22-7645

ORIGINAL

No. _____

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In The Supreme Court of the United States

BRYAN O'BRIEN

Petitioner

v.

PRETI FLAHERTY BELIVEAU & PACHIOS, LLP, JOHN SULLIVAN, MIKE LANE, and PAM LORING

Respondents.

On Petition for Writ of Certiorari To The United States Court Of Appeals For The First Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether federal courts resolving the threshold question of arbitrability under some type of "wholly grounded" exemption is consistent with the Federal Arbitration Act.

2. Whether the word "shall" actually means "shall" within the context of the Federal Arbitration Act, 9 U.S.C. § 3.

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Statutes and Rules of Court

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Opinions Below

The opinion of the United States Court of Appeals for the First Circuit was issued on December 29, 2023, App. 1, affirming the decision of the U.S. District Court for the District of Massachusetts issued on, April 29, 2022. App. 4.

Statement of the Basis for Jurisdiction

Petitioner Bryan O'Brien and his wife filed a complaint against Respondent Preti Flaherty Beliveau & Pachios, Chartered, LLP and certain of its employees under the Family and Medical Leave Act (FMLA) as well as other claims, including state antidiscrimination laws, namely Chapter 151B §4 of the General Laws of Massachusetts and §4572 of the Maine Human Rights Act. He alleged that the Defendant discriminated against him based on his sex and retaliated against him for complaining to the Massachusetts Commission Against Discrimination and the U.S. Equal Employment Opportunity Commission. Because Petitioner's FMLA claims raised questions of federal law, the district court properly had jurisdiction over the matter pursuant to 28.U.S.C. §1331.

Statutory Provisions Involved

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 et seq. Specifically, Sections 2 and 3 of the Federal Arbitration Act (the "**FAA**") respectively provide:

> A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract....
>
> 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.

Statement of the Case

The United States Court of Appeals for the First Circuit affirmed dismissal of Petitioner's case in recognition of the stare decisis doctrine recognized in that circuit, where interpretation of the FAA has stated "[A] district court can, in its discretion, choose to dismiss the lawsuit, if all claims asserted in the case are found arbitrable." *Next Step Med. Co. v. Johnson & Johnson Int'l*, 619 F.3d 67, 71 (1st Cir. 2010).

However, under the rules of the American Arbitration Association (the "**AAA**"), which is incorporated into the parties' arbitration agreement, the threshold issue of arbitrability for Petitioner's underlying claims would be a question for an arbiter to decide, not the district court judge. Nevertheless, upon Respondents' assertion that certain claims were subject to arbitration, the district court erroneously determined the arbitrability of such claims himself rather than simply analyzing and validity of the arbitration agreement alone. Furthermore, the district court dismissed rather than stayed the proceeding while an arbitrator was engaged to resolve the question of arbitrability. Though Petitioner challenged the arbitrability of underlying issues in this matter,

specifically that statutory discrimination claims are not arbitrable under state contract law without meeting a clear and unmistakable language standard, the First Circuit erroneously deemed the Petitioner's concession that an arbitrator would need to resolve certain issues as having abandoned any claim that the matter as a whole was not subject to arbitration.

Reasons for Granting the Petition

THE FEDERAL ARBITRATION ACT REQUIRES THAT AN ARBITRATOR DETERMINE THE THRESHOLD ISSUE OF ARBITRABILITY IN ACCORDANCE WITH THE PARTIES' AGREEMENT

The Supreme Court has relied on the incorporation of the AAA Rules to determine what parties have agreed to. *See Preston v. Ferrer*, 552 U.S. 346, 361–63 (2008); *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418–20 (2001). Moreover, besides one court which nevertheless has precedent suggesting that it would join the consensus, every circuit has found that the incorporation of the AAA Rules (or similarly worded arbitral rules) provides "clear and unmistakable" evidence that the parties agreed to arbitrate "arbitrability." *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842 (6th Cir. 2020), citing, *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7, 11–12 (1st Cir. 2009); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 208–09 (2d Cir. 2005); *Richardson v. Coverall N. Am., Inc.*, — F. App'x —, 2020 WL 2028523, at *2–3 (3d Cir. 2020); *Simply Wireless, Inc v. TMobile US, Inc*, 877 F.3d 522, 527–28 (4th Cir. 2017) *Petrofac, Inc. v.*

DynMcDermott Petrol. Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); *McGee v. Armstrong*, 941 F.3d 859, 866 (6th Cir. 2019), *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1272–73 (7th Cir. 1976); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130–31 (9th Cir. 2015); *Dish Network L.L.C.* v. Ray, 900 F.3d 1240, 1246 (10th Cir. 2018); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1372–73 (Fed. Cir. 2006); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207–08 (D.C. Cir. 2015).

