ORIGINAL

IN THE SUPREME COURT OF OHIO

AMERICAN MUNICIPAL POWER, INC.,	)	Certified Question of State Law
	)	
Petitioner,	)	
v.	)	
	)	
BECHTEL POWER CORPORATION,	)	Case No. 2014-1847
	)	
Respondent.	)	

BRIEF OF AMICUS CURIAE OHIO COUNCIL OF RETAIL MERCHANTS IN SUPPORT OF RESPONDENT BECHTEL POWER CORPORATION

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I. Statement of Interest of Amicus Curiae Ohio Council of Retail Merchants

For decades, Ohio law has allowed contracting parties to mutually agree to limit their liability for breaches of their contracts, provided that the breaches are not the result of willful or wanton misconduct. *See Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Co.*, 54 Ohio St. 2d 147, 158 (1978). The certified question in this proceeding asks whether the Court should change that established rule and void limitation of liability clauses when a breach results from reckless conduct. The Ohio Council of Retail Merchants ("OCRM") has chosen to participate as an amicus curiae because it believes that the *Berjian* standard promotes important public policies and fosters economic development, and because its members have relied on this Court's precedent in their contracts. As explained below, changing Ohio law to prohibit contractual limits on liability for reckless conduct would:

- limit freedom of contract for the sake of a purported countervailing public policy--treating reckless conduct the same as willful or wanton misconduct--that simply does not exist; and
- retroactively invalidate contractual provisions that allow contracting parties, in reliance on settled Ohio law, to reduce prices for goods and services by limiting damages for all but willful or wanton breaches of the contract.

Altering the *Berjian* standard would have real-world consequences for contracting parties in Ohio, including OCRM's members. Likewise, adopting AMP's public policy argument, which is overly expansive and not tethered to law, would inject uncertainty into Ohio contracts and affect Ohio business.

OCRM is extremely interested in this issue because it directly affects OCRM's members and generally affects Ohio's business climate. Founded in 1922, OCRM is Ohio's oldest and largest advocate for the retail and wholesale industries, representing more than 6,400 retailers and wholesalers across the state. Ohio's retail industry accounts for $46.5 billion of Ohio's annual Gross Domestic Product and supports 1.5 million jobs, which is one in four of all Ohio jobs and more than any other industry. OCRM promotes the interests of the retail and wholesale distribution industries and helps these enterprises achieve lasting excellence in all areas of their business. To maintain a legal environment that supports business and creates jobs, OCRM works closely with legislative and industry leaders to achieve that goal. OCRM also monitors important litigation in the courts and participates as an amicus curiae in carefully selected cases that are particularly important to Ohio businesses and citizens.

OCRM asks this Court to answer the certified question in the negative and confirm that: (1) "willful or wanton" misconduct is the correct legal standard for refusing to enforce limitation of liability clauses, and (2) Ohio public policy does not prevent contracting parties from freely agreeing to limit their liability for reckless breaches of their contract.

A. The public policy of Ohio promotes freedom of contract with only rare and narrow exceptions.

OCRM strongly believes that free enterprise is the foundation of our economic growth and prosperity. Individuals and businesses should be allowed to mutually define their contractual rights and obligations with minimal governmental intrusion. "The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write or speak

without restraint." *Blount v. Smith*, 12 Ohio St. 2d 41, 47 (1967). Accordingly, a court that is asked to invalidate a contractual agreement on public policy grounds must act "with no less restraint than in striking down a statute." *Id.*, at 74. Only in rare cases and narrow circumstances has this Court identified countervailing public interests that were sufficiently important to override the freedom of contract; the petitioner's private interests in this case should not compel this Court to change the law for all Ohioans.

Petitioner American Municipal Power, Inc. ("AMP") has not identified any public policy that is threatened by mutually negotiated limitations of liability for reckless breaches of a contract. In this litigation, AMP is pursuing its purely private interests: it wants to get out of a contractual provision that will limit the amount of damages it can recover if it proves a breach of contract in its underlying lawsuit against respondent Bechtel Power Corporation ("Bechtel"). AMP voluntarily agreed to that provision with the advice of its counsel when it negotiated the contract with Bechtel, and it had no public policy concerns until it wanted to challenge the agreed limit on its damages.

