

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 FOR PETITIONERS

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QUESTIONS PRESENTED

Under Section 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 2, state law principles of “law and equity” applicable to contracts generally govern the validity, revocability, and enforceability of a “written provision” to arbitrate. Section 3 of the FAA, 9 U.S.C. § 3, in turn provides a device to enforce arbitration rights protected under Section 2 by requiring a district court, upon the application of any party, to stay “any issue 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 an arbitration agreement.
- (2) Whether Section 3 of the FAA requires a district court to stay claims against non-signatories to an arbitration agreement when the non-signatories can otherwise enforce the arbitration agreement under state law principles of law and equity.

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, LLC; 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 WJG Strategic Investments, LLC.

Petitioners' Rule 29.6 disclosure statement is found at page ii of their petition for a writ of certiorari.

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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 order denying petitioners’ motions to stay under Section 3 of the Federal Arbitration Act is reprinted at Pet. App. 17a. The district court’s statement from the bench explaining its reasons for denying petitioners’ Section 3 motions is reprinted at Pet. App. 13a–16a.

JURISDICTION

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 a writ of certiorari until August 7, 2008. Supreme Court Dkt. No. 07A1031. Petitioners timely filed a petition for a writ of certiorari on August 4, 2008, which this Court granted on November 7, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

9 U.S.C. § 2 provides:

2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out

of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, 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. § 3 provides:

3. Stay of proceedings where issue therein referable to arbitration

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. § 4 provides in pertinent part:

4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

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

16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed[.]

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title[.]

STATEMENT OF THE CASE

A. Background Legal Principles under the FAA

This case concerns the availability of relief under the Federal Arbitration Act (“FAA” or “Act”), 9 U.S.C. § 1 *et seq.*, when non-signatories seek to enforce the relevant arbitration agreement in federal district court.

Section 2 of the FAA, which is the Act’s “centerpiece,” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), provides that a “written provision” to arbitrate future controversies arising out of the contract containing the 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. Section 2 was intended to overturn long-standing judicial hostility toward the specific enforcement of arbitration agreements, *Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944), and thereby “place arbitration agreements ‘upon the same footing as other contracts.’” *Scherk v. Alberto-*

Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. at 1, 2 (1924)).

Under Section 2, courts “apply general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act.” *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 475 (1989) (citing *Perry v. Thomas*, 482 U.S. 483, 492–493 n.9 (1987)). In requiring that arbitration agreements be construed according to state law principles of “law and equity” generally applicable to contracts, Section 2 of the FAA requires that the entire panoply of state law be made applicable to arbitration agreements, not just the law of contracts. See 1 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act* § 10.6.2, at 10:28 (1999) (“*Federal Arbitration Law*”) (“It should be noted that contract law alone is an insufficient foundation for the FAA. The FAA also presupposes the existence of a whole corpus juris of general law: property, torts, agency, corporations, criminal, and regulation, to mention a few of countless possible examples.”).

Section 2’s broad application of state law to the interpretation of arbitration agreements is subject only to the limitation that state law not discriminate against arbitration agreements, *Perry*, 482 U.S. at 492–493 n.9, and the “federal policy favoring arbitration,” under which “ambiguities as to the scope of the arbitration clause itself [are] resolved in favor of arbitration.” *Volt*, 489 U.S. at 476.

Sections 3 and 4 of the FAA in turn “implement[]” the “declared policy” of Section 2. *Anaconda*, 322 U.S. at 44; see also *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (Sections 3 and 4 of the FAA are “parallel devices for enforcing an arbitration agreement”); Ian R. MacNeil, *American Arbitration Law* 102 (1992) (*American Arbitration Law*) (“Sections 3 and 4 are the key sections implementing the enforceability principle [of Section 2].”).

Section 3 of the FAA provides a defendant sued in district court on a claim subject to an arbitration agreement with a mechanism that effectively compels specific performance: “[O]n application of one of the parties,” a district court shall stay proceedings “until such arbitration has been had” if the court concludes that the “issue involved in such suit or proceeding is referable to arbitration” under “an agreement in writing for such arbitration.” 9 U.S.C. § 3. “The concept seems to be that a power to grant a stay is enough without the power to order that the arbitration proceed, for, if a stay be granted, the plaintiff can never get relief unless he proceeds to arbitration.” *Anaconda*, 322 U.S. at 45.

Section 4 of the FAA provides a putative arbitration plaintiff with a mechanism to compel specific performance of an arbitration agreement when the putative arbitration defendant refuses to arbitrate. Section 4 allows a “party aggrieved” by the refusal of “another to arbitrate under a written agreement for arbitration” to petition a district court which otherwise has jurisdiction “for an order

directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

As originally enacted, the FAA provided no express right of immediate appellate review of orders denying relief under Sections 3 and 4. Over time, such orders were understood as appealable in certain cases under 28 U.S.C. § 1292(a)(1), by operation of the complicated *Enelow-Ettelson* doctrine. See, e.g., *Moretrench Am. Corp. v. S.J. Groves & Sons Co.*, 839 F.2d 1284, 1287 (7th Cir. 1988) (Section 3); *Kan. Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) (Section 4). In *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), this Court overturned the *Enelow-Ettelson* doctrine, limiting interlocutory review of Section 3 and 4 orders to only those rare cases where the order threatened “serious, perhaps irreparable, consequence[s]”—a difficult standard to satisfy. See 485 U.S. at 287–288 (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)).

