

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 RESPONDENTS

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QUESTION PRESENTED

The defendants, who were not parties to the arbitration agreement, unsuccessfully invoked equitable estoppel in seeking to stay the claims brought against them by the plaintiffs, who were parties to that agreement. The district court denied the stay and the defendants filed an interlocutory appeal, purportedly under 9 U.S.C. § 16(a)(1)(A). Did the stay requested and denied fall outside 9 U.S.C. § 3, such that the district court's denial was not immediately appealable under Section 16(a)(1)(A) of the Federal Arbitration Act?

CORPORATE DISCLOSURE STATEMENT

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

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PRELIMINARY STATEMENT

This matter arises out of the dismissal of petitioners' interlocutory appeal based on a lack of jurisdiction under 9 U.S.C. § 16(a)(1)(A). The court of appeals dismissed the appeal because petitioners, as non-parties to an arbitration agreement who unsuccessfully asserted equitable estoppel in attempting to force one of the agreement's parties to arbitrate with them, could not satisfy the "agreement in writing" requirement of 9 U.S.C. § 3, which provides for mandatory stays pending arbitration. Because the stay petitioners requested fell outside section 3, they were not entitled to file an interlocutory appeal from its denial, under 9 U.S.C. § 16(a)(1)(A).

Petitioners' Brief peddles the legal fiction that a non-party to an arbitration agreement, who unsuccessfully asserts equitable estoppel in attempting to compel one of the agreement's parties to arbitrate, nonetheless satisfies the "agreement in writing" requirement of section 3 and, thus, automatically is entitled to file an interlocutory appeal from a stay denial, under section 16(a)(1)(A). This case highlights why the Court should extinguish this fiction once and for all: A major law firm, which had no arbitration clauses in its clients' retention agreements, is sued for legal malpractice for giving them bad tax advice, among other theories. It responds by trying to force its clients to arbitrate their claims against it. Another defendant in the case, a brokerage firm with whom the clients actually had agreed to arbitrate their account-related claims, files for bankruptcy. That arbitration – the only one to which these clients agreed – will never take place.

Almost a decade after signing retention agreements that never mentioned arbitration, the clients' claims against their former lawyers remain captive to the lawyers' demand that they arbitrate. That demand, which failed to yield a district court stay the former lawyers sought, now has turned into a protracted dispute over whether the court of appeals has the authority to hear an immediate appeal from the stay denial. So even though nary a word ever passed between client and lawyer about where any claims between them would be litigated (*i.e.*, court or arbitration), the clients and their former lawyers (as well as their former accountants) remain locked in time-consuming litigation over when to litigate an appeal about whether to litigate or stay claims based on malpractice that occurred nine years ago. Neither the language of sections 3 and 16(a)(1)(A) of the Federal Arbitration Act ("FAA"), nor the federal policy favoring arbitration, supports granting petitioners the right to an automatic interlocutory appeal.

STATEMENT

A. The Relevant Facts

In June 1999, Wayne Carlisle, James Bushman, and Gary Strassel (respondents) sold their heavy construction equipment business in Kentucky. App. 20. After the sale, they began exploring methods of legally minimizing taxes on gains realized from it. App. 20-21. They consulted with Arthur Andersen LLP ("Andersen"), which had served as their company's accountant, auditor, and tax advisor for more than twenty years. App. 20-21. In September 1999, Andersen introduced them to Bricolage Capital, LLC ("Bricolage"), which at the time described itself as "a

financial boutique that developed complex structured transactions for high net worth individuals and private corporations.” App. 21. Bricolage in turn referred them to Curtis, Mallet-Prevost, Colt & Mosle, LLP (“Curtis”), a New York law firm that held itself out as providing “independent” tax advice. App. 58.

Andersen, Bricolage, and Curtis recommended a tax shelter based on foreign currency exchange options, specifically a “leveraged option strategy” (“LOS”). App. 21. Through a series of transactions involving partnership interests, the LOS was designed to generate tax losses to offset income from other transactions. Curtis agreed to provide an independent, reliable legal opinion substantiating the legality and validity of the LOS as a viable tax shelter. App. 23-24.

In October 1999, Carlisle, Bushman, and Strassel entered into standard Investment Management Agreements (“IMAs”) with Bricolage, through their respective LLCs – WC Thomas, JB Cinoh, and GS Noky. App. 60, 67-123. The IMAs between Bricolage (defined as “the Manager”) and the LLCs (defined individually in each IMA as “the Client”) provided Bricolage with “full discretionary” authority to manage the assets in the accounts, App. 67-68, 86-87 & 105-106, and contained the following other provisions:

- “[T]he Client desires to retain the services of the Manager to provide investment management services in respect of all cash, securities and other assets and contracts comprising the investment account (‘Account’)” established by each Client. App. 67, 86, 105.

- “[T]he Client is a sophisticated investor experienced in business and investment matters and receives tax, legal and accounting advice with respect to the Client’s investments generally and in respect of the Account from persons other than the Manager.” App. 68, 87 & 106.
- “Neither the Manager nor any of its officers, directors, employees or agents shall be liable for any loss, expense, cost or liability arising out of any error in judgment or any action or omission hereunder, including any instruction given to the [bank acting as] Custodian by anyone other than an officer, director, employee or agent of the Manager, unless arising out of their negligence, malfeasance or bad faith.” App. 71-72, 90-91 & 109-110.
- “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.” App. 80-81, 99-100 & 118-119.

The IMAs did not mention the LOS, nor impose responsibilities on any person or entity other than Bricolage and its principals.

Late in 1999, Carlisle, Bushman, and Strassel engaged in the recommended LOS transactions

through their separate business entities. App. 25.¹ And they were required to invest \$4,350,000 in certain warrants to purchase stock in unidentified small, high-tech companies. App. 22-23. After these transactions were completed, they formed WJG Strategic Investments and funded it with \$4,350,000. App. 26. These funds were used to purchase from Prism Connectivity Ventures (“Prism”) warrants that previously had been owned by Integrated Capital Associates, Inc. (“ICA”), an investment banking firm with the same principals as another firm, Intercontinental Pacific Group, Inc. (“IPG”), and that turned out to be virtually worthless. App. 19-20, 26-27.

Shortly after paying Prism for the warrants, Carlisle, Bushman, and Strassel signed individual retainer agreements with Curtis, which billed each of them \$100,000 as a retainer for professional services to be rendered. App. 24. These retainer agreements did not contain an arbitration clause.² Curtis subsequently instructed respondents to pay \$100,000 each to IPG, ostensibly to reimburse ICA for its payment of their retainers. App. 25. Unbeknownst to respondents, Curtis not only represented ICA and IPG at the time, but ICA was then paying Curtis for tax shelter-related services to be performed for at least five other ICA-related clients. App. 25.

¹ Carlisle did so through WC Thomas, LLC, WC Venture Corp., and the Ohio 1999 Irrevocable ESBT, a trust; Bushman, through JB Cinoh, LLC, JEB Venture Corp., and the JEB Revocable ESBT, a trust; Strassel, through GS Noky, LLC.

² Respondents had not signed any retention agreements with Andersen during the 20 years it had served as their accountant, auditor, and tax advisor.

In June 2000, Curtis sent Carlisle, Bushman, and Strassel individual letters purportedly containing the firm's independent opinion validating the LOS as a tax shelter. App. 27. In reliance on these letters and the tax advice provided by Andersen, respondents filed their 1999 income tax returns, on which they claimed capital and ordinary losses from their LOS transactions. App. 30-31. Unbeknownst to respondents, these were canned, deceptive, prefabricated form letters, prepared well in advance of Curtis's introduction to respondents and disseminated cookie-cutter style. App. 28.

In August 2000, the IRS deemed the LOS an abusive tax shelter. App. 29-30. Despite receiving notice of the IRS's determination regarding the LOS and its amnesty offer, Curtis failed to retract, modify, or qualify what it knew or should have known was flawed tax advice. *Id.* Respondents were forced to enroll in an IRS settlement program under which all of their outstanding issues with the IRS were resolved, resulting in tens of millions of dollars in damages. App. 31-32. Respondents also resolved their outstanding issues with state tax authorities. App. 31-32.

B. The Proceedings in the District Court

On March 25, 2005, Carlisle, Bushman, and Strassel and their various business entities – including the three LLCs that were parties to the Bricolage IMAs – filed suit in the United States District Court for the Eastern District of Kentucky. App. 11-51. The complaint named nine defendants, including Andersen, Curtis and one of its partners, William Bricker, Jr. (“Bricker”), Bricolage and two of its

principals, and ICA, IPG, and Prism, which were involved in the sale of the virtually worthless warrants. The complaint alleges claims for fraud against all defendants; civil conspiracy against all defendants; legal malpractice against Curtis; professional malpractice against Andersen; breach of fiduciary duty against Andersen, Curtis and its partner Bricker, and Bricolage and its two principals; and negligence against Andersen, Curtis, and Bricolage.

