In the
Supreme Court of Ohio

STEVEN SINLEY,	)	Case No. 2020-1158
	)	
Plaintiff-Appellee,	)	On Appeal from the
	)	Cuyahoga County
v.	)	Court of Appeals,
	)	Eighth Appellate District
SAFETY CONTROLS TECHNOLOGY, INC., *et al.*	)	
	)	Court of Appeals
	)	Case No. 109065
Defendant-Appellant.	)	

REPLY BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT SUPERIOR DAIRY, INC.

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INTRODUCTION

The Federal Arbitration Act and the U.S. Supreme Court's FAA precedents require accepting the propositions of law under review, reversing the judgment below, and enforcing the arbitration agreement in this case.

Neither plaintiff-appellee Sinley nor his *amici*, the Ohio Association for Justice and the Ohio Employment Lawyers Association, offers a persuasive response. At bottom, their arguments rest on a view that arbitration provisions in collective bargaining agreements are subject to heightened scrutiny. But that is no longer the law in light of the U.S, Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). And the magic-words approach that Sinley and his *amici* urge—which would require listing every conceivable statutory claim in an arbitration clause—reflects a minority view that conflicts with the FAA's directive to enforce arbitration agreements according to their terms and impermissibly "singles out arbitration agreements for disfavored treatment." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425 (2017). Indeed, since the Chamber's opening brief was filed, the Sixth Circuit has rejected that approach. *Nealy v. Shelly & Sands, Inc.*, --- F. App'x ----, 2021 WL 1102307 (6th Cir. Mar. 23, 2021). This Court should do the same.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I:

> *The presumption of arbitrability applies in R.C. 2711.03 and 9 U.S.C. § 3 motions to compel arbitral resolution of statutory claims. Arbitration should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.*

Proposition of Law No. II:

> *A "clear and unmistakable" waiver of a judicial forum for resolving employee statutory claims can exist in a private or public-sector collective bargaining agreement without exhaustively listing every conceivable, possible state and federal statute. A collectively-bargained waiver of a judicial forum for employee statutory claims is to be treated and viewed no differently than the complete waiver of the statutory right or claim itself.*

A. The FAA's Presumption Of Arbitrability Applies To Arbitration Agreements Covering Statutory Claims That Are Located In Collective Bargaining Agreements.

Mr. Sinley's *amici* concede that the Federal Arbitration Act requires, as a matter of substantive federal law, "that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration." *Lamps Plus, Inc. v. Varela*, 139 S. Ct 1407, 1418-19 (2019) (citing *Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth*, 473 U.S. 614, 626 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). But they seek two carve-outs from this presumption in favor of arbitrability. Both exceptions are foreclosed by precedent.

First, the proposition that arbitration provisions in *collective bargaining agreements* are excluded from the FAA's presumption in favor of arbitrability (*e.g.*, OAJ Br. 8, OELA Br. 13) cannot be squared with the U.S. Supreme Court's holding that there should be no "distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009); *see* Chamber Br. 6-7 & n.1 (explaining why the reasoning in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), a case that did not involve the FAA and thus is not binding in FAA cases, is inconsistent with *14 Penn Plaza*).

Indeed, much of *amici*'s argument (OELA Br. 4-6, OAJ Br. 13-14) that collective bargaining agreements are categorically different rests on "broad dicta" in a line of earlier cases "that were highly critical of the use of arbitration," dicta that the Court expressly *rejected* in *14 Penn Plaza* as resting "on a misconceived view of arbitration that this Court has since abandoned." 556 U.S. at 265. For example, OELA extensively relies on the discussion of collective bargaining

agreements and the arbitrability of "individual statutory claims" in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). OELA Br. 4-6.

But in *14 Penn Plaza*, the Supreme Court repudiated those prior statements. As the Court explained, "objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory . . . claims." 556 U.S. at 269. The Court further explained that "there is 'no reason to color the lens through which the arbitration clause is read' simply because of an alleged conflict of interest between a union and its members." *Id.* at 270 (quoting *Mitsubishi*, 473 U.S. at 628). As the Court recognized, "[l]abor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargaining agreements and implement them on a daily basis." *Id.* "But this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment" just because it was entered into by a union rather than an individual employee. *Id.* Accordingly, the Court concluded, the "*Gardner-Denver* line of cases" are at most limited to their facts—in which the arbitration agreements covered purely contract-based claims—and do "'not involve the issue of the enforceability of an agreement to arbitrate statutory claims.'" *Id.* at 264 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991)); *see id.* ("*Gardner-Denver* and its progeny thus do not control the outcome here.").

Second, *amicus* OAJ says that the presumption of arbitrability is limited to contractual claims. OAJ Br. 8. But the U.S. Supreme Court explicitly held in *Mitsubishi* that "there is no reason to depart from" the FAA's presumption in favor of arbitrability "where a party bound by an arbitration agreement raises claims founded on statutory rights." 473 U.S. at 626 (applying the presumption to statutory antitrust claims). And the U.S. Supreme Court has applied the presumption to other non-contractual claims as well. For instance, *Lamps Plus*, a data breach case,

involved "negligence" and "invasion of privacy" claims in addition to a breach of contract claim. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 671 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407.

In short, the FAA's presumption in favor of arbitrability applies with full force in the collective-bargaining context and to agreements to arbitrate statutory claims.

B. An Arbitration Agreement Need Not List Every Possible State or Federal Statutory Claim In Order To Be Enforceable Under The FAA.