In response to *Gulfstream*, Congress amended the FAA in 1988 to provide an express right of immediate interlocutory appeal of orders denying motions to stay under Section 3 and to compel under Section 4.¹ Pub. L. No. 100-702, tit. X, § 1019(a), 102 Stat. 4671, § 15 (1988), renumbered § 16, Pub. L. No. 101-650, tit. III, § 325(a)(1), 104 Stat. 5120 (1990), codified at 9 U.S.C. § 16(a)(1). Section 16(a)(1)(A)

¹ 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.

allows an immediate interlocutory appeal from an order “refusing a stay of any action under section 3 of this title.” 9 U.S.C. § 16(a)(1)(A). Similarly, Section 16(a)(1)(B) allows an immediate interlocutory appeal from an order “denying a petition under section 4 of this title to order arbitration to proceed[.]” 9 U.S.C. § 16(a)(1)(B). At the same time, Congress expressly precluded interlocutory review of orders *granting* relief under Sections 3 and 4. *See* 9 U.S.C. § 16(b)(1)–(2).

B. Factual Background

In 1999, Bricolage Capital, LLC (“Bricolage”) and certain petitioners provided tax and investment advice to respondents Wayne Carlisle, James Bushman, and Gary Strassel concerning strategies designed to reduce their tax liability. Pet. App. 3a. To implement this advice, Carlisle, Bushman, and Strassel created limited liability corporations (“LLCs”), which are also respondents. Pet. App. 3a. The LLCs in turn entered into investment management agreements with Bricolage. Pet. App. 3a; J.A. 67, 86, 105. All of these agreements contained the following broad arbitration provision:

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

Pet. App. 3a–4a; J.A. 80–81, 99–100, 118–119 (emphasis added). Petitioners were not signatories to the investment management agreements containing this arbitration provision.

C. The District Court Decision

In 2005, respondents brought this diversity action against Bricolage and petitioners in the Eastern District of Kentucky. Pet. App. 4a; J.A. 11. Respondents alleged that the tax advice they received was faulty and, *inter alia*, that all defendants were jointly and severally liable for damages resulting from fraud, J.A. 34–37, and civil conspiracy, J.A. 37–38. Respondents further alleged that various defendants, including Bricolage, were also jointly and severally liable for damages resulting from breach of fiduciary duty, J.A. 44–45, and negligence, J.A. 46–49.

Petitioners moved to stay respondents' claims against them pursuant to Section 3 of the FAA. J.A. 52, 54, 63, 65. In their motion,² 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 provision contained in the investment management agreements between the LLCs and Bricolage. As petitioners argued, equitable estoppel required the arbi-

² For ease of comprehension, this brief refers to petitioners' Section 3 filings as a single motion, even though petitioners actually filed multiple Section 3 motions. See J.A. 52, 54, 63, 65.

tration of respondents' claims against them because respondents' claims fell within the scope of the arbitration provision and alleged substantially interdependent and concerted misconduct by both the signatory (Bricolage) and the non-signatories (petitioners) to the investment management agreements containing the arbitration provision.

The district court denied petitioners' motion to stay under Section 3, concluding (1) that petitioners did not satisfy the requirements for application of equitable estoppel and thus could not enforce the arbitration provision, and (2) that respondents' claims did not fall within the scope of the arbitration provision.³ Pet. App. 16a. Petitioners timely appealed this order to the Sixth Circuit pursuant to Section 16(a)(1)(A) of the FAA.

D. The Sixth Circuit Decision

In full merits briefing and oral argument before the Sixth Circuit, petitioners argued that the district court erred by not staying respondents' claims against them under Section 3 because (1) petitioners could enforce the arbitration provision under equitable estoppel principles, and (2) respondents' claims were within the scope of the provision. The Sixth Circuit, however, never considered these issues. *See* Pet. App. 5a ("The district court rejected

³ The district court also denied as moot Bricolage's own motion to stay under Section 3 because Bricolage filed for bankruptcy while its motion was pending. Pet. App. 18a–19a; Dist. Ct. Dkt. No. 73 (suggestion of bankruptcy).

the defendants' equitable-estoppel argument and denied the motion to stay for substantive reasons that need not detain us here[.]"). Instead, the Sixth Circuit dismissed petitioners' appeal for lack of appellate jurisdiction under Section 16(a)(1)(A) of the FAA. Pet. App. 12a.

At the outset, the Sixth Circuit noted that whether Section 16(a)(1) allows interlocutory appellate review of denials of Section 3 and 4 motions involving non-signatories has divided the courts of appeals. Pet. App. 5a.⁴ 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 circuit split, upholding appellate jurisdiction over denials of Section 3 motions to stay claims involving non-signatories to the arbitration agreement, the Sixth Circuit identified *Ross v.*

⁴ 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 J.A. 52, 54, 55, 57.

American Express Co., 478 F.3d 96 (2d Cir. 2007).
Pet. App. 7a.

With little elaboration, the Sixth Circuit then followed *DSMC* and *Universal Service Fund*. 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 without explaining their reason 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) by holding that, as a matter of law, neither Section 3 nor Section 4 of the FAA applies to claims involving non-signatories to an arbitration agreement. As to Section 4, the court reasoned that the applicable test is “whether the parties are *signatories* to a written agreement.” 349 F.3d at 683 (emphasis added). The court applied the same reasoning to Section 3: “The denial of the benefit of the mandatory stay provision to *non-signatories* has been grounded in the recognition that the non-signatory’s litigation with an arbitrating party cannot be referred to arbitration.” *Id.* at 684 (quoting *Adams v. Ga. Gulf Corp.*, 237 F.3d 538, 540 (5th Cir. 2001)) (emphasis added). *DSMC* thus stands for two related propositions: first, that Sections 3 and 4 of the FAA do not apply to claims involving non-signatories; and second, that Section 16(a)(1) does not allow interlocutory appellate review of denials of Section 3 and 4 motions involving claims of non-signatories.