B. The public policy that prohibits limitations of liability for willful or wanton conduct does not apply to reckless conduct, which this Court has explained is a different and lesser standard.

This Court's *Berjian* precedent prohibits contracting parties from shielding themselves behind limitation of liability clauses for their willful or wanton wrongful acts. In *Anderson v. City of Massilon*, 134 Ohio St. 3d 380, 2012-Ohio-5711, this Court distinguished reckless conduct from willful or wanton misconduct. Reckless is a different and lower standard, and it is appropriate for this Court to prohibit limitations of liability for intentional or wanton conduct, while allowing contracting parties to agree to limit their liability for damages caused by reckless conduct.

C. A negative answer to the certified question would protect the settled expectations of contracting parties regarding the allocation of risks on which contract prices are based.

OCRM is also concerned about the unfair effect on existing contracts if this Court changes Ohio law and decides that it will not enforce limitations of liability for conduct that is less than willful or wanton. In *Berjian,* the Court confirmed that a contractual limitation of liability clause will be enforced absent "willful or wanton" misconduct by the breaching party, and it defined "wanton" as acting with "no care whatsoever." As explained below, individuals and businesses have relied upon this legal rule for decades to allocate the risks of loss for breaches of their contracts and to set lower contract prices for goods and services that reflect the limited liability for breach. In some circumstances, parties would not agree to provide goods or services at any price without this agreed upon protection from unlimited financial risk.

If the Court upsets these settled expectations and refuses to enforce agreed allocations of the risk for conduct that is less than willful or wanton, parties to existing contracts will be saddled with unlimited liability for damages for reckless breaches even though their contracts limit their liability for those damages. This is unfair to parties who relied upon settled Ohio law when they agreed to reduce contract prices for their goods and services in exchange for a limit on their liability for damages in the event of a breach. More generally, a retroactive change of this law would affect the perceptions of Ohio's business climate by individuals and companies who need stable and predictable legal rules to enforce their contractual rights.

II. Statement of the Case and Facts

The certified question that is now before the Court arose in a federal court lawsuit in which AMP sued Bechtel for breach of contract. The parties expressly agreed that Bechtel's liability would be limited to $500,000 if AMP cancelled the contract before Bechtel was paid any fee. However, AMP now wants to pursue damages in excess of the agreed limit, so it seeks to invalidate the limitation of liability to which the parties had agreed. The District Court held that a limitation of liability clause is enforceable absent a willful or wanton breach of the contract, and that Bechtel did not act in a willful or wanton manner. The Court found it unnecessary to determine if Bechtel was reckless, as it held that reckless conduct is not sufficient to invalidate a limitation of liability clause. AMP then requested and obtained certification of the question to this Court. For the reasons discussed more fully below, this Court should answer the question in the negative.

III. Argument

A. Ohio courts consistently protect parties' freedom of contract in the absence of a compelling countervailing public policy.

In the present case, AMP seeks to set aside a limitation of liability clause on the grounds that the willful or wanton standard established by this Court should be changed to include reckless conduct. AMP's argument, which is based on public policy, is dangerous, and not just in the area of limitations of liability. OCRM is concerned that AMP's reasoning, if adopted by this Court, could be used to undermine other important and freely negotiated clauses in private contracts with little to no justification for doing so.

1. Ohio law upholds freedom of contract subject only to narrow and compelling exceptions.

"Under well-established contract law . . . contracts entered into freely and fairly . . . will be held valid and enforced in the courts." *Cincinnati City School Dist. Bd. of Ed. v. Conners*, 132 Ohio St. 3d 468, 2012-Ohio-2447, at ¶ 15, *quoting Lamont Building Co. v. Court*, 147 Ohio St. 183, 184 (1946) (internal punctuation omitted). "[T]he right of making contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained." *Id.*, at ¶ 16. Freedom of contract may be infringed by the courts only when a contract is "against the public law, general policy, or public justice." *Id.*, *quoting Key v. Vattier*, 1 Ohio 132, 147 (1823). This Court "continue[s] to uphold the importance of the freedom to contract and recognize[s] the narrowness of the doctrine of public policy;" there must be "a compelling reason to support the application of the doctrine" and override parties' contractual agreements. *Id.*, at ¶ 24. "The presumption under Ohio law is the freedom to contract." *Eastham v. Chesapeake Appalachia*, 754 F.3d 356, 365 (6th Cir. 2014).

