IN THE SUPREME COURT OF OHIO

CREDIT ACCEPTANCE CORPORATION, **APPELLEE,** ***V.*** **GLORIA BEARD, *ET AL.*,** **APPELLANTS,**	**CASE NO. 2025-0246** **ON APPEAL FROM CUYAHOGA COURT OF APPEALS, EIGHTH APPELLATE DISTRICT, CASE NO. CA-24-113682**

BRIEF OF AMICUS CURIAE LEGAL AID OF SOUTHEAST AND CENTRAL OHIO, IN SUPPORT OF APPELLANTS GLORIA BEARD AND JASMINE BEARD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

OTHER PROVISIONS

STATEMENT OF INTEREST OF AMICI CURIAE

For decades, Legal Aid of Southeast and Central Ohio ("LASCO") has represented low-income and senior Ohioans in debt collection lawsuits and automotive litigation, including cases initiated by Appellee Credit Acceptance Corporation ("CAC"). The question presented in this case directly concerns LASCO and their client population because the lower court's ruling wrongly decided that motions to compel arbitration where the Federal Arbitration Act ("FAA") controls is not a final order subject to appellate review under R.C. 2711.02(C), despite being in state court at the time the motion to compel was filed. Adopting this holding will deny low-income and senior Ohioans the right to appellate review.

The Eighth District Court of Appeals' decision, which found it did not have jurisdiction over Gloria and Jasmine Beards' ("The Beards") appeal for lack of a final appealable order, was improper. Pursuant to the R.C. 2711.02(C), the Eighth District Court of Appeals does have jurisdiction to hear The Beards' appeal. Even if this Court accepts the position that the FAA preempts R.C. 2711.02(C), the Court must make clear that an interlocutory appeal is proper when a motion to stay for arbitration is granted where not doing so would be against public policy. Arbitration agreements have been found to be unenforceable pursuant to public policy where the agreement is unconscionable, does not promote judicial economy, or to prevent forum shopping when the right to arbitrate has been waived.

This case is about State sovereignty, access to justice, and fairness. With two economic crises in the last 20 years, LASCO has witnessed the critical role of courts, particularly courts of appeals, in debt collection cases. While this Amicus is not a referendum on arbitration, there are inherent inequities that often arise in the circumstances around signing an arbitration agreement, the outcomes for consumers in arbitration, the prevention of class actions and the forums chosen.

This Court has the ability to ensure this unfair, and erroneous outcome by the lower appellate court does not stand.

STATEMENT OF THE CASE AND FACTS

Amicus curiae LASCO fully adopts the Statement of the Case and Facts in the merit brief of Appellants Gloria Beard and Jasmine Beard.

ARGUMENT

Proposition of Law No. 1: For cases brought in Ohio courts where the parties have agreed to arbitration proceedings governed by the Federal Arbitration Act, a trial court order granting a motion to stay the proceedings and compel arbitration is a final order subject to appellate review under R.C. 2711.02(C).

Arbitration agreements were principally used to settle disputes between commercial entities. Consumer Financial Protection Bureau, *Prepared Remarks of CFPB Director Richard Cordray on the Arbitration Rule Announcement*, https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-arbitration-rule-announcement/ (accessed July 10, 2017). Today, arbitration agreements are ubiquitous in consumer contracts. In fact, after extensive research as required by The Dodd Frank Act, the Consumer Financial Protection Bureau ("CFPB") found that arbitration clauses now exist in hundreds of millions of consumer finance contracts. *Id.* Credit card agreements, cell phone agreements, internet provider agreements, vehicle purchases, i.e., areas that have become necessities in life, contain arbitration agreements. With the advent of e-signing, and the quickness within which people are rushed through their paperwork, most are not given the chance to fully appreciate the consequences of arbitration. But even if they do, what choices do they have? None. The idea that someone can simply choose to contract with another company who does not use arbitration agreements is unrealistic. There is no negotiation of these terms. There is no open marketplace where

consumers can research and make informed about which boilerplate contract they prefer. Even if they could, individuals lack the time to research and negotiate terms for everything we buy or use.

Interestingly, car dealers complained to Congress that car manufacturers abused their superior bargaining power in forcing dealers to arbitrate claims with manufacturers and obtained an exemption from the Federal Arbitration Act's preference for arbitration. Car dealers can now get out of binding mandatory arbitration agreements with manufacturers unless the dealer consents **after the dispute arises.** 15 U.S.C. § 1226(a)(2). (Emphasis added). If binding mandatory is not always fair for car dealers, it surely is not always fair for consumers either.