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 brought by non-signatories. The Tenth Circuit reasoned: “[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 in original). Because the Tenth Circuit agreed with the D.C. Circuit’s conclusion that a non-signatory could not satisfy the “written agreement” requirement, it dismissed the appeal for lack of jurisdiction under Section 16(a)(1).

Given that the Sixth Circuit in this case adopted the reasoning of *DSMC* and *Universal Service Fund*, and that *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 state law principles of law and equity, including 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 its merits analysis 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–3a (emphasis added).

Hence, although the Sixth Circuit’s decision is ostensibly denominated as a dismissal for lack of *appellate jurisdiction*, in substance it established a categorical rule regarding Section 3 motions made to stay claims against non-signatories. Indeed, since the decision below, the Sixth Circuit has extended its categorical rule to Section 4 motions to compel arbitration of claims against non-signatories. See *Kimberlin v. Renasant Bank*, No. 07-6040, 2008 WL 4428417 (6th Cir. Sept. 25, 2008).

SUMMARY OF THE ARGUMENT

The Sixth Circuit committed two errors of statutory interpretation, first as to Section 16(a)(1)(A), and then as to Section 3. This Court should reverse both errors and remand this case to the Sixth Circuit to consider petitioners’ arguments that respondents’ claims are “referable to arbitration” under the doctrine of equitable estoppel.

1. The Sixth Circuit erred by deciding appellate jurisdiction under Section 16(a)(1)(A) by reference to its *merits* determination that Section 3 does not apply as a matter of law to claims involving non-signatories.

a. The text of Section 16(a)(1)(A) conditions appellate jurisdiction upon only two elements: first, that the appellant sought relief under Section 3, and

second, that the district court denied such relief. Petitioners satisfy that simple test, as they moved under Section 3 and the district court denied their motion. Any purported substantive defect in petitioners' Section 3 motion speaks only to the merits of petitioners' request for Section 3 relief, and is therefore irrelevant to the question of appellate jurisdiction.

b. Petitioners' textual reading of Section 16(a)(1) is confirmed by the structure of the FAA's provisions for appellate review, under which all orders hostile to arbitration under Sections 3 and 4 are immediately appealable whereas all Section 3 and 4 orders favorable to arbitration are not. By its interpretation of Section 16, the Sixth Circuit in effect created a new subcategory of banned interlocutory appeals—a subcategory absent from the text of Section 16.

c. Petitioners' interpretation of Section 16(a)(1) is further supported by this Court's decision in the analogous context of immunity appeals in *Behrens v. Pelletier*, 516 U.S. 299 (1996), under which appellate jurisdiction is determined "by focusing upon the category of orders appealed from, rather than upon the strength of the grounds for reversing the order." *Id.* at 311. The Sixth Circuit's analysis inverts the *Behrens* test by focusing not on the category of order appealed from (denials of Section 3 motions) but instead on the merits of an appellant's arguments for reversal.

d. Finally, petitioners' interpretation of Section 16(a)(1) is supported by considerations of judicial

efficiency. Petitioners' theory establishes a clear, bright-line test for appellate jurisdiction: was Section 3 relief sought and denied? This test should not disrupt district courts or burden courts of appeals with groundless Section 16 appeals. In *Behrens*, this Court approved of procedures adopted in several circuits for district courts to certify appeals as frivolous, thereby permitting district courts to retain jurisdiction pending appeal. Courts of appeals, for their part, retain their inherent authority to use summary procedures to weed out groundless appeals.

2. The Sixth Circuit also erred in its interpretation of Section 3. According to the Sixth Circuit, petitioners' Section 3 motion failed as a matter of law because there was no "written agreement to arbitrate" in view of petitioners' status as "[non-]signator[ies] to the written agreement in question." Pet. App. 2a, 3a.

a. The centerpiece of the FAA is Section 2, under which state law principles of "law and equity" generally applicable to contracts dictate the validity, revocability, and enforceability of arbitration provisions. In *Perry v. Thomas*, 482 U.S. 483 (1987), this Court recognized that whether a non-signatory can invoke a written arbitration provision turns not on the text of the FAA, but on state law principles made applicable by Section 2; whether the "arbitration provision inures to the benefit" of the non-signatory is determined under such state law principles. *Id.* at 492–493 & n.9. Thus, state law principles of "law and equity," and not Section 3,

control whether petitioners may enforce the arbitration agreement.

b. It is indisputable that “hundreds of years of common law” recognize that “non-parties” may enforce or be bound by contracts. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (Kozinski, J.). Applying such principles, courts have routinely held that non-signatories may enforce or be bound to arbitration agreements under myriad theories, including equitable estoppel. Similarly, scholarly treatises on contract law and commercial arbitration devote entire chapters to the various common law theories by which non-signatories may enforce or be bound to arbitration agreements. Thus, by exempting arbitration agreements from such ordinary common law rules applicable to contracts, the Sixth Circuit’s categorical rule runs contrary to the very purpose of Section 2: to place arbitration agreements on an equal footing with other contracts.

c. The Sixth Circuit’s reliance on Section 3 was therefore misplaced because Section 3 is merely a mechanism for enforcing state law rights recognized and protected by Section 2. Section 2, and the state law principles it applies, resolve the issue of a non-signatory’s rights and obligations under an arbitration agreement subject to the FAA. Although Section 3 certainly requires the existence of a written arbitration agreement, nothing in Section 3 or Section 2 requires that the arbitration agreement be signed. History confirms this reading of the statute, as Congress modeled the FAA on less-strict provisions of New York arbitration law not requiring

signatures, in contrast to a stricter provision of New York law requiring signatures and other formalities for certain arbitration agreements. Finally, the absence of a signature requirement under the FAA reflects the often informal nature of regular commercial practices and concern about the dampening effect upon arbitration from excessive formalities.

