No. 08-146

In The Supreme Court of the United States

ARTHUR ANDERSEN, LLP, *et al.*,
Petitioners,

v.

WAYNE CARLISLE, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULE

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case concerns an issue of fundamental importance to the Chamber of Commerce of the United States of America[1] (the "Chamber") – whether the mechanisms afforded for the enforcement of contractual arbitration rights by the Federal Arbitration Act ("FAA" or "Act"), 9 U.S.C. § 1 *et seq.*, may be invoked only by parties who are signatories to the arbitration agreement. Enacted to ensure the enforceability of privately-made agreements to arbitrate, the FAA's fundamental purpose was "to place an arbitration agreement 'on the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)).

Section 2 effectuates the federal policy favoring arbitration by providing that a written arbitration provision "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. Sections 3, 4, and 16 implement the declared policy of Section 2 by providing respectively for: a mandatory stay of litigation brought upon "any issue referable to arbitration under an agreement in writing" (§ 3); an

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[1] The parties have consented to the filing of this *amicus curiae* brief. Pursuant to Rule 37.6, the *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to preparation or submission of this brief.

order compelling arbitration of any party who fails or refuses to arbitrate "under a written agreement for arbitration" (§ 4); and interlocutory appeal of orders favoring litigation while precluding review of interlocutory orders favoring arbitration. 9 U.S.C. §§ 3, 4 & 16.

For the past twenty-five years the Court's decisions overwhelmingly and consistently have enforced this federal policy, which liberally favors arbitration and encourages private contractual agreements to arbitrate disputes, recognizing that the FAA "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 15 n.9 (1984); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); Maggio & Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 Oh. St. J. Dispute Resolution 151, 153 (2003). Consistent with the text, purpose, and history of the FAA, these decisions require that arbitration agreements be enforced according to ordinary principles of contract and agency law applicable to all contracts, giving due regard to the federal policy favoring arbitration and resolving "any ambiguities as to the scope of the arbitration clause itself … in favor of arbitration." *Volt Info. Scis., Inc. v. Bd. of Thomas*, 489 U.S. 468, 475-76 (1989). Because the basic objective of the FAA is the enforcement of commercial contracts, it leaves the parties free to define by contract the limitations and scope of their agreement to arbitrate. *Dean Witter Reynolds*, 470 U.S. at 217 (FAA requires courts to enforce the bargain of the parties even

where enforcement results in inefficient use of the judicial system).

The *per se* rule adopted below threatens this fundamental objective. The Sixth Circuit held that appellate jurisdiction under Section 16 was limited to review of motions brought by signatories to the arbitration agreement. There simply is no support in the language or purpose of Section 16 for this result. Instead, it improperly conflates appellate jurisdiction with the merits of the motion because it is necessarily premised on a view that only signatories can invoke the protections of Sections 3 and 4, and only signatories can enforce or be held to arbitration agreements in commercial contracts. While superficially a bright-line rule, intended to promote efficiency and enforce the agreement between those who actually signed the arbitration agreement, this decision ignores the commercial realities underlying many arbitration agreements, as well as centuries of contract law holding that non-signatories can enforce and be held to agreements under ordinary principles of contract and agency law. *See*, *e.g.*, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (noting "hundreds of years of common law under which nonparties can be contractually liable under ordinary contract and agency principles"); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* Ch. 13 (3d ed. 2008). Moreover, the signatory-only limitation written by the Sixth Circuit into the FAA interferes with the freedom to define by contract the intended scope of private arbitration agreements because it precludes enforcement of freely-contracted arbitration clauses directing that arbitration include claims involving non-signatories.

Not only is this interpretation inconsistent with the text and history of the FAA, it also frustrates the purposes of the Act by setting up a "disfavored" class of disputes and disputants who are locked out of the protections of the FAA. More fundamentally disturbing, a signatory-only rule actually discriminates *against* the enforcement of arbitration agreements because it forecloses enforcement of such agreements by and against non-signatories who, under ordinary principles of contract and agency law, can otherwise enforce and be held to the remaining provisions in the contract containing the arbitration clause.