Bricolage was the only defendant that actually was a party to the IMAs containing the arbitration clause at issue. As noted, these IMAs imposed on Bricolage certain responsibilities in managing the investment accounts established by the three LLCs. The pending claims against Curtis and Andersen have nothing to do with whether Bricolage properly managed these accounts. There is no allegation that Bricolage improperly executed any foreign exchange currency option transactions, let alone that Curtis and Andersen are liable for such a lapse. The complaint seeks to hold Curtis and Andersen liable for violating duties that arose by operation of law, separate and apart from any obligations imposed by the IMAs.

It alleges Curtis committed fraud, legal malpractice, and negligence and breached its fiduciary duties to respondents by violating legal obligations the law imposes on lawyers, *i.e.*, misrepresenting themselves as independent counsel, disseminating deceptive opinion letters, failing to apprise respondents that the IRS actually considered the LOS an abusive tax shelter, and accepting payments from third-parties in exchange for compromising their clients' (*i.e.*, respondents') interests. Curtis's alleged

legal duties and violations thereof – and thus the claims on which they are based – have nothing to do with any obligations that a standard IMA between a customer and an investment account manager imposes on the latter.

The complaint alleges Andersen committed fraud, professional malpractice, and negligence and breached its fiduciary duties to respondents by violating legal obligations the law imposes on accountants, auditors, and tax advisors, *i.e.*, deceptively steering respondents to a flawed tax shelter, compromising respondents' interests by instructing them to buy virtually worthless warrants, and failing to apprise respondents that the IRS considered the LOS an abusive tax shelter. Andersen's alleged legal duties and violations thereof – and thus the claims on which they are based – also have nothing to do with the obligations that a standard IMA between a customer and an investment account manager imposes on the latter.

The other defendants, ICA, IPG, and Prism, allegedly violated still other obligations imposed by operation of law, as opposed to the obligations the IMAs imposed on Bricolage. These obligations spring from the selling of worthless warrants to respondents for \$4.35 million. There is no allegation these warrants had anything to do with the Bricolage investment accounts governed by the IMAs.

On June 10, 2005, before any appreciable discovery, Andersen filed – and Curtis and Bricker joined in – a motion “to stay these proceedings . . . pending the completion of all necessary and related arbitration proceedings,” arguing that equitable estoppel prevents respondents from avoiding arbitration of all claims

against the non-signatory defendants.³ App. 52-56. The motion argued that, even if the court would not allow them, as non-signatories, to invoke the arbitration clause under equitable estoppel principles, it still should stay the claims against them, pending the arbitration they then anticipated between respondents and Bricolage, the lone signatory defendant. The district court rejected both arguments.

On October 14, 2005, Bricolage filed a bankruptcy petition under Chapter 11. App. 5. Prior to filing its bankruptcy petition, Bricolage had moved to compel respondents to arbitrate their claims against it and its two principals. Due to its bankruptcy filing, however, Bricolage ceased taking part in district court proceedings, and the court denied Bricolage's motion as moot.

C. Petitioners' Attempted Interlocutory Appeal to the Sixth Circuit

The non-signatory defendants filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit. Relying on *DSMC Inc. v. Convera Corp.*,

³ Although the remaining defendants, ICA, IPG, and Prism, purported to join in the stay motions filed by Bricolage, Andersen, and Curtis, their notices of joinder indicate that they sought to stay the action pending plaintiffs' arbitrations with Andersen, Curtis, and Bricolage. (App. 63, 65). They did not claim respondents would be required to arbitrate with them. This suggests they sought a discretionary stay until after plaintiffs' arbitrations with Andersen, Curtis, and Bricolage. Although ICA, IPG, and Prism joined in the interlocutory appeal to the Sixth Circuit and in the Petition for a Writ of Certiorari, respondents note the apparent distinction between their stay requests and those of Andersen and Curtis.

349 F.3d 679, 683-85 (D.C. Cir. 2003) (“*DSMC*”), and *In re Universal Service Fund Telephone Billing Practice Litig.*, 428 F.3d 940, 942-45 (10th Cir. 2005) (“*Universal*”), plaintiffs (respondents herein) argued the Sixth Circuit had no jurisdiction to entertain petitioners’ interlocutory appeal under section 16(a)(1)(A) of the FAA, which permits immediate appeals from orders refusing stays “under section 3” of the FAA.

DSMC and *Universal* contain the same straightforward textual interpretations of section 16(a)(1) and sections 3 and 4 of the FAA. Because section 16(a)(1) limits the interlocutory jurisdiction it confers to appeals from orders refusing section 3 stays or denying section 4 petitions to compel arbitration, both *DSMC* and *Universal* focused on what makes a stay motion a section 3 application and on what makes a motion to compel arbitration a section 4 petition. Both concluded the common denominator was a written arbitration agreement between the party seeking arbitration and the party resisting it. Thus, both *DSMC* and *Universal* limit interlocutory appellate jurisdiction to those cases where the movant could invoke a written agreement compelling arbitration, which non-signatories who unsuccessfully asserted equitable estoppel by definition could not do – precisely the reason they resorted to equitable estoppel in the first place.

1. The *DSMC* decision

In *DSMC*, the United States Court of Appeals for the District of Columbia Circuit (Roberts, J.) discussed at length why sections 3 and 4 – and thus also section 16(a)(1) – cannot apply to a non-signatory’s attempt to

compel a signatory to arbitrate based on equitable estoppel:

Section 4 does not merely require that there be a written agreement somewhere in the picture. It requires that the motion to compel be based on an alleged failure to arbitrate under that written agreement. Convera's motion to compel is not based on any alleged failure by DSMC to arbitrate under the only written agreement at issue here – the one between DSMC and NGTL. The motion is instead based on an effort to expand DSMC's obligation *beyond* the terms of that written agreement pursuant to principles of equitable estoppel.

DSMC, 349 F.3d at 683 (emphasis original). Noting the circuit decisions addressing equitable estoppel in the arbitration context, the court observed:

Those cases typically did not address jurisdiction under section 16 of the FAA, but instead simply proceeded directly to consider the propriety of compelling signatories to arbitrate with non-signatories. We need not and do not decide whether such an effort can ever succeed. What we do decide is that an effort to compel arbitration in such circumstances on the basis of equitable estoppel does not fall within Section 4 of the FAA. Accordingly, we hold that this court has no jurisdiction under Section 16(a)(1)(B) to hear an appeal of an order denying a motion to compel arbitration between parties *not* under a written agreement to arbitrate. In doing so we are mindful that “section 16 is a limited grant of jurisdiction,”

that “[i]n general, statutes authorizing appeals should be narrowly construed,” and that this is particularly true with respect to statutes allowing interlocutory appeals. . . . We are also cognizant that jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. . . . Asking whether the parties are signatories to a written agreement to arbitrate satisfies these criteria. On the other hand, the application of equitable estoppel – if permitted in this context – requires a multifactor factual and legal inquiry to determine whether the issues to be litigated by the non-signatory and signatory are sufficiently intertwined with the issues subject to arbitration. That type of analysis, in turn, would require this court to delve deeply into the merits of a case before even deciding whether we had interlocutory appellate jurisdiction – an unattractive prospect.

Id. at 683-84 (citations omitted; emphasis original). The court in *DSMC* also held that section 3 does not apply when a non-signatory to an arbitration clause invokes equitable estoppel in an effort to stay a signatory’s suit pending arbitration. *Id.* at 684-85.

2. The *Universal* decision

The Tenth Circuit’s decision in *Universal* reached the same conclusion on the issue of interlocutory appellate jurisdiction. Quoting extensively from *DSMC*, the Tenth Circuit observed that circuit decisions that merely addressed equitable estoppel

without first considering the issue of interlocutory appellate jurisdiction “miss the point,” adding:

The issue in this appeal is not whether they have a right to compel arbitration, but whether they have a right to an interlocutory appeal from the denial of a motion seeking to compel arbitration. Given that statutes allowing interlocutory appeals should be narrowly construed, Defendants stand the scope of appellate jurisdiction on its head. . . . We also agree with the *DSMC* court that dismissing this appeal does not mean equitable estoppel cannot be employed to compel arbitration. Indeed, our holding is limited to whether Defendants can invoke interlocutory appellate jurisdiction to challenge the merits of the district court’s order. In the absence of jurisdiction, any thoughts we might express on whether the doctrine of equitable estoppel can or should be recognized in the circumstances of this case would be without effect.

Universal, 428 F.3d at 945.

3. Petitioners’ response in the Sixth Circuit

Curtis and Andersen responded by dismissing *DSMC* and *Universal* as “extra-jurisdictional cases” that consisted of dicta and did not involve motions expressly brought under section 3 or section 4 of the FAA – facts that, according to them, “render *DSMC* and *Universal* neither controlling nor persuasive.” Appellants’ [Petitioners’] Reply Brief in 6th Cir. Case No. 06-5290, pp. 8-10. Instead, they argued “Section 16 neither suggests nor requires that an appellate court

inquire beyond the substance of the movants' pleadings or the district court's ruling, as long as the bases for the motion and ruling clearly arose under Section 3. If they did, the Court's jurisdictional inquiry is at an end." *Id.* at 3.⁴ They further argued that, "even if this Court chooses to follow the *dicta* of *DSMC* and *Universal*," the court of appeals still would have jurisdiction under section 16(a)(1)(A) because their "express reliance on section 3 was proper . . ." *Id.* at 11. To this, Curtis and Andersen added that "the ability of a party to move under section 3 is necessarily limited by the statute's requirement that a plaintiff's lawsuit be based 'upon any issue referable to arbitration under an agreement in writing for such arbitration.' 9 U.S.C. § 3." *Id.* at 12.

