No. 22-561

In The Supreme Court of the United States

LARRY J. WINGET and
THE LARRY J. WINGET LIVING TRUST,

Petitioners,

v.

ALTER DOMUS, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* MEMBERS OF THE TRUST AND ESTATE PLANNING BAR IN MICHIGAN IN SUPPORT OF PETITIONERS

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January 13, 2023

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BRIEF OF *AMICUS CURIAE* MEMBERS OF THE TRUST AND ESTATE PLANNING BAR IN MICHIGAN IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, attorneys who are members of the Trust and Estate Planning bar in Michigan ("MT&E") respectfully submit this *amicus curiae* brief, on behalf of themselves and other members of MT&E, in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The MT&E has one of the largest memberships of the State Bar of Michigan, with the Probate and Estate Planning Section of the Bar having a membership of approximately 3500 members. Those who practice in trusts and estates have an interest in the following:

1. Ensuring clarity in the law as it applies to trusts executed or administered within our state; and

2. Ensuring that long-standing principles of trust law are not disrupted.

[1] Pursuant to Supreme Court Rule 37.2, notice of intent from attorneys of MT&E to file this *amicus curiae* brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MT&E, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

The main purpose of *Amicus*' participation in this case is to ensure that the courts do not alter long-standing trust law in seeking to provide a remedy to a party that has failed to give proper attention to the law.

SUMMARY OF ARGUMENT

The questions presented are fundamental questions of trust law and creditor rights. Respondent, JPMorgan Chase Bank acting as agent for a group of hedge funds ("Agent"), now Alter Domus, LLC, has acknowledged existing trust law while attempting to fashion a remedy for itself that is not found in that law. It is quite straightforward under the laws pertaining to creditor rights and revocable trusts that Agent's acceptance of a limitation on its recovery from the assets of Petitioner ("Winget") precludes Agent's relief. The Sixth Circuit Court of Appeals' Majority Opinion, *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022) (the "Majority Opinion") alters long-standing trust law to find a remedy for Agent that is not available to Agent under the law.

The findings in the Majority Opinion depart substantially from case law and from statutory law found in the Michigan Trust Code ("MTC"), the Uniform Trust Code ("UTC"), and the United States Code ("USC").

Amicus agrees with the findings and reasoning articulated in the Sixth Circuit's dissent opinion of Judge

Alice M. Batchelder concerning the questions involved in this brief. Such findings are incorporated and discussed in this brief.

ARGUMENT

I. THE RIGHT OF A SETTLOR OF A REVOCABLE TRUST TO REVOKE THE TRUST IS NOT RESTRICTED BY OBLIGATIONS CREATED BY A TRUSTEE

It is not disputed that the trust instrument established by Winget (the "Trust") is a revocable trust. Winget expressly retained the right to revoke the Trust when it was established. However, the Majority Opinion states that Winget's right to revoke the Trust is not unlimited. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 8. The majority suggests that the Trust's contractual obligations to a creditor prevent the settlor, Winget, from revoking an otherwise revocable trust. This conclusion has the effect of rendering a revocable trust irrevocable by an action of a trustee, which has far-reaching tax and contractual implications. There is no support in Michigan law for this conclusion. An encumbrance on a trust asset does not render an otherwise revocable trust irrevocable or in any way preclude the settlor's revocation of the trust instrument.

By analogy, a trustee may seek a mortgage on real property titled in the name of the trustee and that mortgage will remain on the property if the settlor

removes the trust property from the trust by revoking the trust, but the encumbrance itself does not in any way affect the ability of the settlor to revoke the trust, even if such revocation results in return of the asset to the settlor. Agent had the opportunity to pursue such encumbrances when it contracted with Winget, but it failed to do so and instead chose to limit its recovery in the form of Winget's Guaranty.

Upon revocation of Winget's Trust, the Trustee was required by law to deliver the assets as Winget directed, which in this instance was to return the assets of the Trust to Winget. This is the nature of a revocable trust.

M.C.L. § 700.7602 states in relevant part:

> (4) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

It is stipulated that Agent had knowledge that the Trust was revocable and that assets could be removed from the Trust or added to the Trust at any time.