ARGUMENT

I. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 16(a)(1)(A) IS ERRONEOUS.

The Sixth Circuit first erred by rejecting jurisdiction over petitioners' appeal based on its evaluation of the *merits* of petitioners' Section 3 motions. All that the text of Section 16(a)(1)(A) requires for appellate jurisdiction is that an appeal be taken from an order denying a motion to stay under Section 3—precisely what petitioners did here. In addition to contradicting Section 16's text, the Sixth Circuit decision is inconsistent both with Congress's pro-arbitration intent and this Court's decisions distinguishing between appellate jurisdiction and the merits of a dispute. Finally, petitioners' interpretation of Section 16(a)(1) furthers judicial efficiency by establishing a clear, bright-line test for appellate jurisdiction.

A. Section 16(a)(1)(A) Conditions Jurisdiction Solely upon a Motion for and Denial of Relief under Section 3, Regardless of the Motion’s Merit.

1. Appellate jurisdiction over Section 3 appeals is governed by Section 16(a)(1)(A), which provides in full:

- (a) An 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).⁵ On its face, this section conditions jurisdiction upon only two requirements: (1) that the appellant filed a motion seeking a Section 3 stay, and (2) that the district court denied the requested stay. As Judge Easterbrook explained in *Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797 (7th Cir. 2005), “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).

⁵ Although Section 4 and its corresponding provision for appellate review, Section 16(a)(1)(B), are not at issue in this case, this Court’s decision in this case should also govern them as well, as there are no meaningful distinctions between the two jurisdictional provisions.

Tellingly, Section 16 makes no reference to the underlying merits of the stay request. Rather, the statute provides jurisdiction so long as the appellant has made a mere “*contention* that the contract provides for ‘arbitration,’” regardless of the substance of that claim. *Omni Tech*, 432 F.3d at 800 (emphasis in original); *see also Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1238 (11th Cir. 2008) (“That [appellant] might not be entitled to a § 3 stay on the merits hardly means it did not request one.”). Thus, Section 16(a)(1)(A) provides for jurisdiction so long as the appellant’s motion *alleges* entitlement to a Section 3 stay. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 212 (3d Cir. 2007).

It is beyond dispute that petitioners have satisfied this simple textual mandate. Petitioners moved to stay the district court proceedings under Section 3 of the FAA. J.A. 52, 54, 63, 65. The district court, in turn, denied petitioners’ motions on the merits. Pet. App. 16a. As a result, petitioners have fulfilled Section 16’s requirements in their entirety.

2. To circumvent Section 16’s plain text, respondents argued below that petitioners’ motion was not *actually* a Section 3 motion—nonwithstanding that it requested relief under Section 3 and the district court denied relief under Section 3—because petitioners relied upon equitable estoppel principles to claim rights under the arbitration provision. Resp. C.A. Br. at 16–17. According to respondents, petitioners’ reliance on equitable estoppel means that they have not satisfied Section 3’s “agreement

in writing” requirement, thereby taking the district court’s order outside the reach of the FAA’s provision of interlocutory review. Resp. C.A. Br. at 16–17. Yet respondents’ argument merely raised a potential defect in the *merits* of petitioners’ Section 3 claim, no different from any other argument relating to the merits of petitioners’ Section 3 motion. *See, e.g., Advanced Bodycare*, 524 F.3d at 1238 (stating, in response to similar contention, “[t]his argument merely duplicates the merits, and we reject it”). Such an argument therefore cannot circumvent Section 16’s clear statutory language.

In other contexts, courts of appeals have repeatedly recognized that arguments concerning the merits of Section 3 and 4 motions cannot defeat appellate jurisdiction under Section 16(a)(1). By definition, any interlocutory appeal under Section 16(a)(1) will only arise after a district court has denied the appellant’s Section 3 or Section 4 motion. Section 16 thus gives the courts of appeals jurisdiction over those disputed cases, in order to allow them to review the *merits* of the dispute quickly and efficiently. *See, e.g., Telecom Italia*, 248 F.3d at 1114 (“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.”). Any contrary rule would create a paradox, in which the resolution of the merits of a Section 16(a)(1) appeal might retroactively strip the court of the jurisdiction necessary to reach the issue in the first place. *See Palcko v. Airborne Express, Inc.*, 372 F.3d

588, 592 (3d Cir. 2004) (discussing circularity of such an interpretation of Section 16(a)(1)).

The firewall between appellate jurisdiction and the underlying merits remains intact even when the alleged defect in the Section 3 or Section 4 motion is that the dispute is outside the scope of the FAA's coverage. For example, challenges to the validity of an arbitration agreement—in essence, that the case lacks an “agreement in writing” as required by the FAA—do not remove Section 16(a)(1) jurisdiction over the interlocutory appeal of a denied motion for stay or to compel arbitration. *See, e.g., Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 102–104 (3d Cir. 2000) (Becker, C.J.) (Section 16(a)(1) confers appellate jurisdiction over a denial of a motion to compel arbitration even when the existence of an agreement to arbitrate is disputed). Similarly, arguments that a given agreement calls for a non-arbitral dispute resolution process, thus bringing it outside the scope of the FAA's coverage, have not served to defeat appellate jurisdiction. *See Omni Tech*, 432 F.3d at 798–800. Indeed, even contentions that the contract containing an arbitration provision falls within one of the FAA's express statutory exemptions have failed to undermine appellate jurisdiction over appeals asserting the right to a stay pending arbitration under the contract. *See Palcko*, 372 F.3d at 591–592 (rejecting claim that district court finding that contract fell within 9 U.S.C. § 1's “employment contract” exemption removed Section 16(a)(1) jurisdiction).