Ohio courts have also noted that close scrutiny is warranted when the arbitration clause at issue involves a consumer transaction for the purchase of an automobile. See *Battle v. Bill Swad Chevrolet*, 140 Ohio App.3d 185, 192 (10th Dist. 2000). ("Transactions involving modern day necessities such as transportation deserve especially close scrutiny *before an arbitration clause is enforced* by the courts.") (Emphasis added).

In the instant case The Beards are Ohio residents who purchased a vehicle at an Ohio dealership with no franchises outside of this State. *See* Memorandum in Support of Jurisdiction of Appellants, Statement of the Case & Facts, pg. 2. A consumer in this situation cannot possibly be expected to understand this transaction is considered interstate commerce, even with the one small line simply claiming that on the agreement.

On top of this, CAC proposes that Ohio's General Assembly cannot protect its consumers against arbitration agreements controlled by the FAA despite being in state court. The Ohio General Assembly enacted O.R.C. 2711.02(C)[1], allowing for an interlocutory appeal if a motion

[1] The right to an appeal as an interlocutory order was originally granted in 1990 under section (B) but separated out into section (C) in 2001.

to compel arbitration is both granted or denied, unlike the FAA which only allows for such an appeal when a motion to stay is denied. In the instant case CAC chose to file in state court and allow it to remain there for almost eight months. Not until The Beards had the nerve to litigate claims against CAC did it decide it was time to move for arbitration. The availability of state court procedures to challenge whether CAC waived its right to arbitration is vital. Appellate review in cases where a motion to stay for arbitration is granted provides crucial protection for Ohio's consumers, as recognized by the Ohio General Assembly.

I. The Lower Court Erred in Finding it Did Not Have Jurisdiction Over The Beards' Appeal by Claiming 9 U.S.C. § 16 Preempted R.C. 2711.02(C).

a. State Procedural Rules Govern State Court Litigation.

Beginning in 1916 with the case of *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, (1916), it has been held that procedural rules should be left to the states even if federal substantive rules apply. *Bombolis* at 222. This Court has held that substantive laws are those that "relate to rights and duties which give rise to a cause of action." *Norfolk S. Ry. Co. v. Bogle*, 2007-Ohio-5248, ¶ 16.

Procedural laws are used to "prioritize the administration and resolution of a cause of action that already exists." *Id.* When an aggrieved party can appeal an order compelling arbitration is a procedural law question. It relates to the "administration and resolution of a cause of action that already exists." In the instant case, Ohio procedural laws control.

The ability to appeal an order compelling arbitration is a question of procedure, not substance. Interlocutory appeals occur within a cause of action that already exists, rather than being a cause of action themselves and R.C. 2711.02(C) merely states when an interlocutory appeal can be filed for motions to compel arbitration. Cornell Law School, *interlocutory appeal* https://www.law.cornell.edu/wex/interlocutory_appeal (accessed March 2023), R.C. 2711.02(C).

Federal procedural rights can differ from state procedural rights. When that happens, the forum court's procedural laws control. The court in *Norfolk* accepted the argument that when the state's laws created a mere procedural supplement to the federal law and did not infringe on substantive rights incurred by that federal statute, the courts could apply the state's procedural statute. *Norfolk* at ¶ 18. *See also Johnson v. Fankell*, 520 U.S. 911, 922-923 (1997), *citing Howlett v. Rose,* 496 U.S. 356, 372-373 (1990). ("We therefore cannot agree with petitioners that § 1983's recognition of the defense of qualified immunity pre-empts a State's consistent application of its neutral procedural rules, even when those rules deny an interlocutory appeal in this context.")

"'Where ... the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.'" *English v. General Electric Co.*, 496 U.S. 72, 79, *citing Jones* v. *Rath Packing Co., 430* U. S. 519, 525 (1977). *See also American General Financial Services v. Jape*, 291 Ga 637, 639-640 (2012), *citing Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). ("Because the FAA contains no express preemptive provision and does not reflect a congressional intent to occupy the entire field of arbitration, its provisions will preempt state law only to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") *Jape* involved an arbitration clause governed by the FAA where the original lawsuit was brought in state court and the plaintiff filed a motion to compel arbitration, which was *denied*. That plaintiff appealed the denial and the court of appeals dismissed for lack of jurisdiction holding its state statute governing arbitration "is a procedural statute not preempted by 9 USC § 16(a)(1)(B)". *Id.* at 638. This court went on to site several other cases in other states that have additionally held "that state procedural laws addressing the timing of appeals are not

preempted by the FAA". *Id.* at 641. *And see*, *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 867 F.2d 1518 (5th Cir. 1989).