The Majority Opinion is creating new trust law when it concludes that a settlor's right of revocation in a revocable trust is limited by actions of the trustee or obligations of the trust. That the action of a trustee could somehow limit the settlor's ability to revoke a revocable trust is contrary to principles of trust law and the express agreement of the settlor and the trustee on the establishment of the revocable trust.

Importantly, Agent does not dispute Winget's right of revocation and has not argued that the Trust's obligation limits Winget's right of revocation. Nor has Agent suggested that Winget's right to remove assets of the Trust by way of revocation was limited. There is nothing in the law or facts to suggest that Winget's right of revocation was *not* exercisable. The majority makes the argument *for* Agent that the Winget's power of revocation is somehow limited by the Trust's obligation.

The Sixth Circuit majority reached a legal conclusion that no party to the case is asserting. Such a conclusion will change trust law in a way that will create much ambiguity about a settlor's rights in a revocable trust, will create possible tax issues for settlors, and will generate an abundance of litigation based on an incorrect reading of Michigan law and general trust law.

II. A REVOCABLE TRUST IS NOT A SEPARATE LEGAL ENTITY WITH RESPECT TO THE RIGHTS OF CREDITORS

Michigan law is well-established in this regard. "Under Michigan law, a revocable trust is not a separate legal entity with respect to the rights of creditors." *Mickam v. Joseph Louis Palace Tr.*, 849 F. Supp. 516, 523 (E.D. Mich. 1993) (relying on M.C.L. § 556.128); accord M.C.L. § 700.7506(1)(a) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors; *see also In re*

Hertsberg Inter Vivos Tr., 578 N.W.2d 289, 291 (Mich. 1998).

M.C.L. § 700.7603 states in relevant part:

> (1) . . . while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. . . .

M.C.L. § 700.7603 comports in part with Section 603(b) of the UTC which states:

> To the extent a trust is revocable [*and the settlor has capacity to revoke the trust*], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

26 U.S.C. § 676 provides:

> (a) General rule. – The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

As members of the trust and estate planning bar of Michigan, *Amicus* notes that its membership drafts thousands of revocable trusts each year, most of which are considered will-substitutes. A revocable trust is an estate planning tool to provide for the management of assets during the settlor's lifetime, importantly including upon incapacity of the settlor and for the efficient transfer of assets upon death. Under the Michigan

Trust Code, the capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as for creating a last will and testament. M.C.L. § 700.7601.

As this Court recognized in *Americold Realty Tr. v. Conagra Foods, Inc.*, 577 U.S. 378, 383 (2016), a trust is "not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people."

In the Sixth Circuit, the majority rightly distinguishes revocable trusts from irrevocable trusts with respect to the rights of creditors. This legal distinction is pivotal to the outcome of this case. Trustees of revocable trusts and irrevocable trusts may sign contracts, but at the same time, creditor rights in and to the assets of revocable trusts are distinguishable from irrevocable trusts under Michigan law and the UTC. It is the *revocability* of the trust itself that creates the distinction in treatment for creditor purposes.

> When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned. M.C.L. § 556.128.

It is noted that M.C.L. § 556.128 was enacted in 1967 and has had no amendments to it since 1970.

The Majority Opinion concluded that Winget's right of revocation of his Trust was limited to the extent of the Trust's debt obligations; this is erroneous.

On the other hand, the Majority Opinion also concludes that Winget's right of revocation of the Trust is *not* impeded when it analyzes whether a fraudulent conveyance occurred by his revocation. The majority's findings concerning the extent of Winget's power of revocation are inconsistent in these analyses.

There is no protection of assets *from* creditors of the settlor of a revocable living trust because the settlor directs and controls the assets within the revocable trust. If liability for actions of the settlor of a revocable trust extend to the trust property, likewise, actions by the settlor to limit the settlor's liability extend to the trust property.

