No. 18-1156

IN THE

Supreme Court of the United States

MORGENTHAU VENTURE PARTNERS, L.L.C.,
and MORGENTHAU ACCELERATOR FUND, L.P.,

Petitioners,

v.

ROBERT A. KIMMEL,

Respondent.

On Petition for a Writ of Certiorari to the Florida Fourth District Court of Appeal

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent ("Kimmel") offers no valid reason for this Court to bypass review of the vitally important issues this case presents. Those issues, involving a Florida appellate court's refusal to follow this Court's command to judge the arbitrability of each alleged claim, and the 10-2 circuit split over the requirement of prejudice for arbitral waiver defenses, drive to the heart of the Federal Arbitration Act's ("FAA") mandate to enforce arbitration agreements. What Kimmel offers in response are immaterial distinctions and distraction. He claims the Florida appellate court, despite its mere affirmance without opinion, supposedly did decide the arbitrability of Kimmel's new claims and theories raised in the amended complaint—just not in this case. But the case Kimmel cites, *Stankos v. Amateur Athletic Union of the U.S., Inc.*, 255 So. 3d 377 (Fla. 4th DCA 2018), illustrates the very hostility to arbitration that calls for this Court's intervention. At least *Stankos* contains analysis. The same is not true for this case, and that violates the FAA under *Cocchi*.

Kimmel also argues Florida's unforgiving no-prejudice version of waiver, adopted from the minority of circuits that do not require prejudice, should be of no concern to this Court. But the debate over whether FAA's mandate controls in state court has long passed. The issue is whether a no-prejudice waiver standard stands as an obstacle to the FAA's goals. It does, and Florida and the two federal circuits it follows stand against 10 other circuits. That this case arose in state court is no basis to ignore the circuit split.

I. This case is procedurally indistinguishable from *Cocchi*.

Kimmel contends Morgenthau is taking *Cocchi*'s prohibition of blanket orders denying arbitration out of context. But that is the holding of the case—when some claims are arbitrable and others are arguably not, "courts must examine a complaint with care to assess whether any individual claim must be arbitrated." *KPMG LLP v. Cocchi*, 565 U.S. 18, 22 (2011). Kimmel thinks this Court substantially qualified the FAA's proscription against "blanket orders" refusing to compel arbitration by including the phrase, "*merely on the grounds that some of the claims could be resolved by the court without arbitration*." Blanket orders denying arbitration, Kimmel suggests, may be permissible if on grounds *other than* the fact that some claims fall outside an arbitration agreement. This Court made no such distinction. It is not as if the Fourth DCA in *Cocchi* announced it was denying arbitration merely because some claims were not arbitrable. That was unclear. This Court recognized "the matter is not altogether free from doubt" and had to resort to a "fair reading of the opinion" to find "a likelihood that the Court of Appeal failed to determine whether the other two claims in the complaint were arbitrable." *See id*. at 19.

Hostility to arbitration still exists, but as a consequence of years of decisions by this Court it rarely is overt. And this Court has never required it to be. Saying nothing but "denied" without discussion of every potential arbitrable claim violates the FAA rule that arbitrable claims "must be sent to arbitration even if this will lead to piecemeal litigation." *See id*. (citing *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217 (1985)).

Kimmel proceeds to read into *Cocchi* a completely different proposition—that a blanket affirmance is only impermissible if based on arguments not raised by the parties. Kimmel points out that he never contested Morgenthau's right to arbitration on the "mere fact that some claims were not arbitrable." BOI.11. But this Court did not base its summary vacatur in *Cocchi* on the argument of the *parties*. It did so on the complete lack of analysis by the lower courts. The same violation occurred here.

Kimmel points out that *Cocchi* did not involve a waiver argument. But waiver defenses are a species of arbitrability challenges. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24 (1983). This Court's command "to examine a complaint with care" for "any individual claim" subject to arbitration applies with equal force.

