No.

In the Supreme Court of the United States

JAVITCH BLOCK, LLC, ANTHONY BARONE, AND ERICA KRAVCHENKO,
Petitioners,
v.
KHADIJA SMITH, Individually and on behalf of all others similarly situated,
Respondent.

On Petition for Writ of Certiorari to the Ohio Court of Appeals, Eighth Appellate District

PETITION FOR WRIT OF CERTIORARI

RICHARD C.O. REZIE
Counsel of Record
GALLAGHER SHARP LLP
1215 Superior Avenue
7th Floor
Cleveland, Ohio 44114
PH (216) 241-5310
FAX (216) 241-1608
rrezie@gallaghersharp.com

MICHAEL D. SLODOV
JAVITCH BLOCK, LLC
1100 Superior Ave.
19th Floor
Cleveland, OH 44114
(440) 318-1073
mslodov@jbllc.com

Counsel for Petitioners

QUESTION PRESENTED

Whether the Ohio Court of Appeals erred by denying enforcement of an arbitration agreement and class action waiver governed by the Federal Arbitration Act, premised on the absence of express authorization in the contract granting a nonsignatory agent enforcement rights, where state law recognizes that a nonsignatory agent may enforce the agreement and the agent is strategically sued for acts on behalf of the principal.

PARTIES TO THE PROCEEDINGS BELOW

The caption contains the name of all the parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Javitch Block LLC ("Javitch") states there is no parent or publicly held company owning 10% or more of the corporation's stock.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14.1, the following proceedings in state and federal courts are directly related to this case:

Ohio Supreme Court Case No. 2023-0496, captioned *Khadija Smith v. Javitch Block, LLC, et al.* decided July 5, 2023. *07/05/2023 Case Announcements*, 2023-Ohio-2236; *Smith v. Javitch Block, L.L.C.*, 170 Ohio St.3d 1480, 2023-Ohio-2236, 211 N.E.3d 1220; Appendix p. 1.

Ohio Court of Appeals, Eighth Appellate District Case No. 111532 captioned *Khadija Smith v. Javitch Block, LLC, et al.* decided March 2, 2023. *Smith v. Javitch Block LLC*, 8th Dist. No. 111532, 2023-Ohio-607, 209 N.E.3d 869; Appendix pp. 2-28.

Ohio Court of Appeals, Eighth Appellate District, Case No. 110154, captioned *Khadija Smith v. Javitch Block, LLC, et al.* decided September 23, 2021. *Smith v. Javitch Block, L.L.C.*, 8th Dist. Cuyahoga No. 110154, 2021-Ohio-3344; Appendix pp. 30-46.

Court of Common Pleas, Cuyahoga County, Ohio, Case no. CV-20-935178, captioned *Khadija Smith v. Javitch Block, LLC, Anthony Barone and Erica Kravchenko*. The court denied a motion to stay and compel arbitration on December 14, 2020, *Smith v. Javitch Block,*

LLC, 2020 WL 13787620 (Ohio Com.Pl.), Appendix p. 47, and denied a second motion to stay and compel arbitration on May 18, 2022, *Smith v. Javitch Block, LLC,* 2022 WL 19765209, at *1 (Ohio Com.Pl.), Appendix p. 29. The case remains pending.

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PETITION FOR WRIT OF CERTIORARI

Javitch Block LLC and its two former attorney employees, Anthony Barone and Erica Kravchenko, collectively referred to herein as "Javitch," respectfully file this petition for a writ of certiorari to review the March 2, 2023 journal entry and opinion of the Ohio Court of Appeals, Eighth Appellate District.

