 (2002); *Int'l Coll. of Surgeons*, 522 U.S. at 173 (finding that § 1367(c) "enumerate[es] the circumstances in which district courts can refuse" to exercise supplemental jurisdiction). Thus, under § 1367(c), a district court may ***not*** refuse to exercise jurisdiction over a supplemental claim unless one of these four exceptions are satisfied. Thus, in the present case, absent one of the exceptions in § 1367(c), the District Court should have permitted any supplemental claim to proceed.

The Federal Arbitration Act of 1925 ("FAA") makes arbitration agreements "'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (citing 9 U.S.C. § 2). Virtually all of this Court's case law interpreting and applying the FAA has been in cases involving ***only the signatories*** to an arbitration agreement, and not third parties. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. at 1424–25; *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 231 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *New Prime, Inc. v. Oliveira*, No. 17-340, 2019 WL 189342, at *3 (U.S. Jan. 15, 2019); *Nitro-*

Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 18 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531 (2012); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012); *KPMG LLP v. Cocchi*, 565 U.S. 18, 20 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 667 (2010); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 626 (2009).

Thus, the unique issue that arises in the present case is whether a plaintiff in federal court loses their right under the supplemental jurisdiction statute, 28 U.S.C. § 1367, to have all claims that form part of the same case or controversy under Article III of the United States Constitution heard in federal court solely because of the existence of an arbitration agreement between a third-party plaintiff and third-party defendant which the original plaintiff is not a signatory. Put differently, does the FAA override a plaintiff's rights under 28 U.S.C. § 1367?

There are a few cases from this Court that touched on but did not fully consider and did not fully answer this fundamental question. The case from this Court that is arguably most on point is *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). In that case, a Hospital sued a contractor and an architect in North Carolina state court seeking, *inter alia*, a declaratory judgment that the contractor had lost any right to arbitration under the contract between the Hospital and the contractor. *Id.* at 7. The Hospital obtained an injunction from the state court forbidding the contractor to take any steps directed toward arbitration; the contractor objected; and the stay was lifted. *Id.* at 7–8. Once the stay was lifted, the

contractor filed an action in federal court seeking an order compelling arbitration. *Id.*

The hospital then moved for a stay of the federal-court suit pending resolution of the state-court suit, alleging the two suits involved the identical issue of the arbitrability of the contractor's claims. *Id.* The Fourth Circuit *en banc* reversed the district court's stay and remanded the case to the District Court with instructions for entry of an order to arbitrate. This Court granted certiorari to consider "the propriety of the District Court's decision to stay this federal suit out of deference to the parallel litigation brought in state court." *Id.* at 13. Ultimately, this Court held under *Colorado River* that the district court had abused its discretion in granting the stay because "exceptional circumstances" requiring the federal court to abstain in favor of parallel state-court litigation did not exist. *Id.* at 4 (1983) (citing *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976)).

The four-factor "exceptional circumstances" test applied in *Moses H. Cone* to determine whether the federal court should abstain in favor of the state court proceeding was: (1) whether there was an assumption by either court of jurisdiction over any res or property; (2) whether the federal forum was any less convenient to the parties than the state forum; (3) the avoidance of piecemeal litigation; and (4) the order in which jurisdiction was obtained by the concurrent forums. *Id.* at 19. After weighing these factors, this Court found in that abstention to the state court proceeding was not appropriate in that case. *Id.* at 29.

As to the third factor—the avoidance of piecemeal litigation—this Court acknowledged that the practical result of its ruling would be piecemeal litigation because the Hospital would be forced to arbitrate against the contractor and at the same time proceed in state court against the Architect, because there was no arbitration agreement between the Hospital and the Architect. *Id.* at 19–21. This Court stated that the FAA "*requires* piecemeal resolution when necessary to give effect to an arbitration agreement." *Id.* (emphasis in original).