Limiting the FAA enforcement mechanisms to only signatories impedes the arbitration rights of both signatories and non-signatories in several ways. As petitioners argue, it upsets settled expectations of non-signatories seeking to enforce arbitration rights where they are entitled to enforce the underlying contract under ordinary principles of contract and agency law. But it also upsets settled expectations of signatories in at least three ways: (1) signatories cannot realize bargained-for benefits of a broad arbitration clause defined expressly to cover claims against non-signatories; (2) signatories cannot realize bargained-for benefits of a broad arbitration clause when non-signatories are sued jointly on disputes subject to arbitration and their relationship is such that the signatory is forced to protect its interests in the litigation; and (3) signatories cannot compel arbitration of a non-signatory otherwise bound by the underlying contract under ordinary principles of contract law.

This issue is crucially important to the Chamber, which is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size throughout the country. The Chamber serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as a party-plaintiff in cases involving issues of national concern to American business.

Most fundamental to Chamber members, and to American businesses generally, is the freedom to contract, coupled with the necessary understanding that contract rights will be enforced according to settled expectations, which allows each party to enjoy the benefits of their bargain while being held to its terms. Accordingly, the Chamber generally favors clear, predictable rules that allow businesses to operate with a fair degree of certainty regarding enforcement of their agreements, and does not favor granting rights or imposing obligations for which the parties have not bargained. Although the signatory limitation adopted below purports to have at least some of these features, it does so at the expense of not enforcing freely-bargained arbitration clauses in accordance with the parties' settled expectations based on ordinary principles of contract and agency law. By creating federal substantive law that only contract signatories can enforce arbitration agreements, this decision fails to appreciate the complexity of many commercial disputes, upsets settled expectations of both signatories and non-signatories, based on rights bargained for before the

dispute arose, interferes with freedom of contract, and allows after-the-fact destruction of arbitration rights by parties who seek to avoid their arbitration obligations by jointly suing non-signatories on their claims.

Many Chamber members routinely enter into arbitration agreements because they believe – and recent studies confirm – that arbitration is a relatively efficient, fair, and inexpensive method of resolving disputes. These members rely on rigorous enforcement of the FAA to ensure that they will not be deprived of the real benefits of arbitration. That is why the Chamber has filed *amicus* briefs in other recent arbitration cases, including *Vaden v. Discover Bank*, No. 07-773, *cert. granted*, 128 S. Ct. 1651 (Mar. 17, 2008), *Preston v. Ferrer*, 552 U.S. ___, 128 S. Ct. 978 (2008), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), and *PacifiCare Systems, Inc. v. Book*, 538 U.S. 401 (2003). In this case too, the Chamber seeks to advance its members' continuing interest in full vindication of the federal liberal policy favoring and enforcing arbitration agreements, including the recognition that full vindication requires recognizing that arbitration agreement covering claims against non-signatories should be protected, and that non-signatories should enforce and be bound by arbitration agreements in accordance with ordinary principles of contract and agency law.

STATEMENT

This case arises from a series of investment-management agreements entered into between Bricolage Capital, LLC ("Bricolage") and respondent limited liability companies ("LLCs"), which had been created by the individual respondents to implement the tax and investment advice provided by Bricolage and petitioners Arthur Andersen LLP ("Andersen") and Curtis, Mallet-Provost, Colt & Mosle LLP ("Curtis"). Each agreement contained the following broad arbitration clause (with emphasis added):

> *Any controversy arising out of or relating to this Agreement or the breach thereof*, shall be settled by arbitration conducted in New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association.

Petitioners were not signatories to the investment-management agreements. The IRS disallowed the tax position claimed by respondents and found that their "leveraged option strategy" was an abusive tax shelter, which eventually resulted in an IRS settlement program that required respondents to pay taxes, penalties, and interest in excess of $25 million.

Respondents filed this diversity action against nine defendants, including Bricolage, and petitioners Andersen and Curtis, alleging, *inter alia*, that in connection with allegedly faulty tax advice received by respondents: (1) all petitioners, together with

Bricolage, were jointly and severally liable for damages resulting from fraud and civil conspiracy, and (2) various petitioners, together with Bricolage, were also jointly and severally liable for damages resulting from alleged breach of fiduciary duty and negligence. Bricolage and petitioners filed motions to stay this litigation pending arbitration of disputes arising out of or relating to the investment-management agreements signed by Bricolage and the respondent LLCs. The district court denied Bricolage's motion as moot because Bricolage filed for bankruptcy while its motion was pending, and denied petitioners' motions on the grounds that (1) petitioners had not satisfied the requirements of equitable estoppel and thus could not enforce the arbitration agreements under ordinary principles of contract and agency law and (2) respondents' claims did not fall within the scope of the arbitration agreements. Petitioners appealed the denial of their motions to the Sixth Circuit under Section 16 of the FAA.