OPINIONS BELOW

The July 5, 2023 order of the Supreme Court of Ohio declining jurisdiction is reported and available at 2023-Ohio-2236, 170 Ohio St. 3d 1480, 211 N.E.3d 1220. Pet. App. 1a. The March 2, 2023 opinion of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio is reported and available at 2023-Ohio-607, 209 N.E.3d 869 ("*Smith II*"). Pet. App. 2a. The May 18, 2022 journal entry of the Court of Common Pleas, Cuyahoga County, Ohio denying the renewed motion to stay and compel arbitration is reported at *Smith v. Javitch Block, LLC,* 2022 WL 19765209, at *1 (Ohio Com.Pl.), Pet. App. 29a. The September 23, 2021 opinion of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County, Ohio is reported and available at 2021-Ohio-3344 ("*Smith I*"). Pet. App. 30a. The December 14, 2020 journal entry of the Court of Common Pleas, Cuyahoga County, Ohio denying the motion to stay and compel arbitration is reported at *Smith v. Javitch Block, LLC*, 2020 WL 13787620 (Ohio Com.Pl.), Pet. App. 47a.

JURISDICTION

The Court of Appeals issued its decision March 2, 2023. Pet. App. 2a. Javitch timely petitioned for discretionary review, which the Supreme Court of Ohio denied on July 5, 2023. Pet. App. 1a. Javitch invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The Supremacy Clause of the U.S. Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 2 of the Federal Arbitration Act ("FAA") provides in relevant part:

> 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 or as otherwise provided in chapter 4.

9 U.S.C. § 2.

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.

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in

> admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

INTRODUCTION

The Ohio Court of Appeals decision *eviscerates* the Federal Arbitration Act because it permits a party to arbitration and class waiver agreements to avoid both through artful pleading by naming only the nonsignatory agent as a defendant, even though the suit raises allegations of concerted misconduct by both the signatory and nonsignatory. This tactic has long been rejected to prevent erosion of the rights protected by the FAA. *See Hilti, Inc. v. Oldach*, 392 F.2d 368, 369, n. 2 (1st Cir. 1968). The Ohio Court of Appeals decision curtails the rights of nonsignatory parties

under Sections 2, 3, and 4 of the Federal Arbitration Act, contrary to a substantial body of federal and state law that recognize that agents have standing to enforce the arbitration agreement of their principals in a proper case. 21 R. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed.). While the case below involved a claim against attorneys pursuing recovery of a debt on behalf of a client, this issue applies broadly to all nonsignatory agents who perform services on behalf of their principals, including claims against corporate officers, directors, or employees.

In *Smith I*, the Ohio Court of Appeals first held that: (a) Smith was a party to a binding Arbitration Agreement and class waiver governed by the Federal Arbitration Act and Utah law and she did not dispute the validity of the Agreement and waiver (Pet. App. 31a-33a, ¶ 2-3, n. 1; Pet. App. 36a, ¶ 10; Pet. App. 5a, ¶7); (b) Synchrony Bank, the issuer of Smith's JCPenney credit card, assigned all its rights under the Agreement to Portfolio Recovery Associates, LLC (PRA); (c) PRA stood in Synchrony's shoes when it sought to collect the balance owed on the account in the Cleveland Municipal Court and, as such, PRA had the right to enforce the Arbitration Agreement (Pet. App. 31a-33a, 38a, ¶3-4, 13; Pet. App. 8a, ¶14); (d) PRA retained Javitch and Javitch acted as PRA's agent in seeking to enforce the Agreement against Smith in Ohio Municipal Court collection proceedings (Pet. App. 39a-40a. ¶14-15); (e) Smith brought claims against Javitch that were within the scope of the Arbitration Agreement (Pet. App. 39a-40a, ¶15; Pet. App. 8a-9a, ¶14; Pet. App. 12a-13a, ¶23); and (f) Javitch, as PRA's agent, was entitled to avail itself

of its principal's arbitration powers under the Arbitration Agreement because the claim against Javitch related to the Agreement, to the extent the Agreement and state law permit (Pet. App. 39a-40a, ¶15). Although Smith "agreed to arbitrate 'any dispute or claim' between [Smith] and [PRA] and/or its agents [including the defendant in this case, Javitch]" (*id.*), the Court narrowly read the Arbitration Agreement restrictively to allow only Smith or PRA to demand arbitration, and, because neither had, found there was no error in denying Javitch's motion. Pet. App. 4a, ¶4-5, 8a, ¶14, 13-14a, ¶25-26, 44a, ¶22.