Kimmel mischaracterizes the Petition as an attack on Florida's rule of judicial administration permitting per curiam affirmances. It is no more of an attack than *Cocchi* itself. That case arrived in this Court directly from the Fourth DCA under the same state law prohibiting Florida supreme court review of affirmances without an opinion. Nothing in *Cocchi* invalidated that procedure in every case, and Morgenthau is not asking this Court to do so here. But when per curiam affirmances are used to hinder the FAA's command to compel arbitrable claims to arbitration, as happened in *Cocchi* and this case, FAA preemption comes into play.

Kimmel also contends a decision on arbitrability became unnecessary when the Fourth DCA decided *Stankos*, which rejected an argument that new claims added in an amended complaint revived the right to arbitrate. It is not clear in *Stankos* that the FAA (as

opposed to Florida's Arbitration Code) even applied. Nor is there any evidence the Fourth DCA had *Stankos* in mind when it affirmed this case without discussion. There are obvious distinctions. Unlike the materially new and different theories and claims Kimmel injected in this case, the amended complaint in *Stankos* added no new facts, only new statutory causes of action. The issue is not a matter of speculating what the Fourth DCA might have decided. As this Court observed in *Cocchi*, "[t]hat question of state law is not at issue here." *Cocchi*, 565 U.S. at 21. The issue is that neither lower court in this case decided anything about the arbitrability of Kimmel's materially new and different claims. That constitutes a straightforward, deliberate violation of *Cocchi*.

II. Kimmel's response reinforces the urgent need for this Court's review.

Kimmel tries to confuse the straightforward issue this case presents—should a waiver defense to an arbitration agreement under the FAA require prejudice. The trial court below decided that it does not, following Florida supreme court precedent. App., 3a-4a. That decision had, in turn, adopted the D.C. Circuit's minority view that prejudice is not required. *See Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 710-11 (Fla. 2005) (citing *Nat'l Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.,* 821 F.2d 772 (D.C. Cir. 1987)).

Kimmel contends Morgenthau never argued below that "the FAA imposes a uniform waiver standard." BIO.15. Morgenthau never could have argued that because the FAA, lacking a decision from this Court on prejudice, has no uniformity. There is a 10-2 circuit split, which is one reason the Florida supreme court was able to adopt the no-prejudice

standard to begin with. *Saldukas* was made possible explicitly because "the United States Supreme Court has not decided this issue," freeing up Florida courts "to interpret the federal statute as being consistent with Florida court decisions analyzing this same issue under the Florida Arbitration Code." *See Saldukas,* 896 So. 2d at 710-11.

It is no surprise the Florida supreme court went with the minority view. Given the choice, states traditionally hostile to arbitration like Florida (whose decisions this Court has reversed more than once, *see Cocchi*, 565 U.S. at 21-22; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)), will run to the waiver standard that makes it easiest to defeat arbitration. These are not reasons to deny the petition but powerful reasons to grant it.

Kimmel shifts to other arguments Morgenthau never made. Kimmel claims Morgenthau presumed below that state law controls waiver. Morgenthau made no such concession. To the contrary, Morgenthau argued Florida's "decades old precedent" counting the mere filing of an answer as an automatic waiver "reflects the kind of pre-*Concepcion* bias the U.S. Supreme Court has condemned." Reply in Support of Mot. to Compel Arb. at 5. And Morgenthau argued Florida's no-prejudice requirement stood as an obstacle to the FAA for just that reason. Morgenthau of course argued that Delaware's law of waiver controlled, under a choice of law provision. But that was not conceding waiver is strictly a matter of state law into which no FAA principle may intrude. Delaware, like Florida, adopted FAA waiver standards from federal circuits, albeit requiring prejudice. *See, e.g.*, *Action Drug Co. v. R. Baylin Co.*, Civil Action 9383, 1989 WL 69394, at *3 (Del. Ch. June 19, 1989) (collecting federal circuit decisions

requiring prejudice). The states may have adopted two polar-opposite views on prejudice, reflecting the circuit split. But it is clear they do not view FAA waiver as strictly a state-law contract issue.

As Morgenthau's arguments below underscore, state law defenses to arbitration agreements are not always freestanding. Even generally applicable contract defenses preserved by § 2 will be preempted where they stand as an obstacle to the accomplishment of the FAA's goals. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). Easily triggered waiver rules such as Florida's are no exception.