The Sixth Circuit dismissed petitioners' appeal for lack of jurisdiction on the ground that none of the petitioners was a signatory to the arbitration clause in question. *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008). Relying on recent decisions by the D.C.[2] and Tenth[3] Circuits, the Sixth Circuit rejected decisions by other

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[2] *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003).

[3] *In re Universal Service Fund Telephone Billing Practice Litigation*, 428 F.3d 940 (10th Cir. 2005).

Circuits[4] to hold that Section 16 confers jurisdiction over interlocutory appeals from the denial of a motion to stay only where the motion and appeal are brought by signatories to the arbitration agreement. In reaching this conclusion, the court construed Section 3, which "makes available a stay of proceedings based upon 'any issue referable to arbitration under *an agreement in writing* for such arbitration,'" to require that the party seeking the stay be a signatory to a written arbitration agreement also signed by the party against whom arbitration is sought. *Id.* at 600 (quoting 9 U.S.C. § 3) (emphasis added by Sixth Circuit). At least two things are clear from this decision: (1) the Sixth Circuit improperly conflated the determination of its appellate jurisdiction with the merits of the underlying motions that were the subject of the appeal; and (2) the Sixth Circuit interpreted the language "an agreement in writing" found in Section 3 to limit the protection of the FAA[5] to only those arbitration agreements actually signed by both the movant and the party against whom arbitration is sought.

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[4] *See*, *e.g.*, *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007); *Ross v. American Express Co.,* 478 F.3d 96 (2d Cir. 2007); *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004); *Long v. Silver*, 248 F.3d 309 (4th Cir.), *cert. denied*, 534 U.S. 894 (2001); *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994).

[5] This, or closely parallel, language is also found in Sections 2 ("written provision," "agreement in writing") and 4 ("written agreement") of the FAA. 9 U.S.C. §§ 2 & 4.

SUMMARY OF ARGUMENT

Petitioners ably demonstrate that the plain language of Sections 16 and 3 of the FAA provide clear answers to the questions on which certiorari was granted. Section 16 provides for interlocutory appeals over denials of motions to stay litigation under Section 3, with jurisdiction predicated on only two elements: (1) denial of (2) a motion to stay litigation under Section 3. 9 U.S.C. § 16. To add a signatory requirement, as the Sixth Circuit did below, both ignores the statutory language and improperly conflates the question of appellate jurisdiction with the merits of the interlocutory appeal. (Petr.'s Br. 19-27.) Similarly, Section 3 provides for a mandatory stay of litigation, where issues involved in that litigation are "referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. Neither the statutory language, purpose nor history of this provision supports the "signatory" limitation imposed by the Sixth Circuit.

But even if the statute were ambiguous, the strong federal policy favoring arbitration, together with its concomitant goal of protecting the freedom to contract for arbitration, would provide an additional reason for giving effect to the broad language of Section 3. Put another way, there is simply no good reason to engraft restrictive language into Section 3, which would limit its protections to only those who have actually signed the arbitration agreement in question. To the contrary, this unduly restrictive view of Section 3 discriminates against arbitration agreements by creating a "disfavored"

class of disputes and disputants, which prevents the enforcement of arbitration agreements for and against non-signatories.

Petitioners have ably presented the case for allowing a non-signatory, who can enforce the terms of a contract containing an arbitration clause, to enforce the arbitration clause in that contract. But the signatory-only limitation also adversely affects the arbitration rights of signatories who have bargained for arbitration of claims involving non-signatories, as well as those who are entitled to enforce the contract containing the arbitration clause against a non-signatory.

By focusing only on the lack of a signed agreement between the non-signatory and the signatory, the signatory-only limitation loses sight of the important federal policy of enforcing the arbitration agreement as defined by the original contracting parties, which may include claims involving non-signatories. As a result, the signatory limitation adopted by the Sixth Circuit upsets settled expectations of signatories, as well as those of non-signatories, based on rights bargained for before the dispute arose. This, in turn, undermines the fundamental FAA policy of freedom to contract for arbitration on terms defined by the parties, and it allows one signatory to avoid arbitration obligations after the fact by jointly suing non-signatories on claims against the other signatory. Thus, reversal is required not only by the plain language of the statute, but also for clear federal policy and prudential reasons.