Following remand, to comply with the Court's reading, PRA demanded arbitration. Pet. App. 9a, ¶15. The trial court again denied the renewed motion in a one line entry with no stated rationale. Pet. App. 10a, ¶18. On appeal from the denial of the renewed motion, the Court of Appeals in *Smith II* erected a new obstacle to enforcement of the Arbitration Agreement, imposing a requirement that only a "party" to the Arbitration Agreement may apply for a stay and to compel arbitration under Sections 2, 3, and 4 of the FAA. Pet. App. 20a-26a, ¶37-43. In reaching this conclusion, the *Smith II* Court nonetheless acknowledged that "the arbitration provision is enforceable, Smith's claims against Javitch related to Smith's account with PRA, and that PRA was entitled to demand arbitration under the unambiguous terms of the Agreement." Pet. App. 19a, ¶36. In reading a new and unstated condition into the Arbitration Agreement, i.e., that a party to a lawsuit must also be a party to the Arbitration Agreement and Class Action Waiver to have standing to seek a stay and to compel

individual arbitration, the Ohio Court of Appeals ignored the mandates of Sections 2, 3 and 4 of the FAA, which require arbitration agreements to be put on equal footing and read just as any other contract would be interpreted. When presented with a binding arbitration agreement under Section 2, Section 3 of the FAA states that the court, "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." 9 U.S.C. § 3 (emphasis added). Likewise, 9 U.S.C. § 4 authorizes a party to petition for an order compelling arbitration and that the term "party" "unambiguously refers to adversaries in the action." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, n. 4 (2009) (recognizing that "parties" as used in 9 U.S.C. §§ 3-4 refers "to parties to the litigation rather than parties to the contract.").

There is no requirement under Section 3 or Section 4 the FAA that *the agreement* itself must *also* expressly authorize a nonsignatory agent to the Arbitration Agreement to seek a stay of the litigation or authorize a nonsignatory agent to compel arbitration of an arbitral dispute. The Court's holding to the contrary was error.

The Ohio Court of Appeals compounded its error in construing the Arbitration Agreement as if it only allowed *"the other party to the Agreement"* to seek a stay or to compel arbitration. Pet. App. 24a, ¶41 (emphasis added). The Agreement actually says that "[t]he *party* who wants to arbitrate must notify the

other *party* in writing... and "[i]f a party files a lawsuit in court asserting claim(s) that are subject to arbitration and the other *party* files a motion with the court to compel arbitration…." Pet. App. 19a, ¶34, 51a. In context, the plain meaning of the term "party" means party to the litigation, just as the term is interpreted in 9 U.S.C. §§ 3 and 4. When read accordingly, Javitch was authorized by the Agreement to apply for a stay and to compel individual arbitration. *Id*.

In employing its own unreasonable interpretation of the Arbitration Agreement, the Ohio Court of Appeals failed to follow Sections 3 and 4 of the FAA, failed to give due regard to the federal policy favoring arbitration, failed to place arbitration agreements on equal footing with all other contracts, and failed to apply universal canons of contract construction. The Court's interpretation is preempted by the FAA.

Finally, the Ohio Court of Appeals erred in concluding that the class action waiver was unenforceable on the grounds that Javitch lacked standing to enforce it. Pet. App. 26a, ¶46. Just as Javitch was entitled to enforce the Arbitration Agreement according to its terms as PRA's agent, no separate authorization was needed for Javitch to enforce the class action waiver.

STATEMENT OF THE CASE

Smith opened a J.C. Penney branded credit card Account in 2013, originated by Synchrony Bank (hereinafter the "Account"). Pet. App. 32a, ¶2. Smith failed to make payments due in late 2016 and 2017; the Account was closed on August 8, 2017, with an outstanding balance of $559.86. *Id*.