Without question, the arbitration provisions of the agreement at issue incorporate the Commercial Arbitration Rules, stating in relevant part that ""any disputes that do arise will be exclusively submitted to mediation and arbitration as administered by the American Arbitration Association ("AAA"). Specifically, you and the Firm agree to endeavor to settle any dispute relating to your relationship with the Firm in an amicable manner by mediation administered by AAA under its Commercial Mediation Rules before resorting to

arbitration. Thereafter, any unresolved controversy shall be settled by arbitration administered by AAA in accordance with its Commercial Arbitration Rules (with the Firm paying the administrative fees due to AAA), and judgement on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

The Supreme Court has also confirmed that the AAA Rules "provide that arbitrators have the power to resolve arbitrability questions." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). Specifically, Rule 7(a) therein states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." Thus, determining arbitrability is obviously a function which the district court should have left to the arbitrator. A unanimous Supreme Court has already flatly rejected the practice in which federal courts sometimes resolve the threshold question of arbitrability in the negative themselves, concluding that the "wholly groundless"

exemption is inconsistent with the law. *Henry Schein*, 139 S. Ct. at 524. For the same reasons, it should now stop federal courts from also resolving the threshold question of arbitrability in the affirmative and reject outright this sort of "wholly grounded" exemption where a court will dismiss a suit should it find that claims fall "squarely within the parties' agreement to arbitrate disputes."

THE FEDERAL ARBITRATION ACT REQUIRES THAT THE ACTION BE STAYED

As noted by the Second Circuit, the courts are about evenly divided whether district courts must stay proceedings after all claims have been referred to arbitration remains unsettled. *Katz v. Cellco P'ship*, 794 F.3d 341 (2nd Cir.2015). Several Circuits have held or implied that a stay must be entered, *see, e.g.*, *Cont'l Cas. Co. v. Am. Nat'l Ins.*, 417 F.3d 727, 732 n. 7 (7th Cir.2005); *Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269–71 (3d Cir.2004); *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953, 955–56 (10th Cir.1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 699 (11th Cir.1992) (per curiam); others have suggested that district courts enjoy

the discretion to dismiss the action, *see, e.g., Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637–38 (9th Cir.1988). Notably, the First Circuit has previously landed within the latter camp. *See Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 156 & n. 21 (1st Cir.1998).

This Court should find that the FAA's text, structure, and underlying policy mean district courts do not retain the discretion to dismiss an action after all claims have been referred to arbitration. Section 3 of the FAA 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. § 3 (emphasis added). The plain language specifies that a district court "shall" stay proceedings pending arbitration in the present case and similar situations. The mandatory term "shall" typically "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998). Though courts may disregard a statute's plain meaning where it begets absurdity, *see Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006), that is manifestly not the case here. Congress's "use of a mandatory 'shall' ... impose[s] discretionless obligations." *Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001).

A mandatory stay also comports with the FAA's statutory scheme and pro-arbitration policy. The statute's appellate structure, for example, "permits immediate appeal of orders hostile to arbitration ... but bars appeal of interlocutory orders favorable to arbitration." *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 86, 121 S.Ct. 513, L.Ed.2d 373 (2000). For similar reasons, a mandatory stay is consistent with the FAA's underlying policy "to

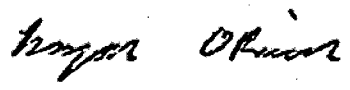
move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). A stay enables parties to proceed to arbitration directly, unencumbered by the uncertainty and expense of additional litigation, and generally precludes judicial interference until there is a final award.

Further, the FAA specifies circumstances in which judicial participation in the arbitral process is permitted. In particular, parties may return to court to resolve disputes regarding the appointment of an arbitrator, to fill an arbitrator vacancy, to compel attendance of witnesses or to punish witnesses for contempt, to confirm, vacate, or modify an arbitral award. 9 U.S.C. §§ 5–11. Parties may also return to court should an arbitrator determine their claims are not subject to arbitration. Dismissal would frustrate these important processes. Thus, the text, structure, and underlying policy of the FAA mandate a stay of proceedings and the district court's dismissal of the case was premature and order it to instead stay the case during the pendency of arbitration proceedings.

Conclusion

This Court should grant the writ of certiorari in this case to honor the separation of powers and prevent the judicial branch from directly flouting the intent of the legislative branch with respect to the FAA any further. The Circuits have been unnecessarily split over simple and straightforward questions of statutory construction, with the First Circuit in particular continuing to ignore unambiguous language and basic logic in favor of its own misguided precedent.

Respectfully submitted,



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