No. 21-365

In the Supreme Court of the United States

Branch Banking and Trust Company

Petitioner,

v.

Sevier County Schools Federal Credit Union, et al,

Respondents.

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

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Response to Motion for Leave to File Brief *Amici Curiae*

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The Respondents hereby submit this Response to the Motion for Leave to File Brief *Amici Curiae*, filed by the American Bankers Association, Bank Policy Institute, Chamber of Commerce of the United States, and Consumer Bankers Association ("the Moving Parties").

I. CONSENT WITHHELD

In accordance with Rule 37.5 of the Rules of the Supreme Court, Respondents state that they did not consent to filing of an *amicus curiae* brief because the Petitioner is already adequately represented by counsel , because the *amici curiae* are presenting the same point of view as the Petitioner, and because Respondents did not believe that the *amici curiae* would likely present any new arguments that would be helpful to the Court—a belief that has now been confirmed upon receipt and review of the proposed brief.

II. INTRODUCTION

Currently pending before this Court is Petitioner Branch Banking & Trust Company's Petition for a Writ of Certiorari, wherein it requests a summary reversal of the Sixth Circuit Court of Appeals' Opinion reversing the judgment of the district court compelling arbitration and dismissing the Plaintiffs' claims. Petitioner makes this request on the erroneous assertion that the factually specific ruling is displaced by the Federal Arbitration Act. The Moving Parties now seek leave to file a brief in support of the bank's Petition for a Writ. The Moving Parties' motion for leave to file an *amicus curiae* brief, however, should be denied because the proposed brief merely restates

Petitioner's legal arguments, offers no unique information or perspective that has not or could not be raised by Petitioner itself, and is, therefore, unhelpful to the Court.

III. THE MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SHOULD BE DENIED

The Moving Parties, including one that calls itself "the voice of the nation's $22.8 trillion banking industry," and another holding itself out as "representing the nation's leading banks and their customers," request leave to file an *amicus curiae* brief in this cause. Motion, p. 1-2 (un-numbered). The main point of the tendered brief seems to be to demonstrate, using supposed "facts" and statistics that are neither in the record nor established as being true, to the effect that arbitration is in general beneficial to all concerned, including not only banks but also their customers. While the Respondents might agree that arbitration is beneficial at least in some contexts, that is not the issue in the instant case, and the proposed *amici curiae* brief does not bring any relevant matter to the attention of the Court that the Petitioner's brief has not already raised. It is, therefore, submitted that the proposed Brief *Amici Curiae* is not helpful to the Court in this case and that, as a result, the Motion for Leave to file the Brief *Amici Curiae* should be denied.

Although it is acknowledged that the Court has broad discretion to permit or reject the appearance of *amicus curiae*, Respondents submit that the proposed brief in this matter is essentially a "me too" filing that does not benefit the Court and should not, therefore, be permitted. *See, e.g., Ryan v.*

Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997); *U.S. v. State of Mich.*, 940 F.2d 143, 164-65 (6th Cir. 1991).

A. An *Amicus Curiae* Brief is Unwarranted in this Case Because the Interests of the *Amici Curiae* are Adequately Represented.

Petitioner in the instant case is one of the largest banks in the United States and, at all stages of the litigation, has been represented by competent counsel. The issues as framed by Petitioner have been set forth and the relevant positions and arguments presented in the proposed Brief *Amici Curiae* have already been articulated. The *amici curiae* brief is, therefore, not helpful to the Court and the Moving Parties' Motion for Leave should be denied.

B. The Proposed Brief *Amici Curiae* presents claimed information that is not relevant and does not provide new arguments or a unique perspective.

The Moving Parties flood the record with claims that are not at issue, saying things such as "Consumers Benefit Significantly from the Addition of Arbitration Provisions to Their Bank Account Agreements Through Change of Terms Provisions," that "consumers are more likely to win in arbitration than in court," that "Consumers receive higher awards in arbitration than in litigation," that "Consumer arbitration is faster than litigation," that arbitration is "usually cheaper for both parties than going to court," and that arbitration enables banks to "mitigate the ever-spiraling costs of class action and other complex litigation," with "those savings [being] passed on to their customers." Moving Parties' Brief, §I, p. 7-13. The Moving Parties go on to

discuss the "intangibles" associated with arbitration, including the advantage of "speak[ing] directly to an arbitrator sitting at a conference table, unencumbered by the cold, intimidating formalities of a courtroom." Moving Parties' Brief, p. 12. These supposed "facts," however, are neither in the record nor at issue in the case, and do not affect whether the Petition for a Writ of Certiorari should be granted. Instead, the Moving Parties are merely attempting to inject matters into the record on appeal that are not relevant and were not presented to the trial court. The Moving Parties' brief is thus not helpful to the Court.

The Moving Parties go on to attempt to unfairly paint the Sixth Circuit as a kind of "aberrant" renegade court that has a "judicial hostility" to arbitration, thus parroting the invalid arguments made by the Petitioner. Moving Parties' Motion, p. 3-4 (un-numbered) and Moving Parties' Brief, pp. 5 and 20. According to the Moving Parties, the decision is so "aberrant" that it "demands" review and reversal by this Court. Moving Parties' Motion, p. 3. In that regard, it should be noted that Petitioner sought an *en banc* review. In denying the petition, however, the appellate court ordered as follows:

> The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition the was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.
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> Therefore, the petition is denied. Judge Griffin would grant rehearing for the reasons stated in his dissent.

Order Denying Petition for Rehearing En Banc, April 7, 2021 (ECF Doc. 53-1).

If the panel's decision were truly "aberrant," one would think that at least one of the Sixth Circuit judges would have recognized the "judicial hostility" and would have voted in favor of *en banc* review.

The Moving Parties then proceed to argue the actual issue to be decided, in large measure by means of block quotes, but do not make any argument in that regard that has not already been made by the Petitioner. *See* Moving Parties' tendered Brief, §II, pp. 13-21.

Because the proposed *amici curiae* brief attempts to present claimed "facts" that are not in the record and that are not relevant to any issue in the case, because it does not add anything new to the arguments already presented, and because it does not present a new perspective to be considered, it is not helpful to the Court and the Moving Parties' Motion for Leave should be denied.

IV.CONCLUSION

Rule 37 of the Rules of the Supreme Court states that an *amicus curiae* brief that brings the Court's attention to "relevant matter not already brought to its attention by the parties" may be of considerable help to the Court, but that an *amicus curiae* brief that does not serve this purpose "burdens the court, and its filing is not favored." The tendered brief falls into the latter category. Accordingly, the Respondents request the Court to deny the Moving Parties' Motion.

Respectfully submitted,

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