IN THE
Supreme Court of the United States

ARTHUR ANDERSEN, LLP, ET AL.,
Petitioners,

v.

WAYNE CARLISLE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3, provides that "on application of one of the parties," a district court shall stay proceedings pending arbitration if the district court concludes that the "issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration." Section 16(a)(1)(A) of the FAA, 9 U.S.C. § 16(a)(1)(A), provides that "an appeal may be taken from an order" of a district court denying a stay application made under Section 3. The questions presented are:

(1) Whether Section 16(a)(1)(A) of the FAA provides appellate jurisdiction over an appeal from an order denying an application made under Section 3 to stay claims involving non-signatories to the arbitration agreement.

(2) Whether Section 3 of the FAA allows a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the same as the parties to the proceeding in the United States Court of Appeals for the Sixth Circuit: petitioners Arthur Andersen LLP, Curtis, Mallet-Prevost, Colt & Mosle LLP, William L. Bricker, Jr., Integrated Capital Associates, Inc., Intercontinental Pacific Group, Inc., and Prism Connectivity Ventures; and respondents Wayne Carlisle, James E. Bushman, Gary L. Strassel, WC Thomas, LLC, WC Venture Corp., the Ohio 1999 Irrevocable ESBT of Wayne Carlisle, JB Cinoh, LLC, JEB Venture Corp., JEB Revocable ESBT, Wayne Carlisle, Trustee, GS Noky, LLC, and WJC Strategic Investments, LLC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioners are subsidiaries of a publicly-owned corporation, and no publicly-owned corporation has a financial interest in the outcome of these proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Arthur Andersen LLP, Integrated Capital Associates, Intercontinental Pacific Group, Inc., Prism Connectivity Ventures, LLC, Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr. respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is available at *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, 521 F.3d 597 (6th Cir. 2008) and is reprinted at Pet. App. 1a-12a. The district court's findings of fact and law made from the bench on February 3, 2006, are reprinted at Pet. App. 13a-16a. The district court's order denying petitioners' Section 3 motions is reprinted at Pet. App. 17a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit entered its judgment and opinion on April 9, 2008. On June 24, 2008, Justice Stevens granted petitioners' application to extend the time to file a petition for writ of certiorari until August 7, 2008. Supreme Court Dkt. No. 07A1031. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 3 provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 16 provides in pertinent part:

> (a) An appeal may be taken from—
>
> (1) an order—
>
> (A) refusing a stay of any action under section 3 of this title[.]

STATEMENT OF THE CASE

1. This case concerns the applicability of certain provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, in cases involving non-signatories to the relevant arbitration agreement. Section 3 of the FAA, 9 U.S.C. § 3, provides that "on application of one of the parties," a district court shall stay proceedings pending arbitration if the district court

concludes that the "issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration."[1]

In 1988, Congress amended the FAA to expressly provide a right of immediate interlocutory appeal of orders denying motions[2] to stay under Section 3. Pub. L. No. 100-72, tit. X, § 1019(a), 102 Stat. 4671, § 15 (1988), renumbered § 16, Pub. L. 101–650, tit. III, § 325(a)(1), 104 Stat. 5120 (1990), codified at 9 U.S.C. § 16(a)(1)(A). Section 16(a)(1)(A) provides that an immediate interlocutory appeal can be taken from an order "refusing a stay of any action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A).[3]

2. In 1999, Bricolage Capital, LLC ("Bricolage") and certain petitioners provided tax advice to respondents Wayne Carlisle, James Bushman, and Gary Strassel concerning strategies to minimize liability for capital gains. Pet. App. 3a. To implement this advice, Carlisle, Bushman, and Strassel created several limited liability corporations ("LLCs"), which are also respondents. The LLCs in turn entered into investment management

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[1] A companion provision of the FAA not at issue in this case, Section 4, similarly allows a district court to compel arbitration. *See* 9 U.S.C. § 4. Courts generally interpret Sections 3 and 4 in tandem.

[2] Although Section 3 refers to "application[s]" to stay and Section 4 refers to "petition[s]" to compel, for ease of reference petitioners hereinafter refer to all such filings as "motions" to stay or compel under the FAA.

[3] The 1988 amendment similarly allows for an immediate interlocutory appeal of a denial of a motion to compel arbitration under Section 4. *See* 9 U.S.C. § 16(a)(1)(B).

agreements with Bricolage. Pet. App. 3a. All of the agreements contained the following arbitration clause: "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." Pet. App. 3a-4a. Petitioners were not signatories to the investment management agreements containing this arbitration clause. Pet. App. 3a.

3. In 2005, respondents brought this action against Bricolage and petitioners in the Eastern District of Kentucky. Pet. App. 4a. Respondents sought to recover damages for investment losses and tax liabilities allegedly incurred as a result of the tax advice and accompanying transaction with Bricolage and petitioners.

Bricolage and petitioners filed motions to stay the district court proceedings pursuant to Section 3 of the FAA.[4] Pet. App. 4a-5a. In these motions,

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[4] Petitioners Arthur Andersen LLP, Curtis, Mallet-Prevost, Colt & Mosle, LLP, and William L. Bricker, Jr. filed motions to stay under Section 3 of the FAA. *See* Motion to Stay Proceedings Pending Arbitration at 1, *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, LLP*, No. 05-59, dkt. 31 (E.D. Ky. June 10, 2005) (Andersen Motion); No. 05-59, dkt. 93 (E.D. Ky. Feb. 17, 2006) (Curtis, Mallet/Bricker Motion). Petitioners Prism Connectivity Ventures, LLC, Integrated Capital Associates, and Intercontinental Pacific Group filed a joinder to these motions. No. 05-59, dkt. 65 and 66 (E.D. Ky. Aug. 26, 2005).