Judge Alice Batchelder of the Sixth Circuit Court of Appeals in her the dissent notes as follows:

> Chase, as creditor, could reach those assets in the Trust as if Winget owned them himself; and Winget could remove those assets from the Trust (or even close the Trust) at any time, for any reason. Even at this late date, Chase concedes as much. *See* Chase Br. at 6 (Dkt. No. 19, Sept. 17, 2021) ("Indeed, [Chase] agrees that Mr. Winget had the right to move property in and out of his trust as he saw fit, both before and after the Guaranty was signed."). *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 25.

Furthermore, the dissent notes:

> The district court found as a matter of fact that both parties had intended and agreed that the Guaranty was limited to $50 million

> and the inclusion of the reference to the Trust did not change that. Judge Cohn issued a thorough and meticulous opinion finding as a factual certainty and explaining beyond any doubt that the final version's failure to include the Trust in the limitation provision was a mistake. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 26.

The Sixth Circuit majority dispenses with the factual findings of the district court concerning the mistake in execution of the Guaranty, which had the majority accepted would have negated the necessity to consider *any* of Agent's claims for relief.

However, Judge Batchelder notes in her dissent that the majority did not need to find that there was a mistake to deny Agent's claims for relief.

> "Rather, a trial was unnecessary because the 'mistake' theory was unnecessary. For purposes of Chase's creditor claim, Winget and the Trust necessarily merged into Winget alone; they are not separate entities. . . . Winget pledged the assets to guaranty the loan and the agreement limited that pledge to $50 million." *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 27.

Each of the majority's holdings are based on an erroneous understanding of creditor law as it applies to revocable trusts.

The Sixth Circuit majority holds that the revocation of Winget's revocable trust by Winget, the settlor, was a constructively fraudulent transfer under the

Michigan Uniform Fraudulent Transfer Act (MUFTA). M.C.L. § 566.31 et seq. *Winget*, Case No. 21-1568, p. 8. In reaching this conclusion, the majority needed to assume that Winget had the power of revocation. Note again, this factual finding that Winget retained the power of revocation is inconsistent with the majority's finding that Winget's power of revocation was "likely" limited by the Trust's obligations.

To reach the conclusion that Winget's revocation of the Trust was a fraudulent transfer, the majority finds that Winget and the Trust are separate entities, which is inaccurate in the creditor context. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 27. In analyzing MUFTA, the Majority Opinion overlooks M.C.L. § 556.128 which as previously referenced states in relevant part:

> When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned.

A prerequisite to any fraudulent-transfer claim is that a *transfer* in fact occurred. *See* M.C.L. § 566.35(1). MUFTA defines transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset." M.C.L. § 566.31(q). Thus, when a creditor has access to the assets, and a *debtor takes action* to fraudulently put those assets beyond the

creditor's reach, a creditor has a basis for relief. *Glazer v. Beer*, 72 N.W.2d 141, 143 (Mich. 1955).

If the Trust is a separate debtor-entity as the majority suggests, then the Trustee could not have acted fraudulently in returning assets to Winget upon revocation. The *Trustee* did not take action to put the assets beyond the reach of creditors. It wasn't the Trustee's action that the majority finds fraudulent but rather *Winget's* revocation of the Trust. Upon revocation by Winget, the settlor, the Trustee was obligated to deliver the assets as the settlor directed, which included return of the assets to settlor. Such obligation existed when the Guaranty was signed, and Agent was aware of the obligation. This is the very nature of the power of revocation. A Trustee's obligation to deliver the assets as the settlor directs upon the settlor's revocation is a feature of every revocable trust; it is not unique to Winget's trust. *See* M.C.L. § 700.7602.

The Majority Opinion states that "as we explained before, trusts don't usually 'own' property. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 5. Rather, they hold property for the benefit of others." *Amicus* would agree with this statement as it pertains to creditor rights. The settlor of a revocable trust is deemed still to be the absolute owner of the trust assets. *See* M.C.L. § 556.128.