4. The motion panel ruling in *Ross*

After filing their Reply Brief, Curtis and Andersen brought to the Sixth Circuit's attention a ruling by a Second Circuit motion panel, *Ross v. American Express Co.*, 478 F.3d 96 (2d Cir. 2007). The ruling in *Ross* declined to follow *DSMC* and *Universal*. *Id.* at 100 n. 2. Instead, the court held "the writing requirement of the FAA" was satisfied because the district court had found the non-signatories were "entitled to the benefit of a written agreement" pursuant to equitable

⁴ Curtis and Andersen acknowledged in their Reply Brief below (at p. 8) that, if a defendant's arbitration-related stay request is made not under section 3 but rather pursuant to the district court's general discretionary authority, the defendant would have no right to an automatic interlocutory appeal under section 16.

estoppel. *Id.* at 99.⁵ The court reasoned that, where equitable estoppel applies, the

written agreement alone creates, defines, and provides procedures – including the method for selecting the arbitrators – for implementing the arbitration obligation. . . . In every relevant sense, therefore, appellants are appealing from the refusal to compel arbitration under a written arbitration agreement.

Id. The court observed that a contrary ruling would leave district courts without authority to employ equitable estoppel to stay proceedings or compel arbitration under sections 3 and 4 of the FAA, and could result in “partial or full bifurcation of cases involving a single writing.” *Id.*⁶

⁵ The district court in *Ross* had denied the non-signatory defendants’ motion to stay and their motion to compel arbitration, despite concluding that they could invoke equitable estoppel against the signatory plaintiffs. It reasoned a jury trial was necessary to determine the validity of the arbitration clauses prior to enforcement because the plaintiffs had raised an antitrust claim concerning the validity of the arbitration clauses. *Ross*, 478 F.3d at 98.

⁶ After the Sixth Circuit’s decision, but before this Court granted certiorari, the merits panel in *Ross* issued its opinion. It did not revisit the motion panel’s jurisdictional ruling, noting only that the Sixth Circuit since had “rejected our analysis” and that “a substantial split among the Circuits has now developed over this jurisdictional question.” *Ross v. American Express Co.*, 547 F.3d 137, 141 n. 2 (2d Cir. 2008) (also citing *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 44 n. 6 (1st Cir. 2008)).

5. The Sixth Circuit opinion

Finding “the statutory analysis in *DSMC Inc.* and *Universal Service Fund* superior to the circular reasoning employed by the Second Circuit in *Ross*,” the Sixth Circuit held that section 3 is inapplicable because the stay applicants were not parties to a written arbitration agreement and that, therefore, “we are without jurisdiction to hear this appeal on an interlocutory basis” under section 16(a)(1)(A).⁷ *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle*, 521 F.3d 597, 598 (6th Cir. 2007).

SUMMARY OF ARGUMENT

The issue in this appeal is whether petitioners, as non-parties to the arbitration agreement who unsuccessfully invoked equitable estoppel in attempting to force respondents to arbitrate with them, have an automatic right to an interlocutory appeal from the district court’s refusal to stay

⁷ *DSMC, Universal*, and the Sixth Circuit decision refused to give any weight to other circuits’ opinions that disposed of interlocutory appeals on their merits without addressing the jurisdictional issue under discussion here. *See DSMC*, 349 F.3d at 683 (quoted above); *Universal*, 428 F.3d at 944 (“Defendants maintain ‘[c]ourts repeatedly have accepted appellate jurisdiction where the district court had denied arbitration motions by litigants that were not signatories to the relevant arbitration agreement.’ They support this contention with a number of cases which simply are not apposite, however, because none of them rule upon the jurisdictional basis for their holdings. Indeed, none of them consider the issue before us.”); *Carlisle*, 521 F.3d at 602 (“[I]n none of those cases does it appear that the appellees raised the issue of appellate jurisdiction to review the question on an interlocutory basis.”). *See* discussion *infra*, section D.

respondents' claims against them pending arbitration. Petitioners invoked section 16(a)(1)(A) as the jurisdictional basis for their attempted interlocutory appeal. Section 16(a)(1)(A) limits the interlocutory jurisdiction it confers to orders refusing a stay "under section 3."

The text of section 3 could not be clearer: the predicate for a stay under this section is an issue "referable to arbitration under an agreement in writing for such arbitration." Petitioners' status as non-parties to the IMAs, who therefore had to invoke equitable estoppel, signaled that they had no written agreement with respondents requiring respondents to arbitrate their claims against petitioners. *Carlisle*, 521 F.3d at 601 (citing *DSMC* and *Universal*); *DSMC*, 349 F.3d at 683; *Universal*, 428 F.3d at 944 n. 3. Because section 3 requires such an agreement, petitioners could not seek a stay under section 3. In other words, the stay that petitioners requested and the district court refused to grant did not and could not fit within the language of section 3. Because of this, the order rejecting that stay could not be immediately appealed under section 16(a)(1)(A), given that the interlocutory jurisdiction it confers is limited to orders refusing a stay under section 3.

The rules the parties ask the Court to adopt differ in the following respects. Under petitioners' proposed rule, an order refusing a non-signatory's arbitration-related stay request is immediately appealable if the underlying stay application merely *alleged* section 3 as its basis. Under this rule, the label a movant places on its stay application would be the binding jurisdictional determinant for any interlocutory appeal from the application's denial. This would leave interlocutory

appellate jurisdiction, which congressional policy disfavors and must be narrowly construed, entirely in the hands of the stay applicant's lawyer, inviting all manner of gamesmanship and manipulation. In contrast, the rule espoused by respondents recognizes that, regardless of the label a movant might place on its stay motion or a district court might place on its order denying such motion, non-signatories relying on equitable estoppel cannot seek arbitration-related stays under section 3 because, by definition, their stay request cannot satisfy section 3's "referable to arbitration under an agreement in writing" requirement.

In choosing the rule respondents espouse and dismissing petitioners' appeal based on a lack of interlocutory jurisdiction, the Sixth Circuit decision correctly followed *DSMC* and *Universal*, properly rejected *Ross*'s reasoning as circular and unpersuasive, and steered well clear of the merits of petitioners' appeal. Whenever possible, such jurisdictional rules must be clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset. The *DSMC/Universal/Carlisle* rule satisfies these criteria. Those, like petitioners, who chose not to enter into arbitration agreements with respondents, and who instead had to resort to equitable estoppel in attempting to force respondents to arbitrate, simply are not eligible for interlocutory appeals under section 16. The federal policy favoring consensual arbitration cannot be stretched far enough to sanction the non-volitional arbitration that petitioners' stay request envisioned. For this reason, the federal proarbitration policy should not affect the outcome of this case. Rather, the Court should adopt the *DSMC/Universal/Carlisle* rule

as the bright-line rule for determining jurisdiction under section 16(a)(1)(A).

ARGUMENT

I. THE REQUESTED STAY FELL OUTSIDE SECTION 3 OF THE FEDERAL ARBITRATION ACT AND, THEREFORE, THE DISTRICT COURT'S REFUSAL TO GRANT IT IS NOT IMMEDIATELY APPEALABLE UNDER SECTION 16(a)(1)(A) OF THE ACT.

The issue in this appeal is not whether respondents' former lawyers (Curtis) and accountants (Andersen) have the right to compel arbitration. It is whether these defendants – as non-parties to the arbitration agreement who unsuccessfully invoked equitable estoppel in attempting to shoehorn their way into arbitration – have an automatic right to an interlocutory appeal from the district court's refusal to stay respondents' claims against them pending arbitration.

Section 16 “governs the timing of review” of certain arbitration-related orders. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 949 (1995). Some, it makes immediately appealable; others, only after final judgment, if not via 28 U.S.C. § 1292(b). Petitioners invoked section 16(a)(1)(A) as the basis for their attempted interlocutory appeal. It permits an interlocutory appeal from an order “refusing a stay of any action under section 3” of the FAA.⁸ This statute

⁸ Section 16(a)(1)(B) permits an immediate appeal from an order “denying a petition under section 4” of the FAA.

conditions interlocutory jurisdiction on the relief the district court refused to grant. Because the only rejected relief that qualifies is “a stay ... under section 3,” the decisive question is whether the district court refused to grant petitioners a stay “under” section 3. Petitioners claim it did and on that basis contend the order was immediately appealable under section 16(a)(1)(A).