ARGUMENT

I. STRONG FEDERAL POLICY FAVORING FREEDOM TO CONTRACT FOR ARBITRATION REQUIRES GIVING PLAIN LANGUAGE OF SECTION 3 ITS NATURAL BROAD CONSTRUCTION

Section 3 requires that litigation be stayed if it is brought upon "any issue referable to arbitration under an agreement in writing." The fundamental questions to be answered when faced with a motion to stay brought under Section 3 is not "who signed the written arbitration agreement originally executed by the signatories," but "what have the parties to that agreement agreed to arbitrate" and "do the claims involving non-signatories fall within its scope."[6] If the answer to these two questions is yes, the plain language of Section 3 requires that a stay be granted pending arbitration, even though the party bringing the motion was not a signatory to the arbitration agreement. *Cf. Perry v. Thomas*, 482 U.S. 483, 492 & n.9 (1987) (ordinary contract principles should determine "whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them").

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[6] *See Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379, 381 (5th Cir. 2008); *accord Campbell v. General Dynamics Gov't Sys. Corp.,* 407 F.3d 546, 552 (1st Cir. 2005) (requiring "that a valid agreement to arbitrate exists, that the movant is entitled to invoke the arbitration clause, that the other party is bound by that clause, and that the claim asserted comes within the clause's scope") (internal quotations and citation omitted).

This approach is consistent with the core FAA policy of enforcing agreements to arbitrate, and it keeps the focus where it should be – on the terms and scope of the written arbitration agreement – not on the formalities of who signed the agreement. Like questions of arbitrability under Section 2, these questions should be answered by applying general principles of contract interpretation, applicable to all contracts, giving due regard to the federal policy favoring arbitration and resolving any ambiguity regarding the scope of the arbitration clause in favor of arbitration. *Volt*, 489 U.S. at 475-76.

A. The FAA Requires that Arbitration Agreements Receive the Same Protection as Other Agreements

The Court has consistently recognized in a long line of FAA decisions that the Act expresses a "liberal federal policy favoring arbitration agreements," which created "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24. These decisions also make clear that the primary Congressional concern was "to enforce private agreements into which parties had entered," and "to place an arbitration agreement 'on the same footing as other contracts, where it belongs.'" *Dean Witter Reynolds*, 470 U.S. at 221 & 219 (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)); *accord Volt*, 489 U.S. at 478 (the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms").

At a minimum, this requires that arbitration agreements receive the same protection afforded other contracts and be construed under the ordinary principles of law and equity generally applicable to all agreements. *See*, *e.g.*, *id.* at 475 (applying "general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act"); *Perry*, 482 U.S. at 492-93 (ordinary principles of "law and equity" apply to arbitration agreements governed by the FAA). And in *Perry*, although it did not decide the issue,[7] the Court recognized that these same principles apply to claims involving non-signatories. Providing guidance for consideration on remand of appellee's claim that, as non-signatories, appellants lacked "standing" to compel arbitration under Section 4, the Court characterized the issue as "a straightforward issue of contract interpretation: whether the arbitration provision inures to the benefit of appellants and may be construed, in light of the circumstances surrounding the litigants' agreement, to cover the dispute that has arisen between them." *Id.* at 492; *accord First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("ordinary state-law principles that govern the formation of contracts" apply when deciding whether the parties, including non-signatories, have "agreed to arbitrate a particular matter").

Indeed, where the issue is arbitrability, or the scope of an arbitration clause, strong federal policy favoring arbitration requires *more*, not less,

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[7] The Court declined to decide this issue on the merits because it had not been decided by the lower courts. *Perry*, 482 U.S. at 492.

protection for arbitration agreements than may be afforded other agreements. For more than twenty-five years, the Court has recognized as much, consistently reiterating that the FAA establishes that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (in construing arbitration agreements, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"). And in *Volt*, the Court reaffirmed that *Moses H. Cone* and *Mitsubishi* require that state-law principles of contract interpretation defer to the strong federal policy favoring arbitration:

> These cases of course establish that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, see *Perry v. Thomas* …, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

Volt, 489 U.S. at 475-76; *see also First Options, Inc.*, 514 U.S. at 944-45 (affirming presumption in favor of arbitration when determining whether claims are arbitrable).