Pursuant to the terms of her Cardholder Agreement, Smith agreed that her Account could be sold or assigned. Pet. App. 4a, ¶4. In 2017, Synchrony sold and assigned all right, title, and interest to Smith's Account to Portfolio Recovery Associates, LLC ("PRA"). Pet. App. 33a, ¶4. Smith also agreed that *any dispute related to her Account* and claims of *wrongdoing* in response to a collection lawsuit would be resolved by binding arbitration on an individual, non-class basis. Pet. App. 4a, ¶4; Pet. App. 48a-52a.

On August 8, 2018, PRA, by and through Javitch, brought suit against Smith in the Cleveland Municipal Court to collect the unpaid balance owed on the Account (the "CMC Action"). Pet. App. 34a,¶6 5a-6a, ¶9. After default judgment was rendered against her, the balance collected through garnishment proceedings, and a satisfaction of judgment filed, Smith filed a motion to vacate the judgment and to dismiss in the CMC Action. Pet. App. 6a, ¶9-10. PRA refunded Smith's garnished funds, the judgment was vacated, and the case was dismissed without prejudice on September 15, 2020. Pet. App. 6a, ¶10.

On July 23, 2020, Smith commenced her action against Javitch and two of its attorneys who filed the

CMC action. Pet. App. 6a, ¶11. The Complaint alleged the CMC Action filed by Javitch on behalf of PRA identified Smith's residence address as in Cleveland, Ohio, even though the address was in Parma Heights (a Cleveland suburb). *Id.* at ¶10. Because Ohio Municipal Courts have limited territorial jurisdiction, Smith asserted the CMC action was filed in the wrong municipal court, and as such, the judgment was rendered against Smith in a court without jurisdiction. *Id.* at ¶11. Smith claimed that in filing suit and collecting the judgment, Javitch violated the Ohio Consumer Sales Practices Act, R.C. 1345.01 et seq. ("CSPA"), was unjustly enriched, negligent, and invaded Smith's privacy. Pet. App.6a, ¶11. Smith sued on behalf of a putative class asserting that Complaints were filed in Ohio municipal or county courts lacking territorial jurisdiction and that the judgments were void. *Id.*

While Smith's Complaint is exclusively about the underlying CMC action brought by PRA, she strategically did not sue PRA – the judgment creditor who sued her because she failed to repay the money owed on her Account. Pet. App. 7a, ¶12. She did not sue PRA to avoid the Arbitration Agreement and class action waiver she had agreed to.

On September 25, 2020, Javitch responded to the Complaint with a motion to stay, compel binding arbitration, and strike the class allegations. Pet. App. 35a; Pet. App. 7a, ¶13. Javitch argued that it was entitled to enforce the Arbitration Agreement on three grounds – intended third party beneficiary, agency,

and alternate estoppel.[1] On December 14, 2020, the trial court issued an order denying Javitch's motion. Pet. App. 7a, ¶13. Javitch appealed. Pet. App. 8a, ¶14.

In *Smith v. Javitch Block, L.L.C.*, 8th Dist. Cuyahoga No. 110154, 2021-Ohio-3344 ("*Smith I*"), the Ohio Court of Appeals for the Eighth Appellate District held that: "PRA stands in Synchrony Bank's shoes retaining all the rights under the agreement as Synchrony Bank contracted to obtain... [and] PRA has the right to enforce the arbitration provision...." Pet. App. 38a-39a, *Smith I*, ¶13, 14. It also held that Smith's claims herein were within the scope of the Arbitration Agreement: "Under the broadly phrased arbitration agreement, Smith and Javitch's dispute relates to the account because the collection action could not arise but for Smith's account." Pet. App. 40a, *Id*. at ¶15. Further, it found that Synchrony Bank's assignment to PRA included "PRA's and its agent's rights to enforce the arbitration provision in the original cardholder agreement" and that "the general presumption is in favor of permitting nonsignatory agents of the creditor to invoke the arbitration agreement if so permitted under the express terms of