Petitioners’ Brief is sprinkled with references to the wording of section 2 of the FAA, to case law holding that state law applies under the FAA, and to the federal policy favoring arbitration, as if they all trump the language of section 3. Petitioners pretend only state law is involved in the interpretation of section 3. There is, however, abundant federal law involved in interpreting section 3 – the words Congress wrote in section 3 and this Court’s decisions precisely defining the federal policy favoring arbitration. Petitioners simply close their eyes to both.

When Felix Frankfurter was a law professor, he is said to have taught three rules for statutory interpretation: (1) read the statute, (2) read the statute, and (3) read the statute.⁹ Petitioners’ Brief evades all three. It is impossible to arrive at a sensible understanding of section 3 stays – and thus of section 16(a)(1)(A) interlocutory jurisdiction – without carefully reading section 3. Textual analysis of this section reveals language incompatible with petitioners’

⁹ Henry J. Friendly, “Mr. Justice Frankfurter and the Reading of Statutes,” *Benchmarks*, 196, 202 (1967); *see also* J.P. Stevens, “The Shakespeare Canon of Statutory Construction,” 140 U. Pa. L. Rev. 1373, 1374-76 (April, 1992) (“Read the statute” and “Read the entire statute.”).

contention that non-parties to arbitration agreements who invoke equitable estoppel when seeking stays pending arbitration do so under section 3.

Petitioners' Brief, like the *Ross* motion panel ruling on which they relied below, avoids section 3's language, espousing instead a policy-driven justification for blanket interlocutory jurisdiction over "all orders hostile to arbitration." Pet. Br., p. 23. In making this argument, petitioners recast the federal policy favoring consensual arbitrations by assuming its goal is to foster expeditious claims resolution, even if that means forcing litigants on both sides of a dispute into an arbitration neither side intended or conceived.¹⁰ This mistaken assumption drives their argument that any order antithetical to this goal must be immediately appealable. Freed of the textual constraints of section 3, they offer up judicial sanction for qualified-immunity appeals as an apt comparison. Petitioners' argument is flawed, not merely because it avoids any real textual analysis of section 3, but also because it misinterprets the goal of federal arbitration policy.

At first pass, this case appears to put two important federal policies recognized by this Court on a collision course with one another – the policies regarding interlocutory appeals and arbitration. This turns out to be an avoidable collision, however, because the issues in this case implicate the former, but not really the latter. There long has been "a firm

¹⁰ Such is petitioners' evident zeal for this brand of dispute resolution that one naturally wonders why they did not choose it nine years ago.

congressional policy against interlocutory or ‘piecemeal’ appeals and courts have consistently given effect to that policy.” *Abney v. United States*, 431 U.S. 651, 656 (1977). This policy recognizes that interlocutory appeals risk “unwise use of appellate courts’ time” unless limited to “categories of orders” presenting “neat abstract issues of law” (as opposed to those requiring fact-intensive inquiries), and unless careful attention is paid to the prospect that, through manipulation, an exception could create a flood of unintended interlocutory appeals. *Johnson v. Jones*, 515 U.S. 304, 315-17 (1995); *see also Abney*, 431 U.S. at 663.

Despite its authority to create exceptions by rule prescription, 28 U.S.C. § 1292(e), the Court generally has deemed it the wiser course to let Congress navigate the interlocutory appeal waters on its own. Although the rule of *Baltimore Contractors v. Bodinger*, 348 U.S. 176 (1955), has been discarded, the Court’s observation on Congress’s role in defining and refining interlocutory jurisdiction remains illustrative:

When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction.... The choices fall in the legislative domain.

Id. at 181-82. Half a century ago, Congress responded to such pressure by allowing courts the discretion to allow interlocutory appeals on a case-by-case basis. It enacted 28 U.S.C. § 1292(b), whose “screening procedure serves the dual purpose of ensuring that [interlocutory] review will be confined to appropriate cases and avoiding time-consuming jurisdictional determinations in the court of appeals.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474-75 (1978).¹¹

At various times, Congress has opted to create special categories of interlocutory appeals. One such statute, section 16 of the FAA, was enacted in the wake of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), in which the Court curtailed interlocutory appellate jurisdiction over stay denials. Enactments such as section 16 nevertheless are subject to the rule that statutes authorizing appeals must be strictly construed. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 43 (1983). Moreover, “jurisdictional rules should be, to the extent possible, clear, predictable, bright-line rules that can be applied to determine jurisdiction with a fair degree of certainty from the outset.” *DSMC*, 349 F.3d at 683 (citing *Grubart v. Great Lakes Dredge & Dock*, 513 U.S. 527, 547 (1995)).

The relevant jurisdictional statute in this case, section 16(a)(1)(A) of the FAA, works in tandem with

¹¹ Rule 23(f), adopted in 1998 under power conferred by 28 U.S.C. § 1292(e), represents a recent exception to the policy against interlocutory appeals. It does not, however, provide for automatic interlocutory appeals. Instead, like section 1292(b), it incorporates judicial screening (in this instance, by the court of appeals) as a safeguard.

section 3 of the FAA to define interlocutory jurisdiction over orders refusing arbitration-related stays, in that the meaning of the former depends on the meaning of the latter. Thus, the language of both must be carefully studied as well as strictly construed.

A. Language In Sections 3 And 16(a)(1)(A) Of The FAA Precludes Automatic Interlocutory Appellate Jurisdiction Over An Order Denying A Motion For A Stay Pending Arbitration That Was Predicated On The Non-Signatory Applicant’s Assertion Of Equitable Estoppel.

1. The language of section 3 and section 16(a)(1)(A)

A single, common word – “under” – forms a crucial part of both section 3 and section 16(a)(1)(A). Section 3 authorizes district courts to stay an action due to “any issue referable to arbitration *under* an agreement in writing for such arbitration”; section 16(a)(1)(A) confers immediate appellate jurisdiction over orders refusing stays “*under*” section 3. (Emphasis added.) Though crucial, there is no mystery about the meaning of “under” in either section.¹²

In section 3, “referable to arbitration *under* an agreement in writing for such arbitration” must mean the stay applicant and the stay opponent have a written agreement that requires them to arbitrate

¹² The Court has observed that “[t]he word ‘under’ has many dictionary definitions and must draw its meaning from its context.” *Ardestani v. INS*, 502 U.S. 129, 135 (1991).

claims between them. *IDS Life Ins. Co. v. Sunamerica, Inc.*, 103 F.3d 524, 529 (7th Cir. 1996) (Posner, J.) (“Although not expressly so limited, section 3 assumes and the case law holds that the movant for a stay, in order to be entitled to a stay under the arbitration act, must be a party to the agreement to arbitrate, as must the person sought to be stayed.”); *DSMC*, 349 F.3d at 684 (“There are no issues referable to arbitration under an agreement in writing between Convera and DSMC because there is no arbitration agreement between those two parties.... As the Seventh Circuit explained in *IDS Life*, ‘[t]he issues in the suits against the nonmembers may be substantively related to the issues in the other suits, but they are not referable to arbitration “under an agreement in writing for such arbitration,” because there is no such agreement between these parties.... The statute has no application to “issues” in cases between different parties.’”).

In section 16(a)(1)(A), a stay “*under* section 3” must mean that the stay requested and refused fit within section 3. Every circuit addressing this situation has resolved the applicability of section 16(a)(1)(A) by asking itself (not with these exact words but in effect) the following question: Is the stay the applicant requested and the district court refused one that fits within section 3?¹³ This question is apt because, in order for a ruling denying an arbitration-related stay

¹³ *DSMC*, 349 F.3d at 683-85; *Universal*, 428 F.3d at 942-45; *cf. Ross*, 478 F.3d at 99-100; *see also Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 391-92 (5th Cir. 2006) (where the arbitration stay issued “could not have been issued pursuant to 9 U.S.C. § 3,” the court of appeals held section 16(b)(1), which precludes interlocutory appeals from orders granting stays, did not apply).

to constitute an order refusing a stay “under section 3,” there logically would have to be some basis, some room, *within* section 3 for granting the particular stay requested. Whatever legal ground there might be for granting non-parties arbitration stays based on equitable estoppel, there is no basis for doing so *under* (*i.e.*, found within) section 3. *DSMC*, 349 F.3d at 684 (citing *IDS Life*, 103 F.3d at 529). Nothing in the language of section 3 suggests otherwise.

To the extent section 3 speaks of stays pending arbitration, it does so exclusively in terms of arbitration mandated by a written agreement. Because petitioners were not parties to the written agreement between respondents and Bricolage, or to any other agreement containing an arbitration clause, no written agreement required respondents to arbitrate with petitioners.¹⁴ This forced petitioners to argue they were entitled to arbitration and a correlative stay because equitable estoppel – not the terms of a written agreement – required respondents to arbitrate their claims against petitioners.