This Majority Opinion states as follows:

> In a prior appeal, he (Winget) asserted that because he (a non-debtor) "owns" the trust property, Agent can't take it to satisfy the

> *Trust's* debt. *See Winget*, 942 F.3d at 750. But we rejected that argument, explaining that "if ownership mattered, creditors of a trust . . . could almost never recover from the trust property." *Id.* And that, we said, conflicts with not only Michigan law but also hornbook trust law. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 4.

Again, the majority is precisely correct in its conclusion that "ownership doesn't matter" regarding the rights of creditors and revocable trusts, but then the majority curiously (and erroneously) uses this legal conclusion to find for Agent rather than Winget. Ownership of the assets does *not* matter for creditor purposes when the trust is a revocable trust. Agent *could* reach the assets of the Trust just as it could reach the assets of Winget, but the Guaranty limited Agent's relief from Winget, the settlor, and the assets of the Trust of which settlor is the "absolute owner."

If ownership does not matter as the majority suggests, then Winget's action of moving the assets out of the Trust by revocation does not matter and could not be fraudulent. Winget's revocation of the Trust did not dispose of the assets. *Agent would have been able to recover from the Trust assets but for the Guaranty signed by Winget that limited Winget's liability, and therefore, by law, limited Agent's recovery from Trust assets.*

Notwithstanding the *sincere concern* that the revocation of a revocable trust could be viewed as fraudulent, finding that Winget's exercise of his right to

revoke the Trust as the settlor is the debtor-Trust's fraudulent action is not legally sound.

The fact of the matter is that for creditor purposes, Winget and his Trust *are* a single debtor, Winget *is* responsible for the debt of Trust, but his liability (and the exposure of the Trust assets to liability) is limited by the Guaranty that Winget signed with Agent. The revocation by Winget does not change the outcome. By application of existing law, the Guaranty that Winget signed, not his revocation of the Trust, limited Agent's recourse from the Trust assets. Agent could not reasonably believe otherwise under the law.

Relying on the law established in *Mickam* that Winget and his revocable trust are not separate debtors, there could be no transfer of assets for creditor purposes. It is important to note that in analyzing whether the elements of a constructively fraudulent transfer have been met, the majority states that the "reasonably equivalent-value requirement" of the M.C.L. § 566.35(1) "feels out of place in the revocable-trust context." *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 8. It feels out of place because it *is* out of place. The constructive fraud statute was not intended to apply to a settlor and his revocable trust. The majority is precisely correct that a revocable trust ceases to exist after it is revoked so it can never receive "reasonable equivalent value," but the majority nevertheless finds that a revocable trust is separate from the settlor for creditor purposes. Michigan law does not support this finding. Revocation of a revocable trust is *not* the type of "conduct" that MUFTA aims to prevent.

The dissent correctly asserts:

> "It is only due to our faulty holding in *Winget*, 602 F. App'x at 257-59 – contrary to Michigan law, *see Mickam*, 849 F. Supp. at 523 – that this revocable Trust is not a normal revocable trust, but is instead treated as a distinct legal entity that pledged to Agent the assets therein." *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 30.

The majority also suggests that the exercise of Winget's right to revoke his Trust is a tort: intentional interference with a contract. Cf. Restatement (Second) of Torts § 766 cmt. b (Am. L. Inst. 1979) (explaining that "there is a general duty not to interfere intentionally with another's reasonable business expectancies . . . with third persons"). *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 9.

Winget revoked his Trust which he had contractual authority to do. Agent had no "reasonable business expectancy" that Winget would not revoke his revocable trust. At all times, Agent understood that Winget had the right to revoke the Trust and that if exercised, the Trust assets would be delivered to Winget or as he directed. The district court's factual findings would support this conclusion.

The majority states that the Guaranty does not say one way or the other how Winget's revocation right interacts with the Trust's obligation. *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 9. The Guaranty does not need to state that which is embodied in the law

that governs the Guaranty. The parties to a contract are expected to understand the law which they invoke to apply to the contract.

A finding that the revocation of a revocable trust (whether revocable by law or by express reservation) could give rise to a fraudulent conveyance or a tort is a dangerous precedent to establish and has far-reaching implications. It was not Winget's revocation of the Trust that caused loss to Agent; it was Agent's misunderstanding of the law and its agreement with Winget to limit Winget's liability, i.e., the Guaranty, that caused Agent loss. *Amicus* finds Agent's arguments quite surprising given the number of revocable trusts.