2. The Ohio legislature and courts have never recognized a public policy against limitations of liability for reckless behavior.

The contours of public policy regarding limitation of liability clauses were addressed in *Richard A. Berjian, D.O., Inc. v. Ohio Bell Telephone Company*, 54 Ohio St. 2d 147 (1978). In the absence of a "showing of willful or wanton misconduct . . . [a] limitation of liability clause is effective." 54 Ohio St. 2d at 158. In other words, a contractual limitation of liability clause is enforceable unless a party breaches the contract willfully or wantonly – *i.e.*, with no care whatsoever.

AMP now asks the Court to change this settled rule and hold that some unarticulated, countervailing public policy renders a limitation of liability clause unenforceable for reckless conduct. But "[the] legislative branch is the ultimate arbiter of public policy," *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, at ¶ 21, and neither the Ohio legislature nor Ohio courts have ever recognized a public policy against limitations of liability for reckless conduct.

a. There is no legislative public policy that precludes enforcement of the limitations of liability provision in this case.

First, a search of legal databases reveals far more Ohio statutes in which the General Assembly has limited statutory protections when conduct is "willful or wanton" than statutes that limit protections when conduct is "reckless." In *Anderson*, the Court held that R.C. 2744.02(B)(1)(b), which limits the civil liability of political subdivisions unless their conduct is "willful and wanton," does not limit their liability when their conduct is merely reckless:

> The legislature expressly stated that a political subdivision has a full defense to liability when the conduct involved is not willful and wanton, and therefore, if the conduct is only reckless, the political subdivision has a full defense to liability.

2012-Ohio-5711, at ¶ 23. The *Anderson* Court emphasized that "willful or wanton" misconduct is substantially different from "reckless" conduct and that they are not "interchangeable terms."

The General Assembly specifically mentions reckless conduct when it intends to exclude that behavior from the scope of statutory protections or to subject it to statutory burdens. *See* R.C. 2744.03(A)(6)(b) (limiting the personal liability of municipal employees unless their conduct is "wanton or reckless"). But a significant

number of statutes condition rights and obligations upon whether an actor's conduct is "willful or wanton." There is no legislative public policy that reckless conduct should be treated the same as willful or wanton conduct or that it should be sufficient to make limitation of liability clauses unenforceable.

b. There is no judicial public policy that precludes enforcement of the limitation of liability provision in this case.

There are also no Ohio judicial decisions that reflect such a public policy. This Court held in *Berjian*, *supra*, that a limitation of liability clause is enforceable absent "willful or wanton" misconduct, without mentioning "reckless" conduct, just as the General Assembly has done in scores of statutes. It subsequently confirmed that the willful or wanton standard does not include reckless conduct. *Anderson*, *supra.* When the legislature or the courts adopt a specific type of conduct as a legal standard, they do not expressly state that every other type of conduct is excluded. The *Berjian* Court held that liability can be limited contractually in the absence of willful or wanton misconduct, and there was no reason for it to go on to specify that liability can be limited for negligence, gross negligence, negligence *per se*, or recklessness.

AMP has not identified any public policy of the legislative or judicial branches of Ohio's government that overrides freedom of contract and prohibits contractual agreements to limit liability for reckless conduct. *See Eastham v. Chesapeake Appalachia*, 754 F.3d 356, 365 (6th Cir. 2014):

> [W]e were unable to locate either an act of the Ohio General Assembly or an Ohio court case that supports [plaintiffs'] assertion with regard to Ohio's public policy. . . . In short, [plaintiffs] have not actually offered any public policy that [the defendant] could have violated.

In the absence of any public policy that prohibits contractual limits on liability for reckless conduct, the Court should follow settled precedent to ensure stable and predictable legal rules regarding contract rights. Stability and predictability are critical for Ohio to attract and keep businesses. This Court should answer the certified question in the negative to uphold freedom of contract and confirm that Ohio is a stable and predictable place to do business.

B. Ohio law recognizes important differences between "willful or wanton" conduct and "reckless" conduct and treats them differently for public policy purposes.