Although non-parties asserting equitable estoppel routinely claim to invoke a signatory’s obligation to arbitrate under the terms of the signatory’s written agreement with someone else, in actuality they seek to bind a signatory to an arbitral obligation *beyond* that signatory’s strictly contractual obligation to arbitrate. *See DSMC*, 349 F.3d at 683. Such is the inherent

¹⁴ Initially, as a fallback position, petitioners requested that the district court at least stay the action against them until after respondents’ arbitration with Bricolage. Bricolage’s bankruptcy ruled out that arbitration, however, rendering this part of petitioners’ original stay request moot.

nature of equitable estoppel.¹⁵ A non-signatory's assertion of equitable estoppel in this context is a clear signal it *cannot* claim party status vis-à-vis any applicable arbitration agreement. See *Universal*, 428 F.3d at 944 n. 3 (“the doctrine of equitable estoppel applies only in the absence of a written agreement”). Indeed, the whole purpose of asserting equitable estoppel in this context is to prevent the signatory from avoiding arbitration based on the fact the agreement's terms *do not* obligate the signatory to

¹⁵ Equitable estoppel typically serves as a substitute for a provable express contract. Richard A. Lord, 3 *Williston on Contracts* § 7:11 (“Where no consideration exists, and is required, the lack of consideration results in no contract being formed in the absence of a substitute for consideration such as ... an estoppel.”); see also *Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc.*, 113 S.W.3d 636, 643 (Ky. App. 2003) (equitable estoppel substitutes for enforceable contract); *Newsom v. Xenia City School Dist. Bd. of Educ.*, No. C-3-95-173, 1996 WL 1089865, *14 (S.D. Ohio Mar. 25, 1996) (promissory estoppel substitutes for contract claim); *Ufe Inc. v. Methode Elec., Inc.*, 808 F.Supp. 1407, 1415 (D. Minn. 1992) (contract and promissory estoppel claims are “mutually exclusive”). The term “equitable estoppel” and its cousin “promissory estoppel” have been used in many and varied circumstances – so many, in fact, that Professor Williston once observed, “When a lawyer or judge does not know what other name to give for his decision to decide a case in a certain way, he says there is an estoppel” 4 *Williston on Contracts* § 8:5. Although the merits are not at issue, it is fair to characterize as somewhat loose courts' use of “equitable estoppel” to describe a situation in which a true stranger to an arbitration agreement (such as petitioners) attempts to force one of the agreement's signatories to arbitrate – especially since in most such cases (this one included) the signatory never made any unfulfilled promise or false representation to the non-signatory, the usual hallmarks of estoppel.

arbitrate with a stranger to the agreement. *Id.*¹⁶ If the case were “referable to arbitration” because the stay applicant and the stay opponent have “an agreement in writing for such arbitration,” surely the stay applicant would say so and never mention equitable estoppel. When the non-signatory stay applicant instead invokes equitable estoppel, that marks the case as one *not* referable to arbitration under a written arbitration agreement. Petitioners’ Brief (perhaps unwittingly) acknowledges the claims against them are not referable to arbitration under an agreement in writing for such arbitration, stating “that respondents’ claims are ‘referable to arbitration’ *under the doctrine of equitable estoppel.*” Pet. Br., p. 14 (emphasis added). So, despite self-serving references to section 3 in their stay motion, petitioners necessarily strayed outside the ambit of section 3 in seeking that stay.

2. Section 3’s other textual features

In addition to the “referable to arbitration” language, section 3 has other “textual features at odds with” granting a stay to a stranger to an arbitration agreement who invokes equitable estoppel. *See Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396, 1399 (2008). Section 3 authorizes a district court to entertain and grant an application for a stay pending arbitration. It specifies three conditions that, if met, require the granting of such an application. All three conditions contemplate a written arbitration

¹⁶ *See* Arthur Andersen’s Memorandum in Support of Motion to Stay Proceedings Pending Arbitration, p. 2 (“well-established principles of equitable estoppel prevent Plaintiffs from avoiding arbitration solely because Andersen was not a signatory to the Agreements”).

agreement that mutually obligates the stay applicant and the opposing party to arbitrate. The three conditions are: (1) (as already mentioned) that the suit involves an “issue referable to arbitration under an agreement in writing for such arbitration,” (2) that the stay would last “until such arbitration has been had in accordance with the terms of the agreement,” and (3) that the stay “applicant is not in default in proceeding with such arbitration.” These three conditions circumscribe a section 3 stay – in other words, a stay *under* section 3. Because a binding written arbitration agreement is the *sine qua non* of each condition in section 3, these three textual references, individually and together, carry connotations incompatible with non-parties to arbitration agreements, such as petitioners, seeking a stay pending arbitration against a party to such an agreement under equitable estoppel.

Language in section 3 precluding a stay when the applicant is “in default” assumes the stay applicant’s obligation to comply with the agreement’s specific terms for proceeding to arbitration. By definition, a stranger to an arbitration agreement is not obligated to comply with its terms. The fact section 3 includes this “not in default” language supports limiting the statute’s application to parties bound to comply with the arbitration agreement’s terms, and not extending it to non-parties invoking equitable estoppel. This, of course, would disqualify petitioners.

Language in section 3 indicating that a stay granted under this statute lasts “until such arbitration has been had in accordance with the terms of the agreement” also is incompatible with a stranger to such an agreement seeking a stay based on equitable estoppel. This statutory language contemplates a stay

pending arbitration between parties who are mutually bound to arbitrate with one another according to procedures specified in terms to which each side agreed.¹⁷ A stranger's stay request based on equitable estoppel, however, perforce envisages arbitration between parties who are *not* mutually bound by the terms specified in any agreement. Such a request presupposes the signatory is obligated to arbitrate *beyond* the written agreement's explicit terms. See *DSMC*, 349 F.3d at 683. The fact section 3 refers to arbitration "in accordance with the terms of the agreement" further supports limiting the statute's application to parties bound by the agreement's terms, and not extending it to non-parties invoking equitable estoppel. This, again, would disqualify petitioners.

In sum, there are three separate textual references to a written arbitration agreement in section 3. Taken together, they constitute the conditions for granting a stay under this section. In essence, they define a section 3 stay. Because each such condition contemplates an arbitration mandated by a written agreement, a non-signatory's request for an arbitration stay based not on the agreement's explicit terms, but instead on equitable estoppel, does not fall within section 3. Petitioners' stay request, therefore, cannot be considered one brought "under section 3." It follows that the district court's ruling rejecting it, whatever its

¹⁷ Although section 3, not section 4, is at issue in this case, the Court has characterized similar language in section 4 as signaling not the "right to compel arbitration of any dispute at any time," but the right to compel arbitration "*in the manner provided for in [the parties'] agreement.*" *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989) (emphasis and bracketed words original).

label, was not in substance “an order ... refusing a stay under section 3” of the FAA. Because section 16(a)(1)(A) interlocutory appellate jurisdiction exists only when the order refuses a stay under section 3, the predicate for automatic interlocutory jurisdiction is missing from this case.

Respondents do not contend litigants such as petitioners can never ask to stay an action pending arbitration, only that they cannot do so “under section 3.” See *DSMC*, 349 F.3d at 684-85 (“District courts may certainly consider stays in circumstances such as these as a matter of discretionary control of their docket.”) (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 n. 23 (1983), and *IDS Life*, 103 F.3d at 530)); see also *Toledano v. O’Connor*, 501 F.Supp.2d 127, 151-54 (D.D.C. 2007). Respondents also do not contend that non-parties to arbitration agreements asserting equitable estoppel have no pathway to interlocutory appeals, only that automatic interlocutory appeals under section 16(a)(1)(A) are unavailable to them, leaving section 1292(b) as their only immediate alternative.¹⁸

3. Petitioners’ “label” test

Petitioners offer a completely different characterization of the pathway to section 16(a)(1)(A) interlocutory appellate jurisdiction. To them, it depends on the kind of application (or, as they call it,

¹⁸ Petitioners did not ask the district court to approve a permissive interlocutory appeal under section 1292(b), although on appeal they belatedly asked the Sixth Circuit in a footnote to treat their appeal as such. Appellants’ [Petitioners’] Reply Brief in 6th Cir. Case No. 06-5290, p. 14 n. 6. The court of appeals did not do so.

“motion”) they filed. Petitioners argue that “a motion seeking a Section 3 stay” is a requirement of section 16(a)(1)(A) “[o]n its face” Pet. Br., p. 19. Petitioners’ characterization of section 16(a)(1)(A) jurisdiction is odd, given that this statute actually does not mention the application at all. As noted above, it only mentions the relief refused. This discrepancy initially seems insignificant, for if, as demonstrated, the district court’s order did not refuse a stay under section 3, it follows that petitioners’ application could not be considered (to use their words) “a motion seeking a Section 3 stay.” Pet. Br., p. 19.

The problem with petitioners’ misplaced emphasis on the nature of the motion filed, though, is where it seems to take their argument in favor of interlocutory appellate jurisdiction. From there, they appear to leap to this conclusion: “Thus, Section 16(a)(1)(A) provides for jurisdiction so long as the appellant’s motion *alleges* entitlement to a Section 3 stay.” Pet. Br., p. 20 (emphasis original). In other words, the essence of petitioners’ argument is that the *rubric* of the underlying stay application dictates whether its denial triggers section 16(a)(1)(A) interlocutory appellate jurisdiction. Mere incantation of the correct words, in petitioners’ estimation, automatically entitles an unsuccessful stay applicant to an interlocutory appeal and the stay-like delay it naturally occasions. Petitioners confidently tout this as a “clear, bright-line” jurisdictional test.