It is long-standing law in Michigan and the UTC that a revocable trust is not a separate legal entity with respect to the rights of creditors. Agent failed to attend to the law while contracting with Winget. Clearly, revocation of a revocable trust is foreseeable and permissible, not fraudulent, or tortious. Any creditor that contracts with a revocable trust or its settlor understands that there is no legal distinction between them for claims purposes. That Agent somehow overlooked this when contracting with Winget is to its detriment. The fact that Agent has limited recovery from Winget despite Winget being solvent does not require the Court to find a remedy for Agent where none exists and to disturb long-standing trust law in the process.

CONCLUSION

While *Amicus* has provided support in Michigan and Federal law for its legal assertions, *Amicus* directs the Court to the well-written dissenting opinion of Judge Batchelder of the Sixth Circuit on the questions raised in this brief, particularly the following excerpt:

> "Our prior faulty opinion in *Winget*, 602 F. App'x at 257-59, stated or necessarily implied three findings or conclusions that have served as premises for all of the judicial decisions that have followed: (1) the revocable Winget Trust is a separate legal entity, distinct from its settlor, Larry Winget; (2) the Trust entity – not the settlor, Winget – owns the assets held in the revocable Trust; and (3) the trustee of this Trust entity (Winget) pledged the "Trust's assets" as an unlimited Guaranty on Agent's entire loan. I find all three to be legally unsound and factually untrue.
>
> The majority's opinion, like other judicial opinions since Winget, 602 F. App'x at 257-59, accepts these premises and ingeniously builds its analysis around them, leading to certain new propositions that will likely serve as premises for future judicial decisions: (1) the Trust's pledge of assets converted Winget's revocable trust to an irrevocable trust, forfeiting Winget's ownership and control of the assets (and eliminating his tax obligation); and (2) Winget's attempt to control his assets (i.e., revoke his revocable trust) under ordinary principles of revocable trusts was not only a

> fraudulent transfer, but possibly an intentional-interference-with-contract tort.
>
> For all of my criticism here, I recognize that the majority here, like others before, has diligently and thoroughly built its analysis around the given premises to reach a justifiable and defensible conclusion. But I also recognize that, in so doing, with every successive judicial opinion in this case, or application of these opinions as precedent, we do further damage to trust law." *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 33.

Amicus shares Judge Batchelder's sincere concerns about the future application of the Majority Opinion causing further damage to trust law.

The Majority Opinion recognizes that the dissent's arguments should be taken seriously but ultimately decides not to consider them on the basis that the Agent and the Trust have a binding contract. Agent and the Trust do indeed have a binding contract and that contract incorporates Michigan law which is well-established with respect to the rights of creditors in connection with revocable trusts. *Amicus* emphasizes that the parties to a contract are expected to understand the law which they invoke to apply to the contract. That Agent failed to attend to the law should preclude its relief.

Amicus respectfully requests that the Court consider Judge Batchelder's recommendation to correct the decision in *Winget*, 602 F. App'x at 257-59, and "apply plain and ordinary revocable-trust principles in a

plain and ordinary way." *Winget*, Case No. 21-1568 (6th Cir. July 1, 2022), p. 33.

Amicus appreciates that the Sixth Circuit majority is concerned with disturbing seven years of litigation "on a single bad apple," but it could disturb age-old principles of trust law to find a remedy for a creditor that did not give proper attention to the law. *Amicus* also understands that the Sixth Circuit was wearied by the protracted litigation. Frankly, *Amicus*' concern is not for Agent or Winget but for the attorneys who must advise trustees and settlors of revocable trusts and the substantial litigation that could arise from the erroneous holdings of the Sixth Circuit's Majority Opinion in this matter.

For the reasons stated in the Petition for Writ of Certiorari and this *amicus curiae* brief, the Court should grant the Petition for Writ of Certiorari.

Dated: January 13, 2023

Respectfully submitted,

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