petitioners argued that, under principles of equitable estoppel, the district court should stay respondents' claims against them until those claims were arbitrated pursuant to the terms of the arbitration clause contained in the agreements between respondents and Bricolage. As petitioners argued, equitable estoppel required the arbitration of respondents' claims against them because respondents' claims fell within the scope of the arbitration clause and alleged substantially interdependent and concerted misconduct by both the signatory (Bricolage) and the non-signatories (petitioners) to the agreements containing the arbitration clause.[5]

The district court denied petitioners' motions to stay under Section 3 on the basis that petitioners did not satisfy the requirements of equitable estoppel and thus could not enforce the arbitration agreement, and that respondents' claims did not fall within the scope of the arbitration agreement.[6] Pet. App. 16a. Petitioners timely appealed this order to the Sixth Circuit pursuant to Section 16(a)(1)(A) of the FAA.

4. In full merits briefing and oral argument before the Sixth Circuit, petitioners argued that the district court erred by not staying respondents'

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[5] Hereinafter, the arbitration clause in the agreements between respondents and Bricolage is referred to as the "arbitration agreement."

[6] The district court also denied as moot Bricolage's motion to stay under Section 3 because Bricolage filed for bankruptcy while its motion was pending.

claims against them under Section 3 because (1) respondents' claims were within the scope of the arbitration agreement, and (2) petitioners could enforce the arbitration agreement under equitable estoppel principles. The Sixth Circuit, however, never considered these issues. Instead, the Sixth Circuit dismissed petitioners' appeal for lack of appellate jurisdiction under Section 16(a)(1)(A). Pet. App. 12a.

At the outset, the Sixth Circuit noted that whether Section 16(a)(1)(A) confers appellate jurisdiction over appeals from denials of Section 3 motions to stay claims involving non-signatories has "been addressed under similar circumstances in at least three of our sister circuits, resulting in a circuit split." Pet. App. 5a.[7] On one side of the split, rejecting appellate jurisdiction over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *DSMC Inc. v. Convera Corp.*, 349 F.3d 679 (D.C. Cir. 2003) and *In re Universal Service Fund Telephone Billing Practice Litigation*, 428 F.3d 940 (10th Cir. 2005). *See* Pet. App. 7a. On the other side of the split, upholding appellate jurisdiction

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[7] In passing, the Sixth Circuit erroneously asserted that petitioners had not actually invoked Section 3 in the district court. *See* Pet App. 5a ("The defendants now seek appellate review of that denial, for the first time invoking Section 3 of the Federal Arbitration Act in an effort to establish interlocutory jurisdiction under Section 16 of the Act."). Nevertheless, the Sixth Circuit decided the case as if petitioners had invoked Section 3 in the district court, which in fact petitioners expressly did. *See* note 4, *supra*.

over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007). *See* Pet. App. 7a.

Without elaboration, the Sixth Circuit followed *DSMC* and *Universal Service Fund*: "In the absence of a controlling decision in this circuit, we opt to follow the reasoning and result in [*DSMC* and *Universal Service Fund*]," Pet. App. 7a, and expressly rejected the reasoning of *Ross*: "We find the statutory analysis in *DSMC Inc.* and *Universal Service Fund* superior to the circular reasoning employed by the Second Circuit in *Ross v. American Express Co*," Pet. App. 10a. The Sixth Circuit criticized *Ross* for relying on other circuits that had exercised appellate jurisdiction under Section 16(a)(1)(A) in cases involving non-signatories to an arbitration agreement but that had not explained their rationale for doing so. *See* Pet. App. 10a-11a.

In *DSMC*, the D.C. Circuit (Roberts, J.) determined the issue of appellate jurisdiction under Section 16(a)(1)(A) by expressly deciding the *merits* and holding that, as a matter of law, Section 3 does not apply to claims involving non-signatories to an arbitration agreement. *See DSMC*, 349 F.3d at 685 ("We simply conclude that the mandatory stay provision of Section 3 does not apply to litigation involving parties not subject to a written arbitration

agreement, and therefore hold that this court lacks jurisdiction under Section 16(a)(1)(A).").[8]

In *Universal Service Fund*, the Tenth Circuit followed *DSMC* and held that it lacked appellate jurisdiction over an appeal from denials of Section 3 and 4 motions. The Tenth Circuit limited its analysis, however, almost entirely to the Section 4 motion. The only sentence in the opinion substantively analyzing the Section 3 motion effectively followed *DSMC*: "[W]hether Defendants are appealing from the district court's denial of a stay or its refusal to compel arbitration, the plain language of the applicable jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction." 428 F.3d at 942 (emphasis by the court).

Because the Sixth Circuit in this case adopted the reasoning of *DSMC* and *Universal Service Fund*, and as *Universal Service Fund* followed the reasoning of *DSMC*, the Sixth Circuit decision must be read as holding that, as a matter of law, Section 3 does not allow a district court to stay claims against non-signatories, even if the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including

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[8] *DSMC* also involved an appeal of a denial of a motion to compel under Section 4, and the D.C. Circuit similarly held that because the Section 4 motion involved a non-signatory, Section 4 did not apply as a matter of law and Section 16(a)(1)(B) did not provide appellate jurisdiction over the appeal from the Section 4 denial. *See* 349 F.3d at 682-84.

equitable estoppel. Put another way, like the D.C. Circuit in *DSMC*, the Sixth Circuit collapsed the jurisdictional analysis under Section 16(a)(1)(A) into the merits of the Section 3 motion.

This reading is confirmed by the first paragraph of the Sixth Circuit decision, which states that "none of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. . . . *In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action . . . We agree.*" Pet. App. 2a (emphasis added). Hence, although the Sixth Circuit's decision is ostensibly denominated as a dismissal for lack of *appellate jurisdiction*, in substance it represents the establishment of a categorical rule regarding the merits of motions made by non-signatories under Section 3.