The label a movant affixes to a motion, however, never controls appellate jurisdiction over the order denying it, just as the label a district court affixes to an order does not dictate its appealability. *United States v. Sisson*, 399 U.S. 267, 279 (1970); *Workman v.*

Bredesen, 486 F.3d 896, 904 (6th Cir. 2007). To treat the stay application’s label (*e.g.*, “Motion for Stay Under 9 U.S.C. § 3”) as a jurisdictional determinant would allow opportunistic parties bent on delay to achieve it by manufacturing their own interlocutory appellate jurisdiction, a circumstance this Court’s decisions have been careful to prevent. *See, e.g., Abney*, 431 U.S. at 663.

Having promised a test that is easy for courts to apply, petitioners propose a gimmick that would be simple enough for clued-in appellants to check off and, what’s more, easy for them to manipulate. It would leave the existence of interlocutory appellate jurisdiction entirely in the hands of the stay applicant’s lawyer, inviting all manner of gamesmanship. If the lawyer simply knows enough to frame an application that facially “*alleges* entitlement to a Section 3 stay,” Pet. Br., p. 20 (emphasis original), the application’s denial would trigger an automatic right to an interlocutory appeal. And what of the signatory to an arbitration agreement whose lawyer does not know enough to use the magic words, but who really is seeking to stay an action between parties to that arbitration agreement, precisely as section 3 contemplates? Presumably a court of appeals exploring its interlocutory jurisdiction in such a case would have to look beneath the surface to the substance of the denied stay application. So much for a “clear, bright-line test.”

Moreover, apparently to blunt criticism that their “label” test could be too easily manipulated, petitioners propose an addendum to it that they claim would further judicial economy – district courts could certify as “frivolous” questionable interlocutory appeals from

denials of arbitration-related stays. This sounds reassuring, but given that petitioners would set the bar for fully vested interlocutory appellate jurisdiction so low – *i.e.*, it would exist “so long as the appellant’s motion *alleges* entitlement to a Section 3 stay” (Pet. Br., p. 20 (emphasis original)) – it is difficult to imagine how any such district court certification could short-circuit any such appeal once interlocutory appellate jurisdiction vests. At most, a certification of this kind likely would be, as in the qualified immunity context, simply another issue the court of appeals must review in the interlocutory appeal. So much for “judicial economy.”

The only truly “clear, predictable, bright-line” test for interlocutory jurisdiction under section 16(a)(1)(A) is that provided by the *DSMC/Universal/Carlisle* rule.¹⁹ Under this rule, parties not subject to a written

¹⁹ As the Sixth Circuit observed, the Second Circuit’s contrary reasoning in *Ross* is circular and unpersuasive. The *Ross* motion panel ruling, on which petitioners relied below, suggests that section 3’s writing requirement is met simply by showing that a written agreement created the signatory’s “arbitration obligation.” *Ross*, 478 F.3d at 99. (*Ross* does not mention any other condition for satisfying the writing requirement, such as the “in default” language, discussed *supra*.) *DSMC* anticipated and refuted this interpretation when it stated – albeit regarding section 4 – that it is not enough “that there be a written agreement somewhere in the picture.” *DSMC*, 349 F.3d at 683. *Ross*’s minimalist interpretation presents two distinct paradoxes. First, section 3 provides for a mandatory stay when its conditions are met. If, as *Ross* mistakenly postulates, all it took to qualify as a section 3 stay were a written arbitration agreement somewhere in the picture, stays sought under equitable estoppel automatically would be granted. The first paradox is that this clearly is not happening – as the many interlocutory appeals from arbitration-related stay denials prove. The second paradox that *Ross*’s

arbitration agreement who instead must resort to equitable estoppel have no access to the mandatory stay provisions of section 3, nor, by extension, to automatic interlocutory appeals under section 16(a)(1)(A). *DSMC*, 349 F.3d at 685. The Court’s adoption of this rule, which litigants and courts alike can apply “with a fair degree of certainty from the outset,” *id.* at 683, would eliminate several unattractive prospects at once – jurisdictional manipulation, fuzzy labels that stay applicants or district courts might use, and the “multifactor factual and legal inquiry” that a court of appeals otherwise would have to use to determine the applicability of equitable estoppel, if jurisdiction depended on it. *Id.* at 683-84.

minimalist interpretation of section 3 presents is that it would render section 16(a)(1)(A) a nullity. Under *Ross’s* interpretation, the only stay applications denied would be those where the arbitration obligation was not based on a written contract. All parties and *amici* herein agree that, where there is no written arbitration obligation anywhere in the picture, section 3 is inapplicable. In other words, the only stay applicants with something to appeal (a stay denial) would be those whose stays, all parties and *amici* agree, clearly would fall outside section 3 and therefore also outside section 16(a)(1)(A). Under this second paradox, section 16(a)(1)(A) would constitute the veritable “sleeves out of the vest,” granting appellate rights to those who would not need to appeal, while denying such rights to the only litigants who would need to appeal. By proposing the even more minimalist “label” test (*i.e.*, it qualifies as a section 3 stay if the applicant labels it one), petitioners avoid having to explain away the two paradoxes that *Ross’s* misinterpretation of the section 3 writing requirement presents.

B. The Policy Underlying The FAA, Which Favors Consensual Arbitration, Does Not Justify Recognition Of An Automatic Right To An Interlocutory Appeal For A Non-Party To An Arbitration Agreement Who Unsuccessfully Sought To Stay A Signatory's Action Based On Equitable Estoppel.

The recurring theme of petitioners' argument is that the Court cannot reject their lenient "label" test in favor of the *DSMC/Universal/Carlisle* rule without offending federal arbitration policy. This concern is unfounded. It is true federal policy fosters arbitration by broadly reading the reach of parties' contractual commitments to arbitrate disputes *with one another*, whenever those parties disagree about their commitments' reach. But this policy does not translate into either tolerating attempts by third parties who are strangers to arbitration agreements to parasitize contracting parties' arbitration obligations through equitable estoppel, *or* guaranteeing such strangers interlocutory appellate rights when their attempts fail. These are simply beyond the purpose and scope of the federal arbitration policy.

As noted at the outset of this discussion, petitioners mistakenly assume the federal arbitration policy's goal is to foster expeditious claims resolution, even if it means forcing litigants on both sides of a dispute into an arbitration neither side ever intended or conceived. The FAA placed arbitration agreements "upon the same footing as other contracts." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The cornerstone of federal arbitration policy,

therefore, is parties' freedom to contract for arbitration when and how they wish to do so. Arbitration under the FAA is a creature of contract, *Hall Street Associates*, 128 S.Ct. at 1399, indeed of a written contract, a fact borne out not only by section 3 but also by section 2. In *First Options v. Kaplan*, 514 U.S. at 945, the Court stated that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration" The Court consistently has held the contesting parties' arbitration agreement takes precedence over any "general policy goals" related to arbitration. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Indeed, the very purpose of the federal policy "is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'" *First Options*, 514 U.S. at 947 (citations omitted). For decades, the Court's arbitration decisions consistently have honored this purpose and resisted its expansion. In *Dean Witter Reynolds v. Byrd*, 470 U.S. at 219, the Court stated:

The legislative history of the [Federal Arbitration] Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement – upon the motion of one of the parties – of privately negotiated arbitration agreements.

See also id. at 221 (“[P]assage of the [FAA] was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (“[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.”); *AT&T Tech., Inc. v. Communications Workers of America*, 475 U.S. 643, 648-49 (1986) (“[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.”).

Because arbitration under the FAA is, by definition, “a matter of consent, not coercion,” one litigant’s attempt to force another to arbitrate is inimical to the FAA’s proarbitration policy. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (“[T]he FAA’s proarbitration policy does not operate without regard to the wishes of the contracting parties.”). This is not to say whether such an effort can succeed, *see DSMC*, 349 F.3d at 683, and *Universal*, 428 F.3d at 945; rather, that it is beyond the purpose and scope of the federal proarbitration policy, which is limited to enforcing *volitional* arbitration, to foster *non-volitional* arbitration. 1 *Domke on Commercial Arbitration* § 13:1 (“Although the federal policy favoring arbitration is strong, it cannot be construed to include parties that were not intended to be part of the original contract.”). As the Fifth Circuit observed in *Westmoreland v. Sadoux*, 299 F.3d 462, 465 (5th Cir. 2002) (Higginbotham, J.),

[W]e will read the reach of an arbitration agreement *between parties* broadly, but that is a different matter from the question of who may invoke its protections. An agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems – an openness this country has been committed to from its inception. It is then not surprising that to be enforceable, an arbitration clause must be in writing and signed by the party invoking it.