In each of these situations, courts recognized that Section 16's text foreclosed arguments parallel

to those made by respondents here: namely, that an alleged defect in an appellant's substantive claim for relief served to remove the claim entirely from the reach of Sections 3 or 4. Although any of these reasons could, if correct, require a court to reject a party's request for relief under Sections 3 or 4, they cannot serve to deny movants the opportunity to obtain immediate appellate review under Section 16(a)(1).

The same textual rule should control here. Regardless of the *merits* of petitioners' Section 3 motion, petitioners have certainly *alleged* that they are entitled to relief under Section 3. By denying the motion, the district court "refus[ed] a stay of an[] action under section 3 of this title." 9 U.S.C. § 16(a)(1)(A). The plain language of Section 16 therefore compels the conclusion that appellate jurisdiction exists over this case.

B. Congress Enacted Section 16 to Allow for Immediate Interlocutory Review of All Orders Hostile to Arbitration.

Petitioners' interpretation of Section 16(a)(1) is confirmed by the structure of the statute, which reflects Congress's clear intent to promote appeals of orders unfavorable to arbitration.

Congress enacted Section 16 in response to this Court's decision in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), which effectively terminated the right to interlocutory review of Section 3 and 4 orders. By enacting

Section 16, Congress “replace[d] the unlamented *Enelow-Ettelson* doctrine . . . with a simpler approach under which anti-arbitration decisions are immediately appealable, while orders enforcing arbitration clauses may be appealed only following the close of the entire case.” *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 505 (7th Cir. 1997) (citation omitted). Section 16 provides a bright-line rule that advances the federal policy favoring arbitration by ensuring that *all* orders denying relief under Sections 3 and 4 are immediately appealable, *see* 9 U.S.C. § 16(a)(1), while orders granting relief under Sections 3 and 4 are not. *See id.* at § 16(b). By giving extraordinary interlocutory preference to district court orders adverse to arbitration, Section 16 “reflects a deliberate determination that appeal rules should reflect a strong policy favoring arbitration.” 15B Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.17, at 9–10 (2d ed. 1992 & 2008 Supp.).

The Sixth Circuit’s interpretation of Section 16(a)(1) thus contradicts the clear congressional purpose behind Section 16. Even though Section 16(a)(1) provides for appellate jurisdiction of *all* orders adverse to arbitration under Sections 3 and 4, the court of appeals adopted a categorical rule barring jurisdiction solely because petitioners were not signatories to the contracts containing the arbitration provision. However, when Congress wanted to set forth such categorical rules barring appeals, it did so clearly and unmistakably. *See* 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. This Court’s Decisions Teach That Appellate Jurisdiction Is Distinct from the Merits.

Petitioners’ interpretation of Section 16 is further supported by an important principle underlying this Court’s jurisprudence: that jurisdiction is judged *independently* from the merits of a case. This rule is well established in the context of federal subject-matter jurisdiction. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) (“[F]ailure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.”). Though this Court has yet to apply this principle expressly in the context of Section 16 appeals, this Court’s decisions in the analogous context of immunity appeals reinforce the conclusion that appellate jurisdiction under Section 16(a)(1) does not turn on the merits of the claim being appealed.

Under the “collateral order” doctrine, courts of appeals have jurisdiction over appeals taken from otherwise interlocutory district court orders denying claims of absolute immunity from suit, qualified immunity from suit, and Eleventh Amendment immunity from suit. *Will v. Hallock*, 546 U.S. 345, 350 (2006). In accordance with this rule, the Court has regularly recognized appellate jurisdiction over immunity appeals, even when the underlying claim to immunity was found meritless. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (rejecting claim of

absolute immunity on merits, in case where court of appeals dismissed for want of jurisdiction). Thus, once such immunity is claimed and the claim is rejected, the court of appeals has jurisdiction to evaluate the merits of the claim. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (qualified immunity); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254–255 (2d Cir. 1984) (holding that even though no court had previously endorsed defendants’ theory of immunity, “the mere fact that the merits of defendants’ claim to absolute immunity are unsettled does not of itself defeat their right to interlocutory review of that claim at this point”).

This Court’s decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), establishes that this principle applies even in the face of a categorical legal rule barring a claim on the merits. In *Behrens*, the Court addressed whether an official could pursue successive pre-trial appeals of the denial of its immunity defense. In light of prior circuit precedent holding that successive appeals were barred, the Ninth Circuit dismissed the appeal for want of jurisdiction. *Behrens*, 516 U.S. at 303. But this Court rejected the Ninth Circuit’s jurisdictional analysis, stating that such concerns spoke to the *merits* of the claim rather than to the quite distinct question of *jurisdiction*:

[T]he 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.

Id. at 311 (internal quotation omitted).

Petitioners ask this Court to apply to this case the same rule that it applied in *Behrens*, divorcing the question of appellate jurisdiction from the substantive merits of petitioners' Section 3 motion. Because petitioners sought and were denied a Section 3 stay, Section 16(a)(1)(A) provides jurisdiction over the appeal from the denial of that Section 3 claim, regardless of the Sixth Circuit's view of the merits of that claim.

D. Petitioners' Interpretation of Section 16 Furthers Judicial Efficiency.

In addition to being mandated by the statutory text, consonant with FAA's structure and purpose, and supported by this Court's jurisprudence in the analogous context of immunity appeals, petitioners' interpretation of Section 16 has the additional advantage of establishing a clear and easily administered test for appellate jurisdiction.

This Court's cases value easily administered jurisdictional tests, as they obviate any need for a court of appeals to conduct detailed factual or legal inquiries merely to ascertain whether the court may *consider* the merits of an appeal. *See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (rejecting multi-factored jurisdictional balancing test). Petitioners' test for appellate jurisdiction under Section 16(a)(1) is consistent

with this principle, as the only requirement under petitioners' test is that the appellant sought and was denied relief under Section 3 or 4. Such a rule eliminates any need for a court of appeals to probe the reasoning or legal arguments supporting an appellant's Section 3 or 4 motion in order to ascertain the existence of appellate jurisdiction. As a result, petitioners' rule ensures that the jurisdictional answer will not vary depending on the underlying facts of any particular appeal.

