No. SC100608

IN THE SUPREME COURT OF MISSOURI

CONNIE LANGE,

Plaintiff-Appellant,

v.

GMT AUTO SALES, INC.,

Defendant-Respondent.

Appeal from the Circuit Court of St. Louis County
Hon. Kristine Kerr, Circuit Judge
Case No. 21SL-CC02892

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community, such as the enforceability of arbitration agreements and interpretation of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.

Many of the Chamber's members and affiliates regularly rely on arbitration agreements. Arbitration is speedy, fair, inexpensive, and less adversarial than traditional litigation in court. The Chamber's members and affiliates have entered into millions of contractual relationships providing for arbitration precisely to achieve those benefits.

The Court of Appeals's ruling that a defendant waives its right to arbitrate simply by filing a *pre-answer* motion to dismiss rests on an erroneous reading of Missouri law. Worse, that interpretation of state law discriminates against enforcement of arbitration agreements in violation of the FAA. If adopted, the resulting end-run around the parties' agreement to arbitrate would undermine the predictable enforcement of arbitration agreements, thus diminishing the availability of arbitration's benefits for companies and consumers alike. The Chamber therefore has a strong interest in this case—particularly Point II on appeal—and in affirmance of the Circuit Court's opinion compelling arbitration.

CONSENT OF PARTIES

Pursuant to Missouri Supreme Court Rule 84.05(f), *amicus curiae* requested consent from all parties' counsel to file this brief. Each party agreed to the filing on September 25, 2024.

JURISDICTIONAL STATEMENT

Amicus curiae adopts Respondent GMT Auto Sales's Jurisdictional Statement.

STATEMENT OF FACTS

To the extent needed to support the arguments below, *amicus curiae* adopts Respondent's Statement of Facts.

ARGUMENT

I. INTRODUCTION

Less than three months after the Petition in this case was filed, GMT Auto Sales both asserted arbitration as an affirmative defense in its answer and moved to compel arbitration. The trial court granted GMT's motion and referred the case to arbitration. But the Court of Appeals reversed. The Court of Appeals concluded that GMT had waived its contractual arbitration defense by filing and receiving a ruling on a pre-answer motion to dismiss for failure to state a claim. It's undisputed that GMT had not otherwise participated in the litigation—meaning that the Court of Appeals adopted a bright-line rule that filing a *pre-answer* motion to dismiss for failure to state a claim forever waives a defendant's right to later seek arbitration and invoke it as an affirmative defense.

That result cannot be squared with ordinary application of the Missouri Rules of Civil Procedure, which are similar to the Federal Rules of Civil Procedure. And if it were

a correct reading of Missouri's procedural law, that reading would be preempted by the Federal Arbitration Act, which prohibits applying state-law rules to improperly disfavor arbitration. Arbitration is an affirmative defense, and, like other affirmative defenses, it is timely invoked and preserved if the defendant raises it in its answer. Because a defendant that raises its arbitration defense at the answer stage satisfies ordinary procedural requirements, that defendant's limited, *pre-answer* litigation conduct cannot be treated as inconsistent with the intent to assert an arbitration defense in the future—just like a defendant's decision not to raise a statute of limitations defense or a prior release or res judicata in a pre-answer motion to dismiss does not waive the ability to raise that affirmative defense via the answer.

The Court of Appeals believed that the U.S. Supreme Court's decision in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), supported its waiver holding. But that analysis misunderstands *Morgan*: because the defendant in *Morgan* invoked arbitration only *after* filing its answer (*id.* at 414), the U.S. Supreme Court did not confront, and thus had no occasion to decide, whether a defendant properly preserves its arbitration defense by raising that defense in its answer. To the contrary, the *Morgan* Court held only that federal courts must "apply the usual federal procedural rules," rather than create "an arbitration-specific waiver rule demanding a showing of *prejudice*." *Id.* at 416 (emphasis added).

If anything, the U.S. Supreme Court's exhortation in *Morgan* for courts to apply the "usual … procedural rules"—in that case, the Federal Rules—charts the course for this Court to hold that a defendant preserves its right to arbitration by following the ordinary rules of procedure and asserting arbitration, like other affirmative defenses, no later than

the time of the answer. Defendants already need to follow those timelines for other affirmative defenses, and this framework therefore ensures evenhanded treatment of arbitration. Ordinary procedural rules encourage prompt assertion of arbitration as an affirmative defense by giving the defendant a right to do so only until the time of the answer. But they also avoid the harsh and unjustified result that—unlike nearly every other affirmative defense—this important contract right is forever lost if not raised alongside or before a pre-answer motion to dismiss.

For these reasons, the Court should affirm the Circuit Court's order compelling arbitration as a matter of Missouri procedural law.