Subsequent to its decision, the Sixth Circuit stayed the mandate pending the filing in this Court of a petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

In the two decades since Congress added Section 16(a)(1)(A) to the FAA, the courts of appeals have sharply divided over the meaning and application of that provision. Even though the language of Section 16(a)(1)(A) permits an immediate appeal of any order denying a Section 3 motion to stay proceedings, the courts of appeals disagree on whether such an appeal is proper when the claim sought to be stayed involves a *non-signatory* to the arbitration agreement.

Several circuits, including the Sixth Circuit in this case, have acknowledged this split. *See Ross*, 478 F.3d at 100 n.2 (recognizing contrary case law in the D.C. and Tenth Circuits, but holding that "we decline to follow them"); *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 44 n.6 (1st Cir. 2008) (noting circuit split); Pet. App. 5a (acknowledging the existence of a "circuit split"). The division extends to intra-circuit conflicts in at least two circuits and an internally inconsistent decision in yet another circuit. Compounding this division is the analytical confusion in the circuits over the proper method of interpreting and applying Section 16(a)(1)(A) in the first instance.

The chaos over appellate jurisdiction grows out of an older underlying conflict in the circuits concerning the *merits* of whether Section 3 allows a district court to stay claims against non-signatories when non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. Two circuits have recognized the split concerning Section 3. *See AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 782 n.5 (8th Cir. 2001) (recognizing conflict between Eighth Circuit and Seventh Circuit caselaw over whether non-signatories can invoke Section 3); *Citrus Mktg. Bd. of Israel v. J. Lauritzen A/S*, 943 F.2d 220, 224 n.6 (2d Cir. 1991) (noting that the Seventh Circuit adopted a position initially suggested but later rejected by the Second Circuit). Similarly, in the wake of the D.C. Circuit's decision in *DSMC*, the district court in that circuit has recognized the split. *See, e.g., Invista N. Am. S.a.r.l. v. Rhodia Polyamide Intermediates*

S.A.S., 503 F. Supp. 2d 195, 203 (D.D.C. 2007) (noting circuit conflict on whether non-signatories can invoke Section 4 to compel arbitration and following *DSMC* as binding).[9]

The two circuit conflicts aggravated by the Sixth Circuit decision are widespread and entrenched, and involve important questions concerning the scope of relief provided by the FAA that require this Court's intervention to resolve. To add clarity and consistency where only confusion and conflict now exist, and to restore an interpretation of the FAA that is consistent with its text and purpose, this Court should grant this petition and reverse the decision below, both on the issue of appellate jurisdiction under Section 16(a)(1)(A) and on the merits of whether Section 3 allows a district court to stay claims against non-signatories when non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel.

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[9] *Invista* involved a motion to compel under Section 4, as opposed to a motion to stay under Section 3, but *DSMC*'s holding applies to both Section 3 and Section 4, as *DSMC* involved both motions. *See DSMC*, 349 F.3d at 682-685. Thus, the circuit split recognized in *Invista* for purposes of Section 4 is the same circuit split that exists under Section 3.

I. The Courts of Appeals Are Intractably Divided Over Whether Section 16(a)(1)(A) Provides Appellate Jurisdiction Over Appeals From Denials of Section 3 Motions Involving Non-Signatories

The decision below widens an existing circuit split concerning the scope of appellate jurisdiction conferred by Section 16(a)(1)(A). Three circuits hold that Section 16(a)(1)(A) does not confer appellate jurisdiction over denials of Section 3 motions involving non-signatories. One circuit holds that appellate jurisdiction does exist in such cases. Two more circuits straddle both sides of the divide with unresolved intra-circuit conflicts, but their latest pronouncements place them on the side upholding appellate jurisdiction. Yet another circuit has taken *both* sides of the issue in a single internally inconsistent decision. Four additional circuits have exercised appellate jurisdiction in Section 3 cases involving non-signatories without substantively addressing the issue, but their rationales on the merits of Section 3 (namely, that non-signatories may invoke Section 3) place them in conflict with circuits denying appellate jurisdiction, because those circuits denying appellate jurisdiction do so on the grounds that non-signatories may not invoke Section 3.

To say that the circuits are divided over appellate jurisdiction, however, understates the confusion in the courts of appeals concerning Section

16(a)(1)(A). The circuits are in utter disarray as to the proper method of interpreting and applying that statute. Some circuits—including circuits on *both* sides of the divide—look to the merits of the Section 3 motion to determine whether appellate jurisdiction exists under Section 16(a)(1)(A). Other circuits, however, refrain from any consideration of the merits of the Section 3 motion and limit the inquiry to whether a Section 3 motion was filed and denied.

a. On one side of the divide are the decisions of the D.C. Circuit in *DSMC*, the Tenth Circuit in *Universal Service Fund*, and the decision below of the Sixth Circuit adopting the reasoning of *DSMC* and *Universal Service Fund*. These decisions collapse appellate jurisdiction under Section 16(a)(1)(A) into the merits and hold that appellate jurisdiction does not exist over denials of Section 3 motions involving non-signatories because Section 3 does not apply as a matter of law to such claims, even if the non-signatory can otherwise enforce the arbitration agreement under principles of contract and agency law.

b. On the other side of the divide is the most recent pronouncement of the Second Circuit, the Third Circuit, and the most recent pronouncements of the Fifth Circuit.