[1] "[S]everal federal circuits have also recognized an 'alternate estoppel theory' whereby arbitration may be compelled by a nonsignatory against a signatory due to the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract...and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations." *Fields v. Herrnstein Chrysler, Inc.*, 4th Dist. Pike No. 12CA827, 2013-Ohio-693, ¶ 17 (cleaned up).

the arbitration agreement." Pet. App. 7a-10a, *Id*. at ¶13-16.

However, the Court of Appeals affirmed the denial of Javitch's motion because it found a condition precedent existed under the terms of the Agreement, such that only Smith and PRA had the contractual right to demand arbitration. Pet. App. 43a-45a, *Id*. at ¶ 20-22. On remand, PRA demanded arbitration. Pet. App. 9a, *Smith II*, ¶ 15. Smith did not comply. *Id*. at ¶16. Javitch filed a Renewed Motion to Stay, Compel Binding Arbitration, and Strike Class Allegations. *Id*. Smith filed a motion to strike, but no response in opposition. On May 18, 2022, the trial court denied Javitch's Renewed Motion in a second one sentence entry without any stated rationale or hearing. Pet. App. 10a, ¶18. Javitch appealed for a second time. *Id*. at ¶19.

In *Smith v. Javitch Block, L.L.C.*, 8th Dist. Cuyahoga No. 111532, 2023-Ohio-607, 209 N.E.3d 869 ("*Smith II*"), the Ohio Court of Appeals affirmed for a second time. Pet. App. 13a-26a, ¶25-44. Despite holding that the Arbitration Agreement "expressly requires Smith and PRA to arbitrate any dispute or claim between Smith and PRA, ***and/or its agents,***" (Pet. App. 17a, ¶30), finding Javitch to be such an agent, (Pet. App. 15a, ¶27), and finding that the dispute falls within the scope of Agreement, (Pet. App. 8a, ¶14, 39a-40a, ¶15), the Ohio Court of Appeals concluded that Javitch "has no contractual right to enforce the terms of the Agreement between Smith and PRA" and "has no standing to enforce the class-action waiver provision." Pet. App. 26a-27a, ¶43, 46 (emphasis added). The Court incorrectly stated that

PRA's demand for arbitration was not a demand for arbitration because it did not "select an arbitration administrator." *Id*. The demand actually did so reading, in pertinent part, as follows: "submit the above captioned putative class action litigation to arbitration on an individual basis before the American Arbitration Association (the 'AAA')…." Pet. App. 25a, *Smith II*, ¶43.

REASONS FOR GRANTING THE PETITION

The Ohio Court of Appeals Erred by Denying Enforcement of the Arbitration Agreement and Class Action Waiver Under Sections 2, 3, and 4 of the FAA, in an Action Brought by a Party to the Agreement Against the Nonsignatory Agent of the Other Party to the Agreement, for Claims Based on Substantially Interdependent and Concerted Misconduct by Both the Nonsignatory and Signatory.

The Ohio Court of Appeals' conclusion that the right to file a motion to stay or to compel arbitration under Sections 3 and 4 of the FAA is restricted by contract to "parties to the agreement" is a threshold limitation placed specifically and solely on arbitration provisions; this interpretation of the Agreement is preempted by the FAA.