Furthermore, there should be no concern that meritless appeals will either disrupt district courts or burden the courts of appeals. District courts will remain unhampered, as they may take advantage of the certification process approved by this Court in *Behrens* to retain jurisdiction over a case while a Section 16(a)(1) appeal certified as "frivolous" is pending. See *Behrens*, 516 U.S. at 310–311 (discussing certification process for immunity appeals adopted by several circuits); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1252–1253 (11th Cir. 2004) (outlining certification process for district courts to follow in Section 16 appeals); *Bradford-Scott*, 128 F.3d at 506–507 (directing district courts to apply certification process from immunity appeals to Section 16 appeals). As for the courts of appeals, they can easily and effectively dispose of groundless Section 16 appeals the same way that they can dispose of groundless immunity appeals—by exercising their "supervisory powers . . . to establish summary procedures and calendars to weed out frivolous claims." *Behrens*, 516 U.S. at 310

(citing *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)).

* * * * *

Section 16(a)(1)(A)'s only requirements are that Section 3 relief be sought and denied—not that the motion seeking such relief also be meritorious. Such an interpretation is supported not only by the statutory text but also by congressional intent, this Court's decisions in an analogous context, and considerations of judicial efficiency. As a result, the fact that petitioners sought and were denied Section 3 relief, standing alone, establishes appellate jurisdiction under Section 16. This Court should therefore reverse the Sixth Circuit's jurisdictional holding.⁶

II. THE SIXTH CIRCUIT'S INTERPRETATION OF SECTION 3 IS ERRONEOUS.

Section 3 of the FAA 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

⁶ If this Court reverses the Sixth Circuit's jurisdictional determination, this Court should still reach the second question presented, because the Sixth Circuit has interpreted Section 3 to establish a categorical bar to petitioners' claim. Reversal on appellate jurisdiction alone would still leave that erroneous categorical rule in place, depriving petitioners of any relief under Section 3. It would also leave in place the substantial circuit split underlying the second question presented. *See* Pet. 21–26.

such suit or proceeding is referable to arbitration” under “an agreement in writing for such arbitration,” so long as the stay applicant is “not in default in proceeding with such arbitration.” 9 U.S.C. § 3.

There is no dispute in this case that petitioners sought relief under a “written arbitration agreement”—the arbitration provision in the Bricolage management agreements. Pet. App. 3a–4a; J.A. 80–81, 99–100, 118–119. In order to establish Section 3’s “referable to arbitration” requirement, petitioners argued that they were entitled to enforce the arbitration provision against respondents based on a theory of equitable estoppel. The district court rejected petitioners’ argument on the merits, finding that petitioners could not establish the requirements of equitable estoppel necessary to give them a right to invoke the arbitration provision, and also that the asserted claims fell outside the scope of the arbitration provision. Pet. App. 15a–16a.

Though petitioners challenged the district court’s determinations on appeal, the Sixth Circuit expressly declined to review them. Pet. App. 5a. Instead, the court of appeals held that petitioners were not entitled to relief based on a categorical ruling that Section 3 does not apply, as a matter of law, to claims involving non-signatories. Pet. App. 5a. In doing so, the Sixth Circuit erred.

Under Section 2 of the FAA, the rights and obligations of non-signatories under an arbitration agreement are governed not by Section 3, but by

state law principles of law and equity generally applicable to contracts. Courts and scholarly treatises agree that under such common law principles, non-signatories may enforce and be bound to arbitration agreements. Section 3 is merely a mechanism to enforce such state law rights recognized by Section 2, and neither Section 2 nor Section 3 imposes any signature requirement on arbitration agreements.

A. Under Section 2, State Law Principles of Law and Equity Generally Applicable to Contracts Govern the Rights and Obligations of Non-Signatories to Arbitration Agreements.

Section 2 of the FAA, which is the Act's "centerpiece," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), provides that a "written provision" to arbitrate future controversies arising out of a contract containing the 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.

Under Section 2, ordinary state law principles of "law and equity" governing "issues concerning the validity, revocability, and enforceability of contracts generally" apply to arbitration agreements governed by the FAA. *Perry v. Thomas*, 482 U.S. 483, 492–493 n.9 (1987) (citing Section 2); *see also* Note, *Erie, Bernhard, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 *Yale L.J.* 847, 860–861

(1960) (“Thus, issues involving the ‘making of the arbitration agreement,’ which the federal act declares are issues for the court, would be decided under state rules of law and equity.”).

Accordingly, this Court has twice emphasized that under Section 2, state law governs the rights and obligations of non-signatories under a given arbitration provision. First, in *Perry*, non-signatories asserted that they could enforce an arbitration provision to compel arbitration; the plaintiff contended that the non-signatories lacked “standing” to enforce the provision. 482 U.S. at 492. In remanding to the lower court to decide that issue, which this Court characterized as “whether the arbitration provision inures to the benefit of [the non-signatories],” *id.*, this Court observed that Section 2 required the lower court to apply state law principles:

We note, however, the choice-of-law issue that arises when defenses such as Thomas’ so-called “standing” and unconscionability arguments are asserted. In instances such as these, the text of Section 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law . . .* “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” 9 U.S.C. § 2. Thus, state law, whether of legislative or judicial origin, is applicable *if* that law arose

to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Id. at 492–493 n.9 (emphasis in original, citations omitted).