The most recent word from the Second Circuit is *Ross*, where the court of appeals found that Section 16 conferred appellate jurisdiction over an appeal of a denial of a non-signatory's motion to stay under Section 3 and motion to compel arbitration under Section 4 of the FAA. Acknowledging its conflict

with the D.C. and Tenth Circuit decisions in *DSMC* and *Universal Service Fund*, *see* 478 F.3d at 100 n.2, the Second Circuit nonetheless held that "when a district court finds that a signatory to a written arbitration agreement is equitably estopped from avoiding arbitration with a non-signatory, the writing requirement of Section 16 of the FAA is met." 478 F.3d at 100 (Winter, J.).

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the Third Circuit held that Section 16(a)(1)(A) conferred appellate jurisdiction over the denial of a non-signatory's[10] motion under Section 3 of FAA. In doing so, the Third Circuit maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(a) and the merits of a Section 3 motion, holding that appellate jurisdiction exists so long as a "prima facie" Section 3 motion is made and denied. *See* 482 F.3d at 212-213.

In the Fifth Circuit's most recent word on this question, *Waste Management, Inc. v. Residuos Industriales Multiquim, S.A.*, 372 F.3d 339 (5th Cir. 2004), the court of appeals held that Section 16(a)(1)(A) conferred appellate jurisdiction over the denial of a non-signatory's Section 3 motion to the extent that the motion was meritorious. *See id.* at 343 (observing that the jurisdictional inquiry was "identical to the substance of this interlocutory appeal"). Similarly, in *Hill v. GE Power Systems*, 282 F.3d 343 (5th Cir. 2002), another panel of the

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[10] In *Ehleiter*, the non-signatory invoking Section 3 claimed to be an "affiliate" of a signatory. *See* 482 F.3d at 213.

Fifth Circuit held that "[b]ecause § 3 is applicable [to non-signatories], we have jurisdiction to hear [the] appeal pursuant to § 16(a)(1) of the FAA." *Id.* at 348.

c. Although the most recent pronouncements of the Second and Fifth Circuits align them with the Third Circuit and place them in conflict with the D.C., Tenth, and Sixth Circuits, both the Second and Fifth Circuits are ridden with unresolved intra-circuit conflicts. The Seventh Circuit is in a class by itself, with a paradoxical panel decision that at once expressly finds and then seemingly rejects appellate jurisdiction.

The Second Circuit's decision in *Ross* upholding appellate jurisdiction under Section 16(a)(1)(A) conflicts with an earlier decision of that court, *Sierra Rutile Ltd. v. Katz*, 937 F.2d 743 (2d Cir. 1991), in which a different panel of that court held that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions involving non-signatories because Section 3 does not apply to such claims. *See id.* at 748.[11]

Similarly, the Fifth Circuit's more recent decisions in *Waste Management* and *Hill* conflict

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[11] Ironically, the D.C. Circuit in *DSMC* cited *Katz* to support its holding that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions involving non-signatories. *See DSMC*, 349 F.3d at 684. Thus, although the Second Circuit in *Ross* expressed disagreement with *DSMC*, *DSMC* followed the Second Circuit's earlier decision in *Katz*.

with *Adams v. Georgia Gulf Corp.*, 237 F.3d 538 (5th Cir. 2001), where yet another panel of that court held that a non-signatory cannot invoke Section 3 and that "[s]ince § 3 does not apply, § 16 cannot provide us with jurisdiction to hear his appeal." *Id.* at 541; *see also May v. Higbee Co.*, 372 F.3d 757, 762 (5th Cir. 2004) (noting the inconsistency between *Adams* and *Hill* and stating "we have no occasion to resolve any disharmony in our circuit's cases regarding the rights of litigants who are not actually parties to an arbitration agreement").

In *IDS Life Insurance Co. v. SunAmerica, Inc.*, 103 F.3d 524 (7th Cir. 1996) (Posner, J.), the Seventh Circuit held that it had appellate jurisdiction under Section 16(a)(1)(A) over the denial of a motion to stay under Section 3 in a case involving non-signatories to the contract. *See id.* at 527 (holding that the non-signatories to the arbitration agreement "having been denied a stay pending arbitration, have a right to appeal under section 16"); *id.* at 528 ("Our jurisdiction limited to the [non-signatory] defendants' appeal, we turn at last to the merits of that appeal."). In so doing, the Seventh Circuit at least initially maintained the analytical distinction between appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3.

Later in the opinion, however, the Seventh Circuit in *IDS* concluded that Section 3 does not apply to claims involving non-signatories and seemingly *rejected* appellate jurisdiction under Section 16(a)(1)(A) on that basis. *See* 103 F.3d at 530 ("We think that section 3 was irrelevant. So their [the non-signatories'] appeal must fail—and for

the additional reason that the denial of a stay pending arbitration is appealable only when the stay was sought 'under section 3 of this title.' 9 U.S.C. § 16(a)(1)(A).").[12] These statements cannot be reconciled with the earlier statements in the opinion that appellate jurisdiction existed over the non-signatories' appeal, *see* 103 F.3d at 527, 528, nor with the opinion's concluding paragraph, which affirmed the district court's judgment *on the merits* as to the non-signatories, but dismissed the appeal as to other parties, *see* 103 F.3d at 530 ("The judgment [as to the non-signatories] is affirmed."). Thus, the most that can be said of *IDS* is that it is internally inconsistent because it seemingly straddles both sides of the divide.

d. The First, Fourth, Eighth, and Eleventh Circuits have not expressly addressed the issue of appellate jurisdiction under Section 16(a)(1)(A) over denials of Section 3 motions involving non-signatories, but nevertheless have exercised appellate jurisdiction in such cases. *See, e.g.*, *Sourcing Unlimited*, 526 F.3d at 44 n.6 (noting that "[s]everal . . . circuits, including our own, have . . . exercised jurisdiction over interlocutory appeals under § 16(a)(1)(A) or (B) where one or more party to the dispute was arguably not a signatory to the

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[12] The D.C. Circuit in *DSMC* cited this passage of *IDS* to support its holding that Section 16(a)(1)(A) does not confer appellate jurisdiction over Section 3 motions to stay claims involving non-signatories. *See DSMC*, 349 F.3d at 684.

written arbitration agreement"); *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (non-signatory appeal of denial of a motion to stay under Section 3); *Long v. Silver*, 248 F.3d 309 (4th Cir. 2001) (non-signatory appeal of denial of motion to stay under Section 3 and motion to compel arbitration under Section 4); *AgGrow Oils*, 242 F.3d 777 (non-signatory appeal of denial of motion to stay under Section 3); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004) (non-signatories' appeal of denial of motion to stay under Sections 3 and motion to compel arbitration under Section 4).