The *Moses H. Cone* case is distinguishable in several ways from the one at bar. First, *Moses H. Cone* was fundamentally an abstention case, dealing with whether a federal court should abstain to a parallel state-court proceeding. The present Petition does not involve any state court proceedings or the doctrine of abstention. Second, the present case involves the dismissal in federal court of a third-party complaint made pursuant to 28 U.S.C. § 1367, whereas *Moses H. Cone* dealt with a motion to compel arbitration between the original plaintiff and the original defendant. Thus, supplemental jurisdiction pursuant to 28 U.S.C. § 1367 was not involved in *Moses H. Cone*. Third, the original plaintiff in the present case is ***not*** a signatory to the arbitration agreement at issue, whereas in *Moses H. Cone* the plaintiff was a signatory to the arbitration agreement at issue. Accordingly, the *Moses H. Cone* case does not resolve the issue raised by this Petition.

Another case from this Court that touches on but does not squarely address the issue raised by this

Petition is *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). In that case, which did not involve any third parties, this Court considered whether to compel arbitration of pendent state-law claims when the federal court was going to continue to assert jurisdiction over a federal-law claim. *Id.* at 216. Ultimately, this Court concluded that the FAA "requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.* at 217.

Again, multiple factors distinguish *Dean Witter* from this case. First, *Dean Witter* dealt ***only with the signatories*** to an arbitration agreement. *Id.* at 215. That is, *Dean Witter* only involved a single plaintiff and a single defendant, both of which were parties to an arbitration agreement. The present case, however, was brought by a plaintiff who is not a signatory to the arbitration agreement at issue, as the agreement is between the defendant and a third-party. Second, as in *Moses H. Cone,* the *Dean Witter* case did not involve the dismissal of a third-party complaint that was properly before the court under the supplemental jurisdiction statute, 28 U.S.C. § 1367, as the present case does.

Several cases from this Court establish that there are limits to the enforcement of arbitration clauses under the FAA. In *Mitsubishi Motors*, this Court held that an arbitration clause would be enforced only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler*

Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). If an arbitration provision "operated . . . as a prospective waiver of a party's right to pursue statutory remedies," this Court emphasized that it would condemn it. *Id.,* at 637, n. 19. This Court also stated that such a clause should be set aside if "proceedings in the contractual forum will be so gravely difficult" that the claimant "will for all practical purposes be deprived of his day in court." *Id.,* at 632 (internal quotation marks omitted).

Since *Mitsubishi Motors,* this Court has repeatedly stated that courts should not enforce an arbitration agreement that effectively (even if not explicitly) forecloses a plaintiff from remedying the violation of a federal statutory right. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (U.S. 1991); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273–274 (2009).

Since *Mitsubishi Motors*, this Court has not addressed whether or how these principles should apply to a case where the plaintiff is ***not*** a signatory to the arbitration agreement and a third-party defendant is alleged to have caused the harm to the plaintiff. These cases do, however, provide a strong rationale for setting aside the arbitration agreement insofar as it stops Mr. Krogstad's claim from being fully considered in federal court, as he is not a party to the arbitration agreement. In sum, permitting the dismissal of third-party complaints will for all practical purposes deprive plaintiffs like Mr. Krogstad of their day in court. This result should not be permitted.

Respondents may contend that the issue raised in this Petition was not squarely raised in the proceedings below. However, the order that was appealed in the present case was the dismissal of a third-party complaint, which had been accepted by the District Court, pursuant 28 U.S.C. § 1367, but was dismissed on the basis of the FAA. Thus, any basis for dismissing this third-party complaint necessarily involved a consideration of the supplemental jurisdiction statute and the FAA.

Nationwide explicitly requested that the Ninth Circuit consider whether the District Court was precluded from dismissing the third-party complaint due to supplemental jurisdiction issues, as expressed through Rule 14 of Federal Rules. And, in any case, an appellate court "may consider an issue conceded or neglected below if the issue is purely one of law and the pertinent record has been fully developed." *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980). The Ninth Circuit, however, declined to consider the supplemental jurisdiction issues without further explanation. While Petitioner seeks this Court's substantive review of the question presented as a pure question of law, this Court could also choose to remand this case to the Ninth Circuit for full consideration of the issue presented in this Petition

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Court grant review in this case.

Respectfully submitted,

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