Sections 2, 3, and 4 of the FAA confirm the validity, irrevocability, and enforceability of arbitration agreements in state courts. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that when an arbitration agreement falls within the coverage of the FAA—*i.e.*, when it involves commerce

under Section 1, and has not been invalidated under Section 2—then Congress has "mandated" its enforcement, by state and federal courts, and these requirements are not "subject to any additional limitations under state law." *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006). The FAA requires state courts to "enforce arbitration agreements according to their terms." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018), quoting *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (cleaned up); *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). The FAA was intended to place arbitration agreements "'upon the same footing as other contracts, where it belongs,'…and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985)(quoting H.R.Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

A stay under Section 3 is required when a movant shows that "(1) the issue is one which is referable to arbitration under an agreement in writing for such arbitration, and (2) the party applying for the stay is not in default in proceeding with such arbitration." *C. Itoh & Co. (Am.) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228, 1231 (7th Cir. 1977); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). In assessing whether to grant a motion to compel arbitration under Section 4 of the FAA, Courts must consider two core issues: (1) whether the parties agreed to arbitrate; (2) whether the scope of the

arbitration clause covers the plaintiff's claims. *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 202 L. Ed. 2d 480, 139 S. Ct. 524, 530 (2019); *see also Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003); *Zachman v. Hudson Valley Fed. Credit Union*, 49 F.4th 95, 101 (2d Cir. 2022); *Jaludi v. Citigroup*, 933 F.3d 246, 254 (3d Cir. 2019); *Will–Drill Res., Inc. v. Samson Res. Co.*, 352 F.3d 211, 214 (5th Cir. 2003). It is well established that the party resisting arbitration bears the burden of proving the claims are not suitable for arbitration. *See*, *e.g.*, *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 91 (2000).

In *Arthur Andersen LLP v. Carlisle*, this Court rejected the contention that "those who are not parties to a written arbitration agreement are categorically ineligible for relief" under Section 3 of the FAA. 556 U.S. 624, 629-632 (2009). This Court observed that "'traditional principles' of state law allow a contract to be enforced by or against nonparties…[based on, for instance,] 'third-party beneficiary theories, waiver and estoppel.'" *Id.* at 631 (quoting 21 R. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001)); *see also GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020).

Traditional principles of state law recognize that an agent is entitled to enforce her principal's arbitration agreement when the other party has sued her for actions taken within the scope of her agency. 21 R. LORD, WILLISTON ON CONTRACTS § 57:19 (4th ed. 2001):

> A nonsignatory agent has standing to invoke an arbitration agreement if one of the following two conditions is met: first, when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory; second, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

See also Grand Wireless, Inc. v. Verizon Wireless, Inc., 748 F.3d 1, 11 (1st Cir. 2014) (citing *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1121 (3d Cir.1993)); *Neal v. Navient Solutions, LLC*, 978 F.3d 572 (8th Cir. 2020). Several Circuits have recognized alternative estoppel as requiring arbitration between a signatory and nonsignatory based on "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract ... and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations.'" *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), abrogated on other grounds by *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624 (2009) (quoting *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373 (4th Cir.

2012) (noting that the doctrine of equitable estoppel applies "'when the signatory to the contract containing the arbitration clause raises allegations of ...substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.'"); *Begole v. N. Mississippi Med. Ctr., Inc.,* 761 F. App'x 248, 253 (5th Cir. 2019)("equitable estoppel will allow a nonsignatory to compel arbitration, when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract."); *Reeves v. Enter. Prod. Partners, LP,* 17 F.4th 1008, 1013 (10th Cir. 2021); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999).

Utah and Ohio courts both recognize that nonsignatory agents may enforce arbitration agreements when sued for actions taken within the scope of their agency under both estoppel and agency principles. *Paparazzi, LLC v. Sorenson*, No. 4:22-CV-00028-DN-PK, 2023 WL 2760593, at *4 (D. Utah Apr. 3, 2023); *Ellsworth v. Am. Arb. Ass'n*, 2006 UT 77, ¶ 19, 20, n. 11, n. 12, 148 P.3d 983; *see Atricure, Inc. v. Meng*, 12 F.4th 516, 532 (6th Cir. 2021)(collecting Ohio cases). Other States are in accord. *Peeler v. Rocky Mountain Log Homes Canada, Inc.*, 2018 MT 297, ¶ 47, 393 Mont. 396, 420, 431 P.3d 911, 927; *Locklear Auto. Grp., Inc. v. Hubbard*, 252 So. 3d 67, 90 (Ala. 2017); *Machado v. System4 LLC,* 471 Mass. 204, 209, 28 N.E.3d 401, 408 (2015); *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1038 (Miss. 2010).