This Court's ruling in *Berjian*, *supra*, which holds that limitation of liability clauses are enforceable in the absence of willful or wanton misconduct, rests on sound public policy considerations and should not be overruled. As noted above, "willful or wanton" and "reckless" are "different and distinct degrees of care and are not interchangeable." *Anderson, supra*, 134 Ohio St. 3d 380, at paragraph one of syllabus. Reckless conduct entails "indifference to the risk," but "the actor does not desire harm." *Anderson*, at ¶ 34, *citing* Black's Law Dictionary 1298-1299 (8th Ed. 2004). The differences in the treatment of intentional, willful, and wanton misconduct and reckless conduct under Ohio law reflect this State's public policy that reckless conduct is different than willful or wanton misconduct and is therefore properly subject to different legal regulation.

C. Risk allocation is essential to modern business activity.

1. Limitation of liability clauses promote economic activity and growth by allocating contractual risks.

Contractual limitation of liability clauses allocate uncertain future risks between contracting parties by placing limits on the amount of damages a plaintiff may

recover. An individual or business will not be willing to enter into a contract at a price that yields a modest profit if it must assume the risk that it will be liable for unlimited and potentially enormous damages for conduct that is not willful or wanton. In many cases, the other contracting party is willing to limit this potential risk to a specified amount of financial liability in order to obtain goods or services at a reasonable price that does not have to incorporate the seller's risk of unlimited damages liability. Indeed, a party may not be willing to provide the product or service at all unless its potential liability is contractually limited. On the other hand, the other party does not have to agree to a limitation of liability clause, nor does it have to accept the willful or wanton standard; the parties are also free to contractually include or exclude reckless conduct from a limitation of liability clause.

In *Berjian*, *supra*, 54 Ohio St. 2d at 157, where the parties' contract limited the defendant telephone company's liability to the plaintiff for failing to provide accurate directory advertisements, the Court noted that, "[b]urdened with unpredictable and indeterminable future liabilities, telephone companies more than likely would be disinclined to provide the service at all, or would provide the service at a prohibitive cost," if they could not limit their liability contractually. This principle remains truer than ever in today's business climate.

2. Contract prices reflect the parties' allocation of their contractual risks, and it would be unfair and unwise to undermine the basis of their agreement.

This Court should not overrule *Berjian*, *supra*, and retroactively invalidate limitation of liability clauses for reckless conduct for another reason. The contract price for Bechtel's services in the present case was undoubtedly lower than it would have

been if Bechtel faced unlimited liability for unintentional conduct. If this Court overrules *Berjian*, existing contracts that were negotiated with the understanding that liability would be limited unless there was willful or wanton misconduct are no longer fair if the standard is changed to reckless, because they were priced according to the *Berjian* standard.

This is illustrated by the decision in *Conners*, *supra*, in which this Court relied on public policy to invalidate a deed restriction limiting the use of property purchased by the defendant. Justice Pfeifer, concurring in part and dissenting in part, pointed out the resulting unfairness to the plaintiff seller:

> [B]ased on logic and a rudimentary understanding of how real estate is valued, I am willing to presume that the deed restriction caused some diminution in the sale price. It strikes me as unfair that the buyer should be able to buy at a reduced price because of a deed restriction and then realize full value by having this court declare the deed restriction to be against public policy. Essentially, the buyer has received a windfall, and the school district has not received the full value for its property.

2012-Ohio-2447, at ¶ 27. *See also Baltimore & Ohio R. Co. v. Hubbard*, 72 Ohio St. 302, 319-320 (1905):

> The [contractual] limitation as to value [in the event of a breach] . . . does not induce want of care. . . . There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to . . . the freedom of contract, and thus in conflict with public policy, if a [party] should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss.

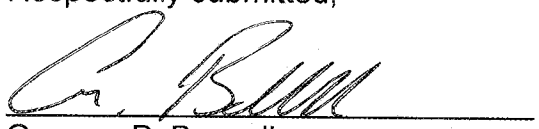
Risk allocation is essential to economic development and growth because it makes it possible for a party to engage in commercial activity posing financial risks that the parties can allocate between themselves by contract. This Court should answer

the certified question in the negative to protect the freedom of contract and the settled expectations of contracting parties in Ohio.

IV. Conclusion

As set forth above, contractual limitations of liability for reckless conduct do not violate public policy and are enforceable. The answer to the certified question should be "no."

Respectfully submitted,



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