Id. (emphasis added).²⁰

²⁰ Although petitioners did not mention the issue in their Petition, they appear to ask the Court to decide whether, under section 3, an arbitration agreement not only must be in writing but also physically signed by the party to the agreement who is invoking it. Pet. Br., p. 38. To the extent petitioners intend this, it is a red herring. The Sixth Circuit never addressed this issue, this clearly is not what the litigants or the court of appeals meant by “non-signatories,” and petitioners are not within the class of litigants who would be affected by such a ruling (*i.e.*, parties to the agreement who did not, for some reason, sign it). Moreover, “non-signatories” is a term petitioners themselves first used, to describe their status vis-à-vis the IMAs, both before the district court and the Sixth Circuit. It also is the term the courts used in *DSMC*, *Universal*, *Ross*, and this case to denote non-parties to arbitration agreements (as do respondents herein). None of these cases addressed any distinction there might be between a party to an arbitration agreement who actually signed it and a party to an arbitration agreement whose signature for some reason was not physically affixed to it. Courts routinely employ “non-signatories” in the arbitration context as synonymous with non-parties, without any apparent intention of creating the “signature requirement” with which Petitioners’ Brief seems preoccupied. If this issue eventually matures into a serious dispute among the

When parties commit in writing to arbitrate disputes with one another and one party later needs a mandatory stay pending arbitration, an order compelling arbitration, or an immediate appeal from an order denying either *merely in order to bring about the arbitration their agreement originally contemplated*, it is easy to see how guaranteeing them access to these means of enforcement would further the federal proarbitration policy. But when a stranger who was not in the picture when the contracting parties committed to arbitrate with one another – a litigant as remote from the parties’ “bargain to arbitrate,” *Mitsubishi*, 473 U.S. at 628, as the proverbial man in the street – demands the right to use the same means of enforcement *against* one of the contracting parties, the equation necessarily changes.²¹

circuits, *cf. Westmoreland*, 299 F.3d at 465, the Court would be in a position to resolve it then, in the light of adverse opinions, a direct ruling by a court of appeals, and full briefing.

²¹ *Amicus* Chamber of Commerce argues that allowing the Sixth Circuit’s rule to prevail would usher in a “signatory-only limitation” under section 3, which the Chamber fears would make it impossible for a non-party to an arbitration agreement to enforce it, even when the agreement explicitly identifies that non-party as someone the parties intend to allow to enforce it against them. That is not this case. First, the IMA in this case indicated that respondents and Bricolage were aware “persons other than the Manager” were giving respondents “tax, legal, and accounting advice,” but it did not grant such other persons the right to enforce any part of the agreement. App. 68, 87 & 106. Second, the Sixth Circuit lacked jurisdiction because petitioners were non-signatories forced to invoke equitable estoppel – a theory that, by definition, assumed the absence of a written agreement to arbitrate. *Carlisle*, 521 F.3d at 601 (citing *DSMC* and *Universal*); *DSMC*, 349 F.3d at 683; *Universal*, 428 F.3d at 944 n. 3. The Chamber’s “what-ifs” concerning the range of contractual or

It is pure fiction to suggest such strangers have any expectations about arbitration, such that the federal policy should be extended to enfold them. There is no logical connection – indeed, there is inconsistency – between: (a) guaranteeing such strangers access to mandatory stays and automatic interlocutory appeals against one of the contracting parties, and (b) guaranteeing a contracting party’s right “to arbitrate only those issues it specifically has agreed to submit to arbitration” *First Options*, 514 U.S. at 945. Federal policy must favor the latter.²²

C. In Coming To The Conclusion It Had No Jurisdiction Over Petitioners’ Interlocutory Appeal, The Sixth Circuit Did Not Delve Into The Merits Of The Appeal.

Petitioners claim the Sixth Circuit delved into the merits under the guise of determining its jurisdiction. They claim that, in contrast, they propose a test for interlocutory jurisdiction that would “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.” Pet. Br., pp. 27-28.

agency theories other non-parties to arbitration agreements might try to use in the future to force signatories to arbitrate with them all fall under the adage that if it is not necessary to decide more, it is necessary not to decide more.

²² Guaranteeing automatic interlocutory appeals to non-signatories would not further attempts to engineer broader use of arbitration, even if that were the touchstone of federal arbitration policy, for by definition non-signatories do not insist that those with whom they deal enter into arbitration agreements.

The Sixth Circuit did not delve into the merits when it ruled that the rejected stay did not fit within section 3. Determining whether a stay fits within or falls outside section 3 is a routine and necessary part of deciding jurisdictional issues under section 16, since the two statutes operate in tandem.²³ It would have been impossible for the Sixth Circuit to resolve the jurisdictional issue under section 16(a)(1)(A) without determining whether the rejected stay fit within section 3.

Contrary to petitioner’s characterization, *DSMC*, *Universal*, and the Sixth Circuit decision show that such determinations do not require “detailed factual or legal inquiries” by courts of appeals. In each case, the court’s determination was based on an easily ascertainable fact, one so straightforward that petitioners’ own brief (again, perhaps unwittingly) acknowledges it: instead of claiming the suit was “referable to arbitration under an agreement in writing providing for such arbitration,” the linchpin for section 3 stays, petitioners, as non-parties to the arbitration agreement, asserted “that respondents’ claims are ‘referable to arbitration’ under the doctrine of equitable estoppel.” Pet. Br., p. 14; see *DSMC*, 349 F.3d at 683 (in this context, equitable estoppel asserts an obligation to arbitrate “*beyond* the terms of” any written arbitration agreement) (emphasis original); *Universal*, 428 F.3d at 944 n. 3 (“the doctrine of

²³ See, e.g., *Brown v. Pacific Life Ins. Co.*, 462 F.3d at 391-92 (section 16(b)(1), which precludes interlocutory appeals from orders granting stays under section 3, did not apply because “the stay could not have been issued pursuant to [section] 3”).

equitable estoppel applies only in the absence of a written agreement”).²⁴

Delving into the merits would have meant deciding the substantive legal issue posed by petitioners’ unsuccessful stay application – whether petitioners, as non-parties to the arbitration agreement between respondents and Bricolage, had the right under equitable estoppel to force respondents to arbitrate claims against petitioners and the concomitant entitlement to stay those claims until that occurred. Like the courts in *DSMC* and *Universal*, the Sixth Circuit steered well clear of this determination, a fact petitioners acknowledge elsewhere in their brief. *Carlisle*, 521 F.3d at 599 (noting the merits of petitioners’ equitable estoppel argument “need not detain us here, given our determination that we do not have jurisdiction to address the merits of the claims”); Pet. Br., p. 10 (acknowledging the Sixth Circuit “never

²⁴ In arguing that the Sixth Circuit delved impermissibly into the merits of petitioners’ appeal, Petitioners’ Brief also cites a number of opinions in which appellate courts considered and confirmed their jurisdiction under section 16. *See* cases cited at Pet. Br., pp. 21-22. These cases are inapposite. Unlike petitioners’ situation, each of the movants in those cases claimed a written agreement that they could invoke. The only challenge in those cases was to the agreement’s validity, and the courts held that was not enough to deprive them of appellate jurisdiction, for to hold otherwise would make jurisdiction depend on the outcome of the merits determination. These decisions appear to fit within section 3 and thus section 16 because they all involved a written arbitration agreement that the movant was invoking. In contrast, petitioners’ stay cannot fit within section 3 or section 16 because they were non-signatories forced to invoke equitable estoppel – a theory that, by definition, assumed the absence of a written agreement to arbitrate. *Universal*, 428 F.3d at 944 n. 3.

considered” the substance of petitioners’ equitable estoppel argument)²⁵; *DSMC*, 349 F.2d at 683 (noting “[w]e need not and do not decide” the issue of “the propriety of compelling signatories to arbitrate with non-signatories”); *Universal*, 428 F.3d at 945 (noting its holding “does not mean equitable estoppel cannot be employed to compel arbitration,” but rather “is limited to whether Defendants can invoke interlocutory appellate jurisdiction to challenge the merits of the district court’s order”).²⁶

²⁵ Petitioners’ second “question presented” can be read as implying the Sixth Circuit went further than it did: “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.” Pet. Br., p. i. To be precise, and also to avoid the merits, just as the Sixth Circuit did, this question should have read: “Whether a non-signatory’s application for a stay pending arbitration with a signatory falls under section 3 of the FAA when it is based on equitable estoppel principles.”

²⁶ The *Ross* motion panel ruling, on which petitioners relied below, also decided the issue of section 3’s applicability in determining interlocutory jurisdiction under section 16(a)(1), although it reached the opposite conclusion. *Ross*, 478 F.3d at 99-100 (holding section 3’s “writing” requirement – and hence section 16(a)(1)(A) – satisfied). Even while doing so, that ruling made clear the merits of the appeal remained to be decided. *Id.* at 99 n. 1 (“In ruling on this motion [to dismiss the non-signatories’ interlocutory appeal], we make no determination as to whether the district court was correct in holding that appellants are entitled to arbitration via equitable estoppel – a determination that will only be made following full briefing and argument on appeal. This ruling touches only upon our jurisdiction under the FAA to hear such an appeal.”).