There is no requirement under Section 3 or 4 the FAA that *the agreement* itself must *also* authorize a nonsignatory agent of a principal to the arbitration agreement to seek a stay and compel arbitration. Instead, Sections 3 and 4 of the FAA can be invoked by a nonsignatory "party to litigation" in a proper case. *Arthur Andersen LLP*, 556 U.S. at 630, n. 4 ("the term 'parties' in §3 refers to parties to the litigation rather than parties to the contract[; and] §4…unambiguously refers to adversaries in the action[.]").

The FAA preempts state contract law and provides the default rules for resolving ambiguities in agreements to the extent state contract law principles "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. *Lamps Plus, Inc. v. Varela*, 203 L. Ed. 2d 636, 139 S. Ct. 1407, 1415 (2019). A court's interpretation of state law that does not put arbitration agreements and class action waivers on equal footing with other contracts, does not give due regard to the federal policy favoring arbitration and is preempted by the FAA. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 58 (2015).

The Ohio Court of Appeals' conclusion that Smith had a binding Arbitration Agreement, that her claims against Javitch were within the scope of the Agreement, that Javitch was PRA's agent, and that Utah law permits an agent to enforce arbitration agreements when the other party has sued them for actions taken within the scope of their agency (Pet. App. 13a-14a, ¶25, 20a-23a, ¶38-40), should have been the end of the matter. Its conclusion that an agent must show more is an impermissible "threshold

limitation[] placed specifically and solely on arbitration provisions" and is thus preempted by the FAA. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996).

The Ohio Court of Appeals rested its decision to affirm on "the Agreement [contending that it] unambiguously sets forth restrictions concerning motions to compel arbitration during a pending lawsuit." Pet. App. 24a, ¶41.

The Court's conclusion was wrong for multiple reasons. First, under the procedural term governing starting an arbitration, the Arbitration Agreement at issue ("how to start an arbitration") ***does not*** limit the right to move for a stay or to compel arbitration to the "other *party to the Agreement*." *Id*. What the Agreement actually says is:

> 1. *The party* who wants to arbitrate must notify the *other party* in writing. This notice can be given *after the beginning of a lawsuit or in papers filed in the lawsuit*….
>
> 2. *If a party files a lawsuit* in court asserting claim(s) that are subject to arbitration and *the other party files a motion with* the court to compel arbitration….

Pet. App. 50a-51a. This language supports only one logical and reasonable construction of the term "party" – that it means "party to the lawsuit," not *"party to the Agreement"* as the court below held.

When construing ordinary contracts, Utah and Ohio courts do not add, ignore, or discard words, and divine the meaning of the language by an objective and reasonable construction of the whole contract. *Mark Steel Corp. v. Eimco Corp*., 548 P.2d 892, 894 (Utah 1976); *Shifrin v. Forest City Enters., Inc*., 64 Ohio St.3d 635 (1992). Even "[w]hen the language is ambiguous, 'there is a presumption in favor of arbitration.'" *HITORQ, LLC v. TCC Veterinary Services, Inc.,* 2021 UT 69, ¶ 25, 502 P.3d 281; *Central Florida Investments, Inc. v. Park West Associates*, 2002 UT 3, ¶ 16, 40 P.3d 599.

The Ohio Court of Appeals disregarded these cardinal rules of construction in its reading of the "how to start an arbitration" section by adding the words "to the Agreement," refusing to construe the contract as a whole, discarding words, disregarding the presumption in favor of arbitration by imposing an anti-arbitration presumption that the FAA was expressly implemented to redress, and, based solely on that reasoning, arrived at an untenable and unreasonable construction of the Arbitration Agreement. Pet. App. 24a-25a, ¶41-42. In doing so, the Ohio Court of Appeals did not equally apply rules of contract construction applicable to all other contracts and its interpretation is preempted by the FAA. *DIRECTV, Inc.*, 577 U.S. at 58.