As petitioners have ably set forth, by focusing on who signed the written arbitration agreement, the Sixth Circuit failed to give arbitration provisions the same protections afforded other agreements under ordinary principles of law and equity. (Petr.'s Br. 31-36.) And at least in the context of Section 3, this decision sets up a restrictive approach that disfavors arbitration when considering the scope of the arbitration clause for claims involving non-signatories. By excluding all non-signatories from the scope of the arbitration agreement under Section 3 as matter of law, this *per se* rule flies in the face of the well-settled requirement that, "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25. Moreover, this *per se* rule interferes with the freedom to bargain for arbitration clauses that are defined broadly to encompass claims against non-signatories.

B. Liberal Federal Policy Favors Freedom of Contract in Arbitration Agreements

The Court has consistently underscored that the freedom to contract for arbitration, and not arbitration for its own sake, is at the heart of the strong federal policy favoring arbitration. As the Court reiterated just last Term, the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston*, 552 U.S. at __, 128 S. Ct. at 981. Fundamental to this national policy of freedom to contract for arbitration is enforcement of the obligation to arbitrate: the FAA "supplies not simply

a procedural framework applicable in federal courts," *id.*; it also "creates federal substantive law requiring parties to honor arbitration agreements." *Southland Corp.*, 465 at 15 n.9; *see also Preston*, 552 U.S. at __ & n.2, 128 S. Ct. at 983 & n.2 (reaffirming *Southland*); *Circuit City Stores v. Adams*, 532 U.S. 105, 122 (2001) (same); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 270-72 (1995) (same).

That the freedom to contract for arbitration is the crux of the national policy favoring arbitration is underscored by the Court's consistent view that the FAA requires enforcement of the bargain struck by the parties. *See*, *e.g.*, *Preston*, 552 U.S. __, 128 S. Ct. 978; *Circuit City Stores, Inc.*, 532 U.S. 105; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Volt*, 489 U.S 468; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi*, 473 U.S. 614; *Dean Witter*, 470 U.S. 213. A necessary corollary to the freedom of contract is the parties' understanding that contract rights will be enforced according to settled expectations so that each party can enjoy the benefits of their bargain while being held to its terms. By limiting the protections of Sections 3 and 16 of the FAA to parties who actually signed the written arbitration agreement, the decision below impedes the freedom to contract for arbitration of disputes involving related claims against non-signatories.

II. SIGNATORY-ONLY LIMITATION FRUSTRATES THE PURPOSES OF THE FAA

Section 3 mandates a stay of litigation brought upon "any issue referable to arbitration under an agreement in writing." 9 U.S.C. § 3. Consistent with the strong federal policy favoring the enforcement of agreements to arbitrate, the question whether an issue involving a non-signatory is "referable to arbitration" should be decided by reference to the written arbitration agreement executed by the signatories, which is claimed to cover the dispute. As suggested by the *Perry* Court in the context of Section 4, this arbitration agreement should be interpreted according to ordinary principles of law and equity with due regard to the presumption favoring arbitration that generally applies to questions of arbitrability. *Perry*, 482 U.S. at 492 & n.9. In each case where this agreement covers claims involving non-signatories, or where non-signatories are otherwise subject to its terms under ordinary principles of law and equity, this written contract is the source of the right to arbitrate claims involving non-signatories.

By imposing a signatory-only limitation on the plain language of Section 3, the Sixth Circuit has precluded enforcement of arbitration agreements that are expressly defined to cover claims involving non-signatories, as well as those that otherwise cover non-signatories under ordinary principles of law and equity. Where the parties have agreed to an arbitration clause broad enough to cover such claims, the core federal policy of enforcing

agreements to arbitrate reflected in Sections 3 and 4 should be available to hold the parties to their bargain regardless of whether the non-signatory could independently enforce or be held to the terms of that agreement.[8]

A. Signatory-Only Limitation Frustrates Freedom to Contract for Defined Arbitration Terms

Perhaps the most glaring problem with engrafting a signatory-only limitation into Sections 3 and 4 is that it would seem to preclude enforcement of even an express written agreement to arbitrate claims involving non-signatories. For example, the parties could agree to the following arbitration clause expressly covering non-signatories:

> Any dispute against a non-signatory, which (1) is substantially similar to (or connected with) issues raised in, or (2) arises out of