The appellant in *Turboff* filed his claims in state court. *Id.* The appellees moved to have the case removed to federal court which the state court granted. *Id.* Once in federal court the appellees moved to compel arbitration which was also granted. *Id.* Appellant filed an interlocutory appeal in part to appeal the granting of the motion to compel arbitration and the appellate court dismissed for lack of jurisdiction. *Id.* While the case was filed in state court prior to the passage of 9 U.S.C. § 16, the appeal was filed after. The court held the new rule was a procedural change to the enforcement of arbitration clauses and did not affect substantive rights. *Turboff,* at 1521. *See also Morgan v. Sundance Inc.*, 596 U.S. 411, 418-419 (2022) ("A directive to a federal court to treat arbitration applications 'in the manner provided by law' for all other motions is simply a command to apply the usual federal procedural rules...If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.")

In 1988, Congress enacted 9 U.S.C. § 16. In 1990, merely two years later, Ohio amended R.C. 2711.02 to add that either granting or denying a motion to compel arbitration was a final appealable order. The timing cannot be a coincidence: Ohio intends arbitration orders to be appealable.

There is no preemption because R.C. 2711.02(C) does not conflict with 9 U.S.C. § 16(b) since the latter can be interpreted to apply solely to federal courts. The FAA does provide an exception to its provision stating an appeal cannot be taken if a motion to compel arbitration is granted. Specifically, 9 U.S.C. § 16(b) says: "[e]xcept as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order…" Thus, while federal cases

can take advantage of the exceptions to the FAA's rule against interlocutory appeals if a motion to compel is granted, those in state court do not get to take advantage of the exception. We implore this Court to hold since this case was filed in state court and has not been removed to federal court, the state provision R.C. 2711.02(C) will apply, rather than 9 U.S.C. § 16(b).

b. The Instant Case was Filed in Ohio State Court Where It Remained.

"The [Ohio] supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right…All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court." Ohio Const. Art. IV, § 5(B). Upholding the lower court's ruling allows the Federal Government to infringe on exclusive rights of Ohio courts to establish their own procedures.

The General Assembly has the power to determine the jurisdiction of Ohio appellate courts over final orders. *See* Ohio Const., Art. IV, § 3(B)(2). The General Assembly used that power to enact R.C. 2711.02(C), allowing an interlocutory appeal from a state court decision granting a motion to compel arbitration.

The primary case argued in CAC's brief, *Smith v. Spirrizzi*, is distinguishable because, unlike in *Spirrizzi*, the parties here were only ever in state court. *Smith v. Spizzirri*, 601 U.S. 472 (2024). *Spirrizzi* was removed to federal court before the motion to compel arbitration was filed. The holding states "[w]hen a **district** court finds that a lawsuit involves an arbitrable dispute, and a party requests a stay pending arbitration, § 3 of the FAA compels the court to stay the proceeding." *Id.* at 479 (Emphasis added.) Thus, even if the parties here "agreed" the FAA applied when the contract was signed, that did not negate the protections of R.C. 2711.02(C).

c. Public Policy Favors Interlocutory Appeals to Prevent Forum Shopping

While it is true that public policy in Ohio favors arbitration, there are several exceptions to this. Unconscionable terms and the surrounding factors in signing the arbitration agreement have been found to violate public policy. *Strader v. Magic Motors of Ohio, Inc.*, 2007-Ohio-5358, ¶ 25 (5th Dist.). Ohio public policy also favors judicial economy; however, CAC proposes The Beards can only appeal the granting of a motion to compel arbitration after the arbitration has been concluded and entered as a final judgment in the trial court. Finally, and what occurred in the instant case, public policy does not favor forum shopping.

In their appeal, The Beards cited many cases regarding waiver as a reason to deny arbitration. *See* Brief of Appellants, pgs. 6-10. When reviewing whether a party waived its right to arbitrate an analysis as to whether the moving party is forum shopping must also be considered. If arbitration truly is the preferred forum, CAC should have initiated arbitration from the beginning as opposed to filing and remaining in state court. A determination of whether a party waived its right to arbitration due to prolonged litigation in court serves to prevent forum shopping.

i. Requesting Arbitration Where the Moving Party has Acted Counter to its Rights is a Method of Forum Shopping.