II. FILING A MOTION TO DISMISS, WITHOUT MORE, DOES NOT WAIVE THE RIGHT TO ARBITRATION

If this Court were to conclude, however, that the Court of Appeals correctly interpreted Missouri law governing the waiver of arbitration provisions, then it should hold that the FAA preempts that interpretation. Treating the defense of arbitration less favorably than other contractual defenses would improperly discriminate against arbitration in violation of the FAA.

A. The FAA prohibits applying state-law rules in a fashion that disfavors arbitration.

The FAA reflects a "'liberal federal policy favoring arbitration agreements'" as a means of dispute resolution. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The "principal purpose" of the FAA, as the U.S. Supreme Court has held time and again, is to "'ensur[e] that private arbitration agreements are enforced according to their terms.'"

Id. at 344 (quoting *Volt Information Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989)); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57-58 (1995); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 807 (Mo. banc. 2015).

The FAA therefore prohibits courts from refusing to enforce arbitration provisions through state-law rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339 (citing *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). In other words, the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Casarotto*, 517 U.S. at 687; *see also, e.g.*, *Kindred Nursing Ctrs. Ltd. P'Ship v. Clark*, 581 U.S. 246, 248 (2017); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54-55 (2015); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (per curiam); *Concepcion*, 563 U.S. at 339; *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Nor may States or courts apply generally applicable state-law doctrines "in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341.

Instead, the FAA requires that "agreements to arbitrate must be governed by the same rules as apply generally in contract law." *Bridgeport Acceptance Corp. v. Donaldson*, 648 S.W.3d 745, 754 (Mo. banc. 2022). And courts of last resort, including this one, should "be alert to new devices and formulas" that lower courts may use for "'declaring arbitration agreements against public policy.'" *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 509 (2018) (quoting *Concepcion*, 563 U.S. at 509).

B. Arbitration should be treated like other affirmative defenses that are appropriately raised at the answer stage.

The Court of Appeals's waiver holding violates the FAA's non-discrimination rule by making it easier for a court to declare the enforcement of an arbitration agreement waived than other types of affirmative defenses—including other contract-based defenses—and departing from generally applicable procedures governing the preservation of affirmative defenses.

An affirmative defense is one that "does not tend to controvert the opposing party's prima facie case as determined by the applicable substantive law." *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) (quoting 2A J. Moore, Moore's Federal Practice ¶ 8.27[3] (2d ed. 1985) (internal quotation marks omitted)); *accord Ressler v. Clay County*, 375 S.W.3d 132, 140-41 (W.D. 2012) (distinguishing an affirmative defense from an argument that the plaintiff cannot "prove an essential element of her case"). Put simply, affirmative defenses are usually defenses that are largely independent of the elements of the plaintiff's claim. A defense that the plaintiff has agreed to resolve his dispute by arbitration rather than by litigation in court falls squarely within that definition, because it does not address the merits of the plaintiff's claims. Indeed, courts, including the Western District of the Court of Appeals, have repeatedly recognized that "'intent to invoke an arbitration provision'" is an "'affirmative defense'" that may be raised by the "'filing of an answer.'" *GFS, II, LLC v. Carson*, 684 S.W.3d 170, 185 (W.D. 2023) (quoting *Johnson Assoc. Corp. v. HL Operating Corp.*, 680 F.3d 713, 718 (6th Cir. 2012)).[1] The U.S. Court

[1] *See also, e.g., Armstrong v. Michaels Stores, Inc.*, 59 F.4th 1011, 1015 (9th Cir. 2023);

of Appeals for the Eighth Circuit has in fact faulted a defendant for *not* including arbitration as an affirmative defense in its answer, noting that the defendant should have "mention[ed] the arbitration agreement in its answer which listed twenty four other affirmative defenses." *Messina v. North Cent. Distributing, Inc.*, 821 F.3d 1047, 1050 (8th Cir. 2016).

Ordinary and generally applicable rules of civil procedure provide a clear and familiar framework for determining whether a defendant has raised arbitration in a timely manner. Under the same framework that governs the timeliness of invoking other affirmative defenses, including other contract defenses, the defendant should invoke such defenses by the time of the answer. Specifically, under Missouri Rule 55.08—similar to Federal Rule of Civil Procedure 8(c)—a defendant should "set forth all applicable affirmative defenses and avoidances" in its answer. Mo. Sup. Ct. Rule 55.08; *see* Fed. R. Civ. P. 8(c) (similar).