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[8] Even if a non-signatory could not be compelled to arbitrate under such an agreement, it should have "standing" to bring a motion to stay or compel under Section 3 or 4 because the clause covering arbitration of claims involving non-signatories inures to its benefit. *See*, *e.g.*, *Waste Management, Inc.*, 372 F.3d at 342-43 (grammatical structure of § 3 gives any party to suit standing to apply for mandatory stay, which must be granted if claim at issue is covered by arbitration agreement); *cf. Perry*. 482 U.S. at 492 & n.9 (suggesting that non-signatory has standing where arbitration inures to its benefit and may be reasonably construed to cover its claims). The status of a non-signatory as either the movant or the person against whom arbitration is sought makes a difference regarding whether a motion to compel will be granted. *See*, *e.g.*, *Comer*, 436 F.3d at 1102 (third-party beneficiary may have power to sue under contract, but cannot be bound to contract it did not assent to).

> substantially the same facts as, a dispute subject to arbitration under this Agreement, shall be subject to arbitration together with related disputes under this Agreement, or if a non-signatory cannot be compelled to arbitrate, shall be stayed pending arbitration of such related disputes.

Obviously, if the agreement expressly provides for arbitration (or deferral) of claims involving non-signatories, the core FAA policy of liberally enforcing arbitration agreements mandates that the protections of the Act for enforcement of this obligation should be available, and the plain terms of Section 3 are broad enough to do so. But due to the lack of an agreement signed by the non-signatory, the decision below would seem to preclude FAA enforcement of even this arbitration agreement with its unequivocal expression of the parties' intention to arbitrate, or at least defer, related claims involving non-signatories.

Such a detailed expression of intent to cover non-signatories is neither required nor practicable in the context of many commercial transactions. *See* 2 Ian P. MacNeil et al., *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* § 17.7.3, at 17:92 (1999) (noting that informal requirements of the FAA conform to the widespread informal nature of routine and ordinary business practices). Where, as here, the agreement's terms do not expressly state whether a signatory may be compelled to arbitrate with a non-signatory, ordinary principles of contract and agency law, including

equitable estoppel,[9] should be applied to determine whether claims by or against non-signatories are "referable to arbitration" within the meaning of Section 3. And consistent with analysis of arbitrability under Section 2, application of these principles must give due regard to the federal policy favoring arbitration, resolving any ambiguity in favor of arbitration.

For example, a broad arbitration clause covering any claims, including those involving relationships, arising out of or relating to the agreement would likely be interpreted to cover related claims involving non-signatories. This was the case recently in *Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379 (5th Cir. 2008). In *Sherer*, the plaintiff borrower executed a loan agreement with the lending bank, which included an arbitration clause covering "[a]ll disputes, claims, or controversies arising from or relating to this Agreement or the relationships which result from this Agreement."

The Fifth Circuit held that the defendant loan servicer, who was not a party to the original loan agreement containing the arbitration clause, was entitled to compel arbitration because the borrower had expressly agreed to arbitrate any claims arising from "the relationships which result from th[e]

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[9] Although often overlapping in their application, other contract theories that provide these rights or obligations to non-signatories include: (1) alter-ego and corporate-veil piercing; (2) incorporation by reference; (3) assumption by conduct; (4) agency; (5) successors in interest; and (6) third-party beneficiary. *See* DiLeo, *The Enforceability of Arbitration Agreements By and Against Nonsignatories*, 2 J. Am. Arb. 31 (2003).

Agreement," and the defendant loan servicer for the underlying loan was just such a relationship. *Id.* at 383; *see also Vigil v. Sears National Bank*, 205 F. Supp. 2d 566, 568 (E.D. La. 2002) (arbitration clause covering "any relationships resulting from this agreement" encompasses claims against non-signatory). This result would be foreclosed if the signatory-only rule applied by the Sixth Circuit were adopted – regardless of how clearly the parties had contracted for arbitration (or deferral) of claims involving non-signatories.

Keeping the focus on the written arbitration agreement, while applying ordinary principles of law and equity generally applicable to all contracts, assures that arbitration agreements, like other contracts, will be enforced according to settled expectations. This, in turn, allows each party to enjoy the benefits of its bargain while being held to its terms. Applying the presumption favoring arbitration consistently applied when ascertaining the scope of an arbitration clause also conforms to these expectations and allows the parties to enjoy the full benefits of their agreement to arbitrate.