The Court later reiterated this principle in *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). In *First Options*, non-signatories contended that they were not bound to an arbitration provision and sought to vacate an arbitration award against them. This Court, following *Perry*, stated that “[w]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.” *Id.* at 944.

As in the instant case, both *Perry* and *First Options* involved the rights or obligations of non-signatories to contracts containing arbitration provisions. In both cases, this Court stated that state law determined the rights and obligations of the non-signatories. Thus, under Section 2 and this Court’s jurisprudence, state law principles of “law

and equity” applicable to contracts control whether petitioners may satisfy Section 3’s “referable to arbitration” requirement by invoking equitable estoppel.

B. State Law Principles of “Law and Equity” Allow Non-Signatories to Enforce and Be Bound to Arbitration Agreements under Myriad Theories, Including Equitable Estoppel.

It is indisputable that common law contract principles, either alone or in conjunction with other doctrines such as agency, permit non-signatories to enforce or be bound to contracts in myriad circumstances: “hundreds of years of common law” recognize that “non-parties” may enforce or be bound by contracts. *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.10 (9th Cir. 2006) (Kozinski, J.). In light of this common law history, “[i]t is not surprising then to find a long series of decisions which recognize that the variety of ways in which a [non-signatory] may [enforce or] 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).

Under these ordinary state law principles, courts have routinely recognized—in cases decided under the FAA—that non-signatories may enforce or be bound to arbitration agreements under a wide variety of theories, including incorporation by refer-

ence,⁷ assumption,⁸ agency,⁹ alter ego/corporate veil piercing,¹⁰ equitable estoppel,¹¹ assignment,¹² successor in interest,¹³ and third-party beneficiary.¹⁴ Indeed, scholarly treatises devote entire chapters to the various common law legal theories by which non-signatories can enforce or be bound to arbitration agreements. *See, e.g.*, 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. 2001) (“*Williston*”) (“Obligations and Rights of Persons Who Are Not Parties to Arbitration Agreements”); 1 Larry E. Edmonson, *Domke on Commercial Arbitration* Ch. 13 (3d ed. 2008) (“*Domke*”) (“Effect of Arbitration Agreement on Nonsignatories”); 1 Thomas Oehmke, *Oehmke Commercial Arbitration* Ch. 11 (3d ed. 2008) (“*Oehmke*”) (“Nonsignatories and Third Parties”). All of these authorities recognize that equitable

⁷ *Imp. Exp. Steel Corp. v. Miss. Valley Barge Line Co.*, 351 F.2d 503, 506 (2d Cir. 1965) (non-signatory can enforce).

⁸ *Employers Ins. v. Bright Metal Specialties, Inc.*, 251 F.3d 1316, 1323 (11th Cir. 2001) (non-signatory bound).

⁹ *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360 (2d Cir. 1993) (non-signatory can enforce).

¹⁰ *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320 (4th Cir. 1988) (non-signatory can enforce).

¹¹ *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 758 (11th Cir. 1993) (non-signatory can enforce).

¹² *Chatham Shipping Co. v. Fertex S.S. Corp.*, 352 F.2d 291, 294 (2d Cir. 1965) (non-signatory can enforce).

¹³ *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 393 (8th Cir. 1994) (non-signatory bound).

¹⁴ *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 600 (5th Cir. 2007) (non-signatory bound).

estoppel is among the many theories under which a non-signatory may enforce an arbitration agreement. *See, e.g., Williston* § 57:19, at 189; 1 *Domke* § 13:8, at 13-19; 1 *Oehmke* § 11:1, at 11-2. Thus, courts and commentators alike agree that “hundreds of years of common law” allow non-signatories to enforce or be bound to arbitration agreements under the FAA. None of this doctrine can survive, however, if this Court affirms the Sixth Circuit’s decision.

By exempting arbitration agreements from ordinary common law principles that otherwise allow non-signatories to enforce or be bound to contracts, the Sixth Circuit rule actually conflicts with Section 2’s anti-discrimination principle. *See Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (“By enacting § 2, we have said several times, Congress precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed ‘upon the same footing as other contracts.’” (citation omitted)). To maintain consistency with Section 2, Section 3 must be interpreted to provide relief to non-signatories entitled to enforce the arbitration provision under ordinary principles of “law and equity.” Otherwise, arbitration provisions will be *less* enforceable than ordinary commercial contracts—the very result Section 2 was designed to prevent.

C. Nothing in Section 3 Bars Non-Signatories from Enforcing Arbitration Rights Recognized under State Law.

As established above, Section 2 is the “centerpiece” provision of the FAA, under which state law generally applicable to contracts is made to govern arbitration provisions. *See also Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 is the primary substantive provision of the Act.”). Section 3 and its companion, Section 4, impose no substantive requirements, but instead are mere devices to enforce state law arbitration rights recognized and protected by Section 2. *See Anaconda v. Am. Sugar Ref. Co.*, 322 U.S. 42, 44 (1944) (Sections 3 and 4 “implement[]” the “declared policy” of Section 2); *Moses H. Cone Mem. Hosp.*, 460 U.S. at 22 (Sections 3 and 4 of the FAA are “parallel devices for enforcing an arbitration agreement”); Ian R. MacNeil, *American Arbitration Law* 102 (1992) (“*American Arbitration Law*”) (“Sections 3 and 4 are the key sections implementing the enforceability principle [of Section 2].”); *see also Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 201 (1956) (rejecting argument that Section 3 can be read independently of Section 2).

Under this regime, state law principles of “law and equity” control a party’s enforcement rights—not Section 3. The Sixth Circuit thus erred by interpreting Section 3 to impose a substantive requirement that the moving party have signed the contract containing the arbitration provision. Such a

requirement contradicts Section 3's text, history, and policy.