There is no legitimate reason to set limits for invoking arbitration that are more stringent than the limits for raising "any other matter constituting an avoidance or affirmative defense." Mo. Sup. Ct. Rule 55.08. Indeed, both Missouri Rule 55.08 and Federal Rule of Civil Procedure 8(c) also expressly list other contract-based affirmative defenses, like "accord and satisfaction," "release," and "arbitration and award" (which applies when an arbitration has already been completed). Mo. Sup. Ct. Rule 55.08; Fed. R. Civ. P. 8(c). A request to arbitrate an ongoing dispute should be treated the same way.

Crossville Med. Oncology, P.C. v. Glenwood Sys., LLC, 310 F. App'x 858, 859 (6th Cir. 2009); *Fasig -Tipton Kentucky, Inc. v. Michaelson*, 955 F.2d 40, 1992 WL 21368, at *1 (4th Cir. 1992) (unpublished); *Mautz & Oren, Inc. v. Teamsters, Chauffeurs, & Helpers Union*, 882 F.2d 1117, 1126 (7th Cir. 1989).

What is more, arbitration is *not* among the handful of expressly enumerated defenses that are waived if not raised at the first opportunity. For example, lack of personal jurisdiction or insufficiency of process or service of process must be raised in a pre-answer motion (or an answer if no pre-answer motion is filed), or else permanently waived. Mo. Sup. Ct. Rule 55.27(f)-(g); *see also* Fed. R. Civ. P. 12(g)-(h). Arbitration is conspicuously absent from that list.[2]

To be sure, whether a party has substantially invoked the litigation machinery to an extent inconsistent with arbitration is a case-specific inquiry. But absent unusual circumstances not present here, the rules of procedure that generally apply to pleadings should govern the timeliness of a motion to compel arbitration and whether the party seeking arbitration has properly raised that defense. And, contrary to the ruling below, a number of federal courts of appeals have held "that a party does not waive its right to arbitrate merely by filing a motion to dismiss." *Sharif v. Wellness Int'l Network Ltd.*, 376 F.3d 720, 726-27 (7th Cir. 2004) (citing cases from the First, Second, Fifth, and Ninth Circuits). As one of those courts has observed, a pre-answer motion to dismiss is "an appropriate responsive pleading" that, without more, does not mean that "the litigation

[2] Under the federal rules, "improper venue" is included in the list of defenses that must be raised at the first opportunity. Fed. R. Civ. P. 12(b)(3). As the U.S. Supreme Court has made clear, "improper venue" refers only to the situation where a case does not meet the requirements of the federal venue statutes—not where there is a contractual defense to the case proceeding in the forum in which it was brought. *See Atlantic Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 55-59 (2013) (holding that a Rule 12(b)(3) motion to dismiss is not the proper mechanism to enforce a contractual forum-selection clause); *compare Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (noting that an arbitration agreement "is, in effect, a specialized kind of forum-selection clause").

machinery has been substantially invoked" or that "the parties were well into preparation of a lawsuit by the time an intention to arbitrate was communicated." *Creative Solutions Grp. v. Pentzer Corp.*, 252 F.3d 28, 33 (1st Cir. 2001) (alterations and quotation marks omitted); *see also Pruteanu v. Team Select Home Care of Missouri, Inc.*, 2019 WL 7195086, at *7 (E.D. Mo. Dec. 26, 2019) (holding that "Defendants have not substantially invoked the litigation machinery" when they only filed and received rulings on a motion to dismiss for failure to state a claim, noting, for example, that "the parties have not participated in a scheduling conference, exchanged initial disclosures, or engaged in discovery").

C. *Morgan v. Sundance* does not support waiver.

In reaching its waiver holding, the Court of Appeals relied heavily on the U.S. Supreme Court's decision in *Morgan*. But *Morgan* does not support that holding.

To begin, the Court of Appeals's assertion that *Morgan* involved a "comparable factual scenario" (Op. 5) to this case is, with respect, entirely inaccurate. *Morgan* did not present the question whether a defendant properly asserts an arbitration defense by raising it at the answer stage for a simple reason: Sundance, Inc. (the defendant in *Morgan*) did *not* raise arbitration as an affirmative defense at the time of its answer. As the U.S. Supreme Court noted, Sundance's answer "assert[ed] 14 affirmative defenses—*but none mention[ed] the arbitration agreement*." 596 U.S. at 414 (emphasis added). It was only later—"nearly eight months after the suit's filing"—that Sundance moved to compel arbitration. *Id.* That is not the scenario here.