Kimmel attempts to draw an overly-fine distinction between FAA preemption and what it calls the "substantive federal standard" of waiver, a seeming reference to the circuits' divided view. He insists the distinction "is not academic," BIO.17, but it is. If Florida's state waiver standard, adopted from the D.C. Circuit, is FAA preempted for being hostile to arbitration, the minority circuit view must fall as well. A cornerstone of the FAA is that its mandate is binding in both state and federal courts. *See Buckeye*, 546 U.S. at 445 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984)). Whether the prejudice issue is decided from a state court decision on preemption grounds or to resolve the circuit split makes little difference. It will be binding on state and federal courts regardless.

This Court has not drawn such dividing lines. In reversing a Second Circuit decision that struck down a class action waiver under federal antitrust laws, for example, this Court found that "our decision in *AT&T Mobility* all but resolves this case." *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013). The

same FAA policies promoting arbitration that drove this Court in *Concepcion* to invalidate a California law "conditioning enforcement of arbitration on the availability of class procedure," *see Concepcion*, 563 U.S. at 336, 345, led the Court to reverse the Second Circuit on the same basis in a federal antitrust case. *See Italian Colors*, 570 U.S. at 238-39. This Court did not pause to consider the subtle differences between state law hostility to arbitration and federal circuit hostility. When it comes to waiver findings without any consideration of prejudice, there is no difference.

Kimmel offers other nonexistent distinctions. He argues no court has decided that "a state-law waiver contract defense is valid under the policy of the FAA only if it requires prejudice." BOI.20. The majority of federal courts that require prejudice have found exactly that, however. They base their waiver standards on the FAA principle that questions of arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." *See, e.g., Keytrade USA, Inc. v. Ain Temouchent M/V*, 404 F.3d 891, 897 (5th Cir. 2005) (quoting *Moses H. Cone*, 460 U.S. at 24; other citations omitted); *Creative Sols. Group, Inc. v. Pentzer Corp.*, 252 F.3d 28, 32 (1st Cir. 2001) (stating "[i]n considering whether a party has waived its arbitration right, courts are consistently mindful of the strong federal policy favoring arbitration…. Waiver is not to be lightly inferred, and mere delay in seeking [arbitration] without some resultant prejudice to a party cannot carry the day.") (citations omitted); *Sweater Bee by Banff, Ltd. v. Manhattan Indus., Inc.*, 754 F.2d 457, 461 (2d Cir. 1985) (same) (citations omitted). FAA policy gave rise to the requirement of prejudice, as well as to the "well-settled rule in th[ese] circuit[s] that waiver of arbitration is not a favored finding, and there is a

presumption against it." *See Keytrade*, 404 F.3d at 897 (citations omitted).

These decisions stand in direct conflict with state court and minority circuit waiver standards that reject a prejudice requirement. Consider the case Kimmel leads his brief with, the Fourth DCA's decision in *Stankos*. The Fourth DCA reversed a trial court order compelling arbitration on the basis that "there is no doubt [the defendant] AAU waived its right to compel arbitration by answering the Stankoses' initial complaint and engaging in discovery directed to the merits of the case." *Stankos*, 255 So. 3d at 379. The reference to discovery was beside the point. Under Florida law, merely filing a complaint automatically waives arbitration. *See id*. There was no discussion of prejudice because Florida does not require it. Nor was there any discussion of the presumptions favoring arbitration and disfavoring waiver findings because Florida's waiver law deems those presumptions irrelevant or, worse, reverses the presumptions. That is inconsistent with the FAA.

Kimmel finally notes that dissenting Justices have resisted *Southland*'s rule that the FAA is controlling in state court. As principled and well-reasoned as those dissents may have been, it is not the law. Many of this Court's most important FAA decisions originated in state court, as *Southland* and *Buckeye* demonstrate.