Even assuming a clear-and-unmistakable standard applies, that standard is satisfied here, because the arbitration agreement expressly covers "*any* violation of *laws or statutes* by the Union or the Company, as alleged by an employee." (Frank Aff. Exh. "A", p. 11, § 4; Dec. ¶ 4) (emphases added). To further require that every conceivable state and federal statute be listed by name in the arbitration agreement would impermissibly single out arbitration agreements for highly disfavored treatment, contrary to the principles discussed above.

As the Chamber explained in its opening brief, the Sixth Circuit's pre-*14 Penn Plaza* decision in *Bratten v. S.S.I. Services, Inc.*, 185 F.3d 625 (6th Cir. 1999), cited by the lower court and by Mr. Sinley's *amici* here (OAJ Br. 23, 25; OELA Br. 9-11), reflects a minority view. And any state-law rule that imposes a heightened standard for the enforcement of arbitration agreements runs afoul of the FAA. *See* Chamber Br. 8-12.

Indeed, since the opening briefs were filed, the Sixth Circuit has retreated from language in *Bratten* appearing to require the magic-words approach adopted by the lower court in this case, holding that an arbitration provision in a collective bargaining agreement requiring arbitration of "[a]ny and all claims regarding equal employment opportunity" or "under any federal state, or local fair employment practices law" encompassed the plaintiff's federal and Ohio statutory claims, even though the specific statutes (42 U.S.C. § 1981, Title VII, and the Ohio Laws Against Discrimination) were not identified by name in the agreement. *Nealy*, 2021 WL 1102307, at *1, *3 (citing *Darrington v. Milton Hershey School*, 958 F.3d 188, 194-95 (3d Cir. 2020)). The *Nealy*

Court specifically *rejected* the interpretation of *Bratten* and *Wright* advanced here—that "citations to specific statutes in the CBAs is necessary for the arbitration provision to cover claims brought under those statutes." *Id.* at *3. Instead, the *Nealy* Court explained, *Bratten* and *Wright* are distinguishable and do not support a requirement to identify every possible statutory claim because in those cases "there was no explicit reference at all to statutory claims in the arbitration provision." *Id.*; *see also* Chamber Br. 9 (distinguishing *Wright* for the same reason).

Like the agreements in *Nealy* and *Darrington* (cited at Chamber Br. 3, 9), the arbitration agreement in this case explicitly refers to statutory claims, covering "any violation of laws *or statutes* . . . ." (Frank Aff. Exh. "A", p. 11, § 4; Dec. ¶ 4) (emphasis added). The agreement then lists a number of federal and Ohio statues, while making clear that the list of enumerated statutes is "without limitation." *Id.* Nothing more is needed to satisfy the *Wright* standard.

Finally, as the Chamber explained in its opening brief, the U.S. Supreme Court has held that the FAA preempts state laws "'requiring greater information or choice in the making of arbitration agreements.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting 2 I. Macneil et al., Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (1995)). Accordingly, the FAA preempts any Ohio state-law rule requiring each statute to be listed by name in an arbitration agreement, because such a rule does not apply outside of the arbitration context. *See* Chamber Br. 10 (discussing *Seals v. Gen. Motors Corp.*, 546 F.3d 766, 772 (6th Cir. 2008)). OAJ's only response to *Casarotto* is to point out that the Supreme Court in *Wright* articulated a clear-and-unmistakable standard as a matter of federal law. OAJ Br. 23. But *Wright* itself, to the extent it applies to arbitration agreements governed by the FAA, provides no support for the magic-words approach. *See Nealy*, 2021 WL 1102307, at *3; Chamber Br. 9-10. That approach, as adopted below, reflects a rule of Ohio law that goes beyond any federal-law rule. And it is precisely the sort of state-law rule that subjects arbitration agreements "to uncommon barriers" that fails to

"survive the FAA's edict against singling out those contracts for disfavored treatment." *Kindred*, 137 S. Ct. at 1427.

C. Personal Injury And Other Tort Claims Are Arbitrable Under The FAA.

Finally, OAJ's effort to transmute Mr. Sinley's statutory claim under Ohio Rev. Code Section 2745.01 into a common-law intentional tort claim (OAJ Br. 5, 19-26) is wrong as a matter of Ohio law and mischaracterizes the complaint, for the reasons explained by Superior Dairy and the Ohio Chamber of Commerce.

In addition, Mr. Sinley's *amici* incorrectly suggest that tort claims involving personal injuries cannot be arbitrated or can be arbitrated only pursuant to a heightened showing of intent to arbitrate. *See* OAJ Br. 21; *see also* OELA Br. 3 (focusing on Mr. Sinley's allegations of personal injury). But that argument also is foreclosed by precedent. *See Marmet Health Care Center, Inc. v. Brown*, 565 U.S. 530, 532-33 (2012) (per curiam).

The Supreme Court rejected this argument in *Marmet*. There, West Virginia's highest court declared as a matter of state public policy that personal injury and wrongful death claims are categorically inarbitrable. *Id.* at 532. And in seeking to insulate its public policy rule from FAA preemption, the state court concluded that "'Congress did not intend for the FAA to be, in any way, applicable to personal injury or wrongful death suits that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce.'" *Id.* (quoting the State court). The U.S. Supreme Court swiftly rejected that "interpretation of the FAA [as] both incorrect and inconsistent with clear instruction in the precedents of this Court." *Id.* "The statute's text includes *no exception* for personal-injury or wrongful-death claims," the Court continued, but instead "requires courts to enforce the bargain of the parties to arbitrate." *Id.* at 532-33 (emphasis added).

The same is true here. Because Mr. Sinley's claim is subject to arbitration under the terms of his arbitration agreement, the FAA requires this Court to enforce it.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court reverse the Court of Appeals' decision and accept Superior Dairy's position on the two propositions of law at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America was served on April 5, 2021 by email upon the following counsel:

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