And perhaps most important, this approach leaves in the hands of the parties, at the time of contracting, the freedom to define the scope of their arbitration agreement. The parties are free to expressly narrow the scope of their agreement by excluding non-signatories from arbitration, even where ordinary contract principles might provide otherwise. *See*, *e.g.*, *Mastrobuono*, 514 U.S. at 53 (FAA requires enforcement of parties' bargain even where it includes punitive damages otherwise prohibited by

law of state designated in contract choice-of-law provision); *Dean Witter Reynolds*, 470 U.S. at 217 (FAA requires enforcement of parties' bargain even where enforcement results in inefficient use of judicial system).

In contrast, focus on the non-signatory status of the movant and concern over whether the non-signatory had itself bargained for arbitration rights,[10] which are central to the signatory-only approach adopted below, distract from the key question – whether the claims involving the non-signatory are "referable to arbitration" under the written arbitration agreement executed by the parties to that agreement.

B. Signatory-Only Limitation Fails to Appreciate Realities and Settled Expectations in Complex Commercial Transactions

As petitioners point out, a signatory-only rule fails to appreciate that, under generally-accepted principles of contract or agency law, non-signatories may enforce and be bound by written agreements executed by third parties. (Petr.'s Br. 31-36.) These generally-accepted principles form the understanding of contracting parties in complex commercial relationships involving multiple parties with interconnected roles. The non-signatory

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[10] These factors are important when a signatory seeks to compel arbitration against a non-signatory, even where the arbitration clause expressly covers claims involving non-signatories, because parties generally cannot bind a third party to an agreement without its knowledge or consent. *See*, *e.g.*, *Comer*, 436 F.3d at 1102.

agreements may incorporate by reference the primary contract, there may be indemnification requirements between the signatory and non-signatories, or there may be agency or third-party beneficiary relationships among the entities that entitle them to enforce or bind them to the terms of the primary contract.

For example, where two parties execute a primary contract, which anticipates the use of non-signatory subcontractors, insurance or performance-bond providers, or other entities providing services related to the primary contract, these non-signatories may be entitled to enforce or be bound by the terms of the primary contract under ordinary principles of agency or contract law. These complexities are illustrated by *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) ("ABS"). In *ABS*, the shipowners executed a construction contract with a shipbuilder to build a yacht, which required, *inter alia*, that the yacht be "classed" according to ABS standards. The shipbuilder contracted with ABS to provide the required classification, and this agreement contained an arbitration clause. After delivery, the yacht suffered hull damage allegedly due to poor construction and defective design, and the underwriters indemnified the owners pursuant to their performance-bond obligations. Facing claims by the owners, shipbuilder, and underwriters, ABS sought to compel arbitration against all three under the arbitration clause in its classification contract with the shipbuilder.

The Second Circuit applied ordinary principles of contract and agency law to hold that (1) the non-signatory owners could be compelled to arbitrate because the construction contract required, and they received a direct benefit from, the ABS classification contract that contained the arbitration clause; and (2) the underwriters could also be compelled to arbitrate because, as insurer-subrogees, they stood in the shoes of the owners. *Id.* at 353; *accord Interbras Cayman Co. v. Orient Victory Shipping Co., SA*, 663 F.2d 4, 6 (2d Cir. 1981) (undisclosed principal may enforce contract made for its benefit by agent).

Similarly, in *Bartley v. Jefferson Parish School Board*, 302 So.2d 280 (La. 1974), a primary contractor sued one of its subcontractors and the school board building owner to compel arbitration of a dispute arising out of the primary contract between the prime contractor and the owner. Although not a signatory to the primary contract, the subcontractor was compelled to arbitrate under the arbitration provision of that contract because its subcontract incorporated by reference the terms of the primary contract. *Id.* at 281; *accord Ventura Maritime Co. v. ADM Export Co.*, 44 F. Supp. 2d 804, 807 (E.D. La. 1999) (holding non-signatory bound to arbitrate where it provided services linked under general principles of contract or agency law to bill of lading containing arbitration clause); *cf. AgGrow Oils, LLC v. National Union Fire Insurance Co.*, 242 F.3d 777 (8th Cir. 2001) (where primary contract expressly disavowed intention to create contractual relationship with third parties and performance bond referenced judicial resolution of disputes,

incorporation clause in performance bond found not to incorporate arbitration obligations of primary contract).

Contrary to the purposes of the FAA, a *per se* signatory requirement discriminates against arbitration clauses in these complex commercial transactions because the non-signatories may be entitled to enforce or be bound by all provisions in the primary contract save the arbitration clause. Moreover, a *per se* signatory requirement fails to appreciate the understood realities of these complex commercial undertakings or to take into account settled expectations regarding the scope of an arbitration clause in the primary contract broadly covering any related disputes.