Although these circuits have not expressly addressed appellate jurisdiction, as more fully discussed *infra* at 22-23, they do hold on the merits that Section 3 allows a district court to stay claims against non-signatories when the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. These holdings conflict with the rationale of the D.C., Tenth, and Sixth Circuits for denying appellate jurisdiction under Section 16(1)(A)(1). Thus, the First, Fourth, Eighth, and Eleventh Circuits are effectively aligned with the Third Circuit and the most recent pronouncements of the Second and Fifth Circuits on the issue of appellate jurisdiction under Section 16(1)(A)(1).

e. Compounding the division and confusion concerning appellate jurisdiction under Section 16(a)(1)(A) is the jurisprudential anarchy that reigns with regard to the proper method for interpreting and applying that provision. Every decision that

denies appellate jurisdiction over Section 3 motions involving non-signatories does so based on the merits of the Section 3 motion, holding that, as a matter of law, Section 3 does not apply to claims involving non-signatories to the arbitration agreement. Decisions upholding appellate jurisdiction under Section 16(a)(1)(A), however, do so for wholly inconsistent reasons.

On one hand, the Second and Fifth Circuit decisions upholding appellate jurisdiction look to the merits of the Section 3 motion, and uphold appellate jurisdiction to the extent that a non-signatory can demonstrate a right to enforce the arbitration agreement under equitable estoppel or other principles of contract and agency law. *See Ross*, 478 F.3d at 100; *Waste Mgmt.*, 372 F.3d at 343.

On the other hand, the Third Circuit simply looks to whether a Section 3 motion has been made and denied and eschews any considerations of the merits. *Ehleiter* explains:

> GSI's stay motion in the Superior Court alleged that the claim at issue in that suit was within the scope of a written agreement to arbitrate and claimed entitlement to a stay mandated by Section 3. Its motion thus alleged a prima facie case of entitlement to a Section 3 stay. That motion was denied. It follows, from a literal reading of Section 16(a)(1)(A) and our interpretative case law, we conclude, that that section conferred jurisdiction on

> the Appellate Division to review the Superior Court's denial of a stay.

482 F.3d at 212.

The test for appellate jurisdiction articulated in *Ehleiter* is consistent with other decisions interpreting Section 16(a)(1)(A) in cases involving only signatories. In *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005) (Easterbrook, J.), the Seventh Circuit explained: "Appellate jurisdiction under § 16(a)(1)(A) depends on the existence (and denial) of a motion for stay pending arbitration, *not on the movant being correct.* If a § 3 motion is made and denied, then appellate jurisdiction exists to determine whether the denial was proper." *Id.* at 800 (emphasis added); *see also Telecom Italia, SPA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001) (rejecting merits-based argument that appellate jurisdiction was absent over denial of Section 3 motion, holding that a merits analysis "confuses the reason for the District Court's ruling against arbitration with the appealability of the ruling. Whether or not the District Court was correct in ruling against arbitration, *its ruling denied a requested stay of the action pending arbitration and was for that reason appealable*") (emphasis added).

In a variation on the same theme, a different panel of the Eleventh Circuit held that, as long as the Section 3 motion is non-frivolous, appellate jurisdiction exists under Section 16(a)(1)(A). *See Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) ("That

Thione might not be entitled to a § 3 stay on the merits hardly means it did not request one . . . . Because Thione made a non-frivolous motion for a stay pending arbitration and that motion was denied, we have jurisdiction.").

II. The Courts of Appeals Are Also Deeply Divided Over Whether Section 3 Applies When Non-Signatories Can Otherwise Enforce the Arbitration Agreement Under Principles of Contract and Agency Law, Including Equitable Estoppel

The circuit split involving appellate jurisdiction under Section 16(a)(1)(A) has its origins in an older circuit split involving the merits of Section 3. Three circuits now hold that, as a matter of law, Section 3 does not apply to claims involving non-signatories, even if the non-signatories can otherwise enforce the arbitration agreement under principles of contract and agency law, including equitable estoppel. Five circuits, on the other hand, recognize that if non-signatories can otherwise enforce the relevant arbitration agreement under principles of contract and agency law, Section 3 allows a district court to stay claims against the non-signatories. Yet another circuit has applied the same principle in the context of Section 4, and its rationale applies with equal force in the context of Section 3. Finally, three other circuits are ridden with lingering unresolved intra-circuit conflicts on this issue.

a. On one side of the Section 3 divide are the D.C., Tenth, and Sixth Circuits, which hold that

Section 3 does not apply as a matter of law to claims involving non-signatories. *See DSMC*, 349 F.3d at 685 ("We simply conclude that the mandatory stay provision of Section 3 does not apply to litigation involving parties not subject to a written arbitration agreement, and therefore hold that this court lacks jurisdiction under Section 16(a)(1)(A).");[13] *Universal Serv. Fund*, 428 F.3d at 942 ("[W]hether Defendants are appealing from the district court's denial of a stay or its refusal to compel arbitration, the plain language of the applicable jurisdictional statute mandates Defendants' prior reliance upon a *written agreement* to arbitrate as a condition precedent to our jurisdiction."); Pet. App. 2a ("[N]one of the defendants involved in this appeal was a signatory to the written arbitration agreement in question. . . . In the absence of an applicable written agreement to arbitrate, the plaintiffs contend that Section 3 is inapplicable in this action . . . . We agree.").