Second, the scope of the arbitration clause ("what claims are subject to arbitration") expressly mentions "agents" who are not parties to the agreement ("other user of your account, and us, our affiliates, agents and/or J.C. Penney Corporation, Inc."). Pet. App. 49a. The inclusion of agents within the scope of arbitrable claims permits agents to implement arbitration proceedings. There is no other reason for the express inclusion of "agents" in the Arbitration Agreement. Thus, to avoid surplusage, the Agreement must be read to permit agents to initiate arbitration proceedings.

Third, the same clause also brings within the scope of arbitral claims those raised in response to a lawsuit when claiming any wrongdoing ("if you respond to the collection lawsuit by claiming any wrongdoing, we may require you to arbitrate"). Pet. App. 49a. Lawsuits on behalf of corporate creditors are brought by lawyers, so it does not stretch one's imagination to read the inclusion of claims involving litigation wrongdoing as extending to the lawyers of the creditor. Again, to avoid surplusage, and construing the Arbitration Agreement as a whole, the Agreement must be read to permit one who is alleged to have engaged in wrongdoing in a lawsuit to compel arbitration in accordance with the Agreement, after the nonsignatory agent's principal has demanded arbitration.

Fourth, the Court cited two Ohio cases that held a third-party lacked standing to enforce an Arbitration Agreement. Pet. App. 24a-25a, ¶42, citing *Sterling Contracting, L.L.C. v. Main Event Entertainment, L.P.*, 2020-Ohio-184, 141 N.E.3d 1073,

¶ 17 (8th Dist.) and *Spalsbury v. Hunter Realty, Inc.*, 8th Dist. Cuyahoga No. 76874, 2000 WL 1753436 (Nov. 30, 2000). Neither case involved the FAA, Utah law, nor an arbitrable claim against an agent sued for claims within the scope of its agency.

Finally, the Court's conclusion that Javitch lacked standing to enforce the class action waiver was equally incorrect. Pet. App. 5a, ¶6, 26a-27a, ¶45-48. Smith "agree[d] not to participate in a class, representative or private attorney general action against us [PRA] in court or arbitration. Also, … [Smith] agree[d] that only accountholders on … [her] account may be joined in a single arbitration with any claim …[Smith may] have." Pet. App. 5a, ¶6, 48a.

The Arbitration Agreement contains no limitations on who may enforce its terms. The Agreement's terms specify that Smith agreed to arbitrate her claims on an individual basis, the terms are unambiguous, and not contrary to public policy. Pet. App. 48a. The provision expressly specifying the parties to arbitration, including the election to proceed with arbitration on an individual, non-class basis, should also be enforced under the FAA. *Id.*, *see AT&T Mobility LLC*, 563 U.S. at 351; *American Express Co. v. Italian Colors Restaurant*, 570 U.S. at 233; *DIRECTV, Inc.*, 577 U.S. at 58-9; *Epic*, 138 S. Ct. 1612, 1621. The assertion that the class waiver was subject to an additional contract-based standing requirement amounts to another "additional limitation[] under state law," and is also preempted by the FAA. *See Southland Corp.*, 465 U.S. at 12; *DIRECTV, Inc.*, 577 U.S. 47.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

RICHARD C.O. REZIE
Counsel of Record
GALLAGHER SHARP LLP
1215 Superior Avenue
7th Floor
Cleveland, Ohio 44114
PH (216) 241-5310
FAX (216) 241-1608
rrezie@gallaghersharp.com

MICHAEL D. SLODOV
JAVITCH BLOCK, LLC
1100 Superior Ave.
19th Floor
Cleveland, OH 44114
(440) 318-1073
mslodov@jbllc.com

Counsel for Petitioners

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