To support their argument that the Sixth Circuit improperly looked beyond the label on their stay motion and impermissibly delved into the merits, petitioners draw an analogy to interlocutory appeals based on qualified immunity. They argue “once such immunity is claimed and the claim is rejected, the court of appeals has jurisdiction to evaluate the merits of the claim.” Pet. Br., p. 26. This analogy undercuts petitioners’ argument.

The courts in *DSMC*, *Universal*, and this case determined the existence of section 16(a)(1)(A) interlocutory jurisdiction by asking if the appellant was eligible to seek a section 3 stay. This analytical approach mirrors the practice courts use to determine interlocutory jurisdiction over qualified-immunity appeals. Appellate courts are not required to entertain an interlocutory appeal based on qualified immunity merely because the appellant claimed qualified immunity in the district court. Rather, such courts routinely inquire whether the appellant fits within the class of persons eligible for qualified immunity. *See, e.g., DeSantana v. Velez*, 956 F.2d 16, 19 (1st Cir. 1992) (“To ascertain whether the appellants have a right to an interlocutory appeal requires that we determine whether they would be entitled to raise the defense of qualified immunity”). An appellant who was ineligible to raise qualified immunity at all has no right to file an interlocutory appeal, so his appeal is dismissed for lack of appellate jurisdiction. *Id.* at 19-20 (private actors’ claimed qualified-immunity appeal dismissed); *Harrison v. Ash*, 539 F.3d 510, 525-26 (6th Cir. 2008) (same); *Stichting Mayflower Recreational v. City of Park City*, 225 Fed.Appx. 744 (10th Cir. 2007) (same); *Penman v. Korper*, No. 91-15520, 1992 WL 276462 (9th Cir. Oct. 8, 1992) (same). That appellate courts thus

disregard claims or labels of qualified immunity in dismissing such interlocutory appeals bolsters respondents' position that, in order to determine if an appellant is eligible for a section 16(a)(1)(A) interlocutory appeal, a court of appeals first must decide if the appellant's circumstances make him ineligible or eligible for a section 3 stay. If it finds the appellant was ineligible for a section 3 stay, it lacks interlocutory jurisdiction and must dismiss the appeal.

D. To The Extent Petitioners' Status As Strangers To The Arbitration Agreement Invoking Equitable Estoppel Deprives Them Of Opportunities For Mandatory Section 3 Stays, Section 4 Orders Compelling Arbitration, And Automatic Interlocutory Appeals Under Sections 16(a)(1)(A) And 16(a)(1)(B), That Status Is A Consequence Of Their Own Choice Not To Enter Into Arbitration Agreements With Respondents.

Petitioners and *amici* also claim that precluding petitioners from proceeding with their interlocutory appeals under section 16(a)(1)(A) unjustly consigns them to lesser status than they would enjoy if they were signatories, which they claim is contrary to federal policy favoring arbitration.²⁷ *Amicus* Chamber

²⁷ See Br. of *Amicus* Washington Legal Foundation, p. 11 (The *DSMC/Universal/Carlisle* test “would assign non-signatories to a class of litigants that would not be able to seek stays under Section 3, to file motions to compel under Section 4, to file immediate appeal under Section 16(a), or to seek protection from

of Commerce curiously suggests the *DSMC/Universal/Carlisle* rule “upsets settled expectations of signatories, as well as those of non-signatories, based on rights bargained for before the dispute arose.” Br. of Amicus Chamber of Commerce of the United States, p. 11. Petitioners go further, predicting that barring interlocutory appeals “solely because petitioners were not signatories to the contracts containing the arbitration provision” will not merely deny non-signatories appellate opportunities, but actually doom the centuries-old decisional law upon which non-signatories now enforce arbitration agreements. Pet. Br., pp. 24, 36 (“None of this doctrine can survive, however, if this Court affirms the Sixth Circuit’s decision.”).

Lest it be forgotten, Curtis and Andersen *chose* their status as non-signatories.²⁸ It is not as if Curtis never entered into retention agreements with respondents. It did. And it is not as if Anderson lacked the opportunity to require respondents to enter into such an agreement in the twenty years they provided respondents tax advice and accounting services. Surely the lawyers at Curtis and the accountants at Andersen could have drafted arbitration language if they had wanted their potential claims against respondents and their potential liabilities to respondents to be arbitrated. Therefore, if any “expectation” is to be

appeal under Section 16(b), despite the fact that these parties are entitled to obtain arbitration under the written agreement at issue.”).

²⁸ Petitioners have never suggested they were prohibited or otherwise prevented from entering into arbitration agreements with respondents.

imputed to these particular non-signatories, let it be the expectation that such claims and liabilities would be resolved in court, not in arbitration. As the Fifth Circuit in *Westmoreland* (Higginbotham, J.) observed in discussing similarly sophisticated non-signatories, their choice of a different status is

no small matter.... These vital distinctions cannot be maintained by simply deploying the standard that the reach of arbitration clauses is to be read broadly, to the distinct problems of their applicability to nonsignatories. Directly put, the courts must not offer contracts to arbitrate to parties who failed to negotiate them before trouble arrives. To do so frustrates the ability of persons to settle their affairs against a predictable backdrop of legal rules – the cardinal prerequisite to all dispute resolution.

Westmoreland, 299 F.3d at 467. Simply by requiring respondents to sign arbitration agreements, petitioners could have assured themselves ready access to mandatory section 3 stays and section 4 compulsion orders and, thus, automatic interlocutory appeals under sections 16(a)(1)(A) and 16(a)(1)(B). Given their conscious choice to bypass these available advantages, it frustrates neither petitioners' expectations nor the federal proarbitration policy to require them to ask permission to file interlocutory appeals under 28 U.S.C. § 1292(b), particularly given that Congress already has determined the federal policy can accommodate permissive interlocutory appeals of arbitration-related stays. *See* 9 U.S.C. § 16(b)(1); *Westmoreland*, 299 F.3d at 464-65 (entertaining non-signatories' interlocutory appeal from order granting stay under section 1292(b)).

Apparently as yet another reason not to adopt the *DSMC/Universal/Carlisle* rule, petitioners, like the *Ross* motion panel ruling on which they relied below, allude to the many appellate decisions that have reviewed orders denying arbitration-related stays or refusing to compel arbitration on equitable estoppel grounds, without becoming entangled in interlocutory jurisdiction issues. Pet. Br., p. 36; *Ross*, 478 F.3d at 100. They are correct that a growing number of circuit decisions (now close to fifteen reported opinions) have addressed equitable estoppel as a ground for granting non-signatories arbitration-related stays or orders to compel arbitration, while paying little or no attention to the section 16(a)(1) issues. Only a handful of decisions – *DSMC*, *IDS Life*, *Universal*, and *Carlisle* – have taken these issues seriously and accurately gauged the jurisdictional deficiency.²⁹ Proving how tempting it is to see unrecognized truth as heresy, petitioners and *amici* dismiss such talk as a threat to the very survival of equitable estoppel and arbitration, and cling for comfort to the steady accretion of appellate decisions continuing to disregard or gloss over the lack of jurisdiction, as if by relative numbers many insensible rulings will outweigh a few sensible ones. Respondents respectfully urge the Court to arrest this trend now and establish the *DSMC/Universal/Carlisle* rule as a bright-line test

²⁹ The number of appellate courts failing to recognize the lack of jurisdiction in such cases seems to have increased as the number of district court decisions addressing non-signatories' equitable estoppel arguments in the arbitration context has dramatically increased. By respondents' count, for example, just the reported district court decisions addressing this issue jumped from 7 in 2004, to 14 in 2005, to 23 in 2006, to 34 in 2007.

that allows courts and litigants alike to determine appealability with certainty.

This case is redolent of the time of *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, which also involved interlocutory appeals from stay denials. The unbridled interlocutory appeals of that time, however, did not cluster around equitable estoppel, arbitration, and non-signatories. It appears that, by then, only one appellate decision – *Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 840-41 (7th Cir. 1981) – had addressed equitable estoppel in the context of a non-signatory’s attempt to compel a signatory to arbitrate. In other words, the theory was still in its infancy. Twenty years after *Gulfstream*, however, the number of interlocutory appeals from stay denials is growing again, due in no small part to the fact that some appellate courts give only passing attention to the issue of interlocutory jurisdiction where arbitration-related orders are involved. Respondents respectfully urge the Court to hold that the lax approach to interlocutory jurisdiction reflected in most arbitration-related appeals and in petitioners’ lenient, easily manipulated “label” test is, in *Gulfstream*’s words, “unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals,” *id.* at 283, and to adopt instead the *DSMC/Universal/Carlisle* rule. Moreover, to the extent the holding respondents urge – as in the days after *Gulfstream* – might lead to rising pressure of the sort mentioned in *Baltimore Contractors*, 348 U.S. at 181-82, it should be left up to Congress to decide whether amendment of section 16(a)(1)(A) or section 3 is or is not warranted. As these statutes are written, courts of appeals have no jurisdiction to entertain interlocutory

appeals from orders denying arbitration-related stays to non-signatories who invoke equitable estoppel.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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