Equally significant, the U.S. Supreme Court's holding in *Morgan* was a narrow one; the Court held only that federal courts may not create "arbitration-specific procedural rules" for "waiver" under federal law—there, a judicially created, arbitration-specific doctrine of federal procedure requiring a showing of "prejudice" to the party opposing arbitration—because the FAA instead requires federal courts to treat arbitration motions like all other motions subject to generally applicable rules of federal procedure. 596 U.S. at 419 (citing 9 U.S.C. § 6 (governing arbitration motions)). Notably, the U.S. Supreme Court in *Morgan did not decide* whether Sundance had acted inconsistently with arbitration, instead remanding for the lower courts to "resolve that question." 596 U.S. at 419; *see also Morgan v. Sundance, Inc.*, 2023 WL 4635904, at *1 (8th Cir. Jan. 17, 2023) (dismissing appeal post-remand at the request of the parties).[3]

Here, even-handed and non-discriminatory application of general procedural rules points *against* waiver. *See* pages 11-14, *supra*. As the U.S. Supreme Court warned in *Morgan*, courts should not use "custom-made rules[] to tilt the playing field in favor of (*or*

[3] The Court in *Morgan* also made clear that it was not deciding any issues "about the role *state law* might play in resolving when a party's litigation conduct results in the loss of a contractual right to arbitrate" or whether that inquiry involves "rules of waiver, forfeiture, estoppel, laches, or procedural timeliness." 596 U.S. at 416 (emphasis added). As the Chamber argued in *Morgan*, whether a party has litigated too extensively or for too long before raising arbitration as a defense is more aptly described as an issue of forfeiture, estoppel, or laches—doctrines that all require detrimental reliance or prejudice—than as an issue of waiver. *See, e.g.*, 13 Williston on Contracts §§ 39:28-29 (4th ed.) (estoppel or forfeiture); 1 D. Dobbs, Law of Remedies § 2.3(5) (2d ed. 1993) (laches).

This Court need not reach these issues here, however, because GMT's pre-answer litigation conduct was not inconsistent with its contractual right to arbitrate under any generally applicable doctrinal framework.

against) arbitration." 596 U.S. at 419 (emphasis added). The Court of Appeals committed that very error here.

III. ARBITRATION BENEFITS CONSUMERS AND BUSINESSES ALIKE.

The Court of Appeals's waiver ruling is not only legally incorrect, but it also threatens to undermine the "real benefits to the enforcement of arbitration provisions." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001); *see also, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution."); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

Empirical research confirms the U.S. Supreme Court's observations about the mutual benefits of arbitration. Multiple studies show that consumers (and workers) who arbitrate fare at least as well, if not better, than ones who litigate in court. A 2022 study released by the Chamber's Institute for Legal Reform surveyed over 41,000 consumer arbitration cases and 90,000 consumer court cases resolved between 2014 to 2021 and found that:

- Consumers who initiate cases were over 12% more likely to win in arbitration than in court;[4]

[4] Nam D. Pham & Mary Donovan, *Fairer, Faster, Better III: An Empirical Assessment of Consumer and Employment Arbitration* 4-5 (Mar. 2022), https://bit.ly/3SK7QwA (41.7% in arbitration compared to 29.3% in court).

- The median monetary award for consumers who prevailed in arbitration was *over triple* the award that consumers received in cases won in court;[5] and
- On average, arbitration of consumer disputes is over 25% faster than litigation in court.[6]

Prior studies of consumer arbitration similarly report that consumers fare at least as well in arbitration as in court.[7]

In short, "there is no evidence that plaintiffs fare significantly better in litigation" in court than in arbitration. David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stanford L. Rev. 1557, 1578 (2005).

Even-handed application of generally applicable procedural rules therefore will benefit consumers and businesses alike. That approach provides clear guideposts for when a defendant must invoke its right to arbitration: on the same timeframe that applies for invoking almost all other affirmative defenses. It subjects arbitration to the same rules as every other contract-based affirmative defense, and thus protects against anti-arbitration discrimination. And, when defendants follow those ordinary rules, as in this case, the

[5] *Id.* at 4-5 ($20,356 in arbitration compared to $6,669 in court).

[6] *Id.* at 4-5 (321 days in arbitration compared to 437 days in court).

[7] *See, e.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996).

approach avoids the harsh result of depriving the parties of the mutual benefits of the arbitration to which they agreed.

CONCLUSION

For these reasons, the Court should affirm the Circuit Court's order compelling arbitration.

Date: September 30, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief: (1) includes the information required by Rule 55.03; (2) was filed with the Court's electronic filing system pursuant to Rule 103.08, which will provide service of an electronic copy to all parties of record; (3) complies with the requirements contained in Mo. R. Civ. P. 81.18 and 84.06; and (4) contains 3,364 words.

Respectfully Submitted,

/s/ Stacey R. Gilman
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 30, 2024, the foregoing was filed electronically with the Clerk of Court to be served by operation of the court's electronic filing system on all parties of record.

/s/ Stacey R. Gilman
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