b. On the other side of the Section 3 divide, the First, Fourth, Eighth, Ninth, and Eleventh Circuits recognize that Section 3 applies to claims involving non-signatories when non-signatories can establish that they can enforce the arbitration agreement under principles of contract and agency law. *See McCarthy*, 22 F.3d at 356, ("[T]he law recognizes certain contract and agency principles under which nonsignatories sometimes can be obligated by, or benefit from, agreements signed by others, and these principles can apply to arbitration provisions. Thus,

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[13] The district court in the D.C. Circuit reads *DSMC* as having decided the merits. *See Invista N. Am.*, 503 F. Supp. 2d at 203.

appellant's failure to sign the Purchase Agreement individually does not in and of itself settle the somewhat different question of whether he can invoke [for purposes of Section 3] the arbitration clause contained therein."); *Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 62 n.2 (1st Cir. 2003) (for purposes of motions to stay under Section 3 or compel under Section 4, "[a] non-signatory may be bound by or acquire rights under an arbitration agreement under ordinary state-law principles of agency or contract"); *Long*, 248 F.3d at 320 (for purposes of a motion to stay under Section 3 and motion to compel under Section 4, "[a] non-signatory may invoke an arbitration clause under ordinary state-law principles of agency or contract"); *AgGrow Oils*, 242 F.3d at 780, 782 n.5 (whether non-signatory could invoke Section 3 turned on "ordinary state law contract principles" and noting that its cases hold that "9 U.S.C. § 3 authorizes a stay in favor of a non-party to the arbitration agreement," in conflict with the Seventh Circuit's decision in *IDS*); *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101 (9th Cir. 2006) (for purposes of motion to stay under Section 3 and motion to compel under Section 4, "non-signatories can enforce arbitration agreements as third party beneficiaries"); *Blinco*, 400 F.3d at 1312 ("The scope of the Note's arbitration clause is sufficiently broad to allow non-signatories to invoke [for purposes of Sections 3 and 4] the clause where, as here, they face claims derived from the Note.").

c. The Third Circuit has addressed this issue in the context of a motion to compel arbitration under Section 4, and in so doing recognized that non-signatories may be subject to an arbitration

agreement under principles of contract and agency law. *See E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 194-95 (3d Cir. 2001) ("Because arbitration is a creature of contract law, when asked to enforce an arbitration agreement against a non-signatory to an arbitration clause, we ask whether he or she is bound by that agreement under traditional principles of contract and agency law."). This rationale applies with equal force to motions to stay under Section 3, so the Third Circuit is effectively aligned with the First, Fourth, Eighth, Ninth, and Eleventh Circuits on the second question presented.

d. The Second, Fifth, and Seventh Circuits straddle both sides of the Section 3 divide with unresolved intra-circuit conflicts. In *Ross*, the Second Circuit held non-signatories may invoke Section 3 under principles of contract law, including equitable estoppel. *See* 478 F.3d at 99 ("[W]e have recognized a number of common law principles of contract law that may allow non-signatories to enforce an arbitration agreement [under Section 3], including equitable estoppel."). *Ross*, however, conflicts with *Nederlandse Erts-Tankersmattschappij, N.V. v. Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964), which held that Section 3 did not permit a stay when the defendants were not signatories to the arbitration agreement. *Id.* at 441. Pre-*Ross* panels of the Second Circuit followed *Nederlandse* and thereby conflict with *Ross*. *See Katz*, 937 F.2d at 748 (following *Nederlandse*); *Lauritzen*, 943 F.2d at 224-25 (reaffirming and following *Nederlandse*).

In *Waste Management,* the Fifth Circuit held that Section 3 does apply when non-signatories can otherwise enforce the arbitration agreement. *See* 372 F.3d at 342 ("A parsing of the language of § 3 demonstrates that, in certain limited circumstances, non-signatories do have the right to ask the court for a *mandatory* stay of the litigation, in favor of pending arbitration to which they are not party.") (emphasis by court). *Waste Management*, however, conflicts with the Fifth Circuit's decisions in *Adams* and *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989), both of which, citing *Nederlandse,* held that Section 3 does not apply to claims involving non-signatories. *See Adams*, 237 F.3d at 540; *Talbott Big Foot*, 887 F.2d at 614.

In *IDS*, the Seventh Circuit followed the Second Circuit's decisions in *Nederlandse* and *Lauritzen,* and the Fifth Circuit's decision in *In re Talbott Big Foot,* and held that Section 3 only applies to claims involving signatories. *See* 103 F.3d at 529 ("Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay under the arbitration act . . . must be a party to the agreement to arbitrate, as must be the person sought to be stayed."). Although the Seventh Circuit in *IDS* followed *Lauritzen,* the Second Circuit in *Lauritzen* noted its conflict with an earlier Seventh Circuit decision. *See Lauritzen*, 943 F.2d at 224 n.6. (admitting conflict with *Morrie Mages & Shirley Mages Foundation v. Thrifty Corp.*, 916 F.2d 402 (7th Cir. 1990)). In *Thrifty*, the Seventh Circuit held that "Thrifty, as a party to litigation involving issues subject to an arbitration agreement, is entitled to a stay under section 3 of the FAA regardless of its

status as party to the arbitration agreement." 916 F.2d at 407. By following *Lauritzen* rather than its earlier decision in *Thrifty*, the Seventh Circuit in *IDS* created an intra-circuit conflict.