C. Equitable Estoppel, as Traditionally Applied to All Contracts, Should Apply to Arbitration Agreements

Like the contract theories discussed above, equitable estoppel principles should be applied to enforce arbitration agreements in the same manner as other contracts. This doctrine, applied traditionally, can be used to compel arbitration by or against a non-signatory. For example, where a non-signatory has invoked, taken advantage of, or asserted rights under a contract with an arbitration clause, traditional principles of law and equity bind the non-signatory to that contract's arbitration provisions as well. This prevents a party, who knowingly exploits an agreement, from taking advantage of the benefits of the contract while simultaneously disavowing its burdens. *See*, *e.g.*,

Long, 248 F.3d at 320-21 (holding signatory bound to arbitrate claims against non-signatories because contract benefits of shareholder status and right to continued employment cannot be asserted against non-signatories while "simultaneously attempting to avoid the terms of an arbitration provision contained therein'"); *International Paper Co. v. Schwabedissen Maschinen & Angalen, GMBH*, 206 F.3d 411 (4th Cir. 2000) (holding non-signatory bound to arbitrate because it cannot claim the benefit of the contract and simultaneously avoid its burdens); *Deloitte Noraudit, A/S v. Deloitte, Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993) (holding non-signatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement through continuing use of tradename covered by agreement). By limiting enforcement of a broad arbitration clause in such agreements, the signatory-only limitation discriminates against arbitration and upsets settled expectations of the parties.

Clearly, any right to stay litigation or compel arbitration must be based on the written agreement containing the arbitration clause – the parties can choose not to arbitrate at all or to limit arbitration even if it results in inefficient use of the judicial system. *Dean Witter Reynolds*, 470 at 217. Accordingly, courts should not compel arbitration based merely on general policy goals, but must look first to whether the parties agreed to arbitrate disputes involving non-signatories, applying general principles of law and equity with due regard for the federal policy favoring arbitration. *See*, *e.g.*, *Circuit City Stores*, 535 U.S. 105; *EEOC v. Waffle House,*

Inc., 534 U.S. 279, 294 (2002). If the written arbitration agreement between the original contracting parties covers claims involving non-signatories, the non-signatory can directly enforce this agreement under Sections 3 and 4 of the FAA. If the arbitration clause does not cover claims involving non-signatories, the mandatory protections of Sections 3 and 4 are not available, even if this results in the inefficient resolution of related claims in different forums.[11] *Dean Witter Reynolds*, 470 U.S. at 217.

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In sum, Section 3 requires that litigation be stayed if it is brought upon "any issue referable to arbitration under an agreement in writing." 9 U.S.C. § 3. Consistent with federal common law requiring enforcement of arbitration agreements, whether an issue involving a non-signatory is "referable to arbitration" should be decided by reference to the written arbitration agreement executed by the signatories, which is claimed to cover the dispute. This agreement should be interpreted according to ordinary principles of law and equity, with due regard given to the federal policy favoring arbitration, and any ambiguity as to the scope of the arbitration clause resolved in favor of arbitration. If an arbitration agreement covers

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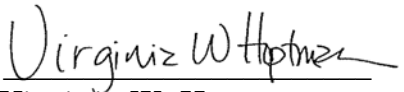
[11] Instead, district courts have the inherent power to grant a discretionary stay where the litigation involves common questions of fact that are within the scope of a pending arbitration and a stay is necessary to further the strong federal policy favoring arbitration. *See*, *e.g.*, *AgGrow*, 242 F.3d at 782-83; *Citrus Marketing Board of Israel v. Lauritzen A/S*, 943 F.2d 220, 225 (2d Cir. 1991).

claims involving non-signatories, the plain language of Section 3 requires that a stay be granted, even where the party bringing the motion was not a signatory to the arbitration agreement. The signatory-only limitation adopted below fails to give effect to the plain language and purpose of Section 3, and discriminates against arbitration by refusing to apply ordinary contract principles to enforce arbitration agreements. As such, it upsets the settled expectations of both signatories and non-signatories, based on rights bargained for before the dispute arose, interferes with freedom to define the terms of arbitration by contract, and fails to appreciate the complexity of many commercial disputes.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

By 
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