And opinions change. Kimmel points out that Justice Scalia originally viewed the FAA as inapplicable in state court. *See Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 284 (1995) (Scalia, J., dissenting) ("I agree with the respondents (and belatedly with Justice O'CONNOR) that *Southland* clearly misconstrued the Federal

Arbitration Act."). Yet Justice Scalia became one of the FAA's fiercest advocates, authoring landmark decisions forcing hostile state courts to enforce § 2's mandate. *See Buckeye*, 546 U.S. at 446 ("arbitration law applies in state as well as federal courts"); *see also Concepcion*, 563 U.S. at 336, 345. In this Court's current composition, only Justice Thomas has unwaveringly maintained that the FAA does not apply in state court.

Perfectly valid arbitration agreements are held unenforceable in Florida and two circuits under waiver standards that are all too easily satisfied. Many of those same agreements would be enforceable in the majority of circuits and states where courts are forced to address prejudice. The disparity undermines the FAA's goal of national uniformity in treatment of arbitration provisions. This Court's intervention is required to insist once again on adherence to those goals.

III. Kimmel's merits arguments highlight the hostility toward arbitration made possible by the no-prejudice waiver standard.

Kimmel wades into the underlying merits with arguments that the FAA supposedly is not in conflict with state and federal circuits that do not require prejudice. Most of the argument is a misreading of the equal-footing guarantee, an essential FAA principle that invalidates state contract rules "too tailor-made to arbitration agreements—subjecting them, by virtue of their defining trait, to uncommon barriers." *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426-27 (2017). Seemingly neutral no-prejudice waiver standards, purportedly steeped in state contract law, provide no equal footing at all. Rather, they invite hostility against arbitration.

The Fourth DCA's decision in *Stankos* scarcely hides its disdain for arbitration. There are the several references to the "undisputed" waiver evidenced by the mere filing of a complaint. *Stankos*, 255 So. 3d at 378-79. There is the suggestion that a waived right to arbitration may never be revived, no matter what new and different arbitrable claims are later injected. *See id.* at 379 (citing Florida case law holding "'[t]he fact that the plaintiffs filed an amended complaint does nothing to revive [the defendant's] right to arbitration.'") (citing *Morrell v. Wayne Frier Mfrd. Home Ctr.*, 834 So.2d 395, 398 (Fla. 5th DCA 2003)). The decision nonetheless performs the Eleventh Circuit's revival analysis to find that the right to arbitration could not have been revived since no new facts were alleged. *See Stankos*, 255 So. 3d at 380.

Stankos may be silent on whether the FAA applied. But after the Florida supreme court found support in the D.C. and Seventh Circuits for a no-prejudice standard, there is nothing to prevent Florida courts from applying this hostile waiver analysis to FAA cases. FAA preemption arguments will invariably fall on deaf ears until this Court intervenes and decides the issue.

Requiring prejudice preserves the strong federal policies and presumptions favoring arbitration ingrained in this Court's FAA decisions. *See Keytrade*, 404 F.3d at 897; *Creative Sols.*, 252 F.3d at 32; *Sweater Bee*, 754 F.2d at 461. Not requiring prejudice opens the door to all manner of hostility, disguised or otherwise. *See Stankos*, 255 So. 3d at 379–80. The presumptions are decidedly against arbitration. The waiver is immediately triggered and perhaps irrevocable. Arbitration agreements are not put on equal footing but are easily and automatically waived in ways other contract provisions are not. *See, e.g.,*

Rodriguez v. Ocean Bank, 208 So. 3d 221, 225 (Fla. 3d DCA 2016) (holding in the non-arbitration context, "[w]aiver by conduct … is an issue for the finder of fact").

Kimmel runs through his evidence of prejudice, but there was no real prejudice. Delay alone is not prejudice under many FAA decisions, *e.g., Creative Sols.*, 252 F.3d at 32, and the minimal discovery comprised simply what Morgenthau voluntarily produced to Kimmel. The courts below decided none of this, bound as they were to the Florida supreme court's adherence to the minority federal view. There was no suggestion of prejudice, moreover, following the amended complaint, which brought on all new facts and theories of relief and prompted the motion to compel arbitration. But the courts below ignored that, too. *See supra* Sec I.

CONCLUSION

The Court should grant the petition and resolve the issue splitting both federal circuits and various state courts—whether prejudice is required to find arbitral waiver.

Respectfully submitted,

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