III. The Questions Presented Are Recurring, Important and Should Be Resolved by This Court

The questions presented are plainly recurring, as almost every circuit has spoken at one time or another on these questions. District courts throughout the country regularly grapple with these questions and the confusion generated by the conflicting decisions of the courts of appeals. *Compare Chew v. KPMG, LLP*, 407 F. Supp. 2d 790, 803-04 (S.D. Miss. 2006) (recognizing that a non-signatory may invoke Section 3), *Denney v. Jenkens & Gilchrist*, 412 F. Supp. 2d 293, 297-301 (S.D.N.Y. 2005) (same), *Blumenthal-Kahn Elec. Ltd. P'ship v. Am. Home Assurance Co.*, 236 F. Supp. 2d 575, 581-83 (E.D. Va. 2002) (same), *and Hoffman v. Deloitte & Touche, LLP*, 143 F. Supp. 2d 995, 1004-05 (N.D. Ill. 2001) (same), *with Nakamura Trading Co. v. Sankyo Corp.*, No. 05 CV 7205, 2006 U.S. Dist. LEXIS 26301, at *13 (N.D. Ill. Apr. 19, 2006) *and Anderson v. Corinthian Colls., Inc.*, No. C06-6157, 2006 U.S. Dist. LEXIS 57698, at *5 (W.D. Wash. Aug. 16, 2006) (rejecting non-signatory's attempt to invoke Section 3). Indeed, the questions arise with such frequency that some circuits have had difficulty maintaining the uniformity of their decisions, as evidenced by unresolved intra-circuit splits in the Second, Fifth, and Seventh Circuits.

The questions presented are also important to the smooth functioning of the FAA. An earlier circuit split involving a different aspect of appellate jurisdiction under Section 16 warranted this Court's attention for that reason. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). On the merits, the Sixth Circuit's interpretation of Section 3 destabilizes the FAA by "drastically alter[ing]" the application of the FAA to cases involving non-signatories. *Ross*, 478 F.3d at 99.

IV. The Sixth Circuit Decision Is Erroneous As to Appellate Jurisdiction Under Section 16(a)(1)(A)

The Sixth Circuit erred by collapsing the merits of petitioners' Section 3 motions into its analysis of appellate jurisdiction, which are entirely different inquiries. All that the text of Section 16(1)(a)(A) requires for appellate jurisdiction is that an appeal be taken from an order denying a motion to stay under Section 3, which is precisely what petitioners did here. In addition, the Sixth Circuit decision is inconsistent with the pro-arbitration structure of the statute and this Court's decisions concerning appellate jurisdiction.

a. Section 16(a)(1)(A) provides that "[a]n appeal may be taken from—(1) an order —(A) refusing a stay of any action under section 3 of this title [.]" 9 U.S.C. § 16(a)(1)(A). On the face of the statute, the *only* requirement for appellate jurisdiction is an order denying a motion for stay brought under Section 3. That simple test is satisfied in this case:

petitioners moved for a stay under Section 3, and the district court denied the motion.

Rather than apply Section 16(a)(1)(A)'s simple jurisdictional test, the Sixth Circuit, like the D.C. Circuit in *DSMC* before it, collapsed the issue of appellate jurisdiction into the merits, asking whether petitioners' motion was properly brought under Section 3. Pet. App. 6a. Nothing in the text of Section 16(a)(1)(A), however, permits consideration (for purposes of appellate jurisdiction) of the merits of a Section 3 motion denied by the district court. *See Omni-Tech*, 432 F.3d at 800; *Ehleiter*, 482 F.3d at 212; *Telecom Italia*, 248 F.3d at 1114.

b. The Sixth Circuit's decision is also in conflict with the purpose of Section 16, which Congress added to the FAA in 1988. The addition of this provision did two things that speak volumes about its purpose. First, it changed the law to provide for immediate interlocutory appeal of denials of motions to compel arbitration or stay proceedings, 9 U.S.C. § 16(a)(1), something that was not permitted at the time, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275, 287 (1988) (holding denial of stays of litigation not appealable). Second, it simultaneously barred interlocutory appeal of all orders granting motions to compel arbitration or stay proceedings. 9 U.S.C. § 16(b)(1)-(2).

Section 16, therefore, demonstrates an undisputed Congressional preference: decisions disfavoring arbitration decisions get an immediate appeal, while those favoring arbitration do not. *See Bradford-Scott Data Corp. v. Physician Computer*

Network, Inc., 128 F.3d 504, 505 (7th Cir. 1997). "By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums." *Blinco,* 366 F.3d at 1251; *see also Bradford-Scott*, 128 F.3d at 506. This right of interlocutory appeal, and the attendant preservation of arbitration rights, is consistent with the FAA's "liberal federal policy favoring arbitration agreements." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (citation omitted).

The rule set forth by the Sixth Circuit flies in the face of the clear congressional purpose behind Section 16. Even though Section 16(a)(1)(A) provides for appellate jurisdiction of decisions adverse to arbitration, the Court of Appeals set forth a categorical rule barring jurisdiction, solely because one of the parties to the case was not a signatory to the arbitration agreement. When Congress wanted to set forth categorical rules barring appeals, it did so clearly and unmistakably. 9 U.S.C. § 16(b)(1)-(4). The Sixth Circuit's decision to create a new category of proscribed appeals is contrary to both the language and purpose of Section 16.

c. By conflating the issue of appellate jurisdiction with the merits of petitioners' Section 3 motions, the Sixth Circuit decision also conflicts with this Court's cases, which teach that appellate jurisdiction does not turn on the merits of the appeal. *See Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) ("In any event, the question before us here—

whether there is jurisdiction over the appeal, as opposed to whether the appeal is frivolous—must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order. Appeal rights cannot depend upon the facts of a particular case.") (citation omitted).