1. Though Section 3 plainly requires a "written agreement" to arbitrate, neither it nor Section 2 imposes a signature requirement. Once again, Section 3 cannot be understood without reference to Section 2. *See Bernhardt*, 350 U.S. at 201 ("[T]he 'agreement in writing' for arbitration referred to in § 3 is the kind of agreement which §§ 1 and 2 have brought under federal regulation.").

All that Section 2 requires is a "written provision" to arbitrate, which need not be signed. As the Second Circuit explained almost fifty years ago:

It is true that under the Act, a "written provision" . . . 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.

Fisser, 282 F.2d at 233 (footnotes omitted); *see also* 1 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act* § 8.3.1, at 8:5 (1999)

(“*Federal Arbitration Law*”) (“There must be an arbitration agreement and it must be in writing, but need not be signed.”); 1 *Domke* § 9:1, at 9-2 (“The ‘in writing’ requirement has a further ramification, namely that the arbitration clause itself does not have to be signed.”); 1 *Oehmke* § 5:3, at 5-5 (same); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987) (“As to the unsigned forms, it is well established that a party may be bound by an agreement to arbitrate even absent a signature. Further, while the Act requires a writing, it does not require that the writing be signed by the parties. See 9 U.S.C. § 3.” (citations omitted)).

Thus, the signature requirement adopted by the Sixth Circuit is unsupported by the FAA’s text. Nothing in Section 3’s writing requirement renders Section 3 relief unavailable to non-signatories, if the claims against the non-signatories are “referable to arbitration” through the arbitration provision under applicable principles of state law.

2. Petitioners’ textual interpretation of Section 3 is confirmed by the historical origins of the FAA. Because the FAA was largely based on the New York Arbitration Act of 1920, 1920 N.Y. Laws, ch. 275 (“1920 New York Act”), see *Hall Street Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396, 1406 n.7 (2008), “any starting point of historical analysis must, therefore, be the New York act.” *American Arbitration Law* at 106.

Under the 1920 New York Act, agreements to arbitrate *future* controversies were made enforceable so long as they were in writing, but this writing

could be informal and did not need be signed by the parties. *Id.* at 35; *see also, e.g., Japan Cotton Trading Co. v. Farber*, 253 N.Y.S. 290, 292–293 (App. Div. 1931) (“The Arbitration Law in words at least, does not require the signature of a party to an agreement to arbitrate. It merely requires a written contract to do so.”). The 1920 New York Act’s requirement accords with petitioners’ rule, allowing for enforcement of an arbitration provision whenever the moving party possessed rights derived therefrom.

By contrast, under an older provision of the New York Code of Civil Procedure that was left intact by the 1920 New York Act, N.Y. Civil Practice Act § 1449, agreements to arbitrate *existing* controversies were enforceable only if the parties complied with strict formalities associated with the recordation of a deed, including signatures and acknowledgements. *See* Osmond K. Fraenkel, *The New York Arbitration Law*, 32 Colum. L. Rev. 623, 625 (1932). The Civil Practice Act thus included a signature requirement similar to that adopted by the Sixth Circuit below, excluding non-signatories from asserting arbitration rights.

Against this backdrop of New York law, Congress enacted the FAA, adopting a version of the informal writing requirement of the 1920 New York Act rather than the stricter formalities of the Civil Practice Act. *See Fisser*, 282 F.2d at 233 n.4 (contrasting the informal requirements of the FAA and the 1920 New York Act with the formalities of N.Y. Civil Practice Act § 1449). As a result, Congress implicitly rejected the very requirement that the court below relied upon in rejecting petitioners’

claims. The FAA's history thus confirms what the statutory text makes clear: although the FAA requires a written arbitration agreement, the agreement need not be signed to be enforceable.

3. Finally, practical experience teaches that the Sixth Circuit's erroneous categorical rule, if adopted by this Court, would render routine commercial practices impossible. Professor MacNeil and his co-authors explain the problems a signature requirement would create:

The requirement of writing, but not signature, reflects an understanding of the informal nature of many commercial negotiations, and a concern about the dampening effect upon arbitration from excessive formalities. For example, it has been asserted that a statutory requirement that written arbitration clauses be signed would have the effect either of eliminating as a practical matter arbitration provisions from numerous contracts which are entered into daily or of upsetting routine and ordinary business practices whereby contracts are made by accepting purchase orders, by broker's notes, by performance, or even silent assent.

2 *Federal Arbitration Law* § 17.7.3, at 17:92 (internal quotation marks omitted); *see also* 1 *Domke* 9:1, at 9-2 (the absence of a signature requirement under the FAA "conforms to the widespread practice in many fields of trade and commerce"); 1 *Oehmke* § 5:3, at 5-5 (same). Therefore, the Sixth Circuit's rule is

impossible to reconcile with the ordinary commercial practices that the FAA is designed to facilitate.

* * * * *

At bottom, Section 3 is merely a mechanism for enforcing state law rights that apply by operation of the FAA's centerpiece provision, Section 2. Under Section 2, state law principles of "law and equity" generally applicable to contracts apply to arbitration provisions, so long as such principles do not single out arbitration provisions for adverse treatment. These general principles, not Section 3, determine whether petitioners may enforce the arbitration provision under equitable estoppel. If petitioners can otherwise enforce the arbitration provision under equitable estoppel, and if respondents' claims fall within the scope of the arbitration provision, then the district court erred by not granting petitioners' Section 3 motion. The Sixth Circuit in turn erred by adopting an unwarranted categorical exception to Section 3 based on petitioners' status as non-signatories, rather than considering petitioners' arguments that respondents' claims are "referable to arbitration" based on the doctrine of equitable estoppel.

CONCLUSION

This Court should 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 consider petitioners' arguments that equitable estoppel allows them to enforce the arbitration provision.

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