IN THE SUPREME COURT OF MISSOURI

Manuel Lopez, on behalf of himself and all others similarly situated,	)	
Plaintiff/Respondent,	)	
vs.	)	SC95718
H&R Block., et al.,	)	
Defendants/Appellants.	)	

SUGGESTIONS OF *AMICUS CURIAE*
MISSOURI CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT
OF DEFENDANTS/APPELLANTS' APPLICATION FOR TRANSFER

The Court of Appeals, Western District created a novel rule that courts "do not address defenses to enforcement of an arbitration agreement unless [they] are first satisfied that an arbitration agreement exists and that the subject disputes are within its scope." Slip Op. at 9. The court made clear that this new rule is not discretionary; rather, the court treated the existence and scope of an arbitration agreement as akin to threshold jurisdictional issues that must be resolved *sua sponte* before other questions may be reached in a case. *See* Slip Op. at 11-12. This rule is uniquely hostile to arbitration agreements and will add cost and delay to the resolution of disputes. It conflicts with the Federal Arbitration Act ("FAA") as well as decisions of this Court and the U.S. Supreme Court. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015). Because the Western District's rule threatens the efficient functioning of arbitration in Missouri, it also presents an issue of great interest and importance meriting transfer.

I. INTEREST OF *AMICUS CURIAE*

The Missouri Chamber of Commerce & Industry ("Chamber") is the largest business association in Missouri; together with its affiliate network, the Missouri Chamber Federation, the Chamber represents more than 40,000 employers. Many of the Chamber's members have adopted arbitration provisions in their consumer contracts.

These arbitration provisions benefit consumers, businesses, and the economy as a whole. For businesses, civil litigation is costly and can produce extortionate settlements. It puts Missouri and American companies at a disadvantage to exporters in other countries; and it can even threaten the viability of some enterprises, especially small businesses. Arbitration offers a much-needed alternative for resolution of disputes that arise between consumers and businesses. It is quicker and generally less expensive than civil litigation, and these advantages benefit all parties. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economies of dispute resolution."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (noting that arbitration allows both businesses and consumers to avoid "the delay and expense of litigation" (citation omitted)).

Moreover, arbitration achieves fair results. In 2009, the Searle Civil Justice Institute conducted a study of American Arbitration Association-administered consumer arbitrations and found that consumers won relief in 53.3 percent of cases filed and recovered an average of $19,255. *See* Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 845-46 (2010). In contrast, in fiscal year 2014, 51.3 percent of civil cases filed in Missouri

circuit courts were *dismissed* without proceeding to trial. *See Missouri Judicial Report Supplement: Fiscal Year 2014*, Table 24, https://www.courts.mo.gov/file.jsp?id=83234.

The benefits of fast, inexpensive, and fair dispute resolution, however, are lost if parties must engage in protracted, costly litigation before arbitration begins. The Western District's novel rule will produce precisely this unfortunate result. The Chamber, on behalf of its members, has a vital interest in seeing that this new rule is rejected.

II. THE WESTERN DISTRICT'S RULE IS CONTRARY TO THE FAA AND DECISIONS OF THIS COURT AND THE U.S. SUPREME COURT; AND THIS CONFLICT PRESENTS AN ISSUE OF GENERAL INTEREST AND IMPORTANCE.

The FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). It provides that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This statute requires that states not "singl[e] out arbitration provisions for suspect status," but instead must place such provisions "upon the same footing as other contracts." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490 (Mo. banc 2012) (stating that, under the FAA, arbitration agreements may not be invalidated "by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue"). State rules that disfavor arbitration conflict with, and are preempted by, the FAA. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. banc 2012).

In particular, the U.S. Supreme Court and this Court have held that states may not interpose proceedings that delay the commencement of arbitration. "Congress's clear intent, in [enacting the FAA], [was] 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.*, 460 U.S. at 22 (emphasis added). The U.S. Supreme Court has accordingly invalidated, for example, a state-law rule that parties must exhaust state administrative procedures before arbitrating. *Preston v. Ferrer*, 552 U.S. 346, 358 (2008). "'A prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results,' which objective would be 'frustrated' by requiring a dispute to be heard by an agency first," the Court has explained. *Concepcion*, 563 U.S. at 346 (quoting *Preston*, 552 U.S. at 357-58). Similarly, the U.S. Supreme Court and this Court have repeatedly held that, when a party challenges the validity of a contract overall rather than the contract's arbitration provision, states may not apply severability rules to give the court the power to decide the challenge rather than immediately sending the case to arbitration. *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 423-24 (Mo. banc 2016).

The Western District's new rule is contrary to these principles. *First*, the rule "singl[es] out arbitration provisions for suspect status," *Doctor's Associates, Inc.*, 517 U.S. at 687, by holding that a court considering a motion to compel arbitration must *sua sponte* evaluate the existence or scope of an agreement to arbitrate even if neither is disputed by the parties, Slip op. at 9. The Western District did not indicate that any such rule applies to other contracts; and, by subjecting arbitration agreements *alone* to this added judicial

scrutiny, the court has guaranteed that agreements to arbitrate will be enforced less often than other types of contracts.

Second, the Western District's discriminatory approach creates roadblocks adding unnecessary delays and costs before disputes move to arbitration. Under the new rule, courts considering motions to compel arbitration must reexamine issues that the parties do not consider worthy of dispute, including issues upon which the parties may actually *agree*. The requirement that judges hunt through the record without parties' guidance places added burdens on courts and will delay the resolution of motions to compel. In addition, the Western District's novel rule means that a party can never waive a challenge to an arbitration agreement's existence or scope; instead, these issues are perpetually open to reconsideration on appeal. This too will protract time spent in litigation. Just as in *Preston*, a law delaying arbitration until the conclusion of administrative proceedings was invalid, *see* 552 U.S. at 357-58, here, the Western District's rule multiplying the issues that must be decided in court before arbitration can begin is invalid.

The Western District's unprecedented judge-made rule is doubly contrary to the FAA and smacks of the judicial hostility to arbitration that this Court and the U.S. Supreme court have more than once condemned. The conflict between this rule and the FAA presents an issue of great interest and importance to Missouri businesses. A reliable and well-functioning arbitration regime allows businesses to minimize litigation costs and, in turn, to both contribute to the State's economy and pass on economic benefits to consumers. This Court should grant Defendants-Appellants' transfer motion, resolve this important question, and ensure that Missouri courts respect the FAA and its policies.

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Respectfully submitted,

/s/ Brian Bunten

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served through the Missouri Supreme Court electronic filing system on May 27, 2016 to:

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