V. The Sixth Circuit Decision Is Erroneous As to the Merits of Section 3

The Sixth Circuit decision that Section 3 does not apply as a matter of law to claims involving non-signatories is erroneous for two reasons. First, the text of Section 3 requires a stay if the district court determines that the claim is "referable to arbitration under such an agreement [in writing]." 9 U.S.C. § 3. Whether a claim against a non-signatory is referable to arbitration depends upon principles of contract and agency law that the Sixth Circuit did not consider. Second, the Sixth Circuit's categorical rule that Section 3 does not apply to claims involving non-signatories, even if the non-signatories can otherwise enforce the relevant arbitration agreement, leads to anomalous results and thwarts the purposes of the FAA.

a. Section 3 provides that, upon finding that "the issue involved in such suit or proceeding is referable to arbitration" under "an agreement in writing for such arbitration," the district court "shall on application of *one of the parties* stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added). Although Section 3

plainly requires the existence of "an agreement in writing" to arbitrate, nothing in Section 3 limits the availability of a stay to claims involving *signatories* to the agreement. Instead, Section 3 requires the district court to stay the action upon application of any "part[y]" to the action, provided that "the issue involved in such suit or proceeding is referable to arbitration under such an agreement [in writing]." 9 U.S.C. § 3.

Thus, whether respondents' claims against petitioners are "referable to arbitration under such an agreement" turns on the issues raised by petitioners in the Sixth Circuit: whether respondents' claims fall within the scope of the arbitration agreement, and whether petitioners can enforce the arbitration agreement under equitable estoppel principles. *See Campbell v. Gen. Dynamics Gov't Sys. Corp.*, 407 F.3d 546, 552 (1st Cir. 2005) ("A party seeking to stay proceedings under section 3 or to compel arbitration under section 4 must demonstrate 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.*") (emphasis added).

Under this Court's cases, whether a party may enforce (or be bound to) an arbitration agreement is determined not by the FAA, but by reference to ordinary principles of contract law. *See First Options v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss

below) should apply ordinary state-law principles that govern the formation of contracts.").

Almost fifty years ago, the Second Circuit explained why ordinary principles of contract and agency law, and not the FAA, determine whether non-signatories may enforce or be bound to arbitration agreements:

> It is true that under the Act, a[n] ["agreement in writing"] is the *sine qua non* of an enforceable arbitration agreement. 9 U.S.C. §§ 2, 4. It does not follow, however, that under the Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. For the Act contains no built-in Statute of Frauds provision but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound by such written provisions and of course parties can become contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law.

Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960) (footnotes omitted).[14] More recently, Judge Kozinski observed for the Ninth Circuit that under "hundreds of years of common law," non-signatories can enforce or be bound by arbitration agreements "under ordinary contract and agency principles." *Comer*, 436 F.3d at 1104 n.10.

Not surprisingly, then, both leading treatises on commercial arbitration recognize that non-signatories may be deemed parties to arbitration agreements by application of contract and agency law principles. *See* DOMKE ON COMMERCIAL ARBITRATION § 13:1, at 13-2 n.2 (3d ed. 2008) ("A non-signatory to a contract may be deemed a party to arbitration under the Federal Arbitration Act through application of contract and agency law principles.") (citation omitted); 1 OEHMKE COMMERCIAL ARBITRATION § 11:1, at 11-2 (3d ed. 2005) (under principles of contract and agency law, "[a] non-signatory can compel arbitration, be ordered to arbitrate, or be bound by the resulting arbitral award . . . ."). Thus, a non-signatory can compel arbitration "when the signatory to the contract containing a [sic] arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." OEHMKE § 11:1, at 11-2. That is precisely the theory that petitioners raised in both the district court and

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[14] *Ross* is a lineal descendant of *Fisser*. *See Ross*, 478 F.3d at 96 (following *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995)); *see Thomson-CSF*, 64 F.3d at 776 (following *Fisser*).

the Sixth Circuit as to why they can enforce the arbitration agreement in this case.

In this case, the Sixth Circuit erred by holding, as a matter of law, that Section 3 does not apply to claims involving non-signatories. Section 3 does apply to claims involving non-signatories if the claim sought to be stayed is "referable to arbitration under such an agreement." 9 U.S.C. § 3. Whether such claims are "referable to arbitration under an agreement" turns on principles of contract and agency law never considered by the Sixth Circuit because of its erroneous construction of Section 3.

b. The Sixth Circuit decision is also erroneous because it is contrary to the broader pro-arbitration purposes of the FAA generally and Section 3 specifically. The purpose of Section 3 is to require the stay of claims "referable to arbitration under such agreement." Under the Sixth Circuit's categorical rule, even if claims involving non-signatories are otherwise referable to arbitration under long-standing principles of contract and agency law applicable to the agreement, Section 3 does not apply and non-signatories are left to rely on the district court's discretion, rather than the mandatory language of Section 3. This strange result cannot be the law.

CONCLUSION

With its decision in this case, the Sixth Circuit disregarded the considered views of the leading treatises on commercial arbitration and "hundreds of years of common law," *Comer*, 436 F.3d at 1104 n.10,

took sides in two circuit splits, and drew an arbitrary line—denying non-signatories the right to request a Section 3 stay and appeal the denial of that request under Section 16(a)(1)(A)—without any basis in the language of the statute. Only this Court's intervention can establish uniform application of federal law on these important questions of commercial arbitration. Accordingly, this Court should grant this petition, reverse the court of appeals, both as to appellate jurisdiction under Section 16(a)(1)(A) and the merits of Section 3, and remand with instructions to reverse the district court's denial of petitioners' Section 3 motion if petitioners are able to demonstrate, as they argued below, that (1) respondents' claims are within the scope of the arbitration agreement, and (2) petitioners can enforce the arbitration agreement under equitable estoppel principles.

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