Ohio courts have consistently found a party is engaging in forum shopping if that party moves for arbitration after "waiving" its rights through active and prolonged litigation in the initial forum. "A party cannot sit on its right to arbitrate for over a year, while actively litigating the case, and then assert such a right in the face of an adverse ruling—such conduct amounts to forum shopping." *Am. Gen. Fin. v. Griffin*, 2013-Ohio-2909, ¶22 (8th Dist.), *citing Ohio Bell Tel. Co. v. Cent. Transport Inc.*, 2011-Ohio-6161, ¶23 (8th Dist.). The parties in *Griffin* litigated for a little over two years before the moving party requested arbitration and the court held

arbitration had been waived *Id*. Similarly in *Ohio Bell* the parties litigated for less than two years before a motion to compel arbitration was filed and the court held arbitration was waived. *Id.* The 11th District Court of Appeals has additionally held if a party knew of its right to arbitrate and sat on those rights for a significant period, the right to arbitrate has been waived. *EMCC Invest. Ventures v. Rowe*, 2012-Ohio-4462 (11th Dist.). In determining the party waived its right to arbitration the court stated "EMCC and Barnes have apparently concluded, after all this effort, that forum shopping would be in their best interests." *Id* at ¶ 55. *See also Liberty Credit Servs. Assignee v. Yonker*, 2013-Ohio-3976, ¶ 28 (11th Dist.). ("Both Liberty and Slovin made what appear to be attempts at forum shopping. Neither Liberty nor Slovin asserted arbitration as an affirmative defense until after the case had been removed to, and then remanded from, federal court.")

The 10th District Court of Appeals found waiver where the party requested arbitration a couple of months before the trial date was scheduled, finding "Appellants filed the motion to stay …only as an alternative in the event they received an unfavorable ruling on the summary judgment motion. Such conduct amounts to forum shopping." *Pinnell v. Cugini & Cappoccia Builders, Inc.*, 2014-Ohio-669, ¶ 23 (10th Dist.). The Northern District of Ohio also linked waiver of arbitration to forum shopping depending on how long the moving party sat on its rights. "Through his demand for arbitration, plaintiff claims to be seeking prompt resolution of his dispute with the Hospital. There is no merit to his shallow and insincere protestations: his motion is the quintessential delaying tactic and effort at forum-shopping." *Uwaydah v. Van Wert County Hosp*., 246 F.Supp.2d 808, 813 (N.D. Ohio, 2002). Finally, the Southern District of Ohio has also compared a late motion to compel arbitration as forum shopping. *See Murray v. Wilkie Farr & Gallagher*, 2025 WL 771586, *7 (S.D. Ohio). (internal citations omitted). ("In sum,

Plaintiffs sought to litigate the case in state court 'before deciding they would fare better in arbitration' than before the bankruptcy court.") *And see Ak Steel Corp. v. Chamberlain*, 974 F.Supp. 1120, 1126 (S.D. Ohio 1997). In *Chamberlain* the court found the moving party was engaged in forum shopping when it waited to file its motion to compel arbitration until after the court certified the nonmoving party's case as a class action.

An interlocutory appeal is vital to prevent forum shopping. A party must not be allowed to engage in court litigation until it decides a different forum may be more advantageous as what happened in The Beard's case.

ii. Forum Shopping is Against Ohio Public Policy

As demonstrated above, depending on how long a moving party has sat on its right to request arbitration, a court may determine that party has waived its right to arbitration. One reason this analysis is important is to ensure parties are not engaging in forum shopping, which is against Ohio public policy. "In the case *sub judice,* the trial judge in Cuyahoga County apparently felt plaintiff was using the Rules of Civil Procedure to 'judge shop' or 'forum shop.' This is clearly a 'factor of public interest involving the courts.' It cannot be said the trial court in Cuyahoga County abused its discretion in changing venue to Belmont County to eliminate forum shopping." *Davis v. Bernhart*, 1990 WL 180654, (Krupansky, J. concurrence) (8th Dist.).

Filing multiple appeals in different counties is a method of forum. *Althof v. State*, 2006-Ohio-502 (4th Dist.). That court went on to state forum shopping is "a tactic condemned by the judicial system." *Id.* at ¶ 11, *citing* *Cos, Inc. v. Liquor Control Comm'n,* 1993 WL 317468, *2 (11th Dist.).

This Court cannot foreclose the possibility to appeal an order granting arbitration when the issue of waiver is asserted. To do so would prevent state appellate review of whether the

moving party is engaging in forum shopping, which is disfavored in Ohio as against public policy.

CONCLUSION

For the reasons stated above, *amicus curiae* LASCO respectfully requests that this Honorable Court reverse the decision of the Eighth District Court of Appeals.

